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TO BESPEAK THE OBVIOUS: A SUBSTANTIVE EQUALITY ANALYSIS OF REPRODUCTION AND EQUAL EMPLOYMENT

DONNA M. EANSOR*

That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant...  

I. INTRODUCTION

Women conceive and bear children. Men do not. This biological ability to conceive, a characteristic shared by all women, is the basis upon which many theorists and a large part of society have concluded that a woman's traditional role is first and foremost that of a primary caregiver. It is from this biological determinism that attitudes and stereotypes that preclude women from equal treatment in society have sprung. Society has nurtured and maintained these sex characterization stereotypes; the law first sanctioned, then solidified, their social entrenchment. The assumption that a woman's primary role in society is to be a caregiver is the basis of the nature theory and it is upon this theory that many political theorists and our courts continue to support the denial of full social justice to women. 2 Underlying the nature theory is the premise that women have a natural desire or need for children which men lack. 3 The nature theory also espouses that when a woman

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2. I am using the term "social justice" to include all of the rights normally enjoyed with full citizenship in the state, including political, employment, and legal rights. See generally ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOUL OF TODAY'S STUDENTS (1987). Bloom relies heavily on Rousseau's idealized picture of family life where women were without full societal protection and participation. Full protection and participation were not necessary because women were fully protected and sheltered by their husbands' love and protection.

chooses to satisfy this innate desire and need, she does so voluntarily. Therefore, any burdens under the law, or any burdens flowing from conflicts arising between family and paid workplace responsibilities must be borne by the woman. Thus, from this voluntary choice flows the rationale for, and the justification of, the denial of full social justice to women.

Society's view of women as transient members of the paid workplace stems from this theory. That is, women secure jobs in the paid workplace, only to leave them upon becoming pregnant. From this assumption, grew the unacceptance of pregnancy in the paid workplace. In recent past history, the law provided for mandatory departure from the paid workplace early in pregnancy.\(^4\) Other types of protectionist legislation and employer policies have been justified on the basis that biological and maternal functions make certain types of work or work practice, unsuitable for women. Legislation which limited the hours in which women could work\(^5\) or which exclude women from military service or contact sports\(^6\) are examples of sex characterization stereotypes at work.

Although many laws of this type have been challenged and set aside by the courts, the repeal of these laws did not quash the sex stereotypes upon which they were based—sex stereotypes continue to affect employers' policies and the law, restricting women's access to social justice.\(^7\) This is so even though statistically a woman's level of commitment to paid

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4. Employer policies and laws allowing employers to arbitrarily require women to leave the workplace have been held unconstitutional under the due process clause. See Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632 (1974) (involving school board policies that required pregnant teachers at an early point in their pregnancy to leave the workplace and take mandatory maternity leaves).

5. See Muller v. Oregon, 208 U.S. 412 (1908). This case dealt with a law that limited the hours that women could work. The Court found that such protection of women was needed: "'[H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man..." Id. at 421-22.


7. A recent example is the appellate decision in UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), rev'd, 111 S. Ct. 1196 (1991). If these policies had remained unchallenged, it was estimated that 20 million jobs would have been unavailable to women. See id. at 914.

work is no longer contingent upon whether or not she has children. Women are not staying at home with children in the 1990's; many return to the paid workplace soon after the birth of a child. 8

Judicial and employer decisions are also influenced by the stereotypical belief that women are secondary wage earners, individuals that do not have to work for financial reasons. 9 Furthermore, the belief that women are incapable of making independent well—reasoned decisions impacts upon judicial determinations.

Discrimination cases dealing with reproduction and employment have been influenced by biological determinism and stereotypical myths about a woman's participation in the paid labour force. These cases clearly illustrate the manner in which judges have been guided by the nature theory and stere-
otypical attitudes about women when reproduction is at issue. Judicial reliance upon these beliefs has resulted in the limitation of women's employment rights on the basis of reproductive capacity.

Biological determinism is entrenched into the law in various ways, however, one of the most effective ways is through the adoption and application of a formal model of equality to issues involving reproduction. The link between biological determinism and the formal equality approach is explained in Part II of this article. This part also contains a description and comparison of formal and substantive equality.

In Part III and IV, this article looks at the application of both a formal and substantive model of equality to cases dealing with reproduction and paid employment opportunities under discrimination laws in Canada and in the United States.  

10. I use the terms "paid employment," "paid workplace," "paid work," and "paid labour" throughout the discussion to note the distinction between work in the public employment sector and work in the private home sector.


12. The examination of discrimination law in this paper is limited to Title VII cases. Discrimination under constitutional law will not be covered. In the United States, the Supreme Court, in Geduldig v. Aiello, 417 U.S. 484 (1974), determined that laws dealing with the unique ability to conceive do not raise an issue of equal protection of women and men. The basis for the decision was the Court's determination that the comparable groups in these cases were pregnant persons and non-pregnant persons, not women and men. Of course, only women can presently become pregnant and therefore if this reasoning is followed, the comparable groups will never raise an issue of equal protection.

Also note that the decision makes it difficult to challenge the constitutional validity of laws and policies where reproduction is at issue. Since gender was defined to exclude the unique ability to conceive, the Court
Specifically, Part III looks at the way in which the application of a formal model of equality resulted in the judicial determination that pregnancy discrimination was not sex discrimination. This finding facilitated the denial of certain employment benefits to women employees who became parents.

Part III also contains a comparison of this formalistic analysis with the analysis adopted and applied more recently by the Supreme Courts in both jurisdictions. Both of these courts have taken significant, although incomplete steps, away from a formalistic analysis. The movement is attributable to a shifting by each of the courts towards a substantive equality analysis which rejects the nature theory and the stereotypical generalizations which flow from the theory. The relevant cases discussed in Part III, as well as the cases discussed in Part IV, demonstrate the way in which a substantive equality analysis produces results which are more equitable in nature than the results which flow from a formal equality analysis. These cases also illustrate the way in which the courts have not fully adopted and applied a substantive equality analysis to the issues involved. The remedies adopted by the courts do not applied a minimal standard of scrutiny. Under this standard, a law is constitutional if there is any rational reason for its existence. Patent irrationality is required for a finding of unconstitutionality and it is therefore difficult to establish unconstitutionality.

Gender based classifications are subject to an intermediate level of judicial scrutiny. See Harris v. McRae, 448 U.S. 297, 342 n.3 (1980). The law must have "a fair and substantial relation to the object of the legislation." Reed v. Reed, 404 U.S. 71, 76 (1971). This level of scrutiny, if it had been applicable, makes a successful constitutional challenge to legislation where reproduction is at issue more probable.

