PREGNANCY DISCRIMINATION: TOWARD SUBSTANTIVE EQUALITY

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I. INTRODUCTION

Feminist legal theorists explore how law both promotes and discourages greater equality between women and men. Drawing on feminist theory, they show how legal discourse creates and perpetuates subordination and oppression by constructing women as different, particularly because of their reproductive capacities, so as to disadvantage them in the workplace. This paper presents a close reading of pregnancy discrimination cases in three jurisdictions, not to compare the rules of doctrine, but to uncover invisible frames of reference. Unveiling the rhetorical strategies in legal narratives facilitates an examination of how judges think about and play a part in constructing sex differences and disadvantages.

None of the original statutes or European Community1 directives outlawing sex discrimination in the United States, Britain, or the European Union explicitly included a prohibition against pregnancy discrimination. In each of the three jurisdictions, courts and industrial tribunals2 were the first to wrestle with the question. In the 1970s some commentators and judges in both the United States and Britain saw pregnancy as a hard case for discrimination law and called it “sex-

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2. In the United Kingdom, cases of sex discrimination are heard first by an industrial tribunal, then appealed to the Employment Appeal Tribunal, followed by the Court of Appeal and then the House of Lords. Industrial tribunals differ from courts in their inquisitorial as opposed to adversarial approach; in their role as informal finders of fact (non-lawyers serve on the panel of three and in theory, one does not need to be represented by a lawyer) as opposed to rulers on complex doctrinal points; and in their being quick and cheap. See Alice M. Leonard, Judging Inequality (1987).
plus." It was not immediately obvious to them that pregnancy discrimination could be sex discrimination because not all women became pregnant. Furthermore, how could women claim employers were treating them less favorably than men if no men became pregnant? I refer to this view as the restrictive comparative approach. Because women get pregnant, they are different from men and cannot be compared to them.

In the twenty years since passage of the Sex Discrimination Act, British judges and members of industrial tribunals have moved away from such a restrictive comparative approach to comparing pregnant women with sick men (what I call an expansive comparative approach). Some have gone further and explicitly avoided comparing pregnant women to sick employees at all. They refuse to allow differences to justify disadvantages in the workplace—what I call substantive equality. The British courts have moved from a restrictive to an expansive comparative approach, which they cling to in Webb v. EMO Air Cargo (UK) Ltd. Like Webb, the U.S. Supreme Court's decision in United Auto Workers Union v. Johnson Controls and the European Court of Justice's decision in Dekker v. Stichting Vormingcentrum voor Jonge Volwassenen (VJV-Centrum), and more recently in Webb v. EMO Air Cargo all display movement beyond an expansive comparative approach toward one of substantive equality. The courts have moved away from, but have not abandoned permitting differences between men and women to justify treating women less favorably in the workplace.

This paper begins with an exploration of the concept of discrimination. I then describe the legislation in three systems, tracing the movement from restrictive to expansive equality (with hints at substantive equality) approaches in the three system’s sex discrimination decisions. I next examine the legal frameworks of three recent opinions searching for movement from the expansive comparative approach to substantive equality. Finally, I conclude that while feminists should be guardedly optimistic about these evolutionary changes, disturbing gaps remain between the promise of nondiscrimination and the opinions of judges and employers as to what is reasonable accommodation of pregnancy.

II. The Concept of Discrimination

In the United States, Britain, and the European Union (E.U.), the definition of discrimination is contested and evolving. Thinking

about race discrimination has influenced the concept of sex discrimination embodied in statutes and directives. In the United States, the prohibitions against race and sex discrimination are in the same statute. In Britain, the Home Secretary used the Sex Discrimination Act as a model for a race relations bill. The minimal definition of discrimination is an intentional act motivated by prejudice: those who discriminate are bad people who hold mistaken views about the attributes of groups. For example, signs on factory doors saying “no blacks” or explicit policies against hiring women. The disparate treatment (U.S.) or direct discrimination (U.K. and E.U.) provisions of sex discrimination law reflect this vision of equality.

Many activists, however, define discrimination more broadly as structural and institutional barriers that assign groups of people to the bottom echelons of society. Whether one views this as the present effects of past discrimination, or as continuing obstacles, expanding the definition of discrimination to include institutional discrimination is to look beyond intentions or motivations and focus instead on the effects of employers’ discriminatory practices. These practices include employment tests, height and weight requirements, veterans preferences, educational requirements, and maximum age limits. Judicial decisions such as Griggs v. Duke Power Company, which established the category of “disparate impact” (or indirect discrimination) and provisions for indirect discrimination in the U.K. and the E.U., all reflect this broader definition of discrimination. In all three jurisdictions, the meaning and application of disparate impact is more contested than that of disparate treatment. Conflicts continue over which party has the burden of proof in such cases, how high a standard of justification employers must meet to continue practices which have a disparate impact on a protected group, and what role government and employers can or must take to rectify an imbalanced workforce. This conflict is evidenced by ongoing debates about “set-asides” in the United States, over what constitutes justifiability in the U.K., and over the concept of proportionality in the E.U.

Judges have drawn on the concept of a stereotype to aid them in deciding discrimination cases. When employers treat individuals as having a group characteristic they do not share, judges can see the unfairness to those individuals. For example, courts in the U.S. have

9. See Angela Byre, INDIRECT DISCRIMINATION (1987). Justifiability refers to the standard necessary to render lawful employment practices, which adversely affect women more so than men. Initially, British industrial tribunals demanded that such practices be necessary, not merely convenient. This standard was eventually diluted to require only that employers give reasons for the practices. Id. at 43-47.
10. The principle of proportionality is close to the English law concept of reasonableness, but also can mean the least discriminatory alternative. L. Neville Brown, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 295-98 (3rd ed. 1989).
held that men who stay home to care for children after the death of a spouse are entitled to social security benefits,\textsuperscript{11} that women air force officers are entitled to an allowance for dependent husbands on the same terms as male officers,\textsuperscript{12} and that employers cannot exclude women who can lift 50 pounds (or prove they can do the job) merely because they are women.\textsuperscript{13} The exceptional individual who defies the gender norm deserves to be treated according to his or her situation: as full-time parent or as a breadwinner or as exceptionally strong. Sex should not be a proxy for other characteristics; this use of stereotype is easier for judges to grasp because it denies justice to individuals because of their group status. The language of liberal individualism can be deployed to argue that everyone should be able to choose their work, unfettered by the inaccurate attributions of group status.

Not all sex differences, however, are easily discarded or overcome. In cases of sex discrimination, judges have differentiated cases in which employers acted on the basis of stereotypes as opposed to recognizing “real” differences between men and women, accepting a rigid distinction between sex and gender. In cases where employers treat men and women differently because of real differences, judges often rule that the employer has not discriminated, viewing those cases as different than those in which employers act on stereotypes. In legal terms, the U.S. Constitution requires the government to treat men and women the same only when they are “similarly situated.”\textsuperscript{14} Under this approach, once employers can show a relevant difference between the sexes—a real rather than stereotypical difference—treating men and women differently does not constitute discrimination.

Feminists have challenged the logic of the dichotomy as well as the way judges classify specific differences.\textsuperscript{15} Sex differences, like gender differences, are socially constructed. By exploring cultural variations in the set of characteristics ascribed to the sexes as well as how these variations changed over time and across race and class, feminists have shown that the rhetoric of biological difference was deployed to make any given societal arrangement seem natural and therefore unchangeable and right. Greek philosophers argued that the male contributed the entire embryo and the female was just an incubator.\textsuperscript{16} In the 19th century, physicians believed that if girls used their brains,

\begin{itemize}
  \item \textsuperscript{11} Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).
  \item \textsuperscript{12} Frontiero v. Richardson, 411 U.S. 677 (1973).
  \item \textsuperscript{13} Rosenfeld v. S. Pac. Co., 444 F.2d 1219 (1971).
  \item \textsuperscript{14} Caban v. Mohammed, 441 U.S. 380 (1979) (Stewart, J., dissenting); Parham v. Hughes, 441 U.S. 347 (1979).
  \item \textsuperscript{16} Carol Delaney, The Meaning of Patriarchy and the Virgin Birth Debate, 21 MAN 508 (Sept. 1986).
\end{itemize}
energy was diverted from their reproductive organs, thereby interfering with procreation.\textsuperscript{17} Scientists continue to describe a vigorously active penetrating sperm impaling a coquettishly passive egg, despite chemical evidence indicating both egg and sperm acting on each other and the egg drawing the sperm to it.\textsuperscript{18} Such stereotypes about men and women’s appropriate gender roles often mix with our understanding of physical differences, as cases on pregnancy, statutory rape, and height and weight requirements of prison guards make clear. When employers assert that a biological difference between the sexes is the basis for differential treatment, judges may fail to recognize the socially constructed nature of these sex differences. They may see physical differences rather than social differences operating. In cases of pregnancy or capacity for pregnancy, judges often focus on the physical differences between men and women. Feminists point out that men also need to bond with newborns and take responsibility for childcare, and that men, too, can damage their offspring from exposure to hazardous substances.

Feminists have called into question the core of the concept of discrimination contained in both antidiscrimination legislation and the equal protection clause of the U.S. Constitution. Having rights and privileges depends upon the extent to which women are like men. Catharine MacKinnon calls this approach the “difference approach,”\textsuperscript{19} while Sylvia Law calls it the “assimilationist approach,”\textsuperscript{20} and Christine Littleton the “symmetrical approach.”\textsuperscript{21} Clare Dalton calls cases which embrace this perspective the “Women and the Law” or “Sex Discrimination” approach.\textsuperscript{22} For the purposes of this paper, I call it the expansive comparative approach. To win cases, feminists have had to draw parallels between men and women. Even if only women give birth, both parents may have a need to bond with newborns, or time to cope with a new baby. Either can be a dependent spouse or need spousal support upon the dissolution of marriage. Both can suffer reproductive damage. Both can suffer

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\item \textsuperscript{18} Emily Martin, The Egg and the Sperm: How Science has Constructed a Romance Based on Stereotypical Male-Female Roles, 16 SIGNS 485 (1991).
\item \textsuperscript{21} Christine Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279 (1987).
\item \textsuperscript{22} Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 BERKELEY WOMEN’S L.J. 1 (1987-88).
\end{itemize}
temporary disabilities. Both should be able to resist the draft or engage in combat.

The expansive comparative approach does have limitations. It rests on the assumption that we can separate stereotypes from true differences—it fails to recognize that sex differences are socially constructed. The expansive comparative approach is inadequate if differences are illusory, or worse, manufactured to subordinate women.

Embedded in the expansive comparative approach is a male standard for what is normal. The more damning criticism of this approach may be that it fails to ask “different from whom?” As Martha Minow points out:

‘Difference’ is only meaningful as a comparison. I am no more different from you than you are from me. A short person is different only in relation to a tall one. Legal treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men, ‘minority’ races to whites, handicapped persons to the able-bodied, and ‘minority’ religions to ‘majorities.’

When a male standard is employed, the difference lies within the woman—something is different about her. For example, women who are on average shorter than men may need to lower the conveyor belt in the factory to work comfortably, or lower the podium and microphone to speak in public. Under the expansive comparative approach, women gain the right to work in the factory or speak in public only if they are tall, or can conform to a male standard. If they need an adjustment, we focus on how they differ from the norm rather than reflect on the norm itself—set according to the size of the average male and therefore, not neutral. Women can have the rights and privileges men enjoy only insofar as they can show that in all relevant respects they are just like men. Adopting a comparative standard deflects attention from the unfairness inherent in the standards themselves and assumes that the adoption of a male standard is fair and appropriate, leaving workplace norms unchallenged.

Finally, the expansive comparative approach cannot accommodate the reality that women and men are different in ways that are relevant to social arrangements. The expansive comparative approach’s only solution for cases of real differences is to first seek an analogy (such as disability for pregnancy), and then to allow employers to treat women differently—usually less favorably—thereby punishing women for biological differences. Under the expansive comparative approach, one can only be equal (in benefits or in privileges) if one is the same, or at least comparable. Littleton calls this mathematical fallacy: the view that only things that are the same can

ever be equal. The expansive comparative approach does not address the question of why it is just or even permissible to disadvantage women who refuse or who are unable to conform to a male standard. Women may have won the opportunity to compete with men for high powered jobs or train for the building trades, but granting power to the exceptional woman who does not have children does little to change the status of women who conform to a more traditional role. It does nothing to improve the pay of nurses, teachers, or secretaries, or to ease the economic vulnerability of women who devote their time to caring for children.

As Littleton explains, feminists disagree about what to do about “the difference difference makes,” the way that difference translates into disadvantage. Should feminists try to change the neutral rules—lower the conveyor belt, or get an adjustable one; have parenting leaves for both men and women; lower exposures to hazardous substances enough to protect pregnant women and men planning to father children? Or should they seek accommodation for women: maternity leave, part-time work, and “the mommy track?” The choice presents a serious dilemma. Minow calls the dilemma of difference the choice between recreating difference by noticing it or by ignoring it:

Focusing on differences poses the risk of recreating them. Especially when used by decision makers who award benefits and distribute burdens, traits of difference can carry meanings uncontrolled and unwelcomed by those to whom they are assigned. Yet denying those differences undermines the value they may have to those who cherish them as part of their own identity.

Some feminists in the United States describe the debate as between those advocating special versus equal treatment. “Equal treatment feminists” believe that if women draw attention to their differences, it will be used against them in the law. Historically, when women claimed they were different from men to gain some accommodation for this difference, those differences were eventually used as the basis for denying them rights. If the law mandates that women get maternity leave, for example, feminists fear employers will use that as a reason not to hire women. Furthermore, if mothers stay home with newborns while fathers continue to work, this arrangement reinforces the idea that women are the primary caretakers and perpetuates unequal responsibilities for child care and housework. If women are exempt from the draft because they are more fragile, or peace-loving, or physically weak, they will lose other important rights of citizenship for which military service has been an important prerequisite, such as holding high public office. As a result, rather than emphasizing dif-

25. Id. at 1282.
26. Id. at 1901.
27. Minow, supra note 23, at 12.
ference, equal treatment feminists suggest that women should try to change gender neutral rules so that they operate less to women’s disadvantage. For example, new parents of either sex should enjoy parental leave; any worker with a temporarily incapacitating medical condition should win the right to job reinstatement; a spouse of either sex who performs unpaid work in the home should have that contribution recognized if the marriage dissolves; and so on.

