EQUALITY'S RIDDLE: PREGNANCY AND THE EQUAL TREATMENT/SPECIAL TREATMENT DEBATE

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INTRODUCTION

The legal battle for gender equality gave birth, in the early 1970's, to a riddle. Faced with the pervasive and profound effect of employer responses to women's reproductive function on their status and opportunity in the paid workforce, feminist litigators asked how laws or rules based on a capacity unique to women — the capacity to become pregnant and give birth — could be susceptible to challenge under any equality doctrine the courts of this country might realistically be persuaded to employ. In response to that question, the proponents of gender equality developed a theory which has been used with moderate success in scores of cases challenging pregnancy rules under Title VII and, for a time, under the equal protection clause as well. Most of these cases have arisen in the employment context; courts have been asked to compare an employer's treatment of pregnancy to its treatment of other physical conditions with similar workplace consequences. The approach has been, in the words of the 1978 Pregnancy Discrimination Act (PDA), to require that "women affected by pregnancy, childbirth or related medical conditions . . . be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work."[1]

Today, commentators have raised questions about the wisdom and propriety of this "equal treatment" approach to pregnancy rules and laws.[2] In

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In view of the position taken in this article, it seems only fair to disclose my involvement with the pregnancy issue. It is: counsel to plaintiffs in Geduldig v. Aiello, 417 U.S. 484 (1974); counsel to amici curiae Center for Constitutional Rights, Employment Law Center, Equal Rights Advocates, Inc., National Organization for Women, Union Wage, Women's Legal Defense Fund and Women Organized for Employment in Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976); legislative drafting committee, Campaign to End Discrimination Against Pregnant Workers (the Campaign, instituted in response to General Electric Co. v. Gilbert, 429 U.S. 125 (1976), was composed of labor unions, civil rights groups and feminist groups; it drafted, obtained sponsors and worked for the passage of the Pregnancy Discrimination Act of 1978)); witness before the House and Senate Committees that considered the Pregnancy Discrimination Bill; member of working group developing proposed federal legislation described at note 223 and accompanying text.

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1. 42 U.S.C. § 2000e(k) (1983).

2. This article, prepared for a colloquium on employment discrimination sponsored by the *N.Y.U. Review of Law & Social Change*, addresses the pregnancy issue primarily in the employment context and as a Title VII problem. The implications of the central problem discussed

Professor Ann Scales's version of the critique, she states her basic assumption as follows:

> The only differences between the sexes which apparently cannot be ignored are *in utero* pregnancy, and breastfeeding, the one function in the childrearing process which only women can perform. In observing that these are the capabilities which *really* differentiate women from men, it is crucial that we overcome any aversion to describing these functions as "unique." Uniqueness is a "trap" only in terms of an analysis, such as that generated in *Geduldig v. Aiello*, which assumes that maleness is the norm. "Unique" does not mean uniquely handicapped.[3]

Linda Krieger and Patricia Cooney, in their extension of the Scales position, add:

> It is likely that to both the Supreme Court and the American public, the distinctions between the condition of pregnancy, of a potential child developing within a woman's body, and any medical condition faced by a man, would leap out with much greater force and vigor than the similarities. The liberal [equal treatment] model, however, relies completely on the acceptance of the analogy. It fails to focus on the effect of the very *real* sex difference of pregnancy on the relative positions of men and women in society and on the goal of assuring equality of opportunity and effect within a heterogeneous "society of equals."[4]

Thus, at least superficially, the dispute centers on whether pregnancy should be viewed as comparable to other physical conditions or as unique and special. On a deeper level, the dispute is about whether pregnancy "naturally" makes women unequal and thus requires special legislative accommodation to it in order to equalize the sexes, or whether pregnancy can or should be visualized as one human experience which in many contexts, most notably the workplace, creates needs and problems similar to those arising from causes other than pregnancy, and which can be handled adequately on the same basis as are other physical conditions of employees. On the deepest level, the debate may reflect a demand by special treatment advocates that the law recognize and honor a separate identity which women themselves consider special and important and, on the equal treatment side, a commitment to a vision of the human condition which seeks to uncover commonalty rather than difference.

The critics believe that the "equal treatment model" precludes recogni-

here are, however, broader than these confines, see, e.g., Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984); Kay, Models of Equality (forthcoming Ill. L. Rev. 1985). This article therefore sometimes necessarily reaches beyond the employment implications of the issue, but does so without any claim to a full discussion of such matters.

3. Scales, Towards a Feminist Jurisprudence, 56 Ind. L.J. 375, 435 (1981).

4. Krieger & Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality, 13 Golden Gate L. Rev. 513, 541-42 (1983).

tion of pregnancy's uniqueness, and thus creates for women a Procrustean bed—pregnancy will be treated as if it were comparable to male conditions when it is not, thus forcing pregnant women into a workplace structure designed for men. Such a result, they believe, denies women's special experience and does not adequately respond to the realities of women's lives.

The proponents of the equal treatment model are also concerned with ensuring that workplace pregnancy rules do not create structural barriers to the full participation of women in the workforce.[5] Unlike the critics, however, they are prepared to view pregnancy as just one of the physical conditions that affect workplace participation for men and women. From their perspective, the objective is to readjust the general rules for dealing with illness and disability to ensure that the rules can fairly account for the whole range of workplace disabilities that confront employed people. Pregnancy creates not "special" needs, but rather exemplifies typical basic needs. If these particular typical needs are not met, then pregnant workers simply become part of a larger class of male and female workers, for whom the basic fringe benefit structure is inadequate. The solution, in that view, is to solve the underlying problem of inadequate fringe benefits rather than to respond with measures designed especially for pregnant workers.

The case that brought these conflicting views into sharp focus is *Miller-Wohl Company, Inc. v. Commissioner of Labor & Industry*,[6] a case in which an employer sought invalidation of a Montana law that made it illegal for an employer to terminate a woman's employment because of pregnancy or to refuse to grant her a reasonable leave of absence.[7] The Miller-Wohl Company had a sick leave policy under which employees were entitled to no paid sick leave until they had completed one year of employment and a limited number of paid sick days per year thereafter.[8] The pregnant employee, Tamara Buley, was hired on August 1, 1979. From the start, she was the victim of severe morning sickness which caused her to miss four or five work shifts in August and to be incapacitated on the job. On August 27, she was fired. The Montana Commissioner of Labor and Industry found that the Miller-Wohl Company had violated the Montana pregnancy statute.[9] Miller-Wohl then filed suit in federal court contending that the Montana statute conflicted with Title VII and specifically with the amendment to that act known as the Pregnancy Discrimination Act. The employer alleged that its sick leave policy treated all

5. Indeed, that concern is what motivated the development of pregnancy issues as equality issues in the first place.

6. 515 F. Supp. 1264 (D. Mont. 1981), vacated, 685 F.2d 1088 (9th Cir. 1982) (district court lacked subject matter jurisdiction).

7. Mont. Maternity Leave Act, Mont. Code Ann. §§ 49-2-310, 49-2-310, (1)-(2) (1983).

8. The employer policy did allow for unpaid leaves during the first year of employment at the employer's discretion. See Miller-Wohl Company Employees Guide § 16 Exhibit A in the proceeding before the Montana Commissioner of Labor and Industry, at 6. That discretion was exercised to permit Tamara Buley several days leave, but her continuing illness led to her dismissal.

9. Mont. Code Ann. § 49-2-310 (1983).

disabilities, including pregnancy-related disabilities, alike and therefore was in compliance with the PDA. It asserted that the Montana maternity leave statute was inconsistent with the federal act and consequently invalid under the supremacy clause of the Constitution because it required preferential treatment of workers disabled by pregnancy in contravention of the federal act's requirement of equality of treatment.

Thus, for the first time in the decade that pregnancy cases had been brought before the federal courts, a case involved a challenge to a provision that singled out pregnancy for favorable[10] rather than unfavorable treatment. The feminist legal community split over whether the Montana law guaranteeing pregnant women a "reasonable" leave of absence should be defended and if so, on what theory. The Ninth Circuit held that the trial court lacked subject matter jurisdiction and ordered the case dismissed,[11] but the debate it engendered persists. After the dismissal, the employer took the case to the state courts, where a Montana judge ruled that the state law conflicted with Title VII and invalidated it. The Montana Supreme Court reversed,[12] and the case is being appealed to the United States Supreme Court. Concurrently, California's version of the Montana law, granting women a leave of up to four months for disability associated with pregnancy, was invalidated as inconsistent with the Pregnancy Discrimination Act by a federal district court in *California Federal Savings and Loan Association v. Guerra*,[13] a decision reversed by the Ninth Circuit.

I propose to further the debate by offering a rationale for the "equal treatment" approach to pregnancy (and other characteristics unique to one sex) in the terms in which its proponents would present it. I do so as one who has participated, almost from the beginning, in the development of the model now under attack. If that model is to be rejected, it should be relinquished with a full understanding of what it is and how it works.

Part I of this article describes the general doctrinal framework of the "equal treatment" approach developed in the sex discrimination cases by feminist litigators and litigation-oriented theoreticians, and it will discuss how pregnancy fits within that general framework. Part II will describe the course of the pregnancy litigation and the courts' and Congress's responses to it. Part III will explore the larger implications of the "equal treatment" model as compared to the "special treatment" model for resolving the pregnancy dilemma.

10. At least, in the view of some. Others are less certain that the provision ultimately benefits women. See text accompanying note 183 infra.

11. 685 F.2d at 1091.

12. The Miller-Wohl Co., Inc. v. Commissioner of Labor & Industry, No. 84-172 (Mont. 1984). The Montana Supreme Court reversed the judgment of the Montana District Court, but "heartily recommended" that the legislature extend the Montana Maternity Leave Act (MMLA) to all of Montana's disabled workers.

13. 33 Emp. Prac. Dec. (CCH) ¶34,227 (C.D. Cal. 1984), rev'd, 53 U.S.L.W. 1165 (April 30, 1985).

I
THE GENERAL DOCTRINAL FRAMEWORK AND HOW PREGNANCY FITS WITHIN IT

The legal theories concerning pregnancy have always been part of a larger theoretical framework advanced by feminist litigators since the early 1970's. This article therefore begins at the beginning—the larger framework in which the pregnancy issue has been developed.[14] In its gross contours, that framework is the same whether one is considering the meaning of equality under a statutory prohibition on sex discrimination, such as that contained in Title VII of the Civil Rights Act, or under the constitutional prohibition of the equal protection clause or the proposed Equal Rights Amendment. Differences in detail result from the different origins, language and purposes of the different sources of the equality guarantees. As will be apparent, the framework has won more acceptance under Title VII than under the equal protection clause. And, of course, the Equal Rights Amendment has yet to become part of our constitution. The larger framework will be set forth in Part A of this section; Part B will describe the way in which pregnancy fits into the framework.

A. The General Doctrinal Framework

The first proposition essential to this analysis is that sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man. Instead of classifying on the basis of sex, lawmakers and employers must classify on the basis of the trait or function or behavior for which sex was used as a proxy. Strength, not maleness, would be the criterion for certain jobs; economic dependency, not femaleness, the criterion for alimony upon divorce.[15] The basis for this proposition is a belief that a dual system of rights inevitably produces gender hierarchy and, more fundamentally, treats women and men as statistical abstractions rather than as persons with individual ca-

14. I will speak of this larger framework as if it were thrust with detailed perfection upon the legal world on January 1, 1970 and coherently implemented from that day to this. In fact, it evolved over time in the intellectual conflict, contradiction, and factual education that accompanies litigation, but the themes are traceable to the beginning of the seventies; they gained shape and specificity as the decade progressed. They reached perhaps their most comprehensive expression in the position papers prepared in the summer and fall of 1983 by a coalition of women's groups supporting the Equal Rights Amendment when it was reintroduced in Congress after its expiration in June of 1983 [hereinafter ERA Draft Position Paper]. A copy of the ERA Draft Position Paper is on file with the N.Y.U. Review of Law & Social Change. See also The Equal Rights Amendment: Hearings Before the Subcomm. on Civil and Constitutional Rights, H.R.J. Res. 1, 98th Cong., 1st Sess. (1983) (statement of Ann Freedman) [hereinafter Freedman Testimony].

15. Sex specific affirmative action is an exception to the rule against classification by sex, providing temporary and focused measures to overcome the effects of past discrimination. See ERA Draft Position Paper, supra note 14.

pacities, inclinations and aspirations—at enormous cost to women and not insubstantial cost to men.[16]

The second essential proposition is that laws and rules which do not overtly classify on the basis of sex, but which have a disproportionately negative effect upon one sex, warrant, under appropriate circumstances, placing a burden of justification upon the party defending the law or rule in court. In the view of its proponents, the proposition is an essential companion to the first proposition and is necessary for the ultimate equality of the sexes. Society has been tailored to predefined sex roles not only through overt gender classification, but also through laws and rules neutral on their face but inspired by the same assumptions, stereotypes and ideologies as sex-based classifications.[17]

16. See Brown, Emerson, Falk and Freedman, The Equal Rights Amendment: A Constitutional Basis of Equal Rights For Women, 80 Yale L.J. 871, 889-93 (1971) [hereinafter Equal Rights for Women]; ERA Draft Position Paper, supra note 14; Freedman Testimony, supra note 14.

17. See Segal, Sexual Equality, The Equal Protection Clause and the ERA, 33 Buffalo L. Rev. 85, 130-46 (1984). As Ann Freedman explained in her House testimony:

> Many of the misconceptions and stereotypes that produce sex discriminatory neutral rules have been recognized and condemned by the Supreme Court in recent decisions under the equal protection clause invalidating facially discriminatory sex classifications. These include "the role typing society has long imposed" on women [sic], particularly the idea that the "female [is] destined solely for the home and rearing of the family" and not "for the marketplace and the world of ideas," and "assumptions that women are the weaker sex or are more likely to be childrearers or dependents"; the invidious relegation of classes of women "to inferior legal status without regard to the actual capabilities of its individual members"; the "nineteenth century presumption that females are inferior to males"; and the willingness to create gender-based hierarchies that keep women "in a stereotypic and predefined place" and grant men more responsible and remunerative positions. Others that have been identified by state legislators and judges in implementing state equal rights amendments, as products of conventional thinking about women that is inconsistent with a commitment to sex equality, include the devaluation of homemakers' contributions to marriage and negative assumptions about women's physical capabilities (resulting, for example, in women's exclusion from certain jobs and from athletics).
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> A number of discriminatory neutral rules are virtually accidental by-products of such conventional ways of thinking, a habit of concentrating on experiences, skills and attributes common to men but unusual among women when making rules for stereotypically male activities, and on experiences, skills and attributes common to women but unusual for men when making rules for stereotypically female activities. For example, the idea that women are physically weak gives rise in some contexts to rules excluding women from traditionally male jobs. In other contexts, a habitual way of viewing certain jobs as normally male leads to height and weight standards that exclude most women from consideration for such jobs and that have no relationship to the requirements of the job, or leads to physical strength tests that serve to exclude disproportionate numbers of women but that test skills in fact irrelevant to the jobs in question. Similarly, an exclusive focus on the female homemaker/male breadwinner model of marriage generates both facially discriminatory rules (e.g., exempting women from jury duty; providing alimony for dependent ex-wives but not for dependent ex-husbands); and neutral rules with a disparate impact (e.g., providing jobs or job training only for the "primary breadwinner," usually the male because of women's lower average earnings; or enacting nepotism rules that encourage the discharge of the lower status member of the couple, usually the woman).
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> This understanding of the nature of sex discrimination offending the constitu-

The goal of the feminist legal movement that began in the early seventies is not and never was the integration of women into a male world any more than it has been to build a separate but better place for women. Rather, the goal has been to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender.[18] The ability to challenge covert as well as overt gender sorting laws is essential both for challenging in court a male defined set of structures and institutions and for requiring their reconstitution to reflect the full range of our human concerns.[19] The first proposition (sex classifications are generally impermissible) facilitates the elimination of legislation that overtly classifies by sex. The second proposition (perpetrators of rules with a disparate effect must justify them) provides a doctrinal tool with which to begin to squeeze the male tilt out of a purportedly neutral legal structure and thus substitute genuine for merely formal gender neutrality.

B. How Pregnancy Fits Within the Framework

How does pregnancy fit into this general framework? The short answer is that the general framework applies, with minor alteration, to laws or rules based on physical characteristics unique to one sex. The proponents contend that classifications based on such characteristics, of which pregnancy is the central example,[20] are sex-based. Under the equal protection clause, the consequence of that conclusion would be that the intermediate standard of review applicable to gender-based classifications would apply to pregnancy classifications.[21] The Supreme Court rejected that position in 1974 in *Geduldig v. Aiello*.[22] Under Title VII, the consequence of characterizing pregnancy classifications as sex-based is that pregnancy-based employer rules constitute unlawful sex discrimination unless the employer can establish that its pregnancy

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tional principles of equality, and the concern—as under the equal protection clause—to balance a commitment to the eradication of inequality with a proper deference to and respect for the legislative and administrative process, generate the principles that govern in ERA challanges to neutral action that has a disparate impact on females or males.

Freedman Testimony, supra note 14.

18. See Kay, supra note 2.

19. See Freedman, Sexual Equality, Sex Differences, and the Supreme Court, 92 Yale L. J. 913, 967 (1984) ("Another component of the new sex discrimination jurisprudence must be an awareness that assimilation into existing predominantly male social structure is an inadequate definition of equality between the sexes and one that robs equality of much of its transformative potential.").

20. Another example is rape laws, which define the criminal act as penetration of the vagina by the penis without the woman's consent. A number of states have redrafted their sexual offense laws to make them gender neutral; the ERA should require such a result.

21. Under that standard, the burden is on the government to establish that such classifications are based on differences between the sexes that bear a substantial relationship to an important governmental objective. See, e.g., Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 199-200 (1976), reh'g denied, 429 U.S. 1124 (1977).

22. 417 U.S. 484, 494, 496, n.20 (1974) (Brennan, J., dissenting).

rule is, in the words of the statute, a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[23] This interpretation of Title VII was adopted by the lower federal courts, ignored by the Supreme Court in 1976 in *General Electric Company v. Gilbert*,[24] and finally imposed by Congress through the amendment known as the Pregnancy Discrimination Act,[25] a 1978 amendment to Title VII. The principle that discrimination based on pregnancy (or other physical characteristics unique to one sex) should be treated as sex discrimination would also be recognized under the Equal Rights Amendment, and classifications grounded on such characteristics would be subjected to strict judicial scrutiny.[26]

The approach in all three legal contexts assumes that for some purposes, sex-unique physical characteristics and capacities are comparable to other characteristics and capacities.[27] Where the purposes of the legislation render them comparable, classifications which single them out for unfavorable treatment would be invalid. Where they are not comparable, such classifications would be upheld. Under this approach, all the classifications would be scrutinized by the courts, and the burden (defined somewhat differently in the three different legal contexts) would be on the party defending the classification to justify its existence.

The companion principle—that neutral laws and rules which have a disproportionately negative effect upon one sex, may warrant shifting the burden of justification to the party defending the law or rule—would apply to "neutral" rules whose disproportionate effects on one sex were due to pregnancy. That principle was recognized for Title VII purposes in the original EEOC guidelines on pregnancy[28] and reiterated in the post-Pregnancy Discrimination Act guidelines.[29] Because of the Supreme Court's insistence in equal protection cases on the existence of an intent to discriminate, narrowly defined,[30] the theory is not available in sex discrimination cases brought under the Fourteenth Amendment.[31] If the proponents' interpretation is adopted by the courts, however, it may well be available under an Equal Rights Amendment.[32]

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23. Title VII of the Civil Rights Act of 1964 § 703(e), 42 U.S.C. § 2000e-2(e) (1982).

