ARTICLES

THE MILLER-WOHL CONTROVERSY: EQUAL TREATMENT, POSITIVE ACTION AND THE MEANING OF WOMEN'S EQUALITY

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> "The Chinese, who have always had a thoroughly dynamic world view and a keen sense of history, seem to have been well aware of the profound connection between crisis and change. The term they use for crisis—*wei ji*—is composed of the characters for 'danger' and 'opportunity' ".[1]

In the summer of 1979, Tamara Buley was hired as a sales clerk by the Miller-Wohl company in Great Falls, Montana. Shortly after she started working Ms. Buley discovered that she was pregnant, and in the weeks that followed, missed a few days of work because of morning sickness. Pursuant to Miller-Wohl's policy of denying any sick leave to employees during their first year with the company, Tamara Buley was fired. She felt that she had been fired because of her pregnancy. Knowing this to be illegal, she filed a discrimination complaint with the Montana Human Rights Commission.[2]

Had Tamara Buley lived in most states, she would almost

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1. F. CAPRA, THE TURNING POINT: SOCIETY, SCIENCE, AND THE RISING CULTURE (1983) [hereinafter cited as CAPRA].

2. Miller-Wohl Co. v. Commissioner of Labor & Indus., State of Montana, 515 F. Supp. 1264, 1265 (D. Mont. 1981).

certainly have lost her case against Miller-Wohl because federal[3] and most state sex discrimination laws provide no affirmative job protection at all to pregnant workers. Federal and most state laws require only that pregnancy-related disabilities be treated no worse than other types of disabilities. There was no evidence in Ms. Buley's case suggesting that Miller-Wohl applied its no-leave policy unevenly.[4]

But because Tamara Buley lived in Montana she succeeded in her complaint against Miller-Wohl.[5] Montana,[6] like Connecticut[7] and California[8] goes farther than the federal government and other states and provides affirmative job security to women workers who are temporarily disabled by pregnancy-related medical conditions. So in Tamara Buley's case, the Montana Commissioner found that Miller-Wohl had violated the Montana Maternity Leave Act (MMLA) by firing Ms. Buley rather

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3. The Pregnancy Discrimination Amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (Supp. IV 1980) states in relevant part: "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."

4. *See* discussion of Commissioner's finding in *Miller-Wohl*, 515 F. Supp. at 1264.

5. *Id.*

6. The Montana Maternity Leave Act, MONT. REV. CODES ANN. § 39-7-203 (1981), provides that it is unlawful to terminate a woman's employment because of her pregnancy, or to refuse to grant her a reasonable leave of absence for such pregnancy.

7. CONN. GEN. STAT. ANN. § 46a-60 (West 1982) provides in pertinent part:

> (a) It shall be a discriminatory practice in violation of this section . . .
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> (7) for an employer, by himself or his agent:
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> (A) to terminate a woman's employment because of her pregnancy;
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> (B) to refuse to grant to that employee a reasonable leave of absence for disability resulting from her pregnancy . . . .

8. The California Fair Employment and Housing Act provides, in relevant part:

> It shall be an unlawful employment practice unless based on a bond fide occupational qualification . . .
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> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical condition . . .
>
> (2) To take leave on account of pregnancy for a reasonable period of time, provided such leave shall not exceed four months . . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical condition . . . .

CAL. GOV'T CODE § 12945 (West 1980).

then granting her an unpaid disability leave.

Miller-Wohl sparked a serious controversy, one might even say a crisis, in the feminist legal community over the meaning of equality for women. Rather than rallying to the Montana statute's defense when Miller-Wohl challenged it in federal court,[9] feminist attorneys split over the statute's validity. For the most part, those attorneys who were instrumental in drafting, lobbying for, and passing Title VII's Pregnancy Discrimination Amendment (PDA), took the position that equality is synonymous with equal treatment, and that any law, such as the MMLA, which deviates from the equal treatment principle is both contrary to Title VII and ultimately dangerous for women. Pregnancy-related disabilities, they contended, can be treated neither better nor worse than non-pregnancy-related medical conditions.[10]

In opposition to this equal treatment view, other feminists, including the authors of this Article, supported the positive action approach of the MMLA. We contended that in some situations, including those presented by pregnancy-related disabilities, equal treatment of the sexes actually results in inequality for women. In these situations, positive action to change the institutions in which women work is essential in achieving women's equality because those institutions are, for the most part, designed with a male prototype in mind.

Until now, the *Miller-Wohl* debate[11] has focused primarily

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9. Miller-Wohl filed a declaratory judgment action in federal district court, maintaining that the MMLA, which it admitted having violated, was unconstitutional and in conflict with Title VII. The district court upheld the validity of the MMLA as to both the constitutional and statutory challenges. 515 F. Supp. at 1266. Miller-Wohl appealed the district court's decision to the Ninth Circuit (Miller-Wohl Co. v. Commissioner of Labor & Indus., No. 81-3333). The Ninth Circuit did not decide the case on the merits. Rather, following the argument raised by *amici curiae* California Department of Fair Employment and Housing, Employment Law Center, and Equal Rights Advocates, Inc., the court held that the district court did not have subject matter jurisdiction over the case and ordered it dismissed. Miller-Wohl Co. v. Commissioner of Labor & Indus., 685 F.2d 1088 (9th Cir. 1982).

10. For a full explanation of the equal treatment approach, *see* W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RIGHTS L. REP. 175 (Spring 1982) [hereinafter cited as Williams].

11. The equal treatment/positive action controversy has been the subject of numerous conferences and meetings over the past two years, including the Thirteenth and Fourteenth Annual Conferences on Women and the Law held in 1982 and 1983, the

on the legal issues raised by the case. Specifically, the debate has focused on the question of whether legal arguments can be constructed to support positive action laws such as the MMLA which do not at the same time endorse legal principles allowing less favorable treatment of women in other contexts. These legal issues are, of course, of essential tactical importance. They will be explored in detail in the first section of this Article, which will show that the MMLA can be legally supported without analytically validating a return to the detrimental "protective" laws of the past.

The *Miller-Wohl* controversy has raised other issues even more complex and profound than these. It has brought into painfully sharp focus the absence of a consensus among feminists as to the meaning of the term "equality." At an even deeper level, it has unearthed two very different conceptions of the nature and process of social change and their impact on the formulation of political and legal strategies within the women's movement.

The purpose of this Article is to take the dangers presented by these conflicts and transform them into an opportunity to examine the assumptions and constructs which limit the efficacy of a strict equal treatment approach, and to build upon it a paradigm which can effectuate equality even in contexts in which men and women are inherently different. In pursuit of this purpose, the Article has been constructed in three sections. Part I will examine the legal issues raised by the *Miller-Wohl* case by contrasting the equal treatment approach of the Pregnancy Discrimination Amendment with the positive action or reasonable accommodation[12] approach of the MMLA. Such an examination

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Equal Rights Advocates Forum on Women's Legal Issues held at Golden Gate University in San Francisco, California, in February 1982, and meetings attended by numerous feminist litigators considering *amicus* participation in the *Miller-Wohl* case before the Ninth Circuit.

12. The concept of "reasonable accommodation" is central to laws prohibiting discrimination on the basis of religion and physical handicap. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1976), an employer has a duty to reasonably accommodate an employee's religious practices, i.e., Sabbath observance, as well as a duty to refrain from affirmatively discriminating against an employee because of his or her religion. *See* Reid v. Memphis Publishing Co., 369 F. Supp. 684 (D.C. Tenn. 1973), *aff'd in part and rev'd in part on other grounds* (attorneys' fees), 521 F.2d 512, *cert. denied*, 429 U.S. 964 (1976), *reh'g denied*, 433 U.S. 915 (1977) (Request for Saturdays off

leads to two conclusions. The first is that the PDA's equal treatment approach is by itself inadequate to assure equal employment opportunity for women who, because of their role as childbearers, confront employment obstacles not faced by men. The second is that laws such as the MMLA, which recognize and take affirmative steps to equalize this inherent sex difference, can be legally supported without indirectly justifying either less favorable treatment of women in other contexts, or under- and over-inclusive "protective" legislation.

After concluding this legal analysis the Article will move one analytical step deeper and examine the different models of equality underpinning the equal treatment and positive action approaches which clashed in the *Miller-Wohl* controversy. As Part II will demonstrate, the liberal model of equality which underlies the equal treatment approach is structurally inadequate to effectuate equality between the sexes. This inadequacy stems from the liberal model's reliance on homogeneity and interchangeability within the "society of equals," a reliance which has its roots in reductionist enlightenment-era political theory.

After examining the sources and consequences of the homogeneity assumption inherent in the liberal view, Part II will proffer two supplemental conceptions of equality: Elizabeth Wolgast's "bivalent" view,[13] and Ann Scales' related, narrowing "incorporationist" view.[14] Both of these models are analytically equipped to effectuate equality within a heterogenous group.

Finally, Part III contrasts the metaphysical view of social change underlying the equal treatment position with the dialectical and materialist conception supporting a positive action approach to the pregnancy issue. In the course of examining these two contrasting paradigms of change, Part III leads to the con-

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for religious reasons must be accommodated where other workers with similar qualifications were available to perform Saturday work). Similarly, both federal regulations and some state laws place a duty on employers to reasonably accommodate a worker's physical disability through job modification, provision of special equipment, restructuring of work hours, or provision of leaves. *See, e.g.*, Fair Employment and Housing, CAL. ADMIN. CODE, tit. 2, R. 7293 (1982).

13. E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN (1980) [hereinafter cited as WOLGAST].

14. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1980-81) [hereinafter cited as Scales].

clusion that no one theory or strategy, including the equal treatment approach to equality, can remain progressive or comprehensively efficacious over time and across different material contexts. It is only by remaining theoretically flexible and by selecting legal strategies or theories in light of the material conditions confronting today's working women that feminist legal practitioners and theorists can facilitate substantive and not merely formalistic equality between women and men. To achieve this goal, a careful expansion of the traditional equal treatment conception of equality is required. This expansion must encompass and analytically support a positive action approach to the equality problems presented by pregnancy and childbirth.

I. EQUAL TREATMENT VERSUS POSITIVE ACTION: THE NEED FOR AFFIRMATIVE JOB PROTECTION AND THE LEGAL ISSUES RAISED BY MILLER-WOHL

The only federal statute which bears significantly on the issue of pregnancy and sex-based employment discrimination is the Pregnancy Discrimination Amendment (PDA) to Title VII of the Civil Rights Act of 1964.[15] Virtually every participant in the *Miller-Wohl* controversy agreed that the PDA is merely a prohibition against disparate treatment. It requires only that pregnancy be treated *the same* as other conditions affecting, or not affecting, an employee's ability to work or entitlement to fringe benefits. The PDA does not require that employers grant pregnant workers any affirmative accommodation such as sick leave if they experience pregnancy-related medical complications, or a leave for normal childbirth. Only less favorable treatment of pregnancy as compared to other conditions is prohibited.

The limited scope of the PDA means that under federal law a pregnant employee has no affirmative rights at all. The pregnant employee has only the right not to be treated *worse* than male, or non-pregnant female employees. This limitation has serious implications for women workers in the United States. More than eighty percent of the female workforce in the United States are in their prime childbearing years, ages fifteen through forty-four. Ninety-three percent of women in this age group are likely

15. 42 U.S.C. § 2000e(k) (Supp. IV 1980).

to have at least one child during those years.[16] Consequently, more than four out of five female workers in the United States' labor force are likely to become pregnant at some point in their working lives. The House Report recommending passage of the PDA noted that pregnancy and childbirth do result in some time period during which a woman is medically unable to work. For ninety-five percent of women this period is six weeks or less.[17]

In light of these statistics, it is clear that a no-leave policy like Miller-Wohl's is tantamount to a policy of dismissal for pregnancy. But under the equal treatment approach of the PDA, a woman who is terminated for missing work due to pregnancy or childbirth has no legal remedy unless she can prove that a specific and "similarly situated" co-worker was permitted to take a comparable length leave for a non-pregnancy-related reason, and that there was no legitimate nondiscriminatory reason for the difference in treatment.[18]

The essential importance of some affirmative protection for women temporarily disabled by pregnancy-related medical conditions is widely recognized and accommodated by other industrialized nations. In fact, the United States stands alone among all other major industrialized countries, capitalist or socialist, in its failure to guarantee women temporarily disabled due to pregnancy job-protected leave and a cash benefit to replace wages.[19] Among these countries, which include Canada, England, Denmark, Finland, France, West Germany, East Germany, Israel, Norway and Sweden, the minimum leave provided is twelve

16. S. KAMERMAN, MATERNITY AND PARENTAL BENEFITS AND LEAVES: AN INTERNATIONAL REVIEW 8 (1980), *cited in* Brief of Amici Curiae at 23, Miller-Wohl Co. v. Commissioner of Labor & Indus., 685 F.2d 1088 (9th Cir. 1982) [hereinafter cited as KAMERMAN].

17. H.R. REP. No. 948, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4753. The House Report states that: "[T]estimony before the Committee indicates that in 95 percent of the cases, the time lost from work due to pregnancy is 6 weeks or less, so barring any medical complications, this period would be the normal time a pregnant woman would be covered."

18. *See* Schwabenbauer v. Board of Education, Oleun, 498 F. Supp. 119 (D.C.N.Y. 1980) (plaintiff established a prima facie case of sex discrimination when she showed that two female co-workers who were disabled by illness and injury received credit for leaves of absence in computing their probationary period while plaintiff did not receive such credit for a pregnancy related disability leave and was subsequently terminated. Defendant failed to introduce evidence of a neutral reason for the disparate treatment.)

19. KAMERMAN, *supra* note 17, at 12, *cited in* Brief of Amici Curiae at 23-24.

weeks, while the average is five months.[20] These provisions have their historical basis in the International Labor Organization's Convention on Maternity Protection for Working Women, originally enacted in 1919. When first adopted, the ILO Conventions provided pregnant workers six weeks leave prior to their due date and prohibited them from working in the six weeks following delivery. During the mother's absence from work, she could receive wage replacement benefits funded by a public mandatory insurance system.[21] In 1952, the Convention was amended to extend leave periods, raise cash benefit levels, and to guarantee job security and paid nursing breaks on the mother's return to work.[22] As even those who most staunchly oppose statutes such as the MMLA will admit, the ILO approach provides women with vastly greater assistance in reconciling their dual roles as workers and childbearers than does the "impoverished" PDA. All the latter does is guarantee women workers as much, or as little, as an employer has chosen to give male employees, none of whom confront the additional burden on employment continuity that pregnancy imposes on female workers. Since such a large proportion of women workers become pregnant at some point in their careers, a no-leave policy such as Miller-Wohl's is apt to hit them particularly hard.

