NOTES

A DECONSTRUCTION OF (M)OTHERHOOD AND A RECONSTRUCTION OF PARENTHOOD

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"Everything about a woman is a riddle, and everything about woman has one solution: that is pregnancy."[1]

INTRODUCTION

For the first time in the history of our nation, economics, and in some respects, the social culture of the United States dictate that most women should work outside the home for wages. This expectation collides with mainstream approval of women's role in the home. The conflict between and among the varied roles that society expects women to play is most acute concerning parenthood. As a result, the concept of motherhood has become increasingly laden with theoretical and practical difficulties.

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1. FRIEDRICH NIETZSCHE, *Thus Spoke Zarathustra First Part: On Little Old And Young Women, in* THE PORTABLE NIETZSCHE 178 (Walter Kaufmann ed. and trans., 1954)(1891).

This Note seeks a new and more useful way to understand how and why our society has constructed motherhood as a problem. My approach takes advantage of critical theory's aim to reconceive of rationality, autonomy, and reflection within a changing culture and society by using the tools of philosophy and the social sciences.[2] As my goal is in part to attack the cognitive categories set in our unconscious that drive our perceptions, I explore a world that breaks down discrete and defined separations between and among people and social institutions. Both my critique and my creative project are anti-essentialist.

I suggest that the ways we understand motherhood and pregnancy are dysfunctional. A disjunction has developed between the way we conceive of women's and men's roles in the social networks and the forms these roles actually take. Our understanding of gender arises from society's need to see women primarily and essentially as mothers. We must question this construction of motherhood and the resulting alienation of women from our ability to shape and define for ourselves our social roles. This problematic construction persists even in some feminist legal theory; feminist legal scholars have attempted to solve the "problem" of motherhood either by analyzing the situations of pregnant women and mothers in exactly the same manner as those of non-pregnant women or men, or by arguing for "preferential" treatment by understanding pregnancy and motherhood as temporary disabilities. Both approaches are flawed because they incorporate societally-created definitions of pregnancy and motherhood. Neither analysis ultimately enables women to create for ourselves an understanding of what it means to be mothers in contemporary society. My end is not to propose *the* solution or *the* way; instead, I offer a perspective that I believe serves both women's and men's interests.[3] Rather than claiming to have discovered some universal "truths," I wish to articulate a way for women to define ourselves in all of the multifarious ways that are important to us — as parents, as workers, as lesbians, as people with disabilities, as people of color, as people with many different religions or no religion at all, as members of vastly diverse communities, as individuals, and yes, as women.[4]

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2. SEYLA BENHABIB, CRITIQUE, NORM AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY 14 (1986).

3. The scope of this Note is necessarily limited not only by space, but also by my understanding of these issues from my particular standpoint. I cannot in this Note explore and analyze all of the ways in which racial and other forms of oppression intersect with patriarchy and fundamentally affect both my critique and my creative project. This limitation should not, however, be understood to suggest that I consider such analysis unimportant. On the contrary, I believe that it is a crucial next step to be taken in order to make my creative project more possible.

4. Membership in groups that society has constructed as "other" and at variance with one unspoken "norm" has often provided a potent source of self definition for the disempowered. For instance, while being white may affect a person's life as much as being Native American, Native Americans as members of an "other" group are more likely to understand consciously the connection of race to the conception of self that we/they hold. Inclusion of otherness in self definition can be problematic, as the "others" include, in our understandings of our status, the

In developing my argument, I do not take a discrete legal problem and attempt to create a discrete legal solution. My goal is instead to trace the construction of motherhood, to expose its embeddedness in law and society, and to discuss the difficulties that arise when motherhood, so constructed, conflicts with a woman's status as a worker. In some sense, I do focus on the discrete issue of women, motherhood, and pregnancy in the American workplace; but the crystallized fixture of motherhood has resisted my efforts to rip it out, to subdue it through legal rhetoric, and to transform it into an objective construct for my tiny needles to dissect. Instead, as I dig at it, I remember the weeds that grew in my back yard when I was little — my mother and I would spend hours digging them out of our flower beds, but we could never remove or overcome them entirely. Often, in pulling out the grasping vines, we would uproot other plants along with them, thin roots tangled and intertwined with the vines, these separate and different plants inextricably linked.

I no longer believe in the clean analytic knife slice that would enable me to write about or understand only the law, its microcoercions and its effects. What I offer instead is a bouquet of twisted roots, tied and woven together by the way in which my perspective requires us to see the world.

In Part I of this project, I first explore the operation of language in both society and law as a powerful coercive mechanism. I then examine the separation of family and civil society that occurs in classical liberal theory and in classical sociology, and show that this paradigm operates unpleasantly in our courts today. With this grounding, I move forward to Part II, in which I expose the embedded understandings we hold about pregnancy and motherhood in society and law. Part III examines the debate between proponents of equal and preferential treatment through the lens of Title VII and two recent cases decided under it,[5] showing that both sides of the debate are flawed. Finally, in Part IV, I explore how we can construct out of currently existing law and scholarship a new ideal that transcends the "problem" of motherhood by reconstructing it as a part of the self definition and self creation of woman. This project has ramifications for men as well as for women, since one of its goals is to create a space within which all can enjoy concrete parenthood.

I. THE CONSTRUCTION AND GROUNDING OF MOTHERHOOD IN THE FAMILY-CIVIL SOCIETY SPLIT

In this section, I sketch the ways in which the social constructions of language, for example, the discourse around reproduction, supports and is supported by an invisible power network within society. Society's simple understandings of women as mothers is in part due to the operation of language,

negative assumptions and stereotypes that society attaches to that status. It has the potential to be positive and redemptive as well, a possibility that I will discuss in my conclusion.

5. I use International Union, UAW v. Johnson Controls, Inc. 111 S. Ct. 1196 (1991), to frame my discussion of equal treatment, and Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987), to frame my examination of the preferential treatment paradigms.

which evolved from a large theoretical tradition of separating family life from civil society. The operation of this tradition in tandem with language's simplification and stereotyping of women has embedded the vision of woman-as-mother in modern society and law.

One of the most important innovations of contemporary critical theory is its recognition of the subtle structuring and deployment of power[6] in modern industrialized societies. In contrast to classical liberal theorists, who implicitly locate power in the market and in the state,[7] many critical theorists see power as an interlocking web, rooted deep within both the structure of society and the individuals and institutions that compose it.[8] Power is not an abstract object to be possessed; rather, it operates within a subterranean network of relations.[9]

This power network's unassailability arises largely from its invisibility. Martha Minow interprets the effect of power's unseen distribution as coloring and shaping everyday life: "Daily social practices that reinforce existing arrangements stand in the way of efforts to expose unstated assumptions about the power behind attributions of difference."[10] Because we cannot perceive the network, we accept the deployment of power almost without being able to question it, since it is difficult to grasp in a critical sense.[11] Thus, "[p]ower . . . is exercised not simply in individually chosen acts, nor even in winning particular contests for political control or public attention. Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination."[12]

Exposing the power structure is the first step toward deconstructing it.[13] Critical theorists focus on language as the "shap[er] of both thought and reality;" they do not view language as a mirror of reality, but "emphas[ize] . . . the

6. As I shall explain below, the operation and deployment of power in society is not neutral. *See, e.g.*, Martha Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 67-70 (1987).

7. For liberals, the state (or at least the ideal state) is an extension of the collective will of the individuals in society. For examples of variations on this approach, see generally the writings of John Locke, Jean-Jacques Rousseau, Immanuel Kant, and John Stuart Mill.

8. "What the apparatuses and institutions operate is, in a sense, a micro-physics of power, whose field of validity is situated in a sense between these great functionings and the bodies themselves with their materiality and their forces." MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 26 (Alan Sheridan trans., 1979) (1975) [hereinafter FOUCAULT, DISCIPLINE AND PUNISH]. The use of Foucault as a base for feminist theory is not entirely unproblematic. His work is primarily directed on a subtle level toward releasing the multifarious forms of power implicit in sexual relations; his project is troubling because of its obvious implications of new forms of domination and control. Little of Foucault's work holds out hope of dismantling domination, hierarchy, and coercion, a goal that many feminists believe is vital to creating a just society.

9. *Id.*

10. Minow, *supra* note 6, at 68.

11. *Id.*

12. *Id.*

13. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 8, at 307-08.

culturally-constructive function of language."[14] According to Foucault, "power acts by laying down the rule: power's hold on sex is maintained through language, or rather through the act of discourse that creates, from the very fact that it is articulated, a rule of law."[15] Language defines and separates licit from illicit, and legal language creates universal categories into which discrete individuals and situations are fitted for analysis.[16]

Language simplifies and collapses the particularity of individuals, for "any word I use to describe your uniqueness draws you into the classes of people sharing your traits."[17] Contemporary critical theory recognizes the human need for simplification and categorization through language.[18] The problem language engenders is that we accept it as an objective and passive reflection of reality rather than understanding words as a sorting mechanism to make sense of the impossibly complex flow of information that our brains must process at every moment. "Reasoning processes tend to treat categories as clear, bounded, and sharp-edged; a given item either fits within the category or it does not."[19] Our use of these categories is necessary, but it leads us to believe that they are absolute, transcending human choice or perspective.[20]

Modern understanding of the importance of perspective began with the writings of Nietzsche and has become a vital component of feminist and critical race legal scholarship. Feminist perspectivist scholarship recognizes (as did Nietzsche) its own reliance upon perspective.[21] Its claim, however, is not to supplant completely the ruling "neutral" perspective in law, but to augment it with other perspectives that have previously remained silent, unrepresented, and unrecognized. Feminist perspectivism aims to encourage the realization that "[a]lthough a person's perspective does not collapse into his or her demographic characteristics, no one is free from perspective, and no one can see fully from another's point of view."[22] Many feminists caution that our blind acceptance of "neutral" categories will enable these categories to "bury their perspective and wrongly imply a natural fit with the world."[23] The hope of

14. Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521, 521 (1988).

15. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: THE WILL TO KNOW 83 (Robert Hurley trans., 1978) (1976) [hereinafter FOUCAULT, HISTORY OF SEXUALITY I].

16. Minow, *supra* note 6, at 45.

17. *Id.* at 90.

18. *See, e.g.*, JACQUES DERRIDA, SPURS: NIETZSCHE'S STYLES (Barbara Harlow trans., 1979)(describing Nietzsche's uses of language).

19. *Id.* at 44.

20. *Id.* at 95. The complete erasure of individual perspective, a frequent strain in liberal philosophy, may be used as a vehicle to reach fairness, justice, or ethics. *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS (James Ellington trans., 1981) (1906); JOHN RAWLS, A THEORY OF JUSTICE (1971).

21. Minow, *supra* note 6, at 15.

22. *Id.* at 32.

23. *Id.* at 14.

much feminist jurisprudence is to include alternative perspectives in law and to encourage recognition of their validity.

Feminist work has illuminated the assumptions underlying society's framework by "nam[ing] the power of naming."[24] But how do perspective, language, and the deployment of power work together to harm and disempower women? The point of deepest conflict and coercion occurs in the space of motherhood and pregnancy. There, common language usage displays the hidden perspective that underlies legal thought. The way we use language every day continues to legitimate our silent assumptions about pregnancy, motherhood, gender, and their effects on women who work. "The term 'working mother,' modifies the general category 'mother,' revealing that the general term carries some unstated common meanings (that is, a woman who cares for her children full-time without pay) which even if unintended, must expressly be modified."[25] What would the term "working father" mean in our culture?[26]

While language may be the primary manifestation and instrument of power and oppression, it can also be used as a weapon to deconstruct and disrupt power structures. Foucault uses a genealogical method of historical investigation to question our assumptions about progress, discipline, and sexuality (among other things).[27] Minow critiques the Supreme Court from a perspective of linguistic contingency.[28] Drucilla Cornell believes that feminists, following the lead of Jacques Derrida, can use language to construct a new ideal of equivalent rights through playing with gender roles and gender identity.[29] While deconstructing our common understandings of pregnancy and motherhood as they occur in law, language, and society, we can clear the way for a more flexible construction of parenthood.

Language, of course, does not arise in isolation from history. The social constructions of motherhood that are today embodied in and reinforced by language and the power network are also a persistent strain in a philosophical heritage. I explore the grounding bifurcation of family life and civil society in order to locate the roots of motherhood as a social construction and ultimately to critique the Western philosophical and sociological commitment to maintaining this construction in the face of social change.

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24. *Id.* at 61.

25. *Id.* at 13-14.

26. The decision to modify a particular class of mothers becomes confused regarding the physical bearing of children. Marie Ashe points out that the "surrogate mother" is actually the person who gives birth to the child. *See* Ashe, *supra* note 14, at 528. In contrast, in the adoption context, we speak of "birth" or "natural" mothers as childbearers while the adoptive or foster parents raise the adopted child.

27. *See* FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 8; FOUCAULT, HISTORY OF SEXUALITY I, *supra* note 15.

28. Minow, *supra* note 6.

29. Drucilla Cornell, *Sex-Discrimination Law and Equivalent Rights*, 1991 DISSENT 400.

A. The Separation of Family and Civil Society

The complete separation of family life from civil society has long been a feature of Western thought, as has its corollary, the placement of women in the home and men in civil society. The story, in simple summary, is that emotive women belong in the home, while rational men labor in the marketplace to support the family and to achieve personal and political fulfillment. The man is, however, head of the family, and exercises his authority there. Some of the most influential Western thinkers have either "discovered" or "reasoned" the logic behind this dichotomy.[30]

Both Thomas Hobbes and John Locke have maintained that these separate spheres exist, but in different ways. For Hobbes, man's power over woman was largely due to man's control over the establishment of the state and politics; in the state of nature, the mother naturally has dominion over children because only she can declare who the father is.[31] Locke's belief in natural rights on the side of the social contract was more extensive than Hobbes'; he argued that the mother and father hold equal power over children.[32] In this sense, Locke's theory grants the woman more power than does Hobbes: Locke understands the mother to have such power not only in the state of nature, but also under the rule of law.

While these classical theorists believe that women have at least some power within the family, this power extends only as far as women's responsibility for raising children. What then of the role of men? Locke took pains to demarcate family society from civil or political society.[33] The difference, he argued, is grounded in the existence of private property and exchange—in short, work.[34] Immanuel Kant, another contractarian, theorized that men alone entered the public sphere. At maturity, a man could become a citizen,

30. I wish only to outline these writers' beliefs about the roles of men and women in Western society. For more thorough critiques of gender roles and their influence on Western philosophy, see WENDY BROWN, MANHOOD AND POLITICS (1988); SUSAN MOLLER OKIN, WOMEN IN WESTERN POLITICAL THOUGHT (1979); ARLENE SAXONHAUSE, WOMEN IN THE HISTORY OF POLITICAL THOUGHT (1986).

