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## Reproductive Hazards in the Workplace: the Law and Sexual Difference

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### Introduction

While feminists have scrutinized claims about the biological differences between men and women and theories about men's and women's differing natures, they disagree about the relationship between this biological difference and gender characteristics and about whether a maintenance of a polarization of human characteristics into male and female (revaluing the female) is desirable. An uncontested difference between men and women, however, is their different biological roles in reproduction. While in many cases neither biological nor gender differences justifies women's differential treatment by employers and others, the issue of how to accommodate men's and women's differing reproductive capacities in the workplace has not been resolved either in legal doctrine or in public policy.

The question, 'what is the nature of the differences between men and women and do these differences constitute a justification for differential treatment?' is not new. It was raised in the 19th century and culminated in the passage of various pieces of protective legislation[1]. This essay explores the questions that using potential reproductive hazards as a justification for excluding women from the workplace raise for a feminist jurisprudence, especially questions about strategy: Should we, as feminists, in both advocating the adoption of particular public policies and litigating the issue under the laws prohibiting sex discrimination, seek to minimize the differences between men and women and whenever possible draw analogies between men's and women's biological characteristics and social circumstances? Or should we seek to emphasise the differences between men and women in order to ensure that a male standard is not accepted as the norm and that women are not penalised to the extent that they diverge from it? Or should we demand that women's different needs be recognised and accommodated without disadvantage?

In the particular case of reproductive hazards, should we try to make com-

parisons between men's and women's vulnerability to reproductive hazards and argue that to treat women differently effectively discriminates against men, or should we argue that even though men and women have different reproductive capacities, this should never be a justification for differential treatment, or, that if special protection is necessary, women must not suffer any negative consequences?

This question is not unique to either the general issue of protective legislation or the more specific case of reproductive hazards. It arises in discussing law and policy on pregnancy, divorce custody and maintenance, insurance, sexual assault and single-sex prisons. There may not be a single response to these general issues: instead, we may choose different strategies for different issues. In this essay, I shall examine whether the fact that a woman may become pregnant and carry a fetus into the workplace differs so significantly from analogous circumstances that employers may treat men and women differently, or pregnant women differently, in the workplace. Are the implications for the fetus when women are exposed to toxic substances so severe that all women of childbearing age may be excluded from some workplaces? How feminists choose to resolve this issue may be determined either on the basis of strategy or on the basis of a particular feminist vision (of which there are many). Is the goal of feminism to break down societal distinctions between men and women, masculine and feminine, or is it about a revaluing of so-called women's characteristics and activities done in women's sphere — or is it both? Is feminism about getting the best deal for women in the short term or eradicating sex differences in the long run? How do feminists guard against the danger that equality is used as a ruse for treating women even worse than they are treated presently and lowering standards for everyone? Is feminism's primary goal on this issue to protect the fetus? To protect women's right to work? To reduce exposure for everyone? To eradicate differences between the sexes? To what extent are these goals in conflict with each other? How can they be reconciled?

Our answers may be influenced by the requirements of legal doctrine as well as by our assessment of the policy-making process such as our need to win the support of male trade unionists. On the one hand, emphasising women's special needs and different reproductive functions (or more accurately the needs of the fetus) may be the beginning of the argument for better protection for all workers (surely, those advocating reduced hours of work for women thought so). Alternatively, we could campaign for lower exposure for all workers without emphasising differences between them, thereby avoiding the danger that in singling out women for special treatment we create the justification for removing them from the workplace altogether rather than for lowering standards of exposure.

### Protective Legislation

Another danger is that equalising standards will produce standards that are

bad for men and women rather than place them at the safest level — that there will be levelling in the wrong direction. This is what the British Trade Union Congress (TUC) fears will happen if protective legislation is repealed and the main feminist campaigning group on this issue, the Women's Rights Unit of the National Council for Civil Liberties, shares this view[2]. They simultaneously argue for the extension of the protective provisions to men and the retention of protection legislation for women on the grounds of women's differing social roles. The Confederation of British Industry (CBI) campaigns for equal treatment proposing the repeal of these laws and supports the recommendations of the Equal Opportunities Commission's Report (1979). The TUC's position, therefore, appears self-contradictory. On the one hand, it argues that neither biological nor social differences between men and women justify differential standards while on the other, social differences between men and women justify differential treatment. Its position can best be understood as a demand for a high standard of protection for all workers while distinguishing between short-term and long-term strategies. It fears a demand for equality will be used as an excuse to lower standards.

Its fear of an erosion of protection for workers under the guise of equality seems to be warranted by developments in retirement and immigration law but most obviously in the issue of hours of work. The Government has recently and without much publicity introduced a Sex Equality Bill into the House of Lords to eliminate restrictions on the hours of work as part of its larger programme of reducing so-called burdens to industry. The CBI supports the Bill and the TUC opposes it.

