Feminist Legal Studies Vol.I no.2 [1993]

AVOIDING THE 'EXQUISITE TRAP': A CRITICAL LOOK AT THE EQUAL TREATMENT/SPECIAL TREATMENT DEBATE IN LAW

by

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Equality is "called upon" by feminists to provide a principle of freedom, a measure of justice, an expression of respect for personhood, a political or legal strategy and as the expression of goals and aspirations.[1] But how to further substantive equality for women through law, if this is indeed possible, is a thorny contemporary problem for feminists. Since law seems to have 'failed' many feminist expectations, in the sense that formal equality has not brought about substantive equality, the temptation may be to abandon it as a tool of struggle. But many feminists are reluctant to do this because equality as a principle, and as an expression of justice, still has considerable political purchase.[2] So we are left asking, surely there is some way we can use it, even to get limited or strategic gains? But we have also learnt we are not the only group using 'equality' arguments; in fact they have been used to reassert father's rights in child custody cases, to reduce women's access to maintenance from their ex-husbands and in Canada to invalidate legal protections for victims of sexual assault.[3]

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1 S. Gibson, "The Structure of the Veil", *Modern Law Review* 52/2 (1989), 420-440, 435.

2 A. Jaggar, "Sexual Difference and Sexual Equality", in D. Rhode, ed., *Theoretical Perspectives on Sexual Difference* (New Haven and London: Yale University Press, 1990), 239-256, at 251.

3 See J. Brophy and C. Smart, "From Disregard to Disrepute: the position of women in family law", *Feminist Review* 9 (1981), 3-16; J. Fudge, "The Public/Private Distinction: the possibilities of and limits to the use of Charter Litigation to further feminist struggles", *Osgoode Hall Law Journal* 25 (1987), 485-554; R. Graycar, "Equality begins at home", in R. Graycar,

This then is the essence of the problem: equality rhetoric is powerful but can it deliver (some of) the proverbial goods?

A crucial way in which feminists have engaged with the equality in law principle[4] since the 19th century has been through the equal treatment/special treatment debate. The content of the debate is whether substantive equality for women will be best achieved by having the same rights as men (equal treatment) or by having different and specific rights (special treatment). A particular focus of the debate has been pregnancy rights, but it has also considered protective legislation. This debate, while perhaps not the most crucial in feminist legal scholarship, has probably absorbed the most energy.[5] In recent times it has most fiercely been played out in the United States over the treatment of pregnancy, and to a lesser degree, reproductive hazards.[6] In the European context equal treatment or special treatment has been debated in relation to protective legislation.[7] In France recently the issue of whether women in some sectors should be able to work at night was raised because of a decision of the European Court of

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ed., *Dissenting Opinions: Feminist Explorations in Law and Society* (Sydney: Allen and Unwin, 1990), 58-69; S. Sevenhuijsen, "Justice, Moral Reasoning and the Politics of Child Custody", in E. Meehan and S. Sevenhuijsen, eds., *Equality, Politics and Gender* (London: Sage, 1991), 88-103.

4 The 'Aristotelian principle' holds that similar situations should be treated in similar ways, while dissimilar situations should be treated in a dissimilar fashion.

5 J. Morgan, "Feminist Theory as Legal Theory", *Melbourne University Law Review* 16 (1988), 743-759, at 744. Although C. Bacchi in *Same Difference* (Sydney: Allen and Unwin, 1990) seeks to show that the history and politics of feminism has often been squeezed into the categories of 'equal' or 'special' which has often been an oversimplification.

6 For the latter see S. Kenney, "Reproductive Hazards in the Workplace: the Law and Sexual Difference", *International Journal of the Sociology of Law* 14 (1986), 393-414.

7 See for instance A. Coyle, "The Protection Racket", *Feminist Review* 4 (1980), 1-12; C. Kaufmann, "Egalité des droits et des droits spécifiques pour les femmes, y a-t-il contradiction?", *Présences: Deux Sexes C'est un Monde*, Special Issue (1991), 123-136; J. Lewis and C. Davies, "Protective Legislation in Britain 1870-1990: Equality, Difference and their Implications for Women", *Policy and Politics* 19 (1991), 13-25; J. Jarman, "Equality or Marginalisation", in E. Meehan and S. Sevenhuijsen, eds., *Equality, Politics and Gender* (London: Sage, 1991), 142-153. It is also used as an analytical tool, see for instance S. Bailey, "Equal Treatment/Special

Justice in 1991, and in the UK it is increasingly important because of the *Webb* decision on pregnancy discrimination.[8]

My aim is to give a critical overview of the debate in the US, both in terms of the arguments used by either side and in terms of the debate itself. I will conclude by arguing that neither equal treatment nor special treatment, nor even necessarily the equality principle itself should be privileged in feminist strategy, although in terms of some specific problems or examples of discrimination these may still be useful. Rather than having as our primary focus a rather abstract situation of 'equality in law', we should start from specific social problems that affect women, or different groups of women, and evaluate legal approaches, and anti-discrimination legislation, in terms of their usefulness in attacking these problems.[9] I am not totally rejecting equal treatment nor special treatment. I appear to be remaining within the 'binary construction', albeit for pragmatic reasons. We must, however, work within existing discourses, although a large part of my argument also consists in saying, as other feminist writers are saying, that we cannot consider particular rights without looking at the broader structure. For instance employment rights for women must be considered against the background of the 'male norm' of employment, which itself needs challenging.[10]

1. *The Background to the US Equal/Special Treatment Debate*

The debate was sparked off in the 1980s by two cases that dealt

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Treatment: The Dilemma of the Dismissed Pregnant Employee", *Journal of Social Welfare Law* (1989), 85-100.