Conversely, the “special treatment feminists” argue that in some cases treating women differently from men is necessary to ease women’s oppression. They argue that women should have maternity leave, consideration for jobs, or whatever is necessary to secure equal status, rights, and privileges. Women should not have to assimilate to a male norm to gain equality; instead, difference should not lead to disadvantage. MacKinnon calls this approach the “dominance approach,” while Littleton refers to it as “equality as acceptance.” I call it the substantive equality approach. Rather than seeking formal equality or neutral rules, the substantive equality approach calls for an examination of the effects of practices. A difference between men and women cannot justify differential treatment if recognizing that difference reinforces inequality. Just because women differ from men does not justify perpetuating women’s subordination.

In the hands of nonfeminist actors and institutions, both special and equal treatment policies can work to women’s disadvantage. Lise Vogel concludes that “[f]amily policy based on the equality framework is potentially as burdened with danger to women’s interests as that produced through the discourse of difference.” Vogel is suspicious of formally gender neutral policies that disadvantage women in the short term while purporting to lead to greater equality in the long term. Drawn to some formulation of the equal treatment approach, Vogel is cautiously optimistic about the liberating potential of family leave and comparable worth policies. Vogel is likewise critical of seemingly neutral standards such as assigning child custody according to the best interest of the child or the equating of pregnancy with illness that leads to little protection for pregnant women.

Fitting our claims into legal categories and the philosophy of liberal individualism limits our ability to create a feminist vision of equality. MacKinnon, like Vogel, sees the pitfalls in both approaches. Although she is more tolerant of special treatment, she invites us to think about what we want as opposed to merely what we can get. If the special versus equal debate can shift to a debate about strategy (rather than ideology), we can then focus on the complex evidence of concrete and symbolic effects—whether we have achieved meaningful equality. The law forces the dichotomy upon us and we should resist

having that structure order our thinking. Furthermore, although U.S. feminists have been successful at exploiting prevailing conceptions of equality and categories of sex discrimination law, perhaps they can learn something from European feminists. These feminists have a greater suspicion about using the law to promote social change and are cautious about whether feminists can control the law. Carol Smart, for example, warns us about “law’s imperialism” and wants us to be more cognizant of the “malevolence of law.”

British and European feminists have not shown the same attachment as U.S. feminists to the equal treatment model of feminism for both institutional and ideological reasons. As a result, they have not become locked into a debate between the two. Instead, they have always embraced some forms of special treatment while sharing U.S. feminists’ critique of stereotyped thinking, the male norm, and the way difference leads to disadvantage. European Community law contains some aspects of special treatment. For example, it allows member states to treat pregnant women more favorably than other workers with disabling medical conditions. Women in Britain and the European Union benefit from more generous provisions for maternity and universal health care, though they share many problems with U.S. women—job segregation, discrimination, limited access to affordable childcare, and the double day. The dichotomy between “real” versus stereotypical differences, the presence of a male norm for comparison, the debate over how much the workplace rather than the worker should change to accommodate difference, and how one draws analogies between men’s and women’s situations are debated in the cases that follow. Before discussing the cases, however, I will first briefly describe the statutes.

III. PREGNANCY DISCRIMINATION IN THE UNITED STATES

A. Background

Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in employment. The drafters of the bill originally sought to prohibit discrimination only on the basis of race, and opponents who sought to “sink the bill under gales of laughter” added sex as a prohib-


imited category of discrimination on the House floor.\textsuperscript{33} Since congressional committees and committee reports did not discuss sex discrimination, Congress offered the courts little guidance as to its legislative intent. The original bill did not specify whether Congress considered pregnancy discrimination to be sex discrimination. When Congress amended the Act in 1972, however, it fully endorsed the provisions against sex discrimination, but did not consider the issue of pregnancy discrimination.

The Equal Employment Opportunity Commission (EEOC), the agency Congress created to enforce the Civil Rights Act, issued guidelines in 1972 requiring employers to treat pregnancy the same as other temporary disabilities.\textsuperscript{34} Five circuit courts followed the EEOC’s guidelines and declared discrimination on the basis of pregnancy to be unlawful sex discrimination when employers treat pregnant women worse than male employees who have temporarily incapacitating medical conditions. The Supreme Court, however, rejected this position. In \textit{General Electric Co. v. Gilbert},\textsuperscript{35} the Court addressed the question of whether an employer’s policy that discriminated on the basis of pregnancy, a characteristic that some women share and that no men share, was discrimination on the basis of sex. Specifically, the Supreme Court considered whether a company’s insurance scheme that covered nonoccupational illness, single-sex ailments, and elective surgery but excluded medical expenses arising from pregnancy was discriminatory under Title VII.

\textit{Geduldig v. Aiello},\textsuperscript{36} like \textit{Gilbert}, raised the question of whether discrimination against a subgroup of one sex was sex discrimination. However, \textit{Geduldig} was a constitutional case, while \textit{Gilbert} was a Title VII case.\textsuperscript{37} In \textit{Geduldig}, the Supreme Court considered whether a state disability scheme that covered all disabilities except pregnancy and childbirth and related complications violated the equal protection clause of the Fourteenth Amendment. The Court held that:

\ldots while it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification. The program divides potential recipients into two groups—pregnant women and nonpregnant persons.

\textsuperscript{33} \textsc{Carolyn Bird, Born Female: The High Cost of Keeping Women Down} 5 (1968).

\textsuperscript{34} 29 C.F.R. § 1604.10(b) (1975). Previously, however, the EEOC’s General Counsel had issued an opinion stating that “since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees” companies could exclude maternity provisions from their disability coverage. The EEOC’s guidelines are discussed in General Elec. Co. v. Gilbert, 429 U.S. 124, 142 (1976).

\textsuperscript{35} 429 U.S. 124 (1976).

\textsuperscript{36} 417 U.S. 484 (1974).

\textsuperscript{37} The Fourteenth Amendment does not cover private actions and Title VII, unlike the Fourteenth Amendment, explicitly prohibits discrimination on the basis of sex. 42 U.S.C. § 2000e (1978).
While the first group is exclusively female, the second includes members of both sexes.\textsuperscript{38}

The Court need not have applied its ruling in a constitutional case to its interpretation of Title VII, but it did. The Court in \textit{Gilbert} held that discrimination on the basis of pregnancy was not discrimination on the basis of sex under Title VII. Furthermore, the Court held that General Electric's "neutral" policy did not have an adverse impact on women employees, who, on average, received more medical benefits than male employees for their contributions. Justice Brennan, joined by Justices Marshall and Stevens, delivered a stinging dissent, and legal scholars as well as members of Congress criticized the ruling.\textsuperscript{39}

The Court softened its position in \textit{Nashville Gas Co. v. Satty}.\textsuperscript{40} While the Court maintained that pregnancy discrimination was not disparate treatment, it recognized that such a policy might have a discriminatory effect. The Court found that Nashville Gas's policy of stripping pregnant employees of all accumulated seniority during a mandatory unpaid leave of absence (making it difficult if not impossible to bid successfully for jobs when they returned), imposed heavy burdens on pregnant workers that no male workers faced. Because there was no proof of any business necessity justifying the adoption of the policy, the Court found Nashville Gas in violation of Title VII. The Court in \textit{Satty} distinguished employment policies that failed to provide benefits to pregnant employees from those that burdened them, holding that only the latter violated Title VII.

\textit{Gilbert} and \textit{Satty} galvanized the feminist movement and Congress reacted swiftly. In 1978, Congress passed the Pregnancy Discrimination Act (PDA)\textsuperscript{41} to reverse \textit{Gilbert}.\textsuperscript{42} The statute amended Title VII to include discrimination based on pregnancy, childbirth, and related medical conditions in the definition of sex discrimination.\textsuperscript{43} The amendment in effect instructed the courts to consider cases of preg-

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\textsuperscript{38} 417 U.S. 484 at 496-97, n.20.
\textsuperscript{40} 434 U.S. 136 (1977).
\textsuperscript{43} 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 703(h) of this title shall be interpreted to permit otherwise. 42 U.S.C. § 2000e-(k).
\end{flushright}
nancy discrimination under the rubric of disparate treatment, rather than disparate impact as in Satty. The Supreme Court could no longer doubt Congress' commitment to prohibiting sex discrimination in general, or its specific intention to prohibit pregnancy discrimination. The legislative history reveals that Congress viewed pregnancy discrimination as a major impediment to equal employment opportunity for women.

Feminists in the United States continue to debate the best way for employers to accommodate pregnancy. Those feminists who litigated the important constitutional and statutory cases in the 1970s and early 1980s and lobbied for passage of the Pregnancy Discrimination Act argue for an expansive comparative approach. They claim that employers should treat pregnancy as any other condition which requires people to miss work. Men who have heart attacks and women who give birth have similar needs which should be treated the same. Any need to bond with newborns or leave for parenting should be made available to parents of both sexes. To treat women differently, the argument goes, will only lead to bad results. Employers will refuse to hire women because they will require additional benefits, and mothers but not fathers will stay home from work to care for newborns, institutionalizing unequal childcare patterns from the start. Women should join in calling for better accommodations for all workers, such as the right to sick leave and job reinstatement, rather than argue that they are different from male workers.

The special treatment model maintains that pregnancy is not an illness. It is a normal, often planned, part of people's lives. Giving women maternity leave should not be linked to whether or not employers have good policies for sick employees. The workplace must acknowledge that women have children rather than suggest that they are to forego childbearing or just cope with the difficulties during non-working hours. To expect women to accommodate their childbearing needs to policies dealing with sickness is to impose a male norm on women—they may participate in the workplace as long as they are like men. Women require special treatment—an acknowledgment that they bear children while male workers do not—to put them on an equal footing in the workplace.

The Court in its Gilbert opinion and Congress in passing the PDA both adopted a comparative approach. Because the Supreme Court found in Gilbert that pregnancy is unique, and that men and women are not alike, the Court allowed employers to treat pregnant women differently from other employees. It therefore adopted a restrictive comparative approach. The EEOC in issuing its second set of guidelines, Congress in passing the PDA, and feminists in the Gilbert amicus briefs also adopted a comparative approach, but concluded that preg-

nant women were similar to men who suffered from a temporarily incapacitating illness. They therefore adopted an expansive comparative approach. Under the PDA, employers may treat pregnant women as well or as badly as they do men who suffer temporary disabilities. The law does not require employers to grant women special rights to reinstatement, maternity leave, or medical benefits not available to other employees.

Yet the Court held that the law may permit states to accommodate the needs of pregnant workers but not sick workers in some cases. In California Federal Savings and Loan v. Guerra, the Supreme Court moved away from an expansive comparative approach toward substantive equality. A California statute mandated that employees disabled by pregnancy had a qualified right to reinstatement following childbirth. Lillian Garland filed a complaint with the Department of Fair Employment and Housing when the California Federal Savings and Loan Association (Cal Fed) did not reinstate her after childbirth. Before the hearing, Cal Fed sought an injunction against enforcement of the statute, claiming it was preempted by Title VII. Citing the opinion in Newport Shipping and Dry Dock Co. v. EEOC (holding that the PDA forbids employers from treating pregnancy-related disabilities less favorably than other disabilities), the Supreme Court held that in enacting the PDA Congress intended "to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." Special treatment by the states would not be precluded by Title VII's equal treatment approach.

Feminist groups filing amicus briefs in California Federal were divided. The National Organization for Women argued as amicus that the language of the PDA forbade treating pregnancy differently from other disabilities, whether more or less favorably. The petitioners contended that given the clear language of the PDA, no reference to the legislative history was necessary. Justice Marshall, writing for the Court, insisted that it "examine the PDA's language against the background of its legislative history and historical context." The legislative history explicitly showed that Congress meant to prohibit the states from enacting such laws. Marshall noted that the California statute, however, unlike protective legislation in the past, was not based on stereotypical notions about women. Instead, it offered a limited benefit to insure that pregnant women were not at a disadvantage in the workplace. The Court held by a 6 to 3 margin that the California statute mandating reinstatement for women in some circumstances after childbirth did not violate the Pregnancy Discrimination Act.

47. Id. at 679.
48. 479 U.S. 272 at 284.
Six years later, Congress furthered the expansive comparative approach in passing the Family and Medical Leave Act (FMLA) of 1993, which President Clinton signed into law. The FMLA represented significant compromises with employers who feared that allowing any sort of family leave would be economically catastrophic. The FMLA grants up to twelve weeks of unpaid leave after childbirth or adoption, to care for a seriously ill child, spouse, or parent, or in the case of the employee’s own illness. Only those who work for companies employing fifty or more workers qualify. Employees must also have worked for the employer for at least twelve months and give thirty days’ notice. The FMLA stayed within the framework of those advocating passage of the Pregnancy Discrimination Act. The Act uses a gender-neutral criterion—those who care for dependents—which allows both men and women to qualify for leave. Unlike the provisions of most Western European laws, however, the leave is unpaid. While the FMLA marks a step forward in accommodating the needs of workers, its application to only larger companies and the absence of paid leave means that many workers will be unable to enjoy its benefits. Prior to passage of the FMLA, perhaps the strongest statement that family obligations need not force women workers to forego paid employment is the Supreme Court’s 1991 decision in UAW v. Johnson Controls.

