

4-1986

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### Recommended Citation

Nancy E. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 Fordham L. Rev. 699 (1986), available at <http://scholarship.law.ufl.edu/facultypub/433>

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# MATERNITY LEAVE: TAKING SEX DIFFERENCES INTO ACCOUNT

NANCY E. DOWD\*

## INTRODUCTION

THE reconciliation of employment responsibilities with the demands of childbirth and child-rearing remains a critical issue in the achievement of true equal employment opportunity for women. One of the principal factors contributing to the difference in the employment status of men and women is the resistance of the workplace to accommodating childbirth and parental responsibilities. This resistance has a disproportionate impact on women who by their sex bear the burden of pregnancy, and who by social custom bear the primary responsibility for child-rearing.

Traditionally employers regarded pregnancy and childbirth as incompatible with work and therefore as a justification for barring pregnant women from the workplace.<sup>1</sup> The assumption that once women became mothers they would stay at home to raise their children, rather than work, underlay the relegation of working women to the status of marginal or temporary employees.<sup>2</sup>

With the passage of Title VII<sup>3</sup> and the Pregnancy Discrimination Act (PDA),<sup>4</sup> the primary focus of litigation has been to remove the barriers to equal employment opportunity created by these policies. Although this effort has been largely successful,<sup>5</sup> simply removing these impediments has not been enough. Pregnancy continues to hamper women's employment opportunities, and childcare remains a primarily female responsibility.<sup>6</sup>

A wholesale restructuring and reexamination of the workplace is needed. The existing employment structure must ensure actual, not merely formal equality of employment opportunity. This requires not only eliminating facially neutral practices that disadvantage pregnant women, but also implementing affirmative policies that redress the dis-

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1. See *infra* notes 36-40 and accompanying text.

2. See *infra* note 40 and accompanying text.

3. The Civil Rights Act of 1964, Pub. L. No. 88-352, tit. vii, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. § 2000e (1982)).

4. Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1982)).

5. See *infra* notes 43-45 and accompanying text.

6. See *infra* notes 23-72 and accompanying text.

proportionate impact of the existing structure on pregnant women. Even more fundamentally, the underlying assumptions of the structure of the workplace must be examined, particularly assumptions concerning the relationship between work and family responsibilities. The existing structure assumes that those responsibilities will be split between one working spouse and one non-working spouse.<sup>7</sup> This has a disproportionate impact on working women because they remain primarily responsible for childcare and housework.<sup>8</sup>

This Article focuses on restructuring the workplace in the context of maternity leave. Although most women are no longer, and indeed generally cannot be, required to take maternity leave,<sup>9</sup> many are not guaranteed leave or may be provided only with inadequate leave.<sup>10</sup> A minority of states have addressed this problem by enacting statutes requiring that all employers provide job-protected maternity leave.<sup>11</sup> Two of the statutes, the California and Montana provisions, have been challenged as discriminatory<sup>12</sup> under Title VII<sup>13</sup> and the equal protection clause,<sup>14</sup> and the Supreme Court has recently agreed to consider the validity of the California provision.<sup>15</sup>

This Article considers whether the gender-specific approach incorporated in state maternity leave provisions is a legally valid means to restructure the workplace. Part I presents an overview of current maternity leave policies and dispels the common presumption that maternity

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7. See Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 Yale L.J. 913, 919-20, 946-47 (1983); Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. Pa. L. Rev. 1249, 1251-52, 1279-80 (1983) [hereinafter cited as Law I]; see also Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1499-1501 (1983) (women have traditionally been excluded from the workplace in exchange for a central role in the home); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 Harv. Women's L.J. 83, 85-86 (1980) (although American women have been working outside the home for many years, women are still considered to belong in the home). Indeed, a recent study reported that less than 10% of American families fit within the pattern of a married couple with children where the husband is the sole provider. See Family Policy Panel, Economic Policy Council of UNA-USA, *Work and Family in the United States: A Policy Initiative v* (1985) [hereinafter cited as *Work and Family*].

For a fascinating look at how assumptions about family and gender roles affect the welfare system, as opposed to the workplace, see Law I, *supra*.

8. See Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. Rev. 55, 56-57, 58 n.29 (1979). See *infra* notes 30-31.

9. See *infra* note 44 and accompanying text.

10. See *infra* notes 46-72 and accompanying text.

11. See *infra* notes 93-158 and accompanying text.

12. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986); *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 692 P.2d 1243 (Mont. 1984), *appeal filed*, 54 U.S.L.W. 3064-65 (U.S. Mar. 27, 1985) (No. 84-1545). For a discussion of the state statutes in question, see *infra* notes 102-18 and accompanying text.

13. 42 U.S.C. § 2000e (1982).

14. U.S. Const. amend. XIV, § 1.

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

leave is "virtually universal." Part II analyzes the two primary solutions to the maternity leave problem suggested by current theories of discrimination, and argues in favor of an approach that takes into account sex differences. Part III discusses the structure of the state maternity leave provisions, and the legal issues raised by those provisions under a sex differences approach. Part IV examines whether the courts have considered those issues in the legal challenges brought to date of the state provisions. Although the courts have thus far upheld the state provisions against challenges brought under both Title VII<sup>16</sup> and the equal protection clause,<sup>17</sup> they have done so largely by avoiding both the question of whether sex differences can be taken into account by gender-specific legislation, and if so, whether limits can be imposed on such legislation. Those questions must be confronted, and indeed the Supreme Court will have the opportunity to do so in resolving the issues raised by the pending California maternity leave statute case. Part V suggests that although the Supreme Court has adopted a differences approach under both constitutional and statutory analysis, it is an approach that is neither clear in theory nor consistent in application. The questions raised by the Court's analysis, and a suggested refinement of its approach, are set forth in the final section.

### I. WORKING WOMEN AND MATERNITY LEAVE

The single most dramatic change in the composition of the workforce in the past twenty years has been the increased proportion of women, from roughly one-third of the workforce in 1960 to nearly one-half of the workforce in 1982.<sup>18</sup> The current overall labor participation rate of women is 52.6%.<sup>19</sup> Even more significantly, over two-thirds of women between twenty and forty-five years old are in the workforce.<sup>20</sup> Because so many women are working during their childbearing years,<sup>21</sup> an estimated 85% of all working women will become pregnant at least once during their worklife.<sup>22</sup>

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16. 42 U.S.C. § 2000e (1982).

17. U.S. Const. amend. XIV, § 1.

18. Consumer Research Center, *The Working Woman—A Progress Report 3* (1984) [hereinafter cited as *Working Woman*]. During the same 20-year period, the number of males employed increased by 27% while the number of employed females increased by three times that rate. *Id.*; see also Bureau of Labor Statistics, U.S. Dep't of Labor, *Handbook of Labor Statistics 6-7* (1983) (from 1960-1982, the number of male workers increased by approximately 26%) [hereinafter cited as *HLS*].

19. *Working Woman*, *supra* note 18, at 4. The comparable figures for men are an overall participation rate of 76.6%. See *HLS*, *supra* note 18, at 17.

20. See *HLS*, *supra* note 18, at 17. The workforce participation rate of males between the same ages ranges from 85-95%. See *id.*

21. The prime childbearing years, measured by the greatest number of children born to women of particular ages, are ages 18-29, followed by ages 30-44. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1985*, 58, 61 (105th ed. 1984) [hereinafter cited as *Statistical Abstract*].

22. *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st. Sess.*

Pregnancy is therefore a predictable, foreseeable condition that will occur among a substantial portion of working women.<sup>23</sup> It is equally

468 (1977) (statement of American Nurses' Association) [hereinafter cited as *Senate Hearings*].

23. The high incidence of pregnancy distinguishes this condition from other disabling sex-specific conditions or illnesses. See generally E. Hing, M. Kovar & D. Rice, *Sex Differences in Health and Use of Medical Care: United States, 1979*, at 35-37 (U.S. Dep't of Health and Human Servs., National Center for Health Statistics Series 3, No. 24, 1983) [hereinafter cited as *Sex Differences*]. Medical data suggest that pregnancy occurs at a far higher rate than any other disabling sex-specific condition during working years (ages 15-64). See *id.* (table of hospital discharge rates per 10,000 population). First, figures comparing acute conditions—conditions lasting less than three months requiring medical attention or resulting in restricted activity, see *id.* at 46—indicate that the number of pregnancy-related acute conditions per 100 persons is almost two times the rate for male genitourinary conditions, a category that includes non-sex-specific conditions. See *id.* at 20. Thus, if pregnancy were compared only to sex-specific acute conditions occurring among men of working age, the differential would be even higher.

This likelihood of a far greater disparity between pregnancy and male sex-specific disabling conditions seems to be confirmed by data concerning hospital discharge rates. The figures reveal a wide disparity between pregnancy and all other sex-specific conditions. The rates per 10,000 population for sex-specific conditions are as follows:

Diagnosis	Ages	Ages
	15-44	45-64
Females with deliveries	710.8	11.7
Complications from pregnancy	192.4	1.7
Sex-specific conditions (excluding pregnancy)		
female	230.4	161.6
male	19.4	62.7

*Id.* at 35-37. These figures indicate that the rate of hospital use for pregnancy is over 10 times the rate for all male sex-specific conditions combined. Furthermore, the hospital discharge rate for delivery is two and one-half times higher than the rate for all other female sex-specific conditions. Indeed, 45% of all hospital discharges for women between the ages of 15 and 44 years are pregnancy-related. *Id.* at 12-13.

Of course, these data only reflect differential disability rates to the extent that hospitalization is required. Data on the frequency of office visits by sex, age and diagnosis, however, present the same striking differential between pregnancy and all other sex-specific conditions. The office visit rates per 1000 population are as follows:

Diagnosis	Ages	Ages
	15-44	45-64
Normal pregnancy	443.1	2.8
Complications from pregnancy	38.0	-
Sex-specific conditions (excluding pregnancy)		
female	235.2	193.6
male	26.5	73.6

*Id.* at 29-30. These figures show that the rate of office visits is almost five times greater for pregnancy than for all male sex-specific conditions combined.

Some caveats are in order however. These figures, as well as the discharge rate information, do not indicate whether some categories overlap. Furthermore, with respect to the office visit rates, an individual may visit a physician several times for one condition and, therefore, the figures may less accurately reflect the incidence of disability than the hospital discharge rate. Finally, none of this data correlates the occurrence of these conditions with employment; that is, there is available data on acute conditions in the general

predictable that pregnancy will involve some period of disability during which the pregnant (or recently pregnant) employee will be unable to work. For the vast majority of women this period of disability will last for no more than six weeks.<sup>24</sup> In order to ensure that pregnancy disabil-

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population and available data on labor participation rates, but I can locate no data that analyze both of these factors in order to determine the rate of disability for particular conditions among the employed population. I have also been unable to find data that specifically correlates individual sex-specific conditions, their incidence or prevalence in the population by age and sex (which would suggest likelihood of occurrence or predictability of occurrence during working years), and disability. General disability figures, however, indicate that the rate of workdays lost due to acute conditions, as defined above, in 1981 was 3.4 days for all employed persons; for employed persons aged 17-44, the rate was 3.2 days for men, 4.1 days for women; for employed persons aged 45 and over, the rate was 2.6 days for men, 3.5 days for women. Health Insurance Association of America, *Source Book of Health Insurance Data 1982-1983*, at 72 (1983).

Nonetheless, the figures support the conclusion that the occurrence of pregnancy among the working age population is far more likely than any other sex-specific condition. Since pregnancy always involves some period of disability, see *infra* note 24, the absence of adequate maternity leave for pregnancy disability would adversely affect the employment status of a substantial proportion of women. See *infra* notes 27-35 and accompanying text.

The figures also indicate that apart from pregnancy, the occurrence of sex-specific illnesses or conditions is much greater for women than for men. The hospital discharge and office visit rates for such conditions are approximately three and one-half times greater for women than for men. See National Center for Health Statistics, U.S. Dep't of Health and Human Servs., *Office Visits for Male Genitourinary Conditions: National Ambulatory Medical Case Survey: United States, 1977-78*, Advancedata, Nov. 3, 1980, at 1 (female hospital visit rate for genitourinary problems over three times as great as rate for males). Again, one cannot directly extrapolate from this data the existence of job disability; that is, inability to work because of the condition. If there were further data confirming a differential in the occurrence of disabling sex-specific conditions coupled with information on the duration of disability, then this data could be analyzed with respect to whether the structure of existing illness and disability policies has a disproportionate effect on women who may suffer more sex-related disabilities. See *infra* text accompanying notes 316-19.

24. The period of actual disability from pregnancy appears to be a matter of conjecture rather than based on any scientific or medical research, as indicated by testimony offered at the hearings on the Pregnancy Discrimination Act (PDA). The most common estimates for disability following normal childbirth presented at the congressional hearings by doctors, actuaries and insurers ranged from four to eight weeks. See *Senate Hearings, supra* note 22, at 7 (statement of Sen. Bayh) (6-8 weeks); *id.* at 445 (remarks of Mrs. Rubin, actuary, U.S. Civil Service Comm'n, Washington D.C., speaking of Labor Department figures) (average of 7.5 weeks); *id.* at 468 (statement of American Nurses' Ass'n) (6-8 weeks); *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess., Part I, 206-07 (1977) (statement of Ruth Weyand, Associate General Counsel, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC) (6 weeks average) [hereinafter cited as *House Hearings Part I*]; *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess., Part II, 66-67 (1977) (statement of Dr. Dorothy Czarnecki, representing American Citizens Concerned for Life, Philadelphia, Pa.) (6 weeks or less) [hereinafter cited as *House Hearings Part II*]. The insurance industry used 11.3 weeks as the average disability period, see *Senate Hearings, supra* note 22, at 445 (remarks of Mrs. Rubin, actuary, U.S. Civil Service Comm'n, Washington, D.C.), which was the major factor in the high estimate given

ity is not an excuse for actual or constructive discharge, or for any diminution in the terms and conditions of employment,<sup>25</sup> maternity leave during the period of pregnancy-related disability is essential. Such leave

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by the industry for the cost of adding pregnancy coverage to disability insurance. On the other hand, information presented at the hearings by the state of Hawaii, which provides pregnancy disability benefits under its disability statute, showed that the average annual total disability period for women employees, *including pregnancy*, was 4.4 weeks in 1975, compared to a male average of 5.1 weeks. *See House Hearings Part I, supra*, at 203 (statement of Ruth Weyand).

Data collected by the National Center for Health Statistics from the 1979 National Health Interview Survey indicates that the number of days of restricted activity per 100 persons per year for deliveries and disorders of pregnancy and the puerperium are 46.7 days, which supports a six-week period of disability. *See Sex Differences, supra* note 23, at 20. On the other hand, in various cases involving maternity leave litigated in the 1970's, the disability period after childbirth ranged from five days to four weeks. *See House Hearings Part II, supra*, at 106-07.

I have been unable to locate scientific or medical data that support the proposition that pregnancy disability will normally last four to eight weeks, and no such data was presented at the PDA hearings. It is generally recognized that it takes approximately six weeks after childbirth for the female reproductive tract to return to its normal non-pregnant state, a period referred to as the puerperium. J. Pritchard, P. MacDonald & N. Gant, *Williams Obstetrics* 367 (17th ed. 1985). It is also recognized, however, that this condition is not normally disabling. *Id.* at 376-77. A report of the American Medical Association's Council on Scientific Affairs candidly admits that there is virtually no scientific data on the frequency, occurrence or duration of disability during pregnancy or postpartum. *Effects of Pregnancy on Work Performance*, 251 J. A.M.A. 1995, 1995-96 (April 20, 1984). "The advice given by generations of physicians . . . has historically been more the result of social and cultural beliefs about the nature of pregnancy (and of pregnant women) than the result of any documented medical experience with pregnancy and work." *Id.* at 1995. "The 'magic' six weeks currently designated as the postpartum period may be no more reasonable when rationally evaluated than would ten weeks or two." *Id.* at 1996.

This lack of consensus or support for the common assumption that disability from childbirth will normally extend from four to eight weeks suggests several things. First, the period of actual disability, based on a case-by-case determination of individual ability to return to work and the demands of the particular job, may be considerably shorter than is assumed. This may alleviate employer concerns regarding leaving a position open or the cost of hiring a temporary replacement (or even the need for doing so). Second, because the figures do not appear to encompass either pre-childbirth disability or post-childbirth complications or their rate of occurrence, they represent only a generalized estimate of the probability of complications that might extend the period of disability before or after childbirth. This second possibility, however, is undercut by data showing that the occurrence of pre-childbirth disability or post-childbirth complications is relatively infrequent, suggesting that employers are unlikely to be confronted by the necessity of providing extended disability leave. *See Sex Differences, supra* note 23, at 29, 36 (tables show that only two percent of women remain in the hospital due to childbirth complications; only 3.8% require office visits for complications of childbirth). Where an extended leave would substantially interfere with business operations, employee rights to reinstatement may have to be balanced against legitimate employer concerns. *See infra* note 164 and accompanying text. Finally, even if the period of disability is more limited than commonly assumed, this does not remove the issue of whether gender-neutral parenting leave should be provided. *See infra* note 40.

25. Employers are not required by federal law to provide disability or personal leave. *See S. Kamerman, A. Kahn & P. Kingston, Maternity Policies and Working Women* 4 (1983) [hereinafter cited as *Maternity Policies*]. Only six states require employers to maintain disability policies. *See infra* note 116 and accompanying text.

must include adequate leave time for pregnancy-related disability, guaranteed reinstatement and maintenance of pre-leave job status and benefits.<sup>26</sup>

The presence or absence of reasonable maternity leave has an enormous impact on working women. This is evident in the pattern of women's workforce participation rates. Despite the overall dramatic increase in the number of women in the workforce, there continues to be a significant difference between the workforce participation rates of married women and women with children, and single women. Over 60% of single women and 75% of divorced women work, as compared to approximately 50% of married women and married women with children.<sup>27</sup> In addition, women are far more likely to work part-time: approximately one quarter of working women work part-time,<sup>28</sup> and women constitute more than half of the part-time workforce.<sup>29</sup> While there are no doubt many reasons for these differences, they certainly reflect the lack of support in the workplace for pregnant women and working mothers,<sup>30</sup> as well as the disproportionate responsibility of women for

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26. These are only the minimum requirements of an adequate maternity leave policy. Such a policy should also include paid leave, that is, full wage replacement. If this were required by state legislation, however, preemption issues under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1982 & Supp. I 1983) (ERISA), might be raised. See *infra* note 217. For the possibility of a federally-mandated paid disability policy, see *infra* note 77. My focus in this Article is solely on unpaid leave.

27. See Women's Bureau, U.S. Dep't of Labor, Bull. No. 298, Time of Change: 1983 Handbook on Women Workers 12-15 (1983) [hereinafter cited as Handbook on Women Workers]; Working Woman, *supra* note 18, at 5.

On the other hand, women are no longer remaining out of the workforce for long periods of time: the worklife expectancy rates for women are now close to those of men. According to 1970 figures, the worklife expectancy of men at age 20 was 41.5 years; for single women it was 41.2 years; for married women with no children it was 34.1 years. Women in the U.S. Labor Force 30 (A. Cahn ed. 1979). This is also reflected in the change in the labor participation rates of women based on the age of their youngest child. In 1970, there were four clear "steps" in the participation rate: for mothers of children up to two years old, the rate was 30% or less; for mothers of children three to five years old, the rate was 35-39%; for mothers of children six to eleven years old, the rate was 40-50%; for mothers of children over junior high school age, the rate was over 50%. By 1983, there were only three steps and higher participation rates at each step: for mothers of infants, the rate was 45%; for mothers with children two-five years old, the rate was 50-57%; for mothers with children of school age, the rate was 60-67%. Waldman, *Labor Force Statistics from a Family Perspective*, Monthly Lab. Rev., Dec. 1983, at 16, 17.

28. See Handbook on Women Workers, *supra* note 27, at 92. The proportion of working women working part-time has decreased, although it should be remembered that, at the same time, the number and proportion of women working has increased dramatically. See *supra* note 27 and accompanying text. In 1979, approximately one-third of all working women worked part-time, see Maternity Policies, *supra* note 25, at 48, while before 1978, over half worked part-time, see M. Meyer, Women and Employee Benefits 14 (1978).

29. See Maternity Policies, *supra* note 25, at 48.

30. Part of that necessary support framework is the availability of pregnancy-related benefits, particularly maternity leave. Equally important is the availability of child care services. For an overview of current child care arrangements, see M. O'Connell & C. Rogers, Child Care Arrangements of Working Mothers: June 1982 (Current Population Reports, Series P-23, No. 129, 1983); Kamerman, *Child-Care Services: A National Pic-*



child-rearing and housework.<sup>31</sup>

The presence or absence of maternity leave policies also affects the range of employment opportunities for those women who do work. The availability of maternity leave with guaranteed reinstatement and maintenance of job status directly affects the income, actual and potential, of working women. The persistent difference in income levels between men and women<sup>32</sup> may be attributed in part to the disruption of employment due to inadequate maternity leave policies.<sup>33</sup> Furthermore, to the extent the income difference reflects the occupational segregation of women in low paying, dead end jobs,<sup>34</sup> that segregation may reflect a "choice" dictated in part by the lasting effects of career disruption due to inadequate maternity policies.<sup>35</sup>

Historically, the two most common employer policies concerning pregnancy were to provide no leave at all, thereby forcing the employee to resign or be discharged, or to impose mandatory unpaid leave during pregnancy and for a period of time after childbirth.<sup>36</sup> As a result, a virtu-

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ture, Monthly Lab. Rev., Dec. 1983, at 35-39. In addition, the structure of working hours and compensation has an adverse effect on parenting in general and particularly on working women to the extent they remain primarily responsible for child care. See Frug, *supra* note 8, at 55-59.

31. Frug, *supra* note 8, at 56-57. For example, unemployed women who desire to work but who are unable to seek employment cite home responsibilities as the primary reason. HLS, *supra* note 18, at 34. In descending order, the other specific reasons cited as of 1982 were "think cannot get job," school attendance and ill health/disability. *Id.* Among women in the labor force who indicated they did not want to work, the overwhelming majority indicated they were currently "keeping house." *Id.* This is not surprising in view of the fact that studies show that wives perform most of the housework in the average household. See Boston Globe, Nov. 14, 1985, at 1, col. 3 ("women work twice as many hours on homemaking and child care tasks as men"); see also Freedman, *supra* note 7, at 914 n.4 (1983) (wives perform approximately 70% of the housework in the average household).

32. Women on average earn only 50-65% as much as men, and within the same occupational categories women earn substantially less than men. Working Woman, *supra* note 18, at 6-7; Shack-Marquez, *Earnings Difference Between Men and Women: An Introductory Note*, Monthly Lab. Rev., June 1984, at 15.

33. See *House Hearings Part I*, *supra* note 24, at 64 ("Further, if seniority is lost, a woman's entire career could be affected: there may be no job to return to when she has recovered or . . . she will have a slower advancement to higher positions because other employees hired later will have priority.") (testimony of Laurence Gold, Special Counsel, AFL-CIO).

34. Women are concentrated in clerical, service and professional-technical jobs, see Handbook on Women Workers, *supra* note 27, at 51-62, 87-96, and within those areas they tend to hold the lowest paying jobs, see Mellor, *Investigating the Differences in Weekly Earnings of Women and Men*, Monthly Lab. Rev., June 1984, at 17-19; see also M. Gold, A Dialogue on Comparable Worth 6-7 (1983) (women workers are in "low paying, dead-end jobs").

35. See *supra* note 33.

36. Maternity Policies, *supra* note 25, at 35-38; Silverman, *Maternity Policies in Industry*, 8 The Child, Aug. 1943, at 20, 21; see Worthy, *Maternity Leaves of Absence*, Management Record, July-Aug. 1959, at 232, 233 (in 1959, half of plans surveyed had mandatory maternity leaves; one-fourth stipulated a definite time for returning to work after pregnancy). According to one study conducted by the Conference Board in 1964, approximately 73% of employers required employees to leave work at a specific point

ally inevitable consequence of pregnancy was the loss of employment or, at a minimum, the forced loss of income for a period of time. To the extent leave was granted, it was usually given without any guarantee of reinstatement, and at the cost of loss of seniority and fringe benefits.<sup>37</sup> These policies reflected either of two assumptions: that women were marginal, temporary workers who would leave the workforce once they assumed their primary role of childbearing and child-raising (justifying discharge or forced resignation), or that women must be protected during pregnancy and after childbirth by excluding them from the hazards of the workplace (justifying mandatory leave).<sup>38</sup> Furthermore, these policies also assumed that women's income was non-essential to maintaining themselves or their families (justifying unpaid leave, discontinuation of fringe benefits and no guarantee of reinstatement).<sup>39</sup>

To the extent that maternity leave was provided, it was largely pre-

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during pregnancy, and 59% permitted pregnant employees to work no longer than 26 weeks after conception. See National Industrial Conference Board, *Studies in Personnel Policy*, No. 194, *Personnel Practices in Factory and Office: Manufacturing 122* (1964). In a 1965 survey conducted by Prentice-Hall of 1000 employers, only 40% of office employers provided leave; 75% of plant employers had leave policies, but of those, more than 80% were mandatory leave policies. *House Hearings Part II*, *supra* note 24, at 149. This high rate of mandatory leave policies changed significantly, however, after the passage of Title VII. By 1974, only 20% of leave policies were still mandatory. See *id.* at 149-50.

Some of these policies regarding mandatory leave were required by state law. Until the 1970's, six states and the Commonwealth of Puerto Rico prohibited the employment of women for periods before and after childbirth. Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits*, 17 N.Y.L.F. 480, 482-83 (1971).