24. 429 U.S. 125.

25. See note 1 and accompanying text supra.

26. See Segal, supra note 17, at 134-35; Freedman Testimony, supra note 14, at 5; ERA Draft Position Paper, supra note 14.

27. For a more detailed discussion of how the comparative model works, see text accompanying notes 63, 109-20 infra.

28. 29 C.F.R. § 1604.10(c)(1977).

29. 29 C.F.R. § 1604.10(c) (1984).

30. See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 278-80 (1979); Arlington Heights v. Metropolitan Housing Dev., 429 U.S. 252, 264-68 (1977); Washington v. Davis, 426 U.S. 229 (1976).

31. See note 30 supra.

32. The ERA Draft Position Paper, supra note 14, contended that while classifications based directly on sex should be prohibited, classifications based on physical characteristics

II
A HISTORY OF THE PREGNANCY LITIGATION

Behind this brief description of the theories on which feminist litigators have sought to attack laws, rules and regulations that single out pregnancy for unfavorable treatment is a history which grounds the special treatment/equal treatment debate in time, place and circumstances. That history is recounted here to permit a more subtle and informed evaluation of the path chosen by the "equal treatment" advocates.

The treatment of pregnancy and maternity under the law developed in stages that went something like this.

A. Stage One: 1870 to 1970

From the beginnings of our Republic until well into the twentieth century, the legal rights and duties of men and women were pervasively and significantly different from each other. The legal distinctions flowed from the central premise that men and women were destined for separate social roles because of innate differences between them, most centrally women's reproductive function. Whether manifested by the late eighteenth and early nineteenth century merging of the legal identity of wife into husband (with the accompanying loss of civil and political rights) or by the twentieth century protective labor legislation for women (limiting the hours they could work, putting a floor on their hourly wages, prohibiting night work and excluding them from certain "hazardous" occupations), women's "maternal function" formed the basis of a dual system of law. The system treated women differently than men

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unique to one sex, such as pregnancy, would be permitted if necessary to further a compelling state interest. The reason for treating physical characteristics classifications differently than "pure" sex-based classifications in this context (but not under Title VII or the equal protection clause) is that the per se standard advocated under the Equal Rights Amendment does not make sense for classifications based on pregnancy and other sex unique physical characteristics. While classifications based on gender are always an inaccurate proxy for some functional trait, unique physical characteristics *are* functional traits. Thus, while courts should treat classifications based on unique physical characteristics with suspicion, given their historic use to disadvantage women, there will be circumstances where legislation based on them is justified. This position on the treatment of unique physical characteristics under the ERA was put forth if not explicitly at least implicitly in Equal Rights for Women, supra note 16, at 893. See also Segal, supra note 17, at 134-35.

Sylvia Law, in her rich and provocative critique of the treatment of biological sex differences under due process and equal protection clauses, makes a similar observation about the difference between classifications based on membership in one sex and classifications based on physical characteristics unique to one sex. She too makes the distinction for the purpose of arguing that the latter classifications raise some different concerns than the former and should therefore be subjected to a different standard of review. Law, supra note 2, at 1007-08. The similarities between the ERA Draft Position Paper's approach and the Law approach end there however. She would substitute for the rational basis standard of *Geduldig v. Aiello* (see text accompanying note 22 supra) the compelling state interest standard, but only if the biology based classification is shown to have a significant impact in perpetuating the oppression of women or culturally imposing sex role constraints on individual freedom. Id. at 1008-09. The difficulties of her approach are discussed in note 144 and accompanying text infra.

under the claim that it sought to accommodate to and provide for women's special needs. *Muller v. Oregon* stated it explicitly: "Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a *real equality of right.*"[33]

In addition to the general "protective" labor laws designed to equalize women in their separate sphere, there were, beginning in the 1940's, a very few provisions dealing specifically with pregnancy. In the early 1940's, the Women's Bureau of the U.S. Department of Labor recommended that pregnant women not work for six weeks before and two months after delivery.[34] Some states adopted laws prohibiting employers from employing women for a period of time before and after childbirth to protect the health of women and their offspring during that vulnerable time.[35] Where leaves were not accompanied by a guarantee of job security or wage replacement, they "protected" pregnant women right out of their jobs, as the Women's Bureau conceded.[36] At the same time, the unemployment insurance laws of many states rendered otherwise eligible women workers ineligible for unemployment insurance if they were pregnant or had recently given birth.[37] Women unemployed because of state laws or employer policies of mandatory unpaid leave thus were precluded from the resources available to other unemployed workers. Four states, including California, created disability insurance programs to provide partial wage replacement to temporarily disabled workers, but those programs either excluded pregnancy-related disabilities altogether or provided restricted benefits.[38] The absence of legislation concerning pregnancy and employment meant that the issue was left to employers (and, where there were unions, to collective bargaining).

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33. 208 U.S. 412, 422 (1908) (emphasis added).

34. Women's Bureau, Maternity Protection of Employed Women 7 (1952) (Bull. No. 240) [hereinafter Women's Bureau].

35. Conn. Gen. Stat. Ann. 7 § 31-26 (West 1960); Mass. Ann. Laws ch. 149, § 55 (Michie/Law. Co-op. 1958); Mo. Ann. Stat. § 290.060 (Vernon 1965); N.Y. Lab. Law § 206b (McKinney 1965); P.R. Laws Ann. tit. 29, § 467 (Supp. 1983); Vt. Stat. Ann. tit. 21, § 444 (1967) (repealed 1970).

36. Women's Bureau, supra note 34, at 24.

37. See Manpower Admin., U.S. Dept. of Labor, Comparison of State Unemployment Ins. Laws: Comparison Revision, Ser. 2, No. 4 (Jan. 5, 1970). The basis for the unemployment insurance disqualification was the presumption that these women were not "able and available for work."

38. Cal. Unemp. Ins. Code § 2626 (Deering 1971); N.J. Stat. Ann. § 43:21-29 (West 1962); N.Y. Work. Comp. Law § 200-242 (McKinney 1965); R.I. Gen. Laws §§ 28-41-8 to 28-41-32 (1979). A fifth state, Hawaii, adopted such a program in 1969; in contrast to its predecessors, pregnancy related disabilities were, from the outset, covered on the same basis as other disabilities. Hawaii Rev. Stat. § 392 (1976). Rhode Island initially paid benefits to pregnant women but did so without regard to whether they were actually disabled. Faced with the resulting high cost of pregnancy benefits, the Rhode Island legislature chose to impose a two hundred fifty dollar cap rather then impose the same controls on pregnancy-related claims as on other claims. Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y.L. Forum 480, 484-85 (1971).

By 1960, the dawn of the decade that would usher in Title VII, many employers simply fired women who became pregnant. Others provided unpaid maternity leaves of absence, frequently accompanied by loss of seniority and accrued benefits. Few provided job security, much less allowed paid sick leave and vacation time to be used for maternity leave. Payment of disability benefits for childbirth was, at best, restricted, and employer sponsored medical insurance provided, at most, limited coverage of pregnancy-related medical treatment and hospitalization.[39]

Pervasively, pregnancy was treated less favorably than other physical conditions that affected workplace performance. The pattern of rules telegraphed the underlying assumption: a woman's pregnancy signaled her disengagement from the workplace. Implicit was not only a factual but a normative judgment: when wage-earning women became pregnant they did, and should, go home.

B. Stage Two: 1970-1976

By 1970, women were in the workforce in unprecedented numbers. Moreover, an increasing number of them were staying after the birth of children.[40] Pregnancy rules which left women unemployed and without income thus affected escalating numbers of women. Not surprisingly the magnitude of change finally drew attention to the institutional disadvantages long experienced by women who sought to maintain their attachment to the workforce after childbirth.

In 1968, a task force of President Johnson's Citizens Advisory Council on the Status of Women recommended "a general system" of protection of wage earners against temporary wage loss because of disability and urged that pregnancy related disability be included within such a program. By 1970, the Council itself issued a policy statement urging that pregnancy be treated under an equality model—neither worse nor better than other physical conditions that affect one's ability to work.[41] In 1971, Elizabeth Duncan Koontz, then head of the Women's Bureau of the Department of Labor, published an article in the New York Law Forum pointing out that Title VII, state human relations laws, and the fourteenth amendment were weapons for challenging disadvantageous employer pregnancy rules. She asserted optimistically that "it seems certain that the courts, after full consideration, will adopt the obvious conclusion that pregnancy is a temporary disability and that women are entitled to the same autonomy and economic benefits in dealing with it that em-

39. Compare Koontz, supra note 38, at 490-93, with Women's Bureau, supra note 34.

40. Between 1950 and 1970, the labor force participation rate for women with children under six years old increased from 12 to 30%. Dept of Labor, Women's Bureau, Economic Report of the President 93 (1971). By 1979 the rate was 56.1%. U.S. Dept of Labor, Perspectives on Working Women: A Databook, Table 34, 34 (1980).

41. Statement of Principles (Oct. 29, 1970), reprinted in Citizens Advisory Council on the Status of Women, Job Related Maternity Benefits (Nov. 1970). See also Citizens Advisory Council on the Status of Women, Women in 1970, App. D at 20.

ployees have in dealing with other temporary disabilities."[42]

Suits were filed under Title VII and the equal protection clause on the theory that treating pregnancy disabilities differently and less favorably than other disabilities discriminates on the basis of sex. In 1972 the EEOC issued guidelines heavily influenced by the Citizen's Advisory Council's equality concept. Courts began to reject the arguments of employer and government defendants that pregnancy was unique—"sui generis"—and to grant women plaintiffs the employment benefits available to others experiencing temporary work disability.

In 1974, however, the United States Supreme Court eliminated the Equal Protection Clause as a vehicle for an "equal treatment" attack on legislation singling out pregnancy for special treatment. The state statute challenged in *Geduldig v. Aiello*[43] created a state disability fund, providing temporary, partial wage replacement to private sector workers who became physically unable to work. The statute was liberally interpreted to cover every conceivable work disability, including, according to the record in the case, disability arising from cosmetic surgery, hair transplants, skiing accidents and prostatectomies.[44] It excluded only one type of work disability from coverage—those "arising out of or in connection with" pregnancy.[45]

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42. Koontz, supra note 38, at 501. In her conclusion she states:

> The prompt removal of inequities in existing systems is a high priority goal, as many low-income women workers are suffering great hardship through unjust denial of economic benefits and arbitrary restrictions on employment. With median earnings of white women working year-round, full-time at a little over five thousand dollars per year and black women at four thousand dollars per year, it is clear that most women workers cannot afford any unnecessary loss of wages or loss of coverage of medical bills.
>
> Groups concerned with human rights should make full use of the courts and human relations agencies to challenge employers' special requirements regarding length of absence for childbirth, exclusion of childbirth from health insurance and temporary disability insurance coverage, special disqualifications for pregnancy in unemployment insurance laws, and the exclusion of pregnancy from state temporary disability insurance laws.
>
> A long range goal is the achievement of protection against loss of income for temporary disabilities for the forty percent of working men and women who now have no protection. This goal could be secured through the enactment of additional state temporary disability insurance laws or through a federal law, such as that suggested by the Task Force on Social Insurance and Taxes in 1968.
>
> With respect to child rearing leave, it might be best to experiment with a variety of approaches before seeking legislation. The women's caucuses of the professional organizations are actively seeking adoption by universities of this type of leave, and perhaps unions would give it high priority.

Id. at 502. See also Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. C.R.-C.L. L. Rev. 260 (1972).

43. 417 U.S. 484.

44. See *Geduldig*, 417 U.S. 484 (1974), Brief for Appellees, at 20-24 [hereinafter Brief for Appellees].

45. The statute provided:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary

The plaintiffs in *Geduldig* argued, first, that discrimination based on pregnancy is sex discrimination and thus warranted application of the more activist standard of review then applicable in sex discrimination cases. Several reasons were given for this conclusion. The reproductive organs associated with pregnancy, they said, are definitional characteristics—the sexes are sorted on their presence or absence.[46] Moreover, the reasons for holding sex-based legislation to the higher standard of justification, they asserted, applied with equal force to pregnancy—namely that stereotypes and generalizations about women who become pregnant result in laws and rules which relegate them to an inferior legal status and deny them benefits and opportunities without regard to their individual capacities.[47] Finally, they argued that California's disability program discriminated on the basis of sex because it provided total coverage for men and only partial coverage for women.[48]

Second, plaintiffs asserted that under the standard of review applicable in sex discrimination cases, California's statutory exclusion of pregnancy-related disabilities failed to pass constitutional muster. Women who sought partial wage replacement for such disabilities were denied equal protection by the program's exclusion of their particular disability, because their relationship to the program's purposes was similar to that of those granted benefits for other disabilities.[49]

Justice Stewart, on behalf of a majority of the court, rejected the first argument, stating that the case did not involve discrimination based on gender as such: "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition —pregnancy—from the list of compensable disabilities."[50] Translated, this means that the statute bases the exclusion on pregnancy, not on sex itself (a point made evident, the court noted, by the fact that the persons covered by the program—disabled nonpregnant persons—included women). This mechanical parsing was apparently reasoning enough for the Court. The majority opinion contained no discussion of the plaintiffs' policy arguments for including pregnancy classifications in the universe of classifications considered to be based upon sex.

The conclusion that discrimination on the basis of pregnancy was not sex discrimination freed the Court from the obligation to engage in the more activist review it reserves for sex discrimination cases. Indulging the strong presumption of constitutionality appropriate to rational basis review, it concluded

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work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

Cal. Unemp. Ins. Code § 2626 (West 1972).

46. Brief for Appellees, supra note 44, at 31.

47. Id. at 34-41.

48. Id. at 34.

49. Id. at 54-71.

50. 417 U.S. at 496 n.20.

that a legislature legitimately could exclude a costly disability from an otherwise comprehensive program in order to maintain contribution and benefit rates at the level the legislature desired.[51] The Court's explanation that exclusion was rational because the "additional" cost of covering pregnancy would upset the pre-established contribution rate or benefit level would apply to any frequent or prolonged disability that had been excluded from the program, however arbitrarily. The state did not, presumably because it could not, argue that pregnancy disabilities would have constituted the most expensive category of disabilities, nor did the Court explain why it was rational to pick pregnancy disabilities rather than some other costly type of disability for exclusion.

Perhaps the answer lies in its hint that pregnancy disabilities are intrinsically different from other disabilities: "normal pregnancy," it said in a footnote, is an objectively "identifiable physical condition with unique characteristics."[52] Its failure to specify the "unique characteristics" which distinguished pregnancy-related disabilities from all others covered by the California program and encompassed within its particular purposes is unfortunate. Forced to articulate such differences, the Court either would have exposed its failure to rise above preconceptions and stereotypes about pregnant women or else it would have presented policy conclusions which future courts, commentators and legislators could debate and evaluate.[53] Justice Stewart managed at one stroke to assert that pregnancy is unrelated to gender—is sex neutral—and to imply that pregnancy's unique features make it readily distinguishable from other disabilities and hence properly excludable from the comprehensive disability program, all without exposing the particular facts and policy judgments that lead him to that conclusion.

Justice Brennan, joined in dissent by Justices Marshall and Douglas, adopted the plaintiffs' position in its entirety. Women disabled by pregnancy-related causes were comparable to other disabled workers for purposes of the California program:

> Disabilities caused by pregnancy . . . , however, like other physically disabling conditions covered by the Code, require medical care, often include hospitalization, anesthesia and surgical procedures, and may involve genuine risk to life. Moreover, the economic effects caused by pregnancy-related disabilities are functionally indistinguishable from the effects caused by any other disability: wages are lost due to a physical inability to work, and medical expenses are incurred for

51. Id. at 496. The court did say that plaintiffs could show that a pregnancy based classification, even though not sex based, was a "pretext" for sex discrimination. It found, however, that California's exclusion of pregnancy related disabilities from the California plan was not such a pretext.

52. Id. at 496 n.10.

53. This point is one of several that is nicely elaborated in Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 Colum. L. Rev. 441, 458-61 (1975). See also Erickson, Women and the Supreme Court: Anatomy Is Destiny, 41 Brooklyn L. Rev. 209, 267-81 (1974).

the delivery of the child and for postpartum care.[54]

Moreover, the exclusion of pregnancy-related disabilities constituted sex discrimination:

> In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.[55]

To grasp the full significance of *Geduldig*, it is necessary to consider three other cases decided by the Supreme Court, one that preceded *Geduldig* by several months and two that were decided some years later. The two cases that were decided later, *General Electric Company v. Gilbert* and *Nashville Gas Company v. Satty*, are the centerpieces of "Stage Three" and will therefore be discussed in the next section. The case decided just before *Geduldig* was *Cleveland Board of Education v. LaFleur*,[56] in which women challenged an unfavorable pregnancy rule and won in the Supreme Court, but on a legal theory different from that rejected in *Geduldig*.

The plaintiffs in *LaFleur* were public school teachers placed on mandatory unpaid maternity leaves under school board rules requiring pregnant teachers to commence a leave in the fourth or fifth month of pregnancy and precluding their return to work for specified periods after childbirth. Such rules were typical in public schools throughout the country.[57]

The Court held that the mandatory maternity leave rules impinged on the teachers' "freedom of personal choice in matters of marriage and family life."[58] It quoted *Eisenstadt v. Baird*, a 1972 case invalidating a law which

54. 417 U.S. at 500-01.

55. Id.

56. 414 U.S. 632 (1974).

57. See Koontz, supra note 38, at 492.

58. 414 U.S. at 639-40. It cited, among other cases, Griswold v. Connecticut, Eisenstadt v. Baird, and Roe v. Wade. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court found in the mysterious penumbras of the Constitution a right to marital privacy that was violated by state interference with access of married persons to birth control. Eisenstadt v. Baird, 405 U.S. 438 (1972), decided that the equal protection clause required that the unmarried have the same right as married persons to acquire birth control devices without state criminal sanction. By recognizing the right of a woman to choose whether or not to abort a pregnancy, the Court in Roe v. Wade, 410 U.S. 113 (1973), completed the transformation of the fundamental right recognized in *Griswold* from a right of marital privacy into a right of personal choice concerning procreation.

This new right, cut loose from its moorings in marital privacy, was nonetheless not the right to full autonomy for which the *Roe* plaintiffs sought recognition. The Court substituted

prohibited the provision of birth control devices to unmarried persons, for the proposition that there is a right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[59] Thus, when the Court struck down the pregnancy policies in *LaFleur*, it invoked not the sex discrimination cases decided under the equal protection clause, but rather, the reproductive choice cases, such as *Eisenstadt* and *Roe v. Wade*.[60]

In *LaFleur*, the Court made the doctrinal choice that became obvious in *Geduldig*. This is apparent when one considers the lower court opinions in the two cases consolidated as *Cleveland Board of Education v. LaFleur*. Those courts had decided the validity of the school board rules not on due process grounds—not as cases involving the fundamental right to choose whether to bear or beget children—but rather as equal protection cases, and both addressed the question whether pregnancy discrimination was sex discrimination.

The Seventh Circuit in *LaFleur* held that the Cleveland Board of Education's mandatory maternity leave policy discriminated against the plaintiffs on the basis of their sex.[61] The Court was of the view that because pregnancy was ineluctably linked with the female sex, discrimination on the basis of pregnancy must be viewed as sex discrimination.