8 *Commission* v. *France* (Stoeckel), judgment of 25.7.91; *Webb* v. *EMO Air Cargo Ltd* [1992] 2 All E.R. 43.

9 See for instance L. Dickens, *Whose Flexibility? Discrimination and Equality Issues in Atypical Work* (London: Institute of Employment Rights, 1992), 39-45.

10 See L. Dickens, *supra* n.9, at 5; F. Maier, "Part-time Work, Social Security Protections and Labour Law: An International Comparison", *Policy and Politics* 19 (1991), 1-11; N. Dowd, "Work and Family: the Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace", *Harvard Civil Rights Civil Liberties Law Review* 24 (1989), 79-172; J. Williams, "Deconstructing Gender", *Michigan Law Review* 87 (1989), 797-845.

with provision for pregnancy and maternity (*Cal Fed* and *Miller-Wohl*), but will probably continue until comprehensive protection is provided for maternity and parenthood.[11] The importance of these two cases hinged on the fact that there is no legally guaranteed protection across all states for mothers against dismissal during pregnancy and immediately after birth, no maternity leave or continued wage-payment in these cases and no parental leave. Most women rely on their employers to provide insurance or benefits, but the employers are under no obligation to make such provision. The US legal context has also helped to structure equality demands in a way that is problematic for feminists. The provisions used to challenge sex-based classifications are historically rooted in the fight against race discrimination: the 5th and 14th Amendments and the statutory anti-discrimination principle in Title VII of the Civil Rights Act 1964. Once the Civil Rights Act was passed, courts accepted that people of different races were similarly situated, and it was in this framework that sex discrimination came to be handled by the courts. But the problem with the race/sex analogy is that judges have often been convinced that there *are* real immutable differences between men and women, and so because they are not 'similarly situated' it is legitimate (i.e. not discrimination) to treat them differently.[12] Following this reasoning the Supreme Court in the 1970s held that distinctions concerning pregnancy are *not* based on sex because the group of non-pregnant persons consists of both men and women.[13] These cases, *Geduldig* and *Gilbert*, prompted Congress to pass the Pregnancy Discrimination Act 1978 (PDA). While feminists were united in the campaign for the passing of this Act, the two cases

11 *California Federal Savings and Loan Association* v. *Guerra* 479 US 272 (1987) and *Miller-Wohl* 515 F. Supp 1264 (D. Mont 1981), vacated 685 F. 2d 1088 (9th Circ. 1982); D. Rhode, *Justice and Gender* (Cambridge: Harvard University Press, 1989), 120. For detailed accounts of the US case-law see also S. Law, "Rethinking Sex and the Constitution", *University of Pennsylvania Law Review* 132 (1984), 955-1040; H. Kay, "Models of Equality", *University of Illinois Law Review* (1985), 39-88; and in particular Z. Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press, 1988), chapter 3.

12 C. Bacchi, "Pregnancy, the Law and the Meaning of Equality", in E. Meehan and S. Sevenhuijsen, eds., *Equality, Politics and Gender* (London: Sage, 1991), 70-87, at 72.

13 *Geduldig* v. *Aiello*, 417 US 484 (1974) and *General Electric Co* v. *Gilbert*, 429 US 125 (1976).

which arose from it provoked serious divisions over whether laws guaranteeing certain rights to pregnant women should be welcomed or discouraged.[14] The Act provided that discrimination on grounds of sex in Title VII of the Civil Rights Act 1964 would include pregnancy. In effect however it allowed employers to treat pregnant employees as badly or as well as male employees suffering from temporary disabilities.[15] There was thus no specific recognition of pregnancy discrimination, nor a national minimum protection given. In *CalFed* the Supreme Court held that under the PDA states could, but were under no obligation to, allow pregnancy leave. This had been done in Montana where a Maternity Leave Act provided for job security to women temporarily disabled by pregnancy or related medical conditions. The Montana statute was at issue in the *Miller-Wohl* case in which there was a dismissal because of illness related to pregnancy. Equal treatment feminists argued that this statute should either be extended so as to guarantee other workers short-term disability leave or the statute should be abandoned (that is pregnant employees should be treated no more favourably than other employees), while the special treatment feminists strongly defended the statute in its original form.

2. *The Equal versus Special Treatment Debate*

2.1 *Equal treatment*

It appears that the 'bottom line' in arguments for equal treatment is the fear that 'special' treatment will mean more discrimination because of the consequences of an acceptance that women are different from men. So, for instance, equal treatment feminists have demanded the repeal of protective legislation to enable women to have more opportunities in the workplace. The feminist equal treatment stance has been summed up as only being concerned with creating an equal starting point and no more. But at least some of its advocates have had a more radical vision, for instance the much criticised Wendy

14 *Supra* n.12, at 77.

15 S. Kenney, "European Community, British and US Courts Compared: the case of Pregnancy Discrimination", Conference Paper, Law and Society Association, Amsterdam, 26-29 June 1991, 12.

Williams.[16] She argued that equal treatment in law is the appropriate constitutional standard because she fears the consequences of 'special treatment'. But Williams does not accept that formal equality is the sum total of feminist aims: for her the equal treatment constitutional standard is a tactic. Anti-discrimination legislation is useful in setting the parameters, but it is not the job of the courts to readjust the social order. Equality delivered by the courts can only mean integration into a pre-existing, predominantly male world, but the equality standard at the constitutional level will give women a number of the privileges the law has given to men. Over and above that Williams advocates seeking other changes from the legislature by political means. She wrote in relation to the *Miller-Wohl* case: "if we can't have it both ways, we need to think carefully about which way we want to have it".[17] She argued for gender-neutral laws, for parental leave rather than maternal leave because this would be a way to break down dominant beliefs which confuse childbearing with childrearing, becoming a central issue, rather than remaining a peripheral 'women's issue', creating a radical transformation of society.