This problem is exacerbated by two facts characterizing women's status in the American labor market. First, women workers, especially working class women, tend to be segregated into a relatively small number of female dominated occupations. Second, women tend to occupy positions in the "secondary labor market"[23] which is characterized by the absence of union representation, provisions for job security, or fringe benefits. Each of these facts diminishes the effectiveness of the equal treatment approach embodied in the PDA. The equal treatment approach to defining discrimination, referred to in case law under Title VII as disparate treatment theory,[24] relies on a comparison between "similarly situated" individuals. In the context of preg-

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20. *Id.*

21. KAMERMAN, *supra* note 17.

22. *Id.*

23. *See* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J. L. REFORM 399, 451-53 (1978-79).

24. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 15-16 (1976) [hereinafter cited as SCHLEI AND GROSSMAN].

nancy-based discrimination, this means that in order to prove discrimination in denial of sick leave under the PDA, a female employee must show that she was denied a pregnancy-related leave while a "similarly situated" person was granted a non-pregnancy-related leave.[25] The key phrase here is "similarly situated." Even if the pregnant employee can point to another employee who was granted a leave, the employer can still prevail by showing that there was some legitimate reason for the difference in treatment.[26] So, for example, the employer might be able to convince the court that due to differences in the duration of leave requested, the precise nature of the different jobs held by the two employees, or fluctuations in workload, granting a leave to the other employee at one point in time was feasible, while granting a leave to the pregnant employee at a different date was not.

The fact that men and women tend to be segregated into different occupations[27] makes it more difficult for female employees who are denied pregnancy-related leaves to find a suitable "similarly situated" male employee for comparison purposes. If an employer hires males and females into different types of jobs, there may be differences between those jobs which defeat a disparate treatment claim. This was precisely what happened in the *Miller-Wohl* case. Although the Commissioner attempted to find evidence of disparate treament in the application of the no-leave policy, the high proportion of women in Miller-Wohl's retail sales workforce defeated any such attempt.[28]

Women's status as occupants of the secondary labor market

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25. *See, e.g., supra* note 19.

26. *E.g., Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670, 676-77 (9th Cir. 1980) (Employer policy requiring pregnant employees to begin their leave as soon as they discovered they were pregnant was a prima facie violation of Title VII but was justified as a bona fide occuaptional qualification, "reasonably necessary" to passenger safety).

27. Women make up the majority of workers in a small number of occupations. In 1979, these occupations included: registered nurses (96.8%); clericals (80.3%), including bank tellers (92.9%), bookkeepers (91.1%), cashiers (87.9%), secretary-typists (98.6%); dressmakers (95.4%); sewers and stitchers (95.3%); teachers, other than college and university, (70.8%); and service workers (62.4%). BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BULLETIN NO. 2080, PERSPECTIVES ON WORKING WOMEN: A DATABOOK, TABLE 11 (1980).

28. Interview with Paul Van Tricht, Esq., Counsel for the Montana Commissioner of Labor and Industry, in Seattle, Washington (July 7, 1982).

has also contributed to the lack of employment protections relating to pregnancy. Women tend to work in unorganized sections of the American labor force. Although an explication of all the possible reasons for this phenomenon is beyond the scope of this Article, it has been caused at least in part by the sex-biases of male-dominated labor unions which viewed women as marginal workers.[29] In addition to being unorganized, jobs in the secondary labor market are often designated "temporary" or "part-time" and may be excluded from employer fringe benefit programs, thus precluding a disparate treatment challenge to denial of pregnancy-related benefits which might be possible were women covered by such plans. The net effect then of the concentration of women in the secondary labor market has been to put employer policies concerning pregnancy leave or other benefits beyond the reach of disparate treatment analysis or union contract. The PDA's equal treatment approach simply does not meet the real needs of a vast proportion of this country's women workers.

The role of feminist attorneys is to use the legal system to ameliorate the problems faced by women in our society. Therefore, the only justification for not supporting positive action statutes such as the MMLA would be if the dangers inherent in any deviation from a strict equal treatment model outweighed any material improvement of employment conditions such laws could accomplish. As the ensuing discussion demonstrates, the MMLA can be legally supported without indirectly endorsing legal principles which permit less favorable treatment of women in other contexts.

A. Legal Issues Raised by *Miller Wohl:* The Problem of Federal Preemption

The gravamen of Miller-Wohl's attack on the MMLA was that the literal language of the PDA requires that women affected by pregnancy, childbirth, or related medical conditions be treated *the same* for all employment-related purposes as other persons not so affected, but similar in their ability or inability to work.[30] Because the MMLA as applied to Miller-Wohl's "no-

29. *See* Women's Bureau, Employment Standards Administration, U.S. Dept. of Labor, Bulletin No. 297, 1975 Handbook on Women Workers 76-78 (1975).

30. Miller-Wohl Co. v. Commissioner of Labor & Indus., 685 F.2d 1088 (9th Cir.

leave" policy requires that pregnancy related conditions be treated more favorably than other disabilities, it conflicts with, and is consequently preempted by, Title VII.[31]

This preemption argument can be adequately countered. Although the MMLA goes further than Title VII in protecting women from discrimination based on pregnancy, the two statutes do not conflict.[32] Congress was aware of and implicitly approved the MMLA when it added the PDA to Title VII in 1978.[33] Both statutes serve the same broad legislative goal—to provide women with employment opportunities allowing them to participate equally with men. In fact, the Montana Legislature,

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1982).

31. *Id.*

32. In Perez v. Campbell, 402 U.S. 637 (1971), the Supreme Court stated that a state law will be invalidated under the supremacy clause where the state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Id.* at 649. The Supreme Court addressed the question of preemption of state laws in Title VII cases in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The Court stated that:

> [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination.

Id. at 48-49. *See also* Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). The Senate defeated an amendment that would have made Title VII the exclusive federal remedy for most unlawful employment practices. 110 CONG. REC. 13,650-13,652 (1964). Finally, the report of the Senate Committee responsible for the Act stated that neither the "provisions regarding the individual's right to sue under Title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws." S. REP. No. 415, 24 (1971) *cited in* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 n.9 (1974).

33. The House Committee Report includes the finding that "[t]he following six States, as well as the District of Columbia, specifically include pregnancy in their Fair Employment Practices laws: Alaska, Connecticut, Maryland, Minnesota, Oregon, and Montana." H.R. REP. No. 948, *supra* note 17 at 11, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 475. Montana's law was also alluded to in the Senate debate by Senator Williams, a sponsor of the Pregnancy Discrimination Amendment. 123 CONG. REC. 29,648 (1977). Approval of such laws was reiterated throughout the legislative reports. *See, e.g.*, S. REP. No. 331, 95th Cong., 1st Sess. 3 (1977).

In addition to Montana's Maternity Leave Act enacted in 1975, Connecticut has a Fair Employment Practices Law similar to the MMLA which also predates the Pregnancy Discrimination Amendment. (*See supra* note 7 for text of CONN. GEN. STAT. § 46a-60.) California also has a state law designed to provide a mandatory reasonable leave time for pregnancy, which in California is not to exceed four months. *See supra* note 8 for text of Ca. Gov't Code § 12945. The California Fair Employment and Housing Act was also enacted prior to the Pregnancy Discrimination Amendment.

in enacting the MMLA, did so with the intent of remedying the adverse impact no-leave policies have on women workers, an impact which is also remediable under § 703(a)(1) of Title VII.[34] If Congress had meant to foreclose state laws such as the MMLA, it would have done so rather than repeatedly *approving* such laws.[35] It is thus apparent that Congress had no intent to preempt laws like the MMLA when it enacted the Pregnancy Discrimination Amendment.

In addition to there being no evidence of congressional intent to preempt, it is also apparent that Title VII, the PDA, and the MMLA were enacted to serve the same legislative goals. Title VII was enacted in 1964 to prohibit employment discrimination on the basis of race, sex, color, national origin, and religion. That purpose was further refined in 1978 by the passage of the Pregnancy Discrimination Amendment. Congress' intent in enacting this amendment was "to insure that working women are protected against all forms of employment discrimination based on sex."[36] In 1972, an amendment to ensure equal rights regardless of sex was added to Montana's Constitution.[37] The inclusion of the constitutional provision mandated a revision of the state's

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34. 42 U.S.C. § 2000e-2 (1970) provides in pertinent part that it is unlawful for an employer "to . . . discharge any individual . . . because of such individual's . . . sex . . . ."

35. *See supra* note 33 and accompanying text.

36. S. REP. No. 331, 95th Cong., 1st Sess. 3 (1977). Discriminatory employment practices based upon pregnancy have always been at the core of the problems faced by working women, and it is clear from legislative history that Congress intended to forbid these discriminatory practices. While congressional concern was focused particularly on the issue of temporary disability insurance benefits for pregnancy, Congress explicitly stated its broader goals:

> Although recent attention has been focused on the coverage of disability benefits programs, the consequences of other discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.

H.R. REP. No. 948, *supra* note 17 at 6-7, *reprinted in* U.S. CODE CONG. & AD. NEWS 4754-55.

37. H.J. Res. 62, 1974 Leg. Sess. Montana.

laws to eradicate any vestige of sex discrimination. The MMLA was adopted within this historical context as one part of Montana's overall effort to "achieve true legal equality of the sexes."[38] The legislative history of the MMLA demonstrates that Montana first determined that denial of pregnancy-related disability leaves to women workers constituted sex-based employment discrimination, and then acted to form a remedy to rectify that discrimination.[39] As such, it is clear that Montana lawmakers intended to create equality of opportunity by guaranteeing reasonable leave and job protection to pregnant workers. The MMLA simply eradicates the perceived discriminatory effects of an employer's no-leave policy, and places pregnant workers on an equal footing with other workers.

The MMLA is also consistent with Title VII in that it in effect recognizes that no leave policies have an adverse impact on women, and therefore constitutes sex based discrimination. This is the same result that would be reached through an application of Title VII's adverse impact doctrine.[40]

B. The Use of Adverse Impact Theory to Harmonize the Pregnancy Discrimination Amendment with a Positive Action Approach to Pregnancy-Related Disability Leave

A no-leave policy such as Miller-Wohl's has an adverse impact on female employees because of their special role as childbearers. As was discussed above,[41] more than four out of

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38. S.J. Res. 68, 1974 Leg. Sess. Montana.

39. *See Minutes of the Meeting, Labor and Employment Relations Committee, Mont. State Sen., Feb. 3 and 5, 1975;* Montana Legislative Council Equality of the Sexes, Interim Study by the Subcommittee on Judiciary, 1974 Leg. Sess. Montana.

40. Title VII's prohibition against employment discrimination is violated either when an employer intentionally applies its policies unequally to the detriment of employees of one sex, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), or when an employer evenly applies facially neutral policies having an adverse impact on employees of one sex. Such a facially neutral policy, though seemingly nondiscriminatory, is violative of Title VII if it has an adverse impact on a protected class and is not justified by business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Thus, an employer can violate Title VII's general prohibition against sex discrimination contained in section 703 by enforcing a no-leave/discharge policy that impacts more harshly upon women than men. Applying this analysis, a policy such as Miller-Wohl's denying sick leave to employees appears sex-neutral on its face, but it clearly has an adverse impact on female employees who alone can become pregnant and suffer pregnancy-related disabilities. It thus violates Title VII unless it can be shown to be necessary to the safe and efficient operation of the employer's business.

41. *See* text accompanying note 16-17.

five female workers in the United States' labor force are likely to become pregnant at some point in their working lives and will require some time off work as a result of pregnancy-related physical disability. No man will ever face this additional obstacle to work attendance.[42]

In order to show that a no-leave policy has a disparate impact on women because of their role as childbearers, it is not necessary to show that such a policy has a statistically significant adverse impact on females employed by one specific employer.[43] This proposition was adopted by the Supreme Court in

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42. Those who support an equal treatment approach to equality and oppose laws like the MMLA argue that no-leave policies like Miller-Wohl's do not have an adverse impact on women because men have higher personal accident rates than do women. This causes men to be absent from work as often as women, who because of their unique childbearing capabilities, must be absent from work when suffering from morning sickness or other pregnancy disabilities. Statistics compiled by the United States Department of Labor, Bureau of Labor Statistics (BLS) contradict this analysis. A study of 1980 absence rates for women and men established that women missed 2.4% of their work time. In comparison, men missed 1.9% of their work time. C. Leon, *Employed But Not at Work: A Review of Unpaid Absences*, 104 MONTHLY LAB. REV. Nov. 1981, at 19.

A study of 1978 absence rates similarly concluded that: "Women lost 4.3% of their usual work hours during the survey week in 1978; men lost 3.1%." BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, SPECIAL LABOR FORCE REPORT No. 229, ABSENT WORKERS AND LOST HOURS 50 (1978). A BLS study in 1964 revealed that married working women under 35 years old most frequently gave pregnancy as the reason they stopped working. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, SPECIAL LABOR FORCE REPORT No. 59, WHY WOMEN START AND STOP WORKING: A STUDY IN MOBILITY 1080 (1965).

A study made in 1976 by the National Survey of Family Growth corroborated, to some extent, the earlier BLS data. The survey focused in part on pregnant workers, age 15-44, with at least one child. The reasons the women gave for quitting work were: health-related (32.7%), reasons other than health (45.7%), employer's decision (12.4%) and the baby's arrival (7.2%). NATIONAL SURVEY OF FAMILY GROWTH DEPARTMENT OF HEALTH AND HUMAN SERVICES (1976) (unpublished Table 42).

Available statistics probably underestimate the impact of no-leave policies on working women. A woman may quit to save herself the indignity of being fired once her employer discovers she is pregnant. Or, prior to becoming pregnant, a woman may voluntarily remove herself from the workplace in anticipation of the pregnancy. Neither of these factors would surface in a statistical analysis of working women.

43. In Mitchell v. Board of Trustees, 599 F.2d 582 (4th Cir. 1979), the plaintiff challenged a school's no-leave policy on the grounds that it had a disproportionate impact on women because they alone could become pregnant. The Fourth Circuit was faced with a record in which the class of persons affected by the school district's no-leave policy was too small to permit the sort of reliable statistical proof frequently available in adverse impact cases. The district court instead proceeded on the basis of several applications of the no-leave policy and on "judicial notice of the world as it is and as it is known in common experience to be." 599 F.2d at 585, citing Fed. R. Evid. 201. This, held the Fourth Circuit, was sufficient:

> Statistical proof of actual applications is not of course indis-

Dothard v. Rawlinson.[44] In *Dothard,* the Court stated that: "There is no requirement . . . that a statistical showing of disproportionate impact must always . . . be based on analysis of the characteristics of actual applicants."[45] Thus, a court can take judicial notice of the fact that since only women become pregnant, a no-leave policy will have a disproportionate impact upon them.

