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Equality and Difference:
The Case of Pregnancy

Herma Hill Kay†

INTRODUCTION

Women and men in the United States are entitled to the equal protection of the laws,¹ and to freedom from discrimination in employment because of sex.² Beginning in the 1970s,³ the United States Supreme Court has applied the laws that guarantee these rights so as to enable both women and men to gain access to positions and privileges formerly dominated by the other sex. The resulting exchange of power between the sexes reflected in Supreme Court litigation has not been equal, nor has the process of exchange been completed.⁴ Men, who hold and historically have held most of the power in American society, have been called upon to concede their exclusive authority in the economically dominant public sphere, while women have been asked to relinquish their priority

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¹ U.S. Const. amend. XIV.
³ The Supreme Court first construed the provisions of Title VII in a sex discrimination case in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); it first invalidated a sex-based classification on constitutional grounds in Reed v. Reed, 404 U.S. 71 (1971).
⁴ Wendy Williams has identified the roles that our culture associates most closely with a particular sex as the military combat role for men and the maternal role for women. See Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 Women's Rights L. Rep. 175, 182-183, 190 (1982). The Supreme Court has refused either to compel men to yield to women their exclusive responsibility for combat, see Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding compulsory registration for males but not females on the theory that a draft would be necessary only to procure males as combat troops), or to deprive unwed mothers of newborns of their primary responsibility for decisions affecting infants, see Caban v. Mohammed, 441 U.S. 380, 392 n.11 (1979) (holding that the mother of an illegitimate child with whom the father had formed a family relationship must share with him her right to decide whether the child will be adopted, but declining to consider whether its holding extends to the adoption of newborns). See also Lehr v. Robertson, 463 U.S. 248, 265-68 (1983) (father who had not established a custodial relationship with his illegitimate child is not denied equal protection when mother is given the sole right to consent to a step-parent adoption).
in the less highly valued private sphere. But I have identified elsewhere a pattern of dual access characteristic of the Supreme Court sex discrimination cases that suggests a mutual desire on the part of both women and men to transcend traditional sex lines.

In ruling upon the legal aspects of this exchange of power, the Supreme Court has attempted to use an assimilationist model of equality drawn from earlier cases challenging race discrimination. I have argued that a model of cross-sex assimilation is useful in those many situations in which women and men share the relevant characteristics that are compared for purposes of measurement. In those few situations where the biological reproductive differences that define the sexes are directly involved, however, I have concluded that the assimilationist model is not useful in achieving legal equality between women and men, and that a different model must be developed. This paper represents a beginning effort to develop an alternative model for thinking about the reproductive difference that has been used to justify the existence of a separate sphere for women: pregnancy. Part I of this paper will examine two recent cases that raise the question of whether pregnancy, a condition that only women experience, may be treated differently in the employment setting from other physical conditions that all workers may experience. Part II will offer a new analytical approach to conceptualizing the legal significance of biological reproductive conduct, which I call "episodic analysis." My thesis is that episodic analysis will help us to avoid penalizing women as the result of their reproductive behavior and thus permit us to accommodate pregnancy within a legal and philosophical framework that affirms the equality of women and men.

I. PREGNANCY AT WORK: THE DISABILITY CASES

A. Background: LaFleur, Geduldig, and Gilbert

Litigation over the treatment of pregnancy at work appeared on the

6 Id. at 48-77.
7 Id. at 77-78. The Court's use of an assimilationist model is limited by its failure to apply that model free of stereotypical notions about the proper roles of women and men. See supra note 4; see also Freedman, Sex Equality, Sex Differences, and the Supreme Court, 92 YALE L.J. 913 (1983).
Supreme Court’s docket early in its consideration of the meaning of legal equality between the sexes. The first cases, consolidated under the name Cleveland Board of Education v. LaFleur, involved mandatory maternity leave policies that excluded pregnant teachers from the classroom, even though they were able and willing to continue working. Plaintiffs challenged the policies as violations of both due process and equal protection.

The Courts of Appeal gave the equal protection claim a mixed response. In LaFleur, a Sixth Circuit majority accepted plaintiff’s argument that a mandatory maternity leave rule based on pregnancy was a classification based on sex. Judge Edwards compared the treatment accorded to pregnant teachers with that applied to male teachers suffering from other illnesses or disabilities and held that the pregnant teachers had been denied equal protection. In Cohen v. Chesterfield County School Board, the Fourth Circuit split over whether a classification based on pregnancy constituted sex-based discrimination at all. Chief Judge Haynsworth was of the view that no sex discrimination was involved because the regulation “does not apply to women in an area in which they may compete with men.” Judge Winter, in dissent, made

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10 414 U.S. 632 (1974). The LaFleur opinion also resolved another case reported below as Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973), rev’d sub nom. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). These cases were the first to be reviewed on the merits. The Court had earlier denied review in one case involving a policy prohibiting pregnant women from working later than two months before the expected date of delivery, see Schattman v. Texas Employment Comm’n, 459 F.2d 32 (5th Cir. 1972), cert. denied, 409 U.S. 1107, rehearing denied, 410 U.S. 959 (1973), and had vacated and remanded another case involving pregnant servicewomen, see Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1972), cert. granted, 409 U.S. 947, vacated and remanded, 409 U.S. 1071 (1972).

11 The pregnant teachers in LaFleur were required to take a maternity leave without pay, beginning five months before the expected date of birth. A teacher on maternity leave was not promised re-employment following delivery, but she was given priority in reassignment. At any event, she was not permitted to resume teaching until the beginning of the regular school semester which followed the date upon which her child attained the age of three months. In Cohen, a teacher was required to leave work four months prior to the expected date of birth, and was guaranteed re-employment no later than the first day of the school year following the date on which a physician certified in writing that she was physically fit for work, if she could assure the Board that care of the child would cause only minimal interference with her job responsibilities. LaFleur, 414 U.S. at 634-37.

12 LaFleur and Cohen were filed prior to March 24, 1972, the date on which Title VII was extended to cover state agencies and educational institutions, see Pub. L. 92-261, 86 Stat. 103 (1972), amending former 42 U.S.C. §§ 2000e-1 and 2000e(b), and were brought under 42 U.S.C. § 1983.

13 LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 1188 (6th Cir. 1972), aff’d on other grounds, 414 U.S. 632 (1974). Chief Judge Phillips dissented from that part of the majority opinion striking down the mandatory maternity leave prior to delivery. 465 F.2d at 1189.


15 Id. 474 F.2d at 397. Chief Judge Haynsworth elaborated this point at length, see 474 F.2d at 397-98, finding it helpful to invoke in aid of his argument the observation of Anatole France that “the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread,” and concluded that “[p]regnancy and maternity are sui generis, and a governmental employer’s notice of them is not an invidious classification by sex.” 474 F.2d at 398.
two points. He argued first that a rule applicable to pregnant teachers affected only women, barring them from working because of their sex.\textsuperscript{16} Second, he contended that such a rule treated pregnant women differently from other employees, both male and female, who were absent from work because of elective surgical procedures.\textsuperscript{17} The Courts of Appeal thus disagreed over which groups were being compared for purposes of the equal protection analysis. Chief Judge Haynsworth was clear that the two comparison groups could not be men and women, since "only women become pregnant."\textsuperscript{18} Neither Judge Winter nor Judge Edwards clearly affirmed that the two comparison groups were men and women. Instead, both compared women excluded from work because of pregnancy to a group of employees composed of women and men who were absent from work because of other medical conditions. Because both groups contain women, their analysis left open the possibility that the defect in the classification was the exclusion of pregnancy as a covered disability, rather than the exclusion of women because of their sex. An equal protection analysis, however, scrutinizes discriminations based on sex. In the absence of a demonstration that a discrimination based on pregnancy constitutes a discrimination based on sex, the equal protection argument is technically incomplete. One would have thought that the missing connection between pregnancy and sex could easily be supplied. But events proved that assumption to be mistaken.

Justice Stewart, writing for the Supreme Court majority in \textit{LaFleur}, did not resolve the conflict between the Fourth and Sixth Circuits over

\textsuperscript{16} Id. 474 F.2d at 400-01. Judge Winter's citation, 474 F.2d at 401, to Chief Judge Brown's telling point, made while dissenting from the denial of rehearing en banc in \textit{Phillips v. Martin-Marietta Corp.}, 416 F.2d 1257, 1259 (5th Cir. 1969), \textit{rev'd}, 400 U.S. 542 (1971), that an employer's refusal to hire mothers of pre-school age children but not fathers of pre-school age children is a discrimination based on sex because "[n]oboy . . . has yet seen a male mother," does not refute Judge Haynsworth's argument, spurious as it is. The relevant comparison groups in \textit{Phillips} were mothers and fathers of young children, not mothers and non-parents, regardless of sex. Once a child is born, both male and female parents can be compared to determine whether their child care responsibilities are likely to interfere with their job performance. An employer could decline, consistently with Title VII, to hire any parent of young children. Haynsworth would presumably argue, however, that a rule excluding a pregnant woman from the work force would not constitute a sex-based discrimination because it would not admit a similarly-situated man. There are no pregnant males whose work routines may be disrupted by pregnancy. Judge Winter's subsequent citation, 474 F.2d at 401, to Judge Wisdom's reasoning, dissenting in \textit{Schattman}, 459 F.2d 32 at 42, that since "[f]emale employees are the only employees . . . who become pregnant[,] it follows that they are provisionally dismissed from work on account of their sex," does advance the argument that a rule regulating pregnancy affects only women. This point still does not show, however, that if equal protection analysis requires a comparison between two similarly situated groups, one of which is disadvantaged by a rule in comparison to the other, that a rule regulating pregnancy disadvantages women in comparison to men. The rule more precisely compares pregnant women to a group composed of those women who are not pregnant and all men, who cannot become pregnant. This alignment of the groups being compared, however, seemingly rules out the argument that the classification is facially based on sex, and requires a showing that the policy has a disparate impact on women. See infra text at notes 27-35. The analysis suggested in this paper may help to solve this conceptual difficulty. See infra text following note 153.

\textsuperscript{17} \textit{Cohen}, 474 F.2d at 401.

\textsuperscript{18} Id. at 397.
whether a classification based on pregnancy constituted a discrimination based on sex for purposes of the equal protection clause. Instead, he invalidated the school board policies on due process grounds, using an analysis that focused on whether the policies embodied an irrebuttable presumption of physical incapacity to work that unduly penalized the teacher's constitutionally-protected decision to bear a child. Justice Powell, concurring in the result, thought that “equal protection analysis is the appropriate frame of reference,” but added in a footnote that he did not reach the question “whether these regulations involve sex classifications at all.” In his view, the conclusion that the regulations did not rationally further any legitimate state interest was sufficient to decide the case.