The status of such protective statutory provisions differs in Britain and America. Neither the EEC Equal Treatment Directive of 1976 (70/207/EEC) nor the Sex Discrimination Act of 1975 abolishes protective legislation; instead, they merely call for its review. During the debates over the Equal Pay Act and again over the Sex Discrimination Act, Members of Parliament had called for the removal of protective legislation. The Government side-stepped the issue by ordering the newly created Equal Opportunities Commission to study the subject and to produce a report. Neither the Equal Opportunities Commission nor the TUC has established the empirical claim that protective legislation for women leads to discrimination in employment and sex segregation in the workplace, a proposition American feminists universally accept.

In America, feminists, too, divided over the issue of protective legislation and trade-union women opposed early versions of the Equal Rights Amendment fearing it would remove their hard-won protections. Pressure groups had emphasised women's difference and special need for protection before the courts [see *Muller v. Oregon* 208 U.S. 412 (2908)] where the famous Brandeis brief provided detailed evidence on women's biological difference in order to pave the way for laws creating better working conditions for all workers. The issue became moot when the 1964 Civil Rights Act became law: Title VII of the act makes it illegal to discriminate against women in employment. The

courts subsequently struck down all state protective legislation under this statute in a process culminating in 1968 with *Rosenfeld v. Southern Pacific Co.* (293 F. Supp 1219) (C.D. Cal. 1968). With that decision, the debate about protective legislation ended, and the trend in campaigns and American legislation has been to get rid of distinctions between men and women in law in favour of sex-neutral language in laws on sexual assault, divorce maintenance and custody, social-security benefits, etc., securing formal legal equality for women.

Thus, although it appears that the debate over protective legislation is dead in America, and in Britain a stalemate has been reached (which may be broken by this new proposed legislation), an entirely new type of protective legislation is developing in both countries. Laws and company policies are restricting women's employment, not on the grounds that women are physically inferior to men, nor that their place is in the home, nor that it is immoral for them to work, but on the grounds that they may be pregnant and the fetus they carry may be damaged by exposure to hazardous substances in the workplace. Although those advocating protective legislation in the past often did so on the grounds of women's role within the family and as the reproducer of the race, the focus often was on women *qua* women — women themselves were the ones to be protected, their health and well-being was the issue. The new protective policies focus on women as the vehicles who transport potential fetuses into a dangerous work environment; protecting the fetus, not the woman, is the aim of these restrictive policies. The instigation of these policies at a time when anti-abortion campaigns are fervently being mounted has led some commentators to draw parallels and diagnose a fetus fetish.

### **The Background to Reproductive Hazards as an Issue: Thalidomide and Occupational Cancer**

Before I consider the cases litigated on this subject, it is useful to mention two issues which have shaped the way the public as well as the scientific community view reproductive hazards: the thalidomide tragedy and the growing awareness of occupational cancer. The birth of 8000 to 10,000 deformed children as a consequence of their mothers' taking thalidomide shocked the world into an awareness of the potentially tragic consequences of substances that may not produce adverse consequences when given to adults. Second, it made obvious the risks of having to rely on animal data in order to predict effects in humans, (thalidomide had no adverse effects when tested on rats but later showed harmful effects when tested on rabbits). Third, it made clear the near impossibility of proving claims of malformations in British courts, demonstrating the difficulties in even the strongest of cases. Finally, it transformed the field of teratology and expanded scientific interest in testing for teratogenic effects. As a consequence, in Britain, the government began to keep statistics on malformations.

Secondly, our awareness of reproductive hazards is also shaped by a grow-

ing understanding of occupational cancer. Workers are becoming increasingly concerned that substances that cause no immediate injury but accumulate over time may be hazardous; in particular, they may cause cancer, the number one killer in Britain (for those aged 35–54) and the disease most feared by the population. Developing a governmental response to this danger may be the challenge of the 1990s.

The media have given selective attention to incidences of reproductive hazards. Most recently, they have focused on the potential hazards of visual display units (VDUs), so much so that reproductive hazards has become synonymous with VDUs in many workers' minds. In 1981, Thames Television made a programme on gynaecomastia (breast enlargement in males) in workers who manufactured the contraceptive pill, the sterility of workers exposed to DBCF received a great deal of publicity in the States, and recently in Britain unions have launched campaigns against the pesticide 245-T and publicised the Derbyshire droop, infertility in agricultural workers exposed to pesticides. If our understanding of the tragic potential for malformations was clearly impressed in our minds by the thalidomide disaster, our knowledge of what reproductive hazards exist in the workplace is often restricted to what the media has chosen to focus on — visual display units and pesticides as opposed to anaesthetic gases or solvents, which are more likely candidates for concern.