The Supreme Court had another opportunity to deal with this issue in the case of Miller-Wohl Co. v. Commissioner of Labor & Industry, 479 U.S. 1050 (1987), vacating 692 P.2d 1243 (1984). In Miller-Wohl, the employer specifically challenged Montana legislation providing preferential treatment to pregnant employees under the equal protection clause, as well as under the state pre-emption doctrine. The state court found that the legislation violated the equal protection clause. The Montana Supreme Court did not specifically make this finding. It did refer to the equal protection clause and quoted from the lower court in finding that the legislation placed men and women on more equal terms. See 692 P.2d at 1254 (quoting Miller-Wohl, 515 F. Supp. 1264, 1266 (D. Mont. 1981)). However, the U.S. Supreme Court never decided the equal protection issue. The Court remanded Miller-Wohl in light of the finding in the case of California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). This remand was significant. The Supreme Court did not deal with the equal protection clause of the fourteenth amendment in Guerra. The decision involved only the issue of state pre-emption which was also before the Court in Miller-Wohl.
necessarily guarantee equality of condition. Specifically, these decisions do not guarantee economic equality.

Part IV of the article looks at the way in which a woman's right to certain jobs in a toxic workplace is denied. This is achieved through fetal protection policies which exclude fertile women from performing certain jobs. The 1991 United States Supreme Court decision in *UAW v. Johnson Controls, Inc.* found this type of policy discriminatory on the basis of sex and pregnancy. In so holding, the Justices overturned the appellate court which had found that the policies were discriminatory but justifiable.

The appellate and Supreme Court decisions in *UAW v. Johnson Controls, Inc.* provide a comparative framework to illustrate the way in which a substantive equality analysis produces more equitable results than a formalistic analysis in cases which involve reproduction issues. A comparative analysis of these decisions also illustrates the manner in which stereotypical attitudes directly impact upon the interpretation and application of laws and standards.

II. **Biological Determinism and Two Theories of Equality**

Formal equality entrenches biological determinism into the law and thus perpetuates stereotypes about women, paid work, and reproduction, because it requires only that the law treat men and women the same. Biological difference is not acknowledged. Under the formal equality analysis, women are guaranteed equality only when they are identically situated to men. In situations where the sexes are not identically situated, as in any case where the ability to conceive is a factor, same or identical treatment does not result in equality of condition.

13. 111 S. Ct. 1196 (1991). Three judgments were issued by the Court. The majority of the Court, Justices Blackmun, Marshall, Stevens, O'Connor and Souter, held that the fetal protection policy was direct sex discrimination which the employer could justify only by establishing that the policy was a bona fide occupational qualification (BFOQ). They further held that such a policy could not be justified as a BFOQ. *Id.* at 1199-210. Concurring in part and concurring in the judgment, Justice White, Chief Justice Rehnquist and Justice Kennedy agreed that the policy was direct sex discrimination which could be justified only if the employer established that it was BFOQ. They agreed that Johnson Controls had not established that the policy was a BFOQ. However, they disagreed with the majority finding that a BFOQ could never be established to justify such a policy. *Id.* at 1210-16. Justice Scalia concurs in the judgment but writes separately largely to disagree with some of the comments by the majority about the scope of the BFOQ. *Id.* at 1216-17.
The absence of a male analogue in cases involving issues of gender has proven detrimental to women.

Claims arising from systemic discrimination also serve to illustrate the conundrum. Under a formalistic analysis, discrimination is defined narrowly, covering only intentional discrimination. Laws which are gender neutral pass this simple test. No attempt is made to look behind a particular policy or law to determine whether it in fact has an adverse impact upon a particular group.

A formal theorist would not disagree with these conclusions and in fact would agree that the idea that women are biologically different and thus inferior to other members of society, is in fact the catalysis of the unequal societal state of women. However, recognition of biological difference is discouraged on the basis that it is not necessary to achieve equality. Equality is reached eventually through market forces. Moreover, acknowledging biological difference requires that women be distinguished from men in this respect and a formal equality theorist maintains that any differential or special treatment of women reinforces the view that women are inferior to men.

Reaching equality through market forces seems unlikely because the failure by the courts to recognize biological difference has in fact reinforced the view that women are validly treated as unequal participants in a just society. In cases about reproduction and equal employment rights, disregard for the biological distinction between men and women, that is the ability to conceive, has resulted in the limitation of women’s employment rights. This result is reached through the adoption of a narrow definition of gender which excludes the ability to become pregnant. Once excluded however, the ability is not ignored. It is employed as a “valid” basis upon which to distinguish women from men and thus exclude women from employment opportunities and benefits that they would have otherwise been entitled to had they not had the capacity to become pregnant.¹⁴

¹⁴. In the United States: See General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). This case involved a complaint of sex discrimination under Title VII about an employer’s policy that provided temporary disability benefits for all employees except those individuals temporarily disabled due to pregnancy. In reaching the decision that the policy did not discriminate, the Court relied upon the constitutional decision in Geduldig v. Aiello, 417 U.S. 484 (1974).

In Canada: See Bliss v. Attorney Gen. of Can., [1979] 1 S.C.R. 183 (1978) (Can.). In Bliss, the question before the Court was the entitlement of a pregnant woman to unemployment insurance benefits. Bliss did not get any
A substantive equality analysis of these issues produces a different result. Equality under this analysis means "equality in the substance of one's condition." This theory of equality finds its roots in a broad definition of discrimination. Such a definition of discrimination has been adopted by the Supreme Court of Canada in two recent decisions:

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capabilities will rarely be so classed.

This definition of discrimination clearly prohibits discrimination on the basis of personal characteristics. A personal and shared characteristic of women is the unique ability to conceive. Therefore, limiting women's rights because of this ability is discrimination.

In addition gender is defined much differently under substantive equality analysis. It is broadly defined to include, not exclude, the ability to conceive. A particular law or standard which distinguishes on this basis will automatically violate antidiscrimination law. Under this analysis, employment rights cannot be validly limited by reproductive capacity.

This type of analysis does not reinforce the belief that women are reproductively inferior to men. Acknowledging that women are biologically different than men, is not the same as advocating that they are in fact inferior in this respect, or

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benefits because she did not qualify for maternity benefits and she was refused benefits under the regular scheme because she was pregnant. She challenged the Unemployment Insurance Act on the basis of sex discrimination and claimed a violation of her right to equal protection of the law under section 1 (b) of the Canadian Bill Of Rights, S.C. 1960, ch. 44, reprinted in R.S.C. 1970, app. 111 (Can.). The Supreme Court found that her equality rights had not been violated because the definition of 'equality' did not extend to the entitlement of benefits.

17. Brooks, 1 S.C.R. at 1244.
that they should enjoy a lesser status in society because of this difference. Accounting for the difference in the determination of whether or not a law or standard discriminates on the basis of sex ensures that the reproductive capacity of women is not utilized to justify discrimination. This safeguard in turn ensures that women as a group are not discriminated against because of this unique component of their gender.

Moreover, substantive equality analysis emphasizes that it is the societal treatment of women as biologically different, rather than the biological difference itself which is at the root of the denial of social justice for women. In this respect, a substantive equality analysis rejects the nature theory and the stereotypical attitudes which flow from it.

However, substantive equality cannot be guaranteed by a finding of discrimination alone. True equality is only attained if the remedy fashioned to redress the discrimination results in equality of condition for the group under consideration. In other words, it is not enough to formulate and interpret laws using this analysis if the remedy devised by the court does not result in actual equality of condition. Equality of condition in cases involving reproduction can be reached only if the unique ability to conceive is considered by the court when it is formulating the appropriate remedy to redress the discrimination.