37. The pattern of benefits for women has consistently reflected the view that women are not "worth" such benefits because they will leave the workforce. See *Maternity Policies*, *supra* note 25, at 33; M. Meyer, *supra* note 28, at 2-4. Thus, for example, it was common before passage of the PDA for employers to exclude pregnancy from health insurance and disability policies. Koontz, *supra* note 36, at 490-93. The problem of loss of pension benefits due to a break in employment has been remedied by passage of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified in scattered sections of 29 U.S.C.A. (West 1985)), which amends the vesting provisions of the ERISA, 29 U.S.C. §§ 1001-1461 (1982 & Supp. I 1983). See 29 U.S.C.A. § 1053(b)(3)(E) (West 1985).

38. The treatment of pregnancy in the workplace has reflected the broader patriarchal structure of society. See, e.g., Z. Eisenstein, *The Radical Future of Liberal Feminism*, 14-17 (1981); K. Millett, *Sexual Politics* 39-43 (1969); Clark, *Politics and Law: The Theory and Practice of the Ideology of Male Supremacy; or, It Wasn't God Who Made Honky Tonk Angels*, in *Law and Policy* 35, 37-41 (D. Weisstub ed. 1976); Rifkin, *supra* note 7, at 83-88; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *The Politics of Law* 117, 117-24 (D. Kairys ed. 1982).

39. See M. Gold, *supra* note 34, at 22. To the contrary, both historically and currently, women have worked to provide essential support for themselves and their families. J. Baer, *The Chains of Protection: The Judicial Response to Women's Labor Legislation* 21-22 (1978). According to 1980 census figures, working wives' salaries constituted 27% of family income. Women who worked full time year round contributed an even larger percentage to family income (38%), as did women in lower income families (69%). *Handbook on Women Workers*, *supra* note 27, at 17. Furthermore, almost 16% of all families were maintained by a single female, over five times the number of families maintained by single males. *Id.* at 15.

mised on notions of the appropriate social role of women.<sup>40</sup> While maternity leave served the necessary purpose of providing time off from work because of disability associated with pregnancy and childbirth, it was based on the idea that it was socially inappropriate and physically harmful for a woman to work once she became visibly pregnant, and that after childbirth she would assume primary responsibility for child-rearing. Thus, the leave provided was a combined disability and parenting

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40. I do not mean to suggest that such attitudes have become historical curiosities; they are still very much with us. *See, e.g.,* Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932, 934 (6th Cir.) (teacher's contract not renewed after she became pregnant because of employer's desire that mothers should be at home with pre-school age children), *appeal filed*, 106 S. Ct. 379 (1985).

The idea that women are "natural" care givers and the most appropriate care givers, and therefore should have primary responsibility for child-rearing, is a central concept of patriarchy. *See* Chodorow, *Mothering, Male Dominance, and Capitalism*, in *Capitalist Patriarchy and The Case for Socialist Feminism* 83, 84-86 (Z. Eisenstein ed. 1979). This notion seemed to gain a scientific patina with the development of "bonding" theory, the idea that there was a critical period of mother-infant interaction after childbirth and in the first few months of infancy. M. Klaus & J. Kennell, *Parent-Infant Bonding* 39 (1982); Klaus & Kennell, *Parent to Infant Bonding: Setting the Record Straight*, 102 J. Pediatrics 575, 575-76 (1983). The research on which this conclusion was based has been criticized as pseudo-scientific and sexist. *See* Arney, *Maternal-Infant Bonding: The Politics of Falling in Love With Your Child*, 6 Feminist Stud. 547, 563-65 (1980); *see also* Lamb, *The Bonding Phenomenon: Misinterpretations and Their Implications*, 101 J. Pediatrics 555, 555-56 (1982) (more than 20 studies show that early mother-infant contact has no enduring effects on either mothers or infants); Wasserman, *The Nature and Function of Early Mother-Infant Interaction*, in *Psychological Aspects of Pregnancy, Birthing and Bonding* 324, 329-30 (B. Blum ed. 1980) (expressing skepticism about necessity of early critical period in establishing vital mother-infant relationship). This critique suggests that parenting is important in early child development, *see* Arney, *supra*, at 564-65 (quoting A. Clarke-Stewart, *Child Care in the Family: A Review of Research and Some Propositions for Policy* 21 (1977)), but that role should not be limited to mothers or to a critical, brief period immediately following childbirth.

Moreover, limiting early child-rearing duties to mothers may have negative consequences for psychological development. Several researchers have documented the consequences of the female primary child-rearer model on gender identification and general psychological development.

This crucial mothering role contributes not only to child development but also to the reproduction of male supremacy. Because women are responsible for early child care and for most later socialization as well, because fathers are more absent from the home, and because men's activities generally have been removed from the home while women's have remained within it, boys have difficulty attaining a stable, masculine gender role identification.

Chodorow, *supra*, at 94. *See also* D. Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* 54, 93-94 (1976) (female-dominated child care fosters male sexual possessiveness and a low esteem for women); C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 7-9 (1982) (because the primary caretaker of young children is typically female, relationships and issues of dependency and individuation are experienced differently by men and women). The importance of parenting by both mothers and fathers in early child development argues for the establishment of non-gender based parental leave policies, a question not addressed by this Article. *See* Maternity Policies, *supra* note 25, at 14-24, 144-45; *see also* Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. Rev. L. & Soc. Change 381, 381 (1984-85) (child-rearing leaves should be called "parental leaves" and should be "extended to men as well as women") [hereinafter cited as Taub I].

leave that incorporated stereotypes about both the extent and nature of pregnancy disability, and child-rearing as a primarily female responsibility.

With the advent of Title VII<sup>41</sup> and the Pregnancy Discrimination Act,<sup>42</sup> many of the most restrictive maternity leave policies have been removed.<sup>43</sup> Courts have almost universally struck down mandatory leave policies.<sup>44</sup> Furthermore, courts have consistently held that if employers maintain employment policies for temporary disabilities, pregnancy must be included among the covered disabilities.<sup>45</sup>

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41. 42 U.S.C. § 2000e (1982).

42. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1982)).

43. An area of developing restrictions, however, is evolving out of concerns for fetal health and development. See generally *Furnish, Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63 (1980); Williams, *Firing the Women to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641 (1981). For discussion of how this might be affected by a sex differences approach, see *infra* note 319.

44. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647-48 (1974); *Crawford v. Cushman*, 531 F.2d 1114, 1123-26 (2d Cir. 1976); *Green v. Waterford Bd. of Educ.*, 473 F.2d 629, 636 (2d Cir. 1973); *Thompson v. Board of Educ.*, 526 F. Supp. 1035, 1041-42 (W.D. Mich. 1981), *rev'd on other grounds*, 709 F.2d 1200 (6th Cir. 1983); *Somers v. Aldine Indep. School Dist.*, 464 F. Supp. 900, 903-04 (S.D. Tex. 1979), *aff'd mem.*, 620 F.2d 298 (5th Cir. 1980); *Fabian v. Independent School Dist. No. 89*, 409 F. Supp. 94, 100 (W.D. Okla. 1976). But see *Burwell v. Eastern Air Lines*, 633 F.2d 361, 371-72 (4th Cir. 1980) (en banc) (per curiam) (mandatory maternity leave policy after first 13 weeks of pregnancy for stewardesses justified by concerns for passenger safety), *cert. denied*, 450 U.S. 965 (1981); *Condit v. United Air Lines*, 558 F.2d 1176, 1176-77 (4th Cir. 1977) (per curiam) (mandatory maternity leave policies for stewardesses justified by bona fide occupational qualification defense), *cert. denied*, 435 U.S. 934 (1978); *Levin v. Delta Air Lines*, 34 Fair Empl. Prac. Cas. (BNA) 1187, 1188, 1191 (S.D. Tex. 1982) (unpaid mandatory maternity leave justified by business necessity), *aff'd*, 730 F.2d 994 (5th Cir. 1984); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683-85 (1983) (plan giving pregnant employee wives lower benefits than pregnant female employees held unlawful; Court concluded it afforded married male employees less protection than married female employees); *Harper v. Thiokol Chem. Corp.*, 619 F.2d 489, 491-92 (5th Cir. 1980) (reinstatement policy requiring women on pregnancy leave to show proof of one normal menstrual period before return to work held invalid); *Maddox v. Grandview Care Center, Inc.*, 607 F. Supp. 1404, 1406-07 (M.D. Ga. 1985) (limitation of maternity leave to three months, while no limitation imposed on "illness" leave, is facially discriminatory; employee who suffered complications from pregnancy was unlawfully denied six months leave and discharged); *Greenspan v. Automobile Club*, 495 F. Supp. 1021, 1053-54 (E.D. Mich. 1980) (forced termination because of childbirth violates Title VII).

45. Most courts required the inclusion of pregnancy in private employers' disability plans prior to the PDA, see, e.g., *Berg v. Richmond Unified School Dist.*, 528 F.2d 1208, 1213 (9th Cir. 1975), *vacated and remanded*, 434 U.S. 158 (1977) (per curiam); *Gilbert v. General Elec. Co.*, 519 F.2d 661, 667 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); *Hutchinson v. Lake Oswego School Dist. No. 7*, 519 F.2d 961, 965-66 (9th Cir. 1975), *vacated and remanded*, 429 U.S. 1033 (1976); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651, 653-54 (8th Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 205-06 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976); *Farkas v. School Dist.*, 8 Fair Empl. Prac. Cas. (BNA) 288, 289-90 (S.D. Ohio), *aff'd mem.*, 506 F.2d 1400 (6th Cir. 1974), until the Supreme Court decided in *General Elec. Co. v. Gilbert*, 429 U.S. 125

It has been widely heralded that as a result of this legislation and litigation concerning pregnancy discrimination, employers have almost universally adopted maternity leave policies.<sup>46</sup> This assertion masks the reality, however, that a substantial number of working women are entitled to no leave or only to inadequate leave.

The best estimates of the availability of maternity leave indicate that fully one-quarter of all employers do not provide any maternity leave.<sup>47</sup> Even this figure may overstate the availability of maternity leave, because it fails to indicate the extent to which leave is provided where women work. Maternity leave policies are least common in the retail trade and

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(1976), that such coverage was not required. For discussion of *Gilbert*, see *infra* notes 203-04. Congress superseded *Gilbert* with the passage of the PDA. See text accompanying *infra* notes 203-06.

46. See M. Meyer, *supra* note 28, at 2, 4 (pre-PDA study noting that maternity policies have been instituted due to Title VII and EEOC guidelines).

47. Recent studies have placed the number of employers providing some form of maternity leave between 75% and 97%, see *Maternity Policies*, *supra* note 25, at 52-59, but the higher figures must be discounted because the studies have been heavily weighted toward large employers, who are more likely to have such policies. See *id.* at 55-56. The range in figures presented in *Maternity Policies* is based on three studies cited by the authors. The 1977 Quality of Employment Survey reported that, of women working at least 20 hours a week, 75% of the respondents were entitled to some job-protected leave, a 15% increase since 1969. See R. Quinn & G. Staines, *The 1977 Quality of Employment Survey: Descriptive Statistics, with Comparison Data from the 1969-70 and 1972-73 Surveys*, at 58, 294 (1979). Job-protected leave was more likely to be provided at large (500 or more employees) firms (89%), versus small (1-9 employees) firms (39%). *Maternity Policies*, *supra* note 25, at 53 (using data from R. Quinn & G. Staines, *supra*).

The second survey cited was a 1978 Conference Board Survey showing that 97% of the sampled companies provided job-protected leave. *Id.* (citing M. Meyer, *supra* note 28, at 2). This study, however, is heavily weighted toward larger corporations. *Id.*

Finally, the authors conducted a small-scale study of their own in 1981 of a cross section of 250 companies which, they admitted, tends to underemphasize small firms, and therefore likely overstates the level of benefits provided. See *id.* at 55-56. This study indicated that while 88% of the employers surveyed provided leave, only 72% formally guaranteed the same or a comparable job and seniority protection. *Id.* at 56. This shows, according to the authors, that "the policy of a protected leave is not 'virtually universal' throughout all sectors of the economy, even if it is within large corporate business." *Id.* (emphasis in original).

This general picture is confirmed by several more recent studies. A 1983 survey conducted by the Bureau of National Affairs (BNA) found that 86% of the surveyed companies provided job rights to employees returning from maternity leave. See Bureau of National Affairs, *Personnel Policies Forum Survey No. 136, Policies on Leave From Work 24-25* (1983) [hereinafter cited as BNA Survey]. A 1984 survey of 384 Fortune 500 companies found that 95% provided short-term disability pay, see Catalyst, *Preliminary Report on a Nationwide Survey of Maternity/Parental Leaves 3* (1984) [hereinafter cited as Catalyst] and 52% provided unpaid leave to female employees, *id.* at 4. A survey conducted in 1984 by Bernard Hodes Advertising of 153 companies found that 51 companies provided unpaid leave, 50 provided partial salary, 33 provided full salary leave, and 52 had some combination of salary and unpaid leave. Bernard Hodes Advertising, *Survey of U.S. Companies' Maternity, Paternity and Childcare Policies* app. table I, table II (1984) [hereinafter cited as Hodes Survey]. For a look at how law schools treat the issues of maternity and parental leave see Chused, *Faculty Parenthood: Law School Treatment of Pregnancy and Child Care* (Society of American Law Teachers 1985).

service industries,<sup>48</sup> where the largest proportion of all women workers are employed.<sup>49</sup> Furthermore, leave policies are far more common in large companies than in small companies,<sup>50</sup> although nearly forty percent of all workers are employed by businesses with less than fifty employees.<sup>51</sup> Thus, the proportion of women workers affected by no leave policies may be substantially higher than the available data would indicate.<sup>52</sup>

Even where maternity leave is provided, the structure and operation of leave policies may result in no leave or inadequate leave for a substantial proportion of women workers. First, many policies impose eligibility requirements based on length of service that translate into no leave for employees during their first year of employment. Two recent surveys indicate that over forty percent of all employers, and perhaps as many as twice that amount, impose length-of-service requirements on maternity leave ranging from three to twenty-two months.<sup>53</sup> Furthermore, leave is commonly not extended to part-time employees, which has enormous

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48. Maternity Policies, *supra* note 25, at 57. The unavailability of maternity leaves in these sectors does not appear to be affected by the presence or absence of unionization. Indeed, in general, unionized companies appear to have a lower incidence of maternity leave policies. According to recent figures, only 36% of all collective bargaining agreements contain maternity leave provisions, with such provisions more common in contracts in manufacturing industries (40%) than in non-manufacturing industries (30%). 2 Collective Bargaining Negotiations and Contracts (BNA) No. 990, at 62:1 (May 12, 1983).

49. Handbook on Women Workers, *supra* note 27, at 69. In 1981, two of every five women were employed in ten occupations; of those ten, all were in the retail trade and service sectors—e.g., sales clerk, waitress, private household worker and nursing aide. *Id.* at 54. In 1981, the service industry was the largest industry division in the employment of women workers; within it 59% of all employees were women. *Id.* at 69. The wholesale and retail trade industry is the second largest employer of women, and most of the women in this industry (7.6 million of 9 million in 1981) are in retail trade. *Id.* In fact, women constitute over two-fifths of all retail trade employees. *Id.*

50. Hodes Survey, *supra* note 47, at 7; Maternity Policies, *supra* note 25, at 52, 57-59.

51. Bureau of Labor Statistics, Reporting Units and March Employment and Percent of Reporting Units and Employment in Establishments with 0-19, 20-49, and 50 and Over Employees, First Quarter 1984, at 1 (unpublished) (available in the files of the *Fordham Law Review*). In the retail sector the proportion of employees in businesses with less than 50 employees is over 50% while in the services sector the proportion is slightly over 40%. *Id.* at 3. No figures are available that further subdivide this distribution of employees on the basis of sex.

52. Because most available studies of maternity leave measure the existence of employer policies versus the extent of employee coverage, it is difficult to estimate the exact proportion of women affected by no-leave policies. Furthermore, any estimate would have to take into account the number of women in the workforce in their childbearing years in order to determine the impact of no-leave policies on those women who could become pregnant.

53. See Maternity Policies, *supra* note 25, at 60. One study showed that 84% of employers impose length of service requirements; of these, 44% require 9 to 22 months of service, 20% require four to six months of service, and 28% require three months of service. See *id.* (authors' study). According to the BNA survey, the most common service requirements were as follows: for plant employees, three months (17% of firms) followed by six months (14%); for office employees, six months (18%) followed by three months (17%); and for management employees, six months (15%) followed by three months (14%). See BNA Survey, *supra* note 47, at 21.

impact given the number of women who work part-time.<sup>54</sup>

Second, even if an employee is eligible for leave, the duration of leave may be inadequate. Approximately seventy percent of employers providing leave impose a maximum limit on leave, which may not be sufficient if an employee is disabled during pregnancy and/or after childbirth beyond that limit.<sup>55</sup> Moreover, many employers provide maternity leave only to the extent of the benefits to which an employee is entitled under the employer's sick pay<sup>56</sup> or disability insurance<sup>57</sup> policies.<sup>58</sup> If "maternity leave" is defined by the benefit period, this may result in significant limitations on the duration of leave. Under most sick leave policies the amount of sick leave to which an employee is entitled is directly tied to length of service.<sup>59</sup> Employees with less than five years of service commonly are entitled to only two weeks of sick leave and, in any case, the maximum period of leave is generally four weeks.<sup>60</sup> Women are likely to be entitled to very limited leave under such policies as they are likely to become pregnant when they have not accumulated significant seniority.<sup>61</sup> Furthermore, even if a woman worker is entitled to the maximum period of sick leave, it may be insufficient to cover the full period of pregnancy-related disability.<sup>62</sup>

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54. See text accompanying *supra* notes 28-29.

55. See BNA Survey, *supra* note 47, at 24; see also Maternity Policies, *supra* note 25, at 57 (almost 60% of those granting leave limit it to two to three months). The Conference Board survey indicates, however, that a substantial proportion of employers (79%) would extend leave for continued disability, but it is not clear for how long. M. Meyer, *supra* note 28, at 7.

56. An estimated two-thirds of all employers have sick leave policies, which are designed to provide short-term leave for illness. Maternity Policies, *supra* note 25, at 67; Statistical Abstract, *supra* note 21, at 421. These policies are more likely to be made available for professional and technical employees (over 90%) than to production employees (42%). *Id.* Paid sick leave usually provides full wage replacement. See BNA Survey, *supra* note 47, at 13 (in 89% of companies, employees are paid for sick leave days at their regular rate).

57. The estimates of the percentage of employers who provide short-term disability insurance to their employees vary considerably. One study of employers put the figure at 50%, see Maternity Policies, *supra* note 25, at 69 (authors' study), while another study placed the figure at 95%. See Catalyst, *supra* note 47, at 3. In contrast to sick pay, disability insurance benefits often are limited to a specific figure or a percentage of salary, and therefore only constitute partial wage replacement. See M. Meyer, *supra* note 28, at 7-8; see also Catalyst, *supra* note 47, at 3 (disability benefits often consist of partial pay). One study found that only 28% of the employers surveyed provided both sick leave and disability insurance, while 20% provided neither benefit. Maternity Policies, *supra* note 25, at 72. Where employers provided disability benefits, few employers offered unpaid leave beyond the medical disability period. *Id.*

58. See Catalyst, *supra* note 47, at 3; Maternity Policies, *supra* note 25, at 66.

59. See Maternity Policies, *supra* note 25, at 67.

60. *Id.* at 67-68; see also M. Meyer, *supra* note 28, at 8 ("median allowable period of benefit payments for a one-year employee is two weeks").

61. See Maternity Policies, *supra* note 25, at 67-68.

62. See *id.* The estimated period of disability from *childbirth* is four to eight weeks. See *supra* note 24 for the proposition that this figure might be shorter on an individual basis. However, assuming the use of the standard estimated period of disability, even if an employee were entitled to the maximum period of sick leave under most policies, this

Similarly, if maternity leave is provided according to the terms of a short-term disability insurance plan, the duration of leave may be severely restricted. Women with normal pregnancies are generally limited to six weeks of disability benefit payments.<sup>63</sup> This may be sufficient to cover pregnancy-related disability for such normal pregnancies, but it is likely to be inadequate if complications occur during pregnancy or after childbirth that extend the period of disability.<sup>64</sup>

Although many maternity leave policies fail to provide an adequate period of leave for pregnancy-related disability, other policies entitle female employees to leave extending far beyond the period of actual disability, thus providing *parenting* leave in addition to disability leave. For example, some employers permit female employees to take maternity leave for six months or one year.<sup>65</sup> Very few employers, however, pro-

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might not be sufficient to cover the period of disability from normal childbirth. Leave will also be limited to the extent the employee has been absent for non-pregnancy related illness.

63. Maternity Policies, *supra* note 25, at 69; M. Meyer, *supra* note 28, at 7. According to one study, half of the plans would provide disability benefits for up to 26 weeks if complications develop. See Maternity Policies, *supra* note 25, at 69.

64. See *supra* note 62. It is possible that an employer would permit continued leave on an unpaid basis. One study indicates, however, that such policies are uncommon. See Maternity Policies, *supra* note 25, at 73. That study showed that, at most, 25% of employers permit leave beyond the disability insurance period. *Id.* (authors' study). The Catalyst survey indicated that 51% of the companies surveyed offered unpaid leave, but it is unclear whether this is offered alone or in addition to paid or partially paid disability leave. See Catalyst, *supra* note 47, at 4.

Alternatively, leave could be extended by the use of vacation time, a practice permitted by 43% of the employers in the BNA survey. See BNA Survey, *supra* note 47, at 23. This can hardly count as maternity leave, however. In addition, vacation time may simply be unavailable to a low seniority employee or to one who has already used the time for vacation.

It should also be noted that while leave may be provided under a paid leave policy, only 38.9% of employers provide full-salary paid leave. See Catalyst, *supra* note 47, at 3. The Catalyst survey found that paid leave, if offered at all, was usually only provided through the use of paid vacation time. Only 25 of the 384 companies surveyed responded that they offered paid leave beyond disability or vacation pay. See *id.* at 2, 4. The Hodes survey found that only seven of the 153 of the responding companies paid full salary as long as medically required. Hodes Survey, *supra* note 47, at app. table I.

65. The Catalyst survey reported that 35.9% of the surveyed employers provided unpaid maternity leave (not based on disability) of two or three months; 28.2% provided leave of four to six months; 7.2% provided leave for seven months to one year. See Catalyst, *supra* note 47, at 4; see also Hodes Survey, *supra* note 47, at app. table I (of 153 employers providing unpaid leave, 26 allow up to 16 weeks; 18 provide 17-26 weeks; four provide 27-52 weeks). The Catalyst survey also indicated that approximately half of these employers provided female employees with unpaid leave, while roughly one-third provided unpaid leave to male employees. See Catalyst, *supra* note 47, at 4. Moreover, where leave was provided to both male and female employees, the maximum unpaid leave granted to men was not significantly shorter than that granted to women. *Id.*

For a discussion of the maternity leave provisions of various state employers, see *infra* note 93. An earlier study conducted in the late 1970's indicated that the typical maternity leave period was up to six months. See M. Meyer, *supra* note 28, at 5-6. The data in the more recent Catalyst survey supports the inference that the trends are toward limiting maternity leave to the period of pregnancy-related disability, see Catalyst, *supra* note 47, at 4, while recognizing that more extended leave is a parenting leave (apart from those



vide comparable paternity leave or gender-neutral parenting leave.<sup>66</sup> These policies are premised on the assumption that women are uniquely capable of, and should be primarily responsible for, childcare.<sup>67</sup> At the same time, these policies implicitly deny the parenting ability of men. They serve, therefore, to perpetuate invalid stereotypes of appropriate social roles that particularly disadvantage women.

Finally, in addition to the problems of eligibility and leave duration, many maternity leave policies do not ensure reinstatement after leave or the protection of pre-leave employment status. As many as one-quarter of all women provided with maternity leave are not entitled to reinstatement.<sup>68</sup> Again, this is more prevalent in smaller companies and in the retail trade and service sectors of the economy.<sup>69</sup> In addition, even if reinstatement rights are provided, they may be guaranteed only for a limited period of time, thus in effect limiting the length of permissible leave.<sup>70</sup> There are no available statistics on the breakdown of companies guaranteeing reinstatement to the same job versus a comparable job on return from leave, nor on how companies define comparability.<sup>71</sup> There are also no statistics concerning the maintenance of seniority and job status at pre-leave levels.<sup>72</sup>

In summary, contrary to the belief that maternity leave is virtually

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instances of continuing disability) that must be provided to both female and male employees. *See id.*; *cf.* Maternity Policies, *supra* note 25, at 144-45 (European countries have recognized that post-childbirth leave is not just for physical disability: rather, it encompasses "the much broader role of providing support for . . . parent-child relationships").

66. Paternity leave is provided by only a small minority of employers. According to the Catalyst survey, 36% of the reporting firms provide unpaid paternity leave to men, *see Catalyst, supra* note 47, at 4-5, although it is notable that men rarely take advantage of such policies, *see id.* at 5. The BNA survey found that only two-fifths of the surveyed employers had leave provisions allowing men time off for the birth of their child, *see BNA Survey, supra* note 47, at 26. The maximum time permitted ranged from two days to one year, with a median of 90 days for plant workers and office staff. *Id.* The Hodes study found only 14% of the companies had any paternity benefits. Hodes Survey, *supra* note 47, at app. table VII.

67. *See supra* notes 39-40 and accompanying text.

68. *See Maternity Policies, supra* note 25, at 56 (only 72% provide formal reemployment guarantee); *see also* BNA Survey, *supra* note 47, at 25 (86% of employers provide the same or a comparable job on return from maternity leave).