31. "Whereas some have attributed the Dominion [over the child] to the Man only, as being of the more excellent Sex; they misreckon in it . . . . For in the condition of meer Nature, where there are no Matrimoniall Lawes, it cannot be known who is the Father, unlesse it be declared by the Mother: and therefore the right of Dominion over the Child dependeth on her will, and is consequently hers." THOMAS HOBBES, LEVIATHAN 253-54 (C.B. Macpherson ed., 1968) (1651). Hobbes' conclusion is based on his understanding that power over individuals arises from a person's ability to save or destroy the individual. Since the mother may save the newborn by suckling it or destroy it by abandoning it, she has power over it. *Id.* at 254.

32. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 30 (C.B. Macpherson ed., 1980) (1690) (paternal power is a misnomer, since "*paternal power* . . . seems so to place the power of parents over their children wholly in the *father*, as if the *mother* had no share in it; whereas, if we consult reason or revelation, we shall find, she hath an equal title." (emphasis in original)).

33. *Id.* at 46.

34. Locke argues that the social contract becomes the mechanism by which the fruits of labor are preserved for the laborer. "No *political society* can be . . . without having in itself the power to preserve the property, and in order thereunto, punish the offenses of all those of that society." *Id.* at 44.

and "[t]he only quality necessary for being a citizen, other than the *natural* one (that he is neither a child nor a woman), is that he be *his own master* . . . consequently that he have some *property* to support himself."[35] For Kant, part of the reason that women engage in the social "contract" in spite of the restrictions it places upon us was that we were threatened and dominated by men.[36]

Thus, according to classical theory, men and women inhabit different realms. By living in these different realms, men and women develop different understandings of the good. Locke believes that "the husband and wife, though they have but one common concern, yet having different understandings, will unavoidably sometimes have different wills too."[37] Even in the circumscribed world of the family both cannot rule — conflicts arising from these differences must be resolved. "[T]he last determination . . . should be placed somewhere; it naturally falls to the man's share, as the abler and stronger."[38] Kant goes further than Locke, claiming that, because of society's low expectations, the "entire fair sex" is lacking in maturity.[39]

The most articulate and complete expression of the separate spheres doctrine occurs in Hegel's *Philosophy of Right*, written in 1821.[40] There, he theorized that "the family, as the immediate substantiality of mind, is specifically characterized by love, which is mind's feeling of its own unity."[41] Marriage begins as contract but transcends civil relations by creating ethical unity of husband and wife through the marriage ceremony.[42]

This connection brings together the two complementary halves necessary to form and sustain the family. The rational male[43] leads "his substantive life in the state, in learning, . . . as well as in labour and the struggle with the external world."[44] In contrast, the woman lives in the immediate and concrete, rather than the universal, world; she experiences "knowledge and voli-

35. IMMANUEL KANT, *Speculative Beginnings of Human History* (1786), *in* PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 52 (Ted Humphrey trans., 1983) [hereinafter KANT, PERPETUAL PEACE].

36. "[T]he wife forsaw the difficulties to which nature had subjected her sex, as well as the additional ones to which the more powerful husband would subject her." *Id.* at 52.

37. *Id.* at 44.

38. *Id.*

39. Kant, *An Answer to the Question: What Is Enlightenment?* (1784), in PERPETUAL PEACE, *supra* note 35, at 41.

40. GEORG HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans. & ed., 1952)(1821). Some might object to my use of Hegel as a proponent of categories adopted by American liberals, reading him as the grounding figure of critical theory. His theory does break with Kantian universalism and abstraction and attempts to ground itself in the concrete experiences of consciousness, but I believe that seeing his as the end of a way of thought as well as a beginning is a fair reading.

41. *Id.* at 110.

42. *Id.* at 111-12.

43. For Hegel, the rational male "is mind in its self-diremption into explicit personal self-subsistence and the knowledge and volition of free universality . . . the self-consciousness of conceptual thought and the volition of the objective final end." *Id.* at 114.

44. *Id.*

tion in the form of concrete individuality and feeling."[45] Thus, she is uniquely suited to be the nurturer of the family.[46] Children are a living symbol of the unity of the family, and Hegel assumes that they are a desired part of all ethical marriages.[47]

In the realm of civil society, the man stands as a discrete individual, rather than in unity with anyone else.[48] He works both to fulfill his material needs and those of his family and to satisfy his social and mental needs as a member of the society.[49] Such participation contributes to living an ethical life within a framework of tolerance and neutrality.[50] The universality of civil society and the state thus contrast with the particularistic quality of the family.

As generations of women philosophy students have been told by their professors, these attitudes may be seen merely as reflections of a less enlightened time.[51] However, for some, these attitudes remained as reasonable as, for instance, Kant's explanation of the categorical imperative. As "reason" progressed with the increasing preeminence of the sciences, it did not immediately oust these "irrational" beliefs. The developing science of sociology did not even question these theories; rather, it "discovered" evidence to support them, and some sociologists devised their own theories to explain these divisions and differences between men and women.

Emile Durkheim, one of the founders of modern sociology, saw heightened differences in the roles and functions of women and men as evidence of the development of a social division of labor.[52] Durkheim observes, "[t]he further we go back into the past, the more we see that the division of labour between the sexes is reduced to very little."[53] Durkheim believed that the fossil record, as well as studies of "primitive" and "savage" cultures, shows that sex roles, and even body morphologies, were more similar before the advent of civilization.[54]

For Durkheim, development and progress in society led to increased sexual division of labor. He explains, "labour became increasingly divided up as between the sexes . . . . The woman had long withdrawn from warfare and public affairs, and had centred her existence entirely round the family."[55] Af-

45. *Id.*

46. "Woman . . . has her substantive destiny in the family, and to be imbued with family piety is her ethical frame of mind." *Id.*

47. *Id.* at 117.

48. *Id.* at 126-27.

49. *Id.*

50. *Id.* at 125-36.

51. Thomas Wartenberg recognizes that brushing off women's concerns about the texts we are asked to study and often to revere is not an adequate reponse. *See* Thomas Wartenberg, *Teaching Women Philosophy*, 11 TEACHING PHILOSOPHY 15 (1989).

52. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 18-21 (W.D. Halls trans., 1984) (1893).

53. *Id.* at 18.

54. *Id.*

55. *Id.* at 20.

ter this preliminary separation of men's and women's roles, women became increasingly involved with the fortunes of the family, leading existences almost entirely separate from men's.[56] This division of labor extended even to thought patterns.[57]

For some social theorists, allowing women out of the home to participate in civil society is problematic not just from a theoretical perspective, but also from a scientific, sociological perspective. Max Weber explains that "[t]he type of backward traditional form of labour is to-day very often exemplified by women workers."[58] The problem is that "they are almost entirely unable and unwilling to give up methods of work inherited or once learned in favour of more efficient ones, to adapt themselves to new methods, to learn and to concentrate their intelligence, or even to use it at all."[59]

Given this overwhelming philosophical and sociological evidence and its grounding in our use of language, the Supreme Court's wholehearted acceptance in 1908 of the theoretical and empirical segregation of women and men into separate spheres was not surprising.[60] However, with even the Seventh Circuit's agreement that "[t]he status of women in America has changed both in the family and in the economic system,"[61] one would expect that the rigid distinction drawn between family and civil society might begin to seem somewhat untenable. Yet the Seventh Circuit sitting en banc in 1989 informed us that women "have become a force in the workplace as well as in the home because of their desire to better the family's station in life."[62] Such language reveals the continued persistence of the belief that work, for women, is not a vehicle for self-fulfillment through participation in civil society, but merely an extension of our role as keepers and nurturers of family life. Even now, contemporary attitudes still hold that:

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56. *Id.* In an almost Lamarckian theoretical twist, Durkheim observes data collected by a Dr. Lebon concerning differences between the skull sizes of men and women and surmises that women's brains have become smaller in response to the decreased demand upon them. Thus, "with the advance of civilisation the brain of the two sexes has increasingly developed differently. According to this observer, this progressive gap between the two may be due both to the considerable development of the male skull and to a cessation and even a regression in the growth of the female skull." *Id.* at 21. Not surprisingly, Durkheim cites evidence showing that, in civilized and cultured France, "the average size of the skulls of male Parisians places them among the largest known skulls, the average size of those of female Parisians places them among the smallest skulls observed." *Id.* (citing Dr. Lebon).

57. "It might be said that the two great functions of psychological life had been . . . dissociated from each other one sex having taken over the affective, the other the intellectual function." *Id.*

58. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 62 (Talcott Parsons trans., 1958) (1904-05).

59. *Id.*

60. Muller v. Oregon, 208 U.S. 412 (1908) (holding that an Oregon statute providing for hour limitations on women workers was not violative of substantive due process). Scholars and courts often quote the language of the court opinion to show the perniciousness of the "separate spheres" doctrine.

61. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 897 (7th Cir. 1989), *rev'd.*, 111 S. Ct. 1156 (1991).

62. *Id.*

> The male role is that of worker and breadwinner, the female role is that of childbearer and rearer. The male sphere is the public world of work, of politics, and of culture — the sphere to which our legislative and economic system have been thought appropriately to be directed. The female sphere is the private world of family, home, and nurturing support for the separate public activities of men.[63]

Lest this appear to be an exaggeration, we will examine contemporary understandings of family as a private institution, the "male" structuring of the workplace, and women's "conflicting" roles as participants in both spheres.

On August 29, 1980, President Carter signed a proclamation declaring August 31 to be Working Mothers' Day.[64] According to Carter, the working mother has dual responsibilities: "[w]orking mothers do not shed homemaking and parental responsibilities; they merely add the demands of a job to those of wife and mother. As we recognize the hard work and dedication of these women, we also acknowledge the many special problems they confront."[65] The Congress and the President thus formally acknowledged this strange new creature, the working mother — a being sprung up in defiance of all theory.[66]

This shift toward paid work was not without its complications for women, however. The workplace structure evolved to meet and continues to reflect the needs of the men who originally occupied its space.[67] Although both women and men occupy workplace space today, "the structures of the workplace remain built either around the needs of male management, or the assumption that the typical worker is a man with a wife at home to worry about

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63. Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1118 (1986).

There are at least two distinct images of what this "private world of the family" looks like to the women who inhabit it. ("One view identifies the family as a cherished enclave, removed from the hustle and cruelty of the marketplace, the impersonal treatment of the state, and the intolerances of majorities." Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 MICH. J.L. REFORM 933, 947 (1985). As Minow observes, affection and love supplant rules; power is not deployed coercively. Therefore, the law should ensure that the family is left alone. *Id.* However, "[a] second view portrays the family as a center of oppression, raw will and authority, violence and brutality, where the powerful economically and sexually subordinate and exploit the powerless." *Id.* at 948. This conception of the family supports the enactment and enforcement of measures allowing state intervention. Although popular among feminists such as Catharine MacKinnon, this perspective on the family does not have tremendous support in broader society. *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

64. Proclamation No. 4786, 45 Fed. Reg. 58,325 (1980).

65. *Id.*

66. Of course, work for wages has existed among poor women since the industrial revolution, and in antebellum America, almost every female slave was a working mother. But by 1980, women who existed above the sight line of poverty and color had moved away from the home and had begun to have an effect on the world outside the family, an effect so great that Congress and the President took notice of it. *See supra* note 64.

67. "The existing structure assumes that . . . [work and family] responsibilities will be split between one working spouse and one non-working spouse." Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699, 700 (1986).

the demands of the private sphere."[68] Thus, the workplace is not sympathetic to workers who feel pressured to simultaneously fulfill responsibilities associated with home and job.[69] Furthermore, the continued insistence upon the bifurcation and reification of women's role in the home and at work causes employers to feel that "[c]hild care arrangements are . . . generally regarded as a woman's private problem, of no concern to the employer."[70]

Women who work outside the home and raise children confront this incompatibility daily. Employers who view women in the dual role of wife/mother and employee, often "assum[e] that these roles create a conflict of allegiance between home and work so that women who try to accommodate the two spheres are seen as demonstrating a lack of commitment to the work world."[71] Worse yet is the situation of the woman who physically displays her conflicting roles by becoming pregnant: "Since it is assumed that women's natural place in the family world is incompatible with their holding a place in the work world, women are seen as 'choosing' to assume their ordained place in the private sphere when they 'choose' to become pregnant."[72]

As the rigid distinction between family and civil society breaks down, the issue of employer involvement in the family/personal life of the employee becomes "thinkable." Proponents of this development claim that, "[n]ow that women make up almost half the work force and the growing percentage of managers, the decision to become involved in the personal lives of employees is no longer a philosophical question but a practical one."[73] However, such enthusiasm is belied by the possible forms that such involvement could take. For instance, Justice White in *International Union, UAW v. Johnson Controls*, expressed his belief that "avoidance of substantial safety risks to . . . [fetuses] is inherently part of both an employee's ability to perform a job and an employer's 'normal operation' of its business."[74]

The distinction between family life and civil society, coupled with women's entrance into civil society in large numbers, has thus created a disjunction between theory and reality. The divergent realms of male-dominated civil society and female-shaped family life have become entangled and confused in response to modern society's diverse pressures upon both men and women. This disjunction is exacerbated by the deployment of constructed motherhood through language in society and law, a phenomenon to which I now turn.

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68. Finley, *supra* note 63, at 1126.
69. *Id.*
70. *Id.*
71. *Id.* at 1127.
72. *Id.* at 1137.
73. Felice Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65, 74.
74. International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (White, J., concurring).

II.
THE "PROBLEM" OF MOTHERHOOD

We generally use the words "pregnancy," "maternity," and "motherhood" in our everyday language without thinking about them as constructed forms of reference. In light of language's role in the deployment of power, we must first know what motherhood and pregnancy mean in order to understand the roots of "discrimination based on sex." We need to understand how motherhood and pregnancy are constructed in society and law, and what significance these constructions have gained. Next, we must unearth their deployment in society as a whole. Grasping the structure of patriarchy thus becomes easier, enabling us to disembed it, and strip it of the illusion of neutrality.