The determination of whether a particular group is in fact equal in condition can be made through a comparative analysis which contrasts the condition of the subject group with the condition of the appropriate comparative group in society.18

This type of analysis also considers the 'disadvantage' status of

18. Andrews, 1 S.C.R. at 164-65, 168-69. This constitutional case specifically rejected a formal model of equality. Andrews decided the question of whether a British Columbia statute which restricted admission to the Bar of British Columbia on the basis of Canadian citizenship violated section 15 of the Charter. The decision of the court was that the Canadian citizenship requirement violated section 15 of the Charter and that it was not a justifiable limit under section 1 of the Charter. Six justices decided the case; three judgments were issued by McIntyre, LaForest and Wilson. All six justices agreed with Justice McIntyre about the interpretation of section 15; Justice LaForest wrote separately but stated that he was in agreement with Justice McIntyre’s analysis of section 15. Justice McIntyre and Lamer formed the minority on section 1 finding that the requirement was a justifiable limit under section 1. Justice Wilson wrote separately on section 1 and it is her judgment that resulted in the majority outcome about section 1; that is that the requirement could not be justified under section 1 of the Charter. Chief Justice Dickson, L'Heureux-Dube, and LaForest concurred with Justice Wilson.

Brooks adopts the equality analysis described in the text but does not explicitly set the analysis out in its judgment. See Brooks, 1 S.C.R. at 1219.
the subject group in our society. This latter step is necessary to ensure that the condition of the subject group is equalized in the sense that it is made the same as the condition of the advantaged comparable group. This equalization is a recognized purpose of anti-discrimination law.

Discrimination cases involving issues of equal employment and reproduction in both Canada and the United States illustrate that the adoption and application of a substantive model of equality to such cases produce results which are more equitable in nature. The application of a formal model of equality to these issues results in the limitation of employment rights on the basis of reproductive capacity. Part III and Part IV of this article demonstrate the distinct results of the two approaches.

III. PREGNANCY DISCRIMINATION AND TWO THEORIES OF EQUALITY

In the not so distant past, the Supreme Courts of Canada and the United States maintained that discrimination on the basis of pregnancy, or the ability to become pregnant, was not sex discrimination. The decisions in Gilbert and Bliss were a product of the application of a formal model of equality to issues about reproduction and employment. Generally speaking, gender was narrowly defined to exclude the ability to conceive. However, despite its exclusion from the definition of gender, the ability was not disregarded. In the next step of the analysis, biological difference was employed as a valid basis upon which to distinguish women from other employees and thus, disenitle them to employment benefits that they would have otherwise been entitled to, had they not been pregnant. Equal employment opportunities did not follow where reproduction was at issue; they were limited, and justifiably it was

19. In a brief discussion in which the court attempts to define the types of distinctions that will violate section 15, Mr. Justice McIntyre refers to "those which involve prejudice or disadvantage. . . ." Andrews, 1 S.C.R. at 181. He also quotes Judge Hugession in Smith, Kline & French Lab. v. Attorney Gen. of Can., [1987] 2 F.C. 359, 369 (1987) (Can.). "Questions of stereotyping, or historical disadvantagement, in a word, of prejudice, are the focus. . . . [of section 15 of the Charter]." Id. at 180.

In a separate judgment, Madame Justice Wilson also discusses the meaning of section 15, stating that it was "designed to protect those groups who suffer social, political, and legal disadvantage in our society. . . ." Id. at 154. Referring specifically to the case before the court, Justice Wilson states that non-citizens are "a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. . . ." Id. at 152.

20. Id. at 173.
argued, because of the biological difference of women from men. Under this formalistic analysis, no independent access to the law is available to women when reproduction is an issue—juridical claims arise only when a woman can demonstrate that a male analogue exists. Because men cannot become pregnant, no analogue can be established. Women are therefore unable to establish a valid legal claim to full employment rights in cases that involve laws or policies that distinguish women from other employees on this basis.

A substantive equality interpretation of issues of equality and reproduction produce a dramatically different result. The 1989 Supreme Court of Canada decision in *Brooks v. Canada Safeway Ltd.* 21 and the 1987 United States Supreme Court decision in *California Federal Savings & Loan Association v. Guerra* 22 illustrate this difference.

### A. Substantive Equality in Canada

Following *Bliss*, many provinces moved to enact human rights legislation which provided that discrimination on the basis of pregnancy was discrimination on the basis of sex. 23 However, before the Manitoba legislature did so, the applications were launched in the *Brooks* case. The appellate court in *Brooks*, 24 relying on *Bliss*, found that an employer's accident and sickness plan (which exempted pregnant women from benefits during a seventeen week period) did not discriminate on the basis of sex. The Supreme Court disagreed and in so doing,


22. 479 U.S. 272 (1987). Of course, this is a matter of interpretation. The holding in *Guerra* can be construed very narrowly: State laws providing preferential treatment for pregnancy are not pre-empted by Title VII.

23. See supra note 21 and accompanying text.

specifically rejected a substantial portion of the formal equality analysis employed by the Canadian and the U.S. Supreme Courts in Bliss and Gilbert respectively.\textsuperscript{25}

The Canadian Supreme Court held that pregnancy discrimination is in fact sex discrimination. The reasoning behind the decision transcends a simple reliance by the court upon the then existing legislation which confirmed this finding. In acknowledging that the legal rights of women cannot be determined without recognizing biological difference, the Court provides a framework in which to assess issues that involve this difference. The analysis consists of the examination of the impact of the law or policy on the condition of the individual or group affected by the law or policy. A law or policy which discriminatorily impacts upon the condition of the individual or group will be in violation of the law.

The condition of an individual or group consists of two components, both of which are derived from the broad definition of discrimination discussed earlier. This definition describes discrimination as a "distinction . . . based on grounds relating to personal characteristics of the . . . group."\textsuperscript{26} The first component then, in the determination of condition, is the identification of the personal characteristics of the group at issue. The Brooks court identified the unique ability to conceive as a personal biological shared characteristic of women. Gender is thus broadly defined to include the unique ability to conceive. As a personal characteristic, the ability is not excluded, as it was under a formal analysis, from the consideration of whether a law or policy distinguishes on the basis of sex. Rather, it is included in the determination of whether the policy or law in fact so distinguishes.

The second component of the condition of a group involves a comparative analysis—the condition of the subject group in society is compared with the condition of others in society. Under this comparative analysis, the 'disadvantaged' status of the group in society is also relevant. If a law or policy distinguishes on the basis of these personal characteristics and has the "effect of imposing burdens, obligation or disadvantages" on the group possessing those characteristics, the law or policy will be discriminatory.\textsuperscript{27}

\textsuperscript{25} See supra note 14.
\textsuperscript{27} Id. at 1229.
In Brooks, the disability policy was found to be discriminatory because it distinguished between pregnant women and other employees who also left the paid workplace temporarily because of a health-related reason. The distinction, that is the unavailability of benefits to pregnant women for seventeen weeks, disadvantaged women by imposing upon them a disproportionate economic burden or obligation for becoming a parent. As a result, the actual condition of women was different than the actual condition of other employees who were required to leave the workplace temporarily for a health-related reason.