B. UAW v. Johnson Controls and Exclusionary Policies

Cases on exclusionary policies differ somewhat from cases of discrimination against pregnant women. Some employers have gone beyond firing or refusing to hire pregnant women and have excluded all women who do not have medical proof of infertility from working with allegedly hazardous substances because they might become pregnant, bear a malformed child or miscarry, and then hold the employer responsible. Employers call such policies fetal protection policies, but in my view the more appropriate term is exclusionary policies. Such policies are underinclusive, because they do not protect potential fetuses from the harm their fathers’ exposure may cause them. They are also overinclusive because not all women are equally likely to become pregnant. The non-existent fetus is protected only from the damage the mother’s exposure might cause, while women are “protected” out of lucrative blue-collar jobs.

The most dramatic example of such a policy is the case of American Cyanamid Corporation. At its plant in Willow Island, West Virginia, company officials told women workers that beginning May 1, 1978, Cyanamid would exclude all women who were not sterilized or post-menopausal from eight of the plant’s ten departments. Manag-
ers told the women that they might transfer to the other two departments or to janitorial work subject to the availability of jobs, but that in most cases, those transferring would receive lower wages.\textsuperscript{51} A company official conducted meetings with women workers, informing them that hundreds of chemicals were harmful to fetuses\textsuperscript{52} and that the company would no longer allow women aged 16-50 to work with them.\textsuperscript{53} A company doctor and nurse at the meetings told the women that sterilization (described as "buttonhole surgery") was simple and could be obtained locally, that the company's medical insurance would pay for the procedure, and that the women would be entitled to sick leave for the surgery.\textsuperscript{54} The company official also informed them that the plant would have only seven jobs for the thirty non-sterilized women. It would dismiss all others. Between February and July of 1978, five women in the lead pigments department opted for sterilization and two women transferred into other departments.\textsuperscript{55} Unfortunately, the sterilizations did not enable the women to keep their jobs because Cyanamid closed the lead pigment department in late 1979.\textsuperscript{56}

\textsuperscript{51} The company extended the policy to include women laboratory workers, although for some unknown reason, it never applied the policy to them. Perhaps the company thought that professional women were more likely to be aware of the hazards and evaluate the risk for themselves, believed the company could more easily control exposure in a laboratory setting, or believed individual laboratories could make arrangements on a case-by-case basis. U.S. Congress, Office of Technology Assessment, Reproductive Health Hazards in the Workplace 253 (Dec. 1985) [hereinafter Reproductive Health Hazards].

\textsuperscript{52} "[Glen Mercer, Director of Industrial Relations, who conducted meetings with groups of three to five employees in January and February of 1978] also represented that a similar sterilization policy was being implemented by a number of other chemical companies and he anticipated that in the near future no women of childbearing age would be able to work in any chemical company in the United States." Memorandum of the Secretary in Opposition to Respondent's Motion for Summary Judgment at 5, Secretary of Labor v. American Cyanamid Company, OSHRC Docket No. 79-5762 (June 30, 1980) [hereinafter DOL Memo]. The Occupational Safety and Health Administration (OSHA) protested the fact that it was not allowed full discovery to investigate Cyanamid's fetal protection policy. Despite this limitation, the brief in opposition to the motion for summary judgment included an analysis of the policy as drawn from the accounts of a number of Cyanamid women, including the women who had been sterilized. \textit{Id}.

\textsuperscript{53} Mercer refused to give the women a copy of the policy and claimed that the Environmental Protection Agency (EPA) and OSHA supported the findings about the harmful effects to the fetus, although he refused to let the women see the letters from the EPA and OSHA. \textit{Id} at 5.

\textsuperscript{54} "When asked if the use of other forms of birth control would be acceptable as a means of abating the potential hazard, Mercer emphatically stated that only surgical sterilization would be acceptable, since women could not be relied upon to faithfully employ other methods of birth control." \textit{Id}.

\textsuperscript{55} After 90 days, their pay was lowered to correspond to the rate for their new jobs. Oil, Chemical and Atomic Workers, International Union v. American Cyanamid Company, 741 F.2d 444, 446 (1984).

\textsuperscript{56} Reproductive Health Hazards, \textit{supra} note 51.
After the Occupational Health and Safety Commission unsuccessfully tried to use Health and Safety laws to stop such policies, the only avenue for women excluded from hazardous work was to claim discrimination under Title VII. Title VII, however, requires all claimants to first file with the Equal Employment Opportunity Commission before going to Court. The Commission's decision to classify such cases as "non-Commission Decision Precedent" effectively kept these cases out of court and off the public agenda for seven years. A staff report of the House Education and Labor Committee, *The EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s*, documented how the EEOC abdicated its responsibility and buried the important issue of discrimination resulting from so-called fetal protection policies. While the agency pleaded lack of expertise, more than 40 complaints gathered dust at headquarters. Succumbing to pressure from Congress, the EEOC reluctantly acted and revised its policy in 1990. Some of the complaints, however, were administratively closed rather than settled, for failure to find the complainant.

It was UAW v. Johnson Controls, 499 U.S. 187 (1991) that put the issue of discrimination from exclusionary policies on the agenda again in 1991, nearly ten years after commentators called reproductive hazards "the occupational health issue of the 1980s." Johnson Controls manufactures batteries, which exposes workers to lead. Before Congress passed the Civil Rights Act of 1964, Johnson Controls employed no women in its lead manufacturing processes. In 1977, Johnson Controls opened certain jobs to women, recommending that women planning to conceive not take these jobs. It required all women to sign a form acknowledging that they were informed about the risks. Between 1979 and 1982 eight employees had become pregnant while maintaining blood lead levels of over 30 micrograms per deciliter, although none of the children born to those employees appeared to have any adverse effects. In 1982, Johnson Controls instituted a policy of excluding non-sterilized women from all lead exposure jobs as well as any job which fed into a high lead-exposure job, regardless of their age, intention to become pregnant, or method of contraception. All women who did not have proof of surgical sterilization or certification from a doctor stating that they were infertile were included in this category. The company claimed that recent evidence on children's exposure to lead suggested that even low levels were dangerous and extrapolated these results to developing fetuses.

In 1986, the United Auto Workers filed suit in the U.S. District Court for the Eastern District of Wisconsin alleging that Johnson Controls' prohibition against the employment of women in its battery

manufacturing processes violated Title VII. The company moved for summary judgement. The UAW, however, argued that two important questions of fact were in dispute: whether fetuses were at risk from low levels of maternal exposure to lead, and whether male reproductive capacity was endangered by their exposure.

As well as disagreeing about the medical evidence, the parties disagreed about the appropriate category of discrimination that the Court should apply—whether the court should analyze Johnson Controls' policy as disparate treatment or disparate impact. How a court chooses to classify the policy allocates the burden of proof between employers and workers and determines how difficult it is for an employer to justify its policies. Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, prohibits discrimination because of pregnancy, childbirth, or related medical condition. To justify excluding women from a job, an employer must show that sex is a bona fide occupational qualification for the job (BFOQ)—that you cannot do the job if you are a woman. However, if an employer institutes a neutral policy which disproportionately excludes more women than men, such as a height or weight requirement, the employer may justify the policy as a business necessity.

Even though the policies are facially discriminatory, two circuit courts categorized such exclusionary or “fetal protection policies” as neutral policies, allowing the employer to justify them under the business necessity defense. In Wright v. Olin, the Court of Appeals for the Fourth Circuit analyzed a similar policy under the category of disparate impact and laid out guidelines for when such policies would be lawful under Title VII. First, a company would have to show that a significant risk to the fetus resulted from women’s exposure but not men’s exposure. Second, the company would have to produce scientific evidence for its conclusions, although there need not be consensus. Third, the company would have to show that there were no less discriminatory alternatives. In Hayes v. Shelby Memorial Hospital, the Court of Appeals for the Eleventh Circuit applied the disparate impact analysis, but concluded that Hayes had been the victim of discrimination because Shelby Memorial Hospital could not show that the radiation an x-ray technician received posed a significant risk to the fetus. Johnson Controls cited Olin and Hayes in support of its claim that their fetal protection policies should be analyzed under the rubric of disparate impact.

On February 24, 1988, the district judge granted Johnson Controls' motion for summary judgment. Judge Robert W. Warren summarized the medical evidence and concluded that low levels of maternal exposure to lead posed a risk to a fetus. Although he recog-
nized that the parties had presented conflicting studies on the risk of exposure to men, he held that Olin only required that there be a considerable body of scientific opinion, not consensus. Noting that many pregnancies were unplanned and that lead stays in the body for some time after workplace exposure ceases, he ruled that Johnson Controls could exclude non-sterilized as well as pregnant women. Judge Warren concluded that “[b]ecause of the fetuses [sic] possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory.”64 Operating under the rubric of disparate impact, Judge Warren held that Johnson Controls established a defense of business necessity because the company was legitimately concerned about tort liability and the UAW had not proven that acceptable alternatives existed.

The UAW appealed, and the Court of Appeals for the Seventh Circuit affirmed en banc 7-4.65 The Court of Appeals agreed that lead posed a risk to a developing fetus and dismissed the evidence of the effects of lead on men’s reproductive capacity. It considered the policy to be neutral and applied the business necessity defense as articulated in Olin66 and Hayes.67 The majority held, however, that Johnson Controls would have been entitled to summary judgment even if the company had had to defend its policy as a bona fide occupational qualification.

The four dissenting justices on the Court of Appeals included Reagan-appointed conservatives of the “law and economics” school. Judges Cudahy and Posner argued that summary judgment was inappropriate, but that the company might be able to prove BFOQ on remand. Judge Easterbrook, joined by Judge Flaum, called this case the most important sex discrimination case in 25 years and possibly the most important ever. He agreed that the policy was explicit sex discrimination (direct discrimination) and that the only defense would be that the policy was a BFOQ. He disagreed with the other dissenters by arguing that Johnson Controls’ purported concern with potential life could not justify the policy as a BFOQ. He thought Johnson Controls’ policy was excessively broad because few women would become pregnant. It was Judge Easterbrook’s view that the Supreme Court echoed in its ruling.

In the Supreme Court’s majority opinion authored by Justice Blackmun (who wrote the majority opinion in Roe v. Wade), the Court stated that Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, prohibits sex discrimination in employment. Discrimination because of pregnancy, childbirth, or a related medical condition also constitutes discrimination

64. Id. at 316.
65. 886 F.2d 871 (7th Cir. 1989).
66. 697 F.2d 1172 (4th Cir. 1982).
67. 726 F.2d 1543 (11th Cir. 1984).
on the basis of sex. The only defense for explicit sex discrimination is that sex is a bona fide occupational qualification for the job—that you cannot do the job if you are a woman. The Court stated that the three circuit courts which analyzed exclusionary or "fetal protection policies" as neutral policies, allowing the employer to justify them under the business necessity defense, had mistakenly applied the law: "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination and thus may be defended only as a BFOQ."68

The Court went on, however, to state that such an exclusionary policy could never be justified as a BFOQ. Having the capacity to become pregnant does not make women incapable of performing their jobs, nor could the threat of tort liability from injured children justify the exclusion of non-sterilized women. In 1978 when the Occupational Safety and Health Administration set standards for occupational exposure to lead, the Administration rejected excluding women or setting different standards for men and women. Instead, OSHA concluded that the evidence warranted setting a single standard for men and women, allowing workers of either sex the right to transfer to another job if they were planning to start families. The Court concluded that employers who met established exposure standards, and informed women of the risks, would not be considered negligent.

The Supreme Court concluded "[t]hat Johnson Controls' professed moral and ethical concerns about the welfare of the next generation [does] not suffice to establish a BFOQ of female sterility."69 In a move that angered anti-abortion groups, he also stated: "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."70 Thus, the rights of a yet-to-be-conceived fetus do not trump all other rights.

All nine members of the Court agreed that Johnson Controls' policy constituted disparate treatment; the strength of this holding was a surprise. Had the Court considered Johnson Controls' policy under the rubric of disparate impact, the outcome might have been different. The Rehnquist Court made it virtually impossible to challenge neutral employment policies which freeze women in low paying jobs71 until Congress passed the Civil Rights Act of 1991. The Rehnquist Court has been more sympathetic to the legal arguments of employers than previous courts. One might have expected this Court to further erode women's right to employment opportunity under Title VII; instead, Justice Blackmun's opinion, joined by four other justices, including Justices O'Connor and Souter, was unambiguously support-

68. 499 U.S. 187 at 199.
69. Id. at 206.
70. Id.
ive of Congress' desire to prevent employers from denying women jobs because they can get pregnant.

In a concurring opinion, Justice White, 72 joined by Chief Justice Rehnquist and Justice Kennedy, thought that a more narrowly-tailored policy might be defended as a BFOQ. Justice White did agree, however, that summary judgment was inappropriate and that the policy must be considered disparate treatment. The concurring justices thought a substantial threat of tort liability could justify a BFOQ, but the burden would be on the employer to prove that a serious threat existed. Justice White thought that the BFOQ could include considerations of cost and safety, not merely whether women could perform the job. He did, however, believe that Johnson Controls had overstated the risk, and that it should have considered less discriminatory alternatives to excluding all non-sterilized women.

Finally, in a separate concurrence, Justice Scalia disagreed with Justice Blackmun's view that cost could not be a defense for explicit discrimination. He agreed that any action required by Title VII could not give rise to tort liability. Justice Scalia's concurrence contained the most surprising and significant part of the Court's holding. Justice Scalia argued that Title VII prohibits employers from excluding non-sterilized women from hazardous work, not because men also face reproductive hazards from lead, but because the Pregnancy Discrimination Act states unambiguously that employers may not exclude women from jobs because of their capacity to become pregnant.

In UAW v. Johnson Controls, the Supreme Court said unequivocally that whether women can compare themselves to men or not, the law forbids employers from punishing women because they have the capacity to bear children. Around the same time that the Supreme Court was deciding UAW v. Johnson Controls, the European Court of Justice was considering the question the Supreme Court had decided in the 1976 case of Gilbert: is discrimination because of pregnancy discrimination because of sex? Before turning to that case, I will briefly describe the European Court of Justice and European Community law.