A. What is a Mother?

In our pluralistic society, it is unremarkable that the question of what actually constitutes motherhood becomes more, rather than less, difficult to resolve upon reflection. *Webster's Collegiate Dictionary* defines "mother" as "a female parent . . . a woman in authority . . . an old or elderly woman."[75] *Black's Law Dictionary* is more succinct: "A woman who has borne a child. A female parent. *The term includes maternity during prebirth period.*"[76] However, these definitions do not capture the full significance of the idea in either law or society.

Biology provides the traditional foundation for understanding motherhood. The biological model has its roots in modern medicine and its faith in objective scientific definition. Foucault points out that the systematization of the medical gaze in tandem with the development of the clinic has allowed the medical profession to exercise a high degree of control over the definition and quantification of the human body.[77] When this medical, scientific, objective gaze turns to pregnancy, it transforms the experience into an event that exists simultaneously as an irreducible mystery and as a medical artifact to be studied and broken down by tests.[78] The woman herself is neither subject nor object of the medical gaze; she disappears as the acquiescer to the medical recommendation. This theme is especially evident in the abortion cases; for instance, although the holding of *Roe v. Wade* was based on the privacy interests of women seeking abortions, the interests of doctors were also considered

75. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 774 (9th ed. 1990).

76. BLACK'S LAW DICTIONARY 1013 (6th ed. 1990) (emphasis added).

77. MICHEL FOUCAULT, THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION 195-96 (A.M. Sheridan Smith trans., 1973) (1963).

78. One example is the frequent use of chorionic villus sampling, a procedure that involves inserting a small tube into the uterus and withdrawing a small quantity of placental material for analysis, despite evidence that the procedure can cause spontaneous abortion and limb deformities. Elisabeth Rosenthal, *Technique for Early Prenatal Test Comes Under Question in Studies*, N.Y. TIMES, July 10, 1991, at C11.

and weighed.[79]

At the same time, the fetus is an object of medical interest. As the fetus develops, it increasingly acquires legitimate interests that can and do conflict with those of the woman carrying it. In the literature on reproductive technology, the woman may be a "uterine environment," an "endocrinological environment," a "surrogate uterus," an "alternate reproduction vehicle," a "host womb," or an "agent of gestation," but she is almost never a whole person with her own existence.[80] As they "harvest" eggs from women, "medical researchers distance themselves from the humanity of women and ignore the emotional impact of their experimentation."[81] Infertility is almost automatically assumed to be the fault of the female body, upon which almost all reproductive technology is put into practice. Yet "[i]t has been estimated that 25 percent of women in IVF [in vitro fertilization] programs are there because of male partners' problems."[82]

The biological model's conflation of women and mothers encourages the development of stereotypes about women. Policies based on motherhood as a unique biological state support the assumption "that women are uniquely capable of, and should be primarily responsible for, childcare. At the same time, these policies implicitly deny the parenting ability of men. They serve . . . to perpetuate invalid stereotypes of appropriate social roles that particularly disadvantage women."[83] These stereotypes often lead employers to have different expectations regarding the behavior and conduct of their female employees than those they hold for their male employees.

Ann Hopkins was nominated in 1982 for partnership at Price Waterhouse, a "big Eight" accounting firm. She had worked for the firm since 1978, and had been exceptionally successful in obtaining business for the firm. By August of 1982, when she and eighty-seven other candidates, all male, were nominated for partnership, she had won contract awards with the Department of State and the Farmers' Home Administration worth between $34 and $44 million to Price Waterhouse, an accomplishment unparalleled by any of the other nominees. She had also billed more hours than any of her eighty-seven peers.

Forty-seven of the eighty-eight nominees were made partners. Twenty-one were rejected outright. The remaining twenty, including Ann Hopkins, had their applications placed on hold. Of those twenty, fifteen were renominated the next year and made partners. Ann Hopkins was not among them. Why? According to the (male) partners who evaluated her, she needed to take a "course at charm school." She used profanity; the partners did not object to the profanity, but to Ann Hopkins' use of it "because she is a lady using foul

79. Roe v. Wade, 410 U.S. 113, 165-66 (1973).

80. Robyn Rowland, *Decoding Reprospeak*, Ms., May/June 1991, at 38, 38-39.

81. *Id.* at 38.

82. Janice G. Raymond, *International Traffic in Reproduction*, Ms., May/June 1991, at 28, 28-29.

83. Dowd, *supra* note 67, at 714.

language." She needed more "social grace." Her chances in the future might be improved if she could "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Ann Hopkins sued.

She was fortunate. Her claim, though it had to travel to the Supreme Court, was vindicated. Price Waterhouse, by using gender stereotypes, had discriminated on the basis of sex. But it was only the blatant use of stereotyping language — the presence of so many "smoking guns" — that convinced the Supreme Court that discrimination had occurred.[84]

The language of motherhood encourages stereotyping, which is detrimental because it closes off space for individual variation and experimentation.[85] If biology defines and limits motherhood to women, and society defines and limits women to motherhood, "modified" mothers — working mothers, unwed mothers, surrogate mothers, etc. — are measured unfavorably against an unstated norm: the married housewife.[86] All language includes some measure of oversimplification and stereotyping, but the language of maternity threatens to subsume all women within its reach. Furthermore, it allows and encourages the conflation of maternity, motherhood, and pregnancy: although definitionally the terms have different meanings, in use they become almost interchangeable.

Biological definitions of motherhood both affect and are affected by society and law. As part of the social structure, the use of these definitions colors the institutions and structure of the workplace as well as the courts' treatment of women. The next section examines motherhood in society and law generally in order to develop a base from which to explore and critique current approaches to sex discrimination under Title VII.

B. Pregnancy and Motherhood in Society and Law

As women, we live in a society that simultaneously assigns value to and devalues motherhood.[87] Society respects motherhood as a noble and benign calling and historically has lauded its virtues.[88] However, substantial resistance still exists toward viewing it as work.[89] The valuation of motherhood seems thus to be an ethical, rather than a monetary, valuation.[90]

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84. Price Waterhouse v. Hopkins, 490 U.S. 228, 232-35 (1989).

85. Cornell, *supra* note 29, at 400.

86. Minow, *supra* note 6, at 44.

87. Ashe, *supra* note 14, at 544.

88. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (upholding an Oregon statute restricting hours of employment despite Lochner v. New York, 198 U.S. 45 (1904), because of woman's delicate physique and vital maternal function).

89. For instance, Felice Schwartz makes the surprising claim that "although the feminist movement was an expression of women's quest for freedom from their home-based lives, most women were remarkably free already .... Women's traditional role ... included freedom from responsibility." Schwartz, *supra* note 73, at 67. One wonders who keeps her house and raised her children.

90. We can look, for instance, at the furor arising from the photograph of a nude and

In daily life, the devaluation of motherhood is especially apparent in the low salaries of child care providers and elementary school teachers, both of whom, not coincidentally, are primarily female.[91] The exclusion of parental child care from the wage economy is further evidence of this problem.

Undocumented aliens frequently get work as live-in nannies. Such a woman essentially has the responsibility for raising the children of her (usually) white, well-educated employers, who know that to take time out for their children is to accept serious setbacks in their careers. One such caregiver explains:

> The people of this society have all been good to me. The only thing is that I've been made illegal. But they need us, too. Maybe in our countries, we were secretaries, accountants — and here, maids. What I wouldn't do to work in an office with a computer in front of me! That's what I did in El Salvador . . . . You know, if I got rich and pregnant, and had a gringa and a Latina in front of me for the job of nanny, I would give it to the Latina. I know how my *raza* takes care of children, but the gringa . . . I just don't know how they care for their children. I don't know if the gringa would do the work well, and love my little dark baby.[92]

She has daughters of her own, but could not bring them to the United States. They remain in El Salvador, cared for by her mother.[93]

The family/civil society split grounds and explains this valuation/devaluation paradox. When motherhood exists completely within the sphere of the family, it is valued. But when motherhood intrudes into civil society, it is devalued both as women's work and as women's special problem. Thus, society's conflicting understanding of motherhood traps women in the paradoxical expectation that we should desire to have children, but that we should freely give up privileges and advantages in the paid workplace to do so. Further, we should not expect economic reward for performing our child care duties. These expectations are so deeply embedded that a woman with a successful paid career may feel like and be seen as a personal failure if she has no chil-

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pregnant Demi Moore that appeared on the August 1991 cover of *Vanity Fair*. Reactions to this image ranged from vigorous affirmations of the sexiness of pregnant women to outrage over the invasion of the fetus' privacy. *See Opinions: Are You Offended By This Picture?*, THE INDEPENDENT, July 14, 1991, at 23. Indeed, the magazine was pulled from the shelves of some grocery stores. Suzanne Fields, *Pretty People Without Clothes*, WASH. TIMES, July 23, 1991, at G1. It is interesting that this fairly discreet photograph provoked more than a yawn in a world where images of nude and nearly nude women are ubiquitous. Nevertheless, many people felt that the photograph denigrated the very meaning of motherhood. *See* Ellen Goodman, *Sexuality and Motherhood: A Lens Exposes Visual Taboo*, BOSTON GLOBE, July 18, 1991, at 13.

91. Such devaluation also occurs with respect to race; it is no accident that many in-home child care providers have traditionally been and continue to be women of color. *See* Beatriz Johnston-Hernandez, *Nanny: Confessions of an "Illegal" Caregiver*, MOTHER JONES, May/June 1991.

92. *Id.* at 43.

93. *Id.*

dren. Simultaneously, the business world is widely perceived as closing off the option of motherhood to women who wish to achieve the same positions and respect to which we could aspire if we were men.[94]

The mirror image of this problem is the continued denigration of the role of male parents. Some blame fathers' limited role in child rearing on the lack of adequate paternity leave. However, data from Sweden suggests that the problem is rooted more in social practices than in law. Although Swedish employers must grant full paternity leave, few fathers take advantage of it, while mothers continue to take maternity leave in large numbers.[95] Some feminists believe that "[i]f mothering is a valued social activity then there should be no sacrifice of either status or pay, and, of course, in the name of collapsing the gender divide and imposed stereotypes, we should encourage men to take up this activity."[96] However, the continuing bifurcation of family and civil society, along with the definitional placement of women in the former sphere and men in the latter, makes such change difficult. Men in our society face tremendous risks in choosing to value their roles as parents over their roles in civil society.

Society at large has portrayed pregnancy as unique and female. Its femaleness places it within the realm of family immediacy and subjectivity. Thus, "[p]ermeating and sustaining" our assumptions about women's role in society "is the view that pregnancy is unique — that it affects only women and it is like no other human condition in its immediate physical effects, significance, and consequences."[97] Furthermore, societal use of the definition of motherhood as pertaining to all women and only to women leads to the assumption that "all women want to and will become pregnant, and that this can happen at any time without planning or warning."[98] This attitude ultimately has led to the imposition of societal and legal limitations in employment based on pregnancy.[99]

Society, through its placement of women in the family, associates not only pregnancy but also child rearing with women. In spite of social changes,

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94. Schwartz, *supra* note 73, at 69.

95. Although the percentage of Swedish fathers taking paternity leave has risen to over 25%, these men still must "tolerate working fathers' scornful references to 'velvet daddies'." *By Your Leave, Europe*, THE ECONOMIST, Aug. 22, 1987, at 46. The same article mentions that "the Italians are so family-minded that they have made it a criminal offense for a woman to work during the two months before the birth of her child or in the three months after. *Id. See also* A Conversation With Peter Stearns, *We Are Holding on to Male Values that Are Outdated*, U.S. NEWS & WORLD REPORT, Nov. 22, 1982, at 86 ("Even in . . . Sweden . . . where they have granted paternity leave to new fathers, few men have taken advantage of it.").

In the United States, of the few fathers who have the option of taking paternity leave, less than one percent choose to use it. Anne Nelson, *Rock-A-Bye Niño*, MOTHER JONES, May/June 1991, at 40, 74.

96. Cornell, *supra* note 29, at 404.

97. Finley, *supra* note 63, at 1139.

98. *Id.* at 1131.

99. Dowd, *supra* note 67, at 715.

"childcare remains a primarily female responsibility."[100] Analysis of the silent reasoning behind the "mommy track" proposal exposes gender stereotypes as embedded in and reinforced by the workplace and society. Felice Schwartz, writing for the executive audience of the *Harvard Business Review*, attempts to establish a way in which women can provide a pool of middle level managers to replace current, less productive employees, who hold such positions either as stepping stones or as dead ends for their stalled careers.[101] Her article purports to discuss "Management Women and the New Facts of Life," but instead primarily presents stereotypic views of women, men, and their roles as parents and as employees. The most striking thing about her proposal is its blindness to the subtle influence of the gender stereotypes embedded in our social conceptions of women's roles.

Schwartz links women's inability to fit in with modern corporate culture to maternity, which she labels "the one immutable, enduring difference between men and women."[102] Her foray into essentialism justifies her proposition that management women should be divided into two castes: "career-primary" and "career-and-family."[103] The small, elite class of "career-primary" women should be identified early and encouraged to become integrated into modern corporate culture, while the "career-and-family" women should be used as mid-level managers, since these women will be quite willing to sacrifice job prestige and pay for the ability to nurture children.[104]

Schwartz notes but fails to grasp the significance of the fact that ninety percent of executive men have children by the age of forty.[105] Executive men generally do not have to sacrifice their ability to have families to their careers; on the contrary, they are expected to have children. This fact demonstrates the deep social problem to which Schwartz and society are often oblivious: the construction and deployment of the definitions of women as mothers and men as workers create a dichotomy in the way male and female employees are treated in and respond to the employment context. Women, in contrast to many men, face tremendous difficulty in balancing the desire to have a career with the desire to have a family. These constructed definitions are supported, not undermined, by Schwartz' proposal. She wishes to create women-men ("career-primary") and women-women ("career-and-family"). The women-men must be exactly like our male counterparts, with one exception. To demonstrate our good faith commitment to modern corporate culture, we must either forgo parenthood completely or find ourselves a partner who will

100. *Id.* at 699.

101. Schwartz proposed in her article the now infamous "mommy track." She sees the decision of employers to get involved in their female employees' family lives as a natural and reasonable way to resolve workplace problems. Schwartz, *supra* note 73, at 74.

102. *Id.* at 66.

103. *Id.* at 70.

104. *Id.* at 70-71.

105. *Id.* at 69.

be willing to be our "housewife."[106] The "majority," women-women, "are willing to trade some career growth and compensation for freedom from the constant pressure to work long hours and weekends."[107] Instead, such women will be trapped in the doldrums of middle management so we can enjoy the privilege of holding down two jobs.[108] Women-women can get "flexibility and family support,"[109] but only at the price of promotions, responsibility, and pay.