69. *See Maternity Policies, supra* note 25, at 56-57.

70. *See BNA Survey, supra* note 47, at 25. The same effect occurs if an employer limits the maximum period of leave. According to the BNA Survey, approximately 25% of the employers limit leave to one to four months, 25% provide leave for five to nine months, and 10% permit leave of one to two years. *Id.* at 24.

71. For instance, a comparable job may mean a similar position at a different facility of the employer. *See Maternity Policies, supra* note 25, at 108.

72. Reinstatement by its nature presumes preservation of seniority, but it is possible that an employer's policies concerning loss of seniority after extended absence from work might undercut this assumption. Even if seniority is assured, consideration for things like promotion and transfer could be affected particularly where these are not seniority-based.

It is not common practice to continue accumulation of seniority during leave: only approximately half of employers count leave time toward accrued seniority, and of those, half count this time for seniority only and do not credit it toward vacation leave or pension, health or insurance benefits. *See BNA Survey, supra* note 47, at 25. *But see Mater-*

universal, many employers provide no maternity leave or maintain policies that in effect may provide no leave or seriously inadequate leave. Furthermore, some leave policies may incorporate invalid and outmoded stereotypes about parenting and child-rearing. The lack of adequate maternity leave policies has a devastating impact on women's employment opportunities by continuing to impose serious employment detriments on the basis of pregnancy, as well as reinforcing the primary parenting role of women.

## II. THEORETICAL APPROACHES TO THE PROBLEM OF MATERNITY LEAVE

Given the lack of adequate leave policies under the current employment structure, and the disproportionate impact of those policies on women workers because of pregnancy, the question is how this difference between the sexes may be legally taken into account in order to remedy the problem. Whether sex differences should be taken into account at all in defining discrimination or the concept of equality has been a matter of considerable debate among scholars and feminists.<sup>73</sup> Two primary approaches exist: the equal treatment model and the sex differences model.<sup>74</sup> The equal treatment model refuses to recognize sex differences

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nity Policies, *supra* note 25, at 60-61 (when fringe benefits are provided, they continue during leave, although some employers may require employee contribution).

73. See *infra* notes 74-92 and accompanying text.

74. A third theoretical position on the issue of sex differences is the assimilationist approach, but it seems to be foreclosed under constitutional and statutory analysis. The assimilationist position is that sex should have no legal significance as a basis for differentiation; sex should be no more significant than eye color. See Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 963 (1984) [hereinafter cited as Law II]; Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L.J. 375, 428 (1981); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581, 606 (1977). Few, if any, differences between the sexes are significant, according to this view, although it is conceded that pregnancy is one of them. Scales, *supra*, at 429; see also Wasserstrom, *supra*, at 611-12 (although pregnancy is a genuine difference, it is limited to the time in utero). Therefore, it is preferable that no differences be recognized in order to preserve the simplicity and lack of ambiguity of the concept of equality. See Wasserstrom, *supra*, at 607.

Under the assimilationist model, the maternity leave statutes would clearly be unlawful sex-specific legislation. Although this result removes ambiguity and ensures simplicity in discrimination theory, it seems to exalt theoretical form over substantive equality. Furthermore, as commentators have noted, the model fails to articulate what this gender-neutral model of equality is; one suspects it may be assimilation of women into an existing male-defined model. See Scales, *supra*, at 430; Note, *Toward a Redefinition of Sexual Equality*, 95 Harv. L. Rev. 487, 487-88 (1981). But even if the model is truly gender-neutral, its proscription of gender conscious action to achieve a gender "unconscious" society seems destined only to preserve current reality under the guise of promoting this ideal.

Finally, the Supreme Court seems to have rejected the assimilationist approach under the constitutional test used for sex discrimination, see, e.g., *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (use of overt gender differences can be sustained if the classifications serve important government interests and are substantially related to those interests); *Kahn v. Shevin*, 416 U.S. 351, 352-53 (1974) (statute authorizing more favorable treatment for

on the grounds that those differences can be compared by means of analogy.<sup>75</sup> The analysis of discrimination rests on finding a common denominator for comparison of men and women, and then determining whether that comparison yields disparate, differential treatment of either gender based on the common factor.<sup>76</sup> The common denominator for pregnancy is to treat it as a disability that can be compared with other temporary disabilities. Thus, the appropriate means for dealing with the issue of maternity leave is to provide leave for all temporary disabilities.<sup>77</sup>

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widow than widowers held constitutional), and even has rejected it under the strict scrutiny test used for race discrimination, *see, e.g., Regents of the Univ. v. Bakke*, 438 U.S. 265, 320 (1978) (racial classifications could be upheld on a showing that "the challenged classification is necessary to promote a substantial state interest"). Under Title VII analysis such an approach is foreclosed both by the language of the statute, *see* 42 U.S.C. § 2000e-2(e)(1) (1982) (bona fide occupational qualification exception for sex discrimination), and by judicial decision, *see United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979). Professor Herma Hill Kay, on the other hand, argues that the Court has primarily incorporated an assimilationist view of equality in its discrimination analysis, particularly with respect to race discrimination. *See Kay, Models of Equality*, 1985 U. Ill. L. Rev. 39, 40-43.

75. *See, e.g., Pregnancy Discrimination*, Civil Liberties 8 (Spring 1985) (membership newsletter of the American Civil Liberties Union) (policy statement adopted by ACLU Board of Directors) [hereinafter cited as *Pregnancy Discrimination*]; Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 35-36 (1975); Ginsburg, *Realizing the Equality Principle*, in *Social Justice and Preferential Treatment* 135, 143-48 (Blackstone & Heslep eds. 1977); Koontz, *supra* note 36, at 481-82, 495-97, 501-02; Taub I, *supra* note 40, at 381-83; Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 325-32, 351-70 (1984-85) [hereinafter cited as Williams I].

76. Williams I, *supra* note 75, at 329-32.

77. Taub I, *supra* note 40, at 382-83; Williams I, *supra* note 75, at 327; *see also* Note, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. C.R.-C.L. L. Rev. 260, 295-97 (1972) (absence for maternity leave must be equivalent to "leaves accorded any other temporary physical disability"). An even more desirable alternative would be the implementation of national legislation ensuring disability and parenting leave. Two recent studies have urged the enactment of such legislation. The Yale Committee on Infant Care Leave advocates providing maternity disability leave and parental leave for a minimum of six months with job protection, benefit continuation and 75% salary replacement for a period of three months during leave. *Recommendations of Yale Advisory Committee on Infant Day Care Leave*, reprinted in Daily Lab. Rep. F-1 (BNA) (Dec. 2, 1985). The Economic Policy Council of UNA-USA advocates, as part of a wide-ranging set of recommendations on family policy, enactment of federal temporary disability insurance legislation covering all employees, job protection for temporarily disabled employees, and the voluntary adoption by employers of unpaid job-protected parenting leave for a period of up to six months. *See Work and Family*, *supra* note 7, at 12-13.

Such legislation was introduced in the 99th Congress by Rep. Patricia Schroeder. Her bill, H.R. 2020, provides unpaid disability leave for a minimum of 26 weeks, *see* H.R. 2020, 99th Cong., 1st Sess. § 102(a), (b) (1985) (available in the files of *Fordham Law Review*), and unpaid parental leave for a minimum of 18 weeks, *see id.* at § 103 (a), (b), with both types of leave protected by reinstatement to the same job on the employee's return to work, *see id.* § 104(a). The bill also provides for a study to recommend implementation of a paid disability and parental leave policy, *see id.* §§ 201-205. The bill was referred to four subcommittees, with hearings held in the Fall of 1985. Letter from Rep. Schroeder to author (August 19, 1985) (available in the files of the *Fordham Law Review*). After the hearings in the Fall, the bill was redrafted as H.R. 4300, the Parental and Medical Leave Act of 1986, and was introduced on March 3, 1986. Hearings on this bill

According to this view, the problem with a differences approach is that the concept of sex differences reflects a stereotyped view of the sexes and could be used just as easily to deny equality as it could be used to promote equal opportunity.<sup>78</sup> Gender-specific legislation therefore is objectionable for two reasons. First, such legislation is underinclusive and discriminates against men by assuming that the need for job-protected disability leave is felt exclusively by women.<sup>79</sup> Second, the treatment of pregnancy as a "special" condition requiring unique legislative action perpetuates patriarchal and paternalistic stereotypes of pregnancy as a condition different from any other temporary disability.<sup>80</sup>

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are scheduled in the spring of 1986. Telephone interview with Maureen Maxwell, legislative aide to Rep. Schroeder (Mar. 20, 1986).

Such legislation would begin to bring the United States into conformity with the policies of other advanced industrialized nations, which have long provided maternity leave with reinstatement and partial or complete wage replacement. See S. Kamerman, *Maternity and Parental Benefits and Leaves: An International Review* 11, 14 (1980). On the other hand, to the extent other countries provide both disability and parental leave, the parental leave aspect is, with the exception of Sweden, confined to mothers, thus perpetuating parenting stereotypes. *Id.* at 14, 16, 45.

If such legislation is enacted in the United States, women are far more likely to benefit from the parental leave aspect of the statute than men because under current child care arrangements they are more likely to take parental leave. See *supra* notes 6-8 and accompanying text. Gender neutral parental leave legislation would at least ensure, however, that this socially-imposed gender role would not have a disproportionately negative effect on women, and a gender neutral statute would avoid the legal perpetuation of that social role resulting from a gender specific statute. At the same time, a gender neutral statute would encourage fathers to take parental leave by affirmatively providing this benefit.

78. See *Pregnancy Discrimination*, *supra* note 75, at 8; Williams, *The Equality Crisis: Some Reflections On Culture, Courts, and Feminism*, 7 *Women's Rts. L. Rep.* 175, 195-96 (1982) [hereinafter cited as Williams II]; Taub, Book Review, 80 *Colum. L. Rev.* 1686, 1690-93 (1980) [hereinafter cited as Taub II].

79. See Williams I, *supra* note 75, at 327, 359 n.130; cf. L. Kanowitz, *Equal Rights: The Male Stake* 18 ("disapproval of sex-based benign discrimination need not deprive women of many of the special benefits they might enjoy under present or future law; it could . . . simply mean that men too would enjoy these same benefits").

80. See Williams I, *supra* note 75, at 371-72; Williams II, *supra* note 78, at 196-98; see also Scales, *supra* note 74, at 431-34 (doctrine of special rights could provide the basis for legislation that would "play into stereotyped notions about womanhood"). According to this view, the maternity leave statutes are simply a new version of protective labor legislation that should be struck down because they are based on a view of women as individuals requiring special protection. See Williams I, *supra* note 75, at 371-72; Williams II, *supra* note 78, at 196 & n.114.

The flaws of this argument are twofold. First, the maternity leave statutes operate to confer a benefit to ensure equal employment opportunity for women, and therefore do not have the effect of the older protective statutes of limiting women's employment opportunities. A different case would be presented if the statutes required mandatory maternity leave. See *supra* notes 36, 44. Second, where the statutes are intended to compensate for actual disability associated with pregnancy and childbirth which operates to disadvantage women, and therefore are based on the existence of a real condition, they are not based on presumed or stereotypical assumptions about the disabling effects of pregnancy or the appropriate social roles of women. To the extent that the statutes provide parental or child-rearing leave, however, they reinforce invalid stereotypes of men and women. See *supra* note 40. This does not undercut, however, the validity of the statutes with respect to disability-related leave.

The sex differences approach, on the other hand, requires that real differences between the sexes, such as pregnancy, be taken into account in order to achieve actual equality of opportunity.<sup>81</sup> According to this view, the equal treatment or comparative model of discrimination simply does not provide a fair basis of comparison where the use of either sex as the standard for comparison may operate to disadvantage the other sex.<sup>82</sup> Instead of using comparative analysis, this approach focuses on the structure of the workplace, and whether that structure advances or inhibits equal opportunity where the sexes are not similarly situated.<sup>83</sup> This requires determining whether the employer's conduct or policy bars equal participation in the workforce because of differences between individuals that are related only to their sex,<sup>84</sup> or whether the employer has incorporated policies into the workplace that benefit some individuals or hinder others only because of their sex differences.<sup>85</sup> Second, it focuses on eliminating those barriers in the workplace that are based on invalid stereotypes or stigmas,<sup>86</sup> while permitting policies that restructure the workplace to take into account actual differences affecting the ability to compete equally in the workplace.<sup>87</sup>

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81. See, e.g., C. MacKinnon, *Sexual Harassment of Working Women* 101-02, 110-11 (1979); E. Wolgast, *Equality and the Rights of Women* 14-16, 42 (1980); Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 Wis. L. Rev. 789, 817-18; Freedman, *supra* note 7, at 927-29, 931-40; Kay, *supra* note 74, at 40, 87-88; Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate Univ. L. Rev. 513, 560, 563-64 (1983); Larson, *Sex Discrimination As To Maternity Benefits*, 1975 Duke L.J. 805, 827-28; Law II, *supra* note 74, at 1007-08; Scales, *supra* note 74, at 435-42; Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 Or. L. Rev. 265, 304-06 (1984).

82. Kay, *supra* note 74, at 44, 87-88; Scales, *supra* note 74, at 427-28; Wildman, *supra* note 81, at 267. See also A. Dworkin, *Renouncing Sexual "Equality"*, in *Our Blood: Prophecies and Discourses on Sexual Politics* 10, 11-12 (1976) (equality does not mean simply exchanging the female role for the male one).

83. See Wildman, *supra* note 81, at 267-68; see also Larson, *supra* note 81, at 827-28 (maternity leave must be offered to women if the workplace is to become equal); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 Wis. L. Rev. 55, 106 ("the terms of work . . . must be realigned to facilitate the equal participation of women and men . . .") [hereinafter cited as Powers I].

84. Cf. Wildman, *supra* note 81, at 304-06 (biological differences must be considered in order to achieve equality in society).

85. Cf. Scales, *supra* note 74, at 437-42 (proposing various methods of restructuring the workplace to take into account inherent differences).

86. See C. MacKinnon, *supra* note 81, at 101-02; see also Law II, *supra* note 74, at 1008-09 (whether the policy "[perpetuates] either the oppression of women or culturally imposed sex-role constraints on individual freedom"); Wildman, *supra* note 81, at 269 ("Any treatment which stigmatizes women or restricts their choice of social role, particularly that which would necessarily confine women to the private sphere, is offensive to the achievement of equal protection."); cf. Powers I, *supra* note 83, at 102 (discrimination on the basis of sex is defined as "socially imposed barriers to the equal participation of women and men").

87. Such calls for explicit gender consideration in fashioning rules . . . focus on an analysis of existing institutional structures and their historical inadequacies in incorporating women, and not on the different and therefore implicitly "deficient" characteristics of women as a group. Difference of treatment is

Under the sex differences approach, while the maternity leave issue could be resolved by enacting a gender-neutral disability leave statute, gender-specific maternity leave legislation would also be a permissible means to ensure that women are not additionally burdened because of pregnancy by inadequate leave policies. If such legislation is limited to providing leave for actual disability, it neither incorporates nor perpetuates cultural stereotypes, but rather is based on physiological differences mandating that leave be provided.

Thus the equal treatment and sex differences approach recognize that there are differences between the sexes, but they reach contradictory conclusions concerning what the legal significance of those differences should be. The linchpin of the equal treatment approach is that pregnancy is always analogous to other temporary disabilities and therefore any differential treatment of pregnancy constitutes unlawful preference by singling out a gender-specific disability for special treatment. What this seems to ignore is the disproportionate impact of pregnancy within the range of potential temporary disabilities under an employment structure that may provide no disability benefits, or inadequate benefits.<sup>88</sup>

Indeed, this approach seems to sacrifice a concern with the effect of "equal" treatment in favor of deemphasizing sex differences. Furthermore, it appears to assume that the level of equal treatment required is defined by the treatment of males. In other words, discrimination is defined by the existing structure of employee benefits, which are premised on a male model.<sup>89</sup> In contrast, the sex differences approach is the theoretical basis for restructuring the workplace to take into account actual differences that affect women's ability to compete equally.<sup>90</sup> This approach permits, even encourages, policies favoring one sex in order to achieve actual equalization of employment opportunity. It therefore measures equality not by determining whether women derive the same

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therefore desirable not because of women's inherently different internal qualities, but because of the discriminatory qualities of the institutions with which they must deal.

Fineman, *supra* note 81, at 818; see also E. Wolgast, *supra* note 81, at 14-15 (women alone bear children and a just society will take that difference into account); Kreiger & Cooney, *supra* note 81, at 563-64 (society can best equalize the relative positions of men and women by recognizing the existence of inherent sex differences).

88. See *supra* notes 47-64.

89. If, on the other hand, the equal treatment model supports an attack on the structure because it favors one sex, then presumably it would require a structure that is gender-neutral. See Williams I, *supra* note 75, at 362-70 (suggesting that correct application of the equal treatment approach requires redefining the typical employee to include female traits as well as male ones). Under this analysis, the maternity leave statutes could not be upheld in their current sex-specific form, but could conceivably be upheld if the same benefits were extended to all temporary disabilities. Cf. L. Kanowitz, *supra* note 79, at 51-58 (rather than invalidating statutes, laws written for women only should be extended to males). To some extent, however, this requires taking sex differences into account, in order to assess whether the current structure has a disparate impact on either sex and what form any new, gender-neutral structure should have to ensure true equality of treatment.

90. See *supra* notes 81-87 and accompanying text.

benefits or detriments as men, but rather whether the structure of the workplace equally affects men and women in terms of employment opportunity. Thus, use of a sex differences approach will guarantee that within the current workplace structure men and women are actually equal.

At the same time, the sex differences approach limits this equalization of opportunity to real differences between the sexes, such as pregnancy.<sup>91</sup> It is not an approach permitting differential treatment on the basis of cultural stereotypes or socially-imposed gender roles; to the contrary, it limits the equalization of sex differences to those means that do not incorporate or perpetuate sex stereotypes.

The most compelling justification for the differences approach is that it focuses on the goal of *actual* equality in order to achieve equal employment opportunity. This equality of result contrasts with the concept of equality as synonymous with sameness, which lies at the heart of the equal treatment model. A concept of equality that focuses on the end result comports with the policy goal of eliminating sex as a factor in employment decisions. It also recognizes that such a goal can only be achieved by first taking sex differences into account.<sup>92</sup> It can only be done, therefore, by confronting structural discrimination in the workplace.

### III. STATE MATERNITY LEAVE PROVISIONS

The structural discrimination created by the lack of adequate maternity leave policies has been resolved in a minority of states by the enactment of statutes or regulations requiring that all employers provide job-protected maternity leave. It is important to examine these provisions from two perspectives. First, to what extent do they provide a guarantee of at least minimally adequate job-protected leave to women workers. Second, if they are to be justified under the sex differences approach, these provisions must be analyzed to determine whether they are based solely on real differences between the sexes, and whether they achieve the goal of ensuring equal opportunity without incorporating or perpetuating sex stereotypes or gender roles.

#### A. Overview

Maternity leave is guaranteed by statute in five states and Puerto Rico,<sup>93</sup> while an equal number of states impose such a requirement by regulation or guideline issued pursuant to state antidiscrimination stat-

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91. See *supra* notes 81-87 and accompanying text.

92. Cf. *Regents of the Univ. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part) ("In order to get beyond racism, we must first take account of race.").

93. The states are California, Connecticut, Massachusetts, Montana and Wisconsin. For the text of these provisions, as well as the Puerto Rico statute, see *infra* notes 101-02,

utes.<sup>94</sup> Another seven states regard the absence of maternity leave or inadequate leave as a violation of state antidiscrimination laws.<sup>95</sup>

All of these provisions require only unpaid leave, although if an employer provides benefits under a sick leave or disability plan, benefits must be paid for pregnancy-related disability to the same extent as other illnesses or disabilities.<sup>96</sup> The duration of leave is defined in most instances by the period of actual disability, although some states recognize a presumed period of disability or impose a maximum period of leave.<sup>97</sup>

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109, 119, 126 and 139. For discussion of these statutes, see *infra* text accompanying notes 101-42.

In addition to these statutory provisions requiring most public and private employers to provide maternity leave, California and Puerto Rico specifically require maternity leave for public sector employees. See *infra* notes 109 and 126. Several other states, which do not generally guarantee maternity leave, nevertheless require that maternity leave be granted to state employees or to teachers. See, e.g., Alaska Stat. § 39.20.225(b)(4) (1984) (state employees entitled to a maximum of nine weeks leave for disability due to pregnancy and childbirth; leave is with pay to the extent the employee has accrued personal leave); Ga. Code Ann. § 20-2-852 (1982) (public school teachers entitled to a maximum of one year's leave of absence for pregnancy and childbirth; if leave is only for period of disability, employee is entitled to reinstatement to substantially equivalent position; if leave extends beyond period of disability, employee is entitled to hiring preference); Ind. Code Ann. § 20-6.1-6-4 (Burns 1985) (public school teachers entitled to leave from commencement of pregnancy until one year after birth of child); La. Rev. Stat. Ann. § 17:48(A) (West 1982) (teachers in special schools entitled to leaves of absence for reasonable time before and after childbirth); N.Y. Civ. Serv. Law Rules & Regs. § 22.1(a) (McKinney 1983) (civil service employees may be granted unpaid leave for two years for pregnancy and childbirth); Tenn. Code Ann. §§ 49-5-702, -705 (1983) (teachers are entitled to unpaid leave for maternity or adoption; if teacher returns within 12 months, reinstatement to the same position is guaranteed; if teacher returns after 12 months, reinstatement to the same or comparable position is guaranteed). Although the statutes or ordinances of subdivisions of state governments may also provide maternity leave, I have not conducted a search for these provisions. Federal employees whose employment is governed by the Civil Service Commission are entitled to maternity leave, which may be a combination of sick pay, annual leave and leave without pay. Basic Federal Personnel Manual, Subchapter 13, at 630-29 (1975). There is no separate category of maternity leave. *Id.* Male employees may request annual leave or leave without pay for the purpose of paternity leave. *Id.* at 630-30.

The legal issues surrounding the validity of the more limited state maternity leave statutes are essentially the same as those concerning the broader state maternity leave provisions. Because some of these provisions permit a leave beyond the period of pregnancy-related disability, however, these statutes may be more vulnerable to challenge on the grounds that providing such childcare or parenting leave solely to female employees discriminates on the basis of invalid sex stereotypes. See *supra* note 40.

94. The five states are Hawaii, Illinois, Kansas, New Hampshire and Washington. For the text of these provisions and a discussion of the regulations, see *infra* notes 144-47 and accompanying text.

95. The seven states are Colorado, Iowa, Maine, Missouri, Ohio, Oklahoma and Rhode Island. For the text of these provisions and a discussion of the regulations, see *infra* note 148 and accompanying text.

96. This is required by the state statutes or regulations, see *supra* notes 93-95, as well as by Title VII, as amended by the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)(1982)).

97. See *infra* text accompanying notes 103, 111, 120 and 126-29. States requiring "reasonable leave" for pregnancy-related disability include Connecticut, Montana, Hawaii, Illinois, New Hampshire and Washington. Massachusetts provides a maximum of



Furthermore, some states limit the leave period solely to childbirth-related disability, rather than including all pregnancy-related disability.<sup>98</sup> Reinstatement is explicitly protected to some degree by a majority, but by no means all, of these provisions,<sup>99</sup> as is the maintenance of pre-leave seniority, benefits and job status.<sup>100</sup>

### B. Statutory Provisions

Connecticut<sup>101</sup> and Montana<sup>102</sup> have virtually identical maternity

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eight weeks, which all employees are entitled to take; California imposes a four month maximum; Puerto Rico provides eight weeks for normal pregnancy.

98. Massachusetts and Kansas limit leave to disability after childbirth. See *infra* notes 119-22 and 145.

99. See *infra* text accompanying note 146 and 148-49.

100. See *infra* text accompanying note 146.

101. The Connecticut statute provides, in relevant part:

[It shall be discriminatory] [f]or an employer, by himself or his agent: . . . (B) to refuse to grant to that employee a reasonable leave of absence for disability resulting from her pregnancy; (C) to deny to that employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by the employer; (D) to fail or refuse to reinstate the employee to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits upon her signifying her intent to return unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . .

Conn. Gen. Stat. § 46a-60(a)(7) (Supp. 1985).

The maternity leave provision is contained within Connecticut's Fair Employment Practices Act, which prohibits sex discrimination as well as discrimination on the basis of race, color, religious creed, age, marital status, national origin, ancestry, mental disorder, mental retardation or physical disability, see Conn. Gen. Stat. § 46a-60(a)(1)-(3), (6) (1983). Sex discrimination is defined in the statute as including discrimination on the basis of "pregnancy, child-bearing capacity, sterilization, fertility or related medical conditions." *Id.* § 46a-51(17). The act protects against pregnancy discrimination by providing, in addition to the requirement of maternity leave, that employers may not fire an employee because of pregnancy, *id.* § 46(a)-60(a)(7)(A), and must make reasonable efforts to temporarily transfer an employee to avoid health risks to the pregnant employee or the fetus. *Id.* § 46a-60(a)(7)(E).

The maternity leave provision was added as an amendment to the statute in 1973. Pub. Act No. 73-647 (1973) (codified as amended at Conn. Gen. Stat. § 46a-60(a)(7) (1983)). The available legislative history indicates that the amendment was enacted as a result of concern over numerous court decisions in the early 1970's which held that employers must include pregnancy within sick leave and disability plans. It was also viewed as a logical step after passage in 1973 of the state equal rights amendment. See *Debates on Conn. H.B. 9195*, at 3952 (Apr. 24, 1973) (remarks of Rep. Matthews); *Debates on Conn. S.B. 1565*, at 151, 156 (Mar. 2, 1973) (remarks of Howard Orenstein, attorney for Connecticut Comm'n on Human Rights and Opportunities) (available in the files of the *Fordham Law Review*).