In the companion case,[62] by contrast, the Fourth Circuit held against the teachers, stating that discrimination on the basis of pregnancy was not, analytically, sex discrimination.[63] That court differed sharply from the Seventh Circuit, saying: "How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course. . . . Pregnancy and maternity

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doctor for spouse, defining the right of the woman to choose abortion as a right to be exercised in consultation with her doctor. 410 U.S. at 163. Moreover, it grounded the determination of when, in the course of a pregnancy, state interests in the woman's health and fetal life become sufficiently compelling to override the woman's choice in the quicksand of changing technology. Id. From a feminist perspective, women's claim to reproductive choice is appropriately grounded in personal autonomy rather than in the privacy of the doctor-patient relationship. Nonetheless, *Roe*, like its predecessor cases, recognized a right— albeit a limited one—to make procreational choices without state interference, a right of tremendous consequence for the status of women.

The Supreme Court in *LaFleur* also cited Loving v. Virginia, 388 U.S. 1 (1967); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

59. 414 U.S. at 640.

60. Id. Both the majority and concurring opinions dismissed the school board pregnancy rules as irrational and arbitrary. Justice Stewart, writing for the majority, said, among other things, that the leave rule was based on a "conclusive presumption", that pregnant teachers were unfit as of the fourth or fifth month of pregnancy. Id. at 644. Since the presumption was neither "necessarily nor universally true," it was rejected as a constitutionally adequate justification for the rule. Id. at 646. Justice Rehnquist, in dissent, criticized the irrebutable presumption analysis as "nothing less than an attack upon the very notion of lawmaking itself." Id. at 660. His view has prevailed. The Court seems to have abandoned it as a mode of analysis in due process cases.

61. 465 F.2d 1184, 1188 (1972).

62. Cohen v. Chesterfield County School Board, 474 F.2d 395 (4th Cir. 1973).

63. Id. at 397.

are *sui generis*, and a governmental employer's notice of them is not an invidious classification by sex."[64]

Thus, when the cases reached the Supreme Court, the issue was neatly framed by the irreconcilable views of the two lower courts: should discrimination against pregnant women be treated as sex discrimination and judged under the Court's new and tougher standard of review in sex discrimination cases brought under the equal protection clause? Or should the Court follow the Fourth Circuit's lead and hold that pregnancy is *sui generis* and not amenable to analysis as sex discrimination? The majority opinion of the Supreme Court in *LaFleur* did neither. It did not even mention, much less appear to resolve, the lower court dispute.

In reality, however, the Court had resolved the dispute. At the time *LaFleur* was decided, the Court had already set for oral argument a second pregnancy case, one that did not as readily lend itself to a due process analysis.[65] That case was, of course, *Geduldig v. Aiello*,[66] which raised for a second time that term the question whether the Court would view discrimination on the basis of pregnancy as sex discrimination. Thus, the Court knew as it decided *LaFleur* that its next pregnancy case would permit it to speak again on the constitutionality of state pregnancy regulations and, if it chose, to resolve the debate that surfaced in the Fourth and Seventh Circuit opinions. In *LaFleur* the Court, presented with two possible doctrinal approaches to pregnancy, chose to apply the due process rather than the equal protection analysis. That it had also rejected the latter became explicit when *Geduldig* was decided; Justice Potter Stewart, the author of the majority opinion in *LaFleur*, also wrote for the six justice majority in *Geduldig*.

The doctrinal distinction between due process and equal protection analysis of pregnancy issues represented by *LaFleur* and *Geduldig* is in a sense a reiteration of the special treatment/equal treatment dichotomy. To oversimplify, the due process approach is not troubled by and, indeed, invokes a form of special treatment analysis. The liberty interest at stake, defined as the right to choose whether to bear or beget a child without undue state interference, is recognized as "fundamental" precisely because of the central and unique importance to the individual of reproductive choice. The characterization of pregnancy discrimination as sex discrimination, by contrast, requires the comparative analysis of the equal protection mode.[67] Its emphasis is on what is not unique about the reproductive process of women.

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64. Id. at 398.

65. Appellees did make a *LaFleur* argument, contending that the exclusion of pregnancy related disabilities from the California disability program, if based on the assumption that women who gave birth were severing their ties with the labor force, constituted an irrebutable presumption of the type invalidated in *LaFleur*. Brief for Appellees, supra note 44, at 74-76. The Court entirely disregarded the argument.

66. 417 U.S. 484.

67. But see Law, supra note 2, at 1008-10, contending that it does not. Her position is discussed at note 144 infra.

The practical consequences of the Court's choice can be illustrated by looking at the facts of the *LaFleur* case from both perspectives. Under the due process/fundamental rights doctrine, the Court asks whether the employer pregnancy rule burdens the exercise of a women's freedom to choose whether or not to bear a child and, if so, whether the burden is justified.[68] The Court in *LaFleur* had no trouble saying that a rule requiring a woman to take an unpaid leave in the middle of her pregnancy constituted a "heavy burden" and was not adequately justified.

But suppose the leave policy were less extreme. Suppose, for example, that the rule or law provided that a woman must take a leave six weeks before her due date and could not return for six weeks after childbirth, as did the laws of several states until recently. The Court might well conclude that a six-week-before-six-week-after rule did not burden the pregnant woman's procreative choice or that even if it did, it did not do so unreasonably. Indeed the *LaFleur* majority took pains to say that it was not passing on the constitutionality of a maternity leave regulation requiring termination of employment "at some firm date during the last few weeks of pregnancy."[69] Justice Powell, concurring, suggested that "in light of the Court's language . . . a four-week pre-birth period would be acceptable."[70] In reaching these conclusions, the Justices would, as they did in *LaFleur*, look solely at the characteristics of pregnancy itself in the context of an educational institution.[71]

The sex equality approach would require a different analysis. In assessing the validity of the six-week-before-six-week-after-childbirth rule, the Court would engage in a comparative analysis. How does the school district deal with other work absences due to physical incapacity? Perhaps more on target, how does it deal with other potentially disabling conditions? If a school district in general permitted an employee with a potentially disabling physical condition or elective surgery to work until there were medical indications to the contrary, then the pregnant woman would be entitled to work until it became medically appropriate for her to cease.

The equality analysis thus shifts the focus, providing by reference to the

68. In *Roe*, 410 U.S. at 155, the announced standard of justification was the vigorous compelling state interest standard. *LaFleur*, for unexplained reasons, applied a rationality standard, saying "[b]ecause public school maternity leave rules directly affect 'one of the basic civil rights of man, . . . the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty." 414 U.S. at 640.

69. 414 U.S. at 647 n.13. The majority also noted that the school board had reasonable alternative ways of keeping physically unfit teachers out of the classroom, for example, requiring the pregnant teacher to submit to medical examinations by the school board physician or to require each teacher to submit a certification from her obstetrician as to her ability to continue to work. Id. at 647 n.13.

70. Id. at 656 n.5.

71. While reference to treatment of other disabilities might aid the court in assessing how strong the state's interest in its pregnancy rule is, such a comparison is not compelled by the due process analysis as it is in the sex discrimination analysis under the equal protection clause. See text following this note.

employees' general rules governing disability a tangible benchmark for measuring the appropriateness of the pregnancy rule.[72] In contrast to the due process analysis which entails only a look at the internal logic of the pregnancy rule, the equality analysis does not automatically place a woman in a separate class when she becomes pregnant. Rather, she is a person like any other person who may be forced to leave work due to a physical condition. Moreover, the influence of sex role assumptions, stereotyped expectations and normative judgments about pregnancy is explicitly examined as part of the sex discrimination analysis. To the extent that these factors infect legislation, it is constitutionally doomed.

Thus, when the Supreme Court chose, in *LaFleur* and *Geduldig*, to view pregnancy as a special case, it made a decision to permit government to single out pregnant women for regulatory purposes, subject only to the limitation that a rule may not impose too great a burden on the choice to bear a child.[73] This is not to say that the reproductive choice cases are somehow unimportant or misguided in their approach to reproductive issues. A woman's ability to control, to time, to prevent conception is no less than the ability to control her own destiny. A society bent on keeping women in their traditional role would first seek to deny them reproductive choice. The doctrine developed in the reproductive choice cases has, as a practical matter, a crucial bearing on women's status. The doctrine in the due process cases, however, is not explicitly sensitive to or focused on women's equality. It is a doctrine that concerns itself not with the status of persons, but rather with the freedom of persons to make certain choices without "undue" state interference. Due process and equal protection doctrines produce distinctly different constraints and consequences. Because the two doctrines focus on different aspects of the reproductive phenomenon—the one on protecting the liberty to make certain reproductive choices free of state intervention, the other on whether the state has treated the sexes evenhandedly— the Court could (and feminists thought should) have made both applicable to the pregnancy problem. In certain contexts, such as those in *LaFleur* and *Geduldig*, the equal protection approach speaks more relevantly to the position in which pregnant women find themselves, and in all contexts in which pregnancy is regulated, a concern for the equality as well as the liberty implications of the regulation is warranted.

The drawbacks of the Court's choice are especially apparent today, since *LaFleur*'s value as precedent has been affected by subsequent developments.[74]

72. Of course, this change in focus is dependent on the Court's willingness to recognize that discrimination on the basis of pregnancy is sex discrimination. Justice Powell used an equal protection approach, but did not treat the classification as a sex based one. As a consequence, he viewed the classification as one distinguishing between pregnant women before the fourth month of pregnancy and pregnant women thereafter. Id. at 652-56. Viewing the classification as one based on sex discrimination means that the two categories are pregnant women and men who become disabled.

73. Moreover, as noted above, subsequent doctrinal developments make it unclear whether *LaFleur*'s reasoning is viable today. See note 60 supra.

74. See notes 60, 73 supra. The Court did rely upon the *LaFleur* reasoning in one subse-

The Court has long since moved away from the irrebutable presumption doctrine that provided part of the underpinnings of the majority opinion. Subsequent cases have also required a more direct burdening of reproductive choice than was evident in *LaFleur* to trigger constitutional scrutiny.[75] In any event, *LaFleur* was from the start a peculiar case. The Court, without explaining why, applied a substantially less rigorous standard than the compelling state interest standard announced in *Roe* to the facts of that case. The Court may have viewed the mandatory leave rule as so obviously irrational that it did not feel the need to apply the higher standard, or it may have had some other reason. Its logic remains unexplained. At any rate, Title VII was extended to cover public employment shortly after the *LaFleur* plaintiffs fell victim to the school board policies, and similar cases have since been brought under the statute rather than the fourteenth amendment.[76] Plaintiffs have correctly perceived, for the reasons outlined above, that Title VII's equality analysis provides the stronger tool.

Thus, by 1976, the end of Stage Two, the dimensions of constitutional analysis of pregnancy legislation were established. The battle to bring pregnancy within the "equal treatment" model through the equal protection clause had been lost. On the other hand, the lower federal courts were unanimous in their opinion that pregnancy discrimination was sex discrimination for purposes of Title VII.[77] Since pregnancy issues almost always came up in the employment discrimination context, *Geduldig*'s effect on the ability of women to challenge pregnancy rules was limited.[78] The Supreme Court, however,

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quent pregnancy case, Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam). In that case the Court struck down, without benefit of oral argument, a state unemployment insurance provison, typical at the time, that excluded pregnant women from eligibility for benefits even when they were able and available to work.

75. See, e.g., Maher v. Roe, 432 U.S. 464, 475-76 (1977); Harris v. McRae, 448 U.S. 297, 314-15 (1980). In both of these cases, the Court said that government did not, by excluding coverage of abortion from Medicaid, erect an obstacle, absolute or otherwise, in the pregnant worker's path to abortion. Since the exclusion did not burden the abortion choice, it was not accorded the scrutiny afforded the abortion law challenged in *Roe v. Wade*.

76. See *LaFleur*, 414 U.S. at 639 n.8.

77. See Communications Workers v. A. T. & T., 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975), vacated on jurisdictional grounds, sub. nom. Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), rev'd, 429 U.S. 125 (1976); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), aff'd, 434 U.S. 136 (1977); Hutchinson v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. 1975).

78. As noted in the text accompanying note 76, with the extension of Title VII's prohibition on sex discrimination to public employers by the 1972 amendments to that Act, fact situations like those in *LaFleur* came within the Act. Moreover, some of the most harmful pregnancy legislation has been changed in other ways. The Court disposed, per curiam, of the unemployment insurance code provisions that made pregnant women ineligible for unemployment insurance, citing *LaFleur*. See note 74 supra. The California legislature finally did what the Court was unwilling to do and extended disability benefits to persons disabled by pregnancy on the same basis as other disabled workers. Cal. Unemp. Ins. Code § 2626 (West Supp. 1985). The other four state disability insurance funds now treat pregnancy disabilities the same as all others. See note 38 supra. The major gap left by *Geduldig* is probably the treatment of pregnancy by the military, one "employment" setting that Title VII does not cover.

had not yet ruled on the question of pregnancy under Title VII.

C. *Stage Three: 1976-1978*

In *General Electric Company v. Gilbert*,[79] decided in December of 1976, the Supreme Court dropped the other shoe. Relying heavily on *Geduldig v. Aiello*, it interpreted Title VII as it had the equal protection clause: it held that discrimination on the basis of pregnancy was not sex discrimination.[80] *Gilbert*, on its facts, was very similar to *Geduldig*. It involved a private employer's disability insurance plan almost identical to the California state plan both in its general scope and in its exclusion of pregnancy-related disabilities. Justice Rehnquist began his analysis on behalf of the majority by invoking *Geduldig*'s conclusion that discrimination on the basis of pregnancy, a unique physical characteristic, is not gender discrimination "as such." Thus, rules concerning it are "neutral," not sex-based.[81] As Justice Stewart had done in *Geduldig*, Rehnquist went on to assert that the pregnancy rule, like the one in *Geduldig*, was not a "pretext" for sex discrimination either.[82] But, in contrast to the equal protection clause relied upon in *Geduldig*, Title VII doctrine provides a third theory of violation, and it is with respect to that third theory that Rehnquist made a unique contribution to the law on pregnancy and equality.

Under Title VII, rules that are "neutral" but have a disproportionate sex-based effect may also violate the Act. However, the particular "neutral" General Electric pregnancy disability rule, said Justice Rehnquist, could not even be viewed as having a discriminatory *effect* on women. Men and women, he said, are both covered by the disability program. Moreover, they are covered for the disabilities common to both sexes. Pregnancy disabilities are therefore an "*additional* risk, unique to women."[83] Failure to compensate women for them does not upset the basic sex equality of the program. In a footnote, he drove home the point: Title VII does not require "that 'greater economic benefit[s]' . . . be paid to one sex or the other because of their differing roles in the 'scheme of human existence.' "[84] This conclusion makes breathtakingly explicit the underlying philosophy of the majority of the justices in *Geduldig* and *Gilbert*. Pregnancy, for Rehnquist, is an "extra," an add-on to the basic male

79. 429 U.S. 125 (1976).

80. The consequence of the holding under Title VII has a consequence different than that under the Equal Protection Clause. In *Geduldig*, the not-sex discrimination holding meant that pregnancy classifications were judged under the rational basis standard rather than the higher standard applied to sex discrimination cases brought under the equal protection clause. *Gilbert* meant that a pregnancy based employer rule, in contrast to a "sex-based" rule, did not per se create a prima facie violation of Title VII and that a complaint alleging that such a rule unjustifiably discriminated on the basis of sex failed to state a claim under Title VII. (Title VII plaintiffs could, however, allege that a pregnancy rule was a pretext for sex discrimination or had a disparate effect on women. See text accompanying notes 72-73 supra, and 172 infra.)

81. *Gilbert*, 429 U.S. at 134-35.

82. Id. at 136.

83. Id. at 139 (emphasis in original).

84. Id. at 139 n.17.

model for humanity. Equality does not contemplate handing out benefits for extras—indeed, to do so would be to grant special benefits to women, possibly discriminating against men. The fact that men were compensated under the program for disabilities unique to their sex troubled his analysis not at all.

Justice Brennan, in his dissent in *Geduldig*, almost grasped the essence of the problem when he observed that "the State has created a double standard for disability compensation; a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex . . . ."[85] What eluded even Justice Brennan was that the statute did not create a "double" standard. Rather, it made man the standard (whatever disabilities men suffer will be compensated) and measured women against that standard (as long as she is compensated for anything he is compensated for, she is treated equally).[86]

For Rehnquist, as long as women are treated in the same way as men in the areas where they are like men—in the disability program this would mean coverage for things like heart attacks, broken bones, appendicitis—that's equality. To the extent the Court will consider the equities with respect to childbearing capacity, it will consider them only in the category where they belong—extra, separate, different. A family, marital or reproductive right—yes, in appropriate cirumstances. A public matter of equality and equal protection of women—no.

A subsequent Title VII case, *Nashville Gas Company v. Satty*,[87] provides an important footnote to the majority's attitude. The relevant portion of *Satty* involved a challenge to a company policy under which women returning from maternity leave were stripped of all their pre-leave seniority. Pursuant to this policy, when Nora Satty returned to work, she found her seniority abolished. Treated as a new employee, her prior years with the company counted for

85. 417 U.S. at 501.

86. Justice Brennan notes that under the majority's rationale in *Gilbert* all disabilities unique to women could be excluded from the program without disparate effect on women. 429 U.S. at 152 n.5.

Rehnquist, when he defines women's rights from a male perspective, is in distinguished company. Sigmund Freud engaged in the same male-skewed reasoning when he built a theory of women's neurosis around their lack of a sex-unique physical characteristic, the penis. Women, when they noticed this physical "deficiency" in themselves, viewed themselves (and men viewed them) as "wounded" and inadequate men. Now we have Rehnquist, who, upon detecting that women have a physical capacity that men lack, labels it an "extra," and penalizes women for it.

What Rehnquist and Freud have in common is the underlying conviction that men are the standard against which equality is to be measured. Whether woman is man plus or man minus, she is placed in a class by herself to her disadvantage. Some feminists share the Stewart/Rehnquist conception of pregnancy as "what a man has, plus", see Krieger and Cooney, supra note 4, at 526, but use it as a basis for arguing that women workers should receive special benefits for pregnancy that other employed people do not receive. In their view, women carry all the burdens men do, plus the additional burden of pregnancy: the authors therefore argue the necessity of special provisions to compensate pregnant women for their unequal biological position.

87. 434 U.S. 136 (1977).

nothing. This was in contrast to other employees who returned from leaves, but kept the seniority credit earned by prior service.

Justice Rehnquist again wrote for the Court. This time, however, the plaintiff prevailed. In *Gilbert*, Rehnquist explained, women sought an extra benefit; they wanted disability benefits for a disability in addition to those which men could suffer. *Satty*, by contrast, involved a burden imposed on women to which men were not subjected: forfeiture of seniority.[88] This, he concluded, violated Title VII.[89] Why loss of income during a pregnancy disability leave was not a burden while loss of seniority upon return to work was a burden remains something of a mystery. As Justice Stevens observed in his concurring opinion, "differences between benefits and burdens cannot provide a meaningful test of discrimination since, by hypothesis, the favored class is always benefited and the disfavored class is equally burdened."[90]

The explanation must lie in Rehnquist's basic conception of pregnancy as extra and extension of benefits accordingly a special privilege. For him, *Satty* was distinguishable from *Gilbert* because the *Satty* plaintiff sought no benefits based on the pregnancy itself.[91] She had earned the seniority prior to her pregnancy leave and was deprived of that seniority upon her return when she was no longer pregnant. She just wanted to keep after pregnancy what she earned before pregnancy intervened. A rule stripping women of benefits they earned as "normal" workers when they again returned to the "normal" (non-pregnant, male-like) status would, for Rehnquist, implicate equality concerns, while women's ascension into the no-man's land of pregnancy would not.