Schwartz asserts as her "new facts" the observations that women have most of the childcare responsibilities and that "all working mothers" experience "persistent guilt."[110] Her solution to the problems faced by "working mothers" embeds more deeply the marginality of women as workers in civil society. Furthermore, she implicitly assumes that men are neither primary nor primarily parents. Men's lack of involvement is "true" and "natural," Schwartz apparently assumes, because only women are willing to and should be required to bargain away responsibility, wages, and promotions at work for responsibility at home. By focusing on working mothers, Schwartz ignores the working fathers who, because of societal pressures, find themselves unable to participate in family life in any meaningful sense.

The deployment of motherhood in society and its concurrence with paternalistic treatment of women is not new.[111] The difference between old paternalism and modern paternalism exists primarily in the mechanism through which protection takes place. Protective legislation has been replaced by protective employer policies, which are often upheld by the courts as long as they do not reflect what the courts recognize as "stereotypes."[112] Thus, a circuit court of appeals could understand a company's "long-standing corporate concern for the danger lead poses to the health and welfare of their employees, their employees' families and the general public as legitimate grounds for paternalistic protection of women."[113] Although the Supreme Court has declared illegitimate the most restrictive measure for "fetal protection" — that of barring women altogether from the workplace — less restrictive measures

106. *Id.* at 70-71. Thus we would reground and reaffirm a contemporary version of the family/civil society split.

107. *Id.* at 70.

108. Schwartz apparently does not recognize childcare and housekeeping as work.

109. *Id.* at 72.

110. *Id.*

111. *See* Muller v. Oregon, 208 U.S. 412, 422 (1908) (sustaining protective legislation regarding women's employment in an era in which such legislation regarding men was routinely struck down. The Court observed that "women's physical structure" put her "at a disadvantage in the struggle for subsistence," and thus protective legislation "seem[ed] necessary to secure real equality of right . . . .").

112. *See* International Union, UAW v. Johnson Controls, 111 S. Ct. 1196 (1991).

113. International Union, UAW v. Johnson Controls, 886 F.2d 871, 875 (7th Cir. 1989) *rev'd*, 111 S. Ct. 1196 (1991). While the Supreme Court overturned the Seventh Circuit's decision, the holding here illustrates prevailing social attitudes about what is appropriate protective behavior.

could pass judicial scrutiny.[114]

The paternalistic aspirations of employers seem to undermine the model of separation between civil society and family. If family concerns are understood to be entirely isolated from civil society, how can employers, as the paradigmatic inhabitors of civil society, justify their intervention into the closed realm of the family? However, employers are not wholly creatures of civil society; they lead lives on a personal and individual level as well.[115]

While overt and blatantly stereotype-driven paternalism which is recognizable to the courts as such may be subject to the dictates of Title VII, more subtle forms are embedded in and maintained by society's conception of motherhood. These forms operate on women in social settings outside the contours of the law.

When Kary Moss, an ACLU attorney, became pregnant, she had been smoking for some time. As her pregnancy began to show and she began to wear maternity clothes to work, she was surprised that many people who had never before expressed any great interest in her health made a point of warning her of the dangers of smoking to fetuses, in spite of the fact that she had written and published several articles on "fetal abuse" and had participated as legal counsel in several cases involving pregnant substance abusers.[116] Obviously she knew about the risk, but because of her pregnancy, her colleagues viewed her as a pregnant woman and not as an intelligent rational person who had the knowledge and ability to choose her actions.

Society's construction of maternity promotes discrimination against both men and women. While women's commitment to and connection with family is overvalued, men's is so undervalued as to be practically nonexistent, except in an economic sense. However, dangerous substances in the workplace often do not differentiate on the basis of gender.[117] Men and women are both endangered, yet the risk to women is overemphasized while the risk to men is downplayed. Removing only women from a dangerous workplace denies

114. While all nine Justices voted to strike Johnson Controls' policy, four believed that, in some cases, an employer could exclude women entirely from a workplace for reasons related to "fetal protection." *Johnson Controls*, 111 S. Ct. at 1210. I explore this concurrence's significance *infra*, text accompanying notes 207-08.

115. As Judge Posner pointed out in dissent in *Johnson Controls* at the circuit court level:

> We know from the controversy over abortion that many people are passionately protective of fetal welfare, and they cannot all be expected—perhaps they cannot be required—to park their passions at the company gate. That 'strong state interest in protecting the potential life of the fetus' of which the Supreme Court spoke in Maher v. Roe . . . and other cases is not a judicial invention but the product of a groundswell of powerful emotion by a significant part of the community, and is only indirectly, although possibly substantially, in conflict with women's workplace aspirations.

Johnson Controls, 886 F.2d at 905 (Posner, J., dissenting).

116. Kary Moss, Lecture at New York University School of Law on Prosecutions and Civil Actions Directed at "Fetal Abuse" (March 1990).

117. Vibiana M. Andrade, *The Toxic Workplace: Title VII Protection for the Potentially Pregnant Person*, 4 HARV. WOMEN'S L.J. 71, 103 (1981); *see also* PETER SCHUCK, AGENT ORANGE ON TRIAL 131-32 (1986) (discussing the claims for tort damages brought by children with birth defects born of Vietnam veterans exposed to the defoliant Agent Orange).

men's vulnerabilities and devalues their desires and interests as they relate to the family.[118]

Society's definition of women as mothers causes us to "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."[119] Women's defined and circumscribed role makes us pay a price to have a family; our participation in civil society is made more difficult, while men are socialized to totally forego a concrete role in family life. In the final analysis, "[t]wo important lessons from history are that women have not been treated the same as men, and that women have lost their jobs and benefits due to pregnancy."[120]

The American legal system has done little to disrupt this historic oppression. In addition to fetal protection policies, numerous examples exist of "[t]he legal system's continuing tolerance of . . . policies [that] . . . reinforce[ ] the underlying assumption that being a worker and being a mother, or an actively involved parent, are inherently incompatible roles."[121] Employers often still do not have maternal leave policies that are designed to take into account women's individual experiences of pregnancy. We must remember that "the most egregious attacks upon female personhood . . . occur at the intersection of law and maternity."[122] The process of legal analysis incorporates preset understandings of motherhood inimical to the interest of women in our ability to create and define ourselves. Such understandings can make motherhood and paid work totally incompatible.

Elizabeth Marshall (a pseudonym) had it all. A Harvard Law School graduate, she had obtained a job with one of the largest and most prestigious law firms in Boston. She had risen to a senior level in the litigation department, and loved her work. Then she had her first child. When the child was six and a half months old, she returned to the firm full time, but soon decided to have a second child. After returning to work again when her second child was five months old, she discovered that, while the pressure of working full time with one child was tremendous but bearable, with two young children at home she would not be able to manage coming in to the office five days a week.

She negotiated with her firm, which agreed to allow her to try coming in only three days a week. In exchange for this concession, the firm required her to bill forty-five hours for each of her three day weeks, and to accept a disproportionate pay cut. Soon, Ms. Marshall found herself receiving research and

118. Indeed, one of the named plaintiffs in *Johnson Controls* was a man who desired a transfer out of a high lead environment prior to attempting to become a father. *Johnson Controls*, 111 S. Ct. at 1203. It is also interesting to note how little his particular claim figured in the Supreme Court's analysis of the case.

119. Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 353 n.112 (1984-85).

120. Finley, *supra* note 63, at 1151.

121. *Id.* at 1122.

122. Ashe, *supra* note 14, at 523.

first-year associate assignments, rather than participating in trial preparation. Finally, in frustration, she left the firm and civil society to become a housewife. Ironically, she blames this result on her own "unwillingness to compromise."[123]

Liberal theory and American jurisprudence have largely developed in the same philosophical space the main tenets of modern liberal theory which infuse much of modern jurisprudence.[124] Some of these tenets are problematic at their intersection with pregnancy and maternity. Most troublesome is the quest for objectivity in law, the belief that neutrality is the ideal of application, and the presumption that new situations can be analogized to previous ones. These three concerns of American jurisprudence all act to obscure real disadvantages to women that occur with respect to pregnancy and maternity.

Law often presumes objectivity through its adoption of a universal perspective.[125] It operates by the use of purportedly neutral objective universal principles to develop ostensibly neutral objective universal rules, which are then applied to particular facts.[126] The problem with this mechanism is that it creates an absence of context and particularity in the analysis of a situation. Thus, when context is important as an acknowledgement of individual experiences, legal analysis elides its value. "The pregnancy cases are notable for their absence of attention to context,"[127] and this absence leads to decisions that evade particularity. Objectivity, since it attempts to view all human experience through a universal lens, relegates what is different to be seen as "other."[128] Objectivity as an analytical standpoint was articulated by classical liberal thinkers such as Kant, who, as we have seen, consciously excluded women from the realm of the objective. Pregnancy, since it is not accessible through this lens, makes women different, and thus encourages our construction as "others." The construction of woman as "other" leaves her "without a knowable essence, substance or identity."[129] This conflicted construction,

123. Patricia A. Mairs, *Bringing Up Baby*, NAT'L L.J. 1 (March 14, 1988).

124. For an analysis of how classical liberal theory from the time of the Greeks to Locke and Rousseau influenced the thinking of the Framers, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967). For a more specific example of the influence of liberal philosophy on American law, see JOHN STUART MILL, *On Liberty, in* THREE ESSAYS (1975) (1859); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) and Dennis v. United States, 341 U.S. 494, 579 (1951) (Black, J., dissenting). When discussing the "marketplace of ideas" and the intent of the Framers in creating the First Amendment, we ought to consider that the concept of the marketplace of ideas did not gain its full and complete expression until the publication of *On Liberty* in 1859.

125. *See* discussion of and citations to works about universality, *supra* text accompanying notes 21-23.

126. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 147 (1988).

127. Finley, *supra* note 63, at 1162.

128. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1951) (on otherness generally); SIMONE DE BEAUVOIR, THE SECOND SEX (H.M. Parshley trans. and ed., 1970) (on women as the unknowable Other).

129. Drucilla Cornell, Gender, Sex and Equivalent Rights, Lecture at Discourses Speaker Series, New York University School of Law (Mar. 8, 1991) *in* THE COMMENTATOR, Apr. 11, 1991 at 6 [hereinafter Gender, Sex and Equivalent Rights].

most acute at the point of pregnancy and motherhood, leaves law unable to fit the day-to-day experiences of women into its objective framework.

The ideal of neutral evaluation operating from an impartial universal perspective is deeply embedded in our law. In the past, belief in a neutral universal perspective has frequently shielded real discriminatory effects from judicial perception. Neutrality implies the existence of a neutral baseline, a "level playing field," that underlies decisions made from its standpoint.[130] As a concept, neutrality has too often applied only superficially; read within a real-life context, there is nothing "neutral" about a policy that says you can't work here if you don't have a high school diploma, or one which says an employer will cover every disability but pregnancy.[131] If all or substantially all those excluded or disadvantaged are from a defined "other" group, such policies, though superficially even-handed, have the effect of discriminating against members of that group. The implicit belief that neutral language means neutral policy is particularly dangerous in the context of pregnancy and motherhood, where the bifurcation of women's roles in the family and in civil society allows us to be defined and shut out by the family role. For instance, is there any real doubt that a court applying existing law would be acting legitimately if it did not hold liable for sex discrimination a company which refused to promote a woman to partnership because of her reluctance to work seventy hours a week during her children's formative years? Where is the sexism? Neutrality makes it invisible.

Law functions and extends itself by analogy. Thus, "if we can show that pregnancy is like a hernia, we can legitimately claim that we are discriminated against as women when our insurance program covers hernias and not pregnancies, because under this understanding, sex-specific male disabilities are covered while female 'disabilities' are not."[132] Because of law's inability to analogize pregnancy or motherhood to anything it encompasses within civil society, it cannot provide meaningful and useful standards for pregnancy, or subdue it within the established framework. One commentator has suggested that the problem is partially due to a mere lack of creativity, but the construction and deployment of maternity collide with law at a level where creativity is not a sufficient solution.[133]

130. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 882-883 (1987).

131. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court recognized the non-neutral effect of a high school diploma requirement. In General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), it failed to recognize the equivalent effect of excepting pregnancy from insurance coverage; to reverse the error, Congress had to amend Title VII of the Civil Rights Act. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978). By enacting subsection (k), Congress not only overturned the holding of *General Electric*, but also rejected the Supreme Court's reasoning that differential treatment of pregnancy is not gender-based discrimination because only women can become pregnant. *See* Newport News Shipping and Dry Dock Co. v. EEOC, 462 U.S. 669, 676-82 (1983).

132. Gender, Sex and Equivalent Rights, *supra* note 129.

133. "In *CalFed*, the Court tried to avoid the problems of stereotyping by characterizing pregnancy solely as a physical disability — ignoring alternative characterizations that analogize women's role in pregnancy to veterans' role in national defense — a role justifying preferential

Thus, the definitional deployment of maternity intersects problematically with embedded liberal assumptions in law. Adding this realization to society's understanding of the meaning of maternity and pregnancy, we see the emergence of a structure that acts to hinder women's participation in civil society by linking us inextricably with the family. I will next take a closer look at the ways in which this dynamic is reproduced in law.

C. The Gendered Workplace and Gendered Legal Standards

If all human relationships in our society take place between and among gendered individuals, we should not be surprised to see gendered standards in the workplace and in law. The silent assumption that law is neutral allows these insidious and nearly invisible gendered standards to remain unrecognized and unacknowledged. As a key part of civil society, the American workplace has developed in response to the needs and desires of men.[134]

The effect of these unacknowledged standards is evident when the law must address women's unique capacity to bear children. As Judge Cuhady wrote in dissent in *Johnson Controls* at the circuit court level:

> It is a matter of some interest that, of the twelve federal judges to have considered this case to date, none has been female. This is significant because this case, like other controversies of great potential consequence, demands, in addition to command of the disembodied rules, some insight into social reality.[135]

While sympathetic to the need for a female perspective, the judge misses the point. What he fears is a disconnection between the court's decision and "social reality." But the danger for women — what has injured us in the past and what continues to hamper our self creation and self definition — is precisely this social reality. Not the disconnection, but the social reality, causes "[t]he classes into which employees are divided . . . [to] be labeled 'potentially pregnant women' on the one hand and, on the other, 'people who cannot become pregnant.' "[136] The workplace structure assumes that the standard employee is one who cannot become pregnant.