102. The Montana maternity leave statute is a separate statute apart from the state's comprehensive fair employment statute. It provides, in relevant part:

It shall be unlawful for an employer or his agent to . . .

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

(3) deny to the employee who is disabled as a result of pregnancy any compen-

leave statutes that provide the broadest guarantee of leave and the strongest protection of job security of any of the state statutes. The statutes contain three essential provisions. First, public and private employers must provide a "reasonable" period of leave for pregnancy-related disability.<sup>103</sup> Because leave must be provided for all *pregnancy-related* disability, leave must be provided both during pregnancy and after childbirth as long as the employee is actually disabled, with no limit on the maximum period of leave. Leave is unpaid, unless the employer voluntarily maintains a temporary disability program and the employee is entitled to accrued benefits under the plan.<sup>104</sup>

Second, the statutes guarantee reinstatement to the same or to an "equivalent" job on the employee's return from leave.<sup>105</sup> What constitutes an "equivalent" position is not defined, but at a minimum would probably require the same compensation and comparable job status, responsibilities and advancement opportunities as the employee's prior position. Private employers may be excused from the reinstatement requirement only if "circumstances have so changed as to make it impossi-

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

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

Mont. Code Ann. § 49-2-310 (1985). As to reinstatement, the statute continues:

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

*Id.* § 49-2-311.

The Montana statute was enacted as a result of the passage of an equal rights amendment to the state constitution in 1972. Mont. Const. art. II, § 4. After the passage of the state ERA, the Montana legislature passed two joint resolutions to establish a committee to review existing statutes and propose amendments or new statutes consistent with the equal rights amendment. Montana Legislative Council, Interim Study by the Subcomm. on Judiciary: Equality of the Sexes 1 (Dec. 1974). Thirteen bills were drafted by a subcommittee established for that purpose, including a fair employment practices law and the maternity leave statute. *Id.* at 2-4.

Notes of the proceedings of the Labor and Employment Relations Committee, which considered the leave statute, indicate that the only major objection to the bill was cost. Minutes, Labor and Employment Relations Comm. Montana State Senate 2 (Feb. 3, 1975); *id.* at 3 (Feb. 5, 1975) (available in the files of the *Fordham Law Review*). The minutes also indicate that a motion was made to amend the bill to include paternity leave, but for reasons not clear from the legislative history, such a provision was not incorporated in the final bill. *Id.* at 3 (Feb. 3, 1975).

103. Conn. Gen. Stat. § 46a-60(a)(7)(B) (1983); Mont. Code Ann. § 49-2-310(2) (1985).

104. See Conn. Gen. Stat. § 46a-60(a)(7)(C) (1983); Mont. Code Ann. § 49-2-310(3) (1985). See also *supra* note 96.

105. See Conn. Gen. Stat. § 46a-60(a)(7)(D) (1983); Mont. Code Ann. § 49-2-311 (1985).

ble or unreasonable to do so."<sup>106</sup> Whether this exception implies the equivalent of a business necessity defense<sup>107</sup> or some lesser standard is unclear. Finally, the statutes provide that the employee's wages, seniority, benefits and service credits on return from leave will be equivalent to pre-leave levels.<sup>108</sup>

The California maternity leave statute,<sup>109</sup> which is currently under re-

106. Conn. Gen. Stat. Ann. § 46a-60(a)(7)(D) (West Supp. 1985); Mont. Code Ann. § 49-2-311 (1985).

107. The business necessity standard is derived from Title VII litigation, and provides that a facially neutral policy that has a disparate impact on the basis of race, sex, religion or national origin is lawful only if the employer can demonstrate that it is necessary or essential to the safe or efficient operation of the business. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971). Furthermore, cost is not a factor that can be the basis of such a defense. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978). If this is the standard incorporated in the maternity leave statute, it would require that the employer demonstrate that it was necessary or essential to fill the employee's position with a permanent replacement or to eliminate the position, and that no comparable position is available to which the employee can be reinstated.

If, on the other hand, the inclusion of the term "unreasonable" is intended to create a different standard, it may only mean the employer must demonstrate a rational business reason for failure to reinstate the employee, which might include cost considerations. *Cf.* *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) (interpreting the "factor other than sex" defense of the Equal Pay Act to mean the employer must have an acceptable business reason for a facially neutral salary practice that has an adverse impact on women).

108. Conn. Gen. Stat. § 46a-60(a)(7)(D) (1983); Mont. Code Ann. § 49-2-311 (1985).

109. The California statute provides that it shall be an unlawful employment practice for an employer to refuse to allow a female employee who is pregnant:

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

Cal. Gov't Code § 12945(b)(2) (West 1980).

The statute is contained within the state's comprehensive anti discrimination law, the Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§ 12900-12996 (West 1980 & Supp. 1986). In addition to this general provision, California has separate leave provisions for the following public sector employees: 1) state employees, Cal. Gov't Code § 19991.6 (West Supp. 1986) (female employees given unpaid leave for purposes of pregnancy, childbirth or recovery from childbirth for a period up to one year; male spouse or parent given unpaid leave not to exceed one year to care for a newborn child; male or female employees given unpaid leave not to exceed one year for adoption of a child); 2) state university employees, Cal. Educ. Code § 89519(a) (West Supp. 1986) (leave for pregnancy, childbirth or recovery from childbirth not to exceed one year); 3) community college employees, *id.* § 88193 (West 1978) (leave may be granted for pregnancy or convalescence following childbirth; rules and regulations may be adopted concerning proof of pregnancy, time during pregnancy when leave shall be taken, and length of leave after birth of child); 4) certified employees of public schools, *id.* § 44965 (leave provided for period determined by employee and employee's physician); and 5) classified employees of the public schools, *id.* § 45193 (leave may be granted, school board may adopt rules and regulations concerning proof of pregnancy, time when leave shall be taken, whether leave is paid and length of leave after birth of child). California also specifically prohibits school boards from discharging employees due to inadequate leave policies that have a disparate impact on the basis of sex. Cal. Gov't Code § 12943(b) (West 1980).

view by the Supreme Court,<sup>110</sup> is very similar to the Connecticut and Montana statutes, although it is less explicit with respect to reinstatement and protection of job status, and imposes a limit on the duration of leave. California requires that employers provide a "reasonable" period of pregnancy disability leave up to a maximum of four months.<sup>111</sup> Although the statute does not expressly guarantee reinstatement after leave, the California Fair Employment and Housing Commission has decided that reinstatement to the same or a similar position is required unless the employer can base refusal on a bona fide occupational qualification or business necessity.<sup>112</sup> Similarly, although the statute does not expressly guarantee retention of pre-leave job status, the Commission's guidelines require this.<sup>113</sup> The statute also states that employers may require reasonable notice of an employee's intention to take maternity leave.<sup>114</sup>

Unlike employees covered by the Connecticut and Montana statutes, California employees are likely to have some wage replacement during leave. The California maternity leave statute provides that employees may use accrued vacation leave, which may be paid leave, during maternity leave.<sup>115</sup> More importantly, California is one of six jurisdictions with a comprehensive temporary disability law providing income replacement to all eligible employees.<sup>116</sup> Amended in 1979 to include preg-

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

111. Cal. Gov't Code § 12945(b)(2) (West 1980). The statute also requires that employers who are not covered by Title VII, 42 U.S.C. § 2000e (1982) (employers with less than 15 employees), and who have a disability policy, must provide a maximum of six weeks of pregnancy related leave for "normal" pregnancy. *Id.* § 12945(b)(1), (e). If a woman is disabled for more than six weeks, she is entitled to only the same coverage as is generally provided for other disabled employees. *Id.*

112. See *Department of Fair Employment & Hous. v. Travel Express*, No. FEP 80-81 A7-992s, N-18709, 83-17, slip op. at 8 (Cal. Fair Employment & Housing Comm'n August 4, 1983) (precedential decision holding that maternity leave statute implicitly requires reinstatement) (available in the files of the *Fordham Law Review*). The Commission has incorporated this position into its proposed regulations. See Fair Employment Housing Commission, proposed regulation 7291.2. In pertinent part, the regulations provide:

(B) The employee shall notify the employer as soon as she is ready and able to return to work. *Unless pursuant to a bona fide occupational qualification or business necessity, the employer shall reinstate the returning employee to her original, or a substantially similar job*, as defined in section 7291.2(b)(7), within a reasonable period of time. There is a rebuttable presumption that a reasonable period of time is not later than two weeks from the date of the employee's notification.

*Id.* R7291.2(c)(2)(B) (emphasis added).

113. Cal. Admin. Code § 7291.2(d)(3)(C)(6) (West 1983).

114. Cal. Gov't Code § 12945(b)(2) (West 1980).

115. See *id.*

116. Cal. Unemp. Ins. Code §§ 2625-2778 (West 1972 & Supp. 1986). The other five jurisdictions with temporary disability statutes are: Hawaii, Hawaii Rev. Stat. §§ 392-1 to -101 (1976 & Supp. 1984); New Jersey, N.J. Stat. Ann. §§ 43:21-25 to -21-56 (West 1962 & Supp. 1985); New York, N.Y. Work. Comp. Law §§ 200-242 (McKinney 1965 &

nancy, childbirth or related medical conditions,<sup>117</sup> the statute provides a weekly benefit of \$50 to \$224 for a maximum of thirty-nine weeks.<sup>118</sup>

The remaining three jurisdictions, Massachusetts, Wisconsin and Puerto Rico, have uniquely structured statutes that vary significantly from those previously discussed. The Massachusetts maternity leave statute<sup>119</sup> requires all employers to grant unpaid leave to non-probation-

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Supp. 1986); Puerto Rico, P.R. Laws Ann. tit. 11, §§ 201-212 (1978 & Supp. 1984); and Rhode Island, R.I. Gen. Laws §§ 28-39-1 to -41-33 (1979 & Supp. 1985). All of these statutes currently include pregnancy as a covered disability, *see* Hawaii Rev. Stat. § 392-21(a) (1976); N.J. Stat. Ann. 43:21-29 (West 1962); N.Y. Work. Comp. Law § 201(9)(B) (McKinney Supp. 1986); P.R. Laws Ann. tit. 11, § 202(g) (Supp. 1984); R.I. Gen. Laws § 28-39-2(14) (Supp. 1985), although with some limitations. *See, e.g.*, N.J. Stat. Ann. 43-21-29 (West 1962) (pregnancy covered during the four weeks immediately preceding the expected birth of child and the four weeks immediately following the termination of pregnancy). For discussion of Puerto Rico's statute, *see infra* text accompanying notes 126-38.

117. 1979 Cal. Stat. c. 663, p.2035, § 1(c). The amendment followed passage of the PDA in 1978, which required inclusion of pregnancy in employer disability programs. Earlier, the exclusion of pregnancy from the statute was upheld in *Geduldig v. Aiello*, 417 U.S. 484, 494-97 (1974).

118. Cal. Unemp. Ins. Code §§ 2653.5, 2655 (West Supp. 1986).

119. The Massachusetts statute provides:

A female employee who has completed the initial probationary period set by the terms of her employment or, if there is no such probationary period, has been employed by the same employer for at least three consecutive months as a full-time employee, who is absent from such employment for a period not exceeding eight weeks for the purpose of giving birth, or for adopting a child under three years of age, said period to be hereinafter called maternity leave, and who shall give at least two weeks' notice to her employer of her anticipated date of departure and intention to return, shall be restored to her previous, or a similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of her leave. Said maternity leave may be with or without pay at the discretion of the employer.

Such employer shall not be required to restore an employee on maternity leave to her previous or a similar position if other employees of equal length of service credit and status in the same or similar position have been laid off due to economic conditions or other changes in operating conditions affecting employment during the period of such maternity leave; provided, however, that such employee on maternity leave shall retain any preferential consideration for another position to which she may be entitled as of the date of her leave.

Such maternity leave shall not affect the employee's right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which she was eligible at the date of her leave, and any other advantages or rights of her employment incident to her employment position; provided, however, that such maternity leave shall not be included, when applicable, in the computation of such benefits, rights, and advantages; and provided, further, that the employer need not provide for the cost of any benefits, plans, or programs during the period of maternity leave unless such employer so provides for all employees on leave of absence. Nothing in this section shall be construed to affect any bargaining agreement or company policy which provides for greater or additional benefits than those required under this section.

Mass. Ann. Laws ch. 149, § 105 (D) (Michie/Law. Co-op. 1976 & Supp. 1986).

The Massachusetts maternity leave statute is a separate statute, not contained within the state's comprehensive antidiscrimination statute, *id.* ch. 151B. Failure to comply

ary female employees for a maximum period of eight weeks "for the purpose of giving birth."<sup>120</sup> Unlike the prior state maternity leave statutes, therefore, the Massachusetts provision is limited to *childbirth* leave, rather than pregnancy-related leave.<sup>121</sup> Thus, if an employee is disabled during pregnancy prior to childbirth, the statute does not require the employer to provide leave.

Massachusetts' eight-week limitation on leave imposes a significant restriction on the amount of leave available to the individual employee. At the same time, the interpretative regulations promulgated under the statute provide that every female employee *may* take eight weeks of leave after childbirth regardless of actual disability.<sup>122</sup> In effect, therefore, the eight week period is viewed as an entitlement to leave for actual disability *and* parenting.

The statute guarantees reinstatement to the same or a "similar" position after leave.<sup>123</sup> The sole exception is where employees of similar status have been laid off during the leave period, the employee is only entitled to preferential consideration as job openings become available.<sup>124</sup> The employee is also entitled to the same status and benefits as those existing at the commencement of leave, but the statute specifically states

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with ch. 149, § 105 (D), however, is actionable under the procedure set forth in the antidiscrimination statute. *Id.* ch. 151B, § 4(11A) (Michie/Law. Co-op. Supp. 1985). Furthermore, the coverage of § 105(D) includes all employers as defined under chapter 151B, which includes public and private employers with six or more employees. *Id.* § 1(5) (Michie/Law. Co-op. 1976).

120. Mass. Ann. Laws ch. 149, § 105(D) (Michie/Law. Co-op. Supp. 1985). The employee is required to give a minimum of two weeks notice of the commencement of leave and of her intention to return to work. *Id.*

121. Although there is no official legislative history for the statute, materials compiled by the state library in connection with this bill confirm that it is solely a childbirth leave statute: "The new law is the first of its kind in the country. . . . [L]egislative recognition of childbirth as an overriding interest, is another example of the [state's] . . . concern with human rights." Statement of Massachusetts Law Reform Institute 2 (undated) (excerpted from unpublished material relating to Senate Bill 1220, later ch. 149, § 105(D)) (available in the files of the *Fordham Law Review*). The statute was enacted in 1972, prior to passage of the state equal rights amendment, Mass. Const. art. I, in 1976. Mass. Ann. Laws ch. 149, § 105(D) (Michie/Law. Co-op. 1976).

122. Because the statute does not base entitlement to leave on disability, it implies that every female employee may take leave after childbirth. See Mass. Ann. Laws ch. 149, § 105(D) (Michie/Law. Co-op. 1976 & Supp. 1985). The regulations, issued in 1973, are even clearer, stating that "if a disability caused or contributed to by childbirth and recovery therefrom is less than eight weeks duration or if a temporary leave policy of an employer would result in a maternity leave of less than eight weeks, a female employee who meets the requirements specified in c. 149, § 105D *shall be entitled* to an eight week maternity leave." Mass. Commission Against Discrimination, rules issued May 24, 1973, Section 3, reprinted in 8A Fair Empl. Prac. Manual (BNA) 455:845, 455:845 (effective May 24, 1973) (emphasis added).

This interpretation of the statute is also supported by the 1984 amendment to the statute requiring that the same period of leave be given to female employees "for adopting a child under three years of age" as for giving birth. 1984 Mass. Adv. Legis. Serv. ch. 423 (Law. Co-op.). The gender-specific adoption provision is a parental leave entitlement.

123. Mass. Ann. Laws ch. 149, § 105(D) (Michie/Law. Co-op. 1976 & Supp. 1985).

124. *Id.*

that these benefits will not accrue during the period of leave.<sup>125</sup>

Like the Massachusetts statute, the Puerto Rico maternity leave statute<sup>126</sup> provides combined disability and parental leave, and also requires

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125. *Id.*

126. The Puerto Rico statute provides:

Pregnant working women shall be entitled to a rest which shall include four (4) weeks before and four (4) weeks after the birth. The working woman may opt to take only one (1) week of prenatal rest, and to extend up to seven (7) weeks the postnatal rest she is entitled to, provided she presents a medical certificate to her employer showing that she is able to work until one (1) week before childbirth. The physician shall take into consideration the kind of work the working woman performs.

The employer shall, likewise, be under the obligation to pay the working mother during said period of rest, half the salary, wages, day wages, or compensation that she may be receiving for her work. This payment shall be made in cash, at the time the working woman begins to enjoy maternity leave. Provided, that the average salary . . . that she may have received during the six (6) months immediately preceding the beginning of the period of rest shall be taken as the sole basis for computing half the salary . . . .

Should the birth take place before the weeks during which the pregnant working women shall enjoy her prenatal rest have elapsed, or without having begun her rest, she may opt to extend the postnatal rest for a period of time equivalent to what she failed to enjoy during the prenatal period, and it shall also be paid to her on a half-salary basis; Provided, That the working mother may request to be reinstated to her employment after the first two weeks of the postnatal rest period, if a medical certificate accrediting that she is able to work is presented to her employer. In this case, the working woman shall be considered to waive the other weeks of postnatal rest to which she is entitled. When the probable date of the childbirth is mistakenly estimated, and the woman has enjoyed four (4) weeks of prenatal rest without having given birth to the child, she shall be entitled to have the prenatal leave extended on a half-salary basis, until the childbirth occurs, in which case, the additional period for which the prenatal rest is extended shall be paid in the same manner and terms established for the payment of regular salaries . . . . If the working woman suffers any postnatal complication and she is prevented from working after the four- (4) weeks period, reckoning from the date of childbirth, the employer shall be under the obligation to extend the rest period for a term which shall not exceed twelve (12) additional weeks, provided that before the expiration of the rest period, a medical certificate accrediting such facts is presented. In this case, the working woman shall not be entitled to receive additional compensation, but the employment shall be retained for her.

P.R. Laws Ann. tit. 29, § 467 (1985); *see also id.* § 468 (during the rest periods provided in § 467, employer must keep position open for pregnant worker); *id.* § 469 (discharge for pregnancy forbidden).

The Puerto Rico statute was originally enacted in 1942 as part of its laws regarding women and employment, and amended in 1969, 1975 and 1982. 1982 P.R. Laws 12, 12-13. According to the statement of motives in the 1942 legislation, the statute was enacted because "[u]ninterrupted work during [the weeks preceding or following childbirth] constitutes a positive danger to the health and life of the workers." Copy of Act No. 3 of March 13, 1942, at 1 (sent to author by Dep't of Labor and Human Resources, Commonwealth of P.R. (Oct. 17, 1985)) (unpublished) (available in the files of the *Fordham Law Review*). The statute applies to all private employers and to women working in public service enterprises. *Id.*

Puerto Rico separately provides similar leave protection to municipal employees and teachers. Teachers are provided eight weeks leave with full pay, whether their status is permanent, probational, substitute or provisional. *See* P.R. Laws Ann. tit. 18, § 218(a).

a limited period of mandatory leave immediately after childbirth.<sup>127</sup> This is not surprising, however, because the statute was enacted in 1942, and although it has since been amended, it still reflects paternalistic provisions typical of earlier protectionist labor legislation.<sup>128</sup> The statute entitles working women to a "rest" period of eight weeks, consisting of either four weeks before and four weeks after childbirth, or one week before and seven weeks after childbirth, regardless of actual disability during that period.<sup>129</sup> Although an employee may opt to take a shorter period of post-natal leave, she must present a medical certificate of her ability to work,<sup>130</sup> and in any case she is barred from returning to work earlier than two weeks after childbirth.<sup>131</sup> In the event of post-natal complications disabling the employee beyond the ordinary leave period, the leave period may be extended for a maximum of sixteen weeks from the date of childbirth.<sup>132</sup>

Unlike the laws discussed previously, reinstatement rights are absolutely protected under the statute during the leave period and cannot be waived.<sup>133</sup> No explicit protection is provided, however, for maintenance of pre-leave seniority and benefits.<sup>134</sup>

The statute also provides for significant wage replacement during leave: one-half of the employee's salary for the leave period must be paid as a cash benefit at the commencement of the leave period.<sup>135</sup> In addition, Puerto Rico, like California, provides employees with benefits under

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(c), (e) (1974 & Supp. 1984). Municipal employees are similarly entitled to eight weeks leave at full pay, *see* P.R. Laws Ann. tit. 21, § 1553b(a) (1974), and, where the complications prevent the employee from returning to work after postnatal leave, an employee may use sick leave, vacation and unpaid leave provided the total leave period does not exceed one year, *id.* § 1553b(c).

127. *See* P.R. Laws Ann. tit. 29, § 467 (1985).

128. *See supra* notes 36 and 126 and text accompanying *infra* notes 252-56.

129. P.R. Laws Ann. tit. 29, § 467 (1985). The latter option is only provided if the employee presents a medical certificate from her physician indicating her ability to work until one week before childbirth. *Id.* If childbirth occurs prior to the anticipated prenatal period, the statute entitles the employee to take the full eight weeks of leave after childbirth. *Id.* The statute also has a notice requirement. In order to be entitled to leave the employee must present her employer a medical certificate attesting to her pregnancy. *Id.* § 470. This certificate must be issued free of charge by the employee's physician. *Id.*

130. *Id.* § 467.

131. *Id.* Permitting an employee to work before two weeks after childbirth is punishable as a misdemeanor. *Id.* § 471.

132. *See id.* § 467.

133. "During the rest periods referred to in the preceding section, the employer shall be bound, notwithstanding any stipulation to the contrary, to keep the position open for the pregnant worker." *Id.* § 468. Failure to reinstate an employee after maternity leave may subject an employer to a civil fine of double damages. *Id.* § 469. Failure to provide leave, pay wages due or reinstate the employee are also punishable as misdemeanors. *Id.* § 471.

134. *See id.* § 467.

135. *Id.* The requirement that wage replacement be paid as a lump sum at the beginning of leave, rather than according to the normal method of wage payment, was added as an amendment to the statute in 1982. 1982 P.R. Laws, at 13.



its temporary disability statute,<sup>136</sup> which provides compensation for pregnancy disability for a maximum of twenty-six weeks.<sup>137</sup> Although the benefit amount is small, it nevertheless provides some wage replacement.<sup>138</sup>

The final statute, the Wisconsin provision,<sup>139</sup> is the least explicit. Indeed, it is questionable whether it is a maternity leave statute at all. Under a 1981 amendment to its fair employment statute, Wisconsin defines prohibited sex discrimination to include "[d]iscriminating against any woman on the basis of . . . maternity leave."<sup>140</sup> The state has not issued any regulations further defining this statutory duty, nor have any cases been litigated concerning this provision. Although the provision seems to imply a guarantee of maternity leave, it is by no means clear to what extent that protection extends.<sup>141</sup> For example, it is not clear whether maternity leave encompasses disability leave only or also includes parenting leave. Furthermore, the statute does not explicitly guarantee reinstatement nor does it ensure retention of pre-leave job status.<sup>142</sup>

### C. Regulatory Provisions

In contrast to the varied statutory provisions guaranteeing maternity

136. P.R. Laws Ann. tit. 11, §§ 202-212 (1978 & Supp. 1984).

137. *See id.* §§ 202(g), 203(c). The statute as originally enacted specifically excluded payment for disability due to pregnancy, *see id.* § 203(g)(2), but was amended in 1979 to include pregnancy in the definition of "disability." 1979 P.R. Laws 527, 529 (codified as amended at P.R. Laws Ann. tit. 11, § 202(g) (Supp. 1984)). Under that same amendment, benefits will not be paid for disability arising from an abortion, unless the abortion was performed for medically necessary reasons. P.R. Laws Ann. tit. 11, § 203(g)(2) (Supp. 1984).

138. *See id.* § 203(d) (benefit amounts and calculation). The employee is not entitled to disability payments, however, during the period when the employee is receiving benefits under the maternity leave statute, unless the maternity leave benefit is lower than the amount the employee would be entitled to receive under the disability statute. *Id.* § 203(i)(6).

139. Wis. Stat. Ann. § 111.36(1) (West Supp. 1985) provides:

Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer, labor organization, employment agency, licensing agency or other person:

(c) Discriminating against any woman on the basis of pregnancy, childbirth, maternity leave or related medical conditions by engaging in any of the actions prohibited under s.111.322 [refusal to hire or employ, termination of employment, discrimination in compensation, terms, conditions or privileges of employment], including, but not limited to, actions concerning fringe benefit programs covering illnesses and disability.

140. *Id.*

141. Alternatively, the provision could be interpreted as not requiring maternity leave, but only as a guarantee that if maternity leave is provided it cannot be the basis for discriminatory treatment.