2.2 *Criticisms of an Equal Treatment Approach*

However, there are many criticisms to be made of equal treatment as a way of achieving substantive equality.

(a) *the 'male' norm*

While appearing to be a neutral standard, equal treatment as interpreted by the courts tends to apply the 'male norm'. Because equal treatment implies a comparison with men, women have been granted equality insofar as they are perceived to be the *same* as men. Some courts have held for instance that there can be no discrimination on grounds of pregnancy because there is no male equivalent.[18] In the

16 W. Williams, "The Equality Crisis: Some Reflections on Culture, Courts and Feminism", *Womens Rights Law Reporter* 7 (1982), 175-200, at 196.

17 *Ibid.*, at 196. See also by same author: "Equality's Riddle: Pregnancy and the Equal/Special Treatment Debate", *New York University Review of Law and Social Change* (1984/5), 325-380.

18 Bliss [1978] 6 WWR 711 (decided by the Supreme Court of Canada before the passing of the Charter). In the UK see *Turley* v. *Allders Department*

words of the judge in *Bliss* "any inequality between the sexes in this area is not created by legislation but *by nature*" (emphasis added). Here a relevant 'difference' supported unequal treatment, no matter how categorical, disadvantageous or cumulative it was.[19] This type of reasoning forces one to find a 'sex-neutral category' to compare with, such as men with a temporary disability. This not only reinforces, but crucially does not challenge the 'naturalness' of the 'difference'; no argument is in sight about differences being socially constructed. It just reinforces the idea of women as 'victims' of their hormones. Even after the judgment of the European Court of Justice (ECJ) in *Dekker*[20] this issue has not been definitively resolved. The ECJ held that discrimination on the grounds of pregnancy has to be direct discrimination on the grounds of sex, but in the UK in the *Webb* case the court persisted in applying a comparative approach and maintaining that dismissing a pregnant woman for reasons arising out of her pregnancy would be direct discrimination only if a male employee would have received more favourable treatment.[21]

Even in circumstances where women are compared to men, comparison with the 'male model' will not necessarily bring women substantive equality with men. The male model does not take into account the roles and activities of women in the 'private sphere' nor the

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Stores Ltd [1980] I.C.R. 66, and in the US *Geduldig* v. *Aiello*. Recently some courts have been changing their approach: the US Supreme Court held in *Johnson Controls* (1991) that the law forbids employers to punish women because they have the capacity to bear children. The Supreme Court of Canada has overruled Bliss saying "how could pregnancy discrimination be *anything other than sex* discrimination?" in *Brooks* v. *Canada Safeway Ltd* [1989] 1 S.C.R. 1219.

19 C. MacKinnon, *Towards a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), at 217.

20 [1991] I.R.L.R. 27.

21 [1992] All E.R. 43. Although the *Dekker* decision was not directly applicable in this case because the defendant was a private firm, the Court of Appeal should have been influenced by the clear message of the European Court. But in *Webb* Glidewell LJ stated: "I do not accept that [the decision in] *Dekker* is to the effect that any ... dismissal of a pregnant employee arising out of her pregnancy, is necessarily discriminatory". For a commentary on the Webb case see A. Arnull, "When is pregnancy like an arthritic hip?", *European Law Review* 17/3 (1992), 265-273.

segregated nature of the labour market. As Wildman[22] has put it: "if people have been treated differently in society they will appear in dissimilar positions when they are compared". MacKinnon[23] has argued that equal treatment or gender neutrality only means that while a few women gain access to the preconditions necessary to assert equality on male terms, the majority of women lose the guarantees of their 'traditional' roles.[24] Equal treatment feminists appear to ignore the structural barriers that gendered social relations create. That is, if pregnancy and motherhood are barriers into the workplace, then demanding gender-neutral parental leave laws seems to ring hollow. Equal treatment feminists are also criticised for aspiring to the model of the conditions and norms typically found among middle-class white men.[25] Their priority, it is argued, is to get greater access to the workplace, to challenge the 'stereotypical assumptions' that generally impede or structure women's employment differently to men's, but this cannot help the women who do conform to these stereotypical assumptions.[26]

Therefore one is left wondering whether anti-discrimination legislation can offer more than merely access to male-defined resources (in the broadest sense) for a few relatively privileged women.[27] The male model appears to place us in 'Wollstonecraft's dilemma': either we must become like men or accept subordination and dependency.[28]

Giving women the same rights as men also tends to freeze the status quo: its logic allows no challenge to the general practices in any

22 S. Wildman, "The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence", *Oregon Law Review* 62 (1984), 265-307, at 273.

23 *Supra* n.19, at 221, 226-227.

24 This has also been described as the impossibility of the "equalitarian ideal" by M. McIntosh, "Feminism and Social Policy", *Critical Social Policy* 1 (1981), 32-42, at p.37, and as "equality with a vengeance" by K. Lahey, quoted in A. Miles, "Feminism, Equality and Liberation", *Canadian Journal of Women and the Law* 1 (1985), 42-68, at 65.

25 J. Brown *et al*, "The failure of Gender Equality: an essay in Constitutional Dissonance", *Buffalo Law Review* 36 (1987), 573-644, at 580.