The proposition that a no-leave policy has an adverse impact on women and is thus violative of Title VII was recently adopted by the District of Columbia Circuit Court of Appeals in *Abraham v. Graphic Arts International Union.*[46] The District of Columbia Circuit is by no means the only court that has de-

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> pensable to proving the disparate impact *prima facie* case, particularly where, as here, the action is individual and not class. Circumstantial evidence, complemented by judicial notice to show that a facially neutral policy must in the ordinary course have a disparate impact on a protected group of which an individual plaintiff is a member is often utilized. *See, e.g.,*Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). To require statistical proof involving a significant sample of actual applications of a policy to establish its disparate impact would always preclude the claim of a "first impactee." Title VII of course cannot be read to yield such a result.

599 F.2d at 585 n.7.

44. 433 U.S. 321 (1977).

45. *Id.* at 330.

46. 660 F.2d 811 (D.C. Cir. 1981). The plaintiff in *Abraham* lost her job when she went on pregnancy disability leave in excess of the 10-day limit on sick leave allowed for temporary employees. In reversing the district court's summary judgment in favor of the defendant, the Circuit Court noted:

> An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have. Title VII outlaws employment discrimination traceable to an employee's gender, and it takes little imagination to see that an omission may in particular circumstances be as invidious as positive action.

Id. at 819. A severely restrictive leave policy, and especially a no-leave policy such as Miller-Wohl's, is tantamount to a policy of dismissal for pregnant employees. As the D.C. Circuit recognized in *Abraham:*

> While many female as well as male employees could have held a . . . job without any problem at all, any such jobholder confronted by childbirth was doomed to almost certain termination. Oncoming motherhood was virtually tantamount to dismissal . . . . In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age — an impact no male would ever encounter.

Id. at 819.

cleared illegal employment policies having an adverse impact on women because of their special role as childbearers.[47] The theory's roots can be traced to the Supreme Court's decision in *Nashville Gas Company v. Satty*,[48] in which the Court invalidated an employer's policy denying accumulated seniority to employees returning from education or pregnancy-related leaves. The Court noted that while "[o]n its face, petitioner's seniority policy appears to be neutral in its treatment of male and female employees . . . both intentional discrimination and policies neutral on their face but having a discriminatory effect may run afoul of §703 . . . . "[49]

Like the seniority limitation policy invalidated in *Satty* under an adverse impact analysis, a no-leave policy subjects female employees to "a substantial burden that men need not suffer."[50] As the Supreme Court recognized in *Satty*, Title VII cannot be read to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different reproductive role.[51]

Employers may argue that since the PDA states literally that pregnancy, childbirth, and related medical conditions shall be treated "the same" for all employment-related purposes as

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47. In addition to the cases discussed below, *see* Vuyanich v. Republic National Bank of Dallas, 505 F. Supp. 224 (N.D. Tex. 1980); Fancher v. V.A. Medical Center, 507 F. Supp. 124 (E.D. Ark. W.D. 1981).

48. 434 U.S. 136 (1977).

49. *Id.* at 140-41.

50. *Id.* at 142.

51. The proposition that a no-leave policy violates Title VII because of its adverse impact on women is supported not only by Title VII case law, but also by regulations promulgated by the United States Equal Employment Opportunity Commission (E.E.O.C.), the federal agency charged with the duty of interpreting and enforcing Title VII. The E.E.O.C. guidelines relating to pregnancy provide, in pertinent part: "(c) Where the termination of an employee who is temporarily disabled [due to pregnancy] is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity." 29 C.F.R. § 1604.10(c). This guideline predated the 1978 Pregnancy Discrimination Amendment to Title VII, and was reissued unchanged following the enactment of the Amendment. Both the House and Senate Committee Reports on the 1978 Amendment expressly endorse the E.E.O.C.'s interpretation of Title VII contained in 29 C.F.R. § 1604.10 S. REP. No. 331, 95th Cong., 1st Sess. (1977); H.R. REP. No. 948, 95th Cong., 2d Sess. (1978). As the Supreme Court stated in *Griggs* "the administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs*, 401 U.S. at 433-34. This principle should hold especially true when the Commission's interpretation has been explicitly endorsed by Congress.

other disabilities, an employer cannot be required to provide pregnancy disability leave when males suffering other types of disabilities are not so accommodated. However, common sense, as well as the higher goal of equal employment opportunity which Title VII was enacted to promote, cannot support this interpretation.[52] To read the PDA literally would require a *de facto* abrogation of the adverse impact doctrine as it applies to sex discrimination cases involving pregnancy. There is no reason to believe that Congress intended such a result. The amendment was enacted in response to the Supreme Court's decision in General Electric Co. v. Gilbert,[53] which held that under Title VII employers were free to exclude pregnancy-related disabilities from their otherwise comprehensive employee insurance compensation programs.

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52. As Larson and Larson, leading commentators on employment discrimination law, point out:

> 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" . . . . Some leave accompanying childbirth is an accepted modern necessity, and a policy denying it, with discharge as the alternative, is tantamount to a policy of discharge for pregnancy . . . it is sex differentiation *not* to offer to women a benefit denied to men — maternity leave. The reason is that this "inequality" is necessary to provide substantial equality of employment opportunity.

A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 38.22 (1982).

53. 429 U.S. 125 (1976). The legislative history of the Pregnancy Discrimination Amendment is replete with statements that § 701(k) was not enacted to limit the protection afforded by § 703(a), but rather to make clear that discrimination on the basis of pregnancy was sex discrimination prohibited by Title VII. If Congress had intended, in enacting § 701(k), to limit severely the adverse impact doctrine, a cornerstone of Title VII law since the Supreme Court's decision in *Griggs*, it surely would have said as much somewhere in the legislative history. Instead, Congress endorsed an E.E.O.C. guideline embracing this very approach.

It was not Congress' intent in enacting the PDA to abrogate the adverse impact doctrine as it applies to pregnancy-related issues. This point is stressed repeatedly in the legislative history to the amendment. During the Senate debate, Senator Javits stated:

> This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of Title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in [*Gilbert*] . . . I hope the Senate will recognize the remedial purpose of the bill and approve it as reported from the Committee.

123 CONG. REC. 29,387 (1977).

Gilbert's profound effect on the new legislation cannot be over-emphasized. The Supreme Court's decision in *Gilbert* came as a shock to the legal community. Prior to *Gilbert,* all federal circuit courts which considered cases brought under Title VII alleging discrimination on the basis of pregnancy interpreted the congressional intent behind Title VII and its amendments to forbid such discrimination.[54] The Supreme Court decision in *Gilbert* was the first to suggest that Congress' prohibition of discrimination "on the basis of sex" did not also mean "on the basis of pregnancy." The fact that reversing the *Gilbert* decision was Congress's primary purpose for enacting the PDA has important consequences.

The focus on *Gilbert* accounts for the emphasis placed on disability insurance payments during the hearings and floor debates and the relative lack of discussion of other employment practices, such as unpaid leave. In adopting the narrow goal of reversing *Gilbert,* Congress made clear that it was leaving intact the law as it stood, minus *Gilbert*'s effect. It can therefore be assumed that the adverse impact analysis utilized by the Supreme Court in *Nashville Gas Co. v. Satty*[55] is still valid, as are

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54. *See* Communications Workers v. A.T.&T., 513 F.2d 1024 (2d Cir. 1975) (court stated that "disparity of treatment between pregnancy-related and other disabilities in the employment context violates Title VII.") *Id.* at 1031; Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975), *vacated on other grounds,* 424 U.S. 737 (1976) (employment policies that excluded pregnancy benefits from the company income protection plan and required female employees to return to work three months after childbirth or be fired held discriminatory against women and in violation of Title VII); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975) (exclusion of pregnancy-related disabilities from company employee disability benefit program deemed prohibited by Title VII); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) (court stated that it was in agreement with other circuits finding disparate treatment of pregnancy-related disabilities discriminatory under Title VII); Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975) (plaintiff's evidence that she was disabled due to pregnancy and was discharged while others were not terminated because of temporary disabilities unrelated to pregnancy established a policy of discrimination against pregnant women in violation of Title VII); Hutchison v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975) (court found the Lake Oswego School Board's sick leave policy excluding pregnancy or childbirth-related disabilities from coverage was in violation of Title VII); Berg v. Richmond Unified School Dist., 528 F.2d 1208 (9th Cir. 1975) (school district policies which required pregnant permanent employees to take a mandatory leave of absence and which denied sick leave pay during pregnancy-related absences found to be in violation of Title VII); Farkas v. South Western City School Dist., 506 F.2d 1400 (6th Cir. 1974) (Sixth Circuit affirmed judgment of district court that failure to pay teachers sick leave for absences related to pregnancy constituted discrimination on the basis of sex).

55. 434 U.S. 136 (1977).

the Equal Employment Opportunity Commission guidelines interpreting Title VII.[56] Both *Satty* and the EEOC guidelines provide sound legal support for laws such as the MMLA without conflicting with Title VII's disparate treatment provisions.

C. Positive Action Laws and the Problem of Protective Legislation

In addition to the contention that the MMLA was preempted by the literal language of the PDA, Miller-Wohl argued that the Montana law was a state protective law which, because it provided women with a benefit denied to men, ran afoul of Title VII.[57] The protective legislation issue provoked heated debate within the feminist legal community. Equal treatment proponents argued that the Montana statute is indistinguishable from laws which until very recently "protected" women out of their jobs. Supporting such a statute, they argued, could lend implicit justification to future "protective" laws which would do more harm than good. Advocates of the MMLA's positive action approach on the other hand, argued that the Montana law can be sufficiently distinguished from the "protective" legislation so recently invalidated.[58]

State protective legislation can take two forms. In its restrictive form, protective legislation limits the employment opportunities of women by excluding them from certain job functions or working conditions, or by denying them entire categories of employment altogether. This type of protective legislation was held to violate Title VII by the Ninth Circuit in *Rosenfeld v. Southern Pacific Co.* in 1971.[59] Clearly, the MMLA is not a restrictive state protective law; it in no way limits the employment opportunities of women. Rather, by assuring that women, who alone can become pregnant, will not lose their jobs as a result of pregnancy-related disabilities, the MMLA promotes equality of opportunity and puts women on an equal footing with men.

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56. 29 C.F.R. § 1604.10(c). For text see *supra* note 51.

57. Brief for Appellant at 21, Miller-Wohl Co. v. Commissioner of Labor & Indus., 684 F.2d 1088 (9th Cir. 1982).

58. *See* Brief of *Amici Curiae* California Department of Fair Employment and Housing, *et. al.*, 41, Miller-Wohl Co. v. Commissioner of Labor & Indus., 684 F.2d 1088 (9th Cir. 1982).

59. 444 F.2d 1219 (9th Cir. 1971).

The protective legislation analysis cannot end here, however. As is demonstrated by *Homemakers, Inc. v. Division of Industrial Welfare*[60] and *Burns v. Rohr Corp.*,[61] there is a second, "beneficial" type of protective legislation which may also violate Title VII. In *Homemakers,* the Ninth Circuit affirmed a decision invalidating provisions of the California Labor Code which required employers to pay overtime to female employees, but did not extend the same benefit to males.[62] Similarly, in *Burns v. Rohr Corp.,* the Southern District of California held that California labor regulations requiring employers to grant rest periods to female employees but not to males was in conflict with and superseded by Title VII.[63] Neither *Homemakers* nor *Burns* requires the invalidation of the MMLA. The state laws invalidated in both cases are distinguishable from the Montana statute.

As Judge Wallace pointed out in *Burns,* laws mandating rest periods for women only are based on the same assumptions as were the weight-lifting restrictions struck down in *Rosenfeld.* This assumption is that because women on the average are physically weaker than men, they should thus be treated differently as a class.[64] *Burns* stands for the proposition that "beneficial" protective legislation will run afoul of Title VII when it requires different treatment of men and women based on stereotypic assumptions about, or normative differences between, the sexes, resulting in under- and over-inclusive classifications.

It is this under- and over-inclusiveness of statutes which classify on the basis of sex or race that brings them into conflict with commonly held notions of equality embodied in the equal protection clause,[65] as well as Title VII. But the Montana law providing for pregnancy-related disability leave is not, and cannot possibly be, under- or over-inclusive. No man will ever *need* a pregnancy-related leave, so the statute is not under-inclusive. No pregnant woman who does not choose or need to go on leave

60. 509 F.2d 20 (9th Cir. 1974), *cert. denied,* 423 U.S. 163 (1976).

61. 346 F. Supp. 994 (S.D. Cal. 1972).

62. Homemakers Inc. v. Division of Industrial Welfare, 509 F.2d at 23.

63. 346 F. Supp. at 998.

64. *Id.* at 996.

65. *See* Tussman & tenBroek, *The Equal Protection of the Laws,* 36 CALIF. L. REV. 341, 352-53 (1949).

for a pregnancy-related disability is forced to do so by the statute. Therefore it cannot be said to be over-inclusive. If in the future, women are faced with "protective" legislation that is offensively over- or under-inclusive, the MMLA can be adequately distinguished on this basis.

There are other critical distinctions between requiring that workers temporarily disabled by pregnancy be afforded reasonable unpaid leave rather than be fired and giving rest breaks or overtime pay to women but not men. Any employee, whether male or female, can use a rest break. Both men and women workers appreciate the opportunity to earn overtime pay. Laws which grant such benefits to women but not to men based on the chauvinistic assumption that women are weaker and thus need these benefits more than men, violate Title VII because they further limit the employment opportunities of women. But the problem treated by the MMLA and the policies underlying the solution it provides are wholly different. Montana's law places women on an *equal* footing with men and permits males and females to compete *equally* in the labor market. The MMLA does not provide women with an additional benefit denied to men; it merely prevents women from having to suffer an additional burden which no male would ever have to bear.

D. Equal Protection of Positive Action Statutes: The *Geduldig* Dilemma

One of the gravest concerns expressed by equal treatment advocates in the *Miller-Wohl* controversy is that supporting positive action statutes such as the MMLA would require acceptance of the Supreme Court's equal protection analysis in *Geduldig v. Aiello*[66]—a case which feminist litigators should be working to overrule rather than using as authority. In *Geduldig*, the Court held that the exclusion of pregnancy-related disabilities from a state administered disability insurance plan did not constitute sex-based discrimination in violation of the equal protection clause. The relationship between *Geduldig*'s equal protection analysis and the *Miller-Wohl* controversy is discussed at greater length below,[67] but a few brief comments are warranted here.