The economic burden on women is disproportionate because the balance of society, including the employer in this case, is not contributing to the cost of procreation. Societal contribution is justified because procreation is a societal benefit to which all members of society should economically contribute. To hold otherwise, as the court points out, would be contrary to the "purposes of anti-discrimination legislation" because such a holding would sanction "one of the most significant ways in which women have been disadvantaged in our society." 28

Implicit in this decision is the determination that the right to equal employment opportunities and the right to procreate 29 are equal. The court precludes any other analysis because

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28. Brooks, 1 S.C.R. at 1238. The Brooks court acknowledged that the disadvantaged status of women in society is primarily due to the societal treatment of a woman's role in the procreative cycle. The court identified the historical treatment of pregnancy in society and under the law as the reason for the disadvantaged status of women in society. Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143 (1989), was not a gender equality case, but the case contains a point that makes it possible for this same conclusion to be reached in section 15 cases. This point arises in the context of the very vague definition of "disadvantage" which is included in the judgment. Although the court provides virtually no guidance about which groups the court will classify as being in this category, it does refer to groups in our society that have been historically disadvantaged. Clearly, women have been historically disadvantaged in our society; they are poor, vulnerable to domination (especially if married and responsible for children) and, unlike men, more frequently the victims of abuse, brutalization, and past discrimination. In Canada, 56.4% of all low-income persons between the ages of 16 and 64 are women. 55.3% of women who are single parents are poor. See Ontario Women's Directorate 1 (1988) (quoting The National Council of Welfare, Poverty Profile (1988)).

29. The Brooks court proceeded on the basis that a right to procreate does exist at law. Safeway argued that the state of pregnancy did not amount to sex discrimination. To support this argument they drew an analogy between the state of pregnancy and the process of growing a beard. The basis for the analogy lay in an earlier Manitoba Court of Appeal decision that
they find that the ability to conceive cannot be used as a differential distinction to justify the limiting of women's employment rights. Therefore, the limitation of employment rights where reproduction is at issue, the accepted practice by the courts before Brooks, is found to be discriminatory.

In addition to outlining a substantive equality framework in which to assess issues about reproduction and paid work, the Brooks court also identified and set aside some of the stereotypical underpinnings of a formalistic analysis. The Justices were clear that it is the societal treatment of women as biologically different rather than biological difference itself which has resulted in the continuing unequal status of women in our society. The nature theory is expressly discounted by the Justices; they reject the employer's argument that pregnancy is a voluntary state and they overrule Bliss.30

The court rejected the stereotypical view that becoming pregnant is simply a voluntary choice by a woman.31 The employer in Brooks argued that the choice was voluntary and therefore was like other voluntary absences from the paid workplace which were not covered by the policy. Relating the issue of voluntariness to the question of whether pregnancy is an accident or an illness, the Court held that it is neither an accident nor an illness but that it is a "valid health-related reason for absence from the workplace."32 In coming to this conclusion, the court looked closely at the function of reproduction in society:

It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society. Indeed, its importance makes description difficult.... If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason....33

held that a "no beards" rule was not a matter of sexual discrimination. (i.e., beards are peculiar to men and pregnancy is peculiar to women). See Canada Safeway Ltd. v. Manitoba Food and Commercial Worker's Union, Local 832, [1981] 2 S.C.R. 180 (1981). Chief Justice Dickson rejects this argument and states, "The attempt to draw an analogy at best trivializes the procreative and socially vital function of women and seeks to elevate the growing of facial hair to a constitutional right...." Brooks, 1 S.C.R. at 1250.

30. Brooks, 1 S.C.R. at 1244.
31. See supra text accompanying notes 2-4.
32. Brooks, 1 S.C.R. at 1237.
33. Id.
An even clearer rejection of the nature theory is the Court's disposition of the Bliss decision. Bliss dealt with the question of Bliss' entitlement to unemployment insurance benefits because she was pregnant. Bliss did not qualify for maternity benefits and she was refused benefits under the regular scheme because she was pregnant. The Supreme Court, interpreting Section 1(b) of the Bill of Rights, found that her equality rights had not been violated because 'equality' did not extend to the entitlement of benefits. Overruling Bliss, Chief Justice Dickson stated: "It is difficult to accept that the inequality to which Stella Bliss was subject was created by nature and therefore there was no discrimination; the better view, I now venture to think, is that the inequality was created by legislation. . . ."34 This is a clear statement by the Supreme Court that the fulcrum of gender equality lies in perceptions about biological difference and their codification in the law in contradistinction to biological differences themselves.

In addition to persuasively rejecting the nature theory, Brooks provides a well developed substantive equality framework in which to assess issues about reproduction and paid work. Providing this framework is a significant step towards the realization of equality of condition for women in society. The decision, however, is not completely consistent with a substantive equality analysis. The economic impact of the decision on the women involved, is arguably, inconsistent with such an analysis.

The decision entitled Safeway's pregnant employees to employer disability funds for seventeen weeks. These funds provided the women with some income to replace lost earnings. However, employer disability funds do not provide for complete income replacement and, even though Unemployment Insurance Benefits are also available, total income replacement is an exception, not the rule. It is for this reason, that the remedy devised in Brooks is only consistent with a substantive equality analysis if one accepts that women employees should bear this economic loss.

A substantive equality theorist would not support such an approach. Treating pregnancy as a disability does not adequately deal with the economic realities faced by women who become parents. Requiring women to bear the majority of the cost of reproduction results in economic penalization. Therefore, women suffer inequality of condition because they remain economically penalized. Partial income replacement provided

34. Id. at 1244.
by the employer or the state simply lessens the degree of the penalization.

Penalization would not occur if the funds provided by the employer, in addition to funds provided by the state, in the form of unemployment insurance and parental benefits, completely compensated for the income loss suffered by a woman when she is out of the paid workplace because of child bearing and child rearing responsibilities.\textsuperscript{35}

Providing for full income replacement through the joint contribution of the state and the employer can also be justified on the basis that any lesser amount is contrary to the purposes

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\textsuperscript{35} In the United States, some women are not entitled to any income replacement because their employers and/or the state in which they live do not provide any benefits through disability or unemployment insurance schemes.

About 40\% of working mothers are entitled to employer-provided paid leave, which is normally funded through disability insurance. \textit{Hearing, supra} note 8, at 50, 117 (GAO report on cost estimates of H.R. 925).

Sixty percent of working women are entitled to unpaid employer-provided leave. \textit{See id.} at 50 (statement of Rep. Patricia Schroeder). A significant percentage of employers do not provide sufficient leaves of absence for pregnant employees, income replacement during leave, and job security. Women employed in larger companies are more likely to receive fair treatment than women employed in small and medium size companies. Unfortunately, women are disproportionately employed in smaller companies and there are more small companies than large companies across the United States. In Michigan, for example, 76\% of the state's employers employ less than 10 employees and 88\% of the state's employers employ less than 20 employees. \textit{See id.} at 105.