Five months later, in *Geduldig v. Aiello*, Justice Stewart confronted the question of the fit between a pregnancy-based classification and equal protection analysis in the context of a state disability insurance program that excluded from coverage disabilities accompanying normal pregnancy and childbirth. He did not discuss in the text of his opinion for the majority whether a classification based on pregnancy constituted a discrimination based on sex. Instead, he compared the condition of pregnancy to other excluded disabilities, primarily short-term disabilities of less than eight days’ duration. He concluded that the state could rationally distinguish between those two types of excluded disabilities and covered disabilities in order to preserve the self-supporting nature of the program, its low cost to employees, and the adequacy of its coverage. Justice Stewart examined in a footnote the impact of the state’s choice of covered risks on women employees. He denied that the exclusion of pregnancy as a covered disability classified employees by sex. Rather, he asserted, “[t]he program divides potential recipients into two

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19 414 U.S. at 644-48. Tribe catalogues the “irrebuttable presumption” approach as a technique of intermediate review in the context of equal protection analysis, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-30 (1978), and defends its use as “a modest addition to the set of intermediate remedies where the alternative, in its absence, might have been a more dramatic form of invalidation.” Id. § 16-32 at 1096. In the context of *LaFleur*, this point suggests that the School Boards could regulate pregnancy in ways more closely related to the goals of classroom continuity and safety, rather than that pregnancy could not be regulated at all. This suggestion is confirmed by Justice Stewart’s footnoted qualifications of the holding in the case. See 414 U.S. at 647, nn.13 & 14.
20 Id. 414 U.S. at 651 (concurring opinion of Justice Powell).
21 Id. at 653 n.2.
22 Id.
25 417 U.S. at 495. Short-term disabilities were covered if the employee was hospitalized. 417 U.S. at 488.
26 Id. at 495-96.
27 Id. at 496 n.20.
Based on this characterization of the groups being compared, Stewart drew the conclusion that neither Winter nor Edwards had expressed: "[w]hile the first group is exclusively female, the second includes members of both sexes." It followed, seemingly inexorably, that the classification did not involve a "discrimination based upon gender as such."

Justice Brennan, in dissent, did not challenge the majority's logic directly. Instead, he argued that the exclusion of pregnancy created one set of rules for males and another for females: "a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia and gout." Justice Stewart's implicit response to this criticism invoked still more formal logic. "There is no risk," he said, "from which men are protected and women are not." True, for men do not risk pregnancy. "Likewise," he added, "there is no risk from which women are protected and men are not." True again, for women are not protected against loss of work due to pregnancy. The suspicion that Justice Stewart saw only the trees, while ignoring the forest, is implicit in the criticism of one commentator who charged that "[t]he conclusion that pregnancy-based classifications are not in themselves sex-based suggests an exceedingly formalistic view of the problem."

Justice Stewart's view that a classification based on pregnancy is not discrimination based on sex was extended from the context of equal protection analysis to an interpretation of Title VII's prohibition against sex discrimination in employment in General Electric Co. v. Gilbert. General Electric's disability plan included benefits for nonoccupational sickness and accidents but excluded disabilities arising during pregnancy. Justice Rehnquist, speaking for the majority, explained that "[s]ince it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under [the statute], Geduldig is precisely in point in its holding that an exclusion of preg-

28 Id.
29 Id.
30 Id.
31 Id. at 500-01 (dissenting opinion of Justices Brennan, Douglas and Marshall). Justice Brennan's dissent uses the strict scrutiny standard of judicial review that he and three other members of the Court had applied to classifications based on sex challenged on equal protection grounds in Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion of Justices Brennan, Douglas, White and Marshall), but the standard of review chosen does not affect the definition of the classes to be compared.
32 Id. at 501 (dissenting opinion of Justices Brennan, Douglas and Marshall).
33 Id. at 496-97.
34 Id. at 497.
nancy from a disability-benefits plan providing general coverage is not a
gender-based discrimination at all."

He offered Justice Stewart's character-
ization of the relevant comparison groups as "pregnant women and
nonpregnant persons," this time in the text of the opinion as the center-
piece of the Court's interpretation of Title VII.

Justice Brennan, in dissent, again responded indirectly to the
Court's reasoning. He did not confront the Court's denial that the omis-
sion of pregnancy was necessarily a discrimination against women
because of their sex. Rather, he challenged the Court's assumption that
General Electric's plan represented a gender-free actuarial decision about
which risks to include, arguing instead that General Electric had a his-
tory of past practices that were designed to and did disadvantage preg-
nant women employees.

Justice Stevens undertook the task of refuting the Court's character-
ization of the two groups being compared. He rose to the challenge,
pointing out in a footnote that

[i]t is not accurate to describe the program as dividing "potential recipients
into two groups—pregnant women and non-pregnant persons." Insurance
programs, company policies, and employment contracts all deal with
future risks rather than historic facts. The classification is between persons
who face a risk of pregnancy and those who do not.

Stevens concluded from his characterization that the relevant compari-
son groups were indeed women and men. "By definition," he pointed
out, "such a rule discriminates on account of sex; for it is the capacity to
become pregnant which primarily differentiates the female from the
male."

Justice Stevens's characterization of the groups being compared pro-
vides one possible solution to the logical dilemma posed for traditional
equal protection analysis by the absence of a matching male group for
pregnant women. His characterization does not, however, demonstrate that
the respective classes are divided exclusively by sex. While all persons
who face a risk of pregnancy are female, the group of those who do not
includes women who are infertile and who have been surgically sterilized,
as well as men. Moreover, the first group is defined too broadly to be

37 *Id.* at 136.
38 *Id.* at 135 (quoting Geduldig v. Aiello, 417 U.S. 484, at 496-97, n.20).
39 *Id.* at 147-48 (dissenting opinion of Justices Brennan and Marshall).
40 *Id.* at 149-50 (dissenting opinion of Justices Brennan and Marshall).
41 *Id.* at 161 n.5 (dissenting opinion of Justice Stevens) (emphasis in original).
42 *Id.* at 161-62 (dissenting opinion of Justice Stevens).
43 This distinction takes on practical significance in the context of toxic work sites. See Oil,
Chemical & Atomic Workers v. Cyanamid Co., 741 F.2d 444, 450 (D.C. Cir. 1984) (holding
that the company's fetus protection policy did not constitute a "hazard" within the meaning of
the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1) (1983)). The fetus protection
policy excluded women of childbearing age from holding jobs that exposed them to toxic
substances at levels considered unsafe for fetuses. Women who could show that they had been
surgically sterilized were exempted from the policy. 741 F.2d at 445. A related suit, challeng-
useful in all situations. Thus, the requirement imposed in *LaFleur* of a mandatory maternity leave prior to delivery affected only pregnant teachers, not all teachers who faced the risk of pregnancy. Stevens's characterization, with its emphasis on future risk, is helpful in the context of insurance, but it does not solve the entire range of actual problems associated with reproduction that confront working women.

The Supreme Court's analysis in *Gilbert* rejected the contrary view of Title VII's coverage that had been adopted in the wake of *Geduldig* by six Courts of Appeal.44 Pregnant women and their allies, thwarted in their attempt to obtain judicial protection against the exclusion of pregnancy from employer disability programs, turned to Congress for relief.


A coalition of more than three hundred groups, including labor unions, feminist groups and some church groups, lobbied for Congressional repeal of *Gilbert.*45 In response, Congress amended Title VII by enacting the Pregnancy Discrimination Act46 (PDA) which defined the statutory term "sex" to include "pregnancy." Commentators47 pointed out that the PDA was intended to overrule the Supreme Court's decision in *Gilbert.* The Court, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC,*48 acknowledged that the PDA had rejected both the result and the reasoning in *Gilbert.* For statutory purposes,49 after 1978, the Court conceded that "discrimination based on a woman's pregnancy is, on its

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44 See cases cited in *Gilbert*, 429 U.S. at 147 (dissenting opinion of Justice Brennan).
45 J. GELB & M. PALLEY, WOMEN AND PUBLIC POLICIES 159-60 (1982).
46 Pregnancy Discrimination Act of 1978. The Act provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

48 462 U.S. 669 (1983) (holding that an employer that had amended its health insurance plan in response to the PDA to provide hospitalization benefits to female employees but had not at the same time extended such hospitalization benefits to the wives of male employees discriminated against men on the basis of their sex).
49 The PDA did not affect the Court's constitutional holding in *Geduldig.*
face, discrimination because of her sex.”  

Many feminist lawyers active in the repeal effort interpreted the PDA as mandating that pregnant women be treated the same as other workers.  

Other observers pointed out, however, that although the PDA ensures that pregnant women workers are equally entitled to any disability coverage the employer may provide for other workers, “[l]ess clear . . . is what the PDA requires of an employer who currently offers no disability programs at all, and who refuses to grant pregnancy benefits on the ground that to do so would be to treat pregnancy differently than other disabilities.” Specifically, the questions left open are whether Title VII, as amended by the PDA, forbids neutral employment practices with a disparate impact on pregnant women, and whether the PDA permits states to require employers to provide job-related incentives to retain pregnant women in the labor force if similar benefits are not mandated for other workers. Such incentives may include, for example, the availability of a reasonable, non-mandatory leave during pregnancy, work-place accommodations, such as facilities for lying down during rest breaks, and the right to return to work following delivery. Two recent

50 Newport News, 462 U.S. at 684.
51 See, e.g., Williams, supra note 4, at 193-94:

At the time the PDA was passed, all feminist groups supported it. Special treatment of pregnancy in the workplace had always been synonymous with unfavorable treatment; the rules generally had the effect of forcing women out of the work force and back into the home when they became pregnant. By treating pregnancy discrimination as sex discrimination, the PDA required that pregnant women be treated as well as other wage earners who became disabled. The degree to which this assisted women depended on the generosity of their particular employers' sick leave or disability policy, but anything at all was better than what most pregnant women had had before. (Footnotes omitted).

52 See Note, Sexual Equality, supra note 47, at 693.
53 Larson notes that “the character of the maternity leave issue changes markedly” in cases where the employer has no sick leave or temporary disability program. Since there is no class of employees composed of men and women who receive more generous benefits than those accorded to pregnant women, the PDA's comparative approach may be interpreted to require that pregnant women similarly receive no benefits. He offers the following illustration:

Postulate a person (man or woman) disabled for four weeks by a broken arm. The employer gives such a person no sick leave. The ability or inability of that person to work is similar to that of a female employee during the late pregnancy and childbirth period. Read mechanically, the statute says that the pregnant employee shall be treated the same as the employee with the broken arm, which is to say, shall be given no leave.

Obviously this amendment, consecrated to improving the lot of pregnant employees, never intended such a result, and, given half a chance, courts will undoubtedly find some way of preserving the pre-amendment rule.

1 A. Larson, Employment Discrimination § 38.22, at 8-34—8-35 (1985) (emphasis in original). It seems fairly clear, however, that feminists who interpret the PDA as designed to achieve what they see as "equal treatment" of men and women accept the "mechanical" reading Larson identifies as a necessary by-product of their position, at least in the absence of a judicial or legislative willingness to extend what they see as "special" benefits designed for pregnant women to all disabled workers. See infra text and accompanying notes 88-91. Larson’s view that, in this context, identical treatment does not constitute equal treatment is discussed infra, at note 99.

cases, discussed in the next section, raise the potential conflict between state and federal law when state statutes impose a duty upon employers to provide a reasonable leave to pregnant employees without regard to whether leaves are available to employees disabled for other reasons, and to provide re-employment after delivery. If such laws are not preempted by Title VII, the further question remains whether they violate any relevant state or federal constitutional provisions.