142. *See* Wis. Stat. Ann. § 111.36(1) (West Supp. 1985). Reinstatement would arguably be included within the discriminatory discharge provisions of the statute. *See id.* § .322(1).

leave, states incorporating this guarantee in regulations or guidelines<sup>143</sup> issued pursuant to their state antidiscrimination laws follow one of two basic frameworks. First, the regulations of several states (Hawaii, Illinois, Kansas, New Hampshire and Washington)<sup>144</sup> provide guarantees similar to the Connecticut and Montana statutes: the regulations or guidelines require employers to provide a period of leave for pregnancy-related disability,<sup>145</sup> reinstatement to the same or to a similar position and maintenance of pre-leave seniority, fringe benefits and job status.<sup>146</sup> In two of the states, an employer is expressly exempted from the require-

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143. One obvious, but very fundamental, difference between these regulations or guidelines and the statutes previously discussed is that the regulations are far more susceptible to modification or abandonment by the relevant state agency, and therefore constitute a considerably less certain guarantee of maternity leave. Indeed, Rhode Island, according to the Rhode Island Commission for Human Rights, is not publicizing or enforcing its regulations. Telephone interview with Paul Holbrook, Director of Fair Housing Program, Rhode Island (March 12, 1986).

144. See Hawaii, Administrative Rules on Sex Discrimination, § 12-23-58 (1983), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:2327, 453:2328-29 (effective Nov. 15, 1982); Illinois, Guidelines on Discrimination in Employment, § 2.10, *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:2751, 453:2753-54; Kansas, Commission On Civil Rights Rules and Regulations 1985, § 21-32-6, *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:3301, 453:3311 (effective Jan. 1, 1974); New Hampshire, Rules of the New Hampshire Commission for Human Rights, HUM 402.03 (1984), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 455:2451, 455:2464 (as amended Nov. 15, 1984); Washington, Human Rights Commission Maternity Regulation, WAC 162-30-020(5) (1973), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 457:2951, 457:2951-52 (effective Oct. 28, 1973).

The language of these regulations is similar to the wording of the relevant provisions in the current sex discrimination guidelines promulgated in 1970 and reissued in 1978 by the Office of Federal Contract Compliance Programs (OFCCP). See 41 C.F.R. § 60-20.3(g)(1), (2) (1985) ("childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time"). See also *infra* note 148.

After passage of the PDA, the Equal Opportunity Employment Commission (EEOC) issued guidelines concerning the new statute indicating that female employees were entitled to only the same leave and disability benefits generally available to male employees. See Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 app. (1985).

145. But see Kansas, Commission on Civil Rights Rules and Regulations 1985 § 21-32-6(d), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:3301, 453:3311 (effective Jan. 1, 1974) (limiting leave to *childbirth*-related disability).

146. See Hawaii, Administrative Rules on Sex Discrimination, § 12-23-58(a), (c) (1983), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:2327, 453:2328-29 (effective Nov. 15, 1982); Kansas, Commission on Civil Rights Rules and Regulations 1985, § 21-32-6(d), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:3301, 453:3311-54 (effective Jan. 1, 1974); see also Illinois, Guidelines on Discrimination in Employment, § 2.10(B), (D) *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:2751, 453:2753-54 (guaranteeing seniority and fringe benefits only to extent provided under employer's temporary disability plan); New Hampshire, Rules of the New Hampshire Commission for Human Rights, HUM 402.03(a), (b) (1984), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 455:2451, 455:2464 (as amended Nov. 15, 1984) (same); Washington, Human Rights Commission Maternity Regulation, WAC 162-30-020(5)(a), (c), (6)(c) (1973), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 457:2951, 457:2952 (effective Oct. 28, 1973) (same).

ment of reinstatement on a showing of business necessity.<sup>147</sup>

The balance of the states (Colorado, Iowa, Maine, Missouri, Ohio, Oklahoma and Rhode Island) provide *some* guarantee of maternity leave by indicating that they would consider an employer to be in violation of the state antidiscrimination law if the failure to provide maternity leave or inadequate leave has an adverse impact on women.<sup>148</sup> These regulations therefore do not affirmatively require the maintenance of a maternity leave policy, nor do they specify an employee's reinstatement or job status rights. While they appear to ensure adequate leave, the requirement that the policy have an adverse impact on women in order to be struck down may mean that an individual disabled beyond the "normal" disability period may be unable to establish the right to a more extended leave.<sup>149</sup>

Two of the states guaranteeing maternity leave by regulation, Ha-

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147. See New Hampshire, Rules of the New Hampshire Commission for Human Rights, HUM 402.03(a) (1984), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 455:2451, 455:2464 (as amended Nov. 15, 1984); Washington, Human Rights Commission Maternity Regulation, WAC 162-30-020(5)(c) (1973), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 457:2951, 457:2952 (effective Oct. 28, 1973). Even without express recognition of a business necessity defense, such a defense implicitly is included by operation of judicial decision. See *supra* note 107 and accompanying text.

148. See Colorado, Sex Discrimination Rules, Rule 80.8(c), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:1125, 453:1128 (effective May 31, 1972); Iowa, Rules of Iowa Civil Rights Commission, Iowa Admin. Code § 240, ch. 3.10(4) (1985), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:3075, 453:3098 (effective May 29, 1985); Maine, Employment Regulations of the Maine Human Rights Commission, § 3.06(F)(4) (1985), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 455:525, 455:530 (effective Oct. 1, 1980); Missouri, Commission on Human Rights, Guidelines and Interpretations, Mo. Code of State Regulations 180-3.040(16)(B), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 455:1701, 455:1712 (as amended Feb. 2, 1981); Ohio, Civil Rights Commission Rules, § 4112-5-05(G)(2) (1985), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 457:251, 457:268 (effective Dec. 23, 1979); Oklahoma, Human Rights Commission Guidelines, V(I)(3), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 457:551, 457:555 (effective Feb. 25, 1977); Rhode Island, Sex Discrimination Guidelines, 7(b), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 457:1275, 457:1276-77 (effective Nov. 1973). The wording of the regulation is generally as follows:

Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no [maternity] leave is available, such a termination is unlawful if it has a disparate impact on employees of one sex and is not justified by business necessity.

*Id.*, *reprinted in* 8A Fair Empl. Prac. Manual (BNA) at 457:1276-77.

The language of these regulations follows that contained within the relevant provision of the proposed revised sex discrimination guidelines of the OFCCP published in 1980, 45 Fed. Reg. 86,216 (1980), which have been indefinitely deferred. 46 Fed. Reg. 42,865 (1981).

149. In other words, the requisite showing of disproportionate impact may be difficult to establish if only a small number of employees would be adversely affected by a leave policy which is otherwise adequate for normal pregnancy disability. For an explanation of disparate impact analysis, see *infra* note 219. Another problem with disparate impact analysis is whether a right to leave could be asserted in a female-intensive (or exclusively female) workforce, where there is no comparative pool of male workers. See, e.g., *Responses*, 13 N.Y.U. Rev. L. & Soc. Change 407, 408 (1984-85) (remarks of Joan Bertin).

waii<sup>150</sup> and Rhode Island,<sup>151</sup> also provide some wage replacement during the period of disability under their temporary disability statutes.<sup>152</sup> Hawaii, which couples this benefit with the more explicit maternity leave regulation,<sup>153</sup> provides benefits equal to fifty-five percent of the average weekly wage, if the wage is \$26 or more<sup>154</sup> for a maximum period of twenty-six weeks.<sup>155</sup> Rhode Island, which has the weaker disparate impact regulation,<sup>156</sup> provides benefits equal to fifty-five percent of the individual's average weekly wage<sup>157</sup> for a maximum period of thirty weeks.<sup>158</sup>

#### D. Summary

The differences between these provisions should not obscure the fact that they all generally ensure that employers provide the basic components of adequate maternity leave, that is, a period of leave, reinstatement, and protection of job status. Measured against the inadequacies of employer maternity leave policies, as previously discussed,<sup>159</sup> these statutes resolve many of the problems identified with those policies. First, virtually all of the provisions ensure that every woman worker is entitled to some leave; only Massachusetts limits leave to non-probationary employees.<sup>160</sup> This resolves the problems of no-leave policies or eligibility requirements that have the effect of providing no leave.<sup>161</sup> Second, these provisions protect the right to reinstatement at pre-leave status unless the employer can demonstrate that reinstatement is impossible or not economically feasible.<sup>162</sup> This ensures that in most instances leave is with-

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150. Hawaii, Administrative Rules on Sex Discrimination, § 12-23-58 (1983), *reprinted in* 8A Fair Empl. Prac Manual (BNA) 453:2327, 453-2328-29 (effective Nov. 15, 1982). See *supra* note 144 and text accompanying notes 144-47.

151. See Rhode Island, Sex Discrimination Guidelines, 7(a), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 457:1275, 457:1276-77 (effective Nov. 1973). See also *supra* notes 143, 148 and text accompanying *supra* notes 148-49.

152. See Hawaii Rev. Stat. § 392-3(5) (1976); R.I. Gen. Laws §§ 28-39-2(14), -41-8 (Supp. 1985).

153. See Hawaii Rev. Stat. § 392-3(5) (1976); Hawaii, Administrative Rules on Sex Discrimination Regulations, § 12-23-58 (1983), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 453:2327, 453:2328-29 (effective Nov. 15, 1982).

154. Hawaii Rev. Stat. § 392-22(1) (1976).

155. *Id.* § 392-23.

156. See Rhode Island, Sex Discrimination Guidelines, 7(b), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 457:1275, 457:1276-77 (effective Nov. 1973). See *supra* note 143.

157. R.I. Gen. Laws § 28-41-5(A) (Supp. 1985).

158. *Id.* § 28-41-7(B). The Rhode Island statute provides, however, that for purposes of maternity disability an employee may elect to receive a lump sum benefit in lieu of weekly benefits: if the employee is entitled to benefits totalling over \$500, the lump sum is \$500; if the benefit entitlement total is less than \$500, then only the lesser total can be paid as a lump sum. *Id.* § 28-41-8.

159. See *supra* text accompanying notes 46-72.

160. See *supra* note 119.

161. See *supra* text accompanying notes 47-64.

162. See *supra* text accompanying notes 144-47.

out risk of job loss, a guarantee not present in many current leave policies.<sup>163</sup> At the same time, this takes into consideration legitimate employer concerns where a position cannot be temporarily filled or left vacant during the leave period, or has been eliminated, and a comparable position is unavailable.<sup>164</sup> Finally, the state provisions guarantee an adequate period of leave for disability associated with normal pregnancy, and the most liberal provisions ensure that leave will be provided for all pregnancy-related disability.<sup>165</sup>

Whether these provisions can be justified under the sex differences approach is a more complex issue. The goal of the provisions is to take into account the unique burden imposed on women workers by no-leave or inadequate leave policies by restructuring the workplace to require that employers at a minimum provide leave for pregnancy. This goal therefore accords with the primary concern of the sex differences approach, which is to achieve actual equality in the workplace.<sup>166</sup> Where these provisions are premised on leave for pregnancy-related disability, they satisfy the requirement of the sex differences approach that efforts at equalization of the employment structure must be limited to real sex differences.<sup>167</sup>

On the other hand, to the extent that these provisions impose a maximum period on the duration of leave or limit leave to childbirth-related disability, they may incorporate invalid assumptions about the nature of pregnancy disability and therefore may be underinclusive in individual cases.<sup>168</sup> Moreover, where they mandate a fixed period of leave that may extend beyond disability, in effect they are providing parenting leave on the basis of socially-imposed gender roles,<sup>169</sup> which is a justification expressly condemned by the differences approach.<sup>170</sup>

The question of the validity of these provisions ultimately depends,

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163. See *supra* text accompanying notes 68-72. Where reinstatement is to a comparable position, these provisions are no more clear than existing employer policies concerning how the term comparable is defined. See *supra* text accompanying notes 71-72. These provisions ensure, however, that the issue of comparability will be measured against a judicial standard of reasonableness, rather than an individual employer's subjective judgment.

164. See *supra* note 24. The limitation of the reinstatement exception to a strict standard of business necessity, a relatively well-developed doctrine under Title VII, provides both employers and employees with a reasonable standard. See *supra* note 107.

165. See *supra* notes 97-98 and accompanying text.

166. See *supra* text accompanying notes 81-87.

167. See *supra* text accompanying notes 90-92.

168. See *supra* note 40 and text accompanying notes 65-66. Mandatory leave, such as the two-week period contained in the Puerto Rico statute, see P.R. Laws Ann. tit. 29, § 467 (1985) (the working mother may only request to be reinstated after the first two weeks of the postnatal rest period), similarly rests on invalid assumptions about pregnancy disability, see *supra* note 24, and, by creating an irrebuttable presumption of disability, would be unlawful under existing case law, see *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644-46 (1974); *Turner v. Department of Employment Sec.*, 423 U.S. 44, 46 (1975).

169. See *supra* note 40 and accompanying text.

170. See *supra* text accompanying notes 91-92.

however, on whether their sex-specific approach, which takes into account differences between the sexes to ensure equal employment opportunity, is permissible under equal protection<sup>171</sup> and Title VII<sup>172</sup> standards. In other words, does constitutional and statutory sex discrimination analysis encompass a sex differences approach that would essentially support these state provisions.

#### IV. CONSTITUTIONAL AND STATUTORY ANALYSIS OF SEX DIFFERENCES

##### A. Court Challenges to the State Maternity Leave Provisions

Two of the maternity leave provisions, the California<sup>173</sup> and Montana<sup>174</sup> statutes, have been upheld against both equal protection and Title VII challenges.<sup>175</sup> The Montana statute initially was declared valid by the Montana federal district court in *Miller-Wohl Co. v. Commissioner of Labor & Industry (Miller-Wohl I)*.<sup>176</sup> Although the court's opinion was

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171. U.S. Const. amend. XIV, § 1.

172. 42 U.S.C. § 2000e (1982).

173. See Cal. Gov't Code § 12945(b)(2) (West 1980).

174. See Mont. Code Ann. §§ 49-2-310, 311 (1985).

175. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390 (9th Cir. 1985), cert. granted, 106 S. Ct. 783 (1986); *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 515 F. Supp. 1264 (D. Mont. 1981), vacated for lack of jurisdiction and appeal dismissed, 685 F.2d 1088 (9th Cir. 1982) [hereinafter cited as *Miller-Wohl I*]; *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 692 P.2d 1243 (Mont. 1984), appeal filed, 54 U.S.L.W. 3064-65 (U.S. Mar. 27, 1985) (No. 84-1545) [hereinafter cited as *Miller-Wohl II*]; see also *Mountain States Tel. & Tel. Co. v. Commissioner of Labor & Indus.*, 187 Mont. 22, 51, 608 P.2d 1047, 1062-63 (1979) (upholding disability benefits portion of Montana maternity leave statute), appeal dismissed, 445 U.S. 921 (1980).

176. The Montana litigation in the *Miller-Wohl* suits arose out of the alleged discriminatory discharge of a pregnant employee resulting from the employer's no-leave policy for employees with less than one year of seniority. See *Miller-Wohl II*, 692 P.2d at 1245, 1249-50. The employee discovered shortly after she was hired that she was pregnant. *Id.* at 1245. She experienced "morning sickness" over several weeks, *id.*, but was unable to take sick leave or disability leave because of the company's policy that no sick leave or leave of absence would be provided until an employee had worked for the company for one year, *id.* at 1249. Unable to take any leave because of her brief time on the job, the employee's illness affected her performance as a sales clerk, resulting in her discharge by the company. *Id.* at 1245. The employee then filed a complaint with the State Department of Labor and Industries (DLI) alleging that she had been unlawfully discharged because of her pregnancy, and charging that the company's no-leave policy violated the requirements of the Montana maternity leave statute. *Id.*

After the employee filed this complaint with the DLI against the employer, *Miller-Wohl II*, 692 P.2d at 1245, the employer filed suit in federal court seeking a declaratory judgment that the statute was invalid on the grounds that the statute was preempted by the PDA, 42 U.S.C. § 2000e(k) (1982), and violated the equal protection clause of the Fourteenth Amendment, see *Miller-Wohl I*, 515 F. Supp. at 1266. The district court's decision upholding the statute was later vacated on jurisdictional grounds. See *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 685 F.2d 1088, 1091 (9th Cir. 1982) (no federal jurisdiction because federal issues were only raised as defenses to plaintiff's state law claims).

In the state court action, the trial court decided in favor of the Company, holding that the statute violated both the equal protection clause and Title VII. *Miller-Wohl II*, 692

later vacated on jurisdictional grounds,<sup>177</sup> its analysis is instructive because it was adopted in part in the subsequent opinion of the Montana Supreme Court (*Miller-Wohl II*), which similarly upheld the statute.<sup>178</sup> Four months after *Miller-Wohl II*, the Ninth Circuit ruled that the California statute was valid in *California Federal Savings & Loan Association v. Guerra*.<sup>179</sup> The Supreme Court has granted certiorari to review the California case,<sup>180</sup> while the appeal of the Montana case is still pending before the Court.<sup>181</sup>

Thus far, the opinions upholding the statutes fail to provide a satisfactory rationale for this result under either constitutional or statutory analysis. Most significantly, the courts have utterly failed to address the

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P.2d at 1246. The Montana Supreme Court reversed on both constitutional and statutory grounds. *Id.* at 1254. An appeal of the Montana Supreme Court's decision has been filed with the United States Supreme Court. 54 U.S.L.W. 3064-65 (U.S. Mar. 27, 1985) (No. 84-1545).

177. See *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 695 F.2d 1088, 1091 (9th Cir. 1982).

178. See *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 692 P.2d 1243, 1254 (Mont. 1984).

179. 758 F.2d 390 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986). The statute was challenged after an employer refused to reinstate an employee at the expiration of her maternity leave. *California Fed. Sav. & Loan Ass'n v. Guerra*, 34 Fair Empl. Prac. Cas. (BNA) 562, 565 (C.D. Cal. 1984). The company's policies provided for leave, including leave for pregnancy, but stated that an employee on leave could be terminated if "a similar and suitable position is not available." *Id.* The employee in this case was ready to return to work in April, 1982, but no position was available until November, 1982. *Id.* The California Federal Savings & Loan Association's policy also stated that leave benefits were unavailable until an employee had worked for three months, and after 30 days of leave, the following benefits would be affected: the employee's anniversary date, emergency leave time accrual, insurance, retirement, salary review date and vacation accrual. *Id.*

The employer filed suit in federal court seeking declaratory and injunctive relief against enforcement of the state maternity leave statute on the ground that the statute was preempted under Title VII. *Guerra*, 758 F.2d at 392-93. The employer also apparently raised a claim under the ERISA, 29 U.S.C. §§ 1001-1461 (1982 & Supp. I 1983), which was later dropped from the lawsuit. 758 F.2d at 393 n.5.

The district court agreed that the statute mandated preferential treatment of female employees that conflicted with Title VII's prohibition against discrimination on the basis of sex, and declared the statute invalid. See *Guerra*, 34 Fair Empl. Prac. Cas. (BNA) at 567-68. This preferential treatment, according to the court, is "inconsistent with the purpose of Congress in enacting the Pregnancy Discrimination Amendment to eliminate classifications based on pregnancy and with the purpose of Title VII to provide equal treatment for males and females." *Id.* at 568. Because of this inconsistency, it was impossible, in the court's view, for the employer to comply with both statutes. See *id.*

The Ninth Circuit vehemently disagreed with this analysis, finding that the district court's ruling "defies common sense, misinterprets case law, and flouts Title VII and the PDA." See *Guerra*, 758 F.2d at 393. The court declared that "equality under the PDA must be measured in employment opportunity not . . . in amounts of days of disability leave expended." *Id.* at 396. The number of days guaranteed was a "means to the goal of [equal] employment opportunity." *Id.*

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

181. *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 54 U.S.L.W. 3064-65 (U.S. Mar. 27, 1985) (No. 84-1545).

treatment of sex differences that lies at the heart of the question of the validity of these statutes. First, under equal protection analysis,<sup>182</sup> the courts have had no difficulty concluding that the statutes are not discriminatory under the Supreme Court's decision in *Geduldig v. Aiello*.<sup>183</sup> In *Geduldig* the Court held that a state disability statute excluding pregnancy as a covered condition did not violate the equal protection clause.<sup>184</sup> According to the Court, pregnancy classifications are not per se sex-based classifications.<sup>185</sup> Rather, such classifications merely differentiate between those who are pregnant (women) and those who are not pregnant (men and women).<sup>186</sup> Therefore, the Court held, a pregnancy classification is permissible unless it can be demonstrated that it is a pretext for sex discrimination, that is, that there is evidence of invidious intent to discriminate on the basis of sex.<sup>187</sup>

Two courts that have examined one of the maternity leave statutes under this standard have concluded that there is no evidence that the statute constitutes a pretext for sex discrimination.<sup>188</sup> To the contrary, no invidious discrimination exists with respect to the statute because its purpose is not to disadvantage either sex, but rather is to ensure that female employees are not uniquely disadvantaged by pregnancy.<sup>189</sup> The statute removes a burden uniquely borne by women—disability from pregnancy—in order to ensure equal employment opportunity.<sup>190</sup> All other disabilities are otherwise treated equally: employers are free to de-

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182. See *infra* notes 188-91 and accompanying text.

183. 417 U.S. 484 (1974).

184. See *id.* at 496-97.

185. See *id.* at 496 n.20.

186. *Id.*

187. See *id.*

188. See *Miller-Wohl II*, 692 P.2d at 1254. The Montana Supreme Court adopted verbatim the federal district court's analysis of the equal protection issue.

189. See *Miller-Wohl I*, 515 F. Supp. at 1266. To the extent that legislative history is available concerning the state statutes, it is clear that most of the statutes were enacted to ensure equal employment opportunity by preventing any disadvantage caused by sexual stereotypes or insensitivity to pregnant employees. See *supra* notes 101-02 and 121. But see *supra* note 126. Furthermore, the operation of the statutes demonstrates the absence of any invidious purpose. With the exception of the Puerto Rican statute, see P.R. Laws Ann. tit. 29, § 467 (1985), none of the statutes require that an employee utilize this benefit, but rather provide it as an option to be used to the extent deemed necessary by an individual employee. See, e.g., Cal. Gov't. Code § 12945(b)(2) (West 1980); Conn. Gen. Stat. § 46a-60(a)(7) (1983); Mont. Code Ann. § 49-2-310 (1985). Thus, unlike the *mandatory* maternity leave requirement struck down in *Cleveland Bd. of Educ. v. La-Fleur*, 414 U.S. 632 (1974), the statutes do not penalize or burden pregnant women in any fashion because of their pregnancy. See *id.* at 651; see also *Turner v. Department of Employment Sec.*, 423 U.S. 44, 46 (1975) (per curiam) (blanket disqualification of women from unemployment benefits for a period extending over an eighteen week period before and after childbirth held unconstitutional). On the other hand, the statutes impose no burden on men, because they do not deprive them of any employment benefit, nor do they cover nonpregnant women disabled by other illnesses.

190. See *Miller-Wohl II*, 692 P.2d at 1254. Furthermore, as the federal district court noted, the statute achieves the sex-neutral goal of protecting the right to bear children without sacrificing the income of one spouse. *Miller-Wohl I*, 515 F. Supp. at 1266-67.



cide whether to adopt a comprehensive leave entitlement for all work disabilities.<sup>191</sup>

In contrast to this constitutional analysis, the courts' statutory analysis under Title VII has been notably less uniform. Essentially, the courts' opinions reflect three rationales. First, it has been argued that the maternity leave statutes present no conflict with an employer's responsibilities under Title VII if leave benefits are simply extended to disabled males.<sup>192</sup> Title VII explicitly permits the states to legislate beyond the standards imposed by federal law.<sup>193</sup> The only restriction on such legislation is that it cannot impose obligations inconsistent with federal law.<sup>194</sup> An employer can avoid any inconsistent obligations, according to this reasoning, by extending leave benefits to all disabled employees.<sup>195</sup>

Second, the lower courts have upheld the statutes on the ground that they redress the disparate impact that no-leave or inadequate leave policies have on women.<sup>196</sup> Under disparate impact analysis, employment policies fair in form but discriminatory in operation are unlawful unless they can be justified by business necessity.<sup>197</sup> Applying that analysis to the maternity leave provisions, the courts have indicated that the absence of an adequate leave policy could violate Title VII because of its disproportionate impact on women.<sup>198</sup> While women would be affected by the absence of a general disability leave policy to the same extent as men, women would still bear the additional burden of pregnancy disability.<sup>199</sup> Thus, if inadequate leave policies would violate Title VII, the courts conclude, then a statute guaranteeing pregnancy disability leave must be

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191. See *Miller-Wohl II*, 692 P.2d at 1254.

192. See *Miller-Wohl I*, 515 F. Supp. at 1267.

193. Section 708 of Title VII provides:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7 (1982).

194. See *id.*

195. See *Miller-Wohl I*, 515 F. Supp. at 1267. Although this suggests that the maternity leave statutes would violate Title VII unless equal benefits were given to disabled males, the court indicated that the absence of an adequate leave policy could violate Title VII because of its disparate impact on women. See *id.* See *supra* notes 166-70.

196. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986); *Miller-Wohl II*, 692 P.2d at 1254.

The Montana Supreme Court indicated that it would be desirable if the legislature were to extend leave benefits to disabled male employees in order to "end any argument that the MMLA [Montana Maternity Leave Act] is indeed sex based discrimination." *Miller-Wohl II*, 692 P.2d at 1255.

197. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). See *infra* note 219.

198. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 395-96 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986); *Miller Wohl II*, 692 P.2d 1243, 1251-52, 1255 (Mont. 1984), *appeal filed*, 54 U.S.L.W. 3064-65 (U.S. Mar. 27, 1985) (84-1545).