A study on small and medium firms conducted in 1981, which covered 100 small and medium sized firms, reported that 88\% of the companies provided maternity leave, but less than 44\% of the companies provided paid disability leave for the six to eight week recovery period. \textit{See id.} at 254. Seventy-two percent of these companies guaranteed job security and seniority.

State funded income replacement in the form of unemployment insurance, is available in all but 14 states. These 14 states are Florida, Indiana, Michigan, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Rhode Island, Vermont, Virginia, and Wisconsin.

Many of these states deny unemployment insurance to pregnant employees on the basis that the woman has left work for a reason not attributable to the employer. For example, in Michigan, the Michigan Employment Security Act, MICH. COMP. LAWS § 421.29 (1990), provides: "An individual shall be disqualified for benefits in all cases in which [the individual]: (a) Has left work voluntarily without good cause attributable to the employer or employing unit." In Watson v. Murdock's Food and Wet Goods, 385 N.W.2d 693 (Mich. App. 1986), the court denied a women unemployment insurance upon leaving work due to pregnancy complications. The court held that pregnancy constituted a "good cause" for leaving work but that it was not attributable to the employer.
of anti-discrimination law. That purpose is twofold, the elimination of discriminatory practices and the equalization of those groups which have been historically disadvantaged in our society because of such practices. Anything less than full income replacement perpetuates the disadvantaged status of women because they remain economically unequal when they procreate. 36

B. Substantive Equality in the United States

A similar move towards the adoption and application of a substantive equality approach in cases about reproduction and paid work has also taken place in the United States. Although the Supreme Court decision in Johnson Controls is the most recent example of this trend, there is a precedential basis for such an analysis in the Pregnancy Discrimination Act of 1978 (PDA) 37 and the 1987 Supreme Court decision in California Federal Savings & Loan Association v. Guerra.

36. I am not suggesting that the Brooks court could have ordered such a remedy. To provide substantive equality of condition in these circumstances requires substantial legislative changes. I am suggesting that had the court fully considered the impact of its decision on the economic condition of the women involved, it may have reached this conclusion. The judgment could have reflected this.

The allocation of the burden between the employer and the state would not be easily settled. If procreation is a societal benefit, presumably it should be supported by all citizens. Requiring employers to contribute disproportionately would not be acceptable on this basis. The other danger of disproportionate contributions by employers is that it becomes more costly to hire women. Of course, cost factors should never be allowed to excuse discrimination, but it provides employers with the incentive to not hire women. On the other hand, a disproportionate contribution on the part of employers can be justified in that they receive a more direct benefit than other members of society. Ensuring that its employees are financially secure when they are out of the workplace, ensures content employees, and this results in more productivity.

Providing full income replacement to women who become parents is only a part of a larger societal question. Other groups in our society have suffered historical disadvantage on the basis of personal characteristics and must rely on the state unemployment insurance scheme for economic assistance from time to time. Persons otherwise able to work, but unable to secure a position in the paid workplace because of this disadvantage, would seem to have the same argument. Immigrants, members of minorities, differently abled people, and individuals from impoverished backgrounds are examples.

37. 42 U.S.C. § 2000e(k) (1988). This act is an amendment to Title VII and therefore only applies to employers having 15 employees or more by virtue of § 2000e(b).

The PDA specifically overruled General Elec. Co. v. Gilbert, 429 U.S.
The PDA, which overruled Gilbert, provides a substantive equality framework in which to analyze issues of discrimination on the basis of pregnancy. The PDA states that pregnancy is an issue of gender equality, providing that discrimination on the basis of pregnancy, childbirth, and related medical conditions is sex discrimination.

The legislative history of the PDA indicates that the drafters of the Act intended to repudiate biological determinism and introduce protections which strike at the heart of narrow and restrictive social attitudes about biological differences. There is clear recognition that attitudes about biological differences, in contradistinction to biological differences themselves, are at the root of social injustice suffered by women.

The assumption that women will become pregnant and leave the labour market is at the core of the sex stereotyping resulting in unfavourable disparate treatment of women in the workplace. A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment.38

Unfortunately, this view was not readily accepted, and the formal versus substantive equality debate erupted over the actual language of the PDA.

The Act states that pregnant women and women affected by pregnancy and childbirth be treated the same (for all employment-related purposes) as other individuals not able to work.39 The use of the terminology ‘same treatment’ fueled the debate centered on a clear difference of opinion about what ‘equality’ meant: did the PDA guarantee a formal model or a substantive model of equality? In my opinion, the intent of the PDA is to guarantee substantive equality and arguably, the 1987 decision of the Supreme Court in Guerra40 supports this conclusion.

The Court in Guerra decided that state laws that provide preferential treatment, in the form of leave and reinstatement rights for pregnant women, are not pre-empted by Title VII 125 (1976), and it can be argued that it impliedly repudiated the reasoning of the Court in Geduldig v. Aiello, 417 U.S. 484 (1974), as well.

39. Many states have discrimination legislation modeled on Title VII. For example, in Michigan, the Elliot—Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.2201, 2201(d), 37.2202 (1990), contains similar language which has been judicially interpreted in a manner consistent with Title VII. See Mich. Comp. Laws §§ 37.2201, 2201(d) (1990).
because their purpose, that is to achieve equality between women and men, is consistent with the purposes of Title VII. The decision does not contain a clear outline of a substantive equality framework, nor does it include a broad description of discrimination\textsuperscript{41} for use by future decisionmakers. The interpretation of the words “same treatment” however, is consistent with a substantive equality analysis. Formal equality is rejected through the determination that gender neutral laws are insufficient to ensure employment opportunities for women.

“Same” is defined by the Court to mean something other than identical or equal treatment to men in all cases. Biological difference is in fact recognized and accounted for through preferential legislation. This accountability supports a broad definition of gender which includes the ability to conceive. Moreover, the ability to conceive is considered as a unique characteristic of women which demands independent recognition—it is not viewed as a valid differential distinction to justify the exclusion of women from employment opportunities.

The basic premise underlying the Court’s analysis is that the intent of the PDA is to guarantee women a place in the paid workplace without having to choose between the equally valid right to procreate: “The purpose of Title VII is ‘to achieve equality of employment opportunities and remove barriers that have operated in the past to favour an identifiable group of . . . employees over other employees.’”\textsuperscript{42} Consistent with a sub-

\textsuperscript{41} To ensure that substantive equality is tangible, the definition of “discrimination” under the equal protection clause must be broadened to include systemic discrimination. The failure by the Court to recognize the impact of systemic discrimination on the condition of women is fatal to the realization of equality for women. \textit{Geduldig}, 417 U.S. 484, held that only those laws resulting in intentional discrimination against women constitute gender based questions: systemic discrimination is not protected. This finding precludes the availability of an examination of the impact of the law on an individual, an examination of the actual condition of the individual is thereby also precluded.