IV. THE EUROPEAN UNION AND PREGNANCY

A. Background

Despite the failure of monetary union, its inability to resolve the conflict in the former Yugoslavia, and the stalled efforts at political integration, the European Union in 1995 is still much more than an international organization. It is a supranational organization with laws, courts, a legislature, and an executive. 73 Cases come before the

72. Justices Souter and O'Connor joined Justice Blackmun's opinion rather than joining the concurring opinion of the more conservative members of the Court.
73. See John Bridge, American Analogues in the Law of the European Community, 11 ANGLO-AM. L. REV. 130 (1982); Walter Hallstein, Europe in the Making 35 (1972);
European Court of Justice from two principal avenues. First, an individual may bring a case in a domestic court and ask it to apply European Community law to the case. When a national court or tribunal concludes that the case before it raises a matter covered by European Community law, Article 177 of the Treaty of Rome (which created the European Economic Community) permits the national court to submit questions calling for the Court of Justice to give a preliminary ruling interpreting Community Law.\textsuperscript{74} The European Court of Justice answers the questions and sends the answers to the national court to apply in the case.

The European Court of Justice differs from the U.S. Supreme Court in several ways. First, the European Court of Justice issues only one opinion; there are no dissents. Second, the Commission may directly challenge national laws through infringement proceedings. The Commission may bring Member States before the European Court of Justice for failing to comply with the Community's law under Article 169.\textsuperscript{75} Finally, unlike the U.S. Supreme Court, which can rely on federal district courts to enforce its rulings, the European Court of Justice is dependent on national courts to apply its rulings and national governments to change their laws if infringement proceedings are not resolved in their favor. The Commission, then, in addition to proposing legislation, has the important task of overseeing the enforcement and implementation of European Community law.

The history of the European Court of Justice shows that it has turned an international treaty into a constitution.\textsuperscript{76} Much as the Marshall Court in U.S. constitutional history promoted federalism, the European Court of Justice promotes European integration. The Court furthers the goal of the Treaty in two ways: by consistently holding that European Community law is supreme, and by holding that the Treaty is more than just a contract among member states—instead, it confers rights directly on individuals which are enforceable in national courts. In the jargon of European Community law, the Court has held parts of the Treaty and certain directives to be directly effective.\textsuperscript{77}

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\textsuperscript{74} Article 177 requires the national court to bring the matter to the European Court of Justice if it is the final court of appeal under national law. EC Treaty, \textit{supra} note 1.

\textsuperscript{75} Article 169 provides that “[i]f the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall issue a reasoned opinion on the matter after giving the State concerned the opportunity to submit its comments.” EC Treaty, \textit{supra} note 1.


The impact of the European Court of Justice's activist rulings is clearly seen in its decisions on sex discrimination and equal pay. In Defrenne v. Sabena II, the Court held that the Treaty's guarantee of equal pay for men and women was a foundation of European Community law and an integral part of the Treaty's social objectives. The Court ruled that Article 119 (the only part of the Treaty to explicitly refer to nondiscrimination on grounds of sex) was not only directly effective, but also had horizontal effects. That is, an individual may seek to have European law applied not only to her claim against the government, but also against private employers, regardless of whether the member state had passed equal pay laws. Envisaged as a program to prevent unfair labor competition, Article 119 was not implemented by European Union member states until interest grew in a social program for the Union. Those who wanted to promote a social policy for the Union saw women's equal employment opportunity as a useful tool. Defrenne II forced Member States to do what the Commission and Council had been unable to do for 19 years—implement Article 119.

Spurred on in part by Defrenne's success, the Commission sought to expand upon the Treaty's provisions for equal pay. The Council passed the Equal Pay Directive in 1975 which defined equal pay for Article 119 to include equal pay for work of equal value, not just equal pay for equal work. Acknowledging that equal pay did little to promote equality for women if they could not get or keep jobs in the first place, the Council passed the Equal Treatment Directive, which went


80. The first case Defrenne brought was an equal pay case under Article 119. Case 80/70, Defrenne v. Belgian State, 1971 E.C.R. 445.

81. Article 119 of the Treaty of Rome requires that "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle of equal remuneration for the same work as between male and female workers." EC Treaty, supra note 1. Although inspiration for the working of Article 119 may have come from Convention No. 100 of the International Labour Organisation, it was French pressure that secured its inclusion in the Treaty. Bernmann, supra note 1.

82. Unfortunately, the European Court of Justice limited claims for back pay—although merely interpreting the Treaty, it did not hold Member States or employers to this interpretation of the Treaty during the time the Treaty was ratified and the Court issued the ruling. Case 43/75, 1976 E.C.R. 455.

83. Council Directive 75/117, 1975 O.J. (L 45) 19. Article 1 of the Equal Pay Directive states that: "The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called 'the principle of equal pay,' means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration." Id.
into effect in 1978, mandating equal treatment of men and women in employment, vocational training, promotion and working conditions.84

Through proposed directives and three action programs, the Commission has actively promoted equal employment opportunity for women.85 The Council passed a third directive in 1979 to secure equal treatment for men and women in matters of social security,86 and another directive on occupational social security schemes in 1986.87 The Commission has proposed directives on atypical work,88 parental leave,89 and reversing the burden of proof in cases of discrimination.90

While the Commission has consciously pushed for greater equal employment opportunity for women in its legislative proposals and infringement proceedings, it is the European Court of Justice which has arguably done the most to achieve this goal. The European Court of Justice has interpreted the Equal Pay and Equal Treatment Directives more broadly than the British legislation they spawned. As a result, several British claimants have demanded their rights under European Community law when British law alone provided them no remedy, and some have won.91 The United Kingdom’s failure to fulfill its treaty obligations has prompted the Commission to bring infringement proceedings twice.92 Combined with rulings in individual cases, the European Court of Justice’s decisions have forced the British Parliament to amend the laws several times to harmonize British

88. 1990 O.J. (C 224).
89. 1984 O.J. (C 316).
90. 1988 O.J. (C 176).
law with European Community law. Forcing changes in British law by individual lawsuits or action by the Commission is an expensive, slow, and cumbersome way of producing social change; yet given the Conservative Government's hostility to expanded protection for workers, working in the arena of the European Union was the most effective way of altering British law in the 1980s.

Aware of the deadlock in European Union decision making, the European Court has occasionally expanded its interpretation of existing European Community laws to essentially bring stalled legislation into effect. While the European Court of Justice has done much to both expand the equality provisions of European Community law and to insure that national governments and courts enforce and implement it, its advancement of feminist goals has been evolutionary rather than revolutionary. The European Court of Justice often seeks a compromise position that gives national courts a wide measure of discretion, thereby encouraging their compliance with its rulings and making national courts the targets of criticism for controversial rulings. For example, in Jenkins v. Kingsgate (Clothing Productions) Ltd. the Court ruled that paying part-time workers at a lower hourly rate might be indirectly discriminatory against women if employers could not show that a material factor other than sex justified the differential. The Court left it up to national courts to determine whether the differential was justified. In Johnston v. RUC, women challenged the decision of the head of the Northern Ireland police to fire all women officers when he decided that all officers should carry firearms. The European Court of Justice rejected the British Government's arguments that several exceptions from the Equal Treatment Directive applied in the case, and insisted that Britain could not insulate the question from judicial review. The Court left to the Northern Ireland tribunal the question of whether the special circumstances of Northern Ireland justified refusing to arm women officers. In von Colson and Kamann v. Land Nordrhein-Westfalen, the Court declined to rule that European Community law required the remedy of requiring em-

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ployers to hire people they had discriminated against. The Court did hold that judges could go beyond domestic law to require fines or awards that would deter would-be discriminators and provide a real remedy to victims. Finally, even when the European Court of Justice has expanded the protection of the law and overturned settled assumptions about what European Community law requires, the Court has refused to give its ruling any retrospective effect.98 Thus, the European Court of Justice has often tried to find a compromise position, one that allows national courts to keep a measure of discretion but continues to advance the cause of equality for women.

Feminists and members of the Commission have occasionally criticized the Court for taking a special treatment approach which boarders on paternalism. In Commission v. Italy,99 the European Court of Justice held that the Equal Treatment Directive (ETD) did not prevent Italy from providing three months paid leave for mothers of adoptive children, but not fathers. Similarly, in Hofmann v. Barmer Ersatzkasse,100 the European Court of Justice ruled that the ETD did not prevent member states from offering a maternity leave, beyond what women required to recover physically from the birth, to women only. The Court rejected the European Commission’s arguments that if the leave was to provide intensive care for newborns rather than to allow for the mother to recover from the birth, the leave should be available to either parent. The European Court of Justice did decide, however, that the special privileges available only to mothers under French labor law (such as extra days holiday each year for every child a woman bears) did violate the Equal Treatment Directive, since they were not directly related to pregnancy and childbirth.101 It has also ruled that several of the exceptions to the principle of equal treatment embedded in British law fail to comply with the Equal Treatment Directive.

The Commission, in its arguments before the Court on preliminary rulings and infringement proceedings, has urged the Court to interpret Community law expansively to provide greater equality for women and has often taken an expansive comparative approach. In the Court’s defense, the special treatment approach is embedded in the Equal Treatment Directive itself, although the Commission advocates interpreting these provisions as narrowly as possible. The Equal Treatment Directive prohibits discrimination on the basis of sex in employment. Like the British Sex Discrimination Act, the ETD contains provisions that permit member states to provide special treatment for childbirth and maternity to women only, even when they do

not have similar benefits for men who require absences from work. It also provides for an equivalent of the bona fide occupational qualification (BFOQ), or genuine occupational qualification exception, but only provides that member states should keep such provisions under review for their continued appropriateness, without further specifics.

When it came to the question of whether the Equal Treatment Directive forbade discrimination on the basis of pregnancy, the European Court of Justice eventually adopted a substantive equality approach. The 1990 decision of the European Court of Justice in Dekker v. Stichting Vormingcentrum voor Jonge Volwassenen (VJV-Centrum)\(^\text{102}\) stated unequivocally that discrimination on the basis of pregnancy is direct discrimination on the basis of sex in violation of the Equal Treatment Directive, regardless of whether an employer disfavored male employees who were ill or required absences from work. It is to that decision that I now turn.

B. Dekker and Hertz

In October of 1989, the European Court of Justice heard oral argument on two cases of pregnancy discrimination. A Dutch court referred the first, Dekker v. VJV-centrum Plus,\(^\text{103}\) asking whether refusing to hire a pregnant woman violated the Equal Treatment Directive. A Danish court referred the second, Hertz v. Aldi Marked,\(^\text{104}\) asking the European Court of Justice whether the Equal Treatment Directive forbids employers from firing women who missed work because of illnesses resulting from childbirth. The Advocate General,\(^\text{105}\) Mr. Marco Darmon, issued his opinion November 14th, 1989, and the Court handed down its decision in October of 1990.

The facts in the Dutch case are as follows. Elisabeth Dekker applied for a job at a youth training center (VJV). During the second interview she told the interviewing panel that she was three months pregnant. The panel found her to be the best qualified applicant and recommended hiring her; however, the board of the center refused. Under the complex system of social entitlements in Dutch law, employees incapacitated by illness are entitled to one year's full pay and a second year at 80% of their salary. The Training Center, however, was not covered by the National Health Insurance Act under which the state covers sick pay. Instead, the law mandates that the Training Center insure itself with a "Riskfund." When asked, the Riskfund told the Center that because Dekker was pregnant when it hired her, the


\(^{105}\) The Advocate General, drawn from French law, has no real analogue in the American legal system. The Advocate General attends oral arguments, reads the submissions, and writes an opinion setting out the facts, summarizing the legal arguments, and recommending how the Court should rule. Brown, supra note 10.
Riskfund would not pay for her replacement during her maternity leave. The Riskfund did not compensate employers for illnesses in the first six months of work which it could have foreseen, under a well-established principle of Dutch law: "you cannot insure a burning house." The Training Center then told Dekker that, because it could not afford to replace her out of its own funds, it was hiring another woman instead.

Dutch law, implementing the Equal Treatment Directive, does not explicitly prohibit discrimination on the basis of pregnancy. The first two Dutch courts which heard Dekker's case, the Rechtbank (trial court) and the Gerechtshof (intermediate appellate court), concluded that the Training Center had not violated the law. Because the Training Center would suffer serious financial difficulties if it had to pay to replace Ms. Dekker, the decision not to hire her constituted a justifiable exception to the antidiscrimination law.

The Hoge Raad, the highest Dutch appellate court, suspended its proceedings and referred the following questions to the European Court of Justice (which I have paraphrased):

1. Does an employer violate the Equal Treatment Directive by not hiring a pregnant woman because it would be costly to do so?
2. Does it make any difference if there were no male candidates?
3. Does it matter whether it is the employer's fault that its insurance will not reimburse for the cost of her leave? Even if it is the employer's fault, can the employer claim an exception because of cost, even if the case does not fall into one of the exceptions of the ETD?
4. Must the employer be certain the insurer will not cover the costs, or merely that there is a risk that the insurer will not pay?

As is typical of the European Court of Justice, the Advocate General's opinion more fully discusses the legal issues. Advocate General Marco Darmon began his opinion by affirming the importance of equality:

[T]wo questions invite you to reflect upon maternity and the importance it needs to be given, considering the community principle of equality between male workers and female workers, in the economic and social life of our European societies.106

Only after so defining the issue did he mention balancing costs and benefits or the burdens imposed by the Equal Treatment Directive. Before Darmon could answer whether the Dutch social insurance scheme failed to implement the Equal Treatment Directive by exempting pregnancy for coverage as a foreseeable illness, he considered the threshold question of whether Dekker could invoke the Equal Treatment Directive against her employer.