C. Miller-Wohl and California Federal: An Acknowledgement of Difference

1. Miller-Wohl

In 1972, Montana adopted an equal rights amendment to its state constitution. In 1974, the Montana legislature created an interim study group and charged its members with the responsibility of studying existing Montana laws distinguishing between persons on the basis of sex, and determining “what changes should be made in these laws to achieve true legal equality of the sexes while preserving for all the people of Montana those essential protections which orderly government provides for its citizens.” In responding to this charge, the subcommittee noted its awareness of “the most common criticism of equal rights legislation: that equal rights for men and women would destroy the family and bring chaos to an orderly society and government.” The subcommittee sought to meet this criticism by harmonizing the potentially divisive pursuit of equality with the preservation of traditional family life. To that end, it proposed legislation which it believed “would accomplish real sexual equality while encouraging stable and workable family and societal relationships.” This approach, applied to the situation of pregnant working women, produced a bill that, as redrafted, was enacted in 1975 as the Montana Maternity Leave Act. The Act enabled pregnant women to choose to continue working during pregnancy; to have a reasonable pregnancy leave; to collect any appropriate and available disabil-

Burns v. Rohr Corp., 346 F. Supp. 994, 996-98 (S.D. Cal. 1972) (invalidating under Title VII a state statute requiring rest periods for women only). Under the analysis suggested here, a more narrowly drawn statute authorizing, but not requiring, rest periods for pregnant workers only might survive a Title VII challenge.

MONT. CONST. art. II, § 4 provides in part that “[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”


EQUALITY OF THE SEXES, supra note 56, at 3.

Id.

MONT. CODE ANN. §§ 49-2-310—49-2-311 (1983). The Act reads in part as follows:
ity benefits; to return to work after delivery; and to be free of retaliation for filing a complaint against an employer who violated the Act. The Montana law thus pre-dated the enactment of the PDA. Indeed, the House Committee Report accompanying the PDA cited Montana, along with five other states, as jurisdictions that "specifically include pregnancy in their Fair Employment Practices Laws." Once the PDA became effective, on October 31, 1978, however, the stage was set for a potential conflict between the two laws.

The facts that provided the legal basis for a challenge to the Montana law based on the PDA occurred less than a year after the enactment of the federal provision. On August 1, 1979, the Miller-Wohl Company hired Tamara L. Buley to work as a salesperson in its clothing store in Great Falls, Montana. She missed two-and-a-half days of work during her first week of employment. She thought she had contracted the flu. Instead, as she learned two weeks later, she was pregnant. In its opinion in Miller-Wohl Co. v. Commissioner of Labor and Industry, the Montana Supreme Court thus described her condition:

During the next two weeks she suffered from "morning sickness." She felt nauseated and faint, and as a result missed time from work, had to leave the selling floor for breaks, and spent considerable time in the store bathroom vomiting, and was sent home early on occasion. Miller-Wohl fired Buley on August 27, 1979. The Montana Supreme Court observed that the employer took this action "undoubtedly because

§ 49-2-310. Maternity Leave—unlawful acts of employers. It shall be unlawful for an employer or his agent to:

(1) terminate a woman's employment because of her pregnancy;

(2) refuse to grant to the employee a reasonable leave of absence for such pregnancy;

(3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; or

(4) require that an employee take a mandatory maternity leave for an unreasonable length of time.

§ 49-2-311. Reinstatement to job following pregnancy-related leave of absence. Upon signifying her intent to return at the end of her leave of absence, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits, unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

60 Id. Section 49-2-310(4) was not part of the subcommittee proposal. See EQUALITY OF THE SEXES, supra note 56, at 157-60. As originally enacted in 1975, the Act also contained § 39-7-203(4) which declared that it was unlawful for an employer to "retaliate against any employee who files a complaint with the commissioner under the provisions of this part." A 1983 amendment deleted subsection (4).

61 H.R. REP. No. 948, 95th Cong., 2d Sess. 11, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749, 4759. The other five states mentioned were Alaska, Connecticut, Maryland, Minnesota and Oregon.


63 Id. at 1245.
her pregnancy diminished her effectiveness as a sales clerk."

Buley filed a complaint on August 6, 1980, with the Montana Commissioner of Labor and Industry. The Commissioner found that Miller-Wohl had violated the Montana Maternity Leave Act. It ordered Miller-Wohl to reinstate Buley as an employee and provide her with back pay plus penalty of $6,573.60. Miller-Wohl, which had earlier commenced a declaratory judgment complaint in the federal district court, then pressed that court for a determination that Title VII preempted the Montana law. The federal district court ruled against preemption, but its judgment was vacated by the Ninth Circuit for lack of subject matter jurisdiction.

Miller-Wohl then turned to the Montana state courts, petitioning for a review of the Commissioner's decision. A lower state court reversed the Commissioner's order. Buley and the Commissioner appealed that judgment to the Montana Supreme Court, which reversed, reinstating the Commissioner's order.

2. California Federal (Cal Fed)

The California legislature amended the California Fair Employment Practice Act in 1978 to define as an unfair labor practice an employer's refusal to allow a female employee to take a leave for a reasonable period of time, not to exceed four months, on account of pregnancy. Unlike the Montana Maternity Leave Act, which had been proposed in response

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64 Id.
65 Id.
66 Miller-Wohl Co. v. Comm'r of Labor & Industry, 515 F. Supp. 1264 (D. Mont. 1981), vacated, 685 F.2d 1088 (9th Cir. 1982). Judge Hatfield reasoned that Miller-Wohl could comply with both state and federal law by amending its leave policy to grant reasonable sickness and disability leaves to all first year employees in its Montana stores. 515 F. Supp. at 1267. The Montana Supreme Court subsequently approved his reasoning supporting the view that the Montana statute did not violate the equal protection clause. See infra text and accompanying notes 97-98.
67 Miller-Wohl Co. v. Comm'r of Labor & Industry, 685 F.2d 1088, 1090-91 (9th Cir. 1982) (holding that the federal claims raised in Miller-Wohl's declaratory judgment complaint were defenses to Buley's state claim, and failed to create the requisite federal question).
68 Miller-Wohl, 692 P.2d at 1246.
69 1978 Cal. Stat. 4320 § 1, adding CAL. LAB. CODE § 1420.35 to the California Fair Employment Practice Act, former CAL. LAB. CODE §§ 1410-33. The FEPA was rechaptered and retitled as the Fair Employment and Housing Act in 1980. The provisions of CAL. LAB. CODE § 1420.35 were incorporated into the FEHA as CAL. GOV'T CODE § 12945. The language of CAL. GOV'T CODE § 12945(b)(2) is the same as that earlier contained in former CAL. LAB. CODE § 1420.35(b)(2). As § 12945(e) makes plain, only § 12945(b)(2) applies to employers subject to Title VII. The other provisions are limited to employers governed by state law only. CAL. GOV'T CODE. § 12945 (Deering 1982) reads in its entirety as follows: It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
(a) For any employer, because of the pregnancy, childbirth, or related medical condition of any female employee, to refuse to promote her, or to refuse to select her for a training program leading to promotion, provided she is able to complete the training program at least three months prior to the anticipated date of departure for her pregnancy leave, or to discharge her from employment or from a training program leading
to a charge to implement the Montana Equal Rights Amendment, the California statute was enacted in response to the Supreme Court's decision in *Gilbert*. The amendment broadened the coverage of an existing provision that made it unlawful for governing boards of school districts to discriminate against females because of their pregnancy, or to terminate any employee whose temporary disability could not be accommodated because of an employment policy that provided no leave or insufficient leave, if the policy had a disparate impact on employees of one sex and was not justified by business necessity. The Attorney Gen-
eral of California argued in a brief filed before a federal district court that the legislative intent underlying the amendment "was aimed at broadening employee protection against adverse impact on the basis of pregnancy."\textsuperscript{73}

As in the case of the Montana law, an employer charged with violating the state law challenged the California statute as being in conflict with Title VII. Lillian B. Garland, who worked as a receptionist and PBX operator for California Federal Savings and Loan Association in Los Angeles, took a pregnancy/childbirth disability leave beginning around January 18, 1982.\textsuperscript{74} Her baby was born on February 12, 1982.\textsuperscript{75} She notified the company on or about April 20, 1982, that she was able to return to work. The personnel department informed her that no receptionist position or similar job openings were then available. After waiting for seven months,\textsuperscript{76} Lillian Garland returned to work at Cal Fed as a receptionist on November 22, 1982.

Garland contacted the California Department of Fair Employment and Housing for advice. The Department served an accusation on Cal Fed on May 2, 1983, alleging that it was in violation of California law. A hearing on the charge was scheduled for September 15-16, 1983. On August 1, 1983, Cal Fed filed a suit for declaratory and injunctive relief in the federal district court, contending that the California pregnancy leave provision was preempted by federal law.\textsuperscript{77} The federal court

\textsuperscript{73} Defendants' Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 23, California Federal Savings & Loan Ass'n v. Guerra, 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984), rev'd 758 F.2d 390 (9th Cir. 1985) [hereafter cited as Cal Fed]. The legislation as enacted may have gone further than some of its sponsors and supporters intended, if they thought that a purely comparative approach extending already existing benefits to pregnant workers was envisioned. See Brief of National Organization for Women as amicus curiae at 36-41, California Federal Savings & Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985) [hereinafter cited as Brief of NOW].

\textsuperscript{74} Id. Defendants' Notice of Motion and Motion for Summary Judgment, supra note 73, at 5, 6. The parties entered into stipulated findings of fact, id. at 6, n.2. Except where indicated, the facts of the case stated in the text are based on this stipulation.


\textsuperscript{76} Lewin reports that during that seven month period, "[t]hings got worse for Miss Garland... : Lacking income, she was evicted from her apartment, and had to sleep on a woman friend's couch. Without resources to care for the baby, she lost custody to the child's father." Lewin, supra note 75, at col. 6.

\textsuperscript{77} The federal court enjoined the Department from holding the scheduled hearing. Judge Real also rejected the Department's motion to dismiss for lack of subject matter jurisdiction. Cal Fed., 34 Fair Empl. Prac. Cas. (BNA) at 567. Subsequent to the Ninth Circuit's holding in Miller-Wohl that a defense based on federal law to a state claim was not sufficient to confer subject matter jurisdiction on a federal court, see supra text and accompanying note 67, the United States Supreme Court arguably undercut that holding. In Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983), the Court distinguished its holdings in Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), that the federal courts lacked subject matter jurisdiction over an action seeking a declaration that state laws were not preempted by federal law. The Court pointed out that in Shaw, by contrast, "companies subject to ERISA [Employee Retirement Income Security Act] regulation seek injunctions against enforcement of state laws they claim are pre-empted by ERISA, as well as declarations that..."
entered its order on March 21, 1984, granting Cal Fed's motion for summary judgment. The Department appealed the judgment to the Ninth Circuit, which reversed.