### **Defining Reproductive Hazards**

Before proceeding, it is necessary to describe a reproductive hazard. The first point is that reproductive hazards affect both men and women and they can occur before, during, and after pregnancy. Substances can act as a *mutagen*, causing change in the DNA of the chromosomes which pass on traits to future generations. A mutagen may not only cause malformations in the next generation but may alter the genes irrevocably for future generations. A *teratogen* causes damage to the developing embryo (first eight weeks) or fetus (from eight weeks to birth). A teratogen could be *embryotoxic* or *fetotoxic* without affecting the mother in any adverse way. A substance could damage the germ cells before fertilization, altering the egg or the sperm, and would be called *gametotoxic*. A female has all of her eggs at birth, while the male is constantly producing sperm. Thus, a woman may be more susceptible to irreversible damage while the male may be more at risk: he is constantly producing sperm and dividing cells are more vulnerable to damage. A substance could cause infertility in either men or women. Teratogens may even trigger a miscarriage (*abortifacient*). Substances may cause impotence or irregular periods or reduce the libido. A substance is *carcinogenic* if it causes growth of tumors which may lead to cancer. Some substances, such as diethylstilboestrol, may not be carcinogenic to the mother, but may lead to an increased susceptibility in cancer in her offspring.

The difficulty in determining the correct public policy on reproductive

hazards is made more difficult because of the dismal state of current knowledge. Not only are few chemicals tested for possible reproductive harm, but often the tests that are done investigate only the potential reproductive effects to the female[3]. There is also the difficulty of extrapolating human effects from animals as well as immense problems in epidemiological studies on this topic. Thus, employers and policy makers will have to make decisions in a situation of uncertainty and unquantified risks rather than on the basis of conclusive evidence. At the moment, substances and hazards cannot be conclusively identified and neatly categorised as teratogenic but not mutagenic. It is also clear from knowledge gained about cancer and thalidomide that different exposures affect different individuals differently — an exposure may affect one fetus but not another. In addition, exposures may be interactive — if both parents are exposed to substances, the possibility of adverse pregnancy outcomes may multiply. Therefore, a safe threshold exposure for all workers may be impossible to establish, unless it is zero.

### The Cyanamid Episode

The potential for discrimination as a consequence of policies developed to deal with the issue of reproductive hazards in the workplace became clear following the sterilization of women workers exposed to lead at the Willow Island, West Virginia plant of American Cyanamid in 1977. American Cyanamid has only recently employed women in this traditionally male and relatively well-paid job. After reviewing the evidence on the teratogenicity of lead, the company introduced its fetal protection policy, requiring all women aged 15–55 to produce proof of surgical sterilisation or be moved to less well-paid janitorial work. Five women were sterilised and two moved to other jobs although shortly afterwards, production at the plant was shut down for other reasons and the women lost their jobs anyway. The sterilisations received world-wide attention and such 'fetus vulnerability programs' were discussed by lawyers, feminists, company officials and government civil servants.

### A Model of Sex Discrimination

Before I analyse the legal doctrine of sex discrimination and cases on reproductive hazards it is useful to set out a model for understanding this material. The model I am using was developed by MacKinnon (1979) in order to categorise and expose legal doctrine in American cases on sex discrimination. She designates two approaches: the differences and the equality:

"The first approach envisions the sexes as socially as well as biologically different from one another, but calls impermissible or 'arbitrary' those distinctions or classifications that are found preconceived and/or inaccruate. The second approach understands the sexes to be not simply socially differentiated but socially unequal. In this broader view, all practices

which subordinate women to men are prohibited. The differences approach, in its sensitivity to disparity and similarity, can be a useful corrective to sexism; both women and men can be damaged by sexism, although usually it is women who are. The inequality approach, by contrast, sees women's situation as a structural problem of enforced inferiority that needs to be radically altered" (MacKinnon, 1979, p. 4–5).

Under the differences approach, once a relevant difference between the sexes is established, discrimination cannot occur because the differential treatment is not arbitrary. Under the equality approach, however, a difference may not justify differential treatment if it reinforces inequality. The issue may turn on the nature and significance of the differences between men and women as well as the issue of comparability. If the comparison between men and women yields a difference, then, under the differences approach, they are not comparable and so discrimination has not occurred. Yet under the equality approach, the inability to compare men and women does not justify perpetuating women's disadvantages.

"If sex discrimination is a problem of invalid differentiation, true differences can provide valid grounds for unequal treatment. If sex discrimination is a problem of inequality, as chances for parity between the sexes are opened, women's differences from men must be equally accommodated and equally valued, without penalty or preference" (MacKinnon, 1979 p.106).

The two approaches not only have different conceptions of discrimination but different solutions as well. The differences approach conceptualises the problem as a failure of social neutrality and tries to develop a system of legal neutrality that is blind to sex differences. The fundamental problem with the differences approach as a legal tool is its abstraction from the reality of social inequality: treating men and women as if they were the same. The answer to the problem of discrimination under the equality approach is a redistribution of power. Solutions under the equality approach are more problematic (and they incorporate a more realistic theory of law). An end to discrimination and the social system of subordination of which it is a part may warrant the development of neutral legal standards or the legal recognition of difference. Many of the solutions to combat women's oppression will, by providing a legal recognition of difference, violate legal neutrality and sex-blind categories, such as affirmative action programmes.