Even if the Court found the Equal Treatment Directive directly effective, that is, creating a right for workers in member states regard-

less of whether the Netherlands passed a law giving it effect, under
current doctrine the directive would not be directly effective against
private employers. The European Court of Justice has held that direc-
tives which are clear and unconditional only confer directly effective
rights against the state. In the language of the Court, the ETD pro-
duces vertical but not horizontal direct effects. If the Court chose to
adhere to its previous rulings on direct effects, Dekker would lose. A
pregnant woman could only have the ETD applied to her case if she
were employed by the state.

Darmon cleverly avoided this limitation. He argued that the Eu-
ropean Commission wrongly cast the question as one of direct effects.
Darmon argued that in deciding the case, the European Court of Just-
tice should think of the case as falling under its ruling that national
courts must interpret national law to be consistent with European
Community law. Because the Netherlands passed its law to comply
with the Equal Treatment Directive, Dutch courts should interpret
Dutch law to avoid any conflict. Darmon’s analysis sidestepped the
problem of the absence of horizontal effects. If the European Court
of Justice concluded that pregnancy discrimination constitutes sex dis-
tribution under the Equal Treatment Directive, then Dutch courts
should interpret their own national law to be consistent with this rul-
ing. Under this analysis, plaintiffs Dekker and Hertz could proceed.
In this situation, European Community law affects domestic law by
“helping” judges interpret national law rather than conferring rights
independently or in direct conflict with national law. Yet the Euro-
pean Court of Justice’s interpretation of European Community law is
controlling.107

The demands of professional life must be reconciled with the de-
mands of childbearing. Darmon pointed out that for a long time, em-
ployers did not have to consider physiological differences between the
sexes, but this is no longer the case. By phrasing the question rhetori-
cally—what could be more specifically linked to women than preg-
nancy?—Darmon prevented the chance that pregnancy discrimination
might not be sex discrimination. He invoked the same
technique to make the second issue seem uncontested: “May we con-
ceive of giving equal treatment to female workers and their male
counterparts without taking maternity into consideration?”108

In his opinion, Darmon treated as obvious questions that other
courts answered differently. British Courts did not initially classify

107. Such a move is consistent with the ECJ’s gradual importation of “rights common
to the member states” and efforts to import the European Convention on
European Court and Its Fundamental Rights Jurisprudence—Part I, 32 COMMON MKT. L.
Rev. 51 (1995); and J.H.H. Weiler & Nicolas J.S. Lockhart, ‘Taking Rights Seriously': The
European Court and Its Fundamental Rights Jurisprudence—Part II, 32 COMMON MKT.

pregnancy discrimination as sex discrimination, nor did U.S. Courts easily conclude that the law permits states to require employers to re-instate women after childbirth even if they dismiss sick employees. Darmon argued that pregnancy discrimination is a clear case of direct discrimination (disparate treatment), not indirect discrimination (disparate impact), which would allow the employer the opportunity to justify the policy, because it is not neutral—it applies only to women. Darmon noted that refusing to hire a pregnant woman is direct sex discrimination even if all the candidates for the job were women and the employer hired a woman.109

Darmon then considered whether the Equal Treatment Directive’s exceptions for provisions on maternity and protective legislation might come into play. Echoing Justice Marshall’s opinion in Cal Fed that the Pregnancy Discrimination Act creates a floor beneath which maternity provisions may not fall, and not a ceiling above which they may not rise, Darmon contended that the Equal Treatment Directive permits member states to treat pregnant women better than sick employees, but not worse. In an interesting use of the term, the Advocate General referred to “what American law calls ‘affirmative action,’ ”110 to apply to the idea that it is not discriminatory to offer entitlements to pregnant women that other employees do not have in an attempt to promote equality. He used affirmative action to mean special treatment, which in British law is referred to as “positive discrimination.”

Having established that pregnancy discrimination may be direct discrimination and that the Equal Treatment Directive permits special treatment, Darmon questioned to what extent pregnancy should be considered an illness. He also considered to what extent cost should be a defense for an employer, and concluded that cost did not excuse the VJV’s refusal to hire Dekker. The Dutch Government, Darmon maintained, should legislate to make sure that employers do not suffer financially by providing maternity leave. The equation of pregnancy with illness may be suitable for calculating pay or benefits during absences from work, but it is not acceptable to refuse to hire pregnant women if one refuses to hire sick employees. In this situation, the analogy should not hold. Darmon maintained that the Equal Treatment Directive forbids treating pregnant women less favorably than men, or nonpregnant women, by refusing to hire or by firing them.

The final issue in Dekker was whether the employer was exempt from any penalties for discriminating since it was the Riskfund’s policy, as sanctioned by Dutch law, which caused the discrimination. On this point, Darmon left the matter to the national court, after asserting that letting the employer off the hook would “thwart the useful

109. Id. at 36.
110. Id. at 35.
effect of the [Equal Treatment Directive].”  

111 He suggested that nothing in Dutch law permitted exceptions to cases of direct discrimination. Darmon asserted that the national court must determine the sanction, but, according to von Colson, it must remedy and deter discrimination or the Equal Treatment Directive would be rendered meaningless.  

112 While both Dekker and Hertz raised questions about the status of pregnancy discrimination under European Community sex discrimination law, the facts were different. Hertz raised the question of whether the Equal Treatment Directive requires employers to treat illnesses caused by childbirth differently from other illnesses rather than whether an employer can refuse to hire a pregnant woman. Advocate General Darmon’s opinion distinguished between “normal” and “abnormal” pregnancies. He noted that member states vary on the issues of when an employer can fire a sick employee and who pays for sick leave. He acknowledged that Hertz’s absences were directly caused by childbirth, commenting:  

We are tempted—how can we help but admit it?—to propose to you a solution in which the pathological states, which would be the consequences in a direct, certain, and preponderant fashion of the pregnancy or of the delivery, would benefit from a sort of “immunity” in that the principle of equal treatment would be opposed to the possibility of the employer to dismiss the employee, for a reasonable period of time considering the given situation. But it seems to us on one hand that the present state of the community law does not postulate such a demand.  

113 Darmon concluded that the provisions of the Equal Treatment Directive permit member states to treat women who miss work because of childbirth and pregnancy more favorably than other employees, but that it does not require them to do so. The costs from an abnormal pregnancy which leaves a woman unable to work for a long time could be high, particularly to the small employer, if the employer were not reimbursed by the state. Fearing the potential high costs of an abnormal pregnancy, employers might refuse to hire pregnant women or women of childbearing age, an outcome contrary to the principle of the Equal Treatment Directive. Thus, the benefit of protecting a few women from the costs of an abnormal pregnancy would come at the expense of all women who want greater access to the labor market. Protecting the exceptional case is a job for the legislator and cannot be read into the Equal Treatment Directive.  

The Advocate General thus recommended that the European Court of Justice distinguish between normal and abnormal pregnancies. The Equal Treatment Directive requires employers to
accommodate normal pregnancy regardless of their policies on illness. Employers may not discriminate against pregnant women in hiring or firing, even though the law may permit them to treat sick employees less favorably. Darmon urged the Court to interpret the Equal Treatment Directive as not requiring employers to make special accommodations for abnormal pregnancies; those they may treat as favorably, or as unfavorably as illnesses. The attractiveness of Darmon’s approach to the cases, like many other holdings of the European Court of Justice on sex discrimination, is that he pursues a middle course. He takes a step toward outlawing discrimination on the basis of pregnancy without holding for the pregnant woman in every case. He is sensitive to different interpretations on the part of member states, and sensitive to some concerns about cost, giving national courts leeway in setting penalties and in defining abnormal and normal pregnancies.

The European Court of Justice accepted Darmon’s recommendations. Like Darmon, the Court began its opinion by reiterating the purpose of the ETD: to secure the equal treatment of men and women. To ascertain whether a refusal to hire pregnant women constituted direct discrimination in contravention of the ETD, the Court asked whether the refusal to hire applies to both men and women employees. Rejecting the comparative approach urged upon them by David Pannick, in his submissions for the U.K., the European Court of Justice refused to expand national regulations allowing employers to refuse to hire employees whose illnesses were foreseeable to include pregnant women. Instead, the Court held:

As employment can only be refused because of pregnancy to women, such a refusal is direct discrimination on grounds of sex. A refusal to employ because of the financial consequences of absence connected with pregnancy must be deemed to be based principally on the fact of pregnancy. Such discrimination cannot be justified by the financial detriment in the case of recruitment of a pregnant woman suffered by the employer during her maternity leave.

The answer to the first question asked by the national court was that refusing to hire pregnant women violates the Equal Treatment Directive, even if employers also treat sick men badly and even if the employer would incur additional expenses by hiring those women.

As in the U.S. Supreme Court’s Gilbert case, the VJV argued that it was not discriminating on grounds of sex because it hired a woman, but was merely discriminating between pregnant and nonpregnant persons. With short shrift, the ECJ rejected this argument, saying that

114. Although Darmon does not refer to it explicitly, the Commission was working on a draft directive on maternity, presumably intended to harmonize the provisions of member states. Council Directive No. 92/85, O.J. L 348 (1992).
one must look to the motive behind the refusal to hire. Refusing to hire a woman because she is pregnant is a form of sex discrimination.

The ECJ next considered whether it mattered that the employer was not at fault since its behavior was dictated by national regulations. The Court found that the ETD did not contain an exemption in such cases. Citing *von Colson*, the Court pointed out that if women have a right under the Equal Treatment Directive, they must have a remedy. The ECJ held that while national courts and legislatures have some discretion as to remedies, they must be sufficient to deter employers from discriminating. Letting employers off the hook for discriminating if national regulations are not favorable would weaken the rights the ETD guarantees.

Through its interpretation of the Equal Treatment Directive, the European Court of Justice with one fell swoop enacted important provisions of the directive on pregnancy (discussed below), which was then only a draft.116 *Dekker*, however, was not a total victory for those seeking expansion of the protection of pregnant workers, nor did it represent the end of the comparative approach. In *Hertz v. Aldi Marked*,117 the European Court of Justice held that employers could dismiss women whose absence from work resulted from complications stemming from childbirth if their statutory maternity leave had expired, and if an employer would also fire a sick man. If an employer fired a pregnant woman who was sick, or a woman who was ill during her maternity leave, however, that would constitute direct discrimination in violation of the Equal Treatment Directive, regardless of how employers treated other sick employees. Following the advice of Advocate General Darmon, the European Court of Justice adopted a compromise position, distinguishing between “normal” and “abnormal” pregnancies, and drew a line as to how far the Equal Treatment Directive required employers to accommodate women workers who give birth. The ECJ found that whatever protection member states require employers to offer sick workers, they must also give that protection to pregnant women and women ill from complications from childbirth. Women must also be protected while pregnant and during the period of maternity leave, but the Equal Treatment Directive confers no additional protection. The Court rejected the comparative approach in *Dekker*, but retained it in *Hertz*. Shortly after the ECJ ruled, the Dutch government passed legislation to make discrimination on the basis of pregnancy illegal.118


In 1992, the Council finally adopted a directive on pregnancy guaranteeing pregnant women a minimum of fourteen weeks leave at the rate of statutory sick pay.\textsuperscript{119} Acknowledging the European Parliament's concerns that pregnancy should not be defined as an illness, the Council denied any such analogy, claiming sick pay was only a reference point. The directive prohibits employers from terminating a woman solely because she is pregnant and entitles pregnant women to switch from night to daytime work, to be exempt from hazardous work, and to take paid leave for pre-natal care. To qualify, the woman must have worked for the same employer for at least one year. The Commission viewed the directive as "a first step." Member states may grant more generous benefits but not lower benefits. Britain consistently blocked proposed pregnancy directives in the Council. The benefits only improve the position of pregnant women in Britain, Ireland, and Portugal—all other member states have at least the minimum benefits the directive requires.\textsuperscript{120} British courts have not enthusiastically embraced the substantial changes to their legal system that membership in the EU brings. Before looking at how British judges interpreted the ECJ's ruling in \textit{Dekker} and \textit{Hertz}, I must first briefly describe sex discrimination law in the U.K.

V Sex Discrimination Law in the United Kingdom

A. Background

The British Sex Discrimination Act of 1975 (SDA) prohibits discrimination in employment, housing, education, and the provision of goods and services. The first type of discrimination prohibited by the Act is direct discrimination, defined as less favorable treatment on the grounds of sex (the British equivalent of disparate treatment). The only defense the employer may use is that sex is a genuine occupational qualification for the job or that one of the many exceptions in the Act applies. The SDA also prohibits indirect discrimination (disparate impact). Indirect discrimination occurs when an employer applies a neutral requirement or condition to all workers that disproportionately affects women, and which the employer cannot show to be justifiable irrespective of sex. The complainant carries the burden of proving by statistical evidence that fewer women can comply with the requirement. Only then does an employer have to prove that the requirement is justifiable, and the SDA provides no definition or criteria for industrial tribunals as to what "justifiable" means.

To understand the protection British law provides to pregnant workers, one must piece together statutes on unfair dismissal, sex dis-

\textsuperscript{119} The European Social Affairs Commissioner, however, recently threatened legal action against member states who had failed to implement the directive. \textit{'Chauvinist' Commissioner Champions Pregnancy Law}, \textit{Guardian}, Jan. 31, 1995, at 9.

crimination, social security, and maternity benefits. Employed mothers have five basic rights: the right not to be dismissed because of pregnancy, the right to time off work for ante-natal care, the right to maternity leave, the right to reinstatement after this leave, and the right to certain payments during absence from employment. The Employment Protection (Consolidation) Act of 1978 provides employed women with a limited right to reinstatement after pregnancy and childbirth (confinement). Women are also entitled to statutory maternity pay or maternity allowance, provided they meet certain conditions. The law requires employers with fewer than five employees to reinstate women only if "reasonably practicable." A woman forfeits the right to return to her job under terms and conditions no less favorable if she fails to comply with certain requirements, such as failing to give her employer 21 days notice before she plans to return. She may also lose the right to her job if her employer can show that it is not reasonably practicable to re-employ her. The restrictions on eligibility coupled with arduous notification requirements mean that only 60 per cent of working women are covered, and even fewer than those eligible actually receive the benefits.