3. Arguments By the Parties in Miller-Wohl and Cal Fed

The employers in Miller-Wohl and Cal Fed made broadly similar statutory arguments. Both characterized the respective state statutes as requiring that they violate Title VII by treating pregnant women more favorably than they treated other disabled employees. Miller-Wohl, but not Cal Fed, also claimed that the state law violated the due process and equal protection clauses of the federal constitution.

The state defendants in the two cases took essentially similar positions. The Montana Commissioner contended that the Maternity Leave Act was supplemental, rather than contradictory, to Title VII. In addition, the Commissioner sought to uphold the statute against constitutional attack by characterizing it as an affirmative action measure designed to enable women to contribute to society according to their fullest possible potential. The California state defendants argued that the state statute was fully consistent with the goals and objectives of Title

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those laws are pre-empted." Id. 463 U.S. at 96 n.14 (emphasis in original). The Court went on to point out that

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See Ex parte Young, 209 U.S. 123, 160-162, 28 S. Ct. 441, 454-455, 52 L.Ed. 714 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. [Citations and further text omitted.]

Id. The jurisdictional question was not briefed or argued in Shaw, but the Department accepted Shaw as controlling on this point in Cal Fed. Lillian Garland's subsequent motion to intervene as of right before the Ninth Circuit on the issue of subject matter jurisdiction was rejected by that court in an unpublished memorandum filed simultaneously with its opinion on the merits. Cal Fed, 758 F.2d at 393.

79 Cal Fed, 758 F.2d 390 (9th Cir. 1985).
81 Complaint of Miller-Wohl, supra note 80, at 7. Miller-Wohl refrained from claiming, however, that the Montana Maternity Leave Act violated the state constitutional Equal Rights Amendment that it was designed to implement.
83 Id. at 15-17.
VII. In their view, the state statute was designed to assure equal employment opportunity for women by protecting female employees affected by pregnancy, childbirth, and related medical conditions from the adverse impact of employment policies that provide insufficient disability leave, or fail to assure that women who take disability leave on account of pregnancy have the right to return to the same or similar job within a reasonable period of time. The California defendants relied on *Abraham v. Graphic Arts International Union*, in which the Court of Appeals for the District of Columbia Circuit had held in a case arising prior to the enactment of the PDA that an employer's ten-day maximum leave policy violated Title VII because of its adverse impact on women who became pregnant. In addition, they pointed to passages in the legislative history of the PDA that they interpreted as evidencing Congressional approval of the Montana statute and other similar statutes dealing with pregnancy. The California defendants broadly summarized this part of their argument:

> [W]hile the legislative history of the PDA reflects Congress' intent that women affected by pregnancy, childbirth or related medical conditions not receive less favorable treatment than similarly situated coworkers, plaintiffs have pointed to nothing in the legislative history which supports their assertion that in enacting the PDA it was Congress' intent to foreclose state legislation which provides pregnant workers with additional protection in order to ensure equality of employment opportunity.

4. Arguments of Amici Curiae in Miller-Wohl and Cal Fed

Feminist and civil rights groups split over the question of statutory interpretation posed in *Miller-Wohl* and *Cal Fed*. Briefs filed in *Miller-Wohl* by a consortium of groups led by the American Civil Liberties Union and in *Cal Fed* by a consortium of groups and individuals led by the National Organization for Women argued that state legislative

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86 Defendants' Notice of Motion and Motion for Summary Judgment, *Cal Fed*, supra note 73, at 34-35 and 34 n.12.
88 Brief of American Civil Liberties Union as Amicus Curiae, Miller-Wohl Co. v. Comm'r of Labor & Industry, 692 P.2d 1243 (Mont. 1984) [hereinafter cited as Brief of ACLU]. Other groups joining the ACLU brief were the ACLU of Montana, the National Organization for Women, Montana State NOW, the NOW Legal Defense and Education Fund, the League of Women Voters of the United States, the League of Women Voters of Montana, the National Women's Law Center, and the Women's Legal Defense Fund. Three other Montana groups filed separate *amicus curiae* briefs in support of the Montana statute: the Women's Law Section of the State Bar of Montana, the Montana Human Rights Commission, and the Montana Education Association.
89 Brief of NOW, supra note 73. NOW was joined by the NOW Legal Defense and Education Fund, the National Women's Political Caucus, the League of Women Voters of the United
efforts to provide special benefits to pregnant workers constituted "protective" legislation that was adverse to the long-range interests of women in equal treatment with men. The state statutes were thus prima facie in conflict with the provisions of the PDA, which mandated equal treatment; but the courts could interpret those statutes so as to make their terms consistent with Title VII by ordering that their benefits be extended to all disabled workers.

The California Department of Fair Employment and Housing, a defendant in Cal Fed, joined by two other groups, filed an amicus curiae brief before the Ninth Circuit in Miller-Wohl. One of those groups, Equal Rights Advocates, Inc., appeared as amicus curiae in Cal Fed as well. Both briefs argued that the restrictive leave policies maintained by the employers in the two cases violated Title VII because of their adverse impact on pregnant women. Moreover, the state laws were consistent with the PDA in that both state and federal laws were designed to provide equal employment opportunities to pregnant women.

Despite their theoretical disagreement, the two sets of amici were divided only narrowly in their proposed outcome in both cases. Each sought to sustain the state statutes against a claim of federal preemption. The ACLU and NOW briefs insisted, however, that the benefits provided by the state statutes must be judicially construed to extend to all workers, not merely to pregnant women. Benefits limited to pregnant workers, they contended, would be preempted by Title VII. Equal Rights Advocates and its allies believed that the PDA left the states free to enact additional measures to place pregnant workers on an equal basis with all other workers.

5. The Courts Decide

The Montana Supreme Court held that Miller-Wohl violated both the Montana law and Title VII when it fired Tamara Buley because of her pregnancy. It rejected, however, the argument that the PDA pre-
empted state law. Instead, it adopted Judge Hatfield's reasoning, which he had offered to rebut the equal protection argument in the subsequently-vacated federal district court judgment in *Miller-Wohl.* Hatfield had argued that the Montana statute did not treat men and women unequally by providing benefits limited to pregnancy. He continued:

Rather, by removing pregnancy-related disabilities as a legal grounds for discharge from employment, the MMLA places men and women on more equal terms. All workers, male or female, disabled for any reason other than pregnancy are still treated identically. Whether the disability or sickness is one that members of either sex could suffer—such as a broken leg, or hepatitis—or is one that members of only one sex could suffer—such as an ovarian cyst or prostatitis—the MMLA still permits plaintiff to treat workers under its leave policy with equal severity. The MMLA merely makes it illegal for an employer such as plaintiff [Miller-Wohl] "... to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *National Gas Company v. Satty,* 434 U.S. 136, 142 (1977).

The Montana Supreme Court thus recognized that the differentness of pregnancy cannot be adequately accommodated in the workplace by treating women the same as men. Its holding is consistent with the view taken in this paper, and developed more fully below, that equality between men and women requires compensating for biological reproductive sex differences that would otherwise handicap women and impede their realization of equal employment opportunity.

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99 Other commentators support the view taken in this paper as well. Thus, Larson recognizes that cases like *Miller-Wohl,* where the employer has no available sick leave or temporary disability program, present problems for an analysis based on formal equality:

We have here an example of the kind of case in which an "equality" issue cannot be disposed of by decreeing that the sexes shall be treated exactly alike. Instead, we must build upon a quite different premise: when the two sexes are *dissimilar* in that one sex exclusively possesses a trait which the other, without exception, does not possess, and when that trait has a bearing upon employability, it is a differentiation based on sex to treat the two sexes *similarly* as to that trait. Clearly, if an employer says, "All pregnant employees will be fired," there is sex differentiation. It is really no different in effect to say, "No maternity leaves will be granted."... [D]ischarge for pregnancy is
The Montana Supreme Court went on to point out that extension to all workers of the benefits provided by the Montana law only to pregnant workers would end any argument that the state law violated Title VII. The court recommended to the Montana legislature that it consider appropriate language to extend the Act’s coverage.\(^{100}\)

The Ninth Circuit also rejected the claim of federal preemption in \textit{Cal Fed}. It disposed of Judge Real’s assertion that the California statute discriminated against men on the basis of pregnancy as a conclusion that “defies common sense, misinterprets case law, and flouts Title VII and the PDA.”\(^{101}\) Judge Ferguson, writing for the court, characterized the preemption inquiry as a narrow one: the court must decide only whether the pregnancy leave provided by the California statute was “permissible”\(^{102}\) under Title VII. In an effective rebuttal to those who fear that any judicial recognition of the uniqueness of pregnancy might lead to the uncritical acceptance of other differences as well, to the ultimate disadvantage of women,\(^{103}\) Judge Ferguson made plain the limits of the holding:

\[\text{[B]ecause } \S \text{ 12945(b)(2) deals with a condition that is unique to women—pregnancy disability rather than, say, parenting—our decision has no bearing on the lawfulness of state statutes or employment practices that classify on the basis of purportedly sex-linked factors that are actually less biological than stereotypical.}\(^{104}\)

The Ninth Circuit’s interpretation of the PDA recognizes that its two clauses are to be read independently.\(^{105}\) It reasoned that the first

\(^{100}\) Miller- Wohl, 692 P.2d at 1255. The Montana legislature has not, at the date of this writing, amended the MMLA.

\(^{101}\) Cal Fed, 758 F.2d at 393 (9th Cir. 1985). The Court pointed out that Judge Real’s reliance on \textit{Newport News} for his conclusion was misplaced, since that case had required the extension to male employees’ wives of pregnancy benefits available to female employees and their husbands. Cal Fed, on the contrary, sought to limit the pregnancy benefit provided by the state.

\(^{102}\) Id. 758 F.2d at 394.

\(^{103}\) See Brief of NOW, supra note 73, at 12-16.

\(^{104}\) Cal Fed, 758 F.2d at 395.

\(^{105}\) A similar interpretation was advanced initially in Note, \textit{Sexual Equality}, supra note 47, at 695-96, and more recently in Note, \textit{Employment Equality}, supra note 99, at 934-40. See supra note 46 for the text of the PDA.
clause made the term "pregnancy" a substitute for the term "sex" in Title VII's antidiscrimination mandate, thus enabling Congress to procure "for pregnancy that which it had already procured for sex: a guarantee against discrimination of all varieties, including facially neutral policies with a disparate impact."\(^{106}\) Contrary to Cal Fed's argument, however, the court refused to read the second clause of the PDA as demanding "pregnancy-neutral policies at all times."\(^{107}\) Instead, it reasoned that Congress had intended to require at a minimum that pregnant women be treated as well as other employees, but not to prevent the states from requiring more complete maximum coverage.\(^{108}\)

The Ninth Circuit's view of how pregnancy fits within the framework of an analysis based on equality between men and women is consistent with the approach taken in this paper. Judge Ferguson put the argument concisely and well in the following passage:

The PDA does not require states to ignore pregnancy. It requires that women be treated equally. As the preceding discussion shows, the PDA also provides a common-sense test of whether a policy—or a statute—affords equal treatment to women who are pregnant. The measure is whether the policy furthers "Title VII's prophylactic purpose of achieving 'equality of employment opportunities.'" \(^{109}\) *EEOC v. Puget Sound Log Scaling & Grading Bureau, 752 F.2d 1389, 1392 (9th Cir. 1985)* (quoting *Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).*). Thus, equality under the PDA must be measured in employment opportunity, not necessarily in amounts of money expended—or in amounts of days of disability leave expended. Equality in the disability context compares coverage to actual need, not coverage to hypothetical identical needs.\(^{109}\)

The ultimate authority to interpret an Act of Congress rests, of course, with the United States Supreme Court. Litigants in both cases have invoked the Court's power to interpret the PDA.\(^{110}\) The remaining task of this paper, in anticipation of that interpretation, is to show how the differentness of pregnancy can be recognized and accommodated within a legal and philosophical framework that affirms the equality of women and men.