American law's claim to be unbiased does not acknowledge the existence of a gendered standard against which discrimination claims are measured. Under "this [gendered] definition of discrimination, equality depends on the demonstration that a woman is *like* her male counterparts. Discrimination, [so] defined, is based on . . . comparative evaluation between . . . [the gen-

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treatment in employment." Minow, *supra* note 6, at 18 n.32. I would argue, however, that the problem is precisely that such an analogy is not thinkable under the liberal framework embedded in our law. Indeed, with the threat of Rule 11 sanctions falling heavily on unconventional civil rights claims, to think creatively might be dangerous. *See* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988).

134. See discussion of the circumstances of Title VII's passage, *infra* note 173 and accompanying text.

135. 886 F.2d 871, 902 (7th Cir. 1989) (Cuhady, J., dissenting).

136. Andrade, *supra* note 117, at 81.

ders]."[137] Abstract justice asks, how does the experience of this pregnant woman or this mother measure up against the standard? In its attempts to analogize, it does not recognize that non-neutral assumptions underlie the standard.[138]

This construction has created a situation in which women cannot complain of discrimination unless we can claim that we are not being treated the same way as men.[139] How can something like pregnancy fit into this neutral, abstract framework? Surely some of the difficulty courts and legislatures have had with pregnancy in the workplace is due to the fact that men do not experience it. It disrupts the male paradigm of a worker, and it cannot be captured by the imagery of likeness.

However, more than just difference is implicated here. Courts have had no problems handling such differences as women's longer lifespans[140] and smaller average size.[141] It is not so much that pregnancy itself constitutes a relevant biological difference, but that it has been constructed by society as a special and unmanageable phenomenon within legal discourse about employment.

Since historical practices have not been neutral, the "neutral" actions of government reinforce a non-neutral system of social arrangements.[142] As currently constructed and deployed, the "neutral" perspective in law is inherently male. The law does not identify its perspective as a male one, but in the main it is and historically has been created and interpreted by men.[143] Both sexuality and gender are societally defined and determined; in our society, gender divisions have led to a gender hierarchy.[144] From its privileged position, male gender determines "who is different and who is normal."[145] In making this determination, legal decisionmakers (whether legislators, judges, or lawyers) must operate from within their own pre-determined points of view, since no one can completely escape her perspective. Because legal rules themselves

137. Gender, Sex and Equivalent Rights, *supra* note 129, at 400.

138. For a critique of liberal acceptance of neutrality as a valid starting point for constitutional theory, see Cass Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1 (1992).

139. "[A]s 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." W. Williams, *supra* note 119, at 346.

140. City of Los Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) (holding a pension plan which required greater contributions from women employees based on their longer average lifespans violated Title VII).

141. Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements which impacted women disproportionately is *prima facie* case of discrimination).

142. Sunstein, *supra* note 138, at 5.

143. Two women sit in the United States Senate, one woman on the Supreme Court. Fewer than 10% of the members of the House of Representatives are female.

144. *See* MACKINNON, *supra* note 63 (explaining and criticizing the construction and differentiation of gender roles and gender hierarchy).

145. Minow, *supra* note 6, at 32. This authority parallels that of heterosexuality in our culture. For a discussion and critique of heterosexuality's marginalization of lesbian and gay perspectives, see Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 139 (1980).

have evolved through time, and, until recently, largely without the direct influence of women, the current attempt to include women's perspectives through measures like Title VII is not a complete solution. Certainly though, the more women are able to integrate ourselves into the legal system, the more the system will have to adopt and accommodate our perspectives to the extent possible within it.

"The role of men in defining the standard of normalcy and in assigning significance to female differences, means that the whole premise of our equality jurisprudence is whatever is male under the norm."[146] The male perspective colors the questions we ask; legislators and courts analyze "whether women are like men, or when, and on what terms, women should be allowed into the male world, where, if they can act just like men, they can succeed."[147] By defining women's rights from a male perspective,[148] the law renders itself incapable of coping with femininity at the crucially-constructed difference of women's childbearing capacity.

Martha Minow's fear is that "[p]resumptions about whose perspective matters ultimately may be embedded in the final, typically unstated assumption: when in doubt, the status quo is preferred, and is indeed presumed natural and free from coercion."[149] When this status quo includes an assumption by men that women rear their children, and that women "should renounce their careers to raise families,"[150] its construction as a natural and neutral result of societal consensus fundamentally revokes women's ability to participate as legitimate members of the public realm.

The male perspective assumes an ideal of homogeneity. American law relies silently upon this assumption, which is embedded in dominant American culture and political tradition.[151] Of course, this ideal is not faceless or without context; the homogeneous "American" has both race and gender. "The American melting pot has been a cauldron into which we have put black, brown, red, yellow and white men and women, in the hope that we will come up with white men."[152] The insistence upon homogeneity creates an inflexible mold; if a situation does not fit the mold, a legitimate solution cannot be easily reached.

For Drucilla Cornell, it is just this rigidity which creates the problem. The wrong in discrimination, she claims, is "the imposition of rigid gender identities on sexual beings who can never be adequately captured by any . . . definition."[153] In her analysis, the breaking down of gender identities and gen-

146. Finley, *supra* note 63, at 1155 (citation omitted).

147. *Id.*

148. Wendy Williams points out that Chief Justice Rehnquist is in the distinguished company of Sigmund Freud in his "conviction that men are the standard against which equality is to be measured." W. Williams, *supra* note 119, at 346 n.86.

149. Minow, *supra* note 6, at 54.

150. Schwartz, *supra* note 73, at 67.

151. Finley, *supra* note 63, at 1152.

152. *Id.* at 1153.

153. Gender, Sex and Equivalent Rights, *supra* note 129, at 403.

der roles creates a broader space for human freedom for members of both genders, since both are trapped within their construction as males or females.

To fit within the male legal paradigm, femininity must either erase itself or shape itself to conform to the standard. The "problem" with pregnancy is that it can do neither. It strikes at the heart of the unstated assumption of homogeneity by parading its incorrigibility. The inability of the male standard to reduce pregnancy from its mysterious state leads to its valued/devalued status.

In the workplace, pregnancy has come to be defined as a disability. The equation of pregnancy with disability is not problematic; the equation of disability with dereliction is. The definition of pregnancy as disability, an attempt to tame pregnancy's incomprehensibility within the male-gendered world of "neutral" standards, thus provides evidence of its devaluation. The law equates it with disease or injury[154] and does not respect its status as a chosen and desired state of being. Furthermore, the idea that childbearing is valuable to society, a concept so pervasive in the construction of women as mothers with respect to our role in the family, is utterly invisible in civil society. After all, how can a "disability" possibly be construed as a benefit to society?

Difference in this context seems to imply devaluation. "[T]o challenge the devaluation of child-bearing, we must insist on recognition of feminine difference, and this difference must not be interpreted so as to devalue us."[155] In other contexts, when the difference in question connects to men's societal roles, difference can imply valuation, and the law has required employers to bear the responsibility for their welfare.[156] Women, on the other hand, bear our own burdens.

This devalorization constitutes a serious barrier to the ability of women to achieve full membership in society. Women face conflict when our experiences of pregnancy and childbirth, which seem unitary and indivisible to many of us, become divided into strands that are highly valued in one context

154. Note here that "disability" carries a connotation of incompetence to perform within civil society. People with disabilities share many of the workplace difficulties that pregnant women face; the workplace assumes ablebodiedness along with maleness. I am grateful to Edith Friedman and Professor Sally Goldfarb for illumination on this point.

155. Cornell, *supra* note 29, at 404.

156. The best example is veterans' preferences, which operate overwhelmingly to the benefit of men. *See* Personnel Administrator v. Feeney, 442 U.S. 256 (1979) (rejecting an equal protection attack on a state law giving an "absolute lifetime" preference to armed service veterans for civil service jobs, despite the fact that over 98% of the veterans were male). As Lucinda Finley points out, "[w]hen male activities and needs have been deemed socially important, employers have frequently been expected to bear some responsibility for them, even to the point of restructuring their workplace to the detriment of some other workers." Finley, *supra* note 63, at 1176. For those who might protest that in today's armed forces women can be beneficiaries of veterans' preferences, note that, in spite of the nightly television coverage of brave women soldiers departing to fight Saddam Hussein during the 1991 Gulf War, only six percent of the troops serving in that war were female, and women are still excluded from combat positions. George DeWan, *After the War: Issues*, NEWSDAY 19 (March 5, 1991).

and greatly devalued in another. The social process of stereotyping exacerbates this conflict.

As a social process, stereotyping functions not only through language, as discussed above,[157] but also through the construction of women as different and other. The stereotype of the "real" woman persists. Women with serious careers are not able to fulfill our socially constructed roles within the family, since "[f]or women, of course [the decision to pursue their careers first] . . . requires that they remain single or at least childless or, if they do have children, that they be satisfied to have others raise them."[158] Serious jobs are thus only appropriate for men or for women who can act like men.

Another common stereotype is the belief that "maternity is biological rather than cultural."[159] This belief creates a presumption in favor of viewing differences as natural. If the differences are irrefutably rooted in biology and therefore are natural, the flow of the argument leads to the conclusion that perhaps the resulting inequalities are natural as well. If this is true, there really is not much hope of eradicating them. Although courts may reject "outmoded" reasoning based on old and admittedly invalid stereotypes, they accept "true" findings of "real" difference: current interpretation of sexual discrimination law holds that "the wrong of discrimination is the imposition of a universal on an individual who does not match that universal. The wrong is not the imposition of the stereotypes per se, but the imposition of stereotypes when they are not 'true' — . . . when the stereotypes are not an adequate description of . . . the person."[160] The construction of these stereotypes must be attacked in order to deconstruct the legal reasoning based on "real differences" that they support. Once the stereotypes are broken down, their use as indicators of "real difference" will be less potent. Therefore, legal rules and conclusions based on "real differences" will no longer appear presumptively valid.

Stereotyping creates problems in two ways. The first way, recognized by the Supreme Court as harmful, is the imposition of a "false" stereotype, which occurs when someone attributes to an individual negative characteristics that she does not in fact possess.[161] The attribution occurs because the attributor has learned to associate the negative characteristic with a particular "type" of person, and the unfairly-characterized person fits the type.[162] Second, biased interpretation occurs when a person has a characteristic that is interpreted negatively through the filter of the stereotype.[163] Ann Hopkins' experience

157. *See supra* text accompanying notes 85-86.

158. Schwartz, *supra* note 73, at 69.

159. *Id.* at 66.

160. Gender, Sex and Equivalent Rights, *supra* note 129, at 400.

161. Madeline Morris, *Stereotypic Alchemy: Transformative Stereotypes and Antidiscrimination Law*, 7 YALE L. & POL'Y REV. 251, 259 (1989).

162. *Id.*

163. *Id.* at 260.

with Price Waterhouse is an illustrative example.[164]

Feminist theory has been helpful in "challeng[ing] both the use of male measures and the assumption that women fail by them."[165] But more must be done. We need to deconstruct the framework of male-gendered neutrality and create utterly new blueprints to understand what equal opportunity in the workplace means. We must create a system that can "allow difference to be recognized and equally valued without women having to show that they are like men for legal purposes or having to make sacrifices because of the specificity of our 'sex' which makes us 'unlike' men."[166] This will enable us to move beyond current debates over difference and equality as competing and opposing paradigms.

This project will entail full-scale restructuring of the American workplace, but the gain in women's capacity to define and create ourselves will be priceless. Both women and men will then have the "freedom to choose career, family, or a combination of the two,"[167] without having to resist the oppression of the gender hierarchy.

The gendered workplace and legal system have engendered the equal treatment/special treatment debate, and through the degendering of the workplace and the law, our ability to deconstruct the terms of the debate will be significantly enhanced. I will now turn to this debate as it is situated in Title VII jurisprudence and examine its paradigmatic Supreme Court decisions. The centers of the equal treatment/special treatment debate delineate much current feminist and liberal thought on the significance of pregnancy and motherhood within the workplace.

III.
EQUAL TREATMENT AND PREFERENTIAL TREATMENT UNDER TITLE VII

> "I calculated that each woman carried about 40 pounds — about half her own weight — on the four-hour trek. 'Why do the women carry heavy loads and the men almost nothing?' I asked Dingono. 'Women are stronger,' he answered matter-of-factly. 'I could never carry all of that weight. Besides, men have to be free to use their weapons.' "[168]

Title VII provides a logical focus for my discussion of the equal treatment/special treatment debate. Two recent Supreme Court decisions decided under Title VII—*International Union, UAW v. Johnson Controls*[169] and *Cali-*

164. *See supra* note 84 and accompanying text.
165. Minow, *supra* note 6, at 61.
166. Cornell, *supra* note 29, at 404.
167. Schwartz, *supra* note 73, at 76.
168. Robert Bailey, *The Efe: Archers of the African Rain Forest*, NAT'L GEOGRAPHIC, Nov. 1989, at 664, 686.
169. 111 S. Ct. 1196 (1991).

fornia Federal Savings & Loan Association v. Guerra[170] — highlight the tension between the equal treatment and preferential treatment analyses. Both decisions gave rise to a great deal of celebration from liberal feminists. They grant an unprecedented level of protection to pregnant women's job security and benefits in the workplace. However, these cases highlight the persistence of deep structural problems that neither equal treatment nor preferential treatment advocates address. What does Title VII do, and what are its limitations? How do these limitations fit into the context of the debate? Most troubling is the continued struggle between a paradigm of equal treatment and a paradigm of special treatment, a struggle that obfuscates and obstructs a deeper and more useful construction of the "problem" of motherhood.

A. Title VII and Its Limitations

Title VII, enacted in 1964, amended by the Pregnancy Discrimination Act in 1978, and recently amended again, makes it an unlawful employment practice for any employer covered by its mandate "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[171] Title VII also governs the employment relationship once it has been created, by not allowing the employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."[172]

The original form of Title VII did not mention sex at all. Gender discrimination was included by amendment in an attempt to make the statute so unpalatable to southern Democrats that the entire provision would be unpassable, but this strategy failed.[173] Since sex was an afterthought, practically no legislative history existed regarding Title VII's application to gender discrimination until the 1978 addition of the Pregnancy Discrimination Act. Title VII in its original form was not drafted specifically to address discrimination against women in the workplace. As the subsequent analysis demonstrates, Title VII, both in its general applications and in its specific treatment of women, has failed to address pathological constructions of motherhood and has not effectively countered the split between family and civil society.