The Employment Protection Act of 1975 made a dismissal of an employee on the grounds of pregnancy unfair, and therefore illegal, provided that the employee had been employed continuously for twenty-six weeks and was capable of doing the job. Because the Employment Act came into effect on the same day as the Sex Discrimination Act, the SDA did not stipulate that discrimination on the basis of pregnancy was sex discrimination. Later legislation extended the qualifying period from six months to two years, or five years for women who work between eight and sixteen hours per week, leaving


125. It only refers to pregnancy in section 2(2), where a man cannot claim discrimination because he has not been afforded the same special treatment which is afforded to women in connection with pregnancy and childbirth. Employment Protection Act, 1975.

many women unprotected against dismissal on the grounds of pregnancy. Furthermore, the Employment Act did not protect women from discrimination because of pregnancy in hiring, promotion, or other employment matters. Many women thus seek redress under the Sex Discrimination Act rather than under the Employment Act, even though they cannot win reinstatement under the former statute. Consequently, the Equal Opportunities Commission has called for the removal of qualifying restrictions for both maternity leave and pregnancy dismissal.\textsuperscript{127}

British industrial tribunals, like their U.S. counterparts, had trouble thinking of discrimination against workers on the grounds of pregnancy as sex discrimination because not all women become pregnant, and no men do. They applied a restrictive comparative approach. Because not all women become pregnant, early commentators characterized the issue as "sex-plus:" an employer was ostensibly not firing the woman because she was a woman, but because she was pregnant. In \textit{Reaney v. Kanda Jean Products Ltd}, the industrial tribunal commented:

The applicant was not dismissed on the assumed facts because she was a woman. She was on the assumed facts dismissed because she was pregnant, and it is only an accident of nature which bestows the burden and happiness of pregnancy on the female sex.\textsuperscript{128}

Under the comparative approach, discrimination can only have occurred if employers treat women less favorably than men. Because men cannot become pregnant early cases held that pregnant women were not the victims of sex discrimination.

The principal illustration of this reasoning is the 1980 case of \textit{Turley v. Allders Department Store}.\textsuperscript{129} Mrs. Turley had worked for Allders Department Store less than a year when she became pregnant and the store dismissed her. Because she did not meet the qualifying period for a claim of unfair dismissal under the Employment Act, she brought her claim under the Sex Discrimination Act. Before examining the merits of her case, the industrial tribunal considered the threshold legal question of whether dismissal on the ground of pregnancy was direct discrimination, and concluded that it was not. On appeal, the Employment Appeal Tribunal (EAT) agreed. For discrimination to occur, a woman would have to receive less favorable treatment than a man; but the EAT found that there was no male equivalent for pregnancy, thereby making comparisons impossible:

\begin{itemize}
\item \textsuperscript{127} \textit{Equal Opportunities Commission, Thirteenth Annual Report} 1 (1989); see also \textit{Equal Opportunities Commission, Equal Treatment for Men and Women: Strengthening the Acts} 7-8 (1988) [hereinafter \textit{Equal Opportunities Commission, Equal Treatment}].
\item \textsuperscript{129} \textit{Turley v. Allders Dep’t Stores Ltd.}, [1980] I.R.L.R. 4 (EAT).
\end{itemize}
In order to see if she has been treated less favourably than a man the sense of the section is that you must compare like with like, and you cannot. When she is pregnant a woman is no longer just a woman. She is a woman, as the Authorised Version accurately puts it, with child, and there is no masculine equivalent.\textsuperscript{130}

Ms. Smith, the only woman member of the panel, dissented, arguing that to give no protection to women dismissed on the grounds of pregnancy "contradicts both the spirit and the letter of the statutes."\textsuperscript{131} Echoing the approach of Congress in the PDA, Smith adopted an expansive comparative approach, and argued that employers should treat pregnancy like any other temporarily disabling medical condition. The case would then turn on this finding of fact. Thus, the right not to be treated less favorably might be more limited than the protection under the Employment Protection Act, depending on the employer's provisions for medical conditions. The SDA would only protect women who had worked less than two years full-time for the same employer if their employers made allowances for sick men. Smith also suggested that Turley could have brought a claim of indirect discrimination that, like the claim of direct discrimination, would be a question of fact. She concluded that the tribunal erred in preventing any pregnant woman from pursuing a claim of discrimination.\textsuperscript{132}

The EAT eventually accepted Smith's expansive comparative approach and overruled Turley in Hayes v. Malleable Working Men's Club.\textsuperscript{133} In Hayes the EAT held that differential treatment on the grounds of pregnancy could be sex discrimination depending on how an employer treated medical conditions that incapacitated men. If an employer dismissed men for such medical conditions, then it could dismiss pregnant women. Both Turley and Hayes adopted a comparative approach, but in Hayes the EAT decided that pregnancy was not so unique after all. Instead, the EAT could draw an analogy between men and women's medical conditions.

Like Ms. Smith, we have not found any difficulty in visualizing cases—for example, that of a sick male employee and a pregnant woman employee, where the circumstances, although they could never in strictness be called the same, could nevertheless be properly regarded as lacking any material difference.\textsuperscript{134}

\textsuperscript{130} Id. at 5 (emphasis added).
\textsuperscript{131} Id. at 6.
\textsuperscript{132} The effects of Turley were immediate. In Case 9/129/79, Robinson v. Tees Components, Feb. 1, 1980, an industrial tribunal held back its opinion that Robinson had been discriminated against because of pregnancy, and instead issued an opinion consistent with Turley.
\textsuperscript{134} Id. at 709.
The Employment Appeal Tribunal did not act on Smith’s suggestion that discrimination on grounds of pregnancy might be indirect discrimination in either Turley or Hayes. If employers demand that their employees shall not have incapacitating medical conditions or shall not be absent from work, it is easy to show that such a neutral requirement would have a disproportionate impact on women who wanted to have children. The statutory provisions on indirect discrimination would prohibit employers from discriminating against women because of pregnancy unless such action was justified irrespective of sex, and employers would carry the burden of justification. A woman’s claim of indirect discrimination, however, would allow the employer to argue that accommodating her pregnancy would be inconvenient, and it could thus treat her in a way that would be forbidden if the government reduced or eliminated the qualifying period under the Employment Protection Act.

The EOC rightly saw Hayes as a breakthrough, while recognizing its limitations:

This decision has practical weaknesses; it affords no protection, for example, when an employer would have treated a sick man badly. It also takes no account of the very real differences between sick men and pregnant women since the latter are usually present at work, and so we believe it is rightly regarded as objectionable in principle by many women. 135

Hayes improves upon Turley but it also has its limitations. Pregnancy is not an illness; it is normal, healthy, and unique to women. As feminist legal scholar Nicola Lacey commented:

[T]his [comparison to a sick man] serves to reinforce a gravely damaging stereotyped view of women as having special weaknesses which render them comparable only with men in non-standard circumstances; the equation of pregnancy with ill health or other misfortune grossly misrepresents the nature of that condition and willfully undervalues the importance still attached in our society to the bearing of children. 136

Furthermore, permitting employers to fire pregnant women because they also treat sick workers poorly does little to improve women’s position in the workplace. Whether one adopts an expansive comparative or substantive equality approach to pregnancy, feminists agree that employers ought not to be able to penalize women because they bear children, leading to cumulative disadvantages.

Despite the limitations of the expansive comparative approach embedded in Hayes, several tribunals relied on its holding to find that employers who dismissed pregnant women violated the Sex Discrimination Act. After four such decisions from industrial tribunals, the Equal Opportunities Commission issued a statement in 1987 inform-

135. Equal Opportunities Commission, Equal Treatment, supra note 127 at 7.
ing employers that pregnancy itself is not a valid reason for dismissal.\textsuperscript{137} By 1988, the EOC’s legal department had concluded that industrial tribunals were dealing with pregnancy discrimination sufficiently well, enough that the EOC could concentrate its resources on other issues.\textsuperscript{138} The agency receives between 700 and 800 inquiries on dismissals because of pregnancy each year.\textsuperscript{139}

Movement toward a substantive comparative approach occurred in Northern Ireland when an industrial tribunal found in \textit{Donley v. Gallaher} that regardless of whether there was a male comparator and regardless of whether an employer dismissed sick employees, the Sex Discrimination Act for Northern Ireland prohibited employers from dismissing women because they were pregnant, or what it called “discrimination against motherhood.”\textsuperscript{140} The EAT referred to the European Union’s Equal Treatment Directive as well as statutes in effect in Northern Ireland, rejecting the comparative approach of \textit{Hayes}.\textsuperscript{141} Citing \textit{Donley}, a Belfast tribunal in \textit{McQuade v. Dabernig}\textsuperscript{142} went further to conclude that discrimination against women because of pregnancy was per se sex discrimination.

Meanwhile, the British Employment Appeal Tribunal was reaffirming the comparative approach of \textit{Hayes} in \textit{Webb v. EMO Cargo} (discussed in the next section).\textsuperscript{143} Not only did British tribunals continue to insist on a comparison, but unless they had contradictory evidence, they accepted the employer’s statement of sick leave policy at face value. In \textit{Taylor v. Harry Yearsley Ltd.},\textsuperscript{144} an industrial tribunal concluded that, unless a pregnant woman could present evidence to the contrary, an employer’s testimony that it would fire a man who had to take a leave of absence would permit it to dismiss pregnant women without violating the Sex Discrimination Act.

In 1988, \textit{Brown v. Stockton-on-Tees Borough Council}\textsuperscript{145} gave the House of Lords the opportunity to rule on the question of the treatment of pregnant employees for the first time, in a case alleging unfair dismissal. Mrs. Brown claimed that the Stockton-on-Tees Borough Council’s Youth Training Scheme had unfairly dismissed her because

\begin{itemize}
  \item \textsuperscript{138} \textit{Equal Opportunities Commission, Thirteenth Annual Report}, \textit{supra} note 127, at 20.
  \item \textsuperscript{140} Case 66/86, Donley v. Gallaher Limited No. 1 (Nov. 6, 1987) (N. Ir.).
  \item \textsuperscript{141} The tribunal did not mention \textit{Hayes}, nor was it bound by that decision, since Northern Ireland is covered by a separate sex discrimination law, the Sex Discrimination (Northern Ireland) Orders of 1976 and 1988.
  \item \textsuperscript{142} Case 427/89 (Aug. 31, 1989) (N. Ir.).
  \item \textsuperscript{143} [1989] I.R.L.R. 124.
  \item \textsuperscript{144} Case 25716/88 (U.K.). See commentary in \textit{Equal Opportunities Review, Discrimination Case Law Digest} No: 12 (Autumn, 1989).
  \item \textsuperscript{145} [1988] I.R.L.R. 263.
\end{itemize}
she was pregnant. The Manpower Service Commission decided to cut the funding for the Scheme but provided funding for a different Scheme for one year. The new Scheme, however, had staff positions for only three workers, and one of the four on the original Scheme would be redundant. Although Brown ranked third in seniority, and her work was satisfactory, the Scheme selected her for redundancy because she was pregnant and would require some maternity leave during the one-year contract. Sidestepping the issue of whether the Scheme had discriminated against her because of sex, the industrial tribunal found that selecting Brown for redundancy because she was pregnant made her dismissal unfair.\textsuperscript{146}

On appeal, the Employment Appeal Tribunal disagreed, finding that the employer dismissed her because of redundancy, not because of pregnancy.\textsuperscript{147} Justice Popplewell's comments were instructive. Like the tribunal opinions surveyed by Joanna Fawkes\textsuperscript{148} and Alice Leonard,\textsuperscript{149} Popplewell considered the possibility that Brown might have offered to take her maternity leave without pay, foregoing her statutory right to keep her job.\textsuperscript{150} He concluded, however, that even if she gave up her statutory maternity pay, and returned to work sooner than the law required, the inconvenience and cost of finding a substitute for her made it reasonable for the Scheme to pass her over for the job. Popplewell also commented that "the joys of motherhood" lead many women to decide not to return to work, implying that the Scheme could not rely on Brown to return at all. Both comments reveal insensitivity and naiveté. Why should women have to give up their rights to keep their jobs? Furthermore, to suggest that it is solely the "joys of motherhood" rather than the obstacles society places in the path of employed mothers that leads women to give up their jobs after having a child suggests a certain distance from the reality of working women's lives, as does the assumption that employment for women is often a choice rather than an economic necessity.\textsuperscript{151}

The Court of Appeal affirmed the EAT's decision,\textsuperscript{152} but the House of Lords disagreed, finding that selecting a woman for redundancy because she was pregnant violated the law. To do otherwise, Lord Griffiths wrote, would be "an abuse of language."\textsuperscript{153} Although Griffiths began with a literalist approach to the statute, he went on to

\begin{itemize}
\item \textsuperscript{146} Case 14414/85, Brown v. Stockton-on-Tees Borough Council (July 23, 1985).
\item \textsuperscript{147} [1986] I.R.L.R. 432.
\item \textsuperscript{148} Fawkes, supra note 121.
\item \textsuperscript{149} Alice M. Leonard, \textit{Judging Inequality: The Effectiveness of the Industrial Tribunal System in Sex Discrimination and Equal Pay Cases} (1987).
\item \textsuperscript{150} [1986] I.R.L.R. 432, 434.
\item \textsuperscript{151} Suzanne Bailey, \textit{Maternity Rights}, 17 \textit{Indus. L. J.} 191 (Sept. 1985). Bailey comments that Popplewell J.'s reasoning has all the false seductiveness of Bristow J.'s judgment in \textit{Turley}. \textit{Id.} at 192.
\item \textsuperscript{152} [1987] I.R.L.R. 230.
\item \textsuperscript{153} \textit{Id.} at 265.
\end{itemize}
consider the history of its consolidation to explain why Parliament did not explicitly make pregnancy a prohibited consideration in selection for redundancy. Interpreting the statute by noting its overall purpose, Griffiths wrote:

S.34 (now s.60) must be seen as a part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable inconvenience to an employer to have to make the necessary arrangements to keep a woman's job open for her whilst she is absent from work in order to have a baby, but this is a price that has to be paid as a part of social and legal recognition of the equal status of women in the workplace... It surely cannot have been intended that an employer should be entitled to take advantage of a redundancy situation to weed out his pregnant employees.¹⁵⁴

By clearly stating that pregnant women may not be singled out for redundancy, the House of Lords' decision represents a step forward in protecting pregnant workers. The emphasis in Griffiths' opinion on the inconvenience women workers cause by reproduction, rather than their contribution to society, their rights, or the double standard that permits men to be both workers and parents, reveals the grudging and limited nature of the House of Lords' willingness to uphold the statute.