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66. 417 U.S. 484 (1974).

67. *See infra* notes 83-85 and accompanying text.

Although the conceptual problems with the majority opinion in *Geduldig* are legion, perhaps its most objectionable attribute is the Court's conclusion that classifications based on pregnancy do not constitute classifications based on sex. In the now infamous footnote 20, the Court reasoned, somewhat grotesquely, that because the California program divided potential recipients into two groups—pregnant women and nonpregnant persons—it did not classify people on the basis of sex.[68] Consequently, the program did not require scrutiny under the more stringent standard set out in *Reed v. Reed*[69] and *Frontiero v. Richardson*,[70] but rather could be tested under a rational basis test.[71]

Many feminist attorneys express concern that in defending statutes such as the MMLA against equal protection challenges, litigants will use the principle set out in *Geduldig* that classifica-

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68. 417 U.S. at 496 n.20.

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero*. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. The lack of identity between the excluded disability and gender as such under this insurance program becomes clear under the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

69. 404 U.S. 71 (1971). The Court held that a sex-based classification " 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . . ' " *Id.* at 76, citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

70. 411 U.S. 677 (1973). The Court held that "classifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.* at 688.

71. *See supra* note 68.

tions based on pregnancy are not sex-based and thus require only minimal scrutiny. This is a legitimate concern. It can reasonably be argued that the more *Geduldig* is used as precedent for the proposition that discrimination based on pregnancy is not sex-based, the greater weight it will achieve. It is necessary, therefore, to examine whether statutes such as the MMLA can survive an equal protection challenge without reliance on *Geduldig*.

Even assuming that the provisions of the MMLA constitute a sex-based classification, it can nonetheless survive an equal protection challenge so long as the classification serves important governmental objectives and is substantially related to achievement of those objectives.[72] The legislative history of the MMLA reveals that two major concerns motivated the Montana Legislature in enacting the statute: (1) to effectuate the provisions of Montana's newly-enacted equal rights amendment and guarantee equal employment opportunities to women which were, in its judgment, defeated by no-leave policies;[73] and (2) to "protect the right of husband and wife, man and woman alike, to procreate and raise a family without sacrificing the right of the wife to work and help support the family after her pregnancy."[74] It can hardly be argued that these are not important government objectives, nor that providing guaranteed unpaid leave to pregnant workers who are disabled by pregnancy is not substantially related to the goal's achievement. Equal protection analysis does not require that Montana provide guaranteed leave for all types of disabilities should it provide leave for pregnancy-related conditions,[75] although this would certainly be desirable from a humanistic perspective.

It is not necessary then to rely on *Geduldig* to protect statutes such as the MMLA, just as it is not necessary to express implicit support for over- and under-inclusive "protective" legislation that may operate to women's detriment in other contexts.

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72. Craig v. Boren, 429 U.S. 190 (1976).

73. MONTANA LEGISLATIVE COUNCIL, EQUALITY OF THE SEXES, INTERIM STUDY BY THE SUBCOMMITTEE ON JUDICIARY 1974 Leg. Sess. Montana.

74. Miller-Wohl Co. v. Commissioner of Labor & Indus., 515 F. Supp. 1264, 1266-67 (D. Mont. 1981).

75. Dandridge v. Williams, 397 U.S. 471, 486-87 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

There is a clear and pressing need for statutes such as the MMLA to afford protections to women workers that the equal treatment approach is unable to provide. It thus seems incumbent upon feminist litigators to fashion arguments that will protect such statutes once they are enacted, whether or not we choose to propose or lobby for them ourselves.

II. THROUGH A GLASS DARKLY: PARADIGMS OF EQUALITY AND THE CHALLENGE OF *MILLER-WOHL*

If the *Miller-Wohl* debate has done nothing else, it has revealed a lack of consensus as to, and perhaps a clear understanding of, what is meant by the term sexual equality. This is not really surprising. As it has risen over the years as a demand within social and political movements, "equality" has seldom been a well-defined objective. This is largely because, as Giovanni Sartori observed,[76] equality is usually raised as a "protest ideal"—a battle cry against the way things are rather than a clear description of the way things are desired to be. With respect to the women's movements of the early and mid-twentieth century, the cry for equality has been a protest against the way things have been, i.e., against disparate treatment of women because of their sex, and not as a description of a unified or clearly envisioned social goal. In light of this, perhaps the most significant, and no doubt most constructive, effect of the *Miller-Wohl* debate is to afford feminist legal theorists an opportunity to examine diverse notions of the meaning of sexual equality and to use the term not as a protest against what society is now, but as a vehicle for thinking about what we want society to become.

In conducting such an analysis, one fortunately need not start from scratch in identifying the various models or paradigms of sexual equality which have emerged during the past two decades. In *Towards a Feminist Jurisprudence,*[77] Professor Ann Scales identifies and describes four such models which she terms the liberal view, the assimilationist view, the bivalent view, and the incorporationist view.[78] Each of these views has emerged at some point during the *Miller-Wohl* debate. In fact, the controversy could accurately be described as a conflict be-

76. G. SARTORI, DEMOCRATIC THEORY 325-26 (1967).
77. Scales, *supra* note 14.
78. *Id.* at 426-37.

tween adherents of the liberal and incorporationist views. A thorough and critical understanding of these models—of their origins, strengths, and weaknesses—can help chart a course through the present crisis in feminist legal theory.

This section examines these four models in the context of the *Miller-Wohl* debate and asks the following questions: What are their underlying assumptions or theoretical origins and how do these limit their utility? Which groups in society are they best calculated to benefit and whose problems do they leave unaddressed? What are their dangers in the context of today's political and legal climate and how can we adequately guard against these dangers? By stepping back from the legal intricacies of the debate and asking these more fundamental questions, two conclusions emerge. The first is that the equal treatment approach to equality cannot, in and of itself, effectuate equality between the sexes. Its analytical assumptions and structural limitations have prevented it from solving the equality problems presented by inherent differences between men and women in the areas of pregnancy and childbirth. The second conclusion is that the equal treatment or "liberal" view of equality must be expanded to permit, indeed to require, positive action accounting for inherent sex differences, and facilitating equality of effect.

A. The Liberal Model of Equality

The liberal view of equality is primarily concerned with the elimination of laws or social practices which treat women differently than men specifically because of their sex. The historical foundations of the liberal model can be seen in the writings of John Stuart Mill,[79] who in the nineteenth century advocated against laws and social practices which specifically denied women equal civil rights in the areas of property, suffrage, marriage and employment. The liberal view addresses the problem of disparate treatment, and advances the proposition that once women are treated the same as men, equality will be achieved through individual competition in the societal marketplace. To the extent that biological or normative differences between the sexes are proffered as justification for differential treatment, ad-

79. J. Mill, *The Subjection of Women*, in Essays on Sex Equality (A. Rossi ed. 1970).

herents to this view respond in two ways. They either point out that because those differences are socially conditioned rather than inherent, they should have no legal significance, or, as in the case of biologically inherent differences, they analogize the female characteristic to some cross-sex analogue and demand that the two conditions be treated the same. The liberal view of equality is the theoretical model being advanced by the "equal treatment" proponents in the *Miller-Wohl* debate and has, in fact, been the prevalent ideology of the women's movement of the 1960's and 1970's.[80]

The liberal model of sexual equality is based on two fundamental assumptions. The first is that there are no "real" differences between the sexes; that is, no differences that cannot be dismissed as illusory sex-stereotypes or the normative results of sex-stereotyped socialization, or which cannot be effectively compared to and treated the same as some cross-sex analogous condition. The second is that once all vestiges of disparate treatment are removed, men and women, by virtue of their inherent similarity, will achieve equal status through individual freedom of choice and equal competition in the social and economic marketplace. The dangers and limitations of the liberal view stem from these two basic assumptions.

These assumptions render the model structurally incapable of defining sexual equality in the context of sex-specific conditions such as pregnancy and childbearing, which are non-normative and which are at most only marginally amenable to cross-sex analogy. The liberal view's need to compare exclusively female characteristics to cross-sex analogues often results in reliance on strained analogies which are unconvincing to courts and consequently rejected, leaving courts without a standard for ef-

80. The National Organization of Women (NOW), organized in late 1966 by Betty Friedan and other liberal feminists, was founded "to bring women into full participation in the mainstream of American society *now*, exercising all the privileges and responsibilities thereof in truly equal partnership with men." Excerpt from *NOW Statement of Purpose, reprinted in* J. HOLE & E. LEVINE, REBIRTH OF FEMINISM 85 (1971). Later, liberal feminists reiterated the equal treatment principle in their defense of the Equal Rights Amendment. *See* Reagan, *In Support of the ERA* in FEMINISTS FRAMEWORKS, 178 (Jaggar & Struhl ed. 1978). Feminist anthropological, sociological and psychological studies also supported or adopted the liberal view that sex differences are "illusory" and not the proper basis of differential treatment. *See also* M. MEAD, SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES 205-06 (1935); C. EPSTEIN; WOMEN'S PLACE (1970).

fectuating equality. In addition, it is foreseeable that courts' *acceptance* of the cross-sex comparisons approach could lead to disastrous results in certain abortion cases. Perhaps the most serious flaw in the liberal approach is that by virtue of its second assumption, it accepts maleness as the norm and permits a denial of equality of effect to women who are either unwilling or unable to assimilate to that norm.

1. The Reliance on Comparables and the Problem of the Strained Analogy

The liberal model works best when "normative" sex differences are used as the basis for sex-based classifications or private decisions regulated by sex discrimination laws.[81] In such contexts, the liberal view, which has gained substantial judicial acceptance in the last decade,[82] establishes that normative differences cannot justify discriminatory classification. It is the characteristics of similarly situated individuals, and not of the groups to which they belong, which must govern classification or selection.

There are, however, some sex differences which are not normative but rather inherent, or exclusive to one sex. The most obvious examples include the capacity to become pregnant and the conditions of pregnancy and childbirth, which characterize women, but not men. When faced with a law or practice in these contexts which is challenged as "unequal", the liberal equal treatment approach must rely on analogy. Without some male characteristic to analogize to the female trait, the model breaks down due to its complete reliance on comparisons of "similarly situated" men and women.

Herein lies the model's first flaw: it relies on courts' willingness to accept imperfectly fitting, often strained analogies, which they have at various times in the past refused to accept. It was this flaw in the comparisons approach that resulted in the plain-

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81. A "normative" sex difference refers to a statistical variance in the extent to which males, on the average, and females, on the average, exhibit a certain aptitude, interest, or characteristic, such as physical strength.

82. *See, e.g.*, Orr v. Orr, 440 U.S. 269 (1979); Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973). *But see* Kahn v. Shevin, 416 U.S. 351 (1974).

tiffs' defeat in *Geduldig v. Aiello.*[83] The plaintiffs' theory in *Geduldig* relied on analogizing pregnancy to medical conditions confronted by men. They argued that pregnancy should be treated the same as prostatectomy, which like pregnancy is exclusive to one sex, or like cosmetic surgery since both are voluntary, or like a heart attack, since both are expensive.[84] The Supreme Court, however, chose to emphasize the distinctions between pregnancy and these other medical conditions and rejected the analogy, thus stripping the liberal model of its analytical effectiveness.[85]

A corollary problem inherent in the liberal view's reliance on like treatment of groups deemed to be "similarly situated" was revealed in *Geduldig.* Once the Court rejected the proferred analogies and determined that "pregnant women and non-pregnant persons" were not similarly situated, nothing in the liberal model required that they treat pregnant women in a manner that resulted in equality of effect. This results from the fact that the liberal view is a formalistic model; it is only equal treatment that is required, regardless of any inequality of effect that such treatment occasions.

The liberal view's failure to achieve equality of effect in the pregnancy context, however, should come as no surprise. As will be discussed below,[86] the liberal model is based on an assumption of homogeneity and interchangeability within the "society of equals". It is not analytically equipped to provide guidance as to the meaning of equality between two functionally distinct groups, but must rely on some device to convince the rulemaker that a perceived difference is, for analytical purposes, an illusion.

Another manifestation of the limitations of this approach is seen in its inability to serve as a theoretical foundation for the proposition that a woman's right to abortion is an issue of sexual

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83. Geduldig v. Aiello, 417 U.S. 484 (1974), *reh'g,* Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973) (Exclusion of pregnancy-related disabilities from a state administered disability insurance plan did not constitute a denial of equal protection of the laws to women.) *See supra* notes 66-75 and accompanying text.

84. *Id.* at 499-500. (dissenting opinion of Brennan, J.).

85. *Id.* at 496, n.20. See *supra* note 68 for text of n.20.

86. *See infra* notes 97-134 and accompanying text.

equality. In *Roe v. Wade*,[87] the Court established a limited constitutional right to abortion, but it did not do so on the grounds that denial of that right violated a woman's right to equal protection of the laws. In fact, Justice Blackmun did not analyze abortion as an issue of sexual equality at all, but rather based the majority opinion on the "penumbral," and significantly qualified, right to privacy implicitly contained in the Bill of Rights.[88] Although various commentators have urged that *Roe v. Wade* should have been based on an equal protection theory[89] following the liberal model, it is not surprising that the Supreme Court declined to do so. In the abortion, as well as the pregnancy context, the comparisons approach is analytically problematic.

The capacity to become pregnant is unique to women; it is an inherent, not a normative sex difference. Therefore, in order to apply the liberal view's essential principle of like treatment of similarly situated individuals, the proponent would have to rely, as in *Geduldig*, on analogizing pregnancy to some condition unique to men. The argument would go something like this: It is true that only women can become pregnant and desire to have an abortion. But there are many analogous medical conditions that men alone may have for which they may want corrective surgery, such as a vasectomy or a hair transplant. Thus the principle of equal treatment requires that women be able to choose to have an abortion on the same basis that men can choose to have a vasectomy, a hair transplant, or any medical procedure.