Title VII, as amended, specifically allows employers to justify discrimination based on sex if gender is a bona fide occupational qualification or if business necessity demands discrimination.[174] Both defenses are intended to be

170. 479 U.S. 272 (1987).

171. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1991).

172. *Id.*

173. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283-84 (1991).

174. 42 U.S.C. § 2000e-2(e) (1991).

narrow exceptions to the general rule of nondiscrimination.[175] Nevertheless, they do permit some degree of discrimination based on sex.

In spite of these limitations, Title VII has had an enormous impact in securing more marketplace work opportunities for women and others covered by it. Employment practices that were unquestioned thirty years ago are unthinkable now. However, Title VII is not a universal solution: it cannot eradicate discrimination, stereotyping, and prejudice from law or society generally and completely. Nor can it attack the separation of family life from civil society simply by opening civil society's doors to women. Like any federal law, it is applied and interpreted by predominantly male courts and subject to amendment by an overwhelmingly male Congress. Furthermore, its structural limitations inhibit its ability to attack the problems engendered by motherhood and pregnancy in the workplace.

The days when the Supreme Court could be counted upon to extend and strongly defend individual rights have (at least temporarily) passed. When the Court interprets Title VII, it in effect "say[s] what the law is"[176] and defines its shape and limits. The Rehnquist Court has decided several cases in ways that are quite troubling to civil rights advocates.[177] With a Supreme Court that is dedicated to minimizing its impact, Title VII's continued effectiveness is not at all assured.

Congress responded to these decisions by passing the Civil Rights Act of 1991, a comprehensive enactment that legislatively overturned a significant amount of the Supreme Court's erosion of protections against workplace discrimination.[178] Advocates for the Civil Rights Act of 1991, unlike those who argued for its 1990 predecessor, focused on the situation of women as an impetus to pass the act. While this is heartening, the situation of women in the workplace has previously served as a political battleground in which women were pawns in a struggle over societal change.[179] Furthermore, Congress is not the most trustworthy repository for individual rights. As recently as the

175. *Developments in the Law — Title VII*, 84 HARV. L. REV. 1109, 1178-79 (1971); Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977).

176. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

177. The Court has interpreted the language of Title VII to require the plaintiff to carry the burden of proof throughout a disparate impact case, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); to allow collateral attacks on consent decrees reached through class action litigation, Martin v. Wilkes, 490 U.S. 755 (1989); to allow discriminatory attitudes to play a non-decisive role in employment decisions, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); to prohibit the assessment of punitive damages in employment discrimination cases brought under Title VII, Lorance v. AT&T Technologies, 490 U.S. 900 (1989); to limit severely the awarding of attorneys' fees in Title VII litigation, Evans v. Jeff D., 475 U.S. 717 (1986); Independent Fed. of Flight Attendants v. Zipes, 491 U.S. 754 (1989); and not to apply to American employers operating beyond the borders of the United States, EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991).

178. *See* Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991).

179. When the nascent labor movement battled management over hour limitations and minimum wage regulators, women became the focus of litigation. *Cf.* Muller v. Oregon, 208 U.S. 412 (1908) (upholding hour limitation on women laundry workers); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking minimum wage for women).

early eighties, civil rights activists praised the Supreme Court and watched worriedly as Congress contemplated curtailing the Court's jurisdiction in busing and school prayer cases.[180] Title VII's protections are probably not constitutionally required; if the statute were repealed tomorrow, no recourse would exist under present understandings of what the Fourteenth Amendment requires.

These general critiques apply to any antidiscrimination law. However, the way Title VII handles employment discrimination against women on the basis of our reproductive capacity allows a great deal of discrimination, discrimination that should be prohibited under a broader understanding of the problem as I have expressed it. Even in its recently-amended incarnation, Title VII does not adequately address women's integration into the workforce as inhabitors of the dual worlds of family and civil society.[181]

A deeper theoretical problem is the existence and application of the bona fide occupational qualification (BFOQ) and business necessity defenses. Although the Supreme Court recently proclaimed that "[i]t is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make,"[182] the employer still has room to maneuver. In the context of a business necessity defense, if "a challenged practice serves, in a significant way, the legitimate employment goals of the employer,"[183] the practice may be permissible. Furthermore, the court will resolve the question of a practice's legitimacy through "a reasoned review of the employer's justification for his use of the challenged practice."[184] This reasoned review will take place within an entire social and legal context that has explicitly and implicitly discriminated against women for centuries.

In *Johnson Controls*, the Supreme Court held that a fetal protection pol-

180. Burt Neuborne, *The Supreme Court and the Judicial Process*, OUR ENDANGERED RIGHTS 27, 35-36 (Norman Dorsen ed., 1984).

181. Title VII itself also has damage limitations that discourage individuals with low paying jobs from bringing suit. While punitive damages are now available to Title VII plaintiffs, they may be obtained only if the plaintiff can prove that the discrimination was malicious or recklessly indifferent to her rights. Civil Rights Act of 1991, § 102, Pub. L. No. 102-66, 105 Stat. 1071, (1991). In the vast majority of cases, the necessary malice either will not be present or will not be provable. *See id.* Other monetary relief available under Title VII includes back pay, reinstatement, limited compensatory damages, and, in some cases, attorneys' fees. Section 102 of the Civil Rights Act of 1991 provides for limits on compensatory damages, apart from other types of damages mentioned. The limits vary with the size of the firm, ranging from $50,000 for a firm with 14-100 employees to $300,000 for firms employing more than 500. Though some plaintiffs sue mainly to force the employer to stop discriminating, most sue because they have been injured in an economic sense — they have been denied a job or a promotion, or they have been fired or demoted. If relief is limited to back pay and reinstatement in most cases, plaintiffs may not be willing to go through the trouble and expense involved in maintaining a lengthy Title VII suit.

182. International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1210 (1991).

183. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).

184. *Id.*

icy having nothing to do with the actual goal of the employer (producing batteries) was not maintainable as a bona fide occupational qualification. The limitations placed on the BFOQ defense in *Johnson Controls* do not address the basic question of whether blocking pregnant women from the workplace is permissible if pregnancy does impede our job performance in some "objective" sense. Even the expansive language of the Supreme Court opinion does not address this question. Given the willingness of the four concurring members of the Court to consider even fetal protection policies valid under some circumstances,[185] little reason exists to believe that a majority of the Court would be willing to strike down a policy that *could* be related to achievement of the primary goal of the employer.

This point is part of a more general objection to Title VII's mandate. Part of the statute's purpose is to attack and prevent discrimination against women, a goal that the courts attempt to achieve by analogizing the experiences of women to the experiences of men. However, "[i]f 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."[186] A difference must be visible to the judicial gaze before the discrimination can be acknowledged by the legal mind. We must remember that "Title VII . . . cannot produce fundamental change. For that, we must seek solutions outside the courtroom."[187] Facts like the unavailability of maternity leave for many women help to remind us that Title VII is not, and cannot be, a universal panacea.[188]

B. Johnson Controls *and the Equal Treatment Paradigm*

The equal treatment paradigm adopted in *Johnson Controls* purports to give women an equal right to make a unilateral decision whether to accept a risk of fetal injury. Johnson Controls, a battery manufacturer had adopted a fetal protection policy that excluded from high tech level work areas "[a]ll women except those whose inability to bear children is medically documented."[189] The Supreme Court struck down the policy, realizing that men play an important role in the creation of new life through their contribution of sperm.[190] In its decision to bar broad use of fetal protection policies, the Court recognized "what is not unique about the reproductive process of women."[191] At the circuit court level, Judge Easterbrook urged in dissent that

185. 111 S. Ct. at 1201 (White, J., concurring); *id.* at 1216 (Scalia, J., concurring).

186. W. Williams, *supra* note 119, at 375.

187. *Id.*

188. "The best estimates of the availability of maternity leave indicate that fully one-quarter of all employers do not provide any maternity leave. Even this figure may overstate the availability of maternity leave, because it fails to indicate the extent to which leave is provided where women work." Dowd, *supra* note 67, at 710.

189. International Union, UAW v. Johnson Controls, 886 F.2d 871, 876 n.8 (7th Cir. 1989), *rev'd*, 111 S. Ct. 1196 (1991).

190. *Id.*

191. W. Williams, *supra* note 119, at 341.

"[n]o legal or ethical principle . . . allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation, that the interests of the next generation always trumps the interests of living women, and that the only acceptable level of risk is zero."[192] The Supreme Court's analysis emphasizes equality: both men and women are at risk, and both men and women should be permitted to choose to accept this risk.[193]

Equality — defined by one commentator as the concept that "similarly situated individuals should be treated alike"[194] — is an ineradicable part of American legal and political idealism. The acceptance of equality as an ultimate goal implies a belief that difference is societally constructed and thus that "[d]ifferent treatment of women is more likely explained by social stereotypes of women's roles in the workplace."[195] The achievement of equality as constructed by equal treatment advocates would be "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 of women."[196]

This goal has much to commend it. The actual language of *Johnson Controls* holds promise for improving the condition of women who participate in both family life and civil society. The Court found that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."[197] Such policies are discriminatory for the simple reason that "[f]ertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job."[198] Men and women both face a risk to their reproductive systems and to their potential children, but fetal protection policies permit only men to accept the risk. Similar situation, different treatment, no justifiable defense — end of case. The picture is complete and contained within the classic equality framework.

For the Court, fertility is the similar situation. The opinion suggests by its silence that if women's fertility alone had been the criterion, the policy might have been unassailable.[199] The evil the Court sees is that women are not being treated the same way as men.[200] The rational and legal solution is to

192. 886 F.2d at 913 (Easterbrook, J., dissenting).

193. 111 S. Ct. 1196, 1202 (1991).

194. Finley, *supra* note 63, at 1142.

195. Andrade, *supra* note 117, at 75.

196. W. Williams, *supra* note 119, at 352.

197. *Johnson Controls*, 111 S. Ct. at 1210.

198. *Id.* at 1202. But would the "choice" be framed in this language for a male worker? Or would the "choice" instead be whether he wanted to take a particular job, in spite of the risk? The difference here is subtle but significant.

199. For example, "Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone." *Id.* at 1203.

200. "Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females." *Id.*

ensure that companies treat women employees the same way they treat male employees.

If pregnancy or motherhood does not interfere with the fulfillment of job duties, "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[201] Since the welfare of future children is not "an essential aspect of battery making,"[202] no grounds exist for applying either a business necessity or BFOQ justification as a bar to women's equality-as-sameness to men.

Strict adherence to equality, however, will not solve the problems created by deep-rooted societal views about pregnancy and maternity. Any "theory of equality that operates on abstract individuals suffers from a glaring flaw — real human beings have a determinate race, age, and sex. Thus, when considering what equality is to mean for women, we cannot be blind to the fact that the law operates on gendered subjects."[203] This understanding belies the viability of equality as sameness, since pregnancy cannot fit within the male rubric.

Equality analysis vests difference in the individual and denies its contingency upon social practice.[204] Difference is only a part of the individual, and society's role in defining it remains hidden. If "real" difference exists, the individual pays the price and the social order continues unquestioned. The individual is in this view a composite of characteristics that do or do not fit into the mold. Equality analysis seeks similarity, but what we see as difference or similarity is largely a result of what we understand through our socialization process to be relevant differences. "Every person, thing, or condition will always have some qualities that are similar, and some that are different from everything else, even when there is agreement on the category of classifications."[205] Certain differences are judged significant, while others are not, and only the significant differences justify departure from the equality model.

Even when the equality model is retained, its insistence upon forcing all diversity into the same mold creates difficulty. Some critics of equal treatment believe that it "precludes recognition 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."[206] The question at issue is not whether pregnancy is unique, but why it is more difficult to manage than other female differences.

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201. *Id.* at 1206.

202. *Id.*

203. Finley, *supra* note 63, at 1161.

204. "By assessing everyone against a norm, equality analysis starts from the premise that differences reside immutably in individuals. In fact, they reside only in the comparisons we draw to locate ourselves in relation to others; male-female, pregnant-nonpregnant, able to work-unable to work." *Id.* at 1169.

205. *Id.* at 1149.

206. W. Williams, *supra* note 119, at 326-27.

Equality analysis cannot attack programs or laws that "recogniz[e] '*actual physical disability* on account of pregnancy'. . . [and do] 'not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers.' "[207] If the difference is "real," and if it involves the central purpose of the business, a policy excluding women from the workplace or limiting our participation would be legally unassailable.[208]

Another worry is that equality analysis, with its emphasis on atomistic individuality and autonomy, frames the problem as a question of enabling the individual woman to bargain as freely with the employer on her own behalf in the same way that a man does. However, "[t]o conceptualize the issue exclusively in terms of individual worker choice would . . . be a step backward in labor history, to an era when freedom of contract resulted in the health of workers being sacrificed to protect industry."[209] *Johnson Controls* advances women's freedom only insofar as we may now choose to risk our health and the health of our fetuses. Employers, faced with the ruling in *Johnson Controls*, have two choices with respect to fetal protection: they can clean up their workplaces by removing the danger to both male and female reproductive capabilities, or they can trust that any suits brought by children born with birth defects due to exposure to chemicals will be unsuccessful. Given that the Supreme Court raised the possibility of allowing the employer to claim that the woman who worked in the toxic environment was contributorily negligent, as well as the fact that no such case has yet been successful, it would not be an unreasonable economic decision for an employer to forego the option of making the workplace safe.[210]

Given the embedded nature of conceptions of motherhood and pregnancy, equality analysis cannot achieve a full measure of freedom for women to create and define ourselves. This is not to say that *Johnson Controls* does not have significant positive ramifications for women. While it is clearly one of the most important cases the Supreme Court has decided concerning women's issues, we can compare its impact to that of the decision in *Brown v. Board of Education:*[211] although the decision was a significant stepping stone

207. International Union, UAW v. Johnson Controls, 886 F.2d 871, 895 (7th Cir. 1989) rev'd, 111 S. Ct. 1196 (1991) (citation omitted).

208. The Court makes this point in *Johnson Controls* by distinguishing its decisions in Dothard v. Rawlinson, 433 U.S. 321 (1977), and Western Airlines v. Criswell, 472 U.S. 400 (1985), both of which remain unchallenged. In *Dothard*, a woman was barred from being a security guard in a maximum security prison due to her "very womanhood." In *Criswell*, the plaintiff unsuccessfully sued an airline for age discrimination. The Court held that safety concerns justified the airline's barring of Criswell from a job in which he might have to co-pilot a plane. *See Johnson Controls*, 111 S. Ct. at 1204-06.