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\(^{106}\) *Cal Fed, 758 F.2d at 396.* Despite the language quoted in the text, the Ninth Circuit indicated at an earlier point in its opinion that "[w]e need not determine, as the litigants would have us do, whether Title VII compels employers to grant reasonable pregnancy disability leave to protect women from the potentially disparate impact of facially neutral, but inadequate, disability leave policies; we need only decide whether section 12945(b)(2) is permissible under Title VII." \(^{107}\) *Id. at 394.* For an argument that the PDA should be interpreted to permit a disparate impact claim of pregnancy discrimination, see Note, *Employment Equality,* supra note 99, at 940-49.

\(^{107}\) *Cal Fed, 758 F.2d at 396.*

\(^{108}\) *Id.*

\(^{109}\) *Id.*

II. EQUALITY AND DIFFERENCE

A. An Episodic Analysis of Biological Reproductive Sex Differences

The philosophical claim that all men—or all women—are equal is commonly challenged by the existence of such inequalities as those of intelligence, ability, merit, physical condition, wealth, status, or power. Some philosophers have chosen to respond to challenges of this sort by invoking a generalized ideal of equality that transcends inequalities stemming from the specific differences of the human condition, such as equality of respect owed to all humans, equality of opportunity, or equality of consideration of interests. Others have sought to justify some forms of social and economic inequalities within a theory of justice. With rare exceptions, these philosophical discussions of equality have been phrased in terms of equality among men, with the term "man" being used in its generic sense to include "woman." When the specific question is raised about what equality between women and men might mean, the debate focuses on a particular set of differences: the biological differences that define the two classes of male and female. The question then becomes: Given that biological reproductive sex differences exist and may be expected to persist, how can it be argued that men and women are equal?¹¹³


¹¹³ See Benn, Egalitarianism and the Equal Consideration of Interests, in NOMOS IX: EQUALITY 61 (1967).

¹¹⁴ See, e.g., J. Rawls, A THEORY OF JUSTICE 60 (1971) (justifying certain social and economic inequalities provided that they are arranged so that they are both "(a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all"). See, for an application of Rawls's difference principle to sexual justice, J. Radcliffe Richards, The Skeptical Feminist 90-120 (1980).


¹¹⁷ See Lucas, 'Because You Are A Woman', 48 PHIL. 161 (1973) (arguing that sex-based differences exist, and may, in some instances, be the basis for differences in treatment). Lucas's arguments are criticized in Govier, Woman's Place, 49 PHIL. 303 (1974); Bhattacharya, Because He Is A Man, 49 PHIL. 96 (1974); and Haack, On the Moral Relevance of Sex, 49 PHIL. 90 (1974). Lucas responds in Vive La Difference, 53 PHIL. 363 (1978); rejoinders appear
At least two approaches to this question have been taken. The significance of biological reproductive sex differences can be minimized, or it can be exalted. The first approach holds that, although differences of this sort may be acknowledged, no public consequence should turn on whether a person is male or female. Equality between men and women is achieved by removing sex as a consideration of consequence; that is, by making the sexes morally, if not physically, indistinguishable. A second approach identifies biological reproductive sex differences as the basis of sexual identity and uses that identity, in turn, as the foundation for social differences that establish separate sex roles for women and men. This approach would abandon egalitarian models in favor of a bivalent concept of the interests of women and men, to create a sort of "separate but equal" social model for the sexes. Adherents of the first position generally support a vision of the good society in which cross-sex assimilation is the norm and difference is limited as narrowly as possible. Those holding to the second position may support a range of social arrangements, from traditional ones in which women and men occupy separate spheres to more modern views of an androgynous society in which the spheres converge, preserving the best characteristics of both sexes.

I wish to propose a third, alternative, approach: that we take account of biological reproductive sex differences and treat them as legally significant only when they are being utilized for reproductive purposes. I suggest that biological reproductive sex differences should be recognized as a functional attribute, rather than an inherent characteristic, of sexual identity, and as one that may or may not be exercised. A woman may be distinguished from a man by her capacity for pregnancy, childbirth, and lactation; but she may choose never to utilize that capac-

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119 Thus, Jaggar denies "that it is either a conceptual or a moral truth that all persons are either female or male." Jaggar, supra note 118, at 279.

120 This position is defended by Elizabeth Wolgast. See E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 25-30, 103-37 (1980). Reviewers have criticized Wolgast for her failure to distinguish adequately between childbearing, a function that can be performed only by women, and childrearing, which can be carried out by either parent. See, e.g., Pierce, Book Review, 93 THE PHIL. REV. 93 (1984); Keohane, Review Essay, 93 ETHICS 102, 108-111 (1982); Beggs, Recent Publications, 17 HARV. C.R.-C.L. L. REV. 287, 288-89 (1982).

121 WOLGAST, supra note 120, at 16.

122 See, e.g., Wasserstrom, supra note 118, at 612-14.

123 See, e.g., De Marco, *Men and Women, Their Difference and Its Importance*, 56 THOUGHT 449 (1981); Browne, supra note 8.

ity. Is she any less female? A man has the unique capacity to produce and ejaculate sperm. But if he fathers no children, he is still a man. Infertile women and men retain their sexual identity, if not their distinguishing sexual capacity. In our society salient distinctions are based on sexuality rather than reproductive behavior. Women and men do not exercise their different biological reproductive capacities when they conform to social norms of appropriate interaction, nor do they necessarily do so when they engage in sexual intercourse. Those differences

125 The model of equality I propose is furthered by, but is not conditioned upon, a woman's having the legal right and the effective power to control her reproductive capacity. If a woman cannot choose whether to utilize her reproductive capacity, she is not a free moral agent, let alone the equal of a man. The Supreme Court has recognized that procreation is a fundamental right that extends to both sexes regardless of marital status. See Carey v. Population Servs. Int'l, 431 U.S. 678, 687-88 (1977) (distribution of non-prescription contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 452-53 (1972) (availability of contraceptives to unmarried persons); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (use of contraceptives by married persons); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (compulsory sterilization). Once the reproductive cycle has been initiated, a woman's right to privacy encompasses her right to choose whether or not to terminate her pregnancy through induced abortion, see Roe v. Wade, 410 U.S. 113, 153 (1973). Moreover, the Court has recognized that a woman's unique physical experience of pregnancy justifies allowing her to make a unilateral choice to terminate her pregnancy through induced abortion despite her husband's objections, see Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 71 (1976).

The recognition of these fundamental rights facilitates an episodic analysis of biological reproductive sex differences by enabling a woman to control her reproductive capacity as freely as a man is able to control his, thus placing both sexes on an equal footing. But even if these rights were not recognized, or if that specific to women—namely, the decision to choose whether to continue a pregnancy to term or to terminate it through induced abortion—were sharply restricted, episodic analysis would still apply to the reproductive function. That is, a woman who finds herself pregnant, even if against her will and despite her wish to terminate the pregnancy, will still occupy a different position from that of a man as a result of procreation. The argument advanced in the text at notes 140-141, infra, based on the social policy favoring equality between men and women in employment will still apply to a pregnant worker whose pregnancy is unwanted. Indeed, she may have a stronger claim to be free of disadvantages at work than the woman whose pregnancy is desired: but for the hypothetical restriction against her decision to terminate the pregnancy, she could avoid the disadvantages.

Menstruation provides an example of an involuntary biological function associated with the female reproductive cycle. I agree with Wasserstrom that social institutions need not be built around this difference, see Wasserstrom, supra note 118, at 612-13, especially in view of the heavy cultural overlay that impedes even medical analysis of its characteristics. See Birke & Best, Changing Minds: Women, Biology and the Menstrual Cycle, in BIOLOGICAL WOMAN—THE CONVENIENT MYTH 161, 163-74 (R. Hubbard, M. Henifin & B. Fried, eds. 1982). Moreover, many women who are diagnosed as having premenstrual syndrome, a condition defined as "the recurrence of symptoms in the premenstruum with absence of symptoms in the postmenstruum," in a severe degree so that their normal working capacity and lifestyles are disrupted by the symptoms, are said to respond well to treatment with hormones. See K. DALTON, THE PREMENSTRUAL SYNDROME AND PROGESTERONE THERAPY 141 (2d ed. 1984).

126 The National Urban League's current campaign aimed at teaching young men to distinguish between manhood and fatherhood provides an apt example. The "male responsibility" campaign, using posters and spot radio announcements, carries the message "[d]on't make a baby if you can't be a father." New York Times, April 21, 1985, Sec. 4 at 20, col. 1.

127 See generally, Goffman, The Arrangement Between the Sexes, 4 THEORY & SOCIETY 301 (1977) (arguing that gender identity is a social, rather than a biological, phenomenon); see also Holmstrom, Do Women Have A Distinct Nature?, 14 PHIL. FORUM 25 (1982) (arguing that, if so, its determinants are social, rather than biological).


129 See Goffman, supra note 127, at 313-25, discussing examples of institutional reflexivity—
appear only when the reproductive function is manifested through a pregnancy that resulted from the reproductive behavior of both sexes.\textsuperscript{130}

This way of looking at reproductive behavior permits us to examine biological reproductive sex differences in a new light. It becomes clearer that reproductive behavior is episodic and temporary. Male reproductive behavior is quite brief in duration; that of females occupies approximately nine months, but its cycle is complete following childbirth. Men and women who are parents are not functionally distinguishable by sex in their capacity to care for the newborn infant, except where breast-feeding is utilized as the method of choice for providing nourishment.\textsuperscript{131} Some have argued that a cultural preference for females over males in the role of primary nurturing parent produces psychological differences based on sex in children that in turn reinforce existing social patterns of male domination, and have proposed that the recurrent cycle be broken by having males join females in caring for children.\textsuperscript{132} Such arguments rest on the assumption that no innate biological traits prevent men from forming primary bonds with infants.

The relevance of this episodic analysis of biological reproductive sex differences for a theoretical model of equality between women and men is that it recognizes that those differences exist, but regards them as inconsequential except during the specific occasions on which they are utilized. Upon those occasions, as the result of the union between sperm and egg, pregnant women experience a complex of needs that are different from those of men and, indeed, of non-pregnant women. Pregnant women

\textsuperscript{130} Some pregnancies are the planned-for result of heterosexual intercourse, artificial insemination, or in vitro fertilization. Others are the presumably unanticipated consequence of recreational heterosexual intercourse. Still others are the product of rape or incest. Whether the pregnancy is desired by both participants, unanticipated, or even unwanted by one or both, does not affect the analysis presented in this paper. I do not undertake here an examination of the possible impact of modern reproductive technologies on my analysis. See generally G. COREA, THE MOTHER MACHINE (1985); TEST-TUBE WOMEN (R. Arditti, R. Klein & S. Minden eds. 1984).