26 *Ibid.*, at 580.

27 N. Lacey, "Legislation Against Sex Discrimination: Questions From a Feminist Perspective", *Journal of Law and Society* 14 (1987), 411-421, at 418.

28 *Supra* n.19, at 219.

area.[29] The rights that men have are not necessarily ideal, such as being able to do nightwork or working in hazardous and unsafe employment.[30] Moreover men may not have all the rights that feminists want. Thus as Gibson has put it: "'equal rights' can be no more than a demand for access to the structure. If it is the structure which is the problem, equal rights to it are not an exciting prospect".[31] An approach which is not frozen into the status quo would for instance be to challenge the employment market, which is structured in stereotypically male terms; workers with family responsibilities who need a 'family wage' but who do not participate primarily in childrearing or caring work. Indeed writers such as Dowd and Joan Williams squarely locate the challenge for feminists as being to the *structure* of the workplace.[32] Accepting the male model prevents us from looking at these structures and seeing that to decrease inequality in employment there must be a recognition that workers of both sexes have home lives and personal needs as well as work commitments.[33]

While the 'male model' is a very useful analytical tool, it is important to look critically at it. Feminist literature tends to accept that behind this model will always be a real man, and so the model will always work to the disadvantage of women. Thus a crucial question is whether equal treatment or the male model really are 'male'.[34] Indeed it is the case that equal treatment while proclaimed to be a gender-neutral standard more often than not conceals male gendered life patterns. But where the model applied is a male one, rather than a gender neutral one, this is a political decision on the part of the courts, and does not mean that equal treatment is inherently male.[35] Where

29 *Supra* n.27, at 417.

30 *Supra* n.15, at 6; R. Holtmaat, "The Power of Legal Concepts: The Development of a Feminist Theory of Law", *International Journal of the Sociology of Law* 17 (1989), 481-502.

31 *Supra* n.1, at 439.

32 Dowd, *supra* n.10, at 81; and Williams, *supra* n.10, at 835.

33 L. Finley, "Transcending Equality Theory: a way out of the maternity and the workplace debate", *Columbia Law Review* 86 (1986), 1118-1182, at 1171.

34 I am grateful to Linda Luckhaus for this point.

35 K. Scheiwe, *Male times and Female times in the law: Normative models of time in labour law, social security law and family law, and their impact on the gendered division of labour*, Doctoral Thesis (Florence: European University Institute, 1991), 175.

the model applied is male, it is focused this way because of interest-oriented legislation and interpretation by the courts, the administration of which is not free from contradiction.[36] Moreover, when the male model is biased towards men we need to be aware of what men are envisaged; this man will not necessarily correspond to real men[37] but rather to the 'prototype' who is conceived as independent, unconnected to others, abstracted from messy realities. Not all men will fit this prototype[38], although more may fit it than women. What is sometimes overlooked is that men have used the equality principle to obtain rights that women have been granted. In this case it seem impossible to assert a 'male' model of equality. In *Barber*[39] for instance the ECJ allowed a man to claim an occupational benefit that women were entitled to five years earlier than him because of the differential pension age.

(b) *a procedural not ends-oriented concept*

It has been forcefully argued that equal treatment is 'empty' because it offers no criteria for determining which differences are relevant and what counts as legitimate.[40] This criticism can for instance be aimed at constitutional guarantees of equality for all: here where equal treatment does not refer to specific goals, it may become 'procedural', that is concerned with rules of conduct "irrespective of the end being pursued".[41] Hoskyns and Luckhaus have argued, in relation to Directive 79/7/EEC on equal treatment in social security, that this type of equality means that "social security schemes must first of all establish that women are not in fact the breadwinner/paid

36 *Ibid.*, at 175.

37 N. Naffine, *Law and the Sexes* (Sydney: Allen and Unwin, 1990).

38 C. Bacchi, "Do Women Need Equal Treatment or Different Treatment?", Conference Paper, International Political Science Association, Buenos Aires, 21-25 July, 1991.

39 [1990] 2 All E.R. 660.

40 A. Bayefsky, "Defining Equality under the Charter", in S. Martin and K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), 106-114, at 107.

41 C. Hoskyns and L. Luckhaus, "The European Community Directive on Equal Treatment in Social Security", *Policy and Politics* 17/4 (1989), 321-355, at 334.

worker before they proceed to discriminate against them".[42] In relation to US jurisprudence, equality is also emphasised as a process rather than as a result, and in cases regarding discrimination in employment what appears to be critical is not whether the defendant's behaviour had a discriminatory impact on women, but rather whether the process itself (of hiring for instance) was free of subjectively motivated bias.[43] In Canada, the equality guarantee in s15 of the *Charter of Rights and Freedom* has been used by male plaintiffs to invalidate legislation passed to protect women from sexual violence and victimization.[44] Fudge argues that "equality arguments are just one of a number of tactics made available by the Charter to defendants — which can be used to invalidate legislation designed to shield women from some of the negative consequences of sexual assault".[45] Equality is patently not the preserve of disadvantaged groups: it is used as a strategy by any number of groups, who may well find it easier to invoke. Fudge argues that many more men are winning s15 cases because all remaining sex-specific provisions obviously benefit women so that they are easily open to attack, while the cases that women are bringing concern often invidious forms of discrimination that are not as apparent and thus are harder to prove.[46] The danger is always that the judiciary will accept that because equality between the sexes is constitutionally enshrined that this automatically translates into equality in practice.[47] Thus it appears that equal treatment, without the articulation of specific goals and without the political or judicial will to implement them, can lead to levelling down. This is a very real danger in a conservative political climate.