### The Law on Sex Discrimination

Before applying MacKinnon's model to the legal doctrine on sex discrimination in Britain, we must first briefly set out the relevant laws and cases. The Sex Discrimination Act (SDA) of 1975 prohibits discrimination in employment, housing, education, and the provision of goods and services. Two types

of discrimination are prohibited by the act. The first is direct discrimination as set out in Part 1, section 1(1):

"A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if (a) on the ground of her sex he treats her less favourably than he treats or would treat a man".

Direct discrimination has two components: less favourable treatment and on the grounds of sex, and both components must be present. The only answer to a proven charge of direct discrimination is that the case falls within one of the many exceptions permitted by the act such as that sex is a genuine occupational qualification. Direct discrimination incorporates the differences approach. Discrimination is prohibited if there is different treatment on the grounds of sex, but if there was different treatment on grounds other than sex, on the basis of strength, seniority, continuous service, etc. it is not direct discrimination under section 1(1)(a).

The second type of discrimination prohibited by the act is indirect discrimination. This has four components: it must be a requirement or condition, that fewer women than men can comply with, not justifiable irrespective of sex and to the detriment of the woman concerned. The prohibition against indirect discrimination has the potential to incorporate the equality approach: the SDA demands that employers scrutinize their 'sex-neutral' requirements to see if they have the effect of creating inequality by disadvantaging women. The drawback is that depending on how difficult it is for an employer to justify his practice (and he is not required to seek the least discriminatory alternative), it may or may not succeed in eliminating the obstacles to equality<sup>[4]</sup>.

### Problems with the Sex Discrimination Act: Sex-plus and Pregnancy

There are many criticisms of the Sex Discrimination Act: the difficulties in using the system of industrial tribunals created to deal with other very different employment cases; the numerous exceptions to the act; the limitations of the British judiciary's understanding of and desire to eradicate sex discrimination; the limited remedies and inability to bring class action suits; and the limited powers of the enforcement body, the Equal Opportunities Commission. What is important for this essay is the way in which the legislation and the legal doctrine arising from it incorporates the differences perspective. Nowhere is this more clear than in the cases on pregnancy.

How to approach characteristics that are unique to one sex is a particular problem for the legal doctrine on discrimination and in the jargon of the doctrine, is referred to as sex-plus issues. Pregnancy is such a sex-plus issue. One could argue that to dismiss a woman because she is pregnant is direct discrimination because the dismissal is on the grounds of sex since only women can become pregnant. Alternatively, others might argue that discrimination on the grounds of pregnancy is not discrimination on the grounds of sex be-

cause not all women become pregnant, therefore, the dismissal is on the grounds of pregnancy and not sex. Sex-plus issues do not fall clearly into the category of indirect discrimination either. Although the requirement or condition seems to be 'no one may become pregnant' and this requirement has a disproportionate impact on women, it is not a neutral requirement or condition because it cannot be applied equally to men. Additional examples of sex-plus issues are a refusal to hire mothers of small children or the sexual harassment of women<sup>[5]</sup>.

The significance of these sex-plus cases is that they demonstrate the limitations of the law on sex discrimination: it ties any notion of unjustified treatment to a comparison between the sexes which adopts a male standard as the norm. The legal treatment of pregnancy is a clear example. Feminists have focused on pregnancy, not only because of the number of women affected but also as the issue in which the differences between men and women can be used to oppress women. The Sex Discrimination Act does not specify whether differential treatment on the grounds of pregnancy constitutes discrimination under the act. In Britain, the Employment Protection Act of 1974, section 34, made dismissal on the grounds of pregnancy unfair if a woman had been at her job for 26 weeks. Subsequent legislation made the qualifying period one year and two years to qualify for maternity pay. Thus, any woman who wanted to bring a claim of unfair dismissal because of pregnancy would have to raise a claim under the Sex Discrimination Act if she had not worked for the qualifying time.

The issue was litigated in *Turley v. Allders Department Store* (1980), Industrial Relations Law Reports (IRLR) 4. Mrs Turley had not worked continuously for her employer, Allders Department Store, when she became pregnant and was dismissed. Since she could not claim unfair dismissal under the 1974 Employment Act, she claimed that she had been discriminated against on the grounds of her sex under the Sex Discrimination Act of 1975. The industrial tribunal tried as a preliminary issue whether dismissal on the ground of pregnancy was unlawful discrimination under 1(1)(a) or 1(1)(b) of the Sex Discrimination Act and concluded that it was not. The Employment Appeal Tribunal (EAT) agreed with the industrial tribunal. The crucial issue was that in order for sex discrimination to occur, a woman would have to receive less favourable treatment than a man. But the court held that there was no male equivalent for pregnancy: therefore, a comparison could not be made and discrimination could not occur.