\textsuperscript{131} Rossi, in a review of the literature, concludes that gender differences in parenting styles are of the same kind that emerge in psychological research: "greater empathy, affiliation, sensitivity to nonverbal cues and social skills in women, greater emphasis on skill mastery, autonomy and cognitive achievement in men." Rossi, supra note 124, at 8. She rejects the idea, however, that these different parenting styles arise as a result of pregnancy and birthing, relying instead on "gender differences that are in place long before a first pregnancy." Id. at 9. She identifies those differences as the result of both social and biological processes. Id. at 11. A recent study of the nurturing styles of fathers offers as one of its conclusions, however, the finding that "[t]he father’s nurturing style is a distillate of selected identifications and disidentifications with the important objects in his own life. Such nurturing capacities do not, therefore, seem to be wholly determined by genetic endowment or gender identity." Pruett, Infants of Primary Nurturing Fathers, in 38 THE PSYCHOANALYTIC STUDY OF THE CHILD 257, 274 (A. Solnit, R. Eissler & P. Neubauer, eds. 1983).

may be advised to follow a certain diet,\textsuperscript{133} to abstain from ingesting particular substances,\textsuperscript{134} to avoid identified toxic environments,\textsuperscript{135} and to engage in or refrain from specified conduct\textsuperscript{136} in order to maximize their chances of delivering a healthy child. And, as a consequence of their changing physical condition, pregnant women may be temporarily disabled from work.\textsuperscript{137}

The necessary result of a woman's reproductive behavior is that, for a limited time and in ways that may vary widely among pregnant women, her condition will be different from that of other persons of both sexes. Is she therefore unequal to those other persons? In particular, is she unequal to a man who has also engaged in reproductive conduct?


\textsuperscript{134} \textit{Id.} at 66-71 (discussing alcohol, tobacco, marijuana, caffeine, herbal teas, and medicines). The Surgeon-General has concluded that smoking is especially harmful to pregnant women, and warnings directed at them have been placed on cigarette packages. \textit{See} \textit{New York Times}, Sept. 27, 1984, at A1, col. 5. For a discussion of whether an unwilling mother could be compelled to undergo forced bodily intrusion in order to protect the fetus, see Robertson, \textit{The Right to Procreate and In Utero Fetal Therapy}, 3 J. LEG. MED. 333, 353-61 (1982).


\textsuperscript{136} Bed rest may become necessary; exercise may be recommended. See P. Simkin, \textit{supra} note 133, at 75-90.

\textsuperscript{137} Dr. John A. Kerner, Clinical Professor of Obstetrics and Gynecology at the University of California, San Francisco, has provided me with a list of nonpathologic problems in pregnancy which might interfere with a woman's ability to work. These include, during the first trimester, nausea and vomiting; distraction caused by knowledge of the possibility of spontaneous abortion resulting from strenuous work, or concern about danger to the fetus from its exposure to toxic substances; and a work situation that might interfere with proper nutrition.

During the second trimester, the danger of fetal exposure to toxic substances continues, but spontaneous abortion is less likely.

During the third trimester, the woman's increasing size interferes with her ability to do certain sorts of work (e.g., work as a waitress or a coal miner who must get into confined spaces). Premature labor can be caused by strenuous work. The woman loses her ability to move quickly in an emergency (e.g., affecting her work as an airline cabin flight attendant or her performance in nontraditional occupations such as a police officer on patrol duty and some military jobs). The woman becomes unable to lift heavy objects or persons (e.g., affecting her ability to do some mechanical work, or to work as a firefighter). There is a danger that the onset of labor may occur far from the place of planned confinement (e.g., this may pose a problem in jobs requiring travel). She will be less able to stand or sit for long periods of time because of edema generated; and she may experience low back discomfort. Sleep disturbances cause loss of energy and sometimes produce loss of emotional control (such sleep disturbances can be mechanical or related to fetal motion, or stem from an emotional basis). A woman may experience disturbance in her emotional stability at any time during pregnancy. Letter from Dr. John A. Kerner to Professor Herma Hill Kay (June 24, 1985) (on file at Professor Kay's office—edited, and with some parenthetical material identifying specific jobs added, by Professor Kay). \textit{See also} P. Simkin, \textit{supra} note 133, at 36-39, setting out a "calendar of pregnancy" detailing physical and emotional changes in the mother during pregnancy. Non-pregnant workers may also, of course, become temporarily disabled from work and need to take disability leave without fear of job reprisal. I believe that all workers should be protected against disability at work. One of the burdens of this paper, however, is to show that it is not unfair to provide such work-place accommodations for pregnancy without first having provided similar relief for all other disabling conditions. \textit{See infra} text and accompanying footnotes 176-184.
I think it is clear that if a woman who is not pregnant is assumed to be equal to a man on some such measure as, say, equality of respect or equality of consideration of interests, her reproductive behavior does not remove or detract in any way from her claim to that sort of equality. A woman may, however, unlike a man who engages in reproductive behavior, be placed at a temporary disadvantage with respect to equality of opportunity. In order to bear a child, she may be temporarily disabled from pursuing her own self-interests. If she becomes pregnant more than once, she may face recurrent disadvantages. It appears unjust to place the consequential disadvantages of reproductive conduct only upon women. This unjust result need not follow, however, for a philosophical basis exists for alleviating the temporary disadvantages of pregnancy within a framework of equality.

Philosophers recognize that, just as the concept of equality requires that equals be treated equally, so it requires that unequals be treated differently. To treat persons who are different alike is to treat them unequally. The concept of formal equality, however, contains no independent justification for making unequals equal. A different concept, that of equality of opportunity, offers a theoretical basis for making unequals equal in the limited sense of removing barriers which prevent individuals from performing according to their abilities. The notion is that the perceived inequality does not stem from an innate difference in ability, but rather from a condition or circumstance that prevents certain uses or developments of that ability. As applied to reproductive behavior, the suggestion would be that women in general are not different from men in innate ability. During the temporary episode of a woman's pregnancy, however, she may become unable to utilize her abilities in the same way she had done prior to her reproductive conduct. Since a man's abilities are not similarly impaired as a result of his reproductive behavior, equality of opportunity implies that the woman should not be disadvantaged as a result of that sex-specific variation.

As applied to the employment context, the concept of equality of opportunity takes on the following form. Let us postulate two workers,

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138 The point seems to have been made originally by Aristotle. See NICHMACHEAN ETHICS v.3, 1113a-13b (W. Ross trans. 1925) ("Equality in morals means this: things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness."). Others have observed that this formula leads to a purely formal equality that is itself lacking in content. See, e.g., Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537, 542-48 (1982); Frankel, supra note 112, at 193-94.

139 See Westen, supra note 138, at 551-56.

140 See Frankel, supra note 112, at 204, advancing a conception of "educational" equality of opportunity, which I have adapted here to fit the case of pregnancy. Frankel's formulation is as follows: Equality of opportunity means that men shall not be limited except by their abilities; the advocate of the 'educational' conception of equality of opportunity holds that we cannot have real equality of opportunity unless we successfully modify those aspects of the individual's situation which prevent him from performing up to the level of his natural abilities.
one female, the other male, who respectively engage in reproductive conduct. Assume as well that prior to this activity, both were roughly equal in their ability to perform their similar jobs. The consequence of their having engaged in reproductive behavior will be vastly different. The man's ability to perform on the job will be largely unaffected. The woman's ability to work, measured against her prior performance, may vary with the physical and emotional changes she experiences during pregnancy. At times, her ability to work may be unaffected by the pregnancy; at other times, she may be temporarily incapacitated by it. Ultimately, she may require medical care to recover from miscarriage, or to complete her pregnancy by delivery, or to terminate it earlier by induced abortion. In order to maintain the woman's equality of opportunity during her pregnancy, we should modify as far as reasonably possible those aspects of her work where her job performance is adversely affected by the pregnancy. Unless we do so, she will experience employment disadvantages arising from her reproductive activity that are not encountered by her male co-worker.

I will explore some of the legal implications of this theoretical position in the sections that follow. Here, I note a possible objection: the cost of compliance. Cost, however, is a function of social value. As the enactment of Title VII demonstrates, our society has made equality between women and men in the workplace a high priority. At the same time, it has accorded to individual decisions concerning procreation the status of a constitutionally-protected fundamental right. Men do not experience a conflict between their right to engage in reproductive conduct and their right to be free of discrimination based on sex at work. Women, however, have experienced such a conflict, and will continue to do so unless pregnant workers are safeguarded from the loss of employ-

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141 Some men experience pregnancy-like symptoms, such as nausea, vomiting, variations in appetite, toothache, some form of indigestion, and, occasionally, abdominal swelling, during their mate's pregnancy. This condition, known as the couvade syndrome, disappears upon or shortly after delivery. See generally, for an overview, Trethowan, _The Couvade Syndrome in MODERN PERSPECTIVES IN PSYCHO-OBSTETRICS_ 68 (J. Howells ed. 1972) (discussing clinical symptoms at 74-79). Clinton and her co-investigators, in a study comparing the discomfort symptoms of 147 men living in the Milwaukee area, 88 of whom were expectant fathers and 66 of whom were non-expectant men, found that their daily diaries showed that expectant fathers did experience discomfort on a greater number of days during the end of pregnancy and the early postpartum period compared to non-expectant men. In response to their symptoms, the expectant fathers reduced their activities outside the home, such as leisure sports and social events, but they did not disrupt their employment at a greater rate than non-expectant men. Hours lost from work attributed to discomfort did not differ between the two study groups at any point during the pregnancy or the immediate postpartum period. The sample was largely composed of salaried, rather than hourly, employees. Mean salary loss in dollars for expectant fathers ranged from $0.00 to $15.46 in a typical month, compared to $0.00 to $14.98 for non-expectant men. J.F. Clinton, Final Report For Couvade: Patterns and Predictors 113-16 (May 1985) (technical report to the U.S. Public Health Service, Bureau of Professions, Health Resources and Services Administration, Division of Nursing) (on file at Professor Kay's office). Clinton's data are consistent with the view taken in this paper that men do not suffer work-related disadvantages as the result of engaging in reproductive conduct.

142 See supra note 125.
ment opportunities during pregnancy. The social value of accommodating reproduction and employment opportunities so that women remain free to engage in both activities on an equal basis with men justifies the additional cost of enabling working women to cope with the differential physical and emotional changes associated with pregnancy.\footnote{143 Judge Ferguson recognized in Cal Fed that accommodating pregnancy in the work place might entail increased costs. In his view, however, Congress accepted this consequence when it enacted the PDA. Cal Fed, 758 F.2d at 395. ("In fact, the PDA's enactment showed that Congress sanctioned the expenditure of more dollars on medical coverage for female employees than for male in order to achieve equally complete health benefits for both. When the Supreme Court in Newport News extended to the wives of male employees medical coverage for pregnancy, it recognized that '[t]he cost of providing complete health insurance coverage for the dependents of male employees, including pregnant wives, might exceed the cost of providing such coverage for the dependents of female employees.' 103 S. Ct. at 2632 n.26. It extended pregnancy coverage anyway.")} This analysis suggests that the increased cost of accommodating pregnancy in the work setting will be attributable to both male and female employees.