But equal treatment is not inherently empty, and the interpretation of equality which mainly privileges the male standard is a political decision. Where there are goals and there is judicial or political

42 *Ibid.*, at 334.

43 *Supra* n. 25, at 612.

44 Fudge, *supra* n.3, at 524.

45 *Ibid.*, at 527.

46 *Ibid.*, at 529.

47 K. Lahey, "Feminist Theories of (In)Equality", in S. Martin and K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), 71-85, at 80-81; M. Eberts, "Risks of Equality Litigation" in S. Martin and K. Mahoney, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), 89-105, at 90.

will, equality provisions can be used effectively. One example is Article 119 in the Treaty of Rome, which has been interpreted dynamically and broadly, especially for the benefit of part-time workers.[48] The Supreme Court of Canada has rejected the comparative approach, saying that it "cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application" (*per* McIntyre J).[49] In the *Brooks* case which recognised pregnancy discrimination as being sex discrimination, it was stated: "combining paid work with motherhood and accommodating the childbearing needs of working women are ever increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically and socially disadvantaged thereby seems to bespeak the obvious".[50] But interpretation of course depends on the criteria used, and even where there are criteria for interpreting equality, these may simply not be feminist criteria, or they may be too vague formulations of a goal, such as 'equal opportunity in the workplace'. If feminist political strength were greater this could possibly influence the criteria used by the courts.

(c) *Equal treatment is not necessarily legally inviolate*

Equality does not even guarantee the same treatment for similarly situated people in all circumstances. Exceptions may be allowed to this principle where groups differ in ways relevant to a valid regulatory objective, for instance in terms of indirect discrimination, or equality guarantees may not be taken as seriously as others.

48 *Bilka-Kaufhaus* [1986] E.C.R 1607 (part-time workers could not be barred from occupational pension schemes that came within Article 119); *Kowalska* [1992] I.C.R 29-36 (striking down a clause in a collective agreement that provided severance grants on retirement only to full-time workers); most recently *Botel* judgment of 4.6.92 relating to compensation for part-time workers engaged in training courses, *Equal Opportunities Review* No. 45, 38-39.

49 *The Law Society of British Columbia* v. *Andrews* (S.C.C Feb 2, 1989).

50 *Brooks* v. *Canada Safeway Limited.*, *supra* n.18, at 1243.

2.3 *Special Treatment*

Special Treatment has usually been advanced as the 'solution' to the deficiencies of equal treatment, normally on one of two grounds. Firstly, because formal equality *must* be modified when it interferes with gaining actual equality in the workplace through, for instance, the introduction of maternity leave. Without this it is argued working women, and not men, are forced to choose between their career and having a family. The second (and more prominent in the US) ground, put forward by 'cultural' or 'relational' feminists, is that certain aspects of women's lives should be recognised as characterised by 'real differences' from those of men, which should be rewarded as 'unique'. These claims can be seen as a reaction to the male norm of equality, which appeared to be an attempt to masculinize women and negate their special capacities.[51] Special treatment can also be seen as a rejection of the 'masculine' values of the public world of work and its other institutions.[52] This kind of response to equal treatment rests on an "ideology of a female nature or female essence reappropriated by feminists themselves in an effort to revalidate undervalued female attributes".[53] I will deal with three examples of a 'cultural feminist' advocacy of special treatment.

Firstly, West[54] has argued that feminists should resist legal equality because it tries to impose sameness and this denies the uniqueness of pregnancy. Her '*connection thesis*'[55] holds that women are actually or potentially materially connected to other human life by virtue of four factors in their lives: during heterosexual intercourse, when menstruating, when pregnant and when breastfeeding. She also argues that women value love and intimacy because these express the unity of self and nature within women's own selves. Because of this

51 *Supra* n.2, at 250.

52 *Supra* n.12, at 80.

53 L. Alcoff, "Cultural Feminism versus post-structuralism: the identity crisis in feminist theory", *Signs* 13 (1988), 405-436, at 408.

54 R. West, "Jurisprudence and Gender", *University of Chicago Law Review* 55 (1988), 1-72.

55 This is in opposition, according to West, to the idea central in jurisprudence based on the masculine idea of 'separation' present in different ways in both main (male) strands of jurisprudence, namely liberal theory (i.e. Dworkin) or in Critical Legal Studies (i.e. Unger and Kennedy).

she says women's differences (which are insisted on by patriarchy) should be celebrated and the rule of law should incorporate the values that flow from these differences. She says the feminist movement in the US has resisted the material version of the connection thesis partly for strategic reasons: they will not identify pregnancy as the root of moral, aesthetic and cognitive difference because so much discrimination against women arises on this basis. However, she points to the fact that the strategy of legal equality has not brought substantial changes either, so "it has become increasingly clear that feminists must attack the burdens of pregnancy and its attendant differences, rather than denying the uniqueness of pregnancy".[56]

However, West's connection thesis begs many questions about whom exactly it includes; on closer examination it simply cannot include all women in the way it claims to. Women excluded are those who are not engaged in penetrative heterosexual intercourse (celibates and lesbians) or who choose not to, or who cannot, have children. Are the following women unconnected? Women who no longer menstruate and therefore do not have the possibility of childbearing or breastfeeding, lesbians who have never had children, adopted or foster mothers or women who at some point in their lives experience a pregnancy as an invasion, women who do not breastfeed. Indeed what is it about menstruation that makes women 'connected'?[57] Even if West is only talking about potentialities, she is still defining women's relation to society only in terms of their reproductive capacities. Ironically enough, based on her own criteria men are not completely unconnected: those who engage in heterosexual intercourse, those who were held in their mother's womb and who were breastfed, or are they completely unaffected?[58] It *is* important to recognize the value of viewing positively what has been associated with women.[59]

56 *Supra* n.54, at 22.