D. Stage Four: 1978-Present

In reaction to *Gilbert* and *Satty*, Congress in 1978 passed the Pregnancy Discrimination Act (PDA) as an amendment to Title VII, quite plainly requir-

88. The Court said:

> Here, by comparison [to *Gilbert*], petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other 'because of their differing roles in the scheme of human existence,' . . . . But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.

434 U.S. at 142.

89. This was not a retreat from the *Gilbert* holding that pregnancy discrimination is not sex discrimination for purposes of Title VII. Although the opinion is less lucid than one might wish, Rehnquist appeared to be viewing the pregnancy rule as neutral and assessing whether it had a disproportionate effect on women. Because women lost earned seniority that men did not, the rule had a disproportionate impact. Since the employer had not established a business necessity for the rule, the rule was declared to violate Title VII. Id. at 140-43.

90. 434 U.S. at 154 n.4.

91. To the extent Nora Satty did claim the extension of a benefit related to pregnancy (she sought coverage during her pregnancy disability under the company sick leave policy) her fate was the same as that of the plaintiffs in *Gilbert*. 434 U.S. at 143-46.

ing that pregnancy be treated under the equality model. The PDA, an amendment to the definitions section of Title VII, provides that employment discrimination on the basis of pregnancy, childbirth and related medical conditions is sex discrimination for purposes of that Act.

The second sentence illustrates how the Act is to be interpreted: "[w]omen 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."[92] This language models the comparative approach the Act requires, prohibiting employers, in the words of the Senate committee report on the Act, from "treat[ing] pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions."[93] Pregnancy is to be understood as a physical event comparable to other physical events which befall workers. A physically fit pregnant worker cannot be laid off when other fit workers are not (the *LaFleur* result) nor can physically disabled pregnant workers be treated differently than other disabled workers (overriding the *Gilbert* result). The requirement that women affected by pregnancy be treated the same for all employment-related purposes as others similar in their work ability underscores the intent of the Pregnancy Discrimination Act to bring pregnancy rules within the general non-discrimination requirements of Title VII. It is apparent from this language that Congress intended that pregnant workers are to be treated no worse—nor any better—than other "similar" workers.

In its first interpretation of the PDA, the Supreme Court expressed its understanding that Congress meant to eradicate both the holding of *Gilbert* and the principle on which that holding was based. In *Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission*,[94] the Court by a seven to two vote struck down an employer medical insurance program that provided to employees less complete coverage for the medical costs of pregnancy of spouses than of other medical procedures for dependents. The policy, said Justice Stevens for the Court, discriminated against male employees. He explained:

> [A] plan that provided complete hospitalization coverage for the spouses of female employees but did not cover spouses of male employees when they had broken bones would violate Title VII by discriminating against male employees.
>
> Petitioner's practice is just as unlawful. Its plan provides limited pregnancy-related benefits for employees' wives and affords more extensive coverage for employees' spouses for all other medical conditions requiring hospitalization. Thus the husbands of female

92. 42 U.S.C. § 2000(k) (1982).

93. S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977); see also H.R. Rep. No. 948, 95th Cong., 2nd Sess. 1-9 (1978).

94. 462 U.S. 669 (1983).

> employees receive a specified level of hospitalization coverage for all conditions, whereas the wives of male employees receive such coverage except for pregnancy-related conditions. Although *Gilbert* concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face, because only women can become pregnant, Congress has unequivocally rejected that reasoning.[95]

With *Newport News*, *Gilbert*'s conceptual framework is definitively interred. Pregnancy-based rules prima facie violate Title VII. The burden is on the employer to show that its rule comes within Title VII's BFOQ exception.[96] The more complicated inquiries required by *Gilbert* and *Satty*—whether the pregnancy rule is a pretext for sex discrimination,[97] and whether it has a disproportionate effect on women not justified by business necessity[98]—are now irrelevant.[99] The equal treatment approach, despite its rocky progress in the Supreme Court, has transformed employer pregnancy policies.[100]

For the most part, lower courts have embraced the equality approach, except during the two years prior to the effective date of the PDA, when *Gilbert* was the governing law. Employer policies requiring terminations and mandatory leaves are plainly illegal and have been nearly eliminated.[101] Women are entitled to work until disabled and to return on the same basis as other temporarily disabled employees. Women disabled by pregnancy are entitled to claim paid sick leave, personal leave, disability benefits and medical and

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95. Id.

96. For courts that follow the Fifth Circuit's BFOQ standard, this means, in the hiring, promotion and firing context, that the employer would have to show that all or substantially all pregnant women could not perform safely and efficiently the duties of the job, see Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), and that the essence of the business operation would be undermined if pregnant persons were hired. See Diaz v. Pan Am. Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971). (The test would be modified in the fringe benefit context to suit that situtation.) In the Ninth Circuit it means that the employer would have to show that a physical characteristic unique to one sex was crucial to successful performance of the job. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971).

97. *Gilbert*, 429 U.S. at 135-36; *Satty*, 434 U.S. at 144.

98. *Gilbert*, 429 U.S. at 136-40; *Satty*, 434 U.S. at 143.

99. Of course, a plaintiff may assert that an apparently neutral rule (not based on sex as redefined to include pregnancy) has a disproportionate effect on women in a situation where the effect is related to the fact of pregnancy. See notes 28-29 and accompanying text supra, and notes 152, 188 and accompanying text infra. Equal Employment Opportunity Guidelines on Pregnancy, 29 C.F.R. § 1604.10(c).

100. See generally Kohl & Greenlaw, The Pregnancy Discrimination Act: Compliance Problems, Am. Mgmt. Ass'n J. 65 (1983); S. Kamerman, A. Kahn & P. Kingston, Maternity Policies and Working Women 50-52, 60-62, 74-76 (1983).

101. Terminations still occur, no longer on the basis of an overt policy of terminating pregnant women, but in other guises. In such cases, plaintiffs must, like any Title VII plaintiff alleging covert discrimination, demonstrate that the employer intended to discriminate—in these cases because of pregnancy—under the principles set forth in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); and McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

hospitalization benefits on the same basis as other workers. The "unjust denial of economic benefits and arbitrary restrictions on employment" that caused hardship for low income workers and thus particularly concerned Elizabeth Koontz, Director of the Women's Bureau, in 1971, is now largely remedied.[102]

Serious problems remain, however. Title VII does not apply to the military, and, because of *Geduldig v. Aiello*, the pregnancy policies of a major employer of women go essentially unscrutinized.[103] Moreover, although substitution of the disability model for the old maternity leave approach to pregnancy has generated a substantial increase in monetary benefits to pregnant employees when they become incapacitated, it may also have encouraged employers to restrict leaves to the disability period.[104] Mandatory maternity leaves often included a time period after childbirth, unrelated to physical incapacity of the woman, during which a mother could spend time away from the job with her newborn. Although unpaid, and often not optional for the employee,[105] it met an important need of employees, too frequently unrecognized

102. Krieger and Cooney, supra note 4, at 545-46, engage in some ill-considered rhetoric about how the equal treatment approach has served the needs of economically privileged employed women and left lower income women by the wayside. As Elizabeth Koontz suggests, it is low income women who had the greatest need for extension of monetary benefits. Koontz, supra note 38. Not surprisingly, the plaintiffs in *Geduldig* and *Gilbert* were compelled by dire economic straits to consider suit. The *Geduldig* plaintiffs were legal services clients, eligible under poverty guidelines for free legal services; the plaintiffs in *Gilbert* were blue collar workers represented by their labor union. One of the *Gilbert* plaintiffs was left with no income and a new infant: she had been recently deserted by her spouse and had had her electricity cut off because she could not pay the bills. School teachers who, though white collar workers, are not in the upper income categories, fought for the right to continue working after the midpoint of their pregnancies in order to continue earning an income as long as possible before the birth of their children. Unpaid mandatory maternity leave was least harmful (although by no means harmless) to high income women who suffered temporary career setbacks but not financial hardship because of forced unemployment.

Of course, pregnant employees whose employers provide few or no job-related benefits are not helped by the Pregnancy Discrimination Act. See text accompanying notes 107, 175-178 infra. They join their fellow workers, men and women alike, in vulnerability to unemployment due to disability and uninsured medical expenses.

103. Until 1971, when the services changed their regulations to permit a waiver of the rule, women were terminated from the Armed Services when they became pregnant. See Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), vacated and remanded, 409 U.S. 1071 (1972). In 1975 the waiver requirement was eliminated and pregnant women permitted to remain in the Army. Plaintiffs' Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment, at A-9, Mack v. Rumsfeld, No. 76-22 (W.D.N.Y. 1984).

But pregnant women remain ineligible to enlist, to enter ROTC or Officer Candidate School, or to gain admittance to the U.S. Military Academy. See Hartnett, Parenthood and the Military: Implications for Equality 13 (unpublished 1984). Pregnancy during basic training or advanced individual training can lead to involuntary separation if the pregnant soldier cannot fully participate in the training. Id. at 13-14.

104. Kamerman, Kahn & Kingston, supra note 100, at 75-76. See also Catalyst, Maternity/Paternity Leaves, infra note 111, at 6 (while paid leave is longer, some companies may have shortened unpaid (childrearing) leaves). Cf. EEOC v. Southwestern Electric Power Co., 35 Fair Empl. Prac. Cas. (BNA) 801 (W.D. Ark. 1984) (no Title VII violation where no evidence that physically able women terminated for refusal to return to work four weeks after childbirth was treated differently than other formerly disabled employees).

105. See, e.g., *LaFleur*, 414 U.S. 632 (Under the Cleveland rule, a school teacher was not

by employers today, to spend the early months of a child's life at home.[106]

Finally, there remains the reality that Title VII guarantees to the pregnant worker only the benefits already extended by the employer to others. When Elizabeth Koontz surveyed the status of pregnant workers in 1971 and recommended that pregnant workers be included in preexisting benefits schemes, she noted that forty percent of working men and women had no protection from unemployment due to disability. "A long range goal," she said, "is the achievement of protection against loss of income for temporary disabilities . . . . This goal could be secured through the enactment of additional state temporary disability insurance laws or through a federal law [creating a temporary disability insurance system as a part of a federal-state unemployment insurance program]."[107]

To date, her long range goal has not been realized, and the gap she noted then has not been bridged by employers.[108] In the meantime, perhaps not surprisingly, a few states[109] have passed legislation aimed at the partial alleviation of this gap and have provided a right to unpaid leave and reinstatement—but only for employees who become pregnant. These are the provisions that have engendered the recent debate about the appropriate legal treatment of pregnancy described in the introductory section of this article.

III

THE EQUAL TREATMENT/SPECIAL TREATMENT DEBATE

We now reach Stage Five, a crossroads. The questions raised by Scales, Krieger and Cooney require an answer. Has the almost fifteen-year experiment with an equal treatment approach to pregnancy been a failure? Is the approach fatally flawed, or perhaps a temporary tactic for which there is no longer any need? If so, is there a workable alternative which avoids the scylla of "equal treatment" but also the charybdis of *Geduldig* and *Gilbert*?

I continue to believe that the course upon which feminist litigators set out at the beginning of the 1970's—the "equal treatment" approach to pregnancy—is the one best able to reduce structural barriers to full workforce participation of women, produce just results for individuals, and support a more

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permitted to return to work until the semester after her infant reached the age of three months.).

106. See Yale Bush Center in Child Development and Social Policy, Infant Care Leave Project, Summaries of Research Components: 1983/1984, Summary of Literature Review on the Effects of Infant Day Care (1984) (Effects of out-of-home care on parent-infant attachment and social relationships of some children and the unavailability of quality out-of-home care for those families who most need it suggest that the alternative of parental care in the home should be an available option during the first months of an infant's life.).

107. Koontz, supra note 38, at 502.

108. Kamerman, Kahn & Kingston, supra note 100, at 69-70. About 50% of firms sampled provided temporary disability benefits; larger firms were more likely to provide benefits, and for longer periods, than smaller firms.

109. Cal. Gov't Code § 12945(b)(2) (West 1980); Conn. Gen. Stat. Ann. § 46 a-60(7) (West Supp. 1984); Mont. Code Ann. § 49-2-310 (1)-(2)(1983).

egalitarian social structure. Though not without problems,[110] this approach is rooted in a theory and produces results superior to the others.

In this section, the rationale for and advantages of the equal treatment approach as compared to other approaches courts might take will be presented. Next, the approach is applied to the controversial Montana and California "special treatment" pregnancy legislation. Finally, I will urge that legislative initiatives are essential companions to judicial challenges to employer and government practices, and will show how the equal treatment approach suggests the best legislative solutions to the problems of pregnant wage earners.

A. In Defense of "Equal Treatment"

For equal treatment advocates, the approach is part of a larger strategy to get the law out of the business of reinforcing traditional, sex-based family roles and to alter the workplace so as to keep it in step with the increased participation by women.[111]

The workplace pregnancy rules evident at the beginning of the 1970's were not simply a random collection of malevolent or irrational impediments for wage earning women. They were not a byproduct of ignorance or inadvertence. Rather, they formed a coherent structure which reflected women's predominant pattern of workforce behavior and reified a particular set of values and objectives about women, work and family.

At the core was an ideology defining men's "natural" function as family breadwinners and women's "natural" function as childbearers and rearers. A woman worker's pregnancy was a signal (as her marriage had been decades earlier) of her impending assumption of her primary role. Workplace rules accordingly treated her as terminating her workplace participation. If she defied the presumption and sought to continue her workforce attachment, she met with numerous obstacles. If she avoided outright termination, then she faced mandatory leaves that had nothing to do with her desire or capacity to work. She was not guaranteed the right to return, she was denied sick leave or disability, she lost seniority, and she became ineligible for unemployment in-

110. See Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1555-60 (1983).

111. The participation of women rose from 19.6% in 1890 to 59.9% in 1980, and the female component of the labor force increased from 17% to 43%. Golden, The Female Labor Force and American Economic Growth, 1890 to 1980, in Long Term Trends in the American Economy, (S. Engerman and R. Gallman eds.) (forthcoming from University of Chicago Press, 1985). By far the sharpest increase has come in the past two decades among married women, especially those with young children. In 1960, approximately 27% of wives were in the labor force. By 1970, the figure was close to 40% and by 1980, 54%. Kamerman, Kahn & Kingston, supra note 100, at 7. By 1982, half the mothers of *preschool* aged children (46% of mothers of children under 3) were in the labor force. Id. at 8-9. By 1984, women constituted 44% of the workforce; by 1990, if projections are correct, fully one half of the labor force in the United States will be female. Catalyst, Preliminary Report on a Nationwide Survey of Maternity/Parental Leaves 1 (June 1984) [hereinafter Maternity/Paternity Leaves].

surance. Moreover, her medical coverage for expenses associated with pregnancy was reduced or nonexistent. All of this underscored for her a lesson that pregnancy is not a workplace but a family issue. Employer and state would not recognize her as a worker again until the pregnancy and the infancy of her child were behind her.

Today's feminists from the outset rejected the separate spheres ideology which assigned men to the workplace and women to the home. The crucial functions of the traditional family arrangement—financial support, housework and childrearing—should not, they asserted, be assigned by sex. To the extent that laws and rules force the traditional preassignment and inhibit choice, they should be replaced by laws and rules that make no assumptions about the sex of the family childrearer or wage earner, but simply address those functions directly. Moreover, the workplace should be restructured to respond to the reality that all adult members of a household in which there are children are frequently in the workforce and that co-breadwinner parents might choose or need to share childrearing functions. Equally importantly, a significant number of families today contain only one parent, who must perform both wage earning and childrearing functions.

Accommodation to parental needs and obligations should penetrate to the core of the workplace rather than remain a peripheral "women's issue." Treating parenthood as a non-issue structurally marginalizes women as workforce participants.[112] Women's increasingly pervasive workforce attachment means that pregnancy should no longer be treated as a private problem of marginal workers best handled by the old exclusionary methods. Justice Rehnquist notwithstanding, it will not do to treat women as "real" workers entitled to the full panoply of benefits only until they become pregnant.

Today the workplace remains unacceptably tailored to the old sex-based allocation of childrearing duties. The basic structures still assume that the "real" workers are men whose "personal lives" do not and should not create obstacles to long, uninterrupted hours of work over an adult lifetime. The majority of women are still in a secondary, segregated, marginal workforce, engaged in the dual careers of worker and mother, in jobs where turnover is assumed and provides minimum disruption.[113]

The "equal treatment" model is designed to discourage employers and the state from creating or maintaining rules that force people to structure their family relationships upon traditional sex-based lines and from refusing to re-

112. See Frug, Securing Job Equality for Women: Labor Market Hostility to Working Women, 59 B.U.L. Rev. 55, 94-103 (1979) [hereinafter Frug, Securing Job Equality]. My own experience (pregnancy plus four years of motherhood) suggests that pregnancy is a minor obstacle to full workforce integration of women compared to the ongoing responsibilities of parenthood. Other parents have emphatically concurred in this view. Parents (almost always mothers) suppress aspirations, curtail work-related activities, change jobs, become part-time employees—all to provide children with the care that they believe is necessary or desirable. Men infrequently make such sacrifices. Id.

113. See U.S. Commission on Civil Rights, A Growing Crisis: Disadvantaged Women and Their Children 19-26 (May 1983).

spond to pregnancy as within the normal range of events which temporarily affect workers.[114]

Maternity leave, when available, was traditionally an unpaid leave for a woman beginning during pregnancy and extending some months after childbirth. It was typically a package that included not only pregnancy but also infant care, on the assumption that the woman who became pregnant would inevitably be the primary caretaker of the child. The "equal treatment" model separates pregnancy and childrearing and insists that each be independently analyzed.[115]

The separation has important implications. When the childrearing function is considered separately from pregnancy, it becomes apparent that parents of either sex might undertake that responsibility. To grant childrearing leave to mothers only would be, under this analysis, to discriminate against fathers.[116] Employers who provide leaves for childrearing must therefore substitute "parental" for "maternal" leaves. This separation of early childrearing from pregnancy thus serves the objective of prohibiting workplace rules that discourage families from opting for an egalitarian or nontraditional assignment of parental roles[117] and from ordering their lives in a way that best meets

114. Some will object that pregnancy is voluntary and its consequences therefore appropriately visited exclusively upon the employee. Individual pregnancies may be and often are voluntary in the sense that the individual woman made a conscious choice to become pregnant. But, as a social matter, pregnancy is not meaningfully voluntary any more than eating or sleeping is voluntary. All are basic functions of the human animal necessary to survival. In a workforce composed of men and women, it is as appropriate to expect employers to provide for pregnancy-related absence as it is to expect them to provide time off to employees to eat and sleep. There is considerable wisdom in the comment, whose source I no longer recall, that "if pregnancy is voluntary, it's a very good thing that women volunteer." Without such "volunteers," there would be no labor force at all.

115. In her pathbreaking legal article on the "equal treatment" model, see note 38 supra, Elizabeth Duncan Koontz, Director of the Woman's Bureau of the United States Department of Labor, suggested that the term "childbirth leave" be substituted for the ambiguous term "maternity leave" and that a separate concept, "childrearing" leave, available to both sexes, be developed, stating:

> The conceptual framework of childbearing and childrearing fits both present and future reality better than a conceptual framework that assumes that childbearing and childrearing are both solely the responsibility of women. The young women feminists insist, quite logically, that assumption by men of a full share in the rearing of children would contribute to the welfare of the whole family.