209. Andrade, *supra* note 117, at 78 (referring to the *Lochner* period of American jurisprudence).

210. *Johnson Controls*, 111 S. Ct. at 1208-10. Consider that the claims of children of Vietnam veterans exposed to Agent Orange (who unquestionably did not consent in any informed sense) never reached trial on the merits, largely due to a lack of causation evidence. SCHUCK, *supra* note 117, at 248.

211. 347 U.S. 483 (1954).

in securing more equal standing for African Americans, no one could suggest that it solved the problem of racial discrimination. Equality analysis can improve the real status of women only up to the point at which it collides with the constructed differences between women and men that percolate throughout law and society. Before these differences, embedded in our language and embodied in the split between family life and civil society, equality analysis stands mute, unable to move women forward.

C. CalFed *and the Preferential Treatment Paradigm*

Some commentators use the debate over special versus equal treatment "principally to critique the usefulness of equality analysis as a transformative device for challenging the social and economic subordination."[212] Lucinda Finley views the debate as one over the definition of injury caused by discrimination: for equal treatment proponents, it lies in not being treated as men are, but for special treatment advocates, the injury results from not being treated as women.[213]

We live in a society that holds its own heterogeneity as one of its cultural icons. As a result, "[e]ach Term, the Supreme Court and the nation [must] confront problems of difference in this heterogeneous society."[214] The confrontation raises the question of what to do about difference, now that, according to Felice Schwartz, we can acknowledge its concrete existence.[215] Special treatment advocates argue that differences which disadvantage should be acknowledged and compensated. The danger is that constructed differences will function to promote paternalistic protection rather than privilege.

The Supreme Court grappled with the preferential treatment issue in *California Federal Savings & Loan Association v. Guerra* (*CalFed*).[216] At about the time the Pregnancy Discrimination Act was passed,[217] California also enacted a statute protecting the rights of pregnant workers to some job security and leave time. The California statute mandated broader protections than the Pregnancy Discrimination Act, and the California Federal Savings & Loan Association received an administrative accusation filed by an employee whose job had been filled while she was on pregnancy leave. California Federal sought a declaratory judgment that the California statute was pre-empted by the less protective Pregnancy Discrimination Act. The Supreme Court, in an opinion written by Justice Marshall, held that the Pregnancy Discrimination Act did not pre-empt state legislation which provided job protection and benefits to pregnant workers beyond its provisions.[218] His opinion "presented in classic form the dilemma of recreating difference through both noticing and

212. Finley, *supra* note 63, at 1121.
213. *Id.* at 1143-44.
214. Minow, *supra* note 6, at 11.
215. Schwartz, *supra* note 73, at 75.
216. 479 U.S. 272 (1987).
217. 42 U.S.C. § 2000e(k)(1978). *See supra* note 171.
218. *Id.*

ignoring it."[219] While Justice Marshall saw that preferential treatment advantaged women, he was blind to difference as a social construct, viewing it simply as an unquestioned given. *CalFed* demonstrates both the advantages and disadvantages of the special treatment approach. Like the decision in *Johnson Controls*, *CalFed* was helpful to women since it had the practical positive effect of allowing California's more comprehensive pregnancy leave act to stand unaffected by the federal Pregnancy Discrimination Act. However, the discourse of difference has its dangers.

The standing organs of power — Congress, state legislatures, the judiciary — control what is defined as difference. The Supreme Court's understanding of difference has moved away from "a definition based on paternalistic, culturally-based stereotypes,"[220] but since the standard against which difference is measured is a male standard, special treatment and paternalism tend to collapse into each other. Martha Minow analyzes the deep structural difficulty of difference:

> If you have [the power to label others 'different'] you may realize the dilemma of difference: by taking another person's difference into account in awarding goods or distributing burdens, you risk reiterating the significance of that difference and, potentially, its stigma and stereotyping consequences. But if you do not take another person's difference into account — in a world that has made that difference matter — you may also recreate and reestablish both the difference and its negative implications.[221]

This dilemma arises from the perception that difference is fundamental and intrinsic, rather than relational and constructed.[222] Our cognitive inability to grasp all of the myriad differences that compose unique individuals in a society leads us to group and to stereotype; we then attach significance to the grouping.[223]

The Supreme Court accepted as a given in *CalFed* that women's capacity to become pregnant makes us different from men. The question then presented was whether this "real" difference could translate into a legal difference in treatment under Title VII. The California Federal Savings & Loan Association argued that the Pregnancy Discrimination Act required equal treatment, and therefore that the California state law requiring unpaid leave during pregnancy regardless of the existence or nonexistence of disability leave

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219. Minow, *supra* note 6, at 17.

220. Dowd, *supra* note 67, at 752.

221. Minow, *supra* note 6, at 71.

222. *Id.* at 33.

223. "Full acknowledgment of all people's differences threatens to overwhelm us. Cognitively, we need simplifying categories, and the unifying category of 'woman' helps to organize experience, even at the cost of denying some of it . . . . We especially attach ourselves to categories like male/female because of our own psychological development in a culture that has made gender matter." *Id.* at 64.

for other ailments was invalid.[224] The Court rejected this argument on the narrow ground that the Pregnancy Discrimination Act did not pre-empt state laws that provided better treatment for pregnant workers.[225] Although Justice White argued that the plain language of the Pregnancy Discrimination Act does not permit preferential treatment in any form,[226] the Supreme Court held to the contrary.

Once the Supreme Court found that the Act "allows some preferential treatment of pregnancy,"[227] it used the act to "extend . . . existing Title VII principles and objectives . . . to cover pregnancy."[228] Here, Title VII is used as a measure to promote equal employment opportunity, enabling the Court to evade the seeming paradox of granting preferential treatment to promote equality. The preferential treatment granted by the California statute, declared the Court, is "unlike the protective labor legislation prevalent earlier in this century . . . [since it] does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers."[229] The Court further asserted that a statute based on outmoded stereotypes "would, of course, be inconsistent with Title VII's goal of equal employment opportunity"[230] and thus would be impermissible. Yet where is the power to define what stereotypes are "outmoded" located? And is the use of stereotypes which are considered "modern" rather than "archaic," consistent with Title VII?

The advantage of preferential treatment in this case is that it provides "a floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise."[231] The Court portrays the positive accomplishment of preferential treatment as putting women on an equal footing with men through the operation of the preference.[232] Thus the Court construes the action of preferential treatment: in situations where women's sex disadvantages us, preferential treatment balances the scales by taking into account a "real" difference and compensating for it.

However, using difference as a basis for preferential treatment is troubling on practical and theoretical levels. Although this particular route has now been foreclosed by *Johnson Controls*, the Seventh Circuit used difference discourse in refusing to bar fetal protection policies. Its justification was that the differences it saw were based in scientific evidence, rather than in outmoded

224. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284 (1987).

225. *Id.* at 280.

226. "The second clause quoted above could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work. This language leaves no room for preferential treatment of pregnant workers." *Id.* at 297 (White, J., dissenting).

227. *Id.* at 294 (Stevens, J., concurring).

228. *Id.* at 288-89.

229. *Id.* at 290.

230. *Id.*

231. *Id.* at 285 (citing the language of the Ninth Circuit in Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985), *aff'd*, 479 U.S. 272 (1987)).

232. "By 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs." *Id.* at 289.

stereotypes.[233]

Maternity, because it is constructed as "the one immutable, enduring difference between men and women,"[234] presents the greatest temptation not only for preferential treatment, but also for its less benign cousin, differential treatment. "The assumption of uniqueness is problematic for women because antidiscrimination doctrine treats truly unique situations differently and far too often, worse. The penalization of women because of their childbearing capacity is thereby legitimized."[235] What appears to be preference may easily blur into unwanted paternalism. It is certainly no accident that Johnson Controls' fetal protection policy was couched in terms of protection of and concern for female workers, constructed as a special exercise of discretion in favor of safety. Difference, in such cases, is viewed as a detriment requiring compensation. It is thus denigrated and devalued. The lesson is that difference (and not just "essential" difference) ought to be valued for its own sake and for its usefulness in maintaining a diverse society, not seen as compensation or accommodation.[236]

The mechanism by which preferential treatment policies are encouraged is also suspect. Moving to a widespread acceptance of preferential treatment ignores the fact that workplace policies are not largely determined by women. Fetal protection policies could be advocated as a form of preferential treatment, if they are understood as making women better off than men. "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."[237] The complex reasons for this relate to society's valuation of motherhood within the family and devaluation of motherhood outside it. The problem is that these special concessions perpetuate the perception of motherhood as unique, as different, and ultimately, as "other."

The entire debate is flawed. In arguing over equal versus special treatment, commentators and courts often do not ask the vital questions: Equal to what? Special as compared to what? And they do not ask why such questions should be necessary. The grounding of the debate and the critiques of each

233. The Seventh Circuit noted that "since lead is an accumulative toxicant which is stored in the bone, with a half-life in the body of 5 to 7 years, a woman with a significant blood lead burden would pose a potential hazard to any conceptus for many years after exposure." International Union, UAW v. Johnson Controls, 886 F.2d 871, 882 (7th Cir. 1989) *rev'd*, 111 S. Ct. 1196 (1991). The court also commented extensively on the insufficiency in the UAW's animal research evidence. *Id.* at 889-90. The procedural posture of the case is of special interest, as it arose on a motion for summary judgment. The normal rule in summary judgment cases is that the facts are taken as presented by the non-moving party. *See* 28 U.S.C. § 56(c).

234. Schwartz, *supra* note 73, at 66.

235. Finley, *supra* note 63, at 1140.

236. While the notion of reasonable accommodation has been a powerful political tool in the struggle for the rights of many groups such as disabled people, the very concept of accommodation suggests making an exception for someone who does not measure up to the norm.

237. W. Williams, *supra* note 119, at 380.

position ignore the fundamental issue of how women and men can escape the societally and legally imposed definitions that trap them.

Difference/sameness is a dichotomy constructed by and embedded in our conceptions of law and society. Exposing this dichotomy will necessarily break down the debate over preferential treatment/equal treatment, since the latter dichotomy depends upon the existence of the former. Of course women are different from men due to our childbearing capacities. But differences abound. I am different from you because I am dyslexic. He is different from her because he is gay. We are different from them because we come from a working class background. Who is to say which differences "matter?" What is the difference among differences? Can anyone afford to be defined by a difference?

We allow ourselves to be defined, as we must. But I believe that we must as a society provide more room for self definition and self creation. The valuation of difference "involves a recognition of feminine difference in those circumstances when we are different, as in our relationship to pregnancy, while simultaneously not reinforcing the stereotypes through which patriarchy has attempted to make sense of that difference and has limited our power because of it."[238] Reconstruction of motherhood and maternity as a vital part of self definition can enable us to revalue this one difference for both women and men.

IV.
SELF DEFINITION, SELF CREATION, AND MATERNITY

> The individual is something quite new which creates new things . . . all his acts are entirely his own. Ultimately, the individual derives the values of his acts from himself; because he has to interpret in a quite individual way even the words he has inherited. His interpretation of a formula at least is personal, even if he does not create a formula: as an interpreter he is still creative.[239]

Although Felice Schwartz realizes that "[f]reedom of choice and self-realization are too deeply American to be cast aside for some wistful vision of the past,"[240] she does not recognize the radical nature of her own statement. Wendy Williams believes that the goal of the feminist legal movement is "to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender."[241] My view is that one effective way to break down such barriers is to shift as a society from a presumption that con-

238. Cornell, *supra* note 29, at 404.

239. FREDRICH NIETZSCHE, THE WILL TO POWER § 767 (Walter Kaufmann ed. & trans., R.J. Hollingdale trans., 1968). I developed some of the ideas in the following section in an unpublished paper submitted to Professor Thomas Nagel for his course, "Introduction to Ethics." His comments were helpful to me in articulating the idea of self definition and its limits.

240. Schwartz, *supra* note 73, at 76.

241. W. Williams, *supra* note 119, at 331.

ceptions of societally-drawn categories will define us as individuals to a presumption that we as individuals and as members of differing communities will define ourselves.[242] This shift, though, must take place beyond the law as well as in it. In this manner, we can establish a connection between freedom, autonomy, and self-creation that otherwise would be difficult to realize.

The barriers hindering such a project are readily apparent. I do not assert as my immediate goal the wholesale restructuring of society, for without a preceding change in our laws and in our individual understandings of motherhood and self definition, such a goal is hopelessly utopian. Rather, I would like to establish a framework within which we can, as individuals and as a society, begin to explore and recreate these gender roles and the reified gender roles of others. The process begins with the dismantling of our old conceptions of pregnancy, motherhood, and gender roles. As we rethink our understandings of gender, we can begin to implement change in thought and action that may eventually change the shape of our society. But our immediate goal must be to disembed the pathological thought forms that ground the problems I address above. Thus, I end at the beginnings — the beginnings we all must make in order to deconstruct motherhood and to reconfigure parenthood.[243]

Changing the way we think will have a cost. But all change, except for that which occurs in the unreal world of Pareto efficiency, exacts its price. The image of Mother will lose its talismanic and iconistic quality. The bearing of a (white) child may no longer be seen as a crowning accomplishment, beside which all other achievements pale. The mysticism surrounding motherhood may fade, and parenthood itself could become as mundane and non-ethereal as a morning subway ride to work.

But also, our society could lose its propensity to blame the mother immediately for anything that goes wrong with her children. We could dissolve the constructed dispute between the fetus and the pregnant woman. Most importantly, we can think, and create in our minds, a freedom for women and men that perhaps eventually could be embedded in laws reflecting our highest aspirations for ourselves, rather than our most miserable fears. In the place of simultaneously mystified and denigrated motherhood, we could regard concrete parenthood as a malleable concept to be configured by each parent.

A. What are Self Definition and Self Creation?

Liberal arguments provide women with access to civil society only through reference to an implicit male standard. The debate between advocates of equal treatment and preferential treatment all too often boils down to a

242. This Note focuses on the particular situation of women with children and pregnant women, but it should not be interpreted to deny the necessity of valuing any difference that a person understands as a fundamental part of her self definition.

243. I use this word with some hesitancy. I wish it to be understood as signifying a new conception of child rearing that does not import all of the difficulties surrounding motherhood that I have detailed. It is inclusive of both genders, emphasizing that both men and women are within its ambit.

debate over whether women are like or unlike men. The concept of self definition,[244] however, does not collapse or demand absurd results when faced with the undeniable facts that women can and do participate in civil society, that men often desire involvement in the family, and that the breakdown of the separation between civil society and family is already underway.