57 Williams, *supra* n.10, at 800-801 footnote 11.

58 In an earlier article West concedes in a footnote that men may be less 'autonomous' if they were more nurturant. On the one hand she presents women's connectedness as an objective exclusionary fact, then reluctantly concedes it is not women's inherent privilege after all, but perhaps more to do with their social role, see R. West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory", *Wisconsin Womens Law Journal* 3 (1987), 81-145, 140 footnote 89.

59 *Supra* n.53, at 408.

However, any feminist legal strategy that uses these sort of 'difference' arguments at best can backfire[60] as in *Sears* and at worst places obstacles in the way of a feminist programme for change[61]. It legitimates the kind of arguments used to justify treating women less fairly than men, and so has aptly been described as trying to "reclaim the compliments of Victorian gender ideology while rejecting its insults".[62] The *Sears*[63] case in the US is a telling reminder that one cannot have the compliments without the insults.

Another difference-based model for special treatment was developed by Wolgast.[64] She argued that equal treatment encourages women to stress the qualities they share with men, rather than developing their own different natures, concerns and perspectives, and that equality does not give a credible place to the family. Wolgast saw the concept of special rights as restoring meaning to women's, especially married women's, ordinary experiences by permitting differences from men to be properly acknowledged. She thus advocated the "*bivalent view*" that every individual is deemed to have two types of rights: equal and special. Every individual has for instance the right of access to a public place, which is equal, but this may not help a person in a wheelchair unless there is a ramp to enter a particular place. This person's right to enter that place can only be possible if that person is given the special right to a ramp. This reasoning has gained statutory acceptance in the US in terms of protection against discrimination in employment on the basis of religion where the two rights co-

60 D. Patterson, "Postmodernism/Feminism/Law", *Cornell Law Review* 77 (1992), 254-317.

61 *Supra* n.53, at 414; K. Offen, "Defining Feminism: A Comparative Historical Approach", *Signs* 14 (1988), 119-157.

62 Williams, *supra* n.10, at 807.

63 628 F Supp 1264 (1986). This company was taken to court by the Equal Employment Opportunities Commission because of its alleged discriminatory hiring and promotion practices. In the courtroom feminist historians were used in evidence on arguments dealing with whether or not women wanted sales commission jobs which demanded hard-sell techniques. The EEOC lost the case. See J. Scott, "Deconstructing Equality-versus-Difference: Or, the uses of poststructuralist theory for feminism", *Feminist Studies* 14 (1988), 33-50, and C. Bacchi, *Same Difference* (Sydney: Allen and Unwin, 1990).

64 E. Wolgast, *Equality and the Rights of Women* (Ithaca: Cornell University Press, 1980).

exist. So it appears to have the potential to provide a basis for change in societal institutions.[65] However, as Kingdom has aptly put it (and this could apply to West) "the difficulty is..[the]..attempt to rescue biology from its bad reputation of supporting and colluding in a concept of women as inferior to men and to reinvest it with moral values".[66] There is nothing in the bivalent view to prevent it from resulting in special but negative treatment since it does not give a rule with which to decide which 'differences' should be taken into account and which should be ignored. This leaves "its proponents [with] their feet precariously on the slippery slope of judicial stereotyping".[67] Without such a differentiating rule Wolgast's approach, rather than challenging equal rights, merely redescribes it: like the formulation of equal rights, the bivalent view holds that rights ought to be equal when they ought to be equal, and special when they ought to be special.[68]

Scales proposed a modification to this approach, that is, a rule for taking differences into account: the "*incorporationist model*".[69] The model says that men and women should only be regarded as different regarding sex-specific conditions completely unique to women. Thus she argues normative differences between the sexes should not serve as the basis for the conferral of special rights and burdens. She argues that recognizing these differences does not nullify them, nor does it analogize them to other conditions (i.e., illness as in the case of pregnancy) or project uniqueness and therefore social and legal consequences onto every conceivable sex-specific trait. Even though pregnancy and breastfeeding are specific to women they should not be re-

65 L. Krieger and P. Cooney, "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality", *Golden Gate University Law Review* 13 (1983), 513-572, at 560.

66 E. Kingdom, *What's Wrong With Rights? Problems for feminist politics of law* (Edinburgh: Edinburgh University Press, 1991), at 124.

67 A. Scales, "Towards a Feminist Jurisprudence", *Indiana Law Journal* 56 (1981), 375-444, at 432-33.

68 E. Kingdom, "BirthRights: Equal or Special?", in R. Lee and D. Morgan, eds., *Birthrights: Law and Ethics at the Beginnings of Life* (London: Routledge, 1990), 17-33, at 33.

69 This should not be confused with her later critique of "incorporationism" which she characterises as 'adding women in' based on the assumption that inequality derives from irrationality that can be cured., see A. Scales, "The Emergence of Feminist Jurisprudence: An Essay", *Yale Law Journal* 95 (1986), 373-1403.

garded as unique because that leads to difference in women being classified in a worse manner than men, and to account for pregnancy and breastfeeding is rather to treat women as equals in the terms of Dworkin's idea of a right to treatment as an equal.[70] While the incorporationist model does remedy a flaw in Wolgast, it reveals its own flaws. Scales describes pregnancy and breastfeeding as unique, but then says that we must not describe them as unique because this is a trap since case-law has revolved around the male norm. Even putting this inconsistency aside, this approach fails to tackle the fact that whether you call certain features 'specific' or 'unique' does not change the way in which they are held to be 'natural' or 'relevant differences' which justify worse treatment. Furthermore, Scales is frozen into the status quo by only advocating (in effect) equal treatment except in relation to "unique" sex-specific conditions.