Koontz, supra note 38, at 481.

116. See, e.g., Ackerman v. Board. of Educ., 372 F. Supp. 274 (S.D.N.Y. 1974) and 387 F. Supp. 76 (S.D.N.Y. 1974). There appears to be unanimity in feminist legal circles that childrearing (infant care) leaves should be available to parents of either sex. The dispute, see text accompanying notes 2-5 supra, is limited to how to treat pregnancy.

117. The traditional family has several important features. It may provide maximum nurturance and personal service to husband and children by designating mother as nurture provider. Mother then disproportionately has the opportunity to nurture, the other family members to receive nurture. The support to develop one's personality and potential has a similarly unbalanced distribution. To the extent that workplace structures marginalize mothers, they discourage workforce participation, thus reinforcing the traditional arrangement. If the

their economic and personal needs.[118] Further, it explicitly rejects stereotypes about motherhood and fatherhood, undermining the view that holds the mother naturally and inevitably responsible, and the father exempt from responsibility, for the nurturing of young children.[119] Finally, it may reduce the vulnerability of working single mothers by making childrearing obligations something that the employer must expect that any parent, male or female, may experience.[120]

The separation of childbearing and childrearing also promotes reanalysis of pregnancy in the workplace context. Much of the disadvantageous treatment of pregnant wage earners by employers was based not on the pregnancy itself but on predictions concerning the future behavior of the pregnant woman when her child was born or on views about what her behavior should be. When shorn of its implications about future behavior by the separation of childbearing and childrearing, pregnancy can be analyzed as a purely physical event. As such, it is susceptible to a functional analysis which compares the way it affects the pregnant worker to how other physical conditions affect

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workplace accommodates only mothers' parental responsibilities, fathers will be discouraged from deviating from traditional roles. The traditional arrangement will reproduce itself.

Nancy Chodorow, in her book The Reproduction of Mothering 173-80 (1978), has suggested that the traditional family structure is also the cradle of gender bias. The father, less involved with children, more identified with the world outside the family, chief breadwinner, is viewed as more powerful, and is more respected. Mother, more accessible, provider of nurturance, is perhaps more dearly loved, but also is assumed to be something of a servant. She has less power and respect. Children internalize these lessons about gender roles and reproduce them in their own families and the outside world.

118. See Kamerman, Kahn & Kingston, supra note 100, at 256. (Parental leave "assures a good start for parenting and child growth"; and "treats women and men equally and equitably.") Workforce participation reduces the time parents can interact with children; paternal involvement in caretaking in this situation expands the child's resources. The bond between infant and father that results from his participation in caretaking may also help sustain the relationship between that parent and child in the event of divorce, thereby reducing male neglect of children when the family breaks up. See note 119 infra. An additional advantage is that the needs of adoptive parents are easily incorporated into such an approach.

The problem is that the practice of granting parental childrearing leaves, even to mothers, is not a widespread one, although the need is acute. Kamerman, Kahn & Kingston, supra note 100, at 104. Solutions must therefore be sought from sources other than Title VII. Moreover, provision of childrearing leaves for the parents of infants is itself a partial solution to a more pervasive need for workplace accommodation to caregiving needs. See Taub, From Parental Leaves to Nurturing Leaves, 13 N.Y.U. Rev. L. & Soc. Change 381 (1985).

119. Sylvia Law, in her superb analysis of the Supreme Court's unwed father cases, Law, supra note 2, at 988-98, observes that:

> In taking responsibility for children women act as independent moral agents. When the Supreme Court assumes that biology dictates that women care for infants, it is impossible to attach moral value to the woman's action or to acknowledge the human and social worth of the nurturing that women do. When the Court allows sex-based classifications to be justified by the presumption that fathers are unidentified, absent, and irresponsible, it is more likely that these generalizations will continue to be true.

Id. at 996.

120. This latter point is crucial. Female-headed families with children have increased from 10% in 1970 to over 18% in 1981, a 93% rise in the absolute number of female headed households. Kamerman, Kahn & Kingston, supra note 100, at 7-8.

other workers.[121] Under a functional analysis, it becomes possible to argue that pregnancy, when not disabling, should not be a basis for termination or forced leave any more than any other nondisabling condition should be,[122] and that when pregnancy does become disabling, the benefits appropriate for other workers should be extended to pregnant workers as well.[123]

The contention that the "equal treatment" approach does not work because the need to "compare exclusively female characteristics to cross-sex analogues often results in reliance on strained analogies which are unconvincing to courts"[124] seems absolutely wrong when one analyzes the circumstances in which the analogy is made or looks at what the lower federal courts have been doing for over ten years on the pregnancy issue. The comparative approach provided a potent tool, with which the courts outlawed within a few years time the most detrimental of the employment pregnancy rules, and continues today to provide important protections.[125]

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121. Notice that the equal treatment approach does not insist that pregnancy is "the same" as other physical conditions nor that pregnancy itself is a disability. Rather, it asserts that pregnancy's effects on the worker's economic security and capacity to perform the job is analogous to that of other physical conditions. Krieger & Cooney miss this point altogether, supra note 4, at 541.

122. The importance of this aspect of the comparative approach to pregnancy should not be overlooked. Until the legal developments of the early 1970's made such employer policies illegal, most employed women could expect to be put on early leave (see *LaFleur*, 414 U.S. 632) or, worse, terminated when they became pregnant (see Schattman v. Texas Employment Comm., 330 F. Supp. 328 (W.D. Tex. 1971); Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975)). The PDA's directive that "women affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but similar in their *ability* or inability to work" (emphasis added) captures this aspect of the "equal treatment" approach. And the EEOC guidelines on pregnancy, both before and after the PDA, so provide. 29 C.F.R. § 1604.10(b) (1984).

123. The disability insurance programs in *Geduldig* and *Gilbert* were intended to provide partial wage replacement to employees who could not work. *Gilbert*, 429 U.S. at 128; *Geduldig*, 417 U.S. at 498. Justice Brennan in his dissent in *Geduldig* was on target when he concluded that pregnancy could entail work related disabilities, triggering the need for disability benefits. 417 U.S. at 500-01. Some complications of pregnancy such as stroke, diabetes and high blood pressure, nausea and vomiting are identical to non-pregnancy related disabilities; other complications may be unique to pregnancy but accord with utterly traditional definitions of illness (placenta previa, ectopic pregnancy); even childbirth, though unique, is a work disability for women. Labor contractions, bleeding, the open wound left by the separation of the placenta, with the attendant risk of infection, do to pregnant women what other physical and mental disabilities do to other workers—render them temporarily unable to work and thus vulnerable to income loss. For the purposes of the California disability program it is apparent that the obvious and important differences between pregnancy and other physical conditions were not relevant. The same is true of all comprehensive disability, sick leave and health insurance programs provided by an employer. Significantly, none of the critics of the "equal treatment" approach have come forward with specific examples of material differences between pregnancy and other conditions that are relevant to employment decisions concerning hiring, firing or the inclusion of pregnant women into fringe benefit programs.

124. Krieger & Cooney, supra note 4, at 538.

125. Literally scores of pregnancy cases have been decided since 1970. A (somewhat random) sampling of those cases will suggest the range of issues courts have resolved in favor of women. Abraham v. Graphic Arts Intern. Union, 660 F.2d 811 (D.C. Cir. 1981) ("neutral" leave policy had disproportionate effect on women because of pregnancy); Clanton v. Orleans

The question is not *whether* pregnancy is different (it is, of course—it has its own specific physical manifestations, course of development, risks, and a different, usually desirable and certainly life altering outcome), but *how* it is different. Men and women, blacks and whites are different. If they were not, they would not exist as categories. The focus in the pregnancy debate, as with men and women or blacks and whites, should be on whether the differences should be deemed relevant in the context of particular employment rules. For purposes of eating peas, a knife is not functionally the same as a fork; but if both utensils are silver, the difference is irrelevant to a thief. Similarly, when a woman goes into labor, the measures appropriate for someone having a heart attack won't help; but if both childbirth and a heart attack cause an inability to work and income loss, it makes sense to encompass both within a disability program designed to cushion the economic effects of temporary inability to work.

The workplace rules governing pregnancy have been singularly burden-

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Parish School Board, 649 F.2d 1084 (5th Cir. 1981) (school board policy under which superintendent vested with discretion to decide when teacher could return from maternity leaves, but no discretion for other sick leaves violates Title VII); Burwell v. Eastern Airlines,Inc., 633 F.2d 361 (4th Cir. 1980) (a seniority policy which treats pregnant flight attendants less favorably than other flight attendants with disabilities violates Title VII); Harper v. Thiokol Chemical Corp., 619 F.2d 489 (5th Cir. 1980) (employer policy requiring women who had been on pregnancy leave to experience a "normal menstrual cycle" before returning to work is unlawful sex discrimination); Mitchell v. Board of Trustees of Pickens County, 599 F.2d 582 (4th Cir. 1979) (school board policy under which pregnant teacher was required to report pregnancy and that report was then used as basis to deny contract renewal constitutes prima facie violation of Title VII); Electrical Workers, IBEW v. Westinghouse Elec. Corp., 561 F.2d 521 (D. Md. 1979) (employee who alleged that employer required pregnant employees to exhaust vacation leave before being eligible for disability leave states claim under Title VII); In re American Airlines, 582 F.2d 1142 (7th Cir. 1978) (rule that women flight attendants who gave birth to or adopted children would be terminated unless they accepted ground duty violates Title VII where male flight attendants not similarly restricted); Pennington v. Lexington School Dist., 578 F.2d 546 (4th Cir. 1978) (employer's reinstatement policy requiring physically fit female teachers to remain on leave for entire school year after childbirth while allowing employees absent for other disabilities to return to work is illegal sex discrimination); Communications Workers v. South Cent. Bell Tel. & Tel., 515 F. Supp. 240 (D. La. 1981) (employer who guaranteed reinstatement to employees on leave except for those on pregnancy related leaves, violated Title VII); Fancher v. Veterans Admin. Medical Center, 507 F. Supp. 124 (E.D. Ark. 1981); Communications Workers v. Illinois Bell Telephone Co., 509 F. Supp. 6 (D. Ill 1980) (employer that returns employees to same job with same work schedule after disability leaves unless leave was for pregnancy related disability violated Title VII); Vuyanich v. Republic National Bank of Dallas, 505 F. Supp. 224, 389 (N.D. Tex. 1980) (complaint alleging that plaintiff, returning from pregnancy leave, was treated less favorably than others returning from other types of leave states claim under Title VII).

See also cases cited in notes 77 supra and 127 infra.

This is not to say that courts have always used it with the vigor the proponents of gender equality might wish (courts have been particularly befuddled by pregnant flight attendants—see Wald, Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent, 31 Am. U.L. Rev. 591, 601-11 (1982)), but such discrepancies between the outcome that any advocacy group wants and what the court delivers are inevitable. Why the Supreme Court did not join the lower courts in treating pregnancy discrimination as sex discrimination is not clear. The reasons put forth by the majority opinions are discussed in Part II, Sections B and C supra.

some and unfair to women.[126] Pregnancy's centrality to human reproduction, and hence to women's traditional role, has made it the basis for rules which express and reinforce old ideologies about women's proper place. The tangible, physical nature and high visibility of pregnancy have made such rules seem natural and appropriate, but upon close examination, the rules are often only tenuously related to their purposes and are premised on the very "old notions" about women that the Supreme Court has ruled will not justify sex-based legislation.[127] As the plaintiffs argued in *Geduldig v. Aiello*:

> Placed in historical context, it should be apparent that discrimination on the basis of pregnancy, a "unique" characteristic, is not separable from previous sex discrimination, but rather part of a continuum of discrimination. For practical purposes there is no difference between refusing to permit women to become lawyers because of their physical and emotional differences from men and refusing women certain jobs on the more narrow ground that they might become pregnant or firing them because they are pregnant. The issue for courts is not whether pregnancy is, in the abstract, sui generis, but whether the legal treatment of pregnancy in various contexts is justified or invidious.[128]

Katherine Bartlett's conclusion, in her 1974 article on *Geduldig*, is relevant here: "Pardoxically, the uniqueness of pregnancy is probably the most important reason why it warrants special protection, for pregnancy's unique identifiability facilitates drafting laws and regulations based on exactly those generalizations, stereotypes and assumptions that constitutional doctrine in the area of sex discrimination was intended to curb."[129]

There may indeed be instances where special pregnancy rules are neither

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126. See Bartlett, Pregnancy and the Constitution: The Uniqueness Trap, 62 Calif. L. Rev. 1532, 1558-59, 1563 (1974); see also Brief for Appellees, supra note 44, at 40-41. Appellees argued that:

> the teacher is put on mandatory maternity leave although she is fit and able to teach; the pregnant woman fully able to serve the goals of the military before and after the disability attendant upon delivery of her child is discharged although disabled men are given leaves of absence; the involuntarily unemployed pregnant woman is denied benefits although her financial loss and suffering are indistinguishable from losses of other unemployed persons. Thus women are relegated to an inferior legal status without regard to their actual capacities, by ill-examined treatment of sex-unique characteristics . . . Their earning power is diminished or terminated, benefits available to others similarly situated are denied them, and career goals and opportunities thwarted.

127. See, e.g., *Gilbert*, 429 U.S. 125 (disability); *Satty*, 522 F.2d 850, aff'd 434 U.S. 136 (seniority, sick leave); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973) (mandatory leave); Black v. School Committee of Malden, 310 N.E.2d 330 (S.Ct. Mass. 1974) (loss of credit toward tenure); Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984) (exclusion from job because of fetal hazard).

128. Brief for Appellees, supra note 44, at 37-38.

129. Bartlett, supra note 126, at 1536. "Special protection," in context, refers to the heightened scrutiny applied in sex discrimination cases brought under the equal protection clause. It does not mean laws making special provisions for pregnant women.

over- nor underinclusive[130] and are free of sex role stereotypes. In the abstract, at least, one could posit that rules singling out pregnancy, because of its functional implications, may, to a greater degree than male-female distinctions in general,[131] be justified. While, in the employment context, examples are scarce, where they exist, they would appropriately fall within the bona fide occupational qualification exception to Title VII and would be permitted.[132]

When we get past the simplistic assertion that pregnancy is different and cannot be compared to anything else, is there anything left of objections to "equal treatment"? The answer to that question is clearly yes. Exploration of "what is left" requires a more detailed exposition of the critics' views.

Professor Ann Scales's search for a principle for resolving the pregnancy cases begins with a basic contention with which equal treatment proponents wholeheartedly agree:[133]

> [T]rue equality requires not just women in men's jobs and operating men's institutions, but also that those institutions be replaced by others broad enough to accommodate the full range of human activities. To demand only the chance to compete is to embrace the status quo in a way that tends to sanction oppressive arrangements — for example, the necessity of choosing between children and career. Moreover, to ask only for equal opportunities to compete is to obscure the fact that the restrictions presently imposed on individual women are functions of class characteristics. The emphasis comes to be on the exceptional woman, on the one who has overcome the obstacles of womanhood, and future change is hindered by throwing the blame for circumstances of class onto individual capabilities.[134]

Likewise Scale's goal of incorporating women into the public world, fully tak-

130. Kreiger & Cooney assert that a statute that provides leave and a right to return to work for pregnant women is distinguishable from protective labor laws which guaranteed overtime pay, rest periods and similar "benefits" to women but not to men, because the latter laws are over and underinclusive while a law "providing for pregnancy-related disability leave is not, and cannot possibly be, under- or over-inclusive. No man will ever need a pregnancy-related leave, so the statute is not under-inclusive." Krieger & Cooney, supra note 4, at 532 (emphasis in original). By contrast, "[a]ny employee, whether male or female, can use a rest break. Both men and women workers appreciate the opportunity to earn overtime pay." Id. at 533. But, obviously, both men and women can "use" and "appreciate" a disability leave when unable to work for physical reasons. A disability program that excludes pregnancy is under-inclusive in light of the program's coverage and purposes; a disability leave that applies only to pregnancy is under-inclusive for the same reason. (And if the pregnant woman's leave is meant to cover more than the period of disability, it is further under-inclusive because it does not give fathers a similar right to take unpaid leave to be with newborns. See text accompanying note 116 supra.)

131. See note 32 and accompanying text supra.

132. Under the parallel constitutional standards, the supplemental Food Program For Women, Infants and Children, a program which, among other things, provides food to pregnant women, is an obvious candidate for approval under the standard of Craig v. Boren, 429 U.S. 190 (1976), see note 21 supra, and under the compelling state interest standard as well. See Law, supra note 2, at 1031.

133. See generally Part II-A supra.

134. Scales, supra note 3, at 427.

ing into account the legal and economic aspects of childbearing,[135] seems to me to be precisely the right one.[136] Equal treatment proponents would certainly agree with her that "of central concern are proposals which facilitate continuity between the experience of childbearing and working,"[137] that "at a minimum, the mandate of the PDA must be vigorously enforced, ensuring that disability, sick leave and medical benefits available to other workers through employment are not arbitrarily withheld from pregnant workers,"[138] and also that "more can be done." The "more" Scales contemplates consists of legislative proposals, which, consistent with her "incorporationist"[139] vision, provide across-the-board protections for workers which also meet the needs of pregnant employees.[140]

Where Scales goes astray is in her analysis of where the courts went wrong. She sees clearly that the Supreme Court in *Gilbert* and *Geduldig* adopts a stance that excludes women's unique capacity from a range of employment benefit schemes. Thus pregnancy, rather than being "incorporat[ed] . . . into the social continuum,"[141] and thereby "reflecting the reality of women's lives,"[142] continues to be excluded. The doctrine developed in those cases thus preserves a male model for the workplace, refusing to accept and account for those unique qualities of women that differentiate them from men.

Having delineated the court's position with impeccable accuracy, Scales advances a solution, and it is here that her analysis drops the skein. Looking at the *Geduldig-Gilbert* outcome, she concludes that it is the attempt to analogize pregnancy to any other condition or enterprise that is the problem. To do so, she thinks, permits maleness to be the norm. But the Court preserved the male model by *failing* to take seriously[143] the similarity in the position of preg-

135. Id. at 435-37. She would add breastfeeding to pregnancy as a difference between the sexes which must be fully taken into account. I confess ambivalence on that point. Human milk provides important benefits to human babies. Yet not all mothers can, or wish to, breastfeed, nor are all mothers who do feed their children human milk limited to delivering it by suckling them. Bottled milk, human or not, need not be fed to the infant by the mother. Choice is important in this area. Dogmas about breastfeeding can become a device for oppressing mothers.

136. And, I venture to say, to equal treatment proponents in general.

137. Scales, supra note 3, at 440.

138. Id.

139. Compare Kathryn Powers' "equal participation" model in Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 Wis. L. Rev. 55, 102-124. See also Freedman, Sex Equality, Sex Differences and the Supreme Court, 92 Yale L.J. 913, 960-68 (1984) (incorporation of women's perspectives into defining problem of discrimination and in constructing responses to it necessary to a new sex discrimination jurisprudence).

140. Scales, supra note 3, at 440. The two ideas she mentions are national health insurance that includes coverage for the medical expenses of childbirth and disability insurance that would include compensation for lost earnings due to pregnancy. Both are indeed "incorporationist"— they are gender neutral ways of meeting basic needs of employees, including those who become pregnant. See text accompanying notes 147-50 infra.