As in the pregnancy-related disability context then, the liberal model must rely on the acceptance of the analogy between pregnancy and medical conditions faced by men, on the proposition that abortion and vasectomy are actually the same. To condition a woman's right to abortion on the acceptability of such an analogy would be a grave tactical error. It is likely that to both the Supreme Court and the American public, the distinctions between the condition of pregnancy, of a potential child developing within a woman's body, and any medical condition faced by a man, would leap out with much greater force and

87. 410 U.S. 113 (1973).
88. *Id.* at 152-53.
89. *See, e.g.*, Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

vigor than the similarities. The liberal model, however, relies completely on the acceptance of the analogy. It fails to focus on the effect of the very *real* sex difference of pregnancy on the relative positions of men and women in society and on the goal of assuring equality of opportunity and effect within a heterogeneous "society of equals". This is the same flaw, stemming from the formalistic nature of the liberal view, that led to the plaintiffs' downfall in *Geduldig v. Aiello.*

Given that the liberal view has been offered to the courts by feminist litigators and legal theorists as virtually the exclusive paradigm in sex discrimination law, it is not surprising that it is on the issues of pregnancy and abortion, where cross sex analogies are weak, that women have made the least progress in the courts. Neither is it hard to understand why after reading *Roe v. Wade* or *Geduldig v. Aiello,* the feminist is left with the distinct impression that somehow in the midst of all this complex if not contorted analysis, the Court has missed the point. The liberal model of sexual equality is only as strong as the analogy upon which it relies. If feminist litigators continue to rely exclusively on that model, we are not apt to make substantial progress in obtaining functional equality for women in the areas of pregnancy and abortion. We need a supplemental construct which does not rely on homogeneity between the sexes.

In its failure to come to grips with the meaning of equality in the context of inherent sex differences not susceptible of cross-sex analogy, the liberal view also declines the opportunity to define clearly the distinction between a sex difference which can justify differential treatment and one which cannot.[90] The

90. In addition to the inherent differences between men and women presented by pregnancy and childbirth, there may be a biological basis for normative sex differences as well. The psychological community is not resolved on this issue. In 1974, Eleanor E. Maccoby and Carol N. Jacklin published THE PSYCHOLOGY OF SEX DIFFERENCES, a thorough review of the literature in this area. Maccoby and Jacklin's study revealed four sex differences that were "fairly well established." E. MACCOBY & C. JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 351-52 (1974). Girls have greater verbal ability than boys; boys excel in visual-spatial ability; boys excel in mathematical ability; males are more aggressive. *Id.* The study established many unfounded beliefs about sex differences as well. These include: girls are more social than boys; girls are more "suggestible" than boys; girls have lower self-esteem; girls are better at rote learning and simple repetitive tasks while boys are better at tasks that require higher level cognitive processing and the inhibition of previously learned responses; boys are more analytic; girls are more affected by heredity while boys are more affected by environment; girls lack achievement motivation;

absence of such a standard has two consequences. The first is that a large degree of uncontrollable subjectivity as to whether a sex-based classification is "substantially related to the achievement of an important government objective"[91] is introduced into the legal analysis in equal protection cases.[92] The second conse-

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and lastly girls are auditory while boys are visual. *Id.* at 350-51. Finally, Maccoby and Jacklin found that due to too little evidence or ambiguous findings, there were open questions about: tactile sensitivity; fear, timidity and anxiety; activity level; competitiveness; dominance; compliance; nurturance and "maternal" behavior. *Id.* at 352-54. Three factors were identified by the authors as contributing to the development of sex differences: genetic factors; "shaping" of boy-like and girl-like behavior by parents and other socializing agents, and the child's spontaneous learning of behavior appropriate for his/her sex through imitation. *Id.* at 360. These factors interact with each other and directly influence behavior. Biological origins were "most clearly implicated" for male aggression and visual-spatial abilities. *Id.* In 1980 Maccoby and Jacklin updated their review of the literature on sex differences. They concluded that the evidence continued to support their theory that male aggression is biologically based. Maccoby & Jacklin, *Sex Differences in Aggression: A Rejoinder and Reprise*, 51 CHILD DEVELOPMENT 964 (1980). *But cf.* Teiger, *On the Biological Basis of Sex Differences in Aggression*, 51 CHILD DEVELOPMENT 943,975 (1980).

While Maccoby and Jacklin's research remains important in the area of sex differences, psychologists continue to question whether, and to what extent, "real" sex differences exist. Psychologist Jacquelynne E. Parsons, University of Michigan, expresses the general view well:

> "Most scientific investigators today do not take a simple either-or position concerning the determinants of sex differences. Instead, human development is seen as the result of the dynamic interaction between an individual's biological makeup and experiences with the environment. The crux of the debate today lies in the relative role that biology plays in creating sex-role differences and in the specific nature of its influence."

J. PARSONS, THE PSYCHOBIOLOGY OF SEX DIFFERENCES AND SEX ROLES xiii (1980). *See also* C. TAVRIS & C. OFFIR, THE LONGEST WAR, SEX DIFFERENCES IN PERSPECTIVE 56 (1977). The uncertainty as to the possible biological rather than environmental origins of sex difference make it critical that feminist notions of equality not rely on the "nonexistence" of sex differences, but rather provide guidance as to the proper implication of such differences.

91. Craig v. Boren, 429 U.S. 190 (1976).

92. In the course of the *Miller-Wohl* debate, equal treatment proponents have argued that the liberal view of equality, despite its limitations, should be adhered to because it furthers judicial value neutrality. That is, by simply requiring like treatment of comparably-situated individuals, the liberal view's equal treatment approach protects against the infusion of the judge's own values and preferences into the decision-making process. However, this bias insulation mechanism functions only if judges are willing to accept that in any one situation, men and women are similarly situated for purposes of a particular statute. In making this determination, judges are instructed to examine the nature of the classification, the state's objectives in enacting the legislation, and the "fit" between the two. Craig v. Boren, 429 U.S. at 197-99. As the history of equal protection decisions reveals, any belief that the "mechanical jurisprudence" of this anti-discrimination test will guard against judicial bias is false. The judge's values and prejudices can

quence is that the liberal view's insistence that differences can never justify differential treatment could lead to results in the abortion context that the vast majority of women, feminist and non-feminist alike, would find completely unacceptable.

2. *Equal Treatment and Paternal Consent to Abortion*

In September of 1982, Judge Daniel Moylan of the Circuit Court for Washington County, Maryland, enjoined Bonny Ann Fritz from having a first trimester abortion because her husband would not consent.[93] He did so on the grounds that the equal treatment requirement inherent in the Maryland equal rights amendment provided a husband with a right to veto his wife's decision to have an abortion. In coming to this conclusion, Judge Moylan analogized the condition of maternity to that of paternity, the analytical mainstay of the liberal view's equal treatment approach. Judge Moylan stated:

> I believe that we are different, that is men and women are different, but the responsibilities and obligations in connection with their marriage are equal and the interest or desire to have children are equal; the function, the biological function that each performs is different from the other, but absolutely essential.[94]

Throughout the *Miller-Wohl* debate, equal treatment proponents have stressed that any acknowledgement that preg-

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enter the "similarity of situation" analysis at all three points. *See generally* O. Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT 84-154 (M. Cohen, T. Nagel & T. Scanlon ed. 1976) [hereinafter cited as Fiss].

Geduldig v. Aiello, 417 U.S. 484 (1974), provides an excellent example of the entry of judicial bias at the first step. By simply declaring that the classification utilized in California's disability insurance plan was based on pregnancy and not on sex, the Court insulated the plan from all but the most minor scrutiny. The outcome of Washington v. Davis, 426 U.S. 229 (1976), in which the Supreme Court held Title VII's adverse impact theory inapplicable in cases under the equal protection clause, stemmed from the same analytical manipulation. The classification involved was deemed one based on test performance, not on race, thus also requiring only minimal scrutiny. The Court's decisions in *Geduldig*, 417 U.S. at 484, and in Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), demonstrate the degree to which judicial bias may be injected into the "similarity of situation" analysis involving the identification of a state's legislative objectives. The principle of like treatment of comparables underpinning the liberal model of equality has simply not been a reliable guarantor of equality.

93. Fritz v. Hagerstown Reproductive Health Services, No. 35, 639 Equity, Washington County, Maryland Circuit Court, from the Bench, September 17, 1982.

94. *Id.*, Transcript of Proceeding at 61.

nancy is in some way a unique condition potentially warranting special treatment of some kind is extremely dangerous and must be avoided.[95] What the *Fritz* case demonstrates is that a *failure* to acknowledge that pregnancy is in some ways a unique condition deserving special treatment may also lead to disastrous results. The equal treatment approach inherent in the liberal model focuses excessively on an attempt to "nullify" sex differences. It does not articulate standards for the proper equality-effectuating implications of those differences. It is in the areas of pregnancy and childbirth, where differences between men and women are the most marked, that this structural limitation causes troubling results.

Perhaps even more troubling than the problems discussed above, the primary defect in the liberal feminist's concept of equality is that it accepts an inherent assumption that men are the norm.[96] Women are permitted to compete with men under the same rules and within the same institutions, but those institutions were designed in accordance with normative male values, priorities and characteristics. The liberal model, in and of itself, does nothing to require that those rules or structures be changed to accommodate the normative or inherent needs, values, or priorities of women.

The result of this is that any individual or group of women that in fact differs from the male norm will be correspondingly disadvantaged in the competitive marketplace and will find no remedy under the liberal view. Thus, the model works relatively well for women who are willing and able to conform to the male norm; *e.g.* women who choose to take a less involved role in the raising of their children, upper-middle class women who have the financial resources to hire others to perform tasks traditionally assigned to the nonworking mother, or women who work within liberal institutions willing to accommodate their roles as mothers in the absence of legal compulsion.

However, the model works significantly less well for women who deviate substantially from the male norm, specifically work-

95. *See* Williams, *supra* note 10, at 195-96.
96. Scales, *supra* note 14, at 427-28.

ing class and single mothers. The failure of the liberal model in addressing these women's difficulties in balancing their dual rule cannot be over-emphasized. Thus, when in the course of the current debate it is argued that the equal treatment approach has "worked so well", the question must be asked "worked well for whom, and in what contexts?" In the area of abortion, the model has provided no assistance at all and may even prove dangerous. In the maternity/employment context, the model can be expected to work best for women in upper income classifications whose lives closely approximate the male norm. But for those women who are unwilling or unable to assimilate, the model has substantially less to offer.

During the course of the *Miller-Wohl* debate, some proponents of the equal treatment or liberal approach have argued that its main strength lies in its strong persuasive value to courts and legislatures and that this strength should not be compromised by any deviation from a strict equal treatment imperative. It is certainly true that an equal treatment argument is very appealing. It feels somehow safe, well-rooted in some very basic notion that "equal" means "the same", and that for groups within society to be equal, they cannot be treated in any way differently from one another.

The liberal view's appeal to the political elite is strong because it accepts and reflects the unarticulated postulates of American equality theory: the assumptions of homogeneity and interchangeability within a society of equals, and the individualistic theory of rights. To the extent that a group within American society could assimilate, that is become homogeneous with the anglo-saxon male core, they were admitted into the society of equals. Groups that were actually, or perceived as, unable to assimilate were denied equality. Liberal American political theory, upon which jurisprudential constructs of equality have in large part been based, has been unable to develop a theory of nonhierarchial pluralism which accommodates differences within the society of equals.

Likewise, the liberal view is superficially persuasive because it views equality as an individual right, and, like the mainstream political theory on which it is based, elevates equality of treatment over equality of effect. However, a close examination of the

reasons for the liberal model's persuasive value reveals that those very characteristics accounting for its appeal are also the source of its inability to solve many of the most pressing race and sex equality problems of our time.

3. *Equality and the Assumption of Homogeneity*

The fact that homogeneity was a prerequisite for admission to the American "society of equals" can be observed in written expressions of colonial and revolutionary era political theory. Although a thorough examination of early American political theory is beyond the scope of this Article,[97] a few brief observations will illustrate this thesis.

In 1780, in a now famous letter entitled "What is an American," extolling the virtues of American equality,[98] St. John de Crèvecoeur observed that American society was creating a "new man," a distinctive type, among whom there prevailed a high degree of equality, both social and economic. Crèvecoeur described a process by which differences of religion, custom and manners between the various sects of colonists faded with relative rapidity, resulting in a "relatively homogeneous society".[99] Crèvecoeur's observations mirrored those of John Jay, the first Chief Justice of the United States Supreme Court, who in *The Federalist* defined Americans as: "[O]ne united people — a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs . . . ."[100]

But, of course, both Crèvecoeur and Jay were wrong. In 1790, black slaves accounted for nineteen percent of the American population,[101] and numerous tribes of American Indians, having demonstrated themselves to be resistant to both slavery and assimilation, were being steadily driven westward. There

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97. For a thorough, provocative explication of this topic, see J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY (1978) [hereinafter cited as POLE].

98. M. CRÈVECOEUR, called St. John de, LETTERS FROM AN AMERICAN FARMER (1904) [hereinafter cited as CRÈVECOEUR].

99. *Id.* at 61-6.

100. THE FEDERALIST No. 2 at 94 (J. Jay) (B. Wright ed. 1961).

101. J. HIGHAM, SEND THESE TO ME: JEWS AND OTHER IMMIGRANTS IN URBAN AMERICA 7 (1975).

were also, as early as 1785, many Chinese immigrants in America who were systematically excluded from the "society of equals,"[102] as of course were women. And yet, the same political theorists or societal observers who extolled the virtues of American equality, never suggested that the exclusion of these groups from that society was irrational or hypocritical.[103]

What one can deduce from these observations is not that the American populace was homogeneous during the colonial and revolutionary era, but rather that homogeneity was a necessary condition of equality.[104] Black slaves, Indians, Chinese, and women were observed as being distinct from and thus innately incapable of assimilating into the homogeneous anglo-saxon male core. Their exclusion from the society of equals was consequently not only justified, but logically necessary. Equality was predicated on homogeneity.[105]

The effects of the historical dependency of equality on homogeneity resurfaced noticeably in the late nineteenth and early twentieth centuries, with the increased, and staunchly opposed, immigration of southern and eastern Europeans to an America previously stocked primarily with northern immigrant groups. The intense opposition to, or at best substantial ambivalence toward, this "second wave" of immigrants corroborates the existence of a deeply rooted, though unarticulated assumption that American society and political ideals, including the ideal of equality, was based on a "distinct pervasive and continuous homogeneity of national character."[106]

A student of the period of this "new immigation" will readily observe that hostility towards any particular national group of immigrants was negatively correlated with their perceived assimilability. Anti-Asian immigration restrictions,[107] hostility to-

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102. S. MILLER, THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE 1785-1882 (1969).

103. *See* CRÈVECOEUR, *supra* note 98, at 222-45. The same apparent contradiction can be observed in A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (D.P. Mayer ed. 1969).

104. The stated hypothesis that homogeneity has historically been a necessary condition of equality in American society is thoroughly developed in POLE, *supra* note 97.

105. *Id.* at 158-59.

106. *Id.* at 226.