"In order to see if she has been treated less favourably than a man the sense of the section is that you must compare like with like, and you cannot. When she is pregnant a woman is no longer just a woman'. She is a woman, as the Authorised Version accurately puts it, with child, and there is no masculine equivalent" (Turley, 1980, IRLR 4, p. 5).

Ms Smith, the only woman on the panel of three, dissented from the EAT judgment arguing that to give no protection to women dismissed on the

grounds of pregnancy "contradicts both the spirit and the letter of the statutes." (*Turley*, p.6). She argued that to determine if dismissal on the grounds of pregnancy was direct discrimination under 1(1)(a), pregnancy would have to be treated as a medical condition. The comparison should not be made between a woman who is pregnant and a man who cannot become pregnant but between men and women who have temporarily incapacitating medical conditions. The issue would not be a question of law but of fact, requiring an investigation of the employer's treatment of men. Thus, the right not to be treated less favourably would be more limited than the protection under the Employment Protection Act, depending on the employer's provisions for medical conditions. Ms Smith also argued that the issue could be argued as a claim of indirect discrimination and that the tribunal was wrong to set the issue as a matter of law which precluded any pregnant woman from pursuing a claim of sex discrimination.

The EAT accepted these arguments and overruled its decision in *Turley* in *Hayes v. Malleable Working Men's Club* (EAT 188/84). The EAT held that differential treatment on the grounds of pregnancy might be discrimination on the ground of sex depending on how the employer treated medical conditions which temporarily incapacitated men. If an employer dismissed men who were temporarily incapacitated then he could dismiss pregnant women. Thus, the requirement for a comparison between men and women under discrimination doctrine remains, what has changed is the court's view that pregnancy is not so unique — instead, an analogy can be drawn to men's medical conditions.

"Like Ms Smith, we have not found any difficulty in visualising cases — for example, that of a sick male employee and a pregnant woman employee, where the circumstances, although they could never in strictness be called the same, could nevertheless be properly regarded as lacking any material differences" (*Hayes, v. Malleable Working Men's Club*, EAT 188/84 p. 8).

This is clearly the differences approach: for discrimination to be demonstrated, a comparison must exist between men and women.

Three points can be made about this approach. Firstly, pregnancy is not an illness, it is normal and healthy and is unique to women. Secondly, tying pregnancy rights to other medical conditions means that they are dependent on good medical benefits and may exist or not depending on the employer. (In the United States, employers cannot treat men and women differently but entitlements to leave for medical conditions vary). Thirdly, the EAT has not fully considered the possibility for a claim under indirect discrimination. If the neutral requirement or condition is employees shall not have temporarily incapacitating medical conditions, then it is fairly easy to establish that this would have a disproportionate impact on women who wanted to have children. Pregnancy discrimination would not be allowed unless the employer could justify it

irrespective of sex — he would have the burden of proof. Allowing the employer to justify his action gives women a weaker right than they would have if the time limit under the Employment Protection Act was reduced.

#### Cases on Reproductive Hazards: Britain and America

Pregnancy is an example where although there is an analogy between men's and women's situation, they are still very different. Until *Hayes*, pregnant women who were treated unfairly had no claim to sex discrimination and now they have a weak one. Given that it appears that whenever a difference is established between men and women, differential treatment is allowed, how does current legal doctrine on sex discrimination approach the similar issue of reproductive hazards, particularly the dangers to the fetus in the workplace? To my knowledge, this issue has only been litigated on two occasions.

The first was *Johnston v. Highland Regional Council* (S/1480/84), a case heard by an industrial tribunal and thus of limited value as a precedent. Mrs Johnston claimed that she was unfairly dismissed in her job as a librarian because her employer refused her request to be moved off work on a visual display unit following her discovery that she was pregnant. The industrial tribunal refused to decide whether it was safe or unsafe for pregnant women to work on VDUs. It decided that given that as she could be easily accommodated with other work with no great inconvenience for the employer, it was unreasonable not to take her worries into account. The fact that the library had not followed its own disciplinary procedures for dismissal was decisive. The case can thus perhaps be better viewed as being about the procedures for dismissal rather than as establishing any sort of right to be removed from work on VDUs while pregnant. In this case, however, it is encouraging that the industrial tribunal considered both the evidence on VDUs and whether there were other alternatives to dismissal. It will be interesting to see how other tribunals deal with such a case in the future. Many unions have arranged a right to move work for pregnant VDU workers that operates on the request of the worker.