141. Scales, supra note 3, at 436.

142. Id.

143. Technically, the problem in *Geduldig* and *Gilbert* was the Court's refusal to view classifications based on pregnancy as sex based. In *Geduldig*, that meant that the Court applied

nant disabled workers and other disabled workers. It preserved the discontinuity between motherhood and workforce participation by failing to understand that the stake of pregnant workers in such benefits was like other workers' stakes — and thus failed to require that women be integrated fully into the basic system of worker protections. Scales's insistence on the uniqueness of pregnancy would not "direct opposite results from those reached by the Supreme Court in the pregnancy cases," but rather the same results.[144]

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the rational basis standard of review; under that standard, any vaguely plausible distinction will do.

Krieger & Cooney fall into a similar error in the following passage:

> Herein lies the model's first flaw: it relies on courts' willingness to accept imperfectly fitting, often strained analogies, which they have at various times in the past refused to accept. It was this flaw in the comparisons approach that resulted in the plaintiffs' defeat in *Geduldig v. Aiello*. The plaintiffs' theory in *Geduldig* relied on analogizing pregnancy to medical conditions confronted by men. They argued that pregnancy should be treated the same as prostatectomy, which like pregnancy is exclusive to one sex, or like cosmetic surgery since both are voluntary, or like a heart attack, since both are expensive. The Supreme Court, however, chose to emphasize the distinctions between pregnancy and these other medical conditions and rejected the analogy, thus stripping the liberal model of its analytical effectiveness.

Krieger & Cooney, supra note 4, at 539-40. As noted above, *Geduldig* rejected the notion that a pregnancy-based classification was sex based, not the analogy to other medical conditions. And when the majority in *Geduldig* did compare pregnancy disabilities with others, it concluded that the legislature had rationally excluded them not because they were intrinsically different from other disabilities but because they were a costly category of disabilities whose addition to the existing disability program would substantially increase costs—reason enough when one is dealing with a sex-neutral classification reviewable under a rational basis standard. See text accompanying note 52 supra. Indeed, the Court cited not a single intrinsic difference, although it implied that they exist. See text accompanying notes 51-52 supra.

In any event, plaintiffs had not contended that pregnancy itself was the same as or should be treated for all purposes the same as a prostatectomy or heart attack or any other condition. Plaintiffs had contended that when their pregnancies disabled them from working, their wage losses should be offset on the same basis as those of others who were disabled from working. It was not, as Krieger and Cooney contend, the plaintiffs' failure "to focus on the effect of the very *real* sex difference of pregnancy on the relative position of men and women in society and on the goal of assuring equality of opportunity and effect within a heterogeneous 'society of equals' " that "led to the plaintiffs' downfall in *Geduldig v. Aiello*." Krieger & Cooney, supra note 4, at 542 (emphasis in original). The argument that the denial to plaintiffs of benefits accorded others violated their right to equal protection of the laws because of the "very real sex difference of pregnancy" is not an argument likely to win any judicial adherents. The equal protection clause is unlikely ever to be interpreted to require equal treatment because an excluded class is *different* from the included class.

144. Sensing the difficulty, but not seeing its implications, she rejects the analogy only to re-embrace it in a form which she realizes is probably unworkable.

> In light of the historical burdens imposed on women due to their procreative capacities, it would be sex discrimination of the most invidious kind to refuse to provide employment related benefits to pregnant workers . . . . Such reliance on the antidiscrimination principle may strike many as inappropriate and unnecessary. That is, the notion of discrimination is compromised by forcing a comparison between male and female activities when no such comparison is possible. Thus, to attempt to secure pregnancy and breastfeeding rights pursuant to the principle of "equality," as embodied in the fourteenth amendment and Title VII, is to set foot again on the primrose path which led to *Geduldig v. Aiello* . . . . Nevertheless, it seems a mere failure of imagination to preclude the application of the principle of equality to the issues discussed herein. It is possible to expand the universe of comparison for equal protection

Scales fails to see that her incorporationist vision—a vision of the inclu-

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and Title VII purposes: instead of attempting to analogize pregnancy to prostatectomy, for example, one could compare the opportunities of men and women, based on their relative reproductive capabilities, to participate fully in every human activity. Moreover, though such a comparison might be difficult for constitutional and statutory purposes, those relative opportunities really *are* the issue.

Scales, supra note 3, at 437-38 (emphasis in original).

Professor Sylvia Law, like Professor Scales, rejects the idea of analogizing pregnancy to other conditions, yet seeks to develop a method for applying an equality analysis. Although she addresses only constitutional adjudication and not that under Title VII, her proposal is worth brief analysis here. Picking up where Scales left off, she proposes a standard of review which she believes will accomplish the task. Her proposal is that:

> laws governing reproductive biology . . . be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state purpose.

Law, supra note 2, at 1008-09. See also Kay, supra note 2 (agrees with Law, but proposes that her test be extended to laws which discriminate against men based on their unique sexual characteristics).

Professor Law does not say, although she probably assumes, that sex based classifications in general should also be scrutinized under the compelling state interest test rather than the current "intermediate" standard of review. See note 21 supra. Otherwise, her proposal presents the anomaly of a higher standard for sex unique biology-based classifications than for those based on average differences between the sexes, a position that would be hard to defend on logical grounds (see text accompaning notes 29, 119 supra) and even harder to sell to a Court that manifestly views classifications based on biological characteristics as distinctly less worthy of scrutiny that male/female classifications.

However, my greatest reservation about Professor Law's approach is that, while committed to the comparative model for male-female classifications, she contends that biological differences are "real" and, accordingly, a comparative model is inadequate. She therefore proposes for biology-based classifications a test she rejects (with good reason) for direct male-female classifications. Id. at 1005-06. She explains the problems with the approach, which is associated with Professor Catherine MacKinnon, as follows:

> Professor MacKinnon's approach is ambitious, but it adds unnecessary complexity to the applications of sex equality doctrine in a large number of cases. The determination of what reinforces or undermines a sex-based underclass is exceedingly difficult. Professor MacKinnon may overestimate judges' capacities to identify and avoid socially imposed constraints on equality. She disregards our history in which laws justified as protecting women have been a central means of oppressing them. Most fundamentally, her proposed standard may incorporate and perpetuate a false belief that a judicially enforced constitutional standard can, by itself, dismantle the deep structures that 'integrally contribute' to sex-based deprivation.

Id. at 1005.

Professor Law fails, I believe, fully to see that the drawbacks of the MacKinnon approach are the same in both contexts. She would have courts find that the law has a significant impact in perpetuating the oppression of women or of culturally imposed sex-role constraints on individual freedom as a prerequisite to application of the compelling state interest test. Without such a finding, the rational basis test of *Geduldig* would be applied. A court that too readily finds "real" differences between the sexes, as this one does (see, e.g., Parham v. Hughes, 441 U.S. 347 (1979); Michael M. v. Superior Court, 450 U.S. 464 (1981); Dothard v. Rawlinson, 433 U.S. 321 (1977)), is unlikely to view legislation based on such distinctions as "perpetuating the oppression of women" or as "culturally imposed sex role constraints on individual freedom." The Court would thus continue to avoid the application of a higher standard of review to biology-based distinctions.

The mischievious potential of a two step approach such as Law proposes is evident in Parham v. Hughes, 441 U.S. 347. Cf. Harris v. McRae, 448 U.S. 297 (1980). At issue in

sion and proper accounting for pregnancy in the public sphere—is best served by the equal treatment approach. It is precisely that vision that gave birth to the equal treatment model in the first place. The model was proposed in the context of an exclusionary workplace, and it was urged to promote the "normalization" of pregnancy. In the litigation context, the model was the basis for insisting on the incorporation of pregnancy into existing benefit schemes. The litigators sought incorporation not by insisting that pregnancy was "the same" as other physical events but that the position of the pregnant worker was analogous to the position of other workers.[145] The approach was based on the notion that the pregnant woman is entitled to respect and dignity as a worker and that the stake a woman shares with other workers in job security and economic viability does not suddenly evaporate when she becomes pregnant. It sought to overcome the definition of the prototypical worker as male and to promote an integrated— and androgynous—prototype.[146]

Parham was the constitutionality of a statute that authorized unwed mothers but not unwed fathers to sue for the wrongful death of their children. Rather than apply the intermediate standard of review to that sex based classification (see *Craig* standard, quoted note 21, supra), Justice Stewart created a preliminary step to determine whether the intermediate or the rational basis standard should apply. Stewart's preliminary test was whether the legislation was based on "generalizations unrelated to any differences between men and women or which would demean the ability or social status of the affected class." 441 U.S. at 354. The second prong of this test is a first cousin of Professor Law's preliminary inquiry although hers is certainly more comprehensively attuned to the harms of sex discrimination. Significantly, it never seems to have occured to Stewart that the legislation before the Court in *Parham*, which to him seemed based, in part, on the biological reality that the identity of fathers is often in doubt, could demean women or men. Indeed, for him this second prong is so obviously not implicated in that case that he analyzes the situation only in terms of the first prong. Finding that the legislation was based on differences between the sexes, he applied the rational basis standard and, as is virtually inevitable under that standard, upheld the legislation. (Justice White, for the dissenters, was not so oblivious; he decried "[t]he incredible presumption that fathers, but not mothers, of illegitimate children suffer no injury when they loose their children." Id. at 368). The point here is that an approach which reserves close scrutiny for legislation which "demeans," or "oppresses" women or perpetuates "culturally imposed" sex role constraints is doomed from the outset by the inability of most judges to perceive most of our sex based social arrangements, particularly those focused on biological differences, as other than an appropriate reflection of "reality." Professor Law's own analysis of Supreme Court decisions involving biological differences eloquently and convincingly makes precisely that point.

Biology-based laws should receive close judicial scrutiny without first passing an "oppression/ sex role perpetuation" test. At minimum, under the equal protection clause, the defender of such legislation should have the burden of establishing—as in any other sex discrimination case—that the classification based on biology is "substantially related to an important governmental purpose." *Craig*, 429 U.S. 190. Better yet, all sex-based classifications, including those that are grounded in a perception of biological differences, should pass constitutional muster only if necessary to a compelling governmental purpose. The history of governmental regulation and private practice with respect to femaleness, female sexuality and female reproductive capacity justifies treating such classifications as suspect. There should, in effect, be a presumption against such legislation, a presumption that must be overcome by the legislation's defenders under a stringent standard of justification.

The Equal Rights Amendment, if adopted, might well compel such a result. See notes 16-17, 32 and accompanying text supra.

145. See notes 54, 121, 130 and accompanying text supra.

146. In 1984, women are 44% of the workforce; by 1990, if present trends continue, they will be 50%. See note 111 supra. Approximately 85% of women experience pregnancy during

Nonetheless, if the equal treatment approach were limited to the integration of pregnancy into the pattern of existing provisions for job security and economic benefits, Ann Scales would have good reason to protest that the incorporationist vision cannot fully be implemented through that approach. An existing system of protections and benefits, she might point out, is structured to respond to the needs and characteristics of the typical male worker. Even if such protections and benefits are extended to women workers (and this might be especially true for those who become pregnant), they will not necessarily deliver equivalent advantages to women. Schemes set up on a male model are likely to be misconfigured from a woman's perspective. To grasp this point one need only envision what workplace rules would look like if the entire workforce were composed of women of childbearing years. The present scheme of things is thus unlikely to account for the needs and characteristics of women workers to the same extent that it accounts for the needs and characteristics of men.

But the "equal treatment" feminists do not contend only that women who are pregnant must be treated the same as other workers in analogous situations. They also assert that apparently neutral rules that have a disproportionate effect on women, whether because of pregnancy or some other class-based characteristic, may violate Title VII.[147]

The disparate effects theory is fundamentally "incorporationist" in the Scales sense. It permits, in effect, a challenge to "neutral" rules based on a male prototype. It goes beyond assessment of discrimination against individuals to identify the group effects of particular rules. When those effects are substantial, this approach imposes a burden upon the employer to justify its rule or policy.[148] Where the rule or policy cannot meet the standard of justification, it is invalidated—not just for the group upon whom it places a disproportionate burden, but for all affected workers.[149] The employer is left to

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their work lives. See Kamerman, Kahn & Kingston, supra note 100, at 5. These statistics underscore the inappropriateness of treating men as the prototypical workers and women as the "deviants"—either generally or with respect to pregnancy.

Perhaps the special treatment advocates see themselves as creating a female prototype by establishing special pregnancy rules. But a rule which functions as an exception is hardly based on a prototype; a true "female" prototype — one that sought to govern workers of both sexes according to a female standard—is an interesting and potentially liberating idea because it illuminates the degree to which structures and procedures are defined in male terms. Imagining a world set to the dimensions of women might generate desirable changes. See Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U.L. Rev. 55, 94-103 (1979); Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 W.S. L. Rev. 55, 102-22.

147. See generally Part II supra; see also Williams, The Equality Crisis: Some Reflections on Culture, Courts and Feminism, 7 Women's Rights L. Rep. 175, 97 n.113 (1982). See also Brief of American Civil Liberties Union, et al, amici curiae, in Miller-Wohl Company, Inc., v. Commissioner of Labor and Industry, No. 84-172 (Mont. S. Ct. July 1984), at 30-31; Brief of National Organization for Women, et al, amici curiae, in California Federal Savings and Loan Association v. Guerra, Nos.84-5843 and 84-5844 (9th Cir. Oct. 1984) at 23.

148. See, e.g., *Dothard*, 433 U.S. at 328-31 and cases cited therein.

149. Thus, for example, in *Dothard*, 433 U.S. 321, the Court invalidated a height and

pursue its objectives in some way that avoids the untoward effects. In short, its replacement rule must be truly, not simply formally, neutral. The tendency of the disparate effects theory is thus to require employers' policies to account for the needs and characteristics of both sexes.[150]

Krieger and Cooney share Scales's basic concern that a legal doctrine which demands only that individual women be treated as well as similarly situated men permits the continuation of "male defined" structures and practices that have a negative effect upon working women as a class. Despite considerable attention devoted to what they see as shortcomings in the basic nondiscrimination principle, these lawyers recognize its utility. What they propose is not a substitute for it but a supplement to it.[151] Their supplemental principle—presented, oddly enough, as if feminist litigators, particularly those involved in the *Miller-Wohl* controversy, reject it[152]—is none other than Title

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weight limitation for the job of prison guard because it had a disproportionate exclusionary effect upon women and the employer failed to establish that the limitation had a "manifest relationship" to the job in question. See text accompanying notes 166-67 infra.

150. The disparate effects theory is, however, like Title VII's basic nondiscrimination principle, a limited tool. Full "incorporation" will require substantive legislation. See Section IV infra.

151. Krieger & Cooney, supra note 4, at 542.

152. Krieger's and Cooney's critique of the equal treatment position devotes considerable energy to the creation and trashing of a straw person. They posit a group of feminist litigators (whom they label "liberals") who take the position that pregnancy is "the same" as other physical conditions and should therefore be treated like those other conditions. See Krieger & Cooney note 4 supra. The problem, according to Krieger & Cooney, is that "the liberal view is a formalistic model; it is only equal treatment that is required, regardless of any inequality of effect that such treatment occasions." Id. at 540. (Emphasis added).

Who are these form-over substance "liberals?" Krieger & Cooney state: "[t]he liberal view of equality is the theoretical model being advanced by the equal treatment proponents in the *Miller-Wohl* debate and is, moreover, the theory 'which feminist attorneys have advocated and relied upon for years.' " Krieger & Cooney, supra note 4, at 538, 572. Krieger and Cooney have misunderstood or misrepresented the positions of the major feminist legal organizations over the past 14 years. As described in Part I of this paper, feminist legal groups since the early 1970's have pursued a strategy that attacked both overt sex classifications and rules with disproportionate negative effects on women. They thus sought relief not only from laws or rules which treated individuals unfairly because of sex but also from laws and rules which, though formally sex neutral, divided up benefits and burdens in a decidedly disparate fashion. Krieger and Cooney did not discover the possible application of disproportionate effects analysis to pregnancy. At the behest of an "equal treatment liberal," Susan Ross, then employed by the Equal Employment Opportunity Commission, the very same EEOC guidelines which in 1972 promulgated an "equal treatment" approach to pregnancy under Title VII also made it clear that a neutral rule with a disproportionate effect on women might violate Title VII. 29 C.F.R. § 1604.10(c) (1977). See note 28 and accompanying text supra. The reason why most cases involved only the former is obvious: overt discrimination against pregnant women was so prevalent and the lower federal courts so receptive to the equal treatment argument that impact analysis was superfluous. Only when employers generally began to treat pregnant workers as well as other workers, late in the 1970's, did there emerge neutral rules which might be challenged as having a disparate effect on women. (And, of course, in the two years between *Gilbert*, in which the Supreme Court declared that pregnancy rules *were* neutral rules, and the PDA, when Congress said they were not neutral but sex-based, lower courts were forced to assess whether explicitly pregnancy based rules had a disparate effect on women. See *Satty*, 434 U.S. 136. Despite the contrary statement in Krieger & Cooney, supra note 4, at 530-31, the

VII's disparate effects theory.[153] In fact, their perception that the doctrine is a necessary companion to the basic nondiscrimination principle is universally accepted among feminist litigators precisely because it is attuned to the differential effect of laws and rules on the sexes. What is not universally accepted is Krieger's and Cooney's interpretation of the principle.

Unlike Scales's vision of inclusion, which encompasses disability and health insurance for all,[154] Krieger and Cooney enlist Scales's reasoning and the disparate effects doctrine to support legislation that singles out pregnant women for special protection. They reason that such legislation is a fundamental prerequisite for women's equality in the workplace. A law which requires the employer to give pregnant women "reasonable leave" of absence, but requires no leaves for other employees, they contend, "places women on an *equal* footing with men and permits males and females to compete *equally* in the labor market."[155] It does not "provide women with an additional benefit denied to men; it merely prevents women from having to suffer an additional burden which no male would ever have to bear."[156]

In so conceptualizing the pregnancy issue, Krieger and Cooney reveal a kinship with the majorities in *Geduldig* and *Gilbert*. In *Geduldig*, the Court concluded that women "received insurance protection equivalent to that provided all other participating employees,"[157] although pregnancy disabilities were excluded from an otherwise comprehensive program. The Court implicitly visualized pregnancy-related disabilities as disabilities in addition to those men might suffer.[158] In *Gilbert*, the Court went even further, denying that the exclusion of pregnancy disabilities from the program had a class-based *effect* on women. It did this by explicitly labeling pregnancy as an "extra" condition of women, compensation of which constituted a benefit beyond that which men could obtain.[159]

Thus both Krieger and Cooney and the Court majority in *Geduldig* and *Gilbert* define women as men plus pregnancy. Once within the male-oriented definition, the fight is over the proper response to the "reality" upon which they essentially agree.[160] Krieger and Cooney view pregnancy as creating for

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PDA has rendered a *Satty* -type analysis inappropriate for explicit pregnancy based legislation by treating it, prima facie, as sex-based.)

153. Krieger & Cooney, supra note 4, at 525.

154. See Scales, supra note 3.

155. Krieger & Cooney, supra note 4, at 533.

156. Id. Thus, it is compensatory legislation, necessary to equalize the position of the sexes.

157. 417 U.S. at 497.