With respect to pregnancy, a narrow definition of discrimination is also used. The \textit{Guerra} Court had the opportunity to broaden the definition of discrimination to include systemic discrimination. The Court could have applied the disparate impact theory set out in \textit{Griggs v. Duke Power Co.}, 410 U.S. 424 (1971), to the gender-neutral disability policy in issue. Because pregnancy has a disparate impact on women, a neutral policy would be sex discrimination and would therefore violate the PDA. This finding by the Court would have broadened the definition of discrimination to include systemic discrimination. Unfortunately, the \textit{Guerra} Court specifically declined to deal with this issue. \textit{Guerra}, 479 U.S. at 279 n.32.

stantive concept of equality, *Guerra* acknowledges both the right to equal employment opportunities and the right to pro-create. Employment rights are not restricted by reproductive ones. This is an important point to establish if a substantive equality framework is to develop. However, like *Brooks*, the remedy in this case is inconsistent with a substantive equality analysis because it falls short of ensuring equality of condition for women across the United States with respect to the employment rights at issue.

The decision does not require states to create legislation (providing for leave and reinstatement) which addresses the particular needs of women who become parents. The result is selective justice for women across the United States because not all states have enacted similar legislation. Therefore, a woman living in a state without such legislation must look to her employer for leave and reinstatement rights. Provision of these benefits by employers is not uniform and some employers do not provide for either of the benefits. As a result, these women may lose their jobs completely or be required to perform a new job which may not pay as much as, or not provide comparable benefits to, the job which they left temporarily. The economic loss is obvious.

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43. State laws provide for reinstatement following a leave from the workplace. However, most state laws contain two exceptions to this right: 1. business necessity and 2. changed circumstances. Many employees, such as the employee in *Guerra*, are not reinstated because of one or both of these restrictions. The *Guerra* decision has been instrumental in the enactment of legislation which specifically addresses the particular needs of women who become parents. This legislation provides for leave and other benefits for pregnant women. At least 17 states have enacted legislation which deals with pregnancy and the birth of a child. Of these 17, 11 have enacted legislation which is substantially similar to the California legislation scrutinized by the *Guerra* Court. These provisions provide for a leave varying from six weeks to a "reasonable" period of time for actual disability and also for reinstatement rights. By restricting preferential treatment to medical disability and job reinstatement, these laws seem unchallengeable under the pre-emption standard set out in the case.

Six other states provide leave for pregnant employees and four of these states provide for parental leave as well. To the extent that these provisions provide for childrearing leave and apply only to women, they are challengeable under Title VII and the *Guerra* doctrine. The six states that do not limit leave to disability are Massachusetts, Minnesota, Oregon, Rhode Island, Tennessee, and Wisconsin. Minnesota, Oregon, Rhode Island, and Wisconsin provide for paternity leave.
C. Summary of Canadian and American Approaches to Pregnancy Discrimination

Both Brooks and Guerra demonstrate that a formal equality analysis perpetuates the existing unequal condition of women in society. Each of the Courts move away from this analysis towards the development of a substantive equality analysis for application to cases about reproduction and employment. Specifically, the Brooks court develops a framework in which to analyze issues about reproduction from a substantive equality point of view. This framework, which rejects the nature theory and stereotypical assumptions about women, paid work, and reproduction, provides a strong starting point for dealing with the roots of gender inequality.

Similarly, in Guerra, the Court’s interpretation of the PDA from a substantive equality perspective is a significant step towards the development of a substantive equality framework in which cases in the United States about reproduction and equal employment can be analyzed. However, despite Guerra, United States courts continued to rely heavily on a formal equality analysis and their decisions remained influenced by the nature theory. The appellate decision in Johnson Controls is an example of this. It is for this reason, among others, that the Supreme Court decision in Johnson Controls is the “most important sex-discrimination case in any court since 1964.”

IV. Employer Fetal Protection Policies and the Two Theories of Equality

The decision of the United States Court of Appeals for the Seventh Circuit in Johnson Controls is the most recent example of the adverse consequences suffered by women because of the application of formal equality to issues about reproduction and employment.

In Johnson Controls, the defendant employer adopted a policy which denied women employees with childbearing capacity, present and future access to certain jobs exposing them to excess lead levels. The purpose of the policy was to protect unborn children from potential bodily harm. The court found that the medical evidence supported the argument that an unborn child exposed to lead through his/her mother could suffer permanent harm.

44. UAW v. Johnson Controls, Inc., 886 F.2d 871, 920 (7th Cir. 1989).
45. Id. at 883.
In a 7-4 decision, the appellate court held that the employer's policy was not sex discrimination under Title VII. The employer made out a case of business necessity by establishing substantial risk of harm to the unborn child and harm resulting through exposure of a single sex, that being women, to lead. The court found that the employees had not discharged their burden of persuasion through the presentation of specific alternatives to the policy that would be equally effective in achieving the employer's legitimate goals.

The court also held that the employer could establish a BFOQ if required to do so, finding that the policy was directly related to industrial safety, that such safety was part of the essence of the employer's business and that all or substantially all women could not safely and efficiently perform the excluded jobs.\(^46\)

As the Supreme Court points out, the decision of the appellate court significantly varied the components of direct and adverse discrimination. The application of established law to these facts would have resulted in a finding that the policy directly discriminated against women and that such discrimination was only statutorily justified if the employer established a BFOQ.

The variation from established law is explained by the appellate court primarily on the basis that it "balance[s] the interests of the employer, the employee and the unborn child in a manner consistent with Title VII."\(^47\) The balancing of interest approach adopted by the court is consistent with a formalistic analysis which views biological difference as a valid justification for the denial of guaranteed rights. Specifically, the approach provides the court with a mechanism to justify the limitation of employment opportunities because of biological difference. This is accomplished through the recognition of a potential fetus's right not to be harmed, which is placed above the right of a woman to make decisions about paid work and procreation.

\(^{46}\) Id. at 896-98.

\(^{47}\) Id. at 886. The test is not compatible with a substantive equality approach and is not reflective of the intent of Title VII. Even if such a test were so compatible and reflective, the result reached in this case does not balance the rights of the employee against the rights of the employer and the unborn child. The rights of the employees, in this case, fertile women, are not even acknowledged let alone balanced. The Seventh Circuit recognizes the right of potential fetuses to be protected from harm and a right in the employer to act as their protector. These rights are recognized to the exclusion of a women's right to make decisions about paid work and procreation.
reproduction. Moreover, and what is most troubling about the Seventh Circuit's decision, is that women do not even have the right to choose not to become pregnant and work in a higher paid but dangerous job. That choice was taken away from women by the court and vested in the employer, who is given the right to decide that all fertile women can be excluded from certain jobs. Women are left with the choice to become sterile, which is a choice no one should have to make.

That the balancing test approach is inconsistent with the intent and language of Title VII and the PDA is a point clearly made by the Supreme Court. The Court reached the conclusion that the fetal protection policy directly discriminates against women on the basis of sex, and that an employer may only justify such a policy by proving that it is a BFOQ. In this case, the employer was unable to establish that the policy was a BFOQ.