The second, and more important case, both because it establishes a precedent (as an EAT decision) and because the complainant was a potentially pregnant woman is *Page v. Freight Hire (Tank Haulage Co.) Ltd* (1981, IRLR 13). A woman truck driver hauling dimethylfornamide (DMF) was dismissed from her job on the basis of the client chemical company's instruction to the haulage company that women should not transport DMF because it was embryotoxic at levels above the threshold limit value. Mrs Page claimed that Freight Hire Company was guilty of an act of sex discrimination contrary to section 1(1)(a) of the Sex Discrimination Act of 1975. The Industrial Tribunal found that refusing to allow her to haul DMF constituted direct discrimination, finding she was treated less favourably than male drivers.

The Industrial Tribunal, however, accepted the employer's argument that

the judgment in *Automotive Products Ltd v. Peake* (1977, IRLR 367) (where the Court of Appeal found that practices in the interests of safety or administrative convenience were not violations of the act) was decisive. It found that as long as the company was motivated by a concern for the safety of a potential fetus, it could discriminate.

On appeal, and with the assistance of the Equal Opportunities Commission (EOC) as *amicus curiae*, the EAT overruled this erroneous point of law, which had been recanted by the Court of Appeal in *Jeremiah v. Ministry of Defence* (1979, IRLR 436). The EAT decided that the only exceptions to the Sex Discrimination Act were to be found in the act itself. This proved no change in the outcome of the case, however, because section 51 of the Sex Discrimination Act states that the act shall not invalidate any statutes passed prior to the act or statutory instruments which, although laid before Parliament after the act, fall under an act passed before 1975[6]. The Health and Safety at Work Act, of 1974, establishes a general duty for employers to provide a safe workplace. Thus, although the legal basis of the decision was altered, the foundation of the decision remains: that employment practices that are in the interest of safety prevail over the employer's duty not to discriminate.

Despite the establishment of this general principle, which is repeated whenever the case is cited, the EAT actually retreated from a claim that *Page* established any general rule, saying the details of the case were very specific. Its main focus was the evidence available to it. The only evidence of a danger presented to the industrial tribunal to a potential fetus was a Hazards Bulletin claiming that DMF might be hazardous at levels above the threshold limit value and the testimony of the Tank Haulage Company of the instruction from Imperial Chemical Industries (ICI). There was no evidence presented as to the effects on men; it was never established that by hauling the material, *Page* was likely to be exposed (she left the area while the substance was loaded and unloaded, merely driving the truck); and even if she was exposed, there was no evidence of exposure above the threshold limit value. If she was exposed at levels above this value, surely it is the employer's duty to reduce the exposure rather than to remove the worker. Although the EAT stated that it might have decided differently if it had more evidence about the potential effects on men, it did not order an industrial tribunal to seek new facts, saying the tribunal had to decide the case on the facts before it. This judgment stands in sharp contrast to the case of *Hoyes* as well as other cases in which the EAT has remitted a case to an industrial tribunal to find a new set of facts. Once the EAT had determined that the industrial tribunal needed to consider a different range of facts, namely, the employer's treatment of men with incapacitating medical conditions and the specific concerns of the employer about the individual pregnancy, it required the industrial tribunal to start fresh.

The second problem in *Page*, apart from the limited data presented, was the issue of the potential fetus. Freight Hire never claimed that DMF exposure harmed *Page*, only that it might affect a fetus she might carry. *Page* was em-

phatic that she did not want children, in fact, when confronted with the withdrawal of the DMF traffic, she offered to sign an indemnity form stating that she would not hold the company responsible for any children she might bear which might be affected. She was 23 and divorced and is now just as sure that she does not want to have children. Although the EAT admitted that the wishes of the individual might be taken into consideration, it argued they could not be overriding. It seems neither the EAT nor the employer gave much consideration to *Page's* wishes. She believes that her desire not to have children made her appear to be a monster in the eyes of the tribunal and prejudiced them against her case. The press quoted the solicitor for Freight Hire as saying: "She formed the view, as women's libbers and pro-abortionists do, that she had the right to decide the future of her own body and her own unborn[7]. He had argued that the decision to have children was not a decision for *Page* to make, but a decision for her future husband. Her solicitor's opinion, on the other hand, is that what was decisive was the ICI directive. As a large employer in the area and one which the haulage company was dependent on for business, what ICI said went.

What is striking about the decision is the low weight given to the harm of discrimination and the consequence of *Page's* losing her job. (She received hate mail and, although well qualified, found it impossible to get a job driving in the area). Beloff, the barrister for the Equal Opportunities Commission, wanted a high standard to be set: for the employer to have the burden of proving that removing her was necessary as the only course of action available to the employer. The tribunal rejected this standard, claiming only that the employer's action need be reasonable. Yet even the standard of reasonableness was easily met. Apparently, it was *Page's* responsibility to prove the substance harmed men as well, or that she was not being exposed. The tribunal provided almost no scrutiny, requiring very little as a justification after they had established that she had been discriminated against.