158. See analysis of *Geduldig*, text accompanying notes 85-86 supra.

159. See analysis of *Gilbert*, text accompanying notes 83-84 supra.

160. *Satty*, 434 U.S. 136 illustrates the point. In *Satty*, the Court said that assessing whether a pregnancy rule had a disproportionate effect on women was a matter of determining whether the rule imposed an additional burden on women or denied them an extra benefit. In that case, the Court concluded that exclusion of pregnancy-related illness from a paid sick leave program would not burden women (and that requiring inclusion would provide them an extra benefit), but that depriving women of their accumulated seniority after they return from mater-

women a burden in addition to those suffered by men. They contend that an equality principle should, because of the extra burden, approve special laws that make up the difference. The Court's majority reached the opposite conclusion, viewing as discrimination the extension of disability benefits to pregnant women. Moreover, it squarely rejected the notion that equality means making up for "women's more burdensome role in the scheme of human existence."[161]

Krieger and Cooney's view leads them to assert that pregnancy is a difference which must be "accommodated," in the manner that Title VII requires employer accommodation to religious practices, or federal regulations require accommodation to employee handicaps.[162] However, the Supreme Court has interpreted accommodation requirements very narrowly.[163] It has little sympathy for provisions which make employers go out of their way for the atypical worker. This result seems predictable. Special "favors" for such workers are viewed as an imposition unconnected to the employer's business needs and interests. In contrast, provisions for the "typical" worker are more easily seen as necessary or desirable responses to the nature of the workforce which may increase employee loyalty and productivity. Moreover, the special treatment approach for women will always embroil its proponents in a debate about whether they are getting more or not enough. Finally, such provisions are a double-edged sword for their beneficiaries because they impose upon employers special costs and obligations in connection with pregnant workers, rendering them less desirable employees and creating an incentive to discriminate against them. By contrast, the equal treatment approach, premised squarely on an androgynous rather than a male prototype and reaching for an incorporationist rather than accommodationist vision, seeks to avoid these consequences by requiring a fundamental reorganization of the way the presence of pregnant working women in the workplace is understood.[164] The vision is

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nity leave imposed a burden women that men need not bear and thus had a disparate effect. See text accompanying notes 88-89 supra.

161. 429 U.S. at 139 n.17 (referring to *Gilbert*, 375 F. Supp. at 383).

162. Krieger & Cooney, supra note 4, at 516 & n. 12.

163. See, e.g., Board of Education v. Rowley, 458 U.S. 176 (1982) (held, when it passed the Education of the Handicapped Act, Congress did not intend to require a State to maximize the potential of each handicapped child with the opportunity provided nonhandicapped child commensurate, but rather sought only to provide them with access to a free public education); Southeastern Community College v. Davis, 442 U.S. 397 (1979) (Section 504 of the Rehabilitation Act of 1973 imposes no requirement upon an educational institution to lower or effect substantial modifications of its standards in order to accomodate handicapped persons); Transworld Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (discharge of employee who refused to work on Saturday sabbath upheld; accommodation requirement of Title VII does not extend to imposing more than de minimus cost on employer).

164. A side effect of the special treatment approach is a narrowing of focus and energy to pregnancy, at the expense of a broader transformation. Pregnancy is not the only condition that women experience, nor given modern birth rates one they experience often. For most of their worklives, other issues predominate. Women and minorities are more likely to work for small and medium sized employers, who are less likely to have adequate employee fringe benefits in general. See Kamermann, Kahn & Kingston, supra note 100, at 99-100. Thus they tend dis-

not, as is Krieger and Cooney's, a workplace based on a male definition of employee, with special accomodation to women's differences from men, but rather a redefinition of what a typical employee is that encompasses both sexes.

Not only is Krieger and Cooney's underlying conceptualization of the pregnancy problem different from that of the equal treatment feminists, but the interpretation of Title VII through which Krieger and Cooney seek to effectuate their accommodationist view is unsound. They urge that "accommodation" is to be achieved through an interpretation of the disparate effects doctrine that permits special pregnancy rules or laws to be upheld where they were instituted to overcome the adverse impact of workplace structures on women.[165] However, disparate effects doctrine has not traditionally been, and should not be, put to such a use. Its purpose is to force the evaluation of neutral rules that are shown to have a disproportionate effect. The remedy when such an effect is shown is neither the construction of a dual system in which the rule continues in effect for one group but not the other, nor the formulation of special rules for the adversely affected classes. Instead, the remedy is reformulation or elimination of the rule for everyone.

Thus, when the Supreme Court held in *Dothard v. Rawlinson*[166] that the height and weight limits for the job of prison guard had an adverse effect on women and that the employer had failed to meet its burden of justification the Court invalidated the height and weight requirement for everyone. State authorities were not thereby freed to create a rule which imposed the height and weight limit on everyone but women, for obvious reasons. The resulting sex-based classification would immediately and correctly be perceived as discriminatory by men who met the female, but not the male, requirement, since, if women of the lesser height and weight could perform the job then there would be no basis for concluding that small men could not.[167]

So, too, in the case of pregnancy. The replacement for a rule or policy

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proportionately to face job loss and economic distress in conjunction with all sickness and disability. Moreover, the more persistent problem for women who do get pregnant is the lack of synchrony between the workplace as currently structured and childrearing obligations. See note supra. These problems both have a greater impact on women wage workers over a working lifetime and will require greater effort to change.

They also, in some of their manifestations, are more costly to employers and thus raise questions about the allocation of costs and responsibilities in the divide where work and family meet as well as ultimate social values and commitments.

165. Krieger & Cooney, supra note 4, at 525-31.

166. 433 U.S. 321.

167. Such a dual system would not be an unqualified advantage for the women beneficiaries, either. Relative size has psychological significance and implications for power and respect which are compounded in the context of male-female relationships. A workforce from which smaller men but not smaller women have been eliminated, in combination with the lower average height and weight of women, exacerbates the perception of differences and the stereotypes that go with them (women as weak, men as strong, etc.). This would be particularly harmful in a prison setting where the job in question is that of prison guard in which power, authority and respect are significant concerns.

that disproportionately affects women because of pregnancy is not a sex- (or pregnancy-) based rule, but a revised rule that, in Scales's terminology, fairly "incorporates" pregnancy into the general scheme of worker protections. That this was Congress's intent when it passed the Pregnancy Discrimination Act is explicit in the language of the Act itself: "[W]omen affected by pregnancy, childbirth or related medical conditions shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work. . . ."[168]

Andrew Weissman goes even further than Krieger and Cooney. He contends that the PDA should be interpreted to provide that employers who have no disability plan at all violate Title VII by failing to create special rules for pregnancy disabilities. Congress, he thinks, intended that pregnancy be accorded *different* treatment in order to "rectif[y] the natural assymetry of the sexes."[169] He urges that women, like the handicapped, need special accommodation in order to participate in the workforce on an equal basis; failure of the employer to provide special provisions violates the PDA.[170] As with Krieger and Cooney, his vision implicitly accepts men as the norm and seeks to make special provision for women insofar as they are not like men.[171]

The equal treatment feminists reject the fundamental assumption that men should be treated as the prototype. An androgynous prototype requires sex neutral schemes that take into account the normal range of human characteristics—including pregnancy. Weissman's approach, like that of Krieger and Cooney, constitutes a fine tuning of the old order. More than the provision of identical services may seem necessary when services are geared to the male norm. But inherent in such an approach is the continued definition of women as "other." Dual standards have always been the law's response to the

168. 42 U.S.C. § 2000e-(k) (Supp. IV 1980).

169. Note, Sexual Equality Under the Pregnancy Discrimination Act, 83 Colum. L. Rev. 690, 717 (1983). Weissman's interpretation of Title VII is strained beyond the breaking point. In order to argue his position, he finds it necessary to write out of Title VII the second sentence of the PDA, which provides that "women affected by pregnancy . . . shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work" 42 U.S.C. § 2000e-(k).36(b). Note, supra note 169, at 695-96. The Supreme Court, in Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission, 462 U.S. 669 (1983), subsequently adopted an interpretation of the PDA's first and second sentences that correctly captures the meaning and intent of those clauses and forecloses the Weissman interpretation.

170. Note, supra note 169, at 717-19.

171. In developing his analogy between women and the handicapped, he almost sees the limits of his vision, but fails to grasp its significance when he says:

> Discrimination against the handicapped occurs not because two standards are applied, one for handicapped and one for the non-handicapped, but because two different standards are not applied. More than the provision of identical services is needed to give the handicapped an equal opportunity to participate in the labor force, *at least when those identical services are geared to the non-handicapped norm.*

Id. at 717. (Emphasis added). If employer policies are not "geared" to a male norm, something "more than the provision of identical services" is not necessary for equality.

Curiously, Weismann does not mention the role of disparate effects doctrine on the pregnancy problem.

sexes.[172] The equal treatment feminists seek a more radical transformation.

B. Miller-Wohl *Revisited*

The feminist debate over the validity and desirability of special treatment for pregnancy has, as noted earlier, focused on the Montana and California legislation currently under challenge as inconsistent with Title VII and the PDA. Having discussed the broader issues underlying the debate, it is time to revisit the specific situations which spawned it. The discussion which follows will, for simplicity's sake, focus on Montana's *Miller-Wohl* case,[173] but the considerations apply equally to California's version of the Montana case, *California Federal Savings & Loan v. Guerra*.[174]

The Miller-Wohl Company provided paid sick leave to no one in the first year.[175] It thus treated pregnancy-related disabilities no worse than it treated other disabilities. The person who experienced nausea and vomiting because of chemotherapy or an ulcer, along with the person who suffered from those symptoms because of pregnancy, might find herself or himself unemployed, with all the negative consequences that flow from that status. Miller-Wohl claimed that because it treated all employees equally under its no-leave policy, its termination of the pregnant employee, Tamara Buley, was in compliance with the Pregnancy Discrimination Act and that the Montana Maternity Leave Act (MMLA), which required the granting of a "reasonable leave" for pregnancy, was in conflict with the PDA.

Three different positions are discernable from the briefs submitted by the parties and amici in the Montana Supreme Court, each advocating a distinct outcome.[176] First, the states and several amici argued that the MMLA was valid and should be upheld.[177] Second, the employer urged that the MMLA

172. Weissman calls his approach "pluralistic" and contrasts it to what he labels the "assimilationist" approach. Although he limits his discussion to pregnancy and Title VII, he apparently sees no reason why his principle should not apply generally. See id. at 709 n. 89. He is apparently unaware that his pluralist approach is the one the Court used historically to uphold all manner of sex discriminatory laws. See, e.g., Muller v. Oregon, 208 U.S. 412 (1908) (work hours restriction for women only) Goesaert v. Cleary, 335 U.S. 464 (1948) (exclusion from bartending); Hoyt v. Florida, 368 U.S. 57 (1961) (exemption from jury service). Law and Kay, supra note 2; Scales, supra note 3; and Krieger & Cooney, supra note 4, all carefully and emphatically limit their proposed deviations from equal treatment to the unique reproductive biology of the sexes.

173. See notes 6-12 and accompanying text supra.

174. 33 Empl. Prac. Dec. (CCH) ¶ 34, 227. See text accompanying note 13 supra.

175. The company policy did provide for an unpaid leave in the discretion of management, *Miller-Wohl*, supra note 8; indeed that discretion was exercised in Tamara Buley's case to permit her several days of leave before she was terminated.

176. The discussion here will address the Montana litigation, but the issues, the alignment of parties and the arguments are very similar in the California litigation in *Guerra*, 33 Emp. Prac. Dec. (CCH) ¶ 34,227.

177. Montana took this position, as did amici curiae State of California and some California feminist organizations.

was preempted by Title VII and the PDA and should be struck down.[178] Third, a number of feminist groups, as amici curiae,[179] urged that the MMLA should be extended to other workers, either on the theory that employers could comply with both MMLA and PDA by granting the MMLA's protections to all workers, or that the MMLA was inconsistent with Title VII and that the proper remedy was extension of its benefits to all workers.[180]

If the state ultimately prevails and its law is upheld, the result is at best a mixed blessing. Women will have a valuable protection against unemployment at a particularly vulnerable time. At the same time, the protections afforded by the special pregnancy legislation have a number of costs. First, it makes women who are likely to become pregnant less desirable employees and thus increases the incentive to discriminate against women of the "vulnerable" age and marital status. Second, special treatment can shift attention from the fact that the employer has a generally inadequate sick leave policy to the fact that some employees have special privileges. Energies which might constructively be directed toward improved working conditions are diverted into hostility toward fellow workers, specifically women who become pregnant and have children.[181] Last and certainly not least, the legislation perpetuates an outmoded ideology—woman as unique and separate, with a special reproductive role in which the state has sufficient interest to single her out for special treatment. That is the precise principle on which the state has historically singled out women for special "protection," a "protection" that has operated, in almost all cases, to women's detriment.[182] Today, it could have other unfor-

178. The employers and employer groups in the Montana and California litigation prevailed in the lower federal courts. The extension argument made by national feminist groups to the higher courts was not presented to these lower courts.

179. These groups included the National Organization for Women, the Legal Defense and Education Fund, the League of Women Voters and others. See Brief of American Civil Liberties Union, et al., amici curiae, supra note 147.

180. The Equal Employment Opportunity Commission interpretive guidelines support such a resolution (see 29 C.F.R. § 1604.2(b)(3)(ii); 1604.2(b)(4)(ii); and § 1604, Appendix: Questions and Answers on the Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (1978), Question 29 (1982)); many feminist groups advocate it, and a federal district court in Montana, in a decision overturned on other grounds, opted for one version of it. In the Montana case, *Miller-Wohl*, 515 F. Supp. 1264, vacated, 685 F.2d 1088, the court held that the MMLA was not preempted by the PDA because the employer could comply with the MMLA by granting pregnant employees reasonable leaves and could comply with the PDA by granting such leaves to others. An alternative version of the argument is that Title VII does preempt the MMLA but the proper remedy is extension of its benefits. See Brief of American Civil Liberties Union, et. al., amici curiae, supra note 147.

181. See Williams, The Equality Crisis, 7 WRLR 175, 196-97 (1982). See also Taub, Book Review, 80 Colum. L. Rev. 1686 (1980).

182. The eight-hour day for women only, enthusiastically supported by many reform minded women, relieved a very real burden experienced by women (and men) but also resulted in loss of jobs by women in "mixed" jobs, probably wage depression for women in segregated jobs, and a net loss of employment for immigrant women. B. Babcock, A. Freedman, E. Norton and S. Ross, Sex Discrimination and the Law: Causes and Remedies 36, 48, 268, 272-77 (1975); Landes, The Effect of State Maximum-Hours Laws on the Employment of Women in 1920, 88 J. Pol. Econ. 476 (1980).

tunate consequences as well—for example, in the area of workplace reproductive hazards, where employers, invoking women's special reproductive role, exclude fertile women from jobs to "protect" their fetuses.[183]

If the employer prevails and the MMLA is struck down, the costs described above are avoided, but so, for some women, are the benefits. Without such a law, some employed women who become pregnant may face termination of employment if their employer has limited provisions for disability leaves.[184] Such an involuntary interruption of employment forces a woman to experience the economic distress of unemployment at a time not only when economic security and employment stability are particularly important to her, but also when her reemployment possibilities are diminished as potential employers contemplate the real or imagined work consequences of impending motherhood. The MMLA obviously meets a very real and legitimate need.[185]

It is important to note, however, that Tamara Buley would not have been entirely without legal recourse in the absence of an MMLA. Like the women in the vast majority of states that lack an MMLA-type provision, her option would be to seek vindication directly under Title VII.[186] Miller-Wohl's policy does not, on its face, distinguish between pregnancy disabilities and other disabilities. Buley would therefore have been precluded from arguing that the employer's policy constitutes facial sex discrimination under the Act. But Title VII does not stop there. She would still be able to proceed under two possible theories. First, she could assert that despite the facially neutral rule, pregnant wage workers are in fact treated differently than others. This would require a consideration of how many days of absence Miller-Wohl in fact tolerates before terminating sick employees and then comparing the data on pregnant employees with other employees.[187] Second, the woman could assert that this

183. See, e.g., Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 585 F. Supp. 1447 (W.D.N.C. 1984).

184. They may not, too. Title VII would provide assistance to some. See text accompanying notes 187-89 infra.

185. This is not to say that her situation is unique. Others unemployed because of disability have increased expenses and find new employment especially difficult to obtain. See note 191 infra.

186. The recent blossoming of the tort of wrongful discharge may provide an additional basis for asserting a right to return to one's job following temporary disability, at least in Montana. The Montana Supreme Court recently reversed a summary judgment entered against an employee who alleged that her discharge for disability constituted that tort and remanded so that the lower court could hear the facts and consider the policy arguments in favor of extending the wrongful discharge tort to her type of situation. Dane v. Montana Petroleum Mktg. Co., 687 P.2d 1015 (Mont. 1984).

187. Under this branch of Title VII doctrine, a plaintiff makes out a prima facie case similar to that specified in Green v. McDonnell-Douglas Corp., 411 U.S. 792, 802 (1973). The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the termination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-54 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24-25 (1978). If the employer produces evidence of a legitimate, nondiscriminatory reason for the firing, plaintiff is then entitled to rebut by showing that the nondiscriminatory reason is a pretext. *Burdine*, 450 U.S. at 254-56. For a pregnancy case applying these principles, see Schwabenbauer v. Board of Educ., 498 F. Supp. 119 (S.D.N.Y. 1980). In that case, the plaintiff, who received no credit toward the

neutral rule denying sick leave in the first year has a disproportionate effect on women.[188] To prove this, she would compare the proportion of women who were terminated to the proportion of men who were terminated under the rule.[189]

The remedy if she prevailed on the first theory, that pregnant workers were actually treated worse than others, would be to gain equal (and improved) treatment for pregnant workers, or at least the back pay equivalent of improved treatment. The remedy if she prevailed on the second, disproportionate effects, theory would be that the rule would be altered to eliminate the effect—with obvious benefits for all workers who become disabled in the first year of employment with Miller-Wohl. Of course, a Title VII plaintiff in a case like *Miller-Wohl* might lose her case. But if she did lose, even with good lawyering and before a fair minded judge, it would be because she (and women as a class) were not special victims of the rule but shared their status as victims with their disabled former coworkers.

Thus, in the absence of an MMLA, pregnant employees who are discriminated against are not bereft of remedies because Title VII and the PDA continue to be a useful avenue of redress. Moreover, the federal act is available for a range of pregnancy based discriminations, beyond the problem of termination or inadequate leave addressed by the MMLA. And Title VII, unlike the MMLA, preserves the basic incorporationist thrust, casting the lot of women with that of men while promoting adjustments to the structure and rules of the male prototype workplace.[190]

Finally, if the court chooses the third course and holds either that the employer is bound to comply both with the MMLA and Title VII or that the

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end of her probationary period when she was on pregnancy-related disability leave and was subsequently terminated, prevailed in her Title VII action when she showed that two coworkers did receive such credit for nonpregnancy-related disability leaves and the employer failed to produce a neutral reason for the disparate treatment. See also text accompanying notes 80, 82-83 supra. Of course, if the employer had a written or unwritten employment policy of granting credit toward fulfillment of probationary periods for all disability leaves except those taken in connection with pregnancy, the policy itself would constitute a prima facie violation of Title VII and the employer would have the burden of persuasion on the issue of bona fide occupational qualification. See text accompanying note 23 supra.