199. *Miller-Wohl II*, 692 P.2d at 1251.

valid.<sup>200</sup>

Finally, one court has argued that the statutes are valid because they do not constitute discrimination<sup>201</sup> as Congress defined that term in the PDA.<sup>202</sup> Congress enacted the PDA to overcome the Supreme Court's opinion in *General Electric Co. v. Gilbert*,<sup>203</sup> where the Court held, tracking its analysis in *Geduldig*, that the exclusion of pregnancy from a private employer's disability plan did not constitute unlawful sex discrimination under Title VII.<sup>204</sup> The PDA provides that prohibited sex discrimination under Title VII includes pregnancy discrimination, but further states that pregnancy must always be treated the same as any other disability for all employment-related purposes.<sup>205</sup> Thus, the PDA confirms that Title VII's fundamental guarantee of equal opportunity extends to pregnancy discrimination, while at the same time it seems to require that pregnancy disability always be given equal treatment with other work disabilities.<sup>206</sup> In addition, the Supreme Court has recog-

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200. *See id.* at 1254.

201. *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 395 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986).

202. 42 U.S.C. § 2000e(k) (1982).

203. 429 U.S. 125 (1976).

204. *See id.* at 138-39 ("[G]ender-based discrimination does not result simply because an employer's disability-benefits plan is less than all inclusive. For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even-handed *inclusion* of risks.") (footnote omitted) (emphasis in original).

205. The PDA provides:

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

42 U.S.C. § 2000e(k) (1982) (emphasis in original).

206. Thus, to paraphrase Title VII, the PDA prohibits discrimination on the basis of sex, which includes discrimination on the basis of pregnancy, with respect to limitations or classifications that would result in the deprivation of employment opportunities. *See* 42 U.S.C. §§ 2000(k), 2000e-2(a) (1982). What is declared unlawful, therefore, is not only policies and practices explicitly using pregnancy as a basis for employment decisions, but also limitations or classifications denying employment opportunity because they fail to take pregnancy into account. This suggests that pregnancy cannot be used as justification to provide inferior terms and conditions of employment, *see supra* note 38, but also that the operation of neutral policies cannot have the effect of denying equal opportunity as the result of their treatment of pregnancy. *See infra* note 221.

The second clause of the PDA, however, states that pregnancy must always be treated the "same" as any other disability for all employment-related purposes. *See* 42 U.S.C.

nized that Congress prohibited the less favorable treatment of pregnancy when compared with other disabilities.<sup>207</sup> This has been interpreted by one court to mean that Title VII does not prohibit more favorable treatment of pregnancy if the result is to contribute to the statute's goal of equal employment opportunity.<sup>208</sup> The equal treatment required by the PDA should be measured in terms of employment opportunity, not identity of benefits.<sup>209</sup> Indeed, the court pointed out, by requiring the inclusion of pregnancy benefits in employer disability policies, Congress forced employers to spend more dollars on their female employees in order to assure equal coverage of disability risks.<sup>210</sup> Leave days can be analogized to disability benefit dollars; they simply equalize the risk of job loss from disability.<sup>211</sup>

### B. Critique of the Courts' Decisions

None of the lower courts' arguments provide a satisfactory rationale for upholding the maternity leave statutes.<sup>212</sup> The equal protection anal-

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§ 2000e(k) (1982). If this clause is interpreted as a limitation on the first clause, then pregnancy can never be taken into account in fashioning employment policies. It would therefore impose a substantial limitation on the definition of discrimination by requiring that all employment policies be "pregnancy-blind." See *infra* note 222. On the other hand, if this clause is an amplification of the first clause, it merely reinforces the prohibition against disparate treatment on the basis of pregnancy by requiring that at a minimum pregnant employees be treated the same as employees with other job disabilities. This would not preclude, then, a prohibition against policies (or the lack thereof) that fail to ensure that pregnancy does not operate to reduce equal employment opportunity. See *infra* note 221.

207. *Newport News Shipbuilding & Drydock Co. v. EEOC*, 462 U.S. 669, 684 (1983); *accord* *California Fed. Sav. & Loan Ass'n v. Gurer*, 758 F.2d 390, 395-96 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986). The Court of Appeals for the Ninth Circuit noted that the PDA did not require that states be blind to pregnancy; rather, it encouraged them to take pregnancy into account in fashioning policies to ensure equal employment opportunity. *Id.* The court pointed out that the PDA's inclusion of pregnancy within the definition of sex discrimination did not alter the substantive protection of Title VII, including its prohibition of policies with a disparate impact. See *id.* at 396.

Although recognizing a "tension between the PDA's first clause, which subjects pregnancy to the same types of discrimination analysis to which it subjects sex, and its second clause, which appears to demand pregnancy-neutral policies at all times," the court declined to resolve this tension against the state maternity leave statute. See *id.*

208. According to the court, the PDA "construct[s] a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986).

209. *Id.*

210. See *id.*

211. *Id.* "We see no principled reason to distinguish pregnancy disability days . . . from . . . pregnancy disability dollars." *Id.*

212. There are those who would argue that only the result matters—if it is good for women, as women define what they want, then the rationale is ultimately unimportant. See Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387, 400 (1984) ("The choice between equal treatment and special treatment is meaningful—if at all—only on a case-by-case basis."). From a practical perspective this may be true, but to the extent the legal system may be a vehicle for social change, it is both desirable and necessary to articulate the principles legitimizing equality goals. See Sherry, *Selective*

ysis is premised on a definition of sex discrimination that is simply unpersuasive and inadequate. It rests on the proposition that pregnancy classifications are not sex-based classifications, which defies biological reality and common sense. It is not my intention to restate the various criticisms of *Geduldig*, which have been thoroughly presented by numerous commentators.<sup>213</sup> In my view, what is most fundamental in that critique, however, is that *Geduldig* proceeds from a recognition of pregnancy as a sex-unique condition to the conclusion that because of this uniqueness, there can be no comparative analysis of the treatment of the sexes to determine the existence of discrimination. Therefore, according to the Court, no discrimination exists. This tautological reasoning seems to rest on an inability to conceptualize discrimination on the basis of sex differences.<sup>214</sup>

More importantly, however, *Geduldig* is simply irrelevant to the analysis of maternity leave statutes. *Geduldig* focused on the issue of whether the exclusion of pregnancy from an otherwise comprehensive disability statute constituted unlawful sex discrimination.<sup>215</sup> The issue raised by the maternity leave statutes, however, is whether the affirmative guarantee of a pregnancy-related benefit is permissible. In *Geduldig*, the Court had to determine whether a state could exclude pregnancy; with the maternity leave statutes, the courts have to determine whether a state may include only pregnancy. Thus, the *Geduldig* analysis is inappropriate for determining whether the guarantee of an affirmative benefit based on the goal of ensuring equal opportunity, such as that provided by the maternity leave statutes, is permissible.<sup>216</sup>

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*Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 Geo. L.J. 89, 98-102 (1984) (analysis of deconstructionists may demystify decision but provides no guidance to better results and is therefore fundamentally inconsistent with the notion of a legal system).

213. As one commentator has noted, criticizing *Geduldig* "has since become a cottage industry." Law II, *supra* note 74, at 983. For a list of the commentaries, see *id.* at 983 nn.107-09.

214. It also reflects a failure to analyze the concept of equality embedded in the equal protection clause. If the equal protection clause requires actual, meaningful equality between the sexes, then *Geduldig* provides no rationale for the exclusion of pregnancy from an otherwise comprehensive structure of disability benefits.

215. See *supra* note 184 and accompanying text.

216. The inapplicability of *Geduldig* to the issue raised by the maternity leave statutes is similar to the critical distinction between the nature of the issues raised in *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976) and *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979). In *Santa Fe Trail*, the Court held that Title VII's prohibition against race discrimination was intended to protect whites, as well as blacks and other minorities, from race discrimination. See *Santa Fe Trail*, 427 U.S. at 287. When the issue of whether affirmative action programs designed to benefit minorities which disadvantaged whites violated Title VII was raised in *Weber*, *Santa Fe Trail* appeared to dictate that such programs be declared unlawful. To the contrary, however, the Court recognized that the legal issue was simply not the same. Whether whites are included within the persons protected by the statute does not answer the question whether affirmative policies designed to correct historic discrimination constitute prohibited discrimination.

The courts' Title VII analysis is even more troubling, because there is no precedent under Title VII like *Geduldig* permitting avoidance of the sex differences issue. Rather, the necessity of defining sex discrimination, and deciding whether it should take into account real differences between the sexes, is dictated by the structure of Title VII discrimination theory.<sup>217</sup> Under traditional Title VII theory, the validity of the maternity

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217. The resolution of the issue of how sex discrimination is defined under Title VII may also determine whether the state statutes are preempted by ERISA, 29 U.S.C. §§ 1001-1461 (1982 & Supp. I 1983). The existence of any preemption issue depends on whether unpaid maternity leave, reinstatement and protection of job status are employee benefits governed by ERISA. ERISA regulates, *inter alia*, "employee welfare benefit plans," including plans, funds, or programs that provide disability benefits. See 29 U.S.C. § 1002(1) (1982). The term "benefit" is not expressly defined in the statute. See *id.* § 1002. When read in conjunction with the interpretative regulations accompanying the statute, however, what is meant is some monetary benefit, because the regulations define "benefits" as those listed under the statutory definition or included within § 302 of the Labor Management Reporting Act of 1947, all of which are monetary benefits. See 29 C.F.R. § 2510.3-1(a)(2) (1985); see also *Hibernia Bank v. International Bhd. of Teamsters*, 411 F. Supp. 478, 489 (N.D. Cal. 1976) ("The benefits to which a beneficiary must be entitled are, in general, 'fringe benefits' such as medical disability and vacation payments."). If ERISA only governs monetary employee benefits, then it would not cover unpaid maternity leave.

Furthermore, the regulations also indicate that many payroll practices are exempt from ERISA. See 29 C.F.R. § 2510.3-1(b) (1985). This includes payment of an employee's normal compensation out of the employer's general assets due to disability, see *id.* § 2510.3-1(b)(2), or non-disability leave, see *id.* § 2510.3-1(b)(3)(i)-(v). See, e.g., *California Hosp. Ass'n v. Henning*, 770 F.2d 856, 858, 862 (9th Cir. 1985) (upholding payroll practices exemption). Thus even if unpaid leave could in some fashion be construed as a payroll practice, it would be exempt under ERISA. Moreover, if an employer provided paid leave, it would be exempt if payment was made out of general assets.

Nevertheless, if the benefits provided under the maternity leave statutes were construed to fall within the scope of ERISA, they would not be preempted if either they fall within the category of state disability insurance laws, which are exempted from ERISA, 29 U.S.C. § 1003(b)(3) (1982); or they are consistent with federal law—in this case Title VII—that is unaffected by ERISA. *Id.* § 1144(d).

The key to whether the statutes would satisfy either of these exceptions is the Supreme Court's decision in *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983). According to *Shaw*, the disability insurance exemption is to be narrowly construed to save from preemption only those state laws requiring the establishment of a separately administered disability plan. See *Shaw*, 463 U.S. at 107. It therefore does not save particular benefits in plans otherwise subject to ERISA. *Id.* Whether the maternity leave statutes fit within this exemption depends on whether they are held to require the establishment of a separately administered disability plan. In other words, while the statutes clearly confer disability benefits on the basis of actual disability due to pregnancy, it is uncertain whether they require the requisite qualities of "separateness" or the establishment of a "plan." None of the statutes include a requirement that the leave provisions be administered separately from any other leave programs offered by the employer. Furthermore, the statutes do not require that the employer establish any particular structure or policy on maternity leave, raising the issue of whether the statutes establish any disability "plan." See *id.* Finally, the exemption may be construed to include only disability plans conferring monetary benefits rather than unpaid time and reinstatement rights, because of the statutory reference to disability insurance laws. See 29 U.S.C. § 1003(b)(3) (1982).

If the statutes fail to fit within the disability exemption, then they can survive preemption only if they are consistent with the enforcement of federal law. As the Court pointed out in *Shaw*, Title VII expressly preserves state discrimination laws as long as they do not conflict with Title VII. See *Shaw*, 463 U.S. at 101 (citing § 708 of Title VII, 42 U.S.C.

leave provisions depends on whether the statutes require disparate treatment<sup>218</sup> or have a disparate impact<sup>219</sup> on the basis of sex by mandating employment policies that solely benefit women.<sup>220</sup> If pregnancy is viewed as a disability unique to women, then men and women are not similarly situated with respect to the risks and employment disadvantages of work disabilities. Once this difference is recognized, conferring pregnancy benefits does not constitute disparate treatment because no discrimination is suffered by either sex. Similarly, such a policy adversely affects no one because of his or her sex; employees of both sexes are treated the same for all other disability purposes.

On the other hand, if real differences between the sexes cannot be taken into account, that is, if pregnancy disability must always be treated the same as other disabilities, then male and female employees would be

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§ 2000e-7 (1982)). The state law at issue in *Shaw* conflicted with Title VII by prohibiting discrimination on the basis of pregnancy at a time when Title VII permitted such discrimination. See *Shaw*, 463 U.S. at 88-89. The Court held that, under these circumstances, ERISA preempted state law. See *id.* 103-06.

Under the rationale of *Shaw*, the maternity leave statutes would not be preempted if they simply mandate what Title VII requires. If the prohibition against sex discrimination in Title VII prohibits employers from failing to provide a reasonable period of maternity leave and reinstatement rights, then the state statutes only parallel that prohibition and make it explicit. They are thus not preempted by ERISA. What *Shaw* does not make altogether clear is whether a state statute that does not conflict with Title VII but mandates more than required by that law, could survive ERISA preemption. In other words, if the benefits protected under the maternity leave statutes are permissible under Title VII but not required by it, can the state provisions survive ERISA preemption? Language in *Shaw* suggests a negative answer, although the question was not before the Court in that case. The Court characterized Title VII as "neutral" on all employment practices not prohibited by it, and found that the only federal interest in state law was simply to save it from preemption. See *id.* at 103 & n.24.

If the issue of ERISA preemption is reached, therefore, the resolution of that issue is dependent on how sex discrimination is defined under Title VII. If the statutes are deemed in conflict with that definition, then they clearly are preempted by ERISA. See 29 U.S.C. § 1144(d) (1982). If, on the other hand, the definition of discrimination mandates the benefits guaranteed by the maternity leave statutes, then the statutes are not preempted. See *id.* If Title VII does not require such benefits, but permits the states to go beyond its terms and require these benefits, it is uncertain whether the statutes would fall under the preemption provisions of ERISA.

218. Under disparate treatment analysis, the plaintiff must demonstrate, by direct or circumstantial evidence, that the employer's conduct resulting in adverse employment consequences for the plaintiff, was motivated by impermissible considerations of race, sex, national origin or religion. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-60 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

219. Under disparate impact analysis, an employment policy that has a disproportionate impact on the basis of race, sex, religion or national origin and that cannot be justified on the grounds of business necessity constitutes prohibited discrimination. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

220. It should also be pointed out that the statutes arguably disadvantage non-pregnant disabled female employees. Whether this makes a difference depends on how you frame the discrimination issue. If the issue is coverage for disability risks, then non-pregnant women are disadvantaged to the same extent as are men. On the other hand, if the issue is availability of benefits, women as a class are given greater protection by the coverage of one sex-specific disability, while men as a class are given no benefits or protection for any sex-specific disability.

similarly situated with respect to disability. Under either disparate treatment or disparate impact analysis, the preferential treatment of sex-linked disability would constitute unlawful discrimination.<sup>221</sup>

Under Title VII analysis, therefore, the question of the treatment of sex differences cannot be avoided.<sup>222</sup> Yet this is precisely what the courts have done. Suggesting that the validity of the statutes can be resolved by the voluntary extension of leave benefits to all employees ducks the central question of whether the statutes are unlawful. This analysis implies that a conflict exists between the state statutes and Title VII. If a conflict

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221. See, e.g., *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (inadequate leave has disparate impact on women); *In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845, 849 (8th Cir. 1979) (neutral policy of failing to guarantee reinstatement from leaves of absence, including pregnancy leave, deprives female employees of employment opportunities); *Mitchell v. Board of Trustees*, 599 F.2d 582, 586-87 (4th Cir.) (neutral policy of refusing to renew contract if employee cannot commit to uninterrupted year of service burdens females who must report foreseeable disabilities), *cert. denied*, 444 U.S. 965 (1979); *Zichy v. City of Philadelphia*, 590 F.2d 503, 507-08 (3d Cir. 1979) (claim that maternity policy limiting leave time and resulting in loss of seniority and benefits had disparate impact compared to other sick leaves); *Eberts v. Westinghouse Elec. Corp.*, 581 F.2d 357, 358-61 (3d Cir. 1978) (cause of action exists under Title VII where seniority and reinstatement policies regarding maternity leave impose substantial burdens on women); *Thompson v. Board of Educ.*, 526 F. Supp. 1035, 1038, 1040 (W.D. Mich. 1981) (maternity leave policies, including required notice of pregnancy, reinstatement limitations, and length of service requirements, constituted disparate treatment and had disparate impact), *rev'd on other grounds*, 709 F.2d 1200 (6th Cir. 1983); *Communication Workers of Am. v. Illinois Bell Tel. Co.*, 509 F. Supp. 6, 10 (N.D. Ill. 1980) (seniority and reinstatement policies concerning maternity leave burden employment opportunities).

222. In other words, if benefits are granted for pregnancy, then they must be given to all other comparable work disabilities. Some courts have upheld such a "pregnancy blind" approach. See, e.g., *Langley v. State Farm Fire & Cas. Co.*, 644 F.2d 1124, 1129 (5th Cir. 1981) (requiring employer to permit employee to use sick leave or vacation leave to extend maternity leave would allow award of greater economic benefit to women, a result not mandated by Title VII); *Eblin v. Whirlpool Corp.*, 36 Fair. Empl. Prac. Cas. (BNA) 1632, 1635 (N.D. Ohio 1985) (absenteeism policy counting pregnancy absences the same as other disability absences does not violate Title VII); *EEOC v. Southwestern Elec. Power Co.*, 591 F. Supp. 1128, 1130-31, 1135 (W.D. Ark. 1984) (maternity leave policy treating pregnancy the same as other disabilities not discriminatory, despite discretion given to managers to extend leave and to disregard employee's physician's recommendation for additional leave); *Mason v. Continental Ins. Co.*, 32 Fair Empl. Prac. Cas. (BNA) 578, 581 (N.D. Ala. 1983) (discharge of employee for taking leave beyond maximum permitted by employer is not discriminatory; employer not required to treat pregnancy more favorably than other disabilities).

It appears that the argument against the maternity leave statute rests on disparate treatment analysis, whereas the defense of the statutes is justified by disparate impact analysis. On the one hand, this suggests that these two theories of discrimination may be in fundamental conflict. On the other hand, the conflict is ultimately based on how one defines sex discrimination. In other words, a consistent definition of sex discrimination removes the conflict. If the definition of sex discrimination requires a sex-blind or equal treatment approach, then the maternity leave statutes fail under either the disparate treatment or disparate impact analysis. If the definition of sex discrimination takes account of sex differences, and prohibits policies that disadvantage one sex based on such differences, while requiring equalization of differences where they affect employment opportunity, then the maternity leave statutes could be upheld under either disparate treatment or disparate impact analysis.

exists, employers cannot be required to resolve it; rather, employers are simply not bound by the conflicting state obligation.<sup>223</sup> Similarly, the argument that the statutes are valid because the absence of a leave policy would have a disparate impact on women<sup>224</sup> fails to address the question of whether an affirmative statutory requirement is a permissible means to remedy an arguable violation of Title VII.<sup>225</sup> The analysis of employer leave policies is simply not dispositive of the legal issue raised by the state statutes. The conclusion that Title VII requires employers to provide adequate leave does not answer the question of whether the state can impose such a requirement by gender-specific legislation.

Alternatively, the attempt to read the PDA as permitting greater benefits for pregnancy than for other disabilities rests on an unconvincing attempt to harmonize a perceived conflict between the concepts of equal treatment and equal opportunity in the language of the PDA. The resolution of this conflict is premised on the conclusion that since the effect of the PDA was to require employers to pay more to cover female employees in order to provide disability coverage equivalent to that of men, the statute permits favorable treatment of pregnancy as long as it is designed to advance the goal of equal employment opportunity. This argument fails to recognize the distinction between requiring inclusion of pregnancy within an existing benefit structure and requiring the establishment of a benefit structure that only includes pregnancy. Moreover, it suggests no clear limit on the conferral of pregnancy benefits. Even if there is no ceiling imposed by the PDA on pregnancy benefits, the statute nevertheless establishes some parameters on the type of benefit structure

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223. This was the conclusion reached by the vast majority of courts when the women's protective labor statutes, see *infra* note 252, were challenged under Title VII. See, e.g., *Homemakers, Inc. v. Division of Indus. Welfare*, 509 F.2d 20, 21, 23 (9th Cir. 1974) (invalidating under Title VII California law providing premium overtime pay for women), *cert. denied*, 423 U.S. 1063 (1976); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1225-27 (9th Cir. 1971) (invalidating under Title VII employer policy required by California law limiting length of female workday and kinds of work); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 234, 236 (5th Cir. 1969) (invalidating under Title VII employer policy restricting weights women could lift). But see *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081, 1084 (8th Cir. 1972) (upholding Arkansas law mandating employers to pay female workers time-and-a-half for overtime work; daily overtime could be paid to both male and female employees). For an argument in favor of extending benefits to men in order to save an otherwise invalid statute, see L. Kanowitz, *supra* note 79, at 50.

224. See *supra* notes 196-200 and accompanying text.

225. The Court's decisions regarding affirmative action, see *United Steelworkers v. Weber*, 443 U.S. 193, 206-08 (1979) (upholding affirmative action plan designed to compensate for past racial discrimination), are not dispositive, because the purpose of the maternity leave statutes is not to compensate for past, historical pregnancy discrimination, but rather to deal with present and continuing burdens imposed by the existing workplace structure. See *supra* note 216. The analysis may be similar, however, in that in both instances the fundamental issue raised is the concept of equality. See generally R. Dworkin, *Taking Rights Seriously* 227, 239 (1976) (arguing that the right to equality under the equal protection clause encompasses a right to equal treatment and a right to treatment as an equal, and that the constitutionality of a preferred admissions policy on the basis of race "is justified if it serves a proper policy that respects the right of all members of the community to be treated as equals.").



that can be required of employers.<sup>226</sup>

Furthermore, the above analysis rests almost exclusively on the facial language of the statute, without close consideration of the underlying legislative history. The legislative history of the PDA<sup>227</sup> does not support a clear resolution of this tension in the statutory language.<sup>228</sup> Rather, it reflects the same dichotomy between the recognition of pregnancy as a unique condition that historically and currently has operated to severely limit women's employment opportunities, while at the same time endeavoring to treat pregnancy no differently from any other work disability.<sup>229</sup>

The "same treatment" concern<sup>230</sup> expressed so strongly throughout the legislative history is clearly the result of the peculiar circumstances under which the PDA was enacted. A major concern of Congress in enacting the PDA was to reverse the specific result in *Gilbert*<sup>231</sup> in order to require the inclusion of pregnancy in disability and health insurance

226. For instance, the state could not require employers to impose a mandatory leave requirement. See *supra* note 44.

227. H.R. Rep. No. 948, 95th Cong., 2d Sess. 1, 1-18, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4749-65; S. Rep. No. 331, 95th Cong., 1st Sess. 1-17 (1977) [hereinafter cited as Senate Report]; 124 Cong. Rec. 21,434-21,443 (1978) (House debate); 123 Cong. Rec. 29,384-29,389 (1977) (Senate debate).

228. See *infra* note 235-44 and accompanying text. Commentators have analyzed the contradictory language of the statute. See, e.g., Comment, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 Colum. L. Rev. 690, 707, 721 (1983) (the PDA supports a "pluralist" model of equality, one that recognizes and compensates for the differences between the sexes, over an assimilationist "sex-blind" approach); Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 934-35 (1985) (the PDA incorporates disparate treatment and disparate impact analysis; thus it is not limited to a "parity" standard). For an analysis of the difficulties of divining congressional intent, see R. Dworkin, *A Matter of Principle* 314-31 (1985).

229. In introducing the bill during the Senate debates, Senator Williams, one of the sponsors of the bill stated:

[M]ost policies and practices of discrimination against women in the workforce result from attitudes about pregnancy and the role of women who become pregnant. . . .

Because of their capacity to become pregnant, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement granted to other workers. . . .

. . . .

The central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work.

The key to compliance in every case will be equality of treatment.

123 Cong. Rec. 29,385 (1977).

230. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4751 ("[The bill] specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work."); *id.* at 4, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4752 ("The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work."); see also *id.* at 5, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4753 ("this bill would require that women disabled due to pregnancy, childbirth or other related medical conditions be provided the same [medical] benefits as those provided other disabled workers"); Senate Report, *supra* note 227, at 4-5 (same).

231. See *supra* notes 203-04, *infra* notes 287-99 and accompanying text.

policies.<sup>232</sup> Thus, not surprisingly, both the House and Senate reports emphasize that the statute will guarantee the "same" or "equal" treatment of pregnancy as other disabilities by requiring that pregnancy be included within the covered risks of a disability plan.<sup>233</sup> To the extent that Congress considered other terms and conditions of employment, including leave, it is also clear that the purpose of the statute was to put pregnancy on the same footing as other work disabilities.<sup>234</sup>

There are indications in the legislative history, however, that the requirement of "same" treatment does not mean that employers are not to take pregnancy into account in fashioning their policies, nor are they prohibited from providing additional benefits for pregnancy to ensure equal employment opportunity.<sup>235</sup> First, Congress clearly did not intend to create a special definition of pregnancy discrimination as a subspecies of sex discrimination.<sup>236</sup> Thus, the substantive law of Title VII, including both disparate treatment and disparate impact analyses, applies to sex discrimination claims involving pregnancy.<sup>237</sup> Second, the legislative history clearly reflects the uniqueness of pregnancy as it impacts on equal employment opportunities for women. Congress was aware that the employment structure imposes additional burdens exclusively on women solely because of pregnancy.<sup>238</sup> This suggests that Congress did not in-

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232. See H.R. Rep. No. 948, 95th Cong., 2d Sess. at 2-5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4749-53; Senate Report, *supra* note 227, at 2-5. The overwhelming concern with coverage of pregnancy in disability plans is also apparent from the testimony presented at the hearings on the bill, which focused almost exclusively on the importance of such benefits to women workers and their cost to employers. *House Hearings Part I*, *supra* note 24, at 174-261; *House Hearings Part II*, *supra* note 24, at 3-71; *Senate Hearings*, *supra* note 22 at 7-8.

233. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 4-5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4752-53; Senate Report, *supra* note 227, at 4-5.

234. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4754; Senate Report, *supra* note 227, at 6.

235. See *infra* notes 236-39 and accompanying text.

236. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4753 ("Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute."); Senate Report, *supra* note 227, at 3-4 ("the bill defines sex discrimination, as proscribed in the existing statute, to include . . . physiological occurrences peculiar to women; it does not change the application of Title VII to sex discrimination in any other way").

237. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 2-3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4749-51. Although Congress expected that in most cases the use of a pregnancy classification would be *per se* discriminatory as disparate treatment, it is clear that disparate impact analysis was not foreclosed. See *id.* at 3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4751; Senate Report, *supra* note 227, at 3-4.

238. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4751 ("the assumption that women will become pregnan[t] and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs"); see also *id.* at 6-7, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4754-55 ("[u]ntil a woman passes the child-bearing age, she is viewed by employers as potentially pregnant"); Senate Report, *supra* note 227, at 3 (same); 124 Cong. Rec. 21,435 (1977) (remarks of Rep. Hawkins) ("Because many of the disadvantages imposed on women are

tend to prohibit pregnancy-conscious policies designed to ensure equal employment opportunity.<sup>239</sup>

Finally, and perhaps most significantly, the issue of whether states could affirmatively require pregnancy-related benefits was simply not discussed during enactment of the PDA because the thrust of the legislation focused mainly on the disability insurance exclusion issue.<sup>240</sup> Congress'

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predicated upon their capacity to become pregnant, genuine equality in the American labor force is no more than an illusion . . . ."); 123 Cong. Rec. 29,388 (1977) (remarks of Sen. Kennedy) ("Many . . . fringe benefit plans follow a discriminatory pattern of providing for types of . . . nonessential surgery such as vasectomies, but not pregnancies"); *id.* at 29,387 (remarks of Sen. Javits) ("Where other employees who face temporary periods of disability do not have to face the same loss, it is especially important that we not ask a potential mother to undergo severe disadvantages in order to bring another life into the world."); *id.* at 29,385 (remarks of Sen. Williams) ("Because of their capacity to become pregnant, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement granted to other workers.").

239. See Senate Report, *supra* note 227, at 3. Most notably, Congress included in the PDA the provision the § 703(h) of Title VII, the Bennett Amendment, would not be applicable to limit the effect of the PDA, 42 U.S.C. § 2000e(k) (1982). See *supra* note 205.

The Bennett Amendment provides that if a practice is authorized by the Equal Pay Act, 29 U.S.C. § 206(d) (1982), that is, if it is within one of the four enumerated exceptions to the Equal Pay Act, it is not unlawful under Title VII. 42 U.S.C. § 2000e-2(h) (1982). The provision in the PDA made it clear that cost-based equality of benefits was not what Congress intended to require under the PDA. See Senate Report, *supra* note 227, at 7.

Another indication that Congress did not intend "same" treatment to mean identity of benefits is the language in the committee reports and in the floor debates to the effect that the PDA was designed to guarantee *equal* treatment as well as to ensure equal employment opportunity. See Senate Report, *supra* note 27, at 4 (same); 123 Cong. Rec. 29,387 (1977) (remarks of Sen. Javits) ("The bill requires equal treatment when disability due to pregnancy is compared to other disabling conditions. . . . It definitely does not require a particular fringe benefit program . . . ."); *id.* at 29,645 (remarks of Sen. Stafford) ("The touchstone of compliance with S. 995 is equality of treatment . . . ."); H.R. Rep. No. 948, 95 Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4753 ("This bill would prevent employers from treating pregnancy, childbirth and related medical conditions in a manner different from their treatment of other disabilities.").

240. It is clear from the legislative history that Congress was well aware of state legislation concerning pregnancy discrimination. Although no specific mention is made of state maternity leave statutes, both committee reports refer to state statutes specifically proscribing pregnancy discrimination and state court decisions construing state fair employment laws as including pregnancy within the definition of sex discrimination. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 10-11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4758-59; Senate Report, *supra* note 227, at 3, 10.

The congressional committees were also aware of state disability statutes covering pregnancy. See H.R. Rep. No. 948, 95 Cong., 2d Sess. 11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4759; Senate Report, *supra* note 227, at 11; *House Hearing Part I*, *supra* note 24, at 202-03 (statement of Ruth Weyland, Associate Gen. Counsel, Int'l Union of Electrical Radio and Machine Workers). Congress' interest in the state disability statutes was partially based on the information the state statutes could provide on the question of the cost of including pregnancy within temporary disability coverage. In addition, in the Senate debate on the PDA, the issue was raised whether these state statutes would be discriminatory under the PDA if they imposed a limitation on the period during which pregnancy benefits would be paid. See 123 Cong. Rec. 29,643 (1977). At the time the PDA was being considered, only Hawaii imposed no special limitations on the payment of disability benefits because of pregnancy; the other four states with disability

reaffirmance that the substantive definition of sex discrimination applies to pregnancy discrimination and its recognition of the unique nature of pregnancy discrimination weigh in favor of permitting affirmative state

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statutes imposed time limits or maximum benefit levels. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4759. See *supra* note 116 and accompanying text. The Senate colloquy concerning this issue focused on the New Jersey statute, which at the time limited benefits for pregnancy disability to four weeks before and four weeks after childbirth.

Mr. HATCH. Do the managers and sponsors of the bill intend S. 995 to be preemptive of State laws so that no employer shall be required to take any action with regard to any pregnancy related disability benefit, or to pay any such benefit, which shall exceed the requirements of this act, by reason of any State or local law or ordinance or by any regulation or order of any Federal, State or local department or agency?

To put it in a somewhat different way, if a State law defines sex discrimination to include discrimination against pregnant women but the law contains a cap on the length of disability benefits, would that State law supersede this law so that it would be enforceable? . . .

Mr. WILLIAMS. I suggest to the Senator from Utah that title VII does not preempt State laws which would not require violating title VII. This is made clear by existing law. Section 708 of title VII, as well as section 706(c), expressly provides that State laws which protect employees from discrimination shall remain in effect unless they operate to permit or require discrimination. The question of a State law which provides or permits a cap on periods of disability—is that the question being raised by the Senator from Utah?

Mr. HATCH. Yes. I use that as a specific example.

Mr. WILLIAMS. I would think that here, again, the title VII test would apply and it would be a question if whether there was discrimination. Within the State law, if all disabilities were classified in terms of time, I would say that would meet the test of nondiscrimination. I would think if a State law did select, and it were found through all the tests on discrimination that the classification and selection were discriminatory, then the State law that discriminated would not be permitted to stand on a test.

Mr. HATCH. If it is nondiscriminatory, it should take preemption over the Federal law in this matter?

Mr. WILLIAMS. That would be my interpretation of the law as it is. Whether the Supreme Court would agree, we never know. That situation has been tested in law and that is the conclusion we draw.

Mr. HATCH. So far as our legislative history here is concerned, that is the correct senatorial interpretation. What about conflicts between the State and Federal law? Would the State law preempt the Federal laws except in the matter where the Supreme Court or the Federal law states there is discrimination?

Mr. WILLIAMS. If there were clear conflicts on this issue and the States attempted to permit what this legislation in an amendment of the Civil Rights Act would prohibit, obviously the Federal law would prevail . . .

I would like to offer an example of a clear conflict. We define discrimination in our terms in this amendment, pregnancy and related conditions being sex discrimination. If the negative were included in a State law, that would be in absolute conflict with the Federal law and Federal law would prevail.

Mr. HATCH. Again where we have known discrimination?

Mr. WILLIAMS. What I am stating is the most stark conflict where it was positively set at the State level that this particular situation, pregnancy, is not

action.<sup>241</sup> Nevertheless, the legislative history is replete with statements that the PDA would not require employers to adopt particular policies or practices, but merely mandates non-discriminatory treatment under existing policies.<sup>242</sup> Such statements of congressional intent might seem to present an obstacle to requiring employment policies that compensate for the unique nature of pregnancy disability, and suggest that an employer would not violate Title VII by maintaining no disability, sick leave or health insurance policies. On the other hand, this may only mean that employers may be required to provide unpaid maternity leave, while not having to establish a comprehensive paid temporary disability plan that includes pregnancy. This would be the logical consequence of express congressional intent that the PDA is intended to proscribe policies, which would include a no leave policy, that have an adverse impact on women's employment opportunities.<sup>243</sup>

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discrimination. In the same context, we say it is discrimination and we would prevail at the Federal level.

Mr. HATCH. But where there is in effect, no discrimination, then the State law would prevail?

Mr. WILLIAMS. That is correct.

Mr. HATCH. And it would preempt the Federal law?

Mr. WILLIAMS. In all of the tests of discrimination, there clearly is an opportunity for the State to act.

123 Cong. Rec. 29,643 (1977).

Finally, apart from the disability benefits issue and the cost of such benefits, the other key focus of the debate concerning passage of the PDA was the addition of an anti-abortion amendment to the bill. See 124 Cong. Rec. 21,440-21,442 (1978) (House debate); 123 Cong. Rec. 29,656-12,660 (1977) (Senate debate).

241. See *supra* notes 236-39 and accompanying text.

242. See, e.g., H.R. Rep. No. 948, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4752 ("[the bill] in no way requires the institution of any new programs where none currently exist"); Senate Report, *supra* note 227, at 4 ("the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave furnishing medical and hospital benefits, providing disability benefits, or any other matter"); 123 Cong. Rec. 29,388 (1977) (remarks of Sen. Kennedy) ("This amendment does not require all employers to provide disability insurance plans; it merely requires that employers who have disability plans for their employees treat pregnancy-related disabilities in the same fashion that all other temporary disabilities are treated with respect to benefits and leave policies.").

This position was also expressed with respect to leave, seniority rights and reinstatement, see H.R. Rep. No. 948, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4752; Senate Report, *supra* note 227, at 4.

243. See Senate Report, *supra* note 227, at 4-5. In both committee reports, in the sections dealing with policies other than disability and health insurance, there is some indication that Congress intended the PDA to proscribe policies with a disproportionate impact on women:

#### *Leaves and Other Policies*

In addition to its impact upon fringe benefit programs, this legislation proscribes various other employment policies which adversely affect pregnant women. For example, under this bill, employers will not longer be permitted to force women who become pregnant to stop working regardless of their ability to continue; employers will not be permitted to set arbitrary time limits within which disabled women must return to work, or before which they may not re-

At a minimum, the legislative history is ambiguous, even contradictory, concerning the treatment of pregnancy and the definition of pregnancy discrimination. There is admittedly much in the legislative history that supports a "pregnancy-blind" definition of discrimination. Nevertheless, it ultimately is of great significance that Congress signaled its clear intention that the treatment of pregnancy was to be subsumed under a general sex discrimination standard.<sup>244</sup> In essence, this indicates deference to judicial construction of what constitutes sex discrimination within the confines of the policy concerns that lie at the heart of Title VII.

## V. THE SUPREME COURT AND SEX DIFFERENCES

The fundamental inadequacy of the lower courts' analysis of the maternity leave statutes is their failure to determine whether the constitutional or statutory definition of sex discrimination permits taking sex differences into account to ensure sex equality. The issue is unavoidable, however, and should be addressed by the Supreme Court in deciding the validity of the California maternity leave statute. If the Court squarely confronts this question there is ample authority for taking sex differences into account under the Court's prior sex discrimination decisions.<sup>245</sup> However, those decisions provide no definitive standard for determining what sex differences may be considered, or what means or objectives may permissibly incorporate sex differences.<sup>246</sup> The Court's existing doctrine

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turn to work, if no such limits exist for other disabled employees; they will have to credit women with accumulated seniority after a pregnancy disability leave on the same terms applicable to other persons absent from work for other disabilities; and they will not be able to refuse to hire or promote women simply because they are pregnant.

The proscription of such policies is perhaps the most important effect of this bill. For, as the history of sex discrimination shows, such policies have long-term effects upon the careers of women and account in large part for the fact women remain today primarily in low-paying, dead-end jobs.

Senate Report, *supra* note 227, at 6; see also H.R. Rep. No. 948, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4754 ("Other employment policies which adversely affect pregnant workers are also covered").

Both reports indicate that Congress did not intend to require institution of paid benefits if an employer did not have a disability or sick leave policy. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4753; Senate Report, *supra* note 227, at 4. Furthermore, if an employer had a disability plan, only payment for actual disability due to pregnancy is required. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4753; Senate Report, *supra* note 227, at 4. The reports do not, however, specifically address the issue of unpaid leave, continuation of job seniority, or reinstatement rights, except in an ambiguous section noted above. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4753; Senate Report, *supra* note 227, at 4.

244. See *supra* text accompanying note 237.

245. See *infra* notes 247-57, 263-69, and 286-310.

246. See *infra* notes 258-61, 272-85, and 312-15. For criticism of the Court's differences approach, see *supra* notes 75, 81; L. Tribe, *Constitutional Choices* 238-45 (1985); Freedman, *supra* note 7, at 943-61; Powers, *The Shifting Parameters of Affirmative Action: Pragmatic Paternalism in Sex-Based Employment Discrimination Cases*, 26 Wayne

nevertheless must be the starting point for analyzing the validity of the maternity leave statutes.

### A. *Constitutional Analysis of Sex Differences*

There is no question that the Court's constitutional opinions indicate that gender differences may be taken into account to assess the validity of sex-based legislative classifications. The Court has never held that the equal protection clause requires legislation to be "sex-blind."<sup>247</sup> Rather, the Court has indicated that legislation may be "sex-conscious,"<sup>248</sup> but has struggled to define both the sex differences that may be used as the justification for sex-based classifications,<sup>249</sup> and the level of scrutiny to be applied to these classifications.<sup>250</sup>

The Court's concept of differences has only slowly evolved from a definition based on paternalistic, culturally-based stereotypes.<sup>251</sup> At the turn of the century the Court upheld state women's protective labor laws<sup>252</sup>

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L. Rev. 1281, 1285-1301 (1980) [hereinafter cited as Powers II]; Scales, *supra* note 74, at 377-401; Taub & Schneider, *supra* note 38, at 125-35.

247. *Cf.* Regents of the Univ. v. Bakke, 438 U.S. 265, 355-56 (1978) (opinion of Brennan, J., joined by White, Marshall, and Blackmun, J.J.) (the Court has never adopted the view that the Constitution is color-blind).

248. *See* Kahn v. Shevin, 416 U.S. 351, 355 (1974); Reed v. Reed, 404 U.S. 71, 75-76 (1971).

249. *See infra* notes 251-61 and accompanying text.

250. Although the Court appeared to be moving toward adoption of a strict scrutiny standard for sex based classification, *see* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion of Brennan, J.), it ultimately adopted a different test, *see* Craig v. Boren, 429 U.S. 190, 199 (1976). It is interesting to note that despite Justice Brennan's statement in *Frontiero* that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny," *Frontiero*, 411 U.S. at 688 (plurality opinion of Brennan, J.), he authored the Court's opinion in *Craig* that adopted a less stringent, intermediate level of scrutiny. *See* Craig, 429 U.S. at 199. *See infra* note 263 and accompanying text.

251. *See, e.g.,* Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life. . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.").

252. For a detailed account of the evolution of protective labor laws exclusively applied to women, *see* J. Baer, *supra* note 39. As Baer notes, these laws were originally passed because women worked under worse working conditions than men. *See id.* at 15. The remedy for this situation provided by these laws was to require employers to observe minimum working conditions for women. *Id.* at 26. While this was intended to curb the abuses of employers, it also prevented women from competing equally with men, who were not subject to such limitations. *Id.* at 25-26. This was exacerbated by technological and social changes that removed many of the abuses of the workplace while leaving intact the limitations on the employment of women. *See id.* at 10-12.

The sexual stereotypes which underlay protective women's labor legislation were not, of course, confined to that area of the law. For two excellent surveys of sex discrimination by law and judicial construction of these laws, *see* Cavanaugh, 'A Little Dearer Than His Horse': Legal Stereotypes and the Feminine Personality, 6 Harv. C.R.-C.L. L. Rev. 260 (1971) and Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675 (1971).

For a description and list of these laws *see* B. Brown, A. Freedman, H. Katz & A.

on the basis that women merited such special protection because of their unique childbearing and child-rearing roles, and their "natural dependency."<sup>253</sup> Thus, paternalistic notions about the effects of pregnancy and patriarchal assumptions about the social role of mothers and the generally dependent nature of women were the basis for recognizing "real" differences between the sexes.<sup>254</sup>

This concept of difference was used to justify sex-based legislation<sup>255</sup> under an extremely deferential standard of review<sup>256</sup> until the early

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Price, *Women's Rights and the Law: The Impact of the ERA on State Laws* 208-19 (1977)

253. The landmark case was *Muller v. Oregon*, 208 U.S. 412 (1908), in which the Court upheld Oregon's statute prohibiting the employment of women for more than ten hours per day in any mechanical establishment, factory or laundry. *See id.* at 416-17, 423. The statute was challenged by an employer who was prosecuted for violating the statute, on the basis that this limitation on women's hours violated the employer's freedom of contract. *See id.* at 417.

The statute was defended by labor reform groups, led by the National Consumer's League, who engaged Louis Brandeis to argue the case on behalf of the state of Oregon. *See J. Baer, supra* note 39, at 57. Seeking to distinguish this case from *Lochner v. New York*, 198 U.S. 45 (1905), where the Court had struck down a maximum hours law on freedom of contract grounds, *see id.* at 53, Brandeis decided to defend the statute on the basis that empirical data supported the conclusion that there are sexual differences that justify differential treatment of women. *See J. Baer, supra* note 39, at 57. This first "Brandeis brief" therefore largely defended the statute based on this "factual" data rather than legal precedent. *Id.* The data Brandeis presented was primarily anecdotal evidence of factory conditions and their relationship to employees' health. *Id.* at 59. The data did not support the conclusion that women were uniquely susceptible to the deleterious effects of long hours. *Id.* at 60. The Court's opinion largely ignored this justification for the statute and instead focused on a two-part rationale for upholding the statute; first, the physical differences between men and women, particularly women's "motherhood" role, *see Muller*, 208 U.S. at 421, and second, women's natural dependency, which justified, indeed necessitated, legislative action to protect women, *see id.* at 412-22. The Court remarked:

[T]here is that in [a woman's] disposition and habits of life which will operate against a full assertion of [her] rights . . . .

Differentiated by these matters from the other sex, she is properly placed in a class by herself, and . . . she is so constituted that she will rest upon and look to [men] for protection . . . [H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.

*Id.* at 422.

254. *See Muller*, 208 U.S. at 421-22. *See generally* Powers II, *supra* note 246, at 1290 ("In developmental terms, women were perceived as being at some static point between that status of child and adult, defined as maleness, and thus in need of a paternal figure.").

255. *See, e.g., Bosley v. McLaughlin*, 236 U.S. 385, 388-89, 396 (1915) (statute limiting the number of hours a woman could work in a day and in a week); *Miller v. Wilson*, 236 U.S. 373, 379, 384 (1915) (same); *Riley v. Massachusetts*, 232 U.S. 671, 678, 680 (1914) (statute limiting the number of hours women could work in factories).

256. *See Bosley v. McLaughlin*, 236 U.S. 385, 394-96 (1915); *Miller v. Wilson*, 236 U.S. 373, 380-81 (1915); *Riley v. Massachusetts*, 232 U.S. 671, 678-80 (1914). *Muller v. Oregon*, 208 U.S. 412 (1908), was an exception to the Court's general view in this period, epitomized by *Lochner v. New York*, 198 U.S. 57 (1905), that economic regulation was an impermissible limitation on freedom of contract. *Compare Muller*, 208 U.S. at 421-23



1970's, when the Court began to reexamine its concept of sex differences and rejected differences defined by cultural and social stereotypes.<sup>257</sup> Despite this rejection of sex stereotypes as the basis for recognizing sex differences, however, the Court continues to be bedeviled by its inability to separate real and stereotypical sex differences. As one commentator has noted, the Court has failed to separate average, often culturally-defined, differences from definitional, physically-defined, differences.<sup>258</sup> Of equal significance is the fact that in *Geduldig*, the Court refused to recognize pregnancy—the quintessential definitional difference between the sexes—

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(state has right under police power to regulate working hours of women) with *Lochner*, 198 U.S. at 57 ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."). The Court's position changed, however, with its decision in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), where the Court held that the right to freedom of contract was subject to reasonable restraint, *see id.* at 391-93, and thereafter adopted a deferential stance toward economic regulation. *See, e.g.,* *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) ("[We] refuse to sit as a 'superlegislature to weigh the wisdom of legislation.' . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours.") (quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)) (footnotes omitted); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 485-86 (1955) (upholding Oklahoma statute restricting the ability of opticians to fit or duplicate eyeglasses); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535-36 (1949) (upholding state "right-to-work" law). Although there was no longer any need to utilize the sex differences rationale to uphold protective legislation, this rationale nevertheless survived and was the fundamental test applied in sex discrimination cases until the 1970's. *See, e.g.,* *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961) (upholding state statute allowing women to decline to serve on a jury because of a woman's role as the center of the home and family life); *Goesaert v. Cleary*, 355 U.S. 464, 466 (1948) (upholding state statute preventing all women, except wives or daughters of tavern owners, from selling liquor because of the potential moral and social problems that could arise). *See generally* Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 238-42 (1965) (discussing the need to discard certain assumptions about women in order to eliminate sex discrimination).

257. *See, e.g.,* *Orr v. Orr*, 440 U.S. 268, 278, 283 (1979) (statute imposing alimony obligations only on husbands found unconstitutional); *Craig v. Boren*, 429 U.S. 190, 192, 204 (1976) (statute prohibiting sale of low alcohol beer to males under the age of 21 and to females under the age of 18 discriminates against males 18-20 years old); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (statute establishing an older age for majority for males than females in the context of support obligations found unconstitutional); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-38, 653 (1975) (statute providing benefits to widow and minor children based on deceased husband's earnings while conferring benefits only on minor children and not widower based on deceased wife's earnings found to reinforce traditional stereotypes); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (statute requiring servicewoman to show husband actually dependent on her for over half of his support as prerequisite to claim him as a dependent, while serviceman permitted automatically to claim his wife as dependent found discriminatory against women); *Reed v. Reed*, 404 U.S. 71, 73, 76 (1971) (finding unconstitutional statute giving preference to men over women when man and woman similarly situated apply to serve as administrator of estate).

258. Freedman, *supra* note 7, at 922-28; *see also* Powers II, *supra* note 246, at 1290-1308 (the Court has rejected romantic paternalism, but appears to have adopted "pragmatic" paternalism in its stead). For a critique of Freedman's analysis of the Court's decisions, *see* Maltz, *Sex Discrimination in the Supreme Court—A Comment on Sex Equality, Sex Differences, and the Supreme Court*, 1985 Duke L.J. 177.

as a sex difference.<sup>259</sup> Thus, for example, the Court might view the greater childcare responsibilities of women, which can be statistically established as an "average" characteristic,<sup>260</sup> as a "real" difference between the sexes, while not viewing women's unique physical ability to bear children as a sex difference. Apart from this illogical approach to pregnancy, the Court's difficulty in defining the nature of sex differences may be related to what at best can be charitably seen as a subconscious incorporation of prevailing social stereotypes within an unclear definition of sex differences. In addition, the Court's approach highlights an underlying question of when, if ever, sexual roles dictated by social stereotypes may legitimately be the basis of sex-based classification.<sup>261</sup>

Although this latter question has been considered by the Court in its examination of what are legitimate legislative goals and legitimate means to achieve those goals where legislation is based on sex classifications,<sup>262</sup> the issue has not been addressed in the context of what constitutes real sex differences. Under the Court's current test of "heightened scrutiny" applied in sex discrimination cases, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>263</sup> The Court has sanctioned benign discrimination under this test by recognizing as an important government objective the "reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women."<sup>264</sup> The Court has simultaneously attempted to distinguish this legitimate compensatory objective from classifications based on

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259. See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). For a discussion of *Geduldig*, see *supra* notes 183-87, 213-14 and accompanying text.

260. See *supra* notes 30-31 and accompanying text.

261. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982) (statutory objectives may not be based on the assumption that one gender "suffer[s] from an inherent handicap or [is] innately inferior."); *Michael M. v. Sonoma County Super. Court*, 450 U.S. 464, 471 (1981) ("We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity."). As one commentator has noted, paternalism dies hard, and the Court continues to accept stereotypical notions about women as a class. See *Powers II*, *supra* note 246, at 1290-93, 1307-08.