*Page* demonstrates the limitations of the Sex Discrimination Act: Section 51 permits discrimination by an employer if reasons of health and safety are put forward. It also shows the limitations of the judiciary's attitudes toward discrimination: nearly any reason will justify the discrimination and the courts will not scrutinise it. Finally, the Act does not require that the least discriminatory alternative be pursued, such as lowering exposure, or moving *Page* to other runs. As long as the courts have decided the action is reasonable, the employer does not have to seek alternative but may choose which course of action he prefers.

Both the numerous exceptions to the Act and the attitude of the judiciary in Britain contrast markedly with the situation in America where the courts have examined company 'fetal vulnerability programs.' The American counterpart of the Equal Opportunities Commission, the Equal Employment Opportunities Commission, and the Department of Labor published proposed interpretive guidelines on employment discrimination and reproductive

hazards in 1980 which required employers to satisfy a series of high standards before women could be excluded. One year later, the EEOC and the Department of Labour withdrew the guidelines, concluding that the best way to eliminate employment discrimination on this issue was through investigation and enforcement of the law on a case-by-case basis[8]. The 'fetal vulnerability programs' raised difficult problems for existing American doctrine on sex discrimination. British sex discrimination law was modelled based on American legal doctrine. Under American law, direct discrimination is called disparate treatment and indirect discrimination, disparate impact. The only defence an employer could offer to a proven claim of disparate treatment is that sex is a bona fide occupational qualification which is much narrower than the British genuine occupational qualification. The only defence for a proven complaint of disparate impact is that the practice is a business necessity. Unlike the British provision for cases of indirect discrimination that the neutral requirement be justifiable irrespective of sex, the business necessity defence is more difficult to meet, setting a high standard for the would-be discriminator.

'Fetal vulnerability programs' which exclude all women of reproductive capacity constitute disparate treatment (direct discrimination in British terms) under Title VII of the Civil Rights Act of 1964. Unlike British law, American sex discrimination legislation (Title VII) has been amended so that discrimination on the grounds of pregnancy is discrimination on the grounds of sex. While the issue of potential pregnancy was not discussed when Congress passed the Pregnancy Discrimination Act of 1978, the U.S. Court of Appeals for the Fourth Circuit concluded in *Wright v. Olin* [697 F.2d. 1172 (1982)] that excluding all women aged 15-63 who did not have proof of surgical sterilisation was disparate treatment (direct discrimination). The only defence to an employer was that not having the capacity to become pregnant was a bona fide occupational qualification, clearly not the case because being potentially pregnant does not interfere with job performance. The U.S. Court of Appeals held that current legal doctrine did not apply in this case, and that the policies should be judged, not in terms of disparate treatment, but instead under the rubric of disparate impact, the defence for which is a business necessity. *Wright* established guidelines for employers who were considering implementing a fetal protection policy. The decision sets out a high threshold or burden on the employer who would discriminate. First, the employer must prove that the exclusion of women was necessary — that their exposure posed a real danger to a potential fetus. Secondly, it would not be enough for the employer to justify the policy solely on a belief that there was evidence of a female-only hazard, the belief must be objectively justified by scientific evidence. (There need not be consensus but only a considerable body of scientific opinion that the risk was confined to women workers.) Third, the employer would have to show additionally that there was no acceptable alternative that would achieve protection in a less discriminatory way.

The decision in *Wright v. Olin* is very different than the approach of the EAT

in Britain. In the *Page* decision, the EAT decided that section 51 of the Sex Discrimination Act allows the employer's general duty under the 1974 Health and Safety at Work Act to take precedence over the duty not to discriminate. The EAT did not require the industrial tribunal to scrutinise whether the employer had considered the potential reproductive effects on men in making a policy designed to ensure the safety of his employees. Under American legal doctrine, a woman's right not to be discriminated against and excluded from the workplace depends on two factors: first, whether there is a danger to men that is ignored when women are excluded and second, whether there is a less discriminatory alternative available to the employer. Under legal doctrine in both countries, women must be able to compare themselves with men and to not be substantially different than men in order to have the highest protection guaranteed by prohibitions against direct discrimination or disparate treatment. (In cases of disparate impact or indirect discrimination, the employer has an opportunity to justify his practice; in cases of direct discrimination or disparate treatment, he does not). Given the constraints of sex discrimination doctrine in both countries which incorporates the differences perspective, it is to women's advantage, if they want to secure an equality of opportunity in the workplace, to draw analogies to their situation and men's — in this case, to compare their potential for reproductive damage while pregnant with hazards to men's reproductive capacity.