Looking first to the general provision against sex discrimination under Title VII, the Supreme Court concludes that fetal protection policies directly discriminate on the basis of sex and these policies exclude women from certain jobs because of childbearing capacity, rather than excluding any employee, male or female, on the basis of fertility.

Moreover, the Court concludes that the PDA supports their finding because the policy "explicitly classifies on the basis of potential for pregnancy..." The Justices spend little time on this point because simply put, the PDA is clear that differentiation "because of or on the basis of pregnancy" is discrimination on the basis of sex.

However, it is the interpretation by the Supreme Court of the intent of Title VII which is the clearest rejection by the Justices of the balancing test adopted by the appellate court:

Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. It is no more appropriate for the court than it is for individual employers to decide whether a woman's reproductive role is more important

48. The concurrence as well as Justice Scalia are in agreement with the majority on this point.

49. The Court did not see the evidence as conclusively supporting that only a woman's exposure to lead could lead to birth abnormalities. The Court refers to the evidence in the record about a man's exposure to lead as: "debilitating." UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1203 (1991).

50. Id.

51. Id.
to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.\textsuperscript{52}

As was the case in \textit{Guerra}, the Supreme Court does not set out a broad definition of discrimination as did the Supreme Court in Canada, nor does it state that it is adopting and applying a substantive equality approach to the issue before it. However, in my opinion, a broad definition of discrimination and a substantive equality analysis underlie the result reached by the Court. Recognizing the right of women to make choices about paid work and reproduction can only be supported if women are viewed as biologically different, but not inferior to men because of this difference. Furthermore, biological difference is not relied upon to disentitle women to employment opportunities. Instead, the Court's approach is consistent with the adoption of a broad definition of gender which includes the unique ability to conceive. This characteristic of women becomes a valid component in the determination of whether the policy discriminates and whether it can be justified as a BFOQ.

In addition to establishing the beginnings of a substantive equality framework in which to assess issues about reproduction and employment, the Supreme Court acknowledges that it is the societal treatment, and specifically the legal treatment of biological difference, rather than biological difference itself, which is the root of gender inequality. The Court explicitly states that biological difference has been used as a ready excuse to deny women equal employment.\textsuperscript{53} Moreover, by not adopting the appellate court's approach to the resolution of many of the issues in the case, there is an implicit rejection by the Supreme Court of the nature theory, as well as at least three of the stereotypical attitudes which flow from the theory.

The conclusion reached by the Supreme Court, that women have the right to make decisions about paid work and reproduction free from court and employer input, could not have been reached if the court accepted the stereotype that

\textsuperscript{52} \textit{Id.} at 1210. Judges Easterbrook and Flaum, in their dissenting opinion in the Seventh Circuit, stated the same:

No legal or ethical principle compels or allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation, that the interests of the next generation always trump the interests of living women, and that the only acceptable level of risk is zero. 'The purpose of Title VII is to allow the individual woman to make that choice for herself!\textit{Johnson Controls}, 886 F.2d at 913 (Easterbrook \& Flaum, JJ., dissenting).

\textsuperscript{53} See \textit{Johnson Controls}, 111 S. Ct. at 1202-04.
women are less able than men, and according to the appellate court, less able than employers, to make independent sound decisions. The appellate court allowed an employer to decide to exclude women from potentially hazardous jobs without any input from the women employees who were the individuals directly affected by such a decision. Since this finding cannot be justified on a legal basis, it is reasonable to assume that the decision was influenced by the belief that women are less capable decisionmakers than others.

The Seventh Circuit opinion also contains other examples which demonstrate the way in which this belief, as well as the belief that women are primary caregivers and secondary wage earners, impacted upon the decision of the appellate court. The Supreme Court does not rely upon these beliefs, and the resolution of the issues by the Court demonstrates this. A comparison of the way in which each of these courts identifies and articulates the interests or rights of the parties involved is one example which illustrates the different approaches adopted by the two courts.

The appellate court viewed the case as one in which three interests were at issue. The first interest is that of a potential fetus to be born free of defects. The second is the interest of the employer to act as a protector of the first interest and the third, is the right of women to pursue paid employment for 'financial reward'.

Limiting women's equal paid work opportunities to only one of the components of such opportunities, that is financial reward, demonstrates that the appellate court views women as secondary wage earners, as workers who provide a supplement income to a primary male wage earner. It becomes very clear that this is the view of the court when Judge Coffey says:

The status of women in America has changed both in the family and in the economic system. Since they have become a force in the workplace as well as in the home because of their desire to better the family's station in life, it would not be improbable that a female employee might somehow rationally discount this clear risk in her

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54. See supra text accompanying notes 39-42.
55. Discussing the first and third of these interests, Judge Coffee says: These concerns are particularly important in a case of this nature where the interest in financial reward is balanced against a medically established risk of the birth of a medically or physically deprived baby and where the challenged distinction is based upon the reality that only the female of the human species is capable of childbearing. Johnson Controls, 886 F.2d at 883.
hope and belief that her infant would not be adversely affected from lead exposure. The unborn child has no opportunity to avoid this grave danger, but bears the definite risk of suffering permanent consequences.\textsuperscript{56}

Characterizing women as secondary wage earners desiring to 'better the family's station in life' is a stereotypical generalization without factual merit. There are many reasons why women participate in the paid workplace and most often the reason is financial necessity\textsuperscript{57} not financial betterment which seems to be what the appellate court is suggesting.

It is also a characterization which is without legal merit because it is inconsistent with the intent of Title VII. Title VII provides women with the right to equal employment opportunities regardless of the reason which motivates them to pursue paid work. The statute does not require a woman to establish grounds for seeking paid employment to trigger the application of the act.

The belief that women are not capable independent decisionmakers is also present in the appellate court's analysis. Judge Coffey's comment that "it would not be improbable that a female employee might somehow rationally discount this clear risk. . . ."\textsuperscript{58} appears to be based on this belief. Giving the employer the right to determine when to exclude women from certain hazardous jobs, makes clear that the court does not think that the employer will fall victim to the same irrational thought.

It is the operation and influence of these assumptions that lead the appellate court to interpret the PDA as providing for a right to equal employment opportunities which is properly limited on the basis of procreative distinctions. An analysis free from the influence of these assumptions results in a very different articulation of the interests involved in the case as the Supreme Court judgment demonstrates.

To identify the interests at issue in this case, the Supreme Court begins with the premise that women, not the court, and certainly not employers, are to be the decisionmakers where paid employment and procreation choices present themselves. As a result, the Court does not recognize three interests. It acknowledges only the rights of women to equal employment opportunities and to reproductive choice. The Court does not limit the right to equal employment opportunities because of

\textsuperscript{56} Id. at 897.
\textsuperscript{57} See supra notes 9 and 31.
\textsuperscript{58} Johnson Controls, 886 F.2d at 888.
biological difference. The interest of women is properly stated as the right to make choices about reproduction and employment free from employer and court interference. The freedom to decide these issues takes precedence over the right of potential fetusses as well as the employer's interest, unless the employer can justify those interests as a BFOQ on the basis of established law.59

A second example of the impact of stereotypical generalizations about women, paid work, and reproduction on the appellate court's decision lies in its determination that the employer could establish a BFOQ. In interpreting that part of the BFOQ test which requires the employer to establish that all or substantially all women are unable to safely and efficiently perform the excluded jobs, the appellate court states that "the very womanhood . . . of the employee undermines . . . her capacity to perform a job satisfactorily."60

By "womanhood," the Seventh Circuit is referring to a woman's ability to conceive and bear children. The appellate court discusses this concept at some length concluding that the BFOQ requirement is a recognition by Congress of the realistic physical differences between men and women—that is the very womanhood of women and the very manhood of men.