British law permits employers to dismiss pregnant workers if they cannot do a large portion of their job, or if a statute prohibits them from working. For example, an employer can dismiss a shop assistant in a pharmacy whose job consists mainly of stocking shelves, which involves heavy lifting, particularly if he suspects she may have a problem pregnancy.¹⁵⁵ If lifting is only a small portion of the job, however, an employer may not fire a pregnant woman for refusing to do it.¹⁵⁶ In Grimsby Carpet Co. v. Bedford,¹⁵⁷ the Employment Appeal Tribunal concluded the law permitted the dismissal of pregnant women who could not do their work; not because of their pregnancy, but for reasons connected with the pregnancy. In that case, Mrs. Bedford was absent from work because of anemia, hypertension, and anxiety connected with her pregnancy.¹⁵⁸ In Jennings v. Burton Group plc, however, a Scottish industrial tribunal found that dismissing a pregnant woman who was absent with pregnancy-related illnesses during her probationary period violated the Sex Discrimination Act.¹⁵⁹

Tribunals now appear to have reached a consensus that dismissing women undergoing “normal” pregnancies violates the Sex Discrimination Act. They vary on whether they require a comparison with an actual or hypothetical male employee. The amount of damages tribunals award in these cases, however, has changed noticeably since 1986-87. In the early cases, tribunals were most likely to award small damages for injuries to feelings. Now tribunals are more inclined to recognize the economic costs of losing one’s job, beyond the “psychological” injury of discrimination. In *Boyd v. Franklins Solicitors*, the industrial tribunal awarded compensation of £1,550 (approximately $2,325). A Leeds industrial tribunal awarded compensation of £6,000 ($9,000), including £2,000 ($3,000) for injury to feelings against an employer who “callously and inconsiderately” dismissed an employee shortly before her baby was due. In *Martin v. McConkey*, a Belfast tribunal awarded £1,460 ($2,190), and another women received £4,997.89 ($7,496). In the second *Marshall* case, the European Court of Justice held that the statutory limit on sex discrimination cases violated the Equal Treatment Directive. The Ministry of Defense’s recent firing of hundreds of pregnant servicewomen resulted in awards up to £400,000 ($600,000).

British feminists do not parallel their sisters across the Atlantic in battling over special versus equal treatment; in fact, most fall into the special treatment camp. British feminists supported protective legislation for women throughout the 1970s and 1980s until the Thatcher government repealed it as a “burden” to industry. British feminists are much more suspicious about what is gained by advocating formal legal equality, particularly under a Conservative government bent on levelling down rather than up and using equality as a tool for containment and control.

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167. See the Sex Discrimination and Equal Pay (Remedies) Regulations, No. 2798 (1993).

168. Jackie David & Christopher Leake, *Euro Military Chiefs Blast Inhuman’ MOD; Britain under fire as pregnancy sackings is set to hit 100,000,000, Mail on Sunday, June 19, 1994, at 22.

cover for deregulation, rather than being genuinely concerned about promoting greater equal employment opportunity. Although eroded in the last decade, the statutory protection for women in the U.K. is greater than in the U.S., and women benefit from maternity leave and pay. Feminists in Britain cannot appeal to an equal protection clause of a written constitution to promote their causes, and are more skeptical of litigation as an effective method of social change, except perhaps by bringing cases to the European Court of Justice. They do not look to the judiciary to champion their cause. Instead, they are likely to see their advancement linked to the election of a Labour or Liberal Democratic Government.

In the ten years between *Turley* and the European Court of Justice's decision in *Dekker*, the law on pregnancy discrimination has changed dramatically. British courts and industrial tribunals expanded sex discrimination law by moving from a restrictive comparative approach to an expansive comparative approach. At the same time, the Conservative government was restricting the rights of employed women under labor law by increasing the qualifying period and erecting hurdles for women who wanted to exercise their statutory rights. It is pressure from the European Union toward substantive equality that is countering the erosion of pregnant women's rights. As Britain becomes even more out of step with the maternity provisions in other European Union countries, one would expect that pressure to increase, although British judges and governmental officials are quite creative in circumventing and delaying implementation of EU initiatives. The British industrial tribunal and courts' decisions in *Webb v. EMO Air Cargo* provides an excellent example of how judges and members of tribunals have wrestled with the issue of pregnancy and how they both resisted and acquiesced to the ECJ's position in *Dekker*, and then ultimately in *Webb*.

B. *Webb v. EMO Air Cargo*

In *Webb v. EMO Air Cargo*, an industrial tribunal found that a company did not violate the Sex Discrimination Act by dismissing a woman who became pregnant shortly after it hired her to fill in for another woman's maternity leave. The tribunal concluded that if the company had hired a man as a substitute who then later needed a leave of absence, it would have dismissed him as well. Webb's lawyer had made arguments under the provisions against direct discrimination, indirect discrimination, and under European Community law.

On appeal, the only question before the Employment Appeal Tribunal was whether termination because of the employee's pregnancy...
was direct discrimination.\textsuperscript{172} That the company did not have a policy of dismissing pregnant employees—in fact, the company hired Webb to replace another employee on maternity leave—impressed Mr. Justice Wood, President of the EAT. The EAT considered three options: (1) whether, because men cannot become pregnant, discrimination on the basis of pregnancy is automatically not direct discrimination (the restrictive comparative approach in Turley; (2) whether, for that same reason it is automatically direct discrimination (anticipating the ECJ’s position of substantive equality in Dekker);\textsuperscript{173} or (3) whether the SDA requires a comparison between actual or hypothetical men (the expansive comparative approach of Hayes). The EAT equated the first two options. Finding discrimination on the grounds of pregnancy to be \textit{per se} direct discrimination would be positive discrimination,\textsuperscript{174} according to President Brown, which is not what the statute requires. Brown reaffirmed the expansive comparative approach, drawing on the arguments of sex discrimination specialist David Pannick as \textit{amicus curiae}.\textsuperscript{175} Brown concluded by noting that the Employment Protection Act does not confer an absolute right against dismissal on grounds of pregnancy, and therefore, neither does the Sex Discrimination Act.\textsuperscript{176}

Analysts initially predicted that the European Court of Justice’s clear decision in Dekker that discrimination on the basis of pregnancy was unlawful sex discrimination would “mark the death-knell of the comparative approach to pregnancy discrimination requiring that like be compared with like, enunciated by the EAT in Webb \textit{v.} EMO Air Cargo (UK) Ltd.”\textsuperscript{177} They were both right and wrong. The Court of Appeal held that the European Court of Justice’s opinion in Dekker did not require them to overturn the EAT’s ruling. (The European Court of Justice had to decide Webb for itself before the House of Lords would accept the ECJ’s holding in Dekker.)

Lord Justice Glidewell believed it to be outrageous that legislation might require employers to hire pregnant women who might then have to leave the job:

In my view, such a result would be so lacking in fairness and in what I regard as the proper balance to be struck in the relations between the employer and employee that we should only adopt Mr. Sedley’s

\begin{itemize}
  \item \textsuperscript{172} [1989] I.R.L.R. 124.
  \item \textsuperscript{173} [1991] I.R.L.R. 27.
  \item \textsuperscript{174} The Sex Discrimination Act of 1975 expressly forbids positive action (affirmation action).
  \item \textsuperscript{175} David Pannick is a barrister who has written about and argued sex discrimination cases in Britain. \textit{See} \textit{Sex Discrimination Law} (1985).
  \item \textsuperscript{176} See commentary in [1990] I.R.L.R. 117; 399 INDUS. REL. LEGAL INFO. BULL. 10 (April 19, 1990).
  \item \textsuperscript{177} \textit{Pregnancy Discrimination, supra} note 5 at 41. Tess Gill, \textit{Maternity Rights and the European Court, Solicitors J.}, Nov. 22, 1991, at 1268.
\end{itemize}
second and third arguments if we are compelled by the wording of the Act of 1975 to do so.\textsuperscript{178}

Glidewell then accepted Pannick's argument as \textit{amicus} that the Sex Discrimination Act "expressly require[s] a comparison to be made between the dismissal of the complaint, the pregnant woman, and what would have happened to a male employee in the nearest comparable situation."\textsuperscript{179} He explicitly reaffirmed Smith's dissent in \textit{Turley}, adopted as the majority view in \textit{Hayes}. Glidewell goes on to draw on Pannick's interpretations of the significance of \textit{Dekker} and \textit{Hertz}. Pannick had argued that \textit{Dekker} and \textit{Hertz} should be read together, thereby diminishing the impact of the ruling in \textit{Dekker} that treating someone differently because of the assumed financial consequences of pregnancy violated the Equal Treatment Directive. Glidewell noted that \textit{Hertz} demonstrated that some dismissals because of the consequences of pregnancy could be lawful, and pointed out that unlike Dekker, Webb would not have been able to do the job, and her remaining on the job prevented the company from training someone else.\textsuperscript{180}

The Court of Appeal goes on in \textit{Webb} to reject Advocate General Darmon's clever evasion of the absence of horizontal direct effects of the Equal Treatment Directive in \textit{Dekker} and Darmon's argument that European law obliges the Court of Appeal to harmonize its interpretations of domestic law with rulings from the ECJ. Glidewell countered that the Sex Discrimination Act (unlike the Dutch legislation at issue in \textit{Dekker}) was not passed to give effect to the Equal Treatment Directive. Therefore, British courts are not obliged to "distort the meaning of a British statute in order to enforce against an individual a Community Directive which has no direct effect between individuals."\textsuperscript{181}

In his concurring opinion, Lord Justice Balcombe agreed that the British law demanded fidelity to the comparative approach. To find otherwise would be to hold that European Community law requires the British courts to "arrive at a conclusion contrary to the justice of the case."\textsuperscript{182} He found it "remarkable" that the European Court of Justice would require the British courts to demand "special" treatment for women—treatment that would amount to discrimination against men. After briefly trying to distinguish the facts in \textit{Dekker} and \textit{Webb}, Balcombe boldly stated that Webb had no direct rights under the

\textsuperscript{178} \textsuperscript{[1992]} \textit{I.R.L.R.} 116, 120.

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} I am puzzled by Glidewell's assumption that Dekker would have been able to perform the job despite the pregnancy while Webb would not. Dekker would have been entitled to maternity leave, although she could presumably decline it. How long she would have been away was unclear. Both Dekker and Webb would have been presumably absent for at least the time necessary to recover from the birth, making bizarre the conclusion that Webb, but not Dekker, could not do the job.

\textsuperscript{181} \textsuperscript{[1992]} \textit{I.R.L.R.} 166, 122.

\textsuperscript{182} \textit{Id.} at 123.
Equal Treatment Directive. Dismissing the ECJ’s opinion in von Colson, Balcombe merely commented that the ECJ could not have meant for British courts to “distort” the meaning of the law.

The Court of Appeal’s decision in Webb revealed its adherence to an expansive comparative approach. Contrary to the European Court of Justice’s holding in Dekker, the Court of Appeal sought to preserve the right of employers to dismiss pregnant women if they would have dismissed men who were temporarily disabled. The Court of Appeal resisted the expansion of EC law and refused to harmonize its rulings with that of the ECJ. The Court of Appeal did, however, grant leave to appeal to the House of Lords.

In its decision of November 26, 1992, the House of Lords largely affirmed the reasoning of the Court of Appeal but did agree to refer the case to the European Court of Justice.183 Lord Keith of Kinkel, writing for a unanimous panel of five, carefully distinguished between firing a woman because she is pregnant and firing her because her pregnancy makes her unable to do the job for which she was hired—in this case replacing a pregnant worker taking maternity leave. “The appellant was not dismissed simply because she was pregnant but because her pregnancy had the consequence that she would not be available for work at the critical period.”184 Lord Keith compared Webb’s situation to workers hired to work a specific event such as Wimbledon or the Olympic games.185 If the worker were suddenly unavailable during that period, he or she would be fired, whatever the reason. “The precise reason for the unavailability is not a relevant circumstance, and in particular it is not relevant that the reason is a condition which is capable of affecting only women or, for that matter, only men.”186 Lord Keith quickly dismissed the possible claim of indirect discrimination because a worker’s unavailability for the specific period for which she was hired would constitute a condition “justifiable irrespective of sex.”

Lord Keith then considered the European Court of Justice’s opinions in Dekker and Hertz. After quoting at length from the opinion, he distinguished Dekker from Webb by arguing that while Dekker was not hired because she was pregnant, Webb was fired because she was unable to do the job as a consequence of being pregnant:

The European Court did not, in Dekker’s case and Hertz v. Aldi, have to consider the situation where a woman, on account of her pregnancy, will not be able to carry out, at the time when her services are required, the particular job for which she is applying or for which she has been engaged.\footnote{187}

The Law Lords did recognize, unlike the Court of Appeal, that the European Court of Justice had ruled that European Community law requires member state courts “to construe domestic legislation in any field covered by a Community directive so as to accord with the interpretation of the directive.”\footnote{188} That obligation exists regardless of whether national law was passed before or after the European Community directive, and regardless of whether the domestic law was passed to give effect to the directive.\footnote{189} Lord Keith reflected that such an obligation, however, existed only when it was possible to give domestic law an interpretation consistent with EC law—implying that such was not the case in Webb. The Law Lords clearly agreed with the Court of Appeal, but seemed to recognize that the European Court of Justice’s ruling in Dekker might well be regarded by the ECJ as inconsistent with the Court of Appeal’s ruling in Webb.