\footnote{144 See supra text and accompanying footnotes 101-09. Episodic analysis is also consistent with the result in Miller-Wohl. See supra text and accompanying footnotes 96-99.}

\footnote{145 Cal Fed, 758 F.2d at 396. The term "sex" is expressly part of the language of Title VII, see 42 U.S.C.A. § 2000e-2(a); the term "pregnancy" is brought within the language by the PDA, which defines discrimination based on sex as including discrimination based on pregnancy. See supra note 46.}

\footnote{146 See, e.g., Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, reh'g denied, 732 F.2d 944 (11th Cir. 1984) (hospital violated Title VII by firing pregnant x-ray technician).}

\footnote{147 42 U.S.C.A. § 2000e-2(e). The BFOQ exception applies to religion, sex and national origin, but not to race or color. Since the PDA defined "sex" to include "pregnancy," it follows that the BFOQ defense is potentially applicable to discrimination based on pregnancy. This view has been adopted by several courts. See, e.g., Hayes, 726 F.2d at 1548-49; Harris v. Pan Am. World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980) (challenge to employer's policy of grounding pregnant flight attendants). Per se discrimination based on sex or pregnancy is justifiable only by the statutory BFOQ defense; the business necessity defense, which was judi-}
workers who cannot perform their jobs may be temporarily removed from hazardous work sites, or from jobs where the woman's pregnancy may prevent her from assuring the safety of customers. Employers must take those measures that may be reasonably necessary to permit pregnant workers to continue working until delivery, in order to avoid discrimination against them. Women returning from pregnancy leave must be allowed to resume their former status as workers.

An episodic view of pregnancy requires that any benefits extended to pregnant workers or restrictions imposed on them be tailored to actual medical need resulting from the pregnancy, and not be triggered by stertotypical notions of what pregnant women should or should not do.

This interpretation of Title VII based on an episodic analysis of biological reproductive sex differences will permit pregnancy to be recognized as the normal consequence of reproductive behavior that can and should be accommodated in the workplace. Pregnancy is not itself a dis-

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148 See, e.g., Harris, 649 F.2d at 676-77 (upholding under the BFOQ exception an airline's policy of grounding pregnant flight attendants as soon as the pregnancy was known); Condit v. United Airlines, 558 F.2d 1176 (4th Cir. 1977), cert. denied, 435 U.S. 934 (1978) (same). But see Burwell v. Eastern Air Lines, 633 F.2d 361 (4th Cir. 1980) (en banc), cert. denied, 450 U.S. 965 (1981) (mandatory grounding permissible after first trimester of pregnancy).


151 Cf. Nashville Gas Co. v. Satty, 434 U.S. 136, 138-43 (1977) (invalidating employer policy that women returning from pregnancy leave lost accumulated seniority, even though other workers returning from disability leave did not). Cal Fed means that this result would follow even if all other workers lost their seniority following a disability leave.

152 See, e.g., Note, Pink Collar Blues: Potential Hazards of Video Display Terminal Radiation, 57 S. Calif. L. Rev. 139, 152-57 (1983) urging a gender neutral approach to VDT regulation, rather than assuming a special danger to pregnant workers not justified by then-available scientific evidence.)
ability, although an individual pregnant woman may experience disabbling symptoms and may require medical care. If she is temporarily impaired from performing at work up to her normal level of ability, the concept of equal employment opportunity embodied in Title VII requires not only that she remain free of resulting job reprisals, but also that she secure compensatory benefits to offset any potential work-related disadvantage. Under this analysis, women will be equal to men in their ability to work and to make reproductive choices.

C. Application of Episodic Analysis to the Constitution

After the effective date of the PDA, discrimination against pregnant persons was illegal in the employment context, but it was not unconstitutional. Geduldig remains the governing interpretation of the equal protection clause, and it stands for the proposition that a classification drawn on the basis of pregnancy is not a discrimination based on sex. An episodic analysis of pregnancy demonstrates the fallacy in the Geduldig classification between pregnant women and non-pregnant persons. The legal issue in Geduldig was how one consequence of reproductive conduct—pregnancy—should be treated in the workplace for purposes of an employer’s disability plan. The Court took as its reference point a group composed of all persons who worked for the employer. But that is not the relevant reference group. Instead, the group should be limited to those persons who have engaged in reproductive behavior while continuing to work. That group is divided into two sub-groups, persons who will require medical care and who may at times be temporarily disabled as a result of that reproductive conduct and persons who will not. The first group of persons is exclusively female, while the second is entirely male. Men and women who have not engaged in reproductive behavior are not similarly situated with respect to the work-related consequences of that conduct to persons who have so acted, and so are not properly part of the equal protection equation. The Geduldig classification was overly-broad, because it included within the category of “non-pregnant persons” both women and men who had not chosen to initiate a reproductive episode as well as men who had so chosen.

Moreover, the Geduldig line was drawn at the wrong point in the reproductive cycle. By focusing on the consequence of reproductive conduct—pregnancy—the Court ignored the male role in reproduction. Properly rephrased in light of an episodic analysis of biological reproductive sex differences, the legal question in Geduldig is whether two persons of the opposite sex who have engaged in reproductive behavior and wish to continue working may be treated differently for purposes of disability

153 See supra text and accompanying notes 23-35.
coverage. Since the man will not be disabled from work as the result of that conduct, equal protection for the woman requires that she not be penalized if she does become disabled. It follows not only that the pregnant woman must be covered by any existing disability plan applicable to workers generally, but also that she must be protected against disability resulting from pregnancy even in the absence of a general disability plan. Geduldig results in unequal treatment of similarly situated women and men who have engaged respectively in reproductive conduct. It should be overruled. 154

It follows from this analysis that, for constitutional purposes as well as statutory coverage under Title VII, a discrimination against a woman based on pregnancy is a facial discrimination against her because of her sex. The same intermediate standard of judicial review developed for equal protection sex discrimination cases 155 can be adapted for use in pregnancy discrimination cases. The analysis will, however, be different in pregnancy discrimination cases, because there is no matching group of pregnant males to use for purposes of comparison. Instead, the constitutional test must be applied so as to assure pregnant women equality of opportunity to the same extent as that available to males who have engaged in reproductive conduct. Thus, pregnant women may be treated differently from such males if the result is to prevent a disadvantage that might otherwise follow from their condition. 156 For example, a reasonable leave provided by a state employer to pregnant workers is not only constitutional, it is constitutionally compelled to avoid discrimination by the state against pregnant workers. 157

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154 Despite the analysis offered in the text, however, the Court may decline to change its constitutional approach to pregnancy classifications established in Geduldig. If so, it may be worth considering whether the text of the proposed Equal Rights Amendment should be altered to include a specific reference to "pregnancy" as well as to "sex." Section 1 of the proposed amendment might, for example, be redrafted to read as follows: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex or pregnancy." It does not appear necessary to use facially-neutral language such as "sex or reproductive conduct." The Court has had no occasion to consider whether a discrimination based on the male capacity for the production and ejaculation of sperm would constitute a discrimination based on sex. Moreover, men do not appear to be disadvantaged by that capacity. Finally, such language might be read to afford constitutional protection to rape, a possibility best avoided.


157 Preferential treatment based on pregnancy is not subject to claims of over-inclusiveness leveled
An employer's policy, however, may not be facially directed against pregnant workers but may have a disparate impact on them, such as a no-leave or inadequate leave policy. Present equal protection doctrine established in Washington v. Davis does not restrict such policies unless the discrimination is intentional. But the very uniqueness of the condition of pregnancy may ameliorate the impact of Washington v. Davis in light of a recent modification of its procedural implications. The Court has made clear that "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." This holding should be extended to sex and pregnancy discrimination cases. In pregnancy discrimination cases, it may not be difficult to show, for example, that a state employer's inadequate or no-leave policy was motivated in part by a desire to reduce the cost of pregnancy leave coverage, if only because the practice of differential coverage for pregnancy at work was so widespread before the enactment of the PDA. If such a showing is sufficient to shift the burden on the issue of intent to the employer, the impact of Washington v. Davis on pregnancy discrimination cases may be minimized.

D. Episodic Analysis and the "Equal Treatment/Special Treatment" Debate

The episodic analysis as applied to pregnancy may serve as a basis for harmonizing some of the views of the opposing participants in the so-

against preferential treatment accorded to women or members of racial minority groups who are not themselves identifiable victims of discrimination. See Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2588-90 (1984). A classification based on pregnancy will always be precisely limited to those persons exhibiting the condition in question. In my view, this difference in treatment is not unfair to other disabled persons. See infra text and accompanying notes 176-184.

Moreover, I am not suggesting, for example, that non-pregnant persons be displaced to make employment opportunities available to pregnant workers who request alternative work sites during pregnancy. Compare Cal. Gov't Code § 12945(c)(1)-(2), quoted supra note 69 (these provisions are expressly not applicable to employers covered by Title VII; id. at § 12945(e)). If no alternative sites are available, leave with pay would be an acceptable option. This approach may, indeed, make it more expensive to hire women who intend to exercise their reproductive capacities while remaining in the work force. The Ninth Circuit, however, rejected cost as a defense of the employer's position in Cal Fed. See supra note 143. The cost differential is, at any event, likely to be brief in duration. The Supreme Court has already made clear that pregnancy benefits granted to women employees and their dependents must be extended to male employees and their dependents in order to avoid discrimination against men because of their sex. See Newport News, 462 U.S. at 682-85.


called “equal treatment/special treatment” debate.\textsuperscript{161} For example, episodic analysis highlights how narrowly the dispute is limited. In her excellent defense of the “equal treatment” model, Wendy Williams identifies two propositions as essential to the theoretical framework within which that model was developed.\textsuperscript{162} They are, first, “that sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man”;\textsuperscript{163} and second, “that laws and rules which do not overtly classify on the basis of sex, but which have a disproportionately negative effect upon one sex, warrant, under appropriate circumstances, placing a burden of justification upon the party defending the law or rule in court.”\textsuperscript{164} Neither of these propositions is in conflict with the episodic analysis of biological reproductive sex differences offered in this paper. I agree with Williams that, taken together, these two propositions form the basis of a legal doctrine of equality between women and men that has served both sexes well in breaking down “the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender.”\textsuperscript{165} As I have shown elsewhere, this assimilationist view of equality has worked well as a tool against both race discrimination and sex discrimination, where the two groups being compared are not different in any relevant way.\textsuperscript{166}

Episodic analysis departs from the “equal treatment” model, however, at the point where Williams claims that her “general framework applies, with minor alteration, to laws or rules based on physical characteristics unique to one sex.”\textsuperscript{167} In my view, biological reproductive sex differences are not comparable to other traits or characteristics that are shared by both sexes, and cannot adequately be analyzed within a framework that turns on differential treatment of two comparable groups.\textsuperscript{168} Instead, episodic analysis recognizes that biological reproductive sex differences exist, but confines their legal significance to the brief period during which they are utilized. I take it that Williams and I agree that women and men should be deemed equals prior to the time either engages in reproductive behavior. At the moment of conception, sperm and egg play equally important roles. Following childbirth, we both would place equal responsibility for childrearing on men and women.

\begin{itemize}
\item \textsuperscript{162} Id. at 329-31.
\item \textsuperscript{163} Id. at 329.
\item \textsuperscript{164} Id. at 330.
\item \textsuperscript{165} Id. at 331.
\item \textsuperscript{166} See Kay, supra note 5, at 77-78.
\item \textsuperscript{167} Williams, supra note 161, at 331.
\item \textsuperscript{168} See Kay, supra note 5, at 78-87.
\end{itemize}
who are parents. But, unlike Williams, I insist that during the episode of pregnancy itself the woman’s body functions in a unique way. We must recognize that unique function in order to prevent penalizing the woman who exercises it. If confined in this way, the recognition of pregnancy as “unique” will enable the law to treat women differently than men during a limited period when their needs may be greater than those of men as a way of ensuring that women will be equal to men with respect to their overall employment opportunities.