Thus the demand for 'special treatment' by critics of equal treatment does not move feminist strategy further, it paralyses it. Special treatment or 'difference' as applied to women merely serves to endorse maleness as the norm.[71] In Rhode's words "to pronounce women either the same or different allows men to remain the standard of analysis"[72] or to quote de Lesseps "man is the reference, woman is the difference".[73] To view childbirth and related policies as 'special' assumes that male needs establish the norm.[74] While pregnancy is a 'difference' between men and women, it almost invariably affects men and other people as well, so that policies labelled special treatment are not in fact 'handouts' to women because they benefit men and children too.[75] In fact any challenge to the current distribution of wealth and resources is (pejoratively) labelled 'special treatment'.[76]

70 R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1979), 227. See in particular chapter 9.

71 C. Smart, *Feminism and the Power of Law* (London: Routledge and Kegan Paul, 1989).

72 *Supra* n.11, at 82.

73 Eisenstein, *supra* n.11, at 89.

74 Holtmaat, *supra* n.30, at 492.

75 *Supra* n.12, at 81.

76 Lahey, *supra* n.47, at 76.

3. *'The exquisite trap': A critical look at the debate*

We have seen that both equal and special treatment have their limitations. While each approach to law represents a useful strategy, approach or claim in the struggle for substantive gender equality, neither tactic can guarantee that it will not ultimately have serious and damaging side-effects for women.[77] Protection or protective legislation offers some amelioration for women at the bottom of the hierarchy but in the end serves to confirm their position of labour market inferiority, while equality or equal opportunities offers some improvement for women at the top of the hierarchy, but also confirms women's inferior position in the labour market, because many women enter this market on different terms than men.[78] The debate in fact is rather abstract, with participants trying to propose one ideal model of equality that will always benefit women, without ever operating to their detriment.[79] Special treatment advocates struggle to define a principle which could determine the appropriate deviations from the norm of identical treatment.[80] This 'quest' clearly places too great a strain on the concept, and indeed on feminists to formulate it[81] but also fundamentally ignores the differences in interest between women. The continued use of the equal/special distinction makes it easier to treat all complex cases in this rarefied way, but the distinction would not easily lend itself to giving guidance in, for instance, producing draft legislation or engaging in analysis of the social effects of legislation.[82] The terms 'equality' and difference are not concrete descriptions of some empirical reality, but are rather part of a political contest about the resolution of some social problems.[83] It is in this sense that arguing over different abstract models of equality is a costly distraction; an approach is needed that can be flexible and operate through more than one strategy, and which will expose, rather than

77 *Supra* n.71, at 84.

78 Lewis and Davies, *supra* n.7, at 22-23.

79 D. Majury, "Strategizing in Equality", *Wisconsin Womens Law Journal* 3 (1987), 169-187, at 179.

80 See for instance the formulas of Scales, *supra* n. 67; Law and Kay, both at *supra* n.11.

81 *Supra* n.79, at 170.

82 *Supra* n.68, at 170.

83 *Supra* n.38 at 3.

obscure, fundamental social problems.

The perceived necessity of making a choice between equal or special treatment is a false choice. In some areas equal rights are necessary, while in others it is gender-specific rights that are necessary, for instance in pregnancy. Neither approach is, nor should be, the exclusive 'answer' or strategy or claim, and arguing over substantive equality by opposing equal with special and vice-versa is at best redundant and at worst a costly distraction.[84] In tackling work and family issues moreover gender is not the only factor; we must not ignore other powerful constraints such as class, race and post-industrial capitalism.[85] The male standard may in fact hide a liberal capitalist economic standard, and so whichever strategy feminists pursue, if capitalist concerns dominate the policy process then capitalist needs are likely to win out.[86] Thus discrimination on the grounds of sex need not be the only paradigm within which we argue or justify the resolution of the issues or orient our public policy.[87]

The debate is an "exquisite trap", in the words of Carol Smart; the two sides have been constructed as mutually exclusive and so to promote either within the legal system as it stands means that we inevitably undermine the other.[88] Instead of remaining within the terms of the debate we should be questioning how this choice came to be defined and whose interests it serves; that indeed the choice was structured by external conditions.[89] While there are deep differences between feminists on a range of issues, it is crucial to turn our attention to the environment in which the debate takes place. Feminists have been divided over how to deal with pregnancy where there is no collective provision for maternity (as in the US), but not where there is collective provision (in post-Beveridge welfare state Britain).[90] In the

84 It is interesting to note that the irreconcilable opposition between equal and special was recognised by a group of feminists campaigning around welfare issues as far back as the 1920s, see W. Sarvasy, "Beyond the Difference versus Equality Policy Debate: postsuffrage feminism, citizenship and the quest for a feminist welfare state", *Signs* 17 (1992), 329-362.

85 Dowd, *supra* n.10, at 81.

86 Jarman, *supra* n.7, at 152.

87 Dowd, *supra* n.10, at 81.

88 *Supra* n.11, at 83.

89 *Supra* n.38, at 8.

90 *Ibid.*, at 7.