262. See *infra* notes 263-75 and accompanying text.

263. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

264. See *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam) (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975) and *Kahn v. Shevin*, 416 U.S. 351 (1974)). The Court has repeatedly upheld higher benefits for women—not merely a different standard for entitlement to the benefit—because the benefits compensated for historical discrimination. See, e.g., *Webster*, 430 U.S. at 314-16, 317 (exclusion of three lowest income years from calculation of base period for social security benefits); *Schlesinger v. Ballard*, 419 U.S. 498, 499-500, 508-09 (1975) (four more years allowed before "up or out" of military, based on limited career opportunities for women in military); *Kahn*, 416 U.S. at 352-54 (\$500 property tax exemption for widows allowed based on historic economic discrimination against women); cf. *Regents of the Univ. v. Bakke*, 438 U.S. 265, 325 (1978) (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.) (government may consider race in efforts to remedy historic racial discrimination).

archaic and overbroad sex stereotypes that operate to perpetuate sex discrimination.<sup>265</sup>

Thus, the Court has required that the objective served by such classifications must be achieved by means substantially related to the objective.<sup>266</sup> A gender classification favoring one sex is permissible only "if it intentionally and directly assists members of the sex that is disproportionately burdened."<sup>267</sup> Sex classifications may not be used as an inaccurate, stereotype-laden proxy for some other characteristic, for example, dependency, to achieve a valid objective.<sup>268</sup> In other words, the effect of the statute must not create a new "cage" in the guise of compensation.<sup>269</sup>

This analysis recognizes that cultural and sexual stereotypes have been the basis for historical discrimination that merits affirmative relief or "benign" discrimination to counterbalance the present impact of that discrimination.<sup>270</sup> It nevertheless requires that that objective be realized without perpetuating old stereotypes or creating new ones.<sup>271</sup> This effort to take account of the deleterious consequences of sex stereotypes without approving stereotyped responses to those consequences has suffered, as has the Court's approach to the definition of sex differences, from illogical and inconsistent application.<sup>272</sup> In part, this application has been

265. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (single-sex nursing school perpetuates stereotype of nursing as an exclusively female occupation); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (plurality opinion of Brennan, J.) (unconstitutional for Social Security Act to provide female worker's spouse with less protection than male worker's spouse); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (different majority age for males than females used to determine when support payments will cease); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (Constitution forbids gender-based generalization that female workers contribute less to family support).

266. See *supra* note 263 and accompanying text.

267. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982).

268. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 143-46, 150-51 (1980) (death benefits statute requiring that widowers, but not widows, prove actual dependency on the deceased spouse's earnings had important objective of providing for needy spouses but made invalid generalized assumption that women were financially dependent); *Orr v. Orr*, 440 U.S. 268, 278-80 (1979) (despite valid objectives of providing for needy spouses and remedying historic discrimination against women, statute imposing alimony obligations exclusively on men had unjustifiable effect of reinforcing stereotype of women as dependent).

269. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion of Brennan, J.) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.") (footnote omitted).

270. See *supra* note 264 and accompanying text.

271. See *supra* notes 268-69 and accompanying text.

272. For example, in *Schlesinger v. Ballard*, 419 U.S. 498, 499-500, 508-10 (1975) and *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) the Court upheld, respectively, a preferential promotion procedure for women in the military and the male-only draft registration law. In effect, the Court tacitly approved the different roles played by men and women in the military based on the assumption that these roles, especially the non-combat role of women, reflect a real difference between the sexes, rather than a social stereotype that only men should engage in combat. See generally L. Kanowitz, *supra* note 79, at 26-28 (arguing that Court decisions on sex discrimination reflect belief that sex differences, like racial

due to deferential consideration of legislative objectives and means,<sup>273</sup> although the Court has shown signs of requiring more explicit proof that the objective of challenged legislation is indeed to remedy historical sex discrimination,<sup>274</sup> and that the means chosen are closely tailored to that end.<sup>275</sup>

The Court's approach nevertheless seems to reflect a difficulty in moving from the condemnation of historical sex roles to a recognition of the continuing pervasiveness and invidiousness of sex stereotyping.<sup>276</sup> Benign discrimination, which permits taking into account sex role differences based on the social and legal manifestations of sex stereotypes,<sup>277</sup> is justifiable *only* as a means to correct the *present consequences* of historical discrimination.<sup>278</sup> The goal of such legislative classifications is to equalize a historical burden,<sup>279</sup> which assumes that this compensatory remedy will eventually be unnecessary with the abolition of the causes of historical discrimination. The Court, however, has also used this analysis to justify efforts to counteract the *continuing effect* of *current* discrimination based on existing cultural and social stereotypes of appropriate sex roles.<sup>280</sup> This extension of the circumstances under which sex roles can be taken into account rests on the acceptance of these culturally and socially determined roles as "real" differences.<sup>281</sup> However, the failure to limit the circumstances under which sex roles can be taken into account inhibits the development of a reasoned analysis to distinguish between impermissible classifications based on sex stereotyping and permissible classifications based on sex differences.

Not surprisingly, some of the same problems with the analysis of sex differences permeate the Court's Title VII sex discrimination analysis. While the Court has condemned employment policies based on "[m]yths and purely habitual assumptions,"<sup>282</sup> or upon average differences be-

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classifications are based on immutable characteristics); Freedman, *supra* note 7, at 954 (discussing that even Justice Marshall's dissent in *Rostker* "did not question the validity of excluding women from combat, nor refer to Congress' assumptions about male and female roles" (footnotes omitted); Powers II, *supra* note 246, at 1290 ("The paternalistic themes concerning women's lack of strength . . . are no longer acceptable as articulated rationale[s] in court opinions.") (emphasis in original).

273. See *Rostker v. Goldberg*, 453 U.S. 57, 72-83 (1981); *Schlesinger v. Ballard*, 419 U.S. 498, 509 (1975); *Kahn v. Shevin*, 416 U.S. 351, 355 (1974).

274. See *Califano v. Goldfarb*, 430 U.S. 199, 215-17 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

275. See, e.g., *Orr v. Orr*, 440 U.S. 268, 281-82 (1979).

276. See *supra* note 272 and accompanying text. See Powers II, *supra* note 246, at 1290-1307 (arguing that the Court has replaced its "romantic paternalism" approach with a "pragmatic paternalism" approach). For the seminal article on sex stereotypes, see Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. Rev. 345 (1980).

277. See *supra* notes 264-65 and accompanying text.

278. See *supra* notes 266-67 and accompanying text.

279. See *supra* notes 264-65 and accompanying text.

280. See *supra* note 272.

281. See *supra* note 272.

282. See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

tween the sexes that are invalid in individual cases,<sup>283</sup> the Court has appeared to accept women's sexuality as a sex difference.<sup>284</sup> Furthermore, the Court has hinted that women's heavier childcare responsibilities as compared to men could be viewed as a "real" sex difference, thereby ignoring the societal discrimination which is the basis for this "fact."<sup>285</sup>

At the same time, the Court appears to have adopted a more finely tuned view of sex differences under Title VII than under constitutional analysis. The Court's cases concerning pregnancy discrimination clearly adopt the view that pregnancy is a difference that must be considered in discrimination analysis.<sup>286</sup> The dissenting opinions in *General Electric Co. v. Gilbert*,<sup>287</sup> which were expressly adopted by Congress in enacting the PDA<sup>288</sup> and embraced by the Court in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,<sup>289</sup> indicate that under either disparate treatment or disparate impact analysis the sex-specific nature of pregnancy is the basis for discrimination analysis.<sup>290</sup>

Focusing on disparate treatment analysis, Justice Stevens remarked in his *Gilbert* dissent that it is the capacity to become pregnant that primarily distinguishes women from men.<sup>291</sup> Because women and men are simply not similarly situated with respect to pregnancy, the proper focus of analysis is the treatment of this sex-specific condition.<sup>292</sup> Employment policies specifically directed toward pregnancy by their nature discrimi-

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283. See *id.* at 716.

284. See *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977).

285. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) ("[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the [Civil Rights Act of 1964]. But that is a matter of evidence tending to show that the condition in question 'is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.'").

286. See, e.g., *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670-72, 683-85 (1983) (employer hospitalization plan that covered employees and spouses equally, but provided less extensive pregnancy benefits for spouses of male employees held to violate Title VII); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 140-42 (1977) (employer policy that allows employee forced to take sick leave for any reason other than pregnancy to retain accumulated seniority held to violate Title VII); see also *General Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting) ("A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies."); *id.* at 161-62 (Stevens, J., dissenting) ("[T]he rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.") (footnote omitted).

287. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 146 (1976) (Brennan, J., dissenting); *id.* at 160 (Stevens, J., dissenting).

288. See H.R. Rep. No. 948, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4749-50; Senate Report, *supra* note 227, at 6.

289. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 677-79 (1983).

290. See *Gilbert*, 429 U.S. at 153-55 (Brennan, J., dissenting); *id.* at 161-62 (Stevens, J., dissenting).

291. See *id.* at 162 (Stevens, J., dissenting).

292. See *id.* at 161-62 (Stevens, J., dissenting).

nate, in the sense of differentiation, by placing pregnancy "in a class by itself."<sup>293</sup> Justice Stevens' analysis suggests that such discrimination is unlawful only where it imposes a detriment or burden, which in *Gilbert* was the burden of a risk of absence not covered by the employer's disability plan.<sup>294</sup>

Similarly, Justice Brennan's *Gilbert* dissent argues that under disparate impact analysis the concept of sex discrimination incorporates the recognition that policies are unlawful if they disproportionately affect employment opportunities due to sex-specific differences.<sup>295</sup> Starting from the premise that pregnancy is a risk unique to women that may translate into the denial of employment opportunities,<sup>296</sup> Brennan points out that it was precisely this result that Title VII was designed to avoid.<sup>297</sup>

[D]iscrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of 'disadvantaged' individuals. *A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies.*<sup>298</sup>

Such a construction of the concept of sex discrimination, Justice Brennan concluded, "is fully consonant with the ultimate objective of Title VII, 'to assure equality of employment opportunities.'"<sup>299</sup>

This view of pregnancy as a sex-specific condition that must be analyzed within a definition of sex discrimination that takes gender differences into account was reaffirmed in the Court's decision in *Newport*

293. *Id.* at 161 (Stevens, J., dissenting).

294. *See id.* (Stevens, J., dissenting).

295. *See id.* at 153-55. Justice Brennan also analyzed the disability plan at issue under disparate treatment analysis. He found that even if this analysis were defined by the infamous *Geduldig* footnote, *see Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), the policy in *Gilbert* was discriminatory because it was a pretext for sex discrimination, based on the company's long history of discriminatory policies toward women and particularly with respect to the treatment of pregnancy. *See Gilbert*, 429 U.S. at 148-50 & n.1, 160 (Brennan, J., dissenting).

296. *See Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting).

297. *Id.* at 160 (Brennan, J., dissenting).

298. *Id.* at 159 (emphasis added) (footnote omitted). It is troubling that Brennan's authority for this proposition is *Lau v. Nichols*, 414 U.S. 563 (1974), *see Gilbert*, 429 U.S. at 159 & n.9 (Brennan, J., dissenting) a case holding that a school district violated Title VI of the 1964 Civil Rights Act by not providing adequate instruction for non-English-speaking Chinese students. *See Lau*, 414 U.S. 564, 566. The Court stated that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *See id.* at 566. Arguably, these students only had a temporary disability that required affirmative policies by the school board until they had attained an adequate command of English. However, the case may stand for the proposition that equal or same treatment does not mean identical treatment.

299. *Gilbert*, 429 U.S. at 160 (Brennan, J., dissenting) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

*News*.<sup>300</sup> The Court considered whether a disability plan providing comprehensive coverage for male spouses, but excluding pregnancy from the otherwise comprehensive coverage for female spouses, was discriminatory.<sup>301</sup> Analyzing the disability plan as the "mirror image" of *Gilbert*,<sup>302</sup> Justice Stevens again applied disparate treatment analysis, focusing on whether the differential treatment of pregnancy constituted unfavorable treatment.<sup>303</sup> Writing for the Court, he remarked that "[t]he 1978 Act [PDA] makes clear that it is discriminatory to treat pregnancy-related conditions *less favorably* than other medical conditions."<sup>304</sup> Because the policy at issue had this effect, it was unlawful under Title VII.<sup>305</sup>

This concept of sex discrimination is further reinforced by *Nashville Gas Co. v. Satty*,<sup>306</sup> a case that was decided after *Gilbert* but before enactment of the PDA.<sup>307</sup> The majority opinion of Justice Rehnquist states that unlawful discrimination exists where the differential treatment of pregnancy has the effect of imposing a burden on women not suffered by men.<sup>308</sup> The conferral of a pregnancy benefit does not burden women;

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300. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

301. See *id.* at 671-72.

302. *Id.* at 685.

303. See *id.* at 676, 684. Although Justice Stevens' opinion analyzes the case solely under disparate treatment analysis, see *id.*, in *Gilbert* he observed that pregnancy discrimination is subject to both disparate impact and disparate treatment analysis, see *General Elec. Co. v. Gilbert*, 429 U.S. 125, 161 (1976) (Stevens, J., dissenting). In *Newport News*, Justice Stevens indicated that the second clause of the PDA—"women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes," 42 U.S.C. § 2000e(k)—is not intended to foreclose analysis under either Title VII theory. See *Newport News*, 462 U.S. at 678 n.14.

304. *Newport News*, 462 U.S. at 684 (emphasis added).

305. See *id.* at 685.

306. 434 U.S. 136 (1977). In *Satty*, Justice Rehnquist wrote an opinion that was joined by Chief Justice Burger and Justices Stewart, White and Blackmun. See *id.* at 137. Justices Brennan and Marshall joined in Part I of that opinion and joined Justice Powell's opinion that concurred in the result and concurred in part. See *id.* at 146. In addition, Justice Stevens wrote an opinion that concurred in the judgment. See *id.* at 153.

307. *Satty* could be viewed as having little continuing validity, as the majority opinion was tied to the now discarded analysis of *Gilbert*, see *Satty*, 434 U.S. at 141-42, and arguably represents a tortured analysis to distinguish *Gilbert*. See *id.* at 142 ("We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other 'because of their differing roles in "the scheme of human existence," . . . . But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.') (footnote omitted). Nevertheless, to the extent *Satty* remains a precedent for the treatment of pregnancy discrimination, it supports a definition of discrimination that takes into account sex differences. See *id.* at 142.

308. See *Satty*, 434 U.S. at 141-42. The Court stated, "[H]ere [as compared to *Gilbert*], petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. . . . [An employer is not permitted] to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Id.* (footnote omitted).

nor does it burden men because they simply are not similarly situated with regard to pregnancy. Alternatively, under Justice Stevens' concurring opinion in *Satty*, discrimination exists if a pregnancy classification "has an adverse impact on the employee's status,"<sup>309</sup> that is, "[if] the formerly pregnant person is permanently disadvantaged as compared to the rest of the work force."<sup>310</sup> This analysis implicitly recognizes the unique employment burdens that can attach to pregnancy and the necessity of analyzing employment policies in terms of their impact on employment opportunities as defined by the structure of the workplace.

These cases suggest that under Title VII analysis, the Court has recognized pregnancy as a gender-specific condition requiring examination of pregnancy classifications in terms of their impact on women's employment opportunities. The Court's analysis remains unclear, however, in two important respects. First, it is uncertain what differences beyond pregnancy are encompassed by this analysis. Second, the Court has not articulated how the consideration of sex differences fits within the traditional disparate treatment/disparate impact framework of Title VII analysis. Disparate treatment or disparate impact analysis, even if it takes into account real sex differences, can only determine whether such classifications invidiously discriminate against the class not benefitted by the classification. In other words, as applied to the maternity leave statutes, these analyses can only resolve whether such classifications are based on a real difference between the sexes and therefore do not discriminate against men. This approach does not define what further scrutiny is required to ensure that the classification does not discriminate against women, the class that it purports to favor. Thus, the analysis does not address what constraints exist on efforts to permanently restructure the workplace.

## VI. REFINING THE DIFFERENCES APPROACH

The Court's opinions indicate that considering sex differences is permissible. However, the cases provide neither a clear definition of sex differences nor any consistent standard for identifying when sex differences can be the basis for sex-specific classifications in order to analyze the validity of the maternity leave statutes.<sup>311</sup> It is unclear, for example, whether women's primary parenting role, in addition to pregnancy disability, could be viewed as a sex difference that would justify the guarantee of maternity leave.<sup>312</sup> It is also uncertain whether either a limitation on

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309. See *id.* at 156 (Stevens, J., concurring).

310. *Id.* Stevens attempted to articulate a rationale consistent with *Gilbert*—despite his dissent in that case, see *General Elec. Co. v. Gilbert*, 429 U.S. 125, 160-62 (1976) (Stevens, J., dissenting)—that avoided the benefit/burden approach of the majority, which he found unsatisfying because one class is always benefitted and the disfavored class is always burdened. See *Satty*, 434 U.S. at 154 n.4.

311. See *supra* notes 247-310 and accompanying text.

312. See *supra* notes 258-61, 282-85 and accompanying text.



the maximum leave that must be provided for pregnancy-related disability or the guarantee of a fixed entitlement to a specified period of leave would be objectionable on the grounds that it incorporates invalid stereotypes about pregnancy or is based on a class-based average that is not true in individual cases.<sup>313</sup>

What is least certain, however, is how the Court would apply its sex differences approach to statutes aimed at restructuring the workplace. Thus far, the Court has utilized a sex differences approach in cases challenging the exclusion of benefits on the basis of sex differences,<sup>314</sup> or the award of preferential treatment on the basis of compensating for historical discrimination.<sup>315</sup> With its upcoming review of the California maternity leave statute, the Court has the opportunity to consider whether sex differences can be used to justify gender-specific legislation aimed at restructuring the workplace to ensure equal opportunity.

More broadly, the California case provides a unique opportunity for the Court to confront the problems of its current approach to sex differences and to refine its analysis of the treatment of sex differences within the concept of discrimination. First, the Court must define what it means by sex differences. Some commentators have argued that this must be narrowly defined to include only biological, definitional differences,<sup>316</sup> while others suggest it should include differences in moral and social perceptions and values.<sup>317</sup> The value of a narrow definition based solely on biological, definitional differences is that it eliminates the tendency to incorporate social and cultural stereotypes in the notion of "real" differences. Recognizing a broader definition of sex differences not only opens the door to sex stereotyping, but also assumes the existence and value of an identifiable and singular "women's culture." This is not to demean the critique of patriarchy and the recognition of women's different "voice."<sup>318</sup> Rather, to the extent an alternative system of values and perception is sex-based, it questions to what extent it is the culture of oppression, or one that would reinforce notions of women's inferiority. On balance, therefore, it is best to limit the differences approach to biological, definitional differences. Pregnancy would be included within this definition; average differences in strength or social differences in general roles would not.<sup>319</sup> This provides a "bright line" for defining sex differ-

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313. See *supra* notes 275, 283.

314. See *supra* notes 280, 286.

315. See *supra* notes 264-69 and accompanying text.

316. See Fineman, *supra* note 81, at 818; Law II, *supra* note 74, at 965-69; Scales, *supra* note 74, at 435-37.

317. See E. Wolgast, *supra* note 81, at 129; Freedman, *supra* note 7, at 965; Karst, *Woman's Constitution*, 1984 Duke L.J. 447, 448-49.

318. For leading critiques in this area, see D. Dinnerstein, *supra* note 40, C. Gilligan, *supra* note 40. See generally Karst, *supra* note 317, at 480-508 (exploring application of women's perspective on constitutional interpretation).

319. Thus, for example, fetal vulnerability policies, which are premised on the potential reproductive harm of toxic substances in the workplace, could be applied exclusively to women workers only if scientific data supported the proposition that the risk of harm

ences that would prohibit recognizing differential social or cultural sex roles as sex differences.

Second, where sex differences are the basis of a policy or statute, it is critical that any sex-based classifications must not have the effect of reinforcing, perpetuating or creating sex stereotypes or gender roles. The theoretical model so far has primarily focused on two situations in which this must be considered.<sup>320</sup> First, a sex-based classification may simply be based on an invalid sex stereotype that creates a barrier to equal employment opportunity. An example of such a classification would be the old protective labor laws for women, such as those that prohibited women from engaging in certain occupations on the basis that this was inappropriate work for women to do.<sup>321</sup> Such a classification could be attacked both on the grounds that it does not reflect any real difference between men and women—that is, it is not based on a biological inability of women to perform the work—or on the basis that it imposes a limitation on women's employment opportunities based on invalid cultural stereotypes. Thus, the incorporation of sex stereotypes or sex roles in such classifications is invalid either because of the definition of differences or the objective of the classification.

Alternatively, a sex-based classification may be premised on stereotypes or sex roles, but if the objective of the classification is to remedy the current effects of historical discrimination that has incorporated those stereotypes or roles, this may justify taking these historical stereotypes or roles into account. This is a very limited exception to the general condemnation of sex stereotypes and gender roles under the sex differences approach. An example of such a classification would be a sex-based affirmative action program. Such a classification would be permitted not because it reflects a real sex difference, but rather because such affirmative action is a legitimate means for compensating for historical discrimination.<sup>322</sup> This valid compensatory objective could only be effectuated, however, by means that do not incorporate or create sex stereotypes. Thus, the means must be strictly tailored to the actual existence of historical discrimination and the necessary compensation to rectify its current effects. The remedy must be limited by its purpose, and must not become an unjustifiable preference.

What must be added to this analysis is how to treat sex-based classifications based on real differences that affirmatively take into account real sex differences in order to guarantee meaningful sex equality, such as the maternity leave statutes. Such classifications are distinguishable from those based on alleged differences that are in fact based on sex stereotypes or sex roles, or that create barriers to equal opportunity based upon

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from exposure to such substances is unique to women or substantially greater than the risk to men. See *supra* note 43.

320. See *supra* note 81.

321. See *supra* notes 80 and 252.

322. See *supra* notes 264-69 and accompanying text.

social or cultural definitions of sex differences.<sup>323</sup> These classifications are based on real, physical differences between the sexes and are aimed at ensuring, not limiting, equal employment opportunity. Similarly, they are distinguishable from affirmative action to compensate for historical discrimination. The goal of such classifications is not to compensate for past wrongs but rather to recognize the existence of *present* discrimination that will continue to exist in the absence of structural change.

The test of sex discrimination under a differences approach of this type of sex-based classification requires an examination of whether the policy, statute or conduct at issue advances or impedes the goal of equal employment opportunity and whether the means chosen to achieve this goal incorporate or reinforce culturally-based sex stereotypes. The test must therefore focus on the *structure* of employment opportunity, while also ensuring that taking sex differences into account does not create or perpetuate invalid sex stereotypes with respect to either sex.

Analyzed under this refinement of the sex differences approach, the maternity leave statutes are a valid means of ensuring the goal of equal employment opportunity. The provision of job protected maternity leave for the period of pregnancy-related disability ensures that this foreseeable, predictable interruption of work that will occur among the vast majority of working women is not a proxy for demotion, discipline or discharge. Where the statutes are limited to providing leave for actual disability, they neither incorporate nor perpetuate cultural stereotypes, but rather are tied to the physiological difference that mandates leave. To the extent the statutes impose arbitrary limitations on leave, they impose an unjustified limitation that presumes a class characteristic that may be stereotypically or generally defined. Similarly, to the extent that the statutes permit a fixed period of leave that may incorporate childcare leave as well as disability leave, they are based on unjustified cultural assumptions about the preeminent role of women with respect to parenting.

Thus, under this analysis the maternity leave statutes are a valid means of ensuring equal treatment of women in the employment market by measuring the impact of that structure on employment opportunity. Just as importantly, the requirement that the statutes not incorporate cultural or social stereotypes imposes a critical restraint on this attempt at structural change. If sex differences are to be taken into account, then it can be only to the extent that the differences are real.

### CONCLUSION

The incorporation of a sex differences approach in the definition of sex discrimination and the concept of equality ultimately is justified on the basis of public policy, as an essential means to achieve the goal of equal opportunity. Legislation such as the state maternity leave provisions is

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323. See text accompanying *supra* notes 267, 276-81.

necessary to ensure that the structure of the workplace affords meaningful equality of opportunity. While it is certainly not the only means to achieve that goal, it is a permissible means to take sex differences into account.

If taking account of sex differences is not only a necessary but a desirable approach on policy grounds, it nevertheless is critical that the parameters of this approach be carefully defined. While restructuring of the workplace is vital to actual equality, the principles on which such structural change occurs are critical. The refinement of the analysis of sex differences is an important step in that process.

It is only one step, however. It can ensure that efforts at equalization of employment opportunity within the current structure of the workplace are subject to rigorous scrutiny. Whether it can be the basis for challenging the underlying assumptions of the existing workplace structure raises fundamental questions about the limits of legal change under current discrimination law.<sup>324</sup> If the answer to those questions is that what is required is further legal or social change, it is a step that must be taken.

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324. It seems that at least some of those questions are whether this is a problem not susceptible to legal solution, see Z. Eisenstein, *supra* note 38, at 19 ("Changes in the law will not substantially alter or weaken the relations of power men derive from sexual hierarchy."), and whether the existing framework of discrimination law could encompass such issues or would be hostile to their resolution, see Freeman, *Antidiscrimination Law: A Critical Review*, in *The Politics of Law: A Progressive Critique* 96-114 (D. Kairys ed. 1982) (judicial construction of the concept of race discrimination has not only blunted the potential for radical change under discrimination law, but also acts as a limit on the anti-discrimination principle); Ackerman, *Foreward: Law in an Activist State*, 92 Yale L.J. 1083, 1089 (1983) (role of the activist lawyer is to "develop a *structural* statement of the facts that reveals the way an activity might be feasibly reorganized to avoid or ameliorate the inefficiencies and injustices it may be generating") (emphasis in original).