188. See notes 28, 147 and accompanying text supra.

189. Compare Dothard v. Rawlinson, discussed at note 149 supra, where the Court assessed the impact of height and weight limitations by identifying what percentage of American men compared to women were rendered ineligible for employment by the rule. The percentage of each sex actually excluded by the rule was rejected as the test because of the likelihood that persons who lacked the height or weight qualifications, perceiving the futility of such an act, would not apply. In a case such as Buley's, the effect of the employer rule is measurable although the possibility of having a "sample" too small to achieve statistical significance may, as did the "discouragee" problem in *Dothard*, suggest that statistical evidence, including, for example, average disability durations for a relevant population compared to durations for the typical pregnancy-related disability leave, might be acceptable.

190. At the same time, Title VII has drawbacks that the MMLA does not. Proof of a violation is often more complicated under Title VII and litigation perhaps more likely because, at least in the neutral rule situation of *Miller-Wohl*, the existence of a violation is less clear under Title VII than the MMLA.

MMLA is inconsistent with Title VII and that its benefits must be extended, pregnant workers will retain their protections while avoiding the costs of special treatment. This outcome acknowledges the mutual stake of women and men workforce participants in certain basic protections[191] and provides for an incorporationist solution. Thus, the basic structure of employee protections will be shaped by the typical needs of women as well as men.

However, this third solution to the *Miller-Wohl* problem will yield benefits only to workers in California and Montana.[192] In no state is reasonable disability leave with a right to return to work guaranteed to all employees within the state.[193] And no state requires (and few employers provide) parental leaves for infant care upon the birth or adoption of a child.[194] It is to that larger difficulty that we now turn.

C. *Equal Treatment Beyond the Courts*

The *Miller-Wohl* dispute illuminates not a flaw in the "equal treatment" theory but rather the limits of reliance on courts for fundamental social change. An anti-discrimination provision like Title VII can require the extension of already established benefit schemes to encompass those employees previously excluded because of sex or pregnancy. It can even, within rather narrow confines, require the invalidation of practices that have a substantially disproportionate negative effect on one sex.[195] An anti-discrimination provision is a device for telling legislatures, governments and designated others what they may not do, thus setting parameters within which they must operate. It does not, and cannot, do the basic job of readjusting the social order.

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191. For example, the problems experienced by a worker who loses her job because of pregnancy disability are replicated for those who lose jobs because of other disabilities. See text accompanying note 185. Job and economic security are jeopardized just when the disabled person faces extra expenses and most needs those benefits; reemployment after termination for disability may be difficult. Moreover, due to the types of jobs they hold and the sectors in which they are concentrated, women and minority workers are the workers most vulnerable to job loss or unpaid disability leaves. Especially for these women, an unpaid leave with job security for pregnancy-related disability is an inadequate solution. Job loss in connection with disability can have a devastating effect for working people supporting families without regard to the sex of the disabled employee. And single parents (most often women) are especially vulnerable.

192. A third state with a special pregnancy provision is Connecticut. Conn. Code § 46a-60(7) (West Supp. 1984).

193. The five states that provide disability benefits to disabled workers, see note 38 supra, do not require the employer to hold a job open during the disability period.

194. See Maternity/Parental Leaves, supra note 111, at 6; Kammerman, Kahn & Kingston, supra note 100, at 98.

195. The limits are substantial. Rules with a substantially disproportionate effect will be upheld if an employer can show a business necessity for the rule. See, e.g., New York Transit Auth. v. Beazer, 440 U.S. 568 (1979); *Dothard*, 433 U.S. 321; Washington v. Davis, 426 U.S. 229 (1976); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The doctrine does not come into play at all where effects cannot be pinpointed to a particular rule; it is not available to challenge the failure to adopt a policy in the first place. See *Gilbert*, 429 U.S. at 139-40; but see De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978). Cf. Frug, supra note 112, at 61-74.

Fundamentally, courts are not the place to seek such important changes. The courts' role is by definition a subsidiary one.

The equal treatment approach to pregnancy under Title VII has been a reasonably effective topping-up device leading to readjustments in some programs.[196] In fact, the contrast between the treatment of pregnancy under the equal protection clause and under Title VII illustrates rather dramatically the difference that the equal treatment approach has made.[197] But Title VII, or — even if *Geduldig* were overruled—the equal protection clause, cannot produce fundamental change. For that, we must seek solutions outside the courtroom.[198]

Curiously, Krieger and Cooney characterize the dispute about the proper treatment of pregnancy as a debate about whether there should be "equal treatment" or "positive action." These terms mix apples and oranges, conflating two quite distinct contrasting pairs. First, there is the difference between a non-discrimination law (i.e., an employer may not discriminate in the provision of disability leaves) and a law which grants particular substantive entitlements (i.e., employers must provide reasonable disability leaves to employees). Second, there is the difference between a law based on an equal treatment model (i.e., employers must provide reasonable disability leaves to employees) and one based on a special treatment model (i.e., employers must provide reasonable disability leaves to pregnant employees). Krieger and Cooney's criticisms of equal treatment arise out of, and are distorted by, their consideration of the limits of equal treatment doctrine solely under a non-discrimination provision. If pregnant workers and others are treated equally badly by the employer, and if the employer's rule does not disproportionately harm women, then a non-discrimination law like Title VII is not violated. The remedy in such a situation may indeed be "positive action," but Krieger and Cooney fail to grasp that a statute or policy creating "positive" rights can be based on either an "equal treatment" or a "special treatment" model. Because of this they miss a fundamental point of agreement between special treatment

196. See, e.g., Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 817-18 (D.C. Cir. 1981); Mitchell v. Board of Trustees, 599 F.2d 582, 586-88 (4th Cir. 1979); Fancher v. Veterans Admin. Medical Center, 507 F. Supp. 124, 127 (E.D. Ark. 1981); Vuyanich v. Republic Nat. Bank, 505 F. Supp. 224 (N.D. Tex. 1980). See also cases cited in note 125 supra.

197. There have been dozens of cases striking down all manner of pregnancy rules, see note 125 supra; the early impact of this litigation is shown in the difference between employer policies in 1969 and 1973. See Quinn, Evaluating Working Conditions in America, 96 Monthly Lab. Rev. 32 (Nov. 1973). In 1973, 73% of the women workers surveyed reported that they were entitled to maternity leave with full reemployment rights as compared to 59% in 1969. Twenty-six percent reported the availability of maternity leave with pay as compared to 14% in 1969. Id. at 37, Table 4. See also U.S. Dep't of Labor and Health, Education and Welfare, Manpower Report to the President 72 (1975); National Industrial Conference Board, Profile of Employee Benefits, Conference Board Report No. 645 (1974), at 42.

198. The point I make in this paragraph with respect to pregnancy and infant care is made for childrearing obligations of working parents more generally and legislative solutions suggested in Frug, supra note 112, at 94-103.

and equal treatment advocates. All parties to the debate agree that "positive action" is needed. The question is what form it should take.

I will illustrate the two models for "positive" legislation, first in terms of the social legislation of other industrialized nations, legislation that creates dramatically more comprehensive protection for pregnant women and mothers than does that in the United States. Although such legislation may constitute an unattainable goal in this country, I discuss it here because it provides a clear illustration of the contrasting approaches to "positive action" in a context where the underlying deficiencies in benefits schemes that affect debate in the United States do not exist.

In 1919, the International Labor Organization (ILO) adopted a Convention on Maternity Protection for Working Women. That instrument provided that pregnant women should be entitled to six weeks leave prior to their expected delivery dates and should be prohibited from working in the six weeks after childbirth.[199] During that absence from work, maternity benefits sufficient for the "healthy maintenance" of woman and child would be provided out of public funds or a mandatory insurance system.[200] The convention was amended in 1952 to extend the leave period to fourteen weeks, guarantee benefits at a level not less than two-thirds of the woman's previous earnings, provide job security, and guarantee paid nursing breaks when the woman returned to work.[201] Most countries have passed social legislation based on the ILO model; Eastern and Western European nations meet or exceed all of the 1952 Convention provisions.[202] The United States is virtually alone among the countries of the world (and certainly among industrialized countries) in having no legislation providing affirmative protection for a woman wage earner who becomes pregnant and gives birth to a child.

The ILO model is plainly a special treatment model. The philosophical basis for the ILO special treatment approach was set forth in a recent ILO publication as follows:

> Combining the responsibilities of family and employment is a problem facing women everywhere. There is no doubt that working women with family responsibilities have to shoulder a heavy burden; social action is required to lighten this burden and to create conditions enabling women to combine their duties as mothers and as workers for the good of both their families and society . . . . Since woman's role is [sic] the perpetrator of mankind demands that she be afforded particular attention by society as a whole, greater responsibility for maternity protection is being assumed by the state on the

199. International Labour Office, Labour Conventions and Recommendations 1919-1981, Convention No. 103, at 693 [hereinafter Recommendation No. 103].

200. The latter is, of course, an important point, because, to the extent employers are expected to carry such burdens they will be tempted not to hire women in the peak childbearing years.

201. Recommendation No. 103, supra note 199.

202. See Kammerman, Kahn & Kingston, supra note 100, at 14-25.

grounds that maternity is a clearly recognized social function.[203]

This is, of course, the philosophy that underlay protective labor legislation for women in this country.[204] It *does* describe the reality of many women's lives, but it also assumes the inevitability of that reality and, more deeply, the desirability of traditional family roles for women. It promotes and reinforces the traditional asymmetrical family model, with father as chief breadwinner and mother as child tender and housekeeper—except that today the woman also holds a job in the labor market. It is designed to provide unquestionably needed help to assist women in coping with dual responsibilities. The problem is, the special treatment approach not only gives recognition to one type of family structure, it actively discourages and thwarts alternative models. It ensures the continuance of women's dual burden.

An example of the equal treatment model is provided by Sweden. That country adopted an official government policy of equality between the sexes in 1968.[205] Swedish family policy therefore has two objectives: not only the well being of children and the social and economic security of families,[206] but also the promotion of equality of men and women.[207]

Sweden's parental insurance scheme,[208] most recently expanded on January 1, 1984, has three features. First, the father or the mother is entitled to a leave with an allowance of 90% of income for 180 days after the birth of a child, a leave which must be used before the child is 270 days old.[209] Second, the father or mother is entitled to stay at home to take care of the child on a full-time, half-time or quarter-time basis for an additional 180 days, which may be used at any time up to and including the child's first year in school. For the first 90 days, the allowance is 90% of income; for the remainder a flat

203. Smirnov, Maternity Protection: National Law and Practice in Selected European Countries, Doc. # ILO-W.H. 420-21 (1978).

204. See text accompanying note 33 supra.

205. Rollen, Work and Family Patterns (presented at a seminar entitled The Working Family: Perspectives and Prospects in the U.S., Canada and Sweden, a seminar cosponsored by the Swedish Information Service and the Swedish Embassies in Ottawa, Washington and Washington, D.C.) (May 1984).

206. Kindlund, Family Policy in Sweden 2, paper delivered at The Working Family, supra note 205.

207. Id. Kindlund defines this objective as "giving men and women equal opportunities of participating in community life and of combining gainful employment with good care of the children."

208. The parental insurance scheme replaced the maternity insurance program and is part of Sweden's national health insurance system. Id. at 5-6. Provision for the family does not stop with parental insurance. A children's allowance is paid for each child up to the age of 16, a means tested housing allowance is available to low income families, a maternal and child health system offers prenatal care and medical treatment for pre-school age children, and child care is provided for working parents, although child care supply has not kept pace with demand. Id. at 3, 6-7.

209. Fathers are also entitled to a 10-day leave to care for children already at home and, when the mother comes home from the hospital, to care for her and a newborn as well. Boethius, The Working Family 4, paper delivered at seminar on The Working Family, supra note 205 [hereinafter Boethius].

amount.[210] In addition, parents of children under eight years old may have their work day shortened to six hours.[211] Third, either parent may take paid time off from work to care for sick children or to care for children when the person normally caring for them is ill.[212]

Importantly, parents of either sex are entitled to the leaves. One parent may take the entire leave, the parents may split the leave (each, for example, working half time), or they may take it in sequence. Predictably, mothers take the leaves more frequently than fathers, but the Swedish government continues to encourage fathers to avail themselves of a larger proportion of the leave benefits and their participation has steadily increased.[213] Finally, in Sweden, disabled workers have job protection and partial wage replacement, like parental leaves, at 90% of income.[214]

Given a choice between the ILO approach and the Swedish approach, equal treatment advocates would, obviously, vote for the Swedish approach. But so, I suspect, would the advocates of "special treatment." If I am right about this, the equal treatment critics part company with the equal treatment advocates as a matter of tactics rather than ultimate goals.[215] Tactically, the special treatment advocates may perceive of themselves as defending what they have (in this case the California and Montana statutes), rather than seeking more at the risk of ending up with nothing.

For reasons set forth throughout this article, I continue to believe that the equal treatment feminists have the best of the argument. Concededly, a com-

210. Id. The amount is Kkr 37, approximately $4084.80 in U.S. dollars.

211. Id. at 2.

212. Id. at 5. A family is entitled to up to 60 days per year per child; illness must be verified by a doctor's certificate.

213. Id. at 5. Such reforms cannot transform ancient patterns overnight. Almost a decade after institution of the program, women still use the leaves more often and for longer periods than do men. Id. at 4. In 1983, 25% of fathers used the leave during the first six months for an average of one month. Approximately 30% availed themselves of the leave in the second six months for an average of 10 days. Kindlund, supra note 206, at 6. Fathers did take a larger share of responsibility for sick children, however. In 1983, 200,000 fathers as compared to 270,000 mothers stayed home to care for sick children. On average, fathers were at home for the same length of time as mothers. Id. Despite government policy, it remains less socially acceptable for men, particularly men who work in Sweden's private sector, to take childrearing leaves than women. Boethius, supra note 209, at 4-5. To hasten the full participation of men in childrearing, Berit Rollen, Under Secretary of the Swedish Ministry of Labor, has proposed that a certain portion of the parental insurance benefits be reserved for men only "so as to strengthen their position in relation to employers and wives and force them to shoulder their responsibilities." Rollen, supra note 205, at 4.

The typical pattern among women is full time work until they have children, then part-time employment. In 1981, 78% of women with children below the age of seven were employed; 47% worked part-time and 31% full time. Kindlund, supra note 206, at 2. As in the U.S., the Swedish labor force remains segregated, men choosing from among 300 jobs, women from around 30. Rollen, supra note 205, at 4. This lack of choice depresses women's wages, making it more economical for them to take leaves rather then their husbands. Kindlund, supra note 206, at 2.

214. Swedish Institute, Social Insurance in Sweden 2 (Apr. 1974).

215. See Taub, From Parental to Nurturing Leaves, 13 N.Y.U. Rev. of L. & Soc. Change 381 (1985).

prehensive social scheme for providing the support to working parents that Sweden offers is unlikely to be forthcoming in the United States. Nonetheless, it is possible to identify some essential features of a leave system toward which we might realistically aspire and work. In this country positive legislation based on the equality model would have the following features. First and most fundamental, it would focus on parental rather than maternal responsibilities.[216] It would recognize that there is a period of time when a woman is physically unable to work because of pregnancy-related disability. During this period of time she will, like other disabled workers, have her job protected and be eligible for wage replacement benefits. The system should further recognize the social advantage of parental childrearing for parent and child in the early months of the baby's life. Thus, it will require that a reasonable parental leave be allowed a new parent to engage in early childrearing. Such legislation might also create an entitlement on the part of nonparents to take leave to tend sick family members.[217]

The twin goals of disability leaves and parenting leaves can be pursued in a number of ways. Five states now have disability insurance programs that cover pregnancy-related disabilities on the same basis as other disabilities. Other states should consider such a program. Even a provision like Montana's— but, of course, a sex neutral one—would be a big step forward. Such a provision would read something like this: "It is an unlawful employment practice for an employer to deny a reasonable leave of absence to persons absent from work due to disability." While no state today requires employers to provide parental leaves, such legislation has been proposed in at least one state.[218] Some employers are instituting such leaves[219] and some unions are seeking them through collective bargaining.[220] A number of groups have made parental leave a research[221] or advocacy[222] priority.

216. Even better, it would consider overall family responsibilities and the way in which a particular family has chosen to distribute those responsibilities.

217. See Taub, supra note 215.

218. A parental leave bill introduced in the Massachusetts House of Representatives would guarantee fathers and mothers reinstatement after a leave to care for a newborn child. The 16 week leave can be paid or unpaid, at the employer's option. The bill, entitled "An Act Providing for Maternity and Paternity-Leave," R. 3121, would amend ch. 149, § 105D of the General Laws.

219. Catalyst reports that men as well as women are increasingly offered unpaid parental leaves. In their 1980 survey only 8.6% of the respondent companies offered "paternity benefits." By 1984 over half the respondents gave women some unpaid leave and over one-third offered leaves to men. Maternity/Paternity Leaves, supra note 111, at 4.

220. United Mine Workers, at the urging of women miners, bargained for parental leaves in 1984 contract negotiations. Coal Employment Project Newsletter, Sept. 1984.

221. The New York based organization, Catalyst, is investigating corporate maternity and parental leaves. See Maternity/Paternity Leaves, supra note 111. Yale's Bush Center on Child Development has initiated an infant care leave project. Professor Richard Chused of Georgetown University is studying parental policies, including leaves, in legal academia under the auspices of the Society of American Law Teachers. See also Project, Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict, 34 Stan. L. Rev. 1263-1308 (1982).

222. San Francisco's Employment Law Center is studying ways to institute parental leaves

Most significantly, a bill recently introduced in the House of Representatives will, if passed, require that employers provide unpaid leaves with job security for persons temporarily disabled from working and for parents of either sex upon the birth of a child.[223] Tentatively entitled the "Disability and Parental Leave Act," it also provides for a Congressional study of ways to fund disability and parental leaves.

CONCLUSION

The dispute among feminists about whether women and men are essentially similar or dissimilar as to their stake in the workplace is as old as feminism itself. Assumptions about similarities and differences yield different theories of what will break down gender hierarchy and promote equality between women and men. The vigorous dispute among those feminists who supported and those who attacked protective labor legislation earlier in this century has been replaced by the debate over whether the fact of pregnancy should be given "equal treatment" or "special treatment" in workplace policies to promote the ultimate equality of women. I have contended here that the "equal treatment"[224] approach to pregnant wage workers, both as a litigative and legislative matter, is demonstrably the better approach.

There is one sense in which I feel the attraction of "special treatment." Visions of equality are one thing; ability to realize a particular vision at a particular historical moment and place is another. It has always been easier to wrench from the jaws of the political system special provisions for women in the name of motherhood than general provisions aimed at the realignment of sex roles in the family and restructuring of the workplace. Urgent problems cry out for immediate solutions. Half the proverbial loaf (a provision like Montana's or California's) sometimes seems better than none.

If this were some other time and place, perhaps expediency would suggest that the benefits of special treatment rules such as Montana's outweigh the cost. For the moment, however, Elizabeth Koontz's 1971 vision remains within the realm of possibility. Much of what she suggested has come to pass. The enormous pressure created by the changed demography of the workforce as well as initiatives by public and private groups indicates that major change is indeed possible. To settle for special treatment now would be to sell equality short.

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in California; national feminist groups have developed the Parental and Disability Leave Act. See note 223 and accompanying text infra.

223. H.R. 2020, introduced April 4, 1985. Information on the bill is available from the Congressional Caucus on Women's Issues and from Representative Patricia Schoreder (D. Col.), lead sponsor of the bill.

224. "Equal treatment" appears in quotation marks because the label means one thing to Krieger & Cooney, see notes 152-153 and accompanying text supra, and another, as this article describes, to the opponents of special pregnancy legislation of the Montana and California types. After all is said and done, we probably need a new label.