UK, for instance, debate tends to revolve around how maternity provision can be improved or made gender-neutral[91], and not on what grounds it should be introduced in the first place. Differences can thus be seen as differences over tactics or strategy[92] or as reflecting the different experience of participants in terms of the tactics of their generation.[93] Feminists come to pre-existing legal structures and have to formulate demands in a language which will be heard within those structures.

The debate has also obscured social problems by concentrating on a few specific areas and by ignoring other equally important ones, particularly the social and economic rights of women resulting from their work in the household economy.[94] Both sides of the debate ignore the differing situations and conflicts of interest among various groups of women; by concentrating on pregnancy, participants have ignored the fact that not all women are present or potential mothers, and their preferences as regards the form and amount of gainful employment are very different.[95] Lewis and Davies and Joan Williams[96] argue that while feminists are engaged in the sameness/difference debate the gendered nature of labour is ignored. The reality that men and women do not enter the labour market on the same terms has not changed, nor the fact that, as Joan Williams[97] has argued, all workers currently have two choices — either to follow a traditional male life pattern or experience economic marginality.

So, feminists should debate the meanings attached to the concepts equal treatment and special treatment *only* in terms of specific social problems to be addressed. It is crucial to see the limitations of these concepts in thinking and talking about social problems.[98] We should campaign for far-reaching social changes, otherwise we will continue

91 See for instance J. Conaghan and L. Chudleigh, "Women in Confinement: Can Labour Law Deliver the Goods?", *Journal of Law and Society* 14 (1987), 133-147.

92 M. Minow, "Beyond Universality", *University of Chicago Legal Forum* (1989), 115-138, at 135; *supra* n.71, at 83.

93 *Supra* n.38, at 5.

94 *Supra* n.35, at 173.

95 *Ibid.*, at 174.

96 Lewis and Davies, *supra* n.7, at 23; Williams, *supra* n.10, at 836.

97 *Ibid.*, at 832.

98 *Supra* n.38, at 15.

asking for "palliatives which will prove inadequate".[99] Indeed the equality-versus-difference question has also been posed in the debate over whether 'citizenship' is gender-neutral or not, and whether the concept can be used to further women's and other group's struggle for political, social and economic power. One way of formulating this question is to ask whether in the political arena the objective is to challenge the conditions which curtail women's rights as citizens, or to develop concepts and practices of citizenship which take into account the sexual division of labour and value women's caring role within it.[100] The 'answer' here too must be that either/or choices need to be rejected, as Lister puts it: "if women are going to enter full citizenship, it is going to require radical changes in both the private sphere and each of the public spheres — as well as a challenge to the rigid separation between the sexes".[101]

4. *Conclusions: towards more flexible and pragmatic frameworks and a rejection of abstract models*

Feminist strategies must involve a calculation of specific issues, tactics and possible outcomes, and there is no single principle which can determine this.[102] There are however several relevant considerations. Strategies should not depend on abstract model building to fit all cases. Engaging with equality in law, if at all, should be as a means rather than as an end.[103] It is also crucial to keep in mind the differences between women, and to recognise that different groups of women may have quite different interests.[104] Another aspect of a more flexible strategy is the acceptance that feminist answers to a given problem can change once conditions change. Bacchi[105] argues that for good political reasons feminists must sometimes adopt

99 *Ibid.*, at 2.

100 R. Lister, "Citizenship Engendered", *Critical Social Policy* 11/2 (1991), 65-71, at 70.

101 *Ibid.*, at 70.

102 *Supra* n.66, at 127.

103 *Supra* n.35, at 175.

104 H. Petersen, "Perspectives of Women on work and law", *International Journal of the Sociology of Law* 17 (1989), 327-346.

105 *Supra* n.38, at 14.

strategies which achieve limited goals. It is also important to recognise those problems for which 'equality' may not be the most effective rhetoric or strategy to use,[106] as for example, Catharine MacKinnon's attempts to pose pornography and abortion as issues of 'sex discrimination'.

I have argued throughout this article that we should start from specific social problems and then work back to assess which strategies would be the most effective. In her recent publication on women and atypical work, Linda Dickens concludes that while anti-discrimination legislation may be of limited use, the greater challenge needs to be to the male structure of employment and to the concept itself of 'typical' work. Other academics concerned with the effect of the *Dekker* case, that it will ensure that employers will find other ways to not hire pregnant women, argue that the long-term solution can only be a change in the workplace so that both male and female employees are recognised to have caring and family *responsibilities.*[107] In proposing this, that either equal treatment or special treatment can be used, but that we must seek solutions that contribute to the breaking down of structures, it could be said that I am ultimately contributing to the binary construction that I have so criticised. Feminists must try to minimise the binary construction, but we *are* also constrained to work within existing discourses.[108]

In recognising that different groups of women have different interests, and in aiming my argument at the long-term, I am accepting that there must be trade-offs, not only between women, but also between the long and short term aims to be pursued. What I cannot do here is to say what those trade offs will be in any given situation, this will inevitably involve a pragmatic decision to be taken with regard to concrete circumstances of individual problems. The sorts of criteria used to make the necessary trade-offs could be class, for instance whether one was favouring middle class or working class women. Another criterion could relate to a specific activity which women predominantly undertake, such as caring for the sick and elderly or childcare.

106 *Supra* n.2, at 253.

107 Such as Finley, *supra* n.33, and E. Ruinaard, *The Reconciliation of Work and Family Responsibilities, A Problem for Women Only?*, LL.M Thesis submitted to the European University Institute, Florence 1992.

108 *Supra* n.66, at 115.