Pregnancy and motherhood are special instances of self definition, since they provide tentative "knowledge of the inadequacies of understandings of 'selfhood' founded [only] upon notions of autonomy, individuation and difference."[245] Pregnancy demonstrates forcefully the contingency of viewing oneself as an individualized being. "Self" and "other" collide in the same body; expressing pregnancy solely in terms of the dependency or separability of the fetus is inadequate. Much theoretical work can be done regarding our understanding of how the self is constructed if we take into account the thoughts and experiences of pregnant women, many of whom feel the self/other dichotomy to be most personal and most real. Such work will be difficult, since "[t]he experience of pregnancy is an experience of undifferentiation not easily expressed in language."[246] Nevertheless, we should value women's expressions of this condition so vital and basic to humanity. We must teach ourselves to encourage and respect its philosophical exploration by those who are experiencing or have experienced it; thereby we can begin to understand the phenomenology of pregnancy. This phenomenology can in turn inform the choices we must make as a society regarding the roles that pregnant women assume.

The law and civil society's attitudes toward pregnancy encourage the view that women and our fetuses have conflicting interests. The undifferentiation and lack of division between self and other that many women experience when pregnant could act, in a society that valued self definition, to resolve this conflict. If women can decide what pregnancy is to mean, we will no longer have to experience it as a limitation on autonomy for the sake of an "other" that is physically part of the self. Immediately we can develop choices and constructions to coincide with the personal, as opposed to the currently understood societal and legal, experience of pregnancy.

The problem of pregnancy and motherhood exists now as a question of whether one should be afforded equal or preferential treatment when one's behavior violates a societal understanding of proper behavior during motherhood and pregnancy. Supporters of women's freedom can reframe the question as whether people should be forced to disavow their fundamental understandings of themselves as people. We must learn to perceive maternity and pregnancy as a substantial part (but only as one part among many) of how

244. I have chosen not to define this term, because I believe that it must differ for each individual. I mean for it to capture the sense in which a Westerner has a vision of herself that is a coherent and discrete unit, which she calls "I."

245. Ashe, *supra* note 14, at 546.

246. *Id.*

women may regard ourselves and understand ourselves as human beings. As we do so, our method of understanding pregnancy and motherhood in the workplace will evolve from an analysis of an individual laborer's choices within a defined structure over which she has no control, to a conception of freedom to affirm and define ourselves within the community.[247]

Each person must have the ability to create and define herself, since in that way, she can decide what differences are important. Our self-namings as parents or non-parents thus can carry the weight in our overall understandings of ourselves that we wish them to bear.[248] Women's position in the workplace will improve in a meaningful sense only if motherhood is seen not as a problem, but as a factor defining the self.

As an immediate strategy for securing recognition of the importance of self definition in our society, we can argue that self definition is already a part of our liberal heritage. Self definition creeps into the liberal argument from time to time. John Stuart Mill stated that:

> "[t]here is no reason that all human existence should be constructed on some one or some small number of patterns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is best, not because it is the best in itself, but because it is his own mode."[249]

Self definition and self creation in the sense of autonomy are also important in legal theory, as well as in the language of Supreme Court privacy cases.

Justice Blackmun implicitly acknowledged the idea in his *Bowers v. Hardwick*[250] dissent. He asserted that "[t]he fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, . . . that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds."[251] *Eisenstadt v. Baird*'s similar language suggests the need for control over the reproductive process as an integral part of freedom.[252] More recently, in *Johnson Controls*, the majority suggested that fundamentally life defining decisions are better left to the private sphere: "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them . . . [since] the deci-

247. I do not by any means deny the difficulty of grounding a concept of positive freedom within modern American constitutional theory. However, I believe that such a notion is implied by the Ninth Amendment, and is surely no more difficult to construct than the notion of a right to privacy, which also lacks explicit textual support.

248. Ashe, *supra* note 14, at 559.

249. MILL, *On Liberty*, *supra* note 124, at 83.

250. 478 U.S. 186 (1985) (holding that Georgia's anti-sodomy statute was not violative of the Constitution).

251. *Id.* at 205 (Blackmun, J., dissenting).

252. Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute which inhibits access to contraceptives dissimilarly based on marital status violates Equal Protection Clause of the Fourteenth Amendment).

sion to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself."[253]

Conceiving self definition as a societal value is, in my view, more useful and fundamentally implies a more radical restructuring of society than privacy. Privacy discourse enabled the extension of many rights to women, but it did not foster real changes in status or substantial realignments or reconstructions of power. It supported the family-civil society split through its assumption that the personal is not and was never both public and political. Furthermore, in extending new rights to women, privacy discourse enhanced and supported the interpretation that women are essentially different from men. Self definition and self creation serve to enable each person, female or male, to grasp in a concrete sense a meaningful ability to participate fully in an integrated and changed civil society and family life.

What currently constitutes the fundamental essence of personhood? While the answer to this question is most likely societally determined,[254] each of us has a view about what makes herself a discrete individual within the world and can name several characteristics without which she cannot imagine existing as the person she is.[255] Even within the strictures of our current society, we do manage to construct conceptions, identifications, and definitions of ourselves.

However, this capacity must expand. Its limits are traced throughout this Note. Our own self definitions are denigrated and devalued by higher authorities. Patricia Williams tells how, after having researched, written, edited, and finally completed *The Alchemy of Race and Rights*, she told her editor that she wished it to be classified by the Library of Congress as "Autobiography," "Fiction," "Gender Studies," and "Medieval Medicine."[256] The Library of Congress, after its own reading of the book, decided that it was really about "1. Afro-Americans — Civil rights. 2. United States — Race relations. 3. Williams, Patricia J., 1951 — . 4. Law teachers — Wisconsin — Biography. 5. Critical legal studies — United States." and finally, almost as an afterthought, "6. Women — status, gender roles, etc.— United States."[257]

253. 111 S. Ct. 1196, 1207 (1991).

254. For instance, one's name may be a more important element of one's being in some societies than it is in ours.

255. As Patricia J. Williams explains it, "[w]hile being black has been the most powerful social attribution in my life, it is only one of a number of governing narratives or presiding fictions by which I am constantly reconfiguring myself in the world. Gender is another, along with ecology, pacifism, my peculiar brand of colloquial English, and Roxbury, Massachusetts. The complexity of role identification, the politics of sexuality, the inflections of professionalized discourse—all describe and impose boundary in my life, even as they confound one another in unfolding spirals of confrontation, deflection, and dream." PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 256-57 (1991).

256. *Id.* at 256.

257. *Id.* at copyright page. The subject classifications of the Library of Congress determine the call number of the book, and thus where on the shelf, and with what other publications, a book will be placed in most major libraries in the United States.

I think this incident speaks poignantly about how little value is placed on self definition.

For many people in our culture, a person's status as a parent or prospective parent is more a part of her fundamental self definition than, for instance, her national origin or ethnic heritage. Intuition suggests that most people without children cannot imagine being the same person that they are if they had children, and vice versa. What we must do is to define for ourselves both what we are and what we believe these definitions to mean, for by individually grasping control over definitions, we are able to redefine the significance of motherhood by transforming it into concrete parenthood.

B. The Ramifications of Self Creation and Self Definition

"Women can define ourselves as mothers or as non-mothers. In order for either definition to create some temporary equilibrium, it must correspond to . . . the self-naming to which her particular history has led her."[258] If we choose to define ourselves as mothers or non-mothers, and if this choice is made meaningful, we can re-cognize the meaning of motherhood and work toward removing the devaluation placed upon it by society.

As an inescapable part of her self definition and self creation, "[a] woman's ability to control, to time, to prevent conception is no less than the ability to control her own destiny."[259] Reproductive freedom must mean, in addition to the ability to control, time, and prevent reproduction, the ability to determine reproduction's significance as a life event. As part of self definition and self creation, it can no longer be constructed as a disability. We must work to develop legal understandings of pregnancy as a chosen and natural part of some people's lives. It should be "normal and natural for women, and . . . a voluntary choice that they make — it would be a shame to treat something so natural, that women freely choose, as if it were something unfortunate like a workplace injury."[260]

Pregnancy and motherhood should be joyful experiences, and they should not lead to dramatic sacrifice in other parts of our lives. As reproductive technology improves, we can plan our pregnancies better and make having a child a defined and comprehensive life event that is chosen, rather than a random accident.[261] Even now, "many women in the workforce are emotionally and mentally capable of planning, and do plan, for such a major event as having a child."[262]

Of course, pregnancy can involve physical pain and incapacitation. This should not, however, be seen as interfering with women's ability to earn

258. Ashe, *supra* note 14, at 545.

259. W. Williams, *supra* note 119, at 343.

260. Finley, *supra* note 63, at 1136.

261. Note, though, that reconstructing motherhood will not alone solve the serious problems of coerced sex and reproduction.

262. Finley, *supra* note 63, at 1131.

wages. Self definition and self creation will enable us to recreate and redefine the "disabilities" associated with pregnancy. Within this societal and individual revaluation, a workplace that gives job preferences to war veterans can recognize the physical difficulties that women undergo during pregnancy, and can do so without penalizing us for these difficulties.

Motherhood and pregnancy partially constitute the concept of self. For instance, "[i]n the post-birth period, the mother continues, in her altered bodily state, to define her motherhood and, in part, her personhood, through the distance she establishes between her body and the child."[263] The rigid gender structure and the fact that society largely defines us leaves little room for such personal alteration and reconstruction of self definition.[264] With the locus of individual definition shifted to the self, the woman can more freely explore possible roles and possible resolutions.

Another advantage of this approach is that it deconstructs the legally modeled adversarial relationship between women and our fetuses.[265] The sharp individuation that acts to create adversity between pregnant woman and fetus disappears in favor of a determination to allow women to view the situation as each individual woman defines it. No longer would it seem logical or reasonable from a legal perspective to imprison a pregnant woman for fetal abuse.

The benefits of self definition accrue to men as well. If well-being "include[s] the need to have the value of one's sex and sexuality recognized,"[266] then men, too, can gain freedom by being able to define themselves and set the parameters of their sex and sexual expression. If parenting is less denigrated, less stigma will attach to choosing to do it actively and to considering one's role as a father important to one's conception of self. Furthermore, through self definition and breakdown of gender hierarchy, men can be mothers and their role in parenting can be encouraged and supported. They will no longer have to be trapped in civil society, with no ability to choose to live entirely or mostly within the family, since the hard separation between family and civil society will be broken down.

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263. Ashe, *supra* note 14, at 553.

264. "The imposition of rigid gender structures may well mean that women have been forced to define their lives within those structures." Gender, Sex and Equivalent Rights, *supra* note 129, at 403.

265. P. Williams observes,

> Recently, in Massachusetts [ironically one of the few states that protects the right to abortion in its state constitution], a woman who suffered a miscarriage in a drunk-driving accident was charged with vehicular homicide when the fetus was delivered stillborn. I suppose this makes sense from the perspective of some litigation model in which mother "versus" fetus is the order of the day, in which the shell of a woman's body is assumed to be at cross-purposes with the heart within. It makes no sense from the perspective of a model in which woman and fetus are one, and in which the home of the body is also the site of sheer torment; it makes no sense from the sad seductive wisdom of self-destruction.

P. WILLIAMS, *supra* note 255, at 183.

266. Cornell, *supra* note 129, at 405.

Pregnancy will remain as a fact both physical and social, but if women can construct its meaning individually, it will be less adaptable for use as a tool of repression. The mystique of motherhood will be lost, but it will be replaced by concrete parenthood.

C. Change Under the New Paradigm

Radical change cannot take place immediately. Advocates for women must address a number of areas simultaneously to promote the development of a society that is accepting of legitimate self definition in the radical sense. The first step is one I take here: the deconstruction and disembedding of harmful conceptions of motherhood and pregnancy. As I have concentrated on the deleterious effects of these conceptions in the workplace alone, deconstructive efforts are still needed. Another stage is the development of self definition and its relation to our legal system. Finally, restructuring of society to accommodate the existence, practice, and further development of self definition will embed a new understanding of freedom in our polity. Although I list these stages in an order, work can be done in all three areas from our current standpoint.

An empowering proposal for both male and female parents is to restructure the workplace in such a way that the hard division between, and reification of, the sphere of the family and that of civil society is neither necessary nor desirable. We should concentrate on creating a society in which both women and men can be workers and parents without allowing one role completely to efface the other.

The current structure of the American workplace reflects the dysfunctional and disjunctive nature of our assumptions about power and work. Many commentators do not recognize the supreme irony of the social fact that the most objectively powerful workers in America — the high-powered fast track executives — in some respects have the least amount of control and power over the economic structuring of their working conditions. Battles over hours won long ago by blue collar workers are barely within the realm of imagination for executive track white collar workers. This establishes a workforce with a dilemma: although they have the objective trappings of power as exemplified by their high salaries, they lack empowerment and control in their own lives both within and outside of the workplace. Societal understandings of motherhood exacerbate the tension surrounding the powerful/powerless worker. Women in law firms report that the desire to work fewer hours after the birth of a child is viewed with exasperation and resentment by co-workers and superiors.[267]

We must examine the structure of the workplace[268] and find ways to reconstruct the relationship between family and work responsibilities. If parenting can become a socially valued activity outside of the context of the family

267. Mairs, *supra* note 123, at 1.

268. "A wholesale restructuring and reexamination of the workplace is needed." Dowd, *supra* note 67, at 699.

and if employers can come to accept this value, flexibility can be maximized to accommodate self creative and self definitive parenting. The continuum could run from the parent who wants excellent long term day care for her child to the parent who wants to take five or six years away from his career after his child is born but still wants to have a career afterward.

Nietzsche named the "new philosophers" of his day as attempters.[269] So too are we who can take the explorations in this Note as challenges to examine and to question. My inquiry has no simple answer, suggests no program to resolve the issues I have raised. The end of this Note is, I hope, more of a beginning than a conclusion.

By encouraging and including as many different perspectives as possible, we gain a richer understanding both of "others" and of our selves. We can learn to speak and to listen to each other across perceived chasms of difference. Rather than relying on the standard dichotomies of difference/sameness, male/female, powerful/powerless, black/white, straight/gay, disabled/ablebodied; we discover the interstices and appropriate them as our playground. Each individual must explore for herself the possibilities for radical change. We will discover new horizons through exploration, if we can maintain enough openness and creativity to rethink everything, including our selves.

269. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL § 42 (Walter Kaufmann trans., 1966) (1885).