107. J. HIGHAM, STRANGERS IN THE LAND: PATTERN OF AMERICAN NATIVISM 1860-1925 25 (1981) [hereinafter cited as HIGHAM].

wards and even violence against Italian,[108] Eastern European,[109] Jewish,[110] and Irish Catholic[111] immigrants was explicitly based on the degree to which those groups threatened the homogeneity and security of the American "society of equals".[112]

The dispute over the new immigration was a conflict between nativist's and immigrationists' faith in the assimilability of immigrant groups.[113] What is most interesting about the debate over immigration is not that opposing groups differed in their belief in assimilability, but rather that virtually no one questioned the underlying assumption that assimilation was a prerequisite for admission into American society.[114] Anglo-con-

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108. *Id.* at 90-91.

109. *Id.* at 89-90.

110. *Id.* at 26-27.

111. *Id.* at 26.

112. Opposition to increased immigration was also based, in the case of organized labor, on its perceived threat to employment opportunities and prospects for successful organizing. *See, e.g.*, HIGHAM, *supra* note 107, at 49-50.

113. The nativist rejection of the assimilationist assumption and argument for restriction in immigration was epitomized in the writings of New York's Madison Grant, who in 1916 wrote that "the races do not blend. The mixture of two races gives us a race reverting to the more ancient, generalized and lower type . . . . [Thus,] the cross between any of the three European races and a Jew is a Jew." M. GRANT, THE PASSING OF THE GREAT RACE, OR THE RACIAL BASIS OF EUROPEAN HISTORY 15-16 (1916). On the other hand, the immigrationists based their arguments on the premise that people of different races or religions were by nature interchangeable, and would consequently assimilate. In 1911, for example, anthropologist Franz Boaz, published a study for the Congressional Commission studying immigration which purportedly proved that the American environment actually changed the head shapes of second generation immigrants. F. Boaz, *Changes in Bodily Form of Descendents of Immigrants*, in REPORTS OF THE IMMIGRATION COMMISSION, S. Doc. No. 208, 61st Cong., 2d Sess. (1911). His report aroused great interest, and was used as proof by immigrationists that all immigrant groups would assimilate rapidly to a central American "type," just as they had in the days of Jay and Crèvecoeur. In the midst of this "scientific" debate, the attitude of the American public, as reflected in the media, appeared hopeful yet skeptical about the prospects of assimilation: "The strong stomach of American civilization may, and doubtless will, digest and assimilate this unsavory and repellent throng . . . . In time they catch the spirit of the country and form an element of decided worth." *Editorial* appearing in The Press (Philadelphia 1888).

114. There was a small pluralist element, for whom Horace Kallen was the chief proponent, who rejected the "melting pot" and "anglo-conformity" theories and advocated the ideal of an American "commonwealth of national cultures". H. Kallen, *Democracy Versus the Melting Pot*, NATION, Feb. 18 and 25, 1915, *reprinted in* H. KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES (1924). Additionally, BERKSON, THEORIES OF AMERICANIZATION, A CRITICAL STUDY WITH SPECIAL REFERENCE TO THE JEWISH GROUP (1920), diverged from the assimilationist norm by advocating a modified view of social pluralism which emphasized individual choice. Berkson argued that equality of opportunity should entail a range of choices available to the individual and that society's

formity has been, and continues to be, a prevalent ideology in American thought.[115] This nonconscious ideology accounts for the shameful delay in the conferral of civil rights to American blacks[116] and Asians.[117]

The assimilationist imperative understandably affected the aspirations, ideals and self-conceptions of individuals within incoming immigrant groups, as well as the arguments they advanced urging their acceptance into American society. One can see expressed in the fiction and drama written by first and second generation immigrants a willingness to be "made over," a desire to been seen as "the same" as any member of the old anglo-saxon stock, and a longing for a new homogeneity subsuming the differences that separated them from equality. The classical expression of this immigrant aspiration can be seen in Zangwill's play *The Melting Pot.*[118] Although this work is now the best known of its type, it was not alone in the assimilationist aspiration to which it gave expression. In the opening pages of *The Promised Land,* Mary Antin wrote, almost apologetically, about her changes since arriving in America: "I have been made over . . . . I am absolutely other than the person whose story I have to tell."[119] And Myron Kauffman in *Remember Me to God,* a play about a Jewish immigrant bucking for acceptance into the exclusive Harvard University Club system, expresses the urgency of the immigrant's desire to merge into the anglo-saxon core when his protagonist states: "If only I can go the last few steps in Ivy League manners and behavior, they will surely rec-

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responsibility was to recognize individual uniqueness and safeguard the availability of multiple choices.

However, the views of Kallen and Berkson were an aberration from the dominant ideology, which in the late 19th and early 20th centuries rejected cultural pluralism as a social goal. *See* M. GORDON, ASSIMILATION IN AMERICAN LIFE, THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGIN (1964) [hereinafter cited as GORDON].

115. GORDON, *supra* note 114, at 89.

116. For a thorough development of the historical denial of civil rights to blacks and its foundations in perceived non-assimilability, *see* POLE, *supra* note 97, at 148-213.

117. The Chinese Exclusion Act of 1904 was not repealed until 1943, and was paralleled by the Limited Immigration Act of 1907 which sharply restricted Japanese immigration. An example of the denial of civil rights of Chinese immigrants as well as blacks and Indians, is seen in an 1849 California statute which prohibited blacks and Indians from testifying in the trial of a white man. In 1854 the statute was construed by the California Supreme Court as applying to the Chinese as well.

118. I. ZANGWELL, THE MELTING POT: DRAMA IN FOUR ACTS (1920).

119. M. ANTIN, THE PROMISED LAND xi (1912).

ognize that I am one of them and take me in."[120]

The liberal view's insistence on a strict equal treatment approach to pregnancy reflects the same implicit acceptance that assimilation is a prerequisite to equality as is reflected in Kauffman's statement. Its ardent deemphasis of even those "real" differences between the sexes that pregnancy epitomizes is, in effect, an effort to say: "See, we are really just like you and (consequently) we have a right to be your equals."

Before accepting the liberal view because of its high persuasive value, the principles which make it so appealing should be critically examined. The assumption of homogeneity, although deeply rooted in our national ideology, has operated to deny equality to groups that would not or could not assimilate. It is incumbent upon feminists to provide a new, more humanistic vision for society, a new ideology of equality. The *Miller-Wohl* crisis clearly presents us with the opportunity to do, or begin to do, just that.

4. The Equal Treatment Model and the Individualistic Theory of Rights

In addition to the homogeneity assumption and assimilationist imperatives discussed above, a second and related factor accounting for the appeal of the liberal view is that it accepts the same individualistic theory of rights which underlies majority American equal protection jurisprudence. This individualism principle strengthens the "persuasive value" of the equal treatment theory. But it is also the source of that construct's inability to provide solutions to many of the current issues regarding equality between the sexes and the races.

The individualistic theory of rights stems from the enlightenment era reductionist philosophy of John Locke and Thomas Hobbes.[121] The individualism principle dissociates the individual person from any context of family, religion, or class and invests in him *as an individual,* certain "natural" or "inalienable"

120. M. KAUFFMAN, REMEMBER ME TO GOD, *cited in* GORDON, *supra* note 114, at 112.

121. *See* T. HOBBES, THE CITIZEN (1949); Laslett, *Introduction to* J. Locke, Two Treatises of Government (1960) [hereinafter cited as Laslett].

rights.[122] In the context of equality theory, Lockean reductionism posits that each individual has a right to be treated as other similarly situated individuals, or that each has the right to equal access to a particular opportunity, resource or burden. Equal treatment is the touchstone of the individualistic theory of rights. Its influence on American jurisprudence can hardly be over-emphasized.[123] In addition to the direct influence on jurisprudential concepts of equality, the individualism principle has an indirect, more subtle effect on the way we conceptualize what is "equal," and what is not, and encourages a broad interpretation of the notion of "similarly situated persons." This tendency can be seen in the *Miller-Wohl* debate in the controverted issue of whether or not a man who is nauseous with a hangover and misses work is "similarly situated" with a woman who has morning sickness. The equal treatment proponents focus on the point of view of the individual man and the individual woman in defining similar situation. Conversly, the positive action advocates focus on the potentially disparate effect of a no-leave policy on men as a group and women as a group. The equal treatment view's adherence to an individualistic approach to equality enhances its "persuasive value," in the minds of those inculcated with the theoretical precepts of anglo-American law.

Before concluding however that the equal treatment model is the better or the only model to support, the problematic "underside" of individualistic jurisprudence should be examined. Such an examination reveals that the same individualistic theory of rights which makes the equal treatment model so "persuasive" in the context of the *Miller-Wohl* debate is also responsi-

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122. Laslett, *supra* note 121, at 341.

123. The individualistic construct of equality, referred to by Owen Fiss as the "anti-discrimination construct", has served as the "primary mediating principle" through which judges have interpreted the equal protection clause of the fourteenth amendment. *See* Fiss, *supra* note 92 at 84-154. Consequently, American constitutional and statutory civil rights opinions repeatedly propound an individualistic definition of equality.

For example, in Shelly v. Kraemer, 334 U.S. 1 (1948) Justice Vinson stated: "The rights created by the first section of the fourteenth amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Id.* at 22. The direct and indirect influence of this individualistic orientation can be seen in decisional law under both the equal protection clause (*See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976), in particular note 22 at 429 U.S. 208, and Title VII (*See, e.g.*, Los Angels Dept. of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (which disfavors normative approaches to statutes or employment practices which utilized sex based classifications).

ble for the Supreme Court's decision in *Regents of the University of California v. Bakke*,[124] which invalidated the University of California at Davis Medical School's affirmative action plan.

It is easy, after reading the *Bakke* decision, to be left with the feeling that somehow, the Supreme Court missed a very important point—that somehow the "equality" effectuated by the elimination of affirmative action admissions programs is neither "equal" nor "just." Yet, the Court's result follows rationally, almost inevitably, from an individualistic theory of equality. It is difficult to articulate just what is "wrong" with *Bakke*, but something does seem not quite right with the Court's "solution" to the affirmative action problem. The Court's treatment of the *Bakke* case, and the entire concept of "reverse discrimination" reveal a fundamental flaw in the individualistic theory of rights. The individualistic view exalts equality of treatment over equality of effect and, as a result, is unable to ameliorate the material conditions of inequality characterizing our society.

In his book *Taking Rights Seriously*,[125] Ronald Dworkin points out that the concept of equality can be viewed in two very different ways. The first is to view the right to equality as a right to equal treatment. The second is to view equality as the right to treatment as an equal, which focuses on equality of effect rather than equality of treatment.[126] Dworkin distinguishes these two concepts with the following illustration.

Assume a person has two children, and one is dying of a disease which is making the other merely uncomfortable. In such a situation, if the parent has but one remaining dose of a drug, she does not divide it in half and treat the two children "equally". She gives the remaining dose to the dying child, hoping to keep them both alive.[127]

This illustration demonstrates two points. The first is that the right to treatment as an equal is morally fundamental and the right to equal treatment derivative. The second is that, in some circumstances, the right to treatment as an equal entails a

124. 438 U.S. 265 (1978).
125. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).
126. *Id.* at 227.
127. *Id.*

right to equal treatment, but sometimes it does not.[128] Equality can be seen as an individual right to equal treatment or as a social policy promoting equality of effect—a distinction that American jurisprudence and political theory has virtually ignored.

In the context of the affirmative action controversy, the individualistic model conceptualizes equality as a personal right rather than as a social policy; it exalts equality of treatment over equality of effect. Mr. Bakke gets into medical school, but blacks remain proportionally excluded from the medical profession. The appearance of equality embodied in uncompromised equal treatment takes precedence over the goal of equality of effect as a social reality. As Justice Powell wrote in his plurality decision in *Bakke:* " 'Justice must satisfy the appearance of justice.' "[129] According to the individualistic view of rights, preferential treatment is morally and constitutionally objectionable because it subordinates an individual's right to equal treatment to broader social aims.[130] Without a model of equality supplementing the individualistic "anti-discrimination" principle on which the liberal view is based, the result in *Bakke* is inescapable.

The strict equal treatment position being advanced in the *Miller-Wohl* debate falls into the same "individualism trap" that resulted in the Court's *Bakke* decision. Equal treatment proponents focus on comparing the individual treatment of a specific man and a specific woman, and require that they be treated the same, regardless of the inequality of effect that equal treatment in such a context occasions. They are approaching the problem as the Supreme Court approached *Bakke* when it compared the treatment of Mr. Bakke, as an individual, to the treatment of any individual black. The result of the individualistic analysis in each case is the same: the appearance of equality that equal treatment provides takes precedence over equality of effect.

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128. *Id.*

129. 438 U.S. at 319 n.53 quoting Justice Frankfurter in Offutt v. U.S., 348 U.S. 11, 14 (1954).

130. *See* R. Simon, *Preferential Hiring: A Reply to Judith Jarvis Thompson,* 3 PHILOSOPHY & PUBLIC AFFAIRS No. 3 (Spring 1974), *reprinted in* EQUALITY AND PREFERENTIAL TREATMENT 40 (M. Cohen, T. Nagel & T. Scanlon ed. 1976).

The individualistic conception of rights is not worthy of feminists' exclusive support. As Fiss reminds us, it contains "structural limitations that prevent it from adequately resolving or even addressing certain central claims of equality being advanced. For these claims, the antidiscrimination principle[131] either provides no framework of analysis or, even worse, provides the wrong one."[132] A jurisprudential model is not the same as justice. It is merely a theoretical construct which attempts to approximate and effectuate our subjective conceptions of justice. Like any theoretical construct, it can be expected to approximate our ideal of justice better in some situations than in others. The Lockean theory of atomistic rights and the liberal disparate treatment construct to which it gave birth is not "wrong" or "false" simply because it does not effectuate equality as a social policy in all contexts. But as problems arise to which the reductionist model provides no satisfactory solution, new models approximating our view of justice must be developed.[133] In addition to the homogeneity and individualism assumptions discussed above, there is a third, similarly related, factor which both accounts for the liberal model's appeal, and proves to be the source of its limitations.

The individualism principle discussed above, when linked with the ideal of equality, combines to form the construct of interchangeability.[134] The interchangeability principle posits that individual members of different groups are inherently no different from one another by virtue of their group identity. Given the necessary training and experience, a constituent of one racial, ethnic, or sexual group could take the place of another. It would thus be a violation of an individual's right to equality to treat

131. *See supra* note 123 and accompanying text.