Advocate General Tesaro issued his opinion on June 1, 1994, which was quickly followed by the Court’s decision on July 14, 1994.\footnote{190} The Court’s decision to assign the case to a chamber of five judges suggests that it found the legal questions much less difficult than did the House of Lords,\footnote{191} and certainly did not consider its ruling to be the “bombshell” described by the British press.\footnote{192} The length and tone, of Advocate General Tesaro’s opinion of sixteen paragraphs also conveys that he considered the case an easy one. He begins by noting two important points. First, the Pregnancy Directive was not yet in effect when the company dismissed Webb. Second, the company offered Webb an indeterminate contract—it did not plan to fire her after Mrs. Stewart returned to work. Tesaro then quickly dispenses with these points by echoing Advocate General Darmon, citing \textit{Marleasing SA v. Commercial Internacional de Alimentacion SA}.\footnote{193} Judges must construe statutes so as to harmonize domestic legislation with European Community law.

\footnotesize{187. Id. at 187.}
\footnotesize{188. Id. at 186.}
\footnotesize{189. See Case C-106/89, Marleasing SA v. Commercial Internacional de Alimentacion SA, 1990 E.C.R. I-4135.}
\footnotesize{190. Webb v. EMO Air Cargo (UK) Ltd., Case 92/93 (1994) I.C.R. 770.}
\footnotesize{191. The Court has four formations (with variations). It may sit as a full court, in July, 1994, consisting of thirteen judges. It may sit as a petite plenum of seven judges, which satisfies the Treaty’s requirement of a quorum for the full court. Alternatively, the Court may assign cases to “chambers” of three or five judges, depending on their assessment of the difficulty and importance of the case. Since the Court has no mechanism equivalent to denying certiorari, it may hear many routine cases.}
\footnotesize{192. Moorman, \textit{supra} note 160, at 2.}
Tesauro expresses incredulity that firing someone because she is pregnant could be anything other than direct discrimination. This conclusion flows from Dekker and is "quite clear," "obvious[ly]," "how could it be otherwise?" He concludes that "the directive must be construed so as to achieve substantive equality, and not mere formal equality which would constitute the very denial of the concept of equality." The outcome also flows logically from the European Court of Justice’s decision in Habermann-Beltermann decided in May, 1994. The Court (sitting in a five-judge chamber) held that employers could not void an employment contract with a pregnant woman hired to work as a night attendant at a nursing home even though German law prohibited pregnant women from working at night. Tesauro, as Advocate General in Habermann, stressed that protection of pregnant workers is necessary to secure material rather than mere formal equality for women. "And, it is worth repeating, it would be paradoxical if recognition of the social function of maternity, and consequent protection of pregnant women, should come about through their exclusion from the labor market."

Tesauro did not accept the distinction between firing someone because of pregnancy and firing someone who is unable to do the job for a period coinciding with maternity leave. Webb would have been absent from work to give birth; German law prohibited Habermann from working at night while pregnant. Tesauro reiterated the purpose of the Equal Treatment Directive, observing that cost is no defense to direct discrimination. He rejected the House of Lords’ reliance on Hertz to distinguish Webb from Dekker: pregnancy is not an illness, nor can it be equated with a simple choice. Women should not have to "choose" to keep their job by not having children. The Court agreed. In its short opinion it emphasized the purpose of the Equal Treatment Directive and stressed the harmful effects of dismissing pregnant women, holding that:

[T]here can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons.

195. Id.
197. 2 C.M.L.R. 729, 736 (1994).
198. Tesauro subtly alters the analogy provided by the House of Lords of a person hired to work for a specific time—such as the Olympic games. Tesauro treats this as if a person were taking a leave to participate in the Olympic games. Such a choice to play sports, Tesauro argues, is not the same as the choice to have children. Webb v. EMO Air Cargo (UK) Ltd., Case 32/93 [1994] I.C.R. 770, at 794.
199. Id. at 798-799.
The Court held that *Hertz* cannot be used as a justification for firing a woman who is temporarily unable to do her job because of pregnancy. The rights of pregnant women do not depend on how an employer treats other sick employees or others temporarily unable to do the job.\textsuperscript{200}

On October 19, 1995, the House of Lords applied the European Court of Justice’s answers to their questions in *Webb* to the facts of the case.\textsuperscript{201} Lord Keith attached great importance to the European Court's recognition that Webb was not offered a temporary contract, but would have remained employed after Stewart returned from her maternity leave. The European Court of Justice's opinion left the Lords little room to deny Webb her victory. They duly remanded the case to the industrial tribunal to determine compensation. They did, however, try to narrow the broad ruling, concluding that even though employers could not fire pregnant women who were on indefinite contracts of employment (replacing a pregnant worker taking maternity leave, for example), an employer could fire them if they were on temporary contracts and their pregnancy prevented them from doing the job:

It does not necessarily follow that pregnancy would be a relevant circumstance in the situation where the woman is denied employment for a fixed period in the future during the whole of which her pregnancy would make her unavailable for work, nor in the situation where after engagement for such a period the discovery of her pregnancy leads to cancellation of the engagement.\textsuperscript{202}

A commentator in the *Glasgow Herald* concluded:

Lawyers had hoped that the House of Lords would give employers clear guidance as to how pregnant women should be treated and they have not done that. They have fudged the issue, possibly because they feel that European law goes too far to help pregnant women.\textsuperscript{203}

\section{VI. Conclusion}

In *Abortion and Divorce in Western Law*, Mary Ann Glendon suggests that “comparative lawyers are drawn to the study of problems that their own legal systems do not handle very well.”\textsuperscript{204} Many employed women in the United States believe that their society not only

\textsuperscript{200} Interestingly, neither Advocate General Tesauro in *Webb* nor the Court in *Habermann* or *Webb* discuss whether such a holding will lead employers to discriminate against women in hiring. The Court in *Habermann* dismisses the German government’s claim that women will abuse their benefits by deliberately getting pregnant after being hired for night work, or that such a policy is unfair to men who cannot be paid for not working. Case 421/92, 2 C.M.L.R. 729, 738 (1994).

\textsuperscript{201} Damages for Pregnancy Dismissal, *supra* note 3.

\textsuperscript{202} *Id.*

\textsuperscript{203} *The Herald* (Glasgow), Oct. 29, 1995.

\textsuperscript{204} MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 1 (1987).
fails to accommodate women with children, but is positively hostile to them.\textsuperscript{205} We look enviously at favorable parental leave policies in Western Europe, while European feminists admire our effectiveness, though limited, at using discrimination in the courts to promote greater gender equality. What conclusions, then, can we draw from a comparative analysis of pregnancy discrimination cases?

In both the United States and Britain, courts adopted a comparative approach that foreclosed using sex discrimination laws to prohibit pregnancy discrimination. Neither Title VII of the Civil Rights Act, the Sex Discrimination Act, nor the Equal Treatment Directive explicitly include pregnancy discrimination in the category of sex discrimination. In the United States, the Supreme Court concluded that for both Title VII and the 14th Amendment of the Constitution, pregnancy discrimination was not sex discrimination because not all women and no men become pregnant. In Britain, the Employment Appeal Tribunal concluded that pregnancy discrimination was not sex discrimination because men could not get pregnant.

Both systems changed that approach before the question ever reached the European Court of Justice. Why? In the United States, part of the answer lies in the actions of the legislative branch. In 1978, feminist groups rallied and Congress swiftly overturned the \textit{Gilbert} decision, mandating employers to treat pregnant women the same as sick employees. This clear mandate of the legislature was an important contributor to the changes in judicial behavior reflected in \textit{Cal Fed} and \textit{UAW v. Johnson Controls}. All nine justices in those cases saw the demands of nondiscrimination as clear, though lower courts, in cases on exclusionary policies, had not.

There is some evidence that judges look to other jurisdictions for solutions to vexing legal problems. Such a comparative analysis likely had an impact on the European Court of Justice and helps to account for its rulings in \textit{Dekker}, \textit{Habermann}, and \textit{Webb}. In its cases adjudicating questions of fundamental human rights that fall outside of the Treaty's narrowly economic objectives, the European Court of Justice has already articulated a jurisprudence of "principles common to the member states," including explicitly incorporating the European Convention of Human Rights.\textsuperscript{206} A survey of member states reveals that few permit discrimination because of pregnancy, although the sanctions are not enforced.\textsuperscript{207} In \textit{Dekker}, Advocate General Darmon explicitly refers to the American concept of affirmative action, and in \textit{Hertz} it was apparent he had clearly surveyed the sickness benefits in member states as applied to illnesses resulting from childbirth. One


\textsuperscript{207} See Prechal 1992, supra note 118.
mechanism for the incorporation of such knowledge, or "diffusion of
innovation," is legal secretaries, who are the "law clerks" of the ECJ. It
may have been significant that at least three legal secretaries at the
European Court of Justice at the time of Dekker were published schol-
ars, expert in sex discrimination law. All were familiar with Gilbert
and subsequent developments as well as a fair amount of feminist jurispru-
dence. While knowledge is no guarantee of influence, the judges on
the European Court would at the very least have had the benefit of the
arguments by someone who believed in it. Their knowledge of how
other jurisdictions answered the question may have enabled the
Court's decision in Dekker. To the extent that sex discrimination law is
evolving, it is evolving in the direction of greater protection for preg-
nant women. Dekker takes two steps in that direction; Hertz takes one
back; and Habermann and Webb move Dekker forward.

Several structural differences in how judges and members of
tribunals do their work in Britain impedes their ability to canvass a
wider body of legal opinion. British judges, let alone members of
tribunals, do not have law clerks to provide "a continuing seminar" on
the latest legal scholarship. Participation as amicus curiae is rare, insu-
lating the courts from lobbying by non-litigants concerned with the
outcome of the case and the development of the law.208 In Dekker, the
European Court of Justice had the benefit of the Commission's argu-
ments on Dekker's behalf, while sex discrimination law specialist
David Pannick reassured British judges and members of tribunals that
neither the statute nor the ECJ's rulings required it to find for Webb.

Several other factors account for the ruling in Dekker. The Com-
mmission clearly supported such a holding. The ECJ was well aware that
Britain had been blocking the Pregnancy Directive and Dekker is not
the first time in which the Court has broken the logjam to further
European integration. Moreover, the Court has used the issue of
equality for women as its vehicle for promoting greater social, politi-
cal, and economic integration. The Court's great expertise in look-
for disguised discrimination against imports from other member
states or discrimination against foreign workers and companies may
make it ideally practiced in analyzing discrimination in other
contexts.209

The European Court of Justice's decision in Dekker reflects the
Court's commitment to social integration at a level with support for a
welfare state as much as it does nondiscrimination against women.
Most Western European countries have more generous provisions for
pregnancy and childbirth than the United States and Britain. While
these countries' family policies may have as much to do with concern
about declining birth rates as they do with differences over the role of

209. The suggestion of T. Koopmans, former judge on the ECJ, in interview with
author. The Hague, Fall, 1990.
the state, they do "communicate that society values child raising, and they may help to maintain an atmosphere that fosters other more tangible kinds of recognition."210

Webb also offered the European Court of Justice a chance to reiterate that European Community law is supreme. The absence of horizontal direct effects of the Equal Treatment Directive meant that previously, domestic courts could only directly apply the Directive against emanations of the state, and not in suits between private individuals. Webb provided the European Court of Justice an opportunity to reassert that member states must harmonize their domestic law with the requirements of European Community law. I would paraphrase the House of Lords in Webb as saying, "we do not like Dekker and wish to stick with the comparative approach embodied in our domestic law regardless of European Community law. We cannot believe you require us to make such an absurd holding." Webb thus gave the European Court of Justice an opportunity to reassert its position, which the House of Lords than narrowed as much as possible.

To conclude, the U.S. Supreme Court's decision in UAW v. Johnson Controls and the European Court of Justice's decisions in Dekker, Habermann, and Webb move away from a comparative approach and toward greater accommodation of pregnant women in the workplace. While cause for celebration, the House of Lords' decision in Webb reminds us that domestic courts may circumvent or seek to narrow the progressive rulings of the ECJ. Judicial decisions do not always translate into changed working conditions. The British courts, like the lower courts in UAW v. Johnson Controls, clearly find unreasonable interpreting sex discrimination statutes as prohibiting employers from firing pregnant workers. Hertz, too, shows the limits of what even the European Court of Justice will require of employers. While courts may be moving somewhat away from the comparative approach, a pregnant woman is still most likely to secure employment rights the more she resembles a "normal" worker; i.e., healthy male worker.

What factors inhibit or enhance the prospects of pregnant women gaining greater employment rights? These three jurisdictions suggest the importance of the position of the legislature (or in the case of the European Union, the Council and Commission), participation of law clerks, existence of arguments as amicus curiae, commitment to the welfare state, and the political agenda of the judiciary. Four other factors merit further investigation: the individuals who decided the specific cases, the role of enforcement agencies and the amount of power that they hold, the effectiveness of the women's movement, and the role of trade unions.

Finally, I caution attaching too much significance to legal victories until we can document that they have a positive effect on the lives of real employed women. Rather than merely cheering the victories

or declaring them hollow, feminist scholars can offer insight into how the courts construct men and women as different, or alike, and how courts permit or forbid employers and member states from disadvantaging women in the workplace. Whether women workers are better off remains an empirical question.