The narrow difference between my approach and that taken by Williams is also emphasized by another consideration. One of the major arguments of proponents of the equal treatment model has been strategic, rather than theoretical. It is that ultimately women will be more successful in escaping traditional stereotypical roles if they refrain from seeking special treatment for the uniquely female condition of pregnancy and rely primarily on demands for benefits that can be pressed in common with all workers. Thus, Williams points out that the equal treatment model “separates pregnancy and childrearing and insists that each be independently analyzed,” so that the workplace can be restructured to accommodate parenting as the joint responsibility of working fathers and mothers.

As I have noted above, my analysis, like that of Williams, makes clear that the woman’s reproductive cycle ends with childbirth. In those cases where two parents are available to care for the child, episodic analysis carries no implications for how they should assign between themselves the ensuing stage of childrearing. My analysis envisions a bright line between pregnancy and child care that requires the provision of any available childrearing leave to both parents. More fundamentally, episodic analysis is consistent with a model of equality that acknowledges

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169 Katherine Bartlett accurately identified the danger to working women posed by treating pregnancy as a unique condition without carefully scrutinizing the stereotypical assumptions that often accompany such a characterization:

With childbearing came the duties of childraising and taking care of the home, and the skill and habit which resulted from practice fed stereotypes that women prefer to stay at home and have children; that they make better parents than their husbands; that they don't want to do real work anyway.


But she also recognized that “[i]f the unique features of pregnancy truly justify differential treatment in a particular case, equal protection analysis, especially under an 'intermediate' standard of review where the outcome is not predetermined by the attachment of labels, should support that conclusion.” Id. at 1560 (footnote omitted). As I have suggested earlier, episodic analysis offers a way of bringing classifications based on pregnancy within the intermediate standard of equal protection review presently afforded to sex-based classifications. See supra text and accompanying notes 153-155.

170 See Williams, supra note 4, at 196-98. This position was reflected in the amicus briefs filed in Miller-Wohl by the American Civil Liberties Union and in Cal Fed by the National Organization for Women. See supra text and accompanying notes 88-90.

171 Williams, supra note 161, at 354.

172 See supra text and accompanying notes 131-32.

173 Like Williams, I therefore prefer the Swedish model of parental caretaking to the ILO model
the reproductive conduct of both men and women, while allowing a woman's pregnancy to be recognized and provided for on its own terms.\textsuperscript{174} It is thus consistent with the view of proponents of the "special treatment" approach that the best way to enable women to compete on an equal basis with men is to assure them that pregnancy will not hinder their achievements.\textsuperscript{175}

Williams has questioned the fairness of a differential approach to pregnancy, using the Miller-Wohl case as a vehicle. She asks: "[o]n what basis can we fairly assert, for example, that the pregnant woman fired by Miller-Wohl deserved to keep her job when any other worker who got sick for any other reason did not?"\textsuperscript{176} The short answer to this question is that no male worker who had exercised his reproductive capacity lost his job as a result. Episodic analysis supports that brief response, and also provides a more complete justification. The point at which that longer justification begins, however, is not when Miller-Wohl was thinking of firing Tamara Buley, but rather when she was thinking of going to work. Planned pregnancy, unlike other medical conditions, is an episode that is intended to culminate in the birth of a child. A woman who plans

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\item which limits child care benefits following delivery to mothers. See Williams, supra note 161, at 376-78.
\end{itemize}

\textsuperscript{174} The episodic analysis of pregnancy does not extend without qualification to a woman's capacity to lactate. Lactation is a biological sex difference associated with reproduction which becomes functional following delivery. Lactation makes possible the choice of breastfeeding as one method of providing nutrition to the child, and it has valuable health consequences for the mother as well. See P. Simkin, supra note 133 at 237 (discussing some factors to consider when deciding whether to breastfeed). Breastfeeding declined in the United States during the 1940s and 1960s to a low of fewer than a quarter of babies being breastfed; breastfeeding grew in popularity in the mid-1970s through the 1980s, when more than sixty percent of American mothers breastfed. Id. at 236. In addition, in developing countries, breastfeeding appears to be a primary determinant of birth spacing. See Smith, Breast-feeding, Contraception, and Birth Intervals in Developing Countries, 16 Studies in Fam. Planning 154 (1985).

Unlike pregnancy, however, breastfeeding is not an unavoidable consequence of reproductive conduct. After childbirth, in two-parent families, either parent can feed the child. Single mothers may be able to call on friends or relatives for help if necessary. Mothers can express milk and refrigerate it for use within 24 hours or freeze it for longer periods, if appropriate. See P. Simkin, supra note 133, at 255-57.

It follows that the constitutional arguments advanced in support of preventing disadvantages to women resulting from pregnancy, see supra text and accompanying notes 153-158, do not apply with the same force to breastfeeding mothers. On the other hand, lactation is similar to pregnancy in that it is a sex-specific trait, and it is stimulated by childbirth. One court has held that breastfeeding is a constitutionally-protected liberty. See Dike v. School Bd. of Orange County, Fla., 650 F.2d 783, 785-87 (5th Cir. 1981). For Title VII purposes, the logic that equates discrimination based on pregnancy with discrimination based on sex may be sufficiently strong to extend to lactation. If so, an employer could not fire, or refuse to hire or promote, a breastfeeding woman. If an employer allowed flextime policies, parents could use those policies for childcare purposes, including breastfeeding. A state statute that mandated extra time off for breastfeeding only for working mothers, however, would probably be preempted by Title VII.


\textsuperscript{176} Williams, supra note 4, at 196.
both to work and to have children must take account of how she will manage her pregnancy at work. If she knows that her employer has in place a program that will accommodate her pregnancy-related needs, she will be able to enter the workforce without fear of encountering obstacles to her decision to bear a child. Such employer programs will encourage women to enter and remain in the job market by mitigating the disadvantages to women caused by pregnancy. Not being fired, of course, is an important part of such a program of accommodation. An employer disability policy that limits the amount of sick leave to very short periods, or that has long probationary periods, cannot provide the necessary assurance to women that they will not be penalized at work if they become pregnant. Such provisions are, therefore, inadequate for pregnant workers, although they may be justifiable—even if undesirable—when applied to fortuitous sickness or injury suffered by other workers. Although employers and their insurers can predict statistically how many workers will be injured or disabled while at work, individual workers themselves normally do not plan for such disabling events. Therefore, they are not deterred from entering the workforce by the anticipation of such risks.

Ruth Bader Ginsburg put the point nicely, although I do not claim that she shares my views on this specific issue. Commenting on some of the pregnancy cases decided prior to the enactment of the PDA, she observed:

The likelihood that childbirth will occur nowadays normally twice in a working woman’s life, and the cost generated by insurance coverage for pregnancy-related physical disability no doubt influenced the Court’s decisions—its meandering course and its current position that discrimination based on pregnancy is unlawful “sometimes.” If Congress is genuinely committed to eradication of sex-based discrimination and promotion of equal opportunity for women, it will respond to the uneven pattern of adjudication by providing firm legislative direction assuring job security, health insurance coverage, and income maintenance for childbearing

177 See Chavkin, supra note 54, at 197-202 (discussing work hazards and the physical changes of pregnancy).
181 Workers can, of course, and typically do, bargain collectively through unions for adequate health and disability plans to protect themselves and their families against those statistical possibilities.
182 Ginsburg discussed, in addition to LaFleur, Geduldig, and Gilbert, all cited supra text and accompanying notes 10-44, supra, Turner v. Department of Employment Sec., 423 U.S. 44 (1975) (invalidating a Utah statute that made pregnant women ineligible for unemployment benefits for a period extending from twelve weeks prior to the expected date of childbirth until a date six weeks after delivery).
women. Women will remain more restricted than men in their options so long as this problem is brushed under the rug by the nation's lawmakers.\textsuperscript{183}

I do not believe that enactment of the PDA, unless it is interpreted to permit employers to provide coverage for pregnant workers regardless of whether other workers are covered for other conditions, has responded satisfactorily to Ginsburg's argument. Such an interpretation would be consistent with the Congressional goal of ending discrimination against working women because of their pregnancy. If such an approach is adopted, feminists on both sides of the "equal treatment/special treatment" debate will be free to pursue our common goal of eradicating the pervasive prejudice against working mothers.\textsuperscript{184}

**CONCLUSION**

The biological fact that only women have the capacity to become pregnant has been used historically to define women as different from men along social, psychological, and emotional dimensions. Those asserted differences, in turn, have served to justify the legal, political, and economic exclusion of women from men's public world. Even now, when the barriers that separate women and men in the work force are breaking down, the uniqueness of pregnancy remains an obstacle to equal opportunity for women.

The nadir of this isolation of pregnancy was reached in modern times by the Supreme Court's distinction in *Geduldig* between pregnant women and non-pregnant persons, an overly-broad characterization properly condemned as artificial and demeaning. Yet the Court's flawed perception of the relevant comparison groups contained an element of factual truth, albeit one from which the Court drew the wrong conclusion. Episodic analysis allows us to reclaim the accurate biological fact of sexual reproductive difference, and to draw the appropriate legal conclusion that difference requires. The Court's false conclusion was that pregnant persons are not women. That conclusion led to the improper legal result that women were protected against sex discrimination only when they are like men—that is, when they are not pregnant. Episodic analysis reveals the right conclusion: that both men and women engage in reproductive conduct, and that women are pregnant persons only for brief and self-contained periods. That insight can give rise to the proper legal result that women continue to be women even when pregnant, and

\textsuperscript{183} Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 Conn. L. Rev. 813, 826-27 (1978).

should be provided with legal redress against discrimination based either on their sex or their pregnancy. On both legal and philosophical grounds, the temporary inequality that stems from the condition of pregnancy can and should be accommodated within a framework of equal opportunity for both sexes.