132. Fiss, *supra* note 92, at 106.

133. It is interesting to note that just as the enlightenment era reductionism of Locke and Hobbes is failing to address adequately various modern problems of equality, its limitations are being revealed in other fields as well. For example, Newtonian physics, which was based on the same mechanistic view of the universe, has been shown to be inadequate to describe subatomic phenomena. In subatomic physics, enlightenment era reductionism is being supplemented by a wholistic model, in which a part can be described only in relation to the whole of which it is a part. As the physics of Newton led the way into the modern mechanism of the sciences and the social sciences, one can predict that the new jurisprudential models which will eventually emerge to deal with problems of equality in the context of group differences will be wholistic and relativistic, as is the new physics. For a thorough discussion of this subject, *see* CAPRA, *supra* note 1.

134. POLE, *supra* note 97, at 293.

him or her differently from members of another group, even if the two groups manifest normative differences.

At various points in American political history, the dominant group has opposed the extension of equal rights to a subordinate group by attacking the assumption of interchangeability. So, for example, the case against equality of civil rights for women was largely based on the argument that women were inherently "different" from men. Women were not seen to be interchangeable with men, and were deemed inadmissible into the "society of equals."

It is no surprise then that feminists advocating equality for women would have attacked this noninterchangeability assumption justifying their opponents' position. It has been a primary goal of the women's movement since the 1960's — to refute the argument that women are inherently distinct from the male core. The liberal view advanced by these women and their male supporters *accepts* the interchangeability prerequisite and attempts to establish that women fulfill it. Liberal feminism accepts the predominant cultural and political ideology, and for that reason has "high persuasive value."

Given that American equality theory is based on an assumption of interchangeability, it is also not surprising that feminists' most successful legal forays have involved rectifying cases of sexual inequality in situations where the sexes are not inherently different. In such cases the courts, once presented with sufficient sociological evidence of interchangeability, have been able to base their decision on a well-established construct of equality that leaves the homogeneity, individualism, and interchangeability principles intact. But in the context of pregnancy and abortion, the courts, unable to find these three constructs present, have been noticeably less successful in dealing with equality issues. Neither mainstream American political theory nor American jurisprudence has yet developed a construct of equality that actually facilitates equality of effect in the context of functional heterogeneity between the sexes.

The fundamental mistake being made by the strict "equal treatment" proponents is that they make no attempt to supplement the interchangeability/homogeneity theory of equality that

has permitted so many injustices in the legal and political history of our society. The liberal view works well in many situations and should not be discarded. But unless the goal of feminist jurisprudence is only to obtain a "piece of the pie" for women who approximate the male norm, the liberal model of equality must be complemented by another theory which will assure equality of effect within a heterogeneous group. Elizabeth Wolgast's model provides such a construct.

B. The Bivalent View

In her provocative book, *Equality and the Rights of Women,* Elizabeth Wolgast proposes a paradigm of sexual equality which she refers to as the "bivalent" view.[135] This view differs considerably from the liberal model. Wolgast rejects the two primary tenets of the liberal feminist view: that sex differences are "illusory," and that equal treatment of the sexes will result in functional equality. Rather, she asserts that the differences between men and women are substantial, and that sexual equality will result only if society deals with sex differences respectfully and fairly by developing accommodating institutions which permit equality of effect. In short, Wolgast acknowledges that the conditions of the sexes, at least in some respects, are asymmetrical or heterogeneous, and sets out to devise a conception of equality that takes this asymmetry into account, something which the liberal model is structurally unable to do.

The essence of Wolgast's theory is that there are two types of rights: "equal" rights and "special" rights. In explicating the differences between these two types of rights, Wolgast uses the following illustration. Within our society, every individual is deemed to have an "equal" right of access to public buildings. That this right is an "equal right" means that with respect to that right, any one person is interchangeable with any other. The right adheres to every individual. But, a disabled person who uses a wheelchair will be unable to exercise this "equal" right unless a ramp is provided. He or she is not being affirmatively discriminated against or denied equal treatment. But the effect of no ramp is a denial of the equal right. In such a circumstance, equality is effectuated only if the disabled person is

135. Wolgast, *supra* note 13.

granted a "special" right to a ramp.[136]

Wolgast's illustration demonstrates that the failure to provide a "special" right to a group whose members are disadvantaged because they deviate from the norm has the effect of denying them an "equal" right to which they are entitled. In such a situation, to accord members of the institutionally disadvantaged group equal treatment denies them equality. This harkens back to Dworkin's illustration involving the two sick children:[137] The "equal" right to continued life can be effectuated only if the dying child has a "special" right to receive the one remaining dose of medication.

The notion of equal rights and special rights has gained statutory judicial acceptance in a number of civil rights contexts. Consider, for example, Title VII's[138] prohibition against discrimination on the basis of religion. Title VII prohibits two types of religious discrimination. First, it would be illegal under Title VII for an employer not to hire an orthodox Jew because he "didn't like Jews."[139] This is an example of "disparate treatment," or "intentional discrimination" condemned by the Act. Suppose the employer hired the Orthodox Jew and then fired him for refusing the employer's demand that he work on Saturdays, even though another worker was willing to switch schedules with him, causing no inconvenience to the employer. Under Title VII, the employee would have a cause of action for the employer's failure to "reasonably accommodate" his religious practice of Sabbath observance.[140]

Title VII's religious accommodation requirement embodies a bivalent conception of employment rights. Viewed in light of Wolgast's paradigm, that requirement can be broken down into the following propositions. First the model posits that every person has an "equal" right to employment opportunity. Second, it recognizes that the Sabbatarian differs from the societal norm upon which most employment schedules are based, one which makes Sunday the common "day of rest." To fire the Sabbath-

136. *Id.* at 51.
137. *See supra* text accompanying notes 125-128.
138. 42 U.S.C. § 2000e (1976).
139. *See* SCHLEI AND GROSSMAN, *supra* note 24, at 217.
140. *Id.* at 187-89.

observer for refusing to work on Saturday is really the equivalent of firing him for being an observant Jew. Finally, the model recognizes that, in light of the Orthodox Jew's *difference* from the social norm, religious equality can be effectuated only by providing him with a *special* right to accommodation of his religious practice. Recognition of the right to reasonable accommodation does not negate the right to be free from disparate treatment. The two rights coexist.

The reasonable accommodation requirement also typifies statutes designed to protect the employment opportunities of disabled individuals. Under various state and federal statutory schemes,[141] an employer can be deemed to discriminate against a disabled individual either by subjecting him or her to disparate treatment, i.e., intentional discrimination along the lines described above, or by failing to take reasonable steps to accommodate his or her disability so as to permit effective job performance. To deny the disabled employee a special right to reasonable accommodation results in her being denied the equal right to employment opportunity.

Similarly, the adverse impact theory of discrimination developed under Title VII is based, though indirectly, on a bivalent view of employment rights. Again, each individual is posited to have an "equal" right to employment opportunity. But because members of different racial or sexual groups manifest normative differences in height, weight, history of arrests or completion of high school, equal treatment of members of these different groups under a selection procedure based on any of the above criteria is not likely to result in equality of effect. Thus, in order to actualize the equal right to employment opportunity, Title VII provides members of a disadvantaged group a special right to be free of selection procedures based on any of the adversely impacting criteria unless they can be shown to be necessary to the safe and efficient operation of the business enterprise.[142] Adverse impact theory is based on the recognition that racial and sexual groups are heterogeneous and that, in light of this hetereogeneity, equality of treatment does not always entail

141. *E.g.*, Title V, Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976); Fair Employment and Housing, CAL. ADMIN. CODE, tit. 2, R. 7293.9 (1982).

142. *Griggs*, *supra* note 40, at 432.

equality of effect. It's bivalent structure reflects an awareness that equality of effect is fundamental and equality of treatment derivative.

One can see that Wolgast's model reconciles the fact of heterogeneity with the theoretical construct of interchangeability underlying traditional egalitarian thinking. Her view acknowledges the fact that institutions such as employment policies, building access, etc. were designed in accordance with normative standards to which some groups within society do not conform. By affording those individuals a special right accommodating their difference, institutions are modified so that the principle of interchangeability is restored. So long as the building has a ramp, the walker and a wheelchair user can be substituted one for the other.

Wolgast's bivalent view of rights provides a cogent and convincing justification for laws such as the MMLA, a justification which is consistent with statutory and case law regarding reasonable accommodation of religion and physical disability. Every individual has a right to equal employment opportunity. However, men and women are not interchangeable with respect to physical conditions which may affect their need to be absent from work. In addition to all the medical disabilities that members of either sex may face, or those sex-specific disabilities for which there exists some cross-sex analogue, women have the capacity to, and do become, pregnant. As a result, they are subjected to an additional disability that no man will confront. Thus, in the context of an employer with a no-sick leave policy such as Miller-Wohl's, men and women will not have equal employment opportunity. Women will be disadvantaged. In order to effectuate equality of opportunity, the MMLA provides women with a "special right" to a reasonable unpaid leave, in the same way that the disabled worker and the Sabbatarian are afforded "reasonable accommodation" under other statutes. The MMLA is nothing more than a reasonable accommodation statute, such as those statutes feminists generally support in the context of discrimination against the disabled or against members of religious minorities.

Wolgast's bivalent model can contribute substantially to efforts to effectuate women's equality. Its most significant analyti-

cal asset is that it eliminates the assimilationist imperative implicit in the liberal view. Under Wolgast's model, women do not have to be proven homogeneous with men in order to gain admission to the "society of equals." On the contrary, the bivalent view provides for changes in societal institutions to accommodate differences. It does not require that women assimilate into institutions built with a white male norm in mind, which often leaves women swimming up a swiftly moving stream.

Wolgast offers a model of sexual equality which can deal with issues such as pregnancy or abortion. Consider for example how the issue of a woman's right to abortion could be established by an application of the bivalent model of equality. Anglo-American jurisprudence implicitly recognizes that individual members of society are invested with a right to bodily integrity, a right which is recognized by the common law of torts and the constitutional prohibition against cruel and unusual punishment.[143] This right is an "equal" right, possessed by every individual. With respect to this right, every member of society, black, white, male, or female should be interchangeable. But women and men are different from one another. Women have the capacity to become pregnant, while men do not. Unless women are accorded the special right to abortion, they will in effect be denied access to the equal right to bodily integrity. Seen in this way, laws prohibiting abortion clearly abrogate women's right to equality on the basis of sex. The bivalent model has the capacity to effectuate equality in the context of functional heterogeneity, and for this reason can provide a constructive companion to the more traditional "anti-discrimination" principle.

However, the bivalent view leaves unaddressed a very troubling issue. Any theory that permits the conferral of special rights based on differences between groups must logically permit the imposition of special burdens based on differences as well. This concern is expressed by equal treatment adherents because permitting special "positive" treatment of pregnancy opens the door to special "negative" treatment as well.

Wolgast recognizes that this is a problem inherent in the

143. U.S. CONST. amend. VIII.

bivalent view:

> The problem of women's rights has this two-sided form. In regard to some rights we want to say that sex is an important difference and ought to have a bearing on rights. With respect to others we want to say that it is unimportant and, like race, ought to be entirely ignored. Is there a single principle by which the two kinds of rights can be sorted out?[144]

After an intriguing review of a variety of modern equal protection cases, Wolgast concludes that no such principle can be found.[145] From the point of view of the feminist legal strategist, this is a serious flaw in the bivalent model. For as Scales points out, absent such a limiting principle, the bivalent approach to equal protection cases could be a constitutional disaster. "Without a rule limiting which differences between the sexes can be taken into account and a requirement that in all other circumstances men and women be treated as equals, its proponents have their feet planted on the slippery slope of judicial stereotyping."[146]

Nothing in the bivalent view prohibits the use of normative differences to trigger the conferral of special rights resulting in over- and under-inclusive sex-based classifications. Under this unlimited bivalent approach, the Supreme Court's decisions in *Kahn v. Shevin*,[147] which held constitutional a Florida tax exemption provided to widows but not widowers, regardless of individual need, would be justified. In *Kahn*, the Court held that the difference in treatment was justified by differences in the average financial condition of widows versus widowers. The dissenting opinions of Justices Brennan and White, however, objected that the statute was over-inclusive, because it afforded the benefit to wealthy widows, and under-inclusive because it excluded destitute widowers.[148]

In permitting normative differences to be used to trigger

144. WOLGAST, *supra* note 13, at 78.
145. *Id.* at 78-102.
146. Scales, *supra* note 14, at 433.
147. 416 U.S. 350, 351 (1974).
148. *Id.* at 357, 360.

special rights, the bivalent view could lead to the reinforcement of societal norms and attitudes having their basis in stereotypical sex roles. As Scales points out, "new arguments for change must not play into stereotypic notions about womanhood."[149] In addition to the possible dangers to women inherent in the absence of a limiting principle, an unbridled bivalent approach could lead to results that seem unfair. *Kahn* is an excellent example of this. This absence of a limiting principle permits over- and under-inclusive classifications which violate the disparate treatment principle so fundamental to our society's conception of equality. And in permitting normative differences to trigger special rights or special burdens, the bivalent approach has the potential of perpetuating limiting stereotypic sex roles and inhibiting the maximization of individual freedom of choice.

C. A Limiting Principle for the Bivalent View: The Incorporationist Approach

In *Towards a Feminist Jurisprudence,* Scales proposes a limiting principle which, when combined with Wolgast's bivalent model,[150] results in what Scales terms an "incorporationist" approach. This approach posits that women should be regarded as having rights different from men only with respect to sex-specific conditions which are completely unique to women, namely pregnancy and breastfeeding.[151] Under the incorporationist view, normative differences between the sexes cannot serve as the basis for the conferral of special rights or burdens.

This is an extremely important and constructive modification of the bivalent approach, which, while limiting it, leaves the bivalent model's conceptual advantages intact. In requiring that the differences triggering special rights be inherent as opposed to normative, the incorporationist approach would reverse the result in *Kahn v. Shevin*[152] and eliminate the possibility of over- and under-inclusive classifications which offend prevailing conceptions of equality. It also guards against the conferral of special rights or burdens based on stereotypic assumptions about the differences between the sexes which could perpetuate limit-

149. Scales, *supra* note 14, at 434.
150. *Id.* at 435.
151. *Id.*
152. 416 U.S. 350 (1974).

ing, stereotypic sex roles. Yet at the same time, the incorporationist model recognizes the existence of some inherent sex differences, and in permitting their accommodation, equalizes the relative positions of men and women in a culture whose institutions were designed with a male norm in mind. As Scales points out, the currently dominant liberal view tends to minimize the process of childbearing in an unrealistic way that operates to women's detriment. The incorporation of childbearing into social institutions, as is permitted by the bivalent and incorporationist views, "has the advantage of reflecting the realities of women's lives."[153]

The assumptions underlying the liberal and incorporationist views are very different. Under the liberal view, sex differences, including inherent sex differences such as pregnancy and childbearing, are minimized. No provision is made for their accommodation by societal institutions. The result is that to avoid being disadvantaged in a society modeled to suit a male prototype, women must conform to a male norm. In contrast, the incorporationist view requires, or at least permits, the modification of those institutions to accommodate differences and to equalize the "competitive" position of the sexes. The incorporationist model embodies a transformational approach to respectful accommodation of differences, whereas the liberal view leaves the male norm and the assimilationist imperative intact.