Consistent with a formal equality analysis, this interpretation of the BFOQ requirement allows for equality of employment only when women are similarly situated to men. However, when women are not so situated, because of their unique role in the procreative cycle, equality of condition does not follow.

To support this analysis, the appellate court attempts to draw a distinction between the real physical differences between men and women and stereotypical characterizations about the sexes. The appellate court acknowledges that laws or standards based upon stereotypical assumptions are not justifiable BFOQ's.61 However, a careful examination of the distinction the Court attempts to draw from a substantive equality perspective reveals that it is a distinction without a difference. The nature theory and stereotypical characterizations about women are based upon the physical biological difference of women. Thus, to accept the court's distinction is to accept that biological difference is a valid basis upon which to distinguish

59. Johnson Controls, 111 S. Ct. at 1210. I agree with the majority of the Court that a fetal protection policy cannot be justified as a BFOQ.
60. Johnson Controls, 886 F.2d at 898.
61. Id. at 894.
and it is also to accept the stereotypical generalizations which followed from this difference.

The Supreme Court does not specifically address the distinction drawn by the appellate court however, as discussed earlier, the determination by the Supreme Court that women are free to make decisions about paid work and reproduction is inconsistent with the nature theory and thus with the basic premise of the appellate court’s argument.

By setting out the parameters of a substantive equality framework which includes the rejection of the nature theory the Supreme Court has taken a significant step towards the realization of substantive equality for women in cases about employment and reproduction. However, as was the case in Brooks and Guerra, this step alone cannot guarantee such equality. The remedy to redress the discrimination must also result in actual equality of condition and unfortunately, the remedy in this case does not.

The choice which the Court guarantees will only result in substantive equality of condition for women in toxic workplaces if it is a real choice and not an illusory one. The choice can be illusory in at least two ways.

First, the obligation of the employer to provide women with the necessary information to make an informed and meaningful decision about whether to work in potentially hazardous conditions must be enforced by the courts. An informed choice can only be made if a fertile woman is aware and understands the most up to date information about the risks associated with the hazardous job. Although the Court states that the employer may not avoid its obligation to “police the workplace” for safety, they do not discuss the obligations of an employer under “Right to Know” Laws. Emphasizing the employer obligation to inform would make the choice provided by the Supreme Court as real as possible.

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63. Johnson Controls, 111 S. Ct. at 1209.

64. Even the most current medical documentation may not reveal every possible risk and, because of this reality, the employer cannot be expected to provide a zero risk workplace.
Sending a clear message to employers that right to know legislation will be enforced will benefit all employees. Johnson Controls did not exclude fertile men from hazardous jobs even though there was some evidence to indicate that lead exposure did have an effect on the reproductive process in men. The appellate court dismissed this evidence as "speculative and inconclusive" because it was animal research evidence. The Supreme Court did not dismiss the evidence and found that the employer should have excluded workers from hazardous jobs on the basis of fertility rather than on the basis of sex. Emphasizing the employer's obligation to provide information on reproductive hazards for women in turn implies a like obligation on employers to provide the same information to men. The result can only be a safer workplace for women and men alike.

Second, the choice can be illusory because the court did not require the employer to continue its current practice of providing fertile women with the option of performing less dangerous jobs without a loss in pay or benefits. In this way, the decision does not guarantee women equality of economic condition. A woman choosing not to work in a high risk position because of potential reproductive hazards will be economically penalized if the only alternative job she is offered pays less money and or offers less attractive benefits, such as a smaller pension or less seniority. In this case, the choice whether to work in a high risk position only provides access to such jobs and this is a remedy which is consistent with a formalistic perspective; women have access to the same jobs as men do. However, if for reproductive reasons a woman moves to a less dangerous job which does not provide the same economic benefits as the more hazardous job, economic inequality follows. The overall effect of the remedy in these circumstances is the perpetuation of the historical disadvantaged status of women in society.

V. CONCLUSION

Procreation benefits society in an obvious and fundamental way. It is for this reason that society encourages women to

65. Johnson Controls, 111 S. Ct. at 1203.
66. Johnson Controls, 886 F.2d at 889.
67. Johnson Controls, 111 S. Ct. at 1203.
68. Under the policy, fertile women were transferred to less dangerous jobs without suffering a loss in wages or benefits. Johnson Controls, 886 F.2d at 889 n.28.
procreate. But, when women procreate and subsequently become nurturers and caregivers to our children, society denies them the rights of other citizens. The nature theory and stereotypical assumptions about women have become entrenched into our laws resulting in the devaluing of women as individual citizens.

Women are prevented from fully participating in society because the law does not support their claim to full citizenship. Laws that deny women social justice because of their unique role in the procreative cycle serve only to perpetuate the disadvantaged status of women in society. The legal treatment of reproduction and employment rights demonstrates this. Women are economically and socially penalized for procreating and this inequality perpetuates the existing unequal status of women in our society. It is for this reason that the legal treatment of reproductive capacity plays a critical role in the task of eliminating inequality.

Under both constitutional and antidiscrimination law, the concept of substantive equality demands an examination of the impact of the law on the actual condition of individual women as conceivers and as a disadvantaged group in our society. Facialy neutral laws and those that limit a woman's participation in society through a differentiation analysis based on biological determinism will not result in equality of condition for women.

Women have the ability to benefit society through their unique procreative role. Whether an individual woman chooses to benefit society in this way should not be relevant to the determination of her legal rights. What is relevant, is that conception is a characteristic shared by all women, an integral characteristic that affects the actual condition of women in our society.

The right of women to participate equally in the paid workplace should not be limited because of the unique ability to conceive. Such an approach places an unjustifiable limitation on a woman's right to equal opportunities in the paid workplace and on the right to reproduce. The courts must ensure that each of these rights is given equal weight. In situations where a choice between these rights may present itself, that choice must always be left with the woman to make.

The substantive equality approach which is being developed and applied in both Canada and the United States is a significant step towards the realization of equality of condition for women. Application of such a model to the determination
of whether policies and laws discriminate on the basis of sex and specifically on the basis of pregnancy, has produced more just results for women. However, equality of condition has not followed from these findings of sex discrimination. The remedies fashioned to redress the discrimination have not addressed the problem of actual inequality of condition. Remedies which account for the fact that women have been, and continue to be disadvantaged in our society because of biological difference, are critical to the realization of equality of condition for women in our society.