Should the *Miller-Wohl* case be reincarnated in another guise, it will offer feminist litigators an opportunity to present a version of the incorporationist view as a new model for sexual equality. The liberal comparisons approach to equality is in many instances useful, but alone it has not, and cannot, adequately address a number of the most pressing equality issues confronting women today. An additional construct, one which can effectuate equality in the context of inherent sex differences, must be developed and presented to the courts.

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153. Scales, *supra* note 14, at 436.

III. CONFLICTING PARADIGMS OF CHANGE: METAPHYSICAL VERSUS DIALECTICAL MATERIALIST ANALYSIS OF THE PREGNANCY DISABILITY ISSUE

The previous section explored how the equal treatment and positive action positions in the *Miller-Wohl* debate reflect profoundly different conceptions about the meaning of equality. Stepping forward one more step into the anatomy of the *Miller-Wohl* controversy, one can observe even more fundamental conceptual differences between adherents of the two opposing views. The strict equal treatment approach is based on a metaphysical conception of the nature and process of social change, in contrast to the dialectical and materialistic conception underlying positive action arguments. The metaphysical analytic origins of the equal treatment approach, like its reliance on a liberal model of equality, limit its ability to address and solve major equality problems confronting women in American society. This limitation can be remedied only by a more materialist, dialectic approach to the formulation of legal strategies. To analyze the *Miller-Wohl* debate in this context, it is first necessary to understand what is meant by the terms "metaphysical" and "dialectical materialist" thinking.

Metaphysical thinking has three outstanding characteristics. First, it entails thinking about things in the abstract rather than in the material temporal context in which they are found. Second, it entails thinking about things in light of preconceived formulae or theories, defining them as either "this" or "that", entailing an "either-or" dichotomy which remains constant over time. And third, it views the process of development as one of continuous, unidirectional movement towards an ultimate ideal. If these three characteristics are examined in the context of the *Miller-Wohl* debate, the metaphysical ideology underlying opposition to positive action statutes such as the MMLA can clearly be seen.

The very essence of metaphysics is to think about things in an abstract way, in light of some theory or scheme of existence, isolated from the concrete, material circumstances in which the "thing" is found to exist. In a political context, the metaphysical thinker makes strategy decisions analyzing the relationship between the issue in question and an abstract theory or ideal, rather than by examining the concrete effect of the position or

action on the material social conditions existing at the time the issue arises.

The equal treatment proponents in the *Miller-Wohl* debate are thinking metaphysically. They approach the question of whether to support statutes such as the MMLA by asking whether or not the statute conforms to a particular legal construct, i.e., the equal treatment principle. They focus the debate on legal theoretical levels,[154] rather than starting with an analysis of the concrete material problems of women in the workforce. As a result of this theoretical orientation, equal treatment proponents are willing, albeit regretfully, to accept the fact that the PDA's equal treatment approach is actually inadequate to address the problems of women workers with respect to their role as childbearers. The metaphysical thinker is programmed to accept the fact that the model does not ameliorate these material problems. This is a necessary and accepted result of metaphysically oriented political strategy-making.

The second characteristic of metaphysical thinking is that it seeks to fix the nature, properties, and potentialities of everything it considers once and for all. A thing is either "this" or "that," and once so designated, remains in the same designation accompanied by the same value judgment across temporal contexts. Consequently, metaphysical thinking views things in terms of set antitheses. It opposes things of one sort to things of another sort, and everything must fit into one or the other exclusive categories or formulae, where it remains over time.

This conception characterizes the arguments raised by equal treatment proponents as well, They seek to "fix" the nature of the MMLA within one of two mutually exclusive designations. According to this view, a statute provides for either "equal treatment" (read "equality") or "special treatment" (read "inequality"). All equal treatment provisions are inherently the same and seen as "good for women." All "special treatment" statutes are inherently the same and seen as "bad for women," thus danger-

154. This does not mean that questions of legal analysis should not be asked, but only that they should not be the *only* questions asked or the determinative factors in feminist political decision making.

ous, and not to be supported.

It is a result of metaphysical thinking that the "equal treatment" proponent sees no distinction between the MMLA and "protectionist" statutes excluding women from various professions, even though the former expands employment opportunities for women while the latter restricts them. The equal treatment advocate classifies the MMLA with other "protectionist" legislation of the late nineteenth and early twentieth centuries, and, seeing both as examples of "differential treatment," labels them "dangerous" and promoting of "inequality," regardless of their immediate, concrete effect on existing, material social conditions.

The arguments in favor of a strict equal treatment approach to pregnancy also reflect a metaphysical conception of the process of social change and development by which evolution is seen as a continuous, unidirectional, although variably paced progress towards the realization of an absolute, abstract ideal. The social activist governed by a metaphysical conception of change attempts to propagate an ideal view of society and seeks to implement changes which bring the observed into ever-increasing theoretical conformity with the abstracted ideal. Metaphysical thinking, in its concentration on this ideal, often pays little attention to the distinction between reformist and transformational change, or to an analysis of which is more or less likely to be effectuated at a particular time and within particular material social conditions. The ideal must be increasingly approximated with each step, and no change which is seen as ideologically contradictory with the ideal is deemed "progressive".

This ideology is reflected in many equal treatment arguments, most notably in the position that because we ultimately want to see *all* disabilities accommodated by employers, it is not only inadequate, but also "counter-progressive" to support a statute that covers only pregnancy-related ills. To take the partial step, the argument goes, acts as a sort of political "steam valve" that *inhibits* rather than advances progress towards the social goal. At the same time, the partial step is claimed to cause divisions and animosities between men and women which also hinder progress. Thus, the metaphysical cry is always for immediate conformity with the ideal, with relatively little regard for

the material social or political conditions of the times in which the issue is joined.

The metaphysically based "steam-valve" view of partial reform is not borne out by experience. Consider, for example, the course of the ILO Conventions.[155] When first enacted in 1919, and as amended in 1952, the Conventions had some serious flaws. Specifically, they provided certain child-rearing related benefits to mothers and not to fathers; they contained over- and under-inclusive sex biases. In Europe now, however, there is a movement towards new conventions which provide child-rearing related benefits to both working parents. In the social and political context of 1919 and the 1950's, the Convention was a progressive step, even with its sex-biased provisions. In accordance with changing attitudes about sex roles, modifications are being made to improve the old scheme. The sex-biased provisions of the first ILO scheme did *not* prevent this transformation from occurring. The net result will soon be that European countries will have a positive, comprehensive social scheme for accommodating the needs of working parents, while America will have the PDA.

The effect of metaphysical thinking on the participants of the *Miller-Wohl* debate is understandable. Anglo-American law, like anglo-American political philosophy, is a metaphysical system of thought. As lawyers, we have been thoroughly trained in its precepts. Legal analysis embodies all three of the characteristics discussed above. First, lawyers are often criticized by laypeople because they approach problems abstractly, theoretically, without primary consideration for the material conditions of the "real world." Second, the process of legal analysis involves categorizing events into preconceived theoretical constructs, designating them into sets of opposing formulae, where, once designated, they remain over time and across varying material circumstances. Third, the law envisions progress as being continuous and definitely noncontradictory. The very foundation of legal thinking is the concept of precedent and of theoretical consistency with precedent. Contradiction is abhorrent to the law.

Legal analysis must be a central consideration in the pro-

155. *See supra* notes 19-22 and accompanying text.

cess of deciding what to do about statutes such as the MMLA. An assessment of the legal implications and potential consequences of any given strategy is crucial. However, legal analysis should not be the only one considered. Feminist legal theorists must be aware of the nonconscious assumptions and practical implications of the metaphysical world view that underpins legal analysis, and must consider alternative ideological constructs and their applications. To do otherwise subordinates the interests of our constituents to the goal of consistency with the precepts of Anglo-American jurisprudence.

The metaphysical system is not the only method of analysis available in deciding what to do about the pregnancy disability dilemma. The process can be examined dialetically and materially as well. In contrast to metaphysics, a dialectical way of thinking is rooted in the observation that, in processes taking place in society, as in the natural world, things come into being, change, and pass out of being, not as separate, individual units, but in essential relation and interconnection.[156] In contrast to the dualism of metaphysics, nothing can be understood separately, as an abstract unit, but only in light of its relation and interconnection with its material/temporal context and with ongoing processes of change and development.

This ideological foundation results in a sharp divergence from the three characteristics of metaphysical thinking discussed above. First, the dialectical materialist method teaches that strategy decisions should be made not according to theoretical abstractions, but in light of the material circumstances of each particular temporal and social context. Applied to the *Miller-Wohl* controversy, the most important question to be asked is: "What are the material needs of working women, and what strategy can best meet those needs now?" The fact that given the choice between the PDA and the ILO Conventions, working women would choose the latter takes on greater significance under dialectical materialist analysis than under the metaphysical approach.

Second, dialectical materialist thinking does not classify things in "either-or" dichotomies remaining consistent over time

156. *See* M. CORNFORTH, MATERIALISM AND THE DIALECTICAL METHOD (1977).

and across social and political contexts. Rather, dialectics urges that no one position or strategy can be characterized as "progressive" or "reactionary", "helpful" or "dangerous," outside of its relation to the whole and to the time and place in which it arises. Internal contradictions are inherent in all things and phenomena—all have positive and negative sides, a past and a future. The process of change takes place not continuously or unidirectionally, but "dialectically". As the material context interacts with the properties of any particular thing, that "thing" rises, then manifests contradictions, then is replaced by something else in a synthetic, transformational process.

To illustrate the differences between metaphysical and dialectical thinking in this regard, it is instructive to examine the divergent views the equal treatment and positive action proponents hold of the "protective legislation" issue. One of the equal treatment advocates' most emotionally powerful arguments is that the MMLA is "just like" the protective legislation of the late nineteenth and early twentieth centuries. Although enacted to protect women, equal treatment adherents claim such legislation limited women's employment opportunities. The metaphysically thinking equal treatment proponent concludes from the course of protective legislation that such legislation, and any other that fits into the "special treatment" construct was, is, and always will be detrimental to women. Consequently, no "special treatment" legislation should be supported, regardless of temporal or historical context.

Dialectical thinking leads to a quite different analysis of the protective legislation issue. It recognizes that, when first proposed and enacted, much of protective legislation, such as that limiting working hours and providing minimum salaries, was a very progressive reform given the material conditions in which it arose. In many cases it ameliorated the crushing exploitation to which women workers of that era were subjected, an exploitation largely unmitigated by the male-dominated labor unions.[157] It is

157. Samuel Gompers, President of the American Federation of Labor in the early 20th century, was not overly-supportive of the problems of working women. For a discussion of the relationship between the male-dominated labor unions and women labor activitists during this time period, *see, e.g.*, A. HENRY, WOMEN AND THE LABOR MOVEMENT (1923); J. KENNEALLY, WOMEN AND AMERICAN TRADE UNIONS (1978); and A. NESTOR, WOMAN'S LABOR LEADER: AN AUTOBIOGRAPHY OF AGNES NESTOR (1954).

also reasonable to assume, although further research into this issue would be needed to conclude, that the enactment of wages and hours legislation for women and children facilitated the eventual extension of such benefits to men as well.

But, counters the metaphysical thinker, protective legislation, whatever benefit it might have provided at one time, ended up being used to the detriment of women. Consequently, it was a mistake to enact it in the early twentieth century, and anything based on a similar "special treatment" model should be eschewed now.

The dialectical thinker comes to a very different conclusion about the eventual harmful use of some "protective" statutes and its implications for present and future strategies. The dialectician observes that, unavoidably, as the material conditions of American society changed between the late 1800's and early 1900's and the 1950's, the same legislation which was "progressive" became "reactionary." As it interacted with the process of change, the contradictions inherent in protective legislation became apparent, just as they do in all things, and a transformation took place in the form of extension of benefits to men and the injunctions against disparate treatment represented by cases such as *Homemakers*[158] and *Rosenfeld*.[159]

Metaphysical thinking attempts to freeze this process of ascendance, contradiction, and transformation and jump all of a piece into an idealized future. It looks at a detached piece of the course of protective legislation (the contradictions phase) and consequently categorizes any legislation based on a special treatment model as "bad" and equal treatment statutes as "good," regardless of their social or temporal contexts. The dialectical interpretation is quite different. It suggests that, viewed over the course of time, protective legislation or any "special treatment" legislation is inherently neither progressive nor regressive; it has no nature as one or the other independent of its relation to the entire ever-changing social context in which it exists.

To judge the value of positive action laws regarding preg-

158. 509 F.2d at 20. *See supra* notes 61-64 and accompanying text.
159. 444 F.2d at 1219. *See supra* note 59 and accompanying text.

nancy and childbirth, feminist legal theorists should not think abstractly, but should look at the material circumstances confronting women now. Any strategy which is successfully implemented will, without doubt, eventually be revealed to contain contradictions which manifest themselves as disadvantages. The once progressive strategy will become regressive and require transformation—a transformation which both history and science teach will take place. It may not take place without effort, but it will take place. The error inherent in the metaphysical thinking of equal treatment advocates is that it seeks to bypass this process of change and therefore in the attempt will inhibit it. Positive action statutes such as the MMLA can facilitate substantive, rather than merely formalistic, equality between men and women. Such statutes deserve the support of the feminist legal community.

CONCLUSION

The *Miller-Wohl* case brought into uncomfortable focus the limitations of the equal treatment theory which feminist attorneys have advocated and relied upon for many years. With these limitations apparent, we have a difficult choice to make. We can continue to rely exclusively on, and attempt to strengthen, the equal treatment approach, but in the process leave unremedied equality problems not solved by equal treatment analysis. Or, we can begin to develop a supplemental construct which can better effectuate equality in the face of heterogeneity, but face the potential dangers and uncertainties such an endeavor will entail.

There are no easy answers to the problems presented by the *Miller-Wohl* debate. At times it seems to present a web of unsolvable dilemmas and irresolvable contradictions. But our most serious mistake would be to ignore the opportunities that those dilemmas and contradictions represent for expanding feminist jurisprudence. As one author has observed, "There is no such thing as a problem without a gift for you in its hands. You seek problems because you need their gifts."[160]

160. R. BACH, ILLUSIONS 72 (1977).