### **Policy on Reproductive Hazards**

The constraints of the doctrine on sex discrimination have determined whether 'fetal vulnerability programs' adopted as company policies above and beyond health and safety regulations are legal. Yet what the courts and tribunals have decided is only one part of the equation. Governmental policies also determine how the issue of reproductive hazards in the workplace shall be treated by the employer. Health and Safety agencies in both Britain and America have focused their efforts on two of the best documented reproductive hazards, lead and ionizing radiation. While other 'protective legislation' remains in force in Britain, the codes of practice setting recommended exposure levels for lead and radiation are the only statutory[9] examples of where women of reproductive capacity are treated differently from men. Looking at the policy-making process in Britain on these two substances reveals that policymakers adopt the differences approach to this issue and give little weight to the harm of sex discrimination. Comparing events in Britain with the same process in America demonstrates the closed nature of the process, the scarcity of groups who campaign on this issue and the unwillingness of the enforcement agency (the EOC) to launch a vigorous campaign.

The British Government had long recognised that lead was not only an abortifacient but fetotoxic and women were banned from working in various workplaces, such as smelters. The legislation, however, was inconsistent and

although women were banned from some workplaces, they were exposed to lead in others, such as in the pottery industry. (While 3000 out of 10,000 employees exposed to lead in Britain were women, the jobs were and still are segregated by sex, with men facing the highest exposures). The 1974 Health and Safety at Work Act provided a different structure for health and safety legislation and lead was one of the first substances targeted for review. Following an increase in public concern about lead poisoning as well as concern over the effect of lead in the air, in 1977 the Health and Safety Executive (HSE) set up a working party composed of representatives from industry, trade unions, experts and civil servants. The group began to draft new regulations, the 1980 U.K. Lead at Work Regulations and Approved Code of Practice, setting exposure limits (measured in blood and air) for all workplaces where workers were exposed to lead. Their efforts were spurred on by the knowledge that the European Commission was considering a Directive on Lead and action was imminent. (Draft Directive of 10 December 1979, *Official Journal*, No. C324, 28 December, 1979, 3).

According to those who helped to draft the regulations, the working committee never doubted that the dual approach (setting different exposure limits for men and women) would be maintained in the new legislation. During the debates in the European Parliament over the proposed Directive on Lead, Members of the European Parliament demanded that the directive set a single low standard for men and women not only because men's reproductive health was at risk by the higher standard but because to set a dual standard would be discriminatory. The European Parliament rejected the Commission's proposals for a lower standard for women of reproductive capacity yet the Directive (82/605/EEC) the Council ultimately accepted sets one (high exposure) standard for all workers and allows individual countries to make special provisions for women of reproductive capacity if they wish.

During the policy-making process in Britain, unlike in the European Parliament, there seemed to be little objection to setting separate standards for men and women of reproductive capacity exposed to lead. The 1977 Health and Safety Executive discussion documents on lead recognised that men and women were no different in their susceptibility to the dangers of lead, however, it recognised the potential harm to a fetus. Nowhere do the documents mention the reproductive effects of lead exposure on men, which is odd given that the major study showing that lead exposure damaged sperm was published in 1975. Although the document did consider the potential discriminatory effect of setting different standards, it decided that if different treatment was warranted on health grounds, the difference would not constitute discrimination:

"The important point here is that *differentiation* on grounds of sex is not the same as *discrimination*. (The view of the IT in the *Page* case.) If it can be shown that there are good grounds for differentiation on the score of e.g. health, then any special treatment would not constitute discrimination" (Health and Safety Executive, 1977, unpub. document).

This example falls clearly under the differences approach. Once a difference is established, differential treatment cannot be discrimination because men and women are not comparable. The HSE, like Lord Justice Brandon in *Jermiah*, bypassed the Act altogether, considering neither whether such a practice would be direct discrimination or indirect discrimination. As long as there was a difference between men and women and a reason for the discrimination (i.e. they thought it was reasonable), the argument could go no further: discrimination, in their minds, had not occurred.

The Equal Opportunities Commission in its 1979 document, *Health and Safety Legislation, Should We Distinguish Between Men and Women?* considered whether men and women should be treated differently in their exposure to hazardous substances, looking specifically at exposure to lead and radiation. While the EOC called for the setting of a single standard for men and women whenever it was reasonably practicable, it agreed with the HSE that 'women of reproductive capacity' should have lower standards of exposure than men to lead and radiation. Its dispute with the HSE was over the definition of this phrase. The HSE, at that time, argued that 'women of reproductive capacity' should be defined as a woman between the ages of 15-55 who does not have proof of surgical sterilisation. The EOC wanted the definition of 'women of reproductive capacity' to exclude women unlikely to become pregnant or taking active steps to prevent pregnancy.

Neither the HSE nor the EOC seemed to consider setting a single low standard of exposure to lead. The EOC officials considered it a success that they had prevented a definition of the phrase 'woman of reproductive capacity' from appearing in the regulations or code of practice. This left open the possibility that a company doctor would interpret the phrase flexibly rather than applying a strict age limit (the earlier HSE position). All parties accepted as fact that the position of the Lead Development Association required to protect the fetus would be economically ruinous or would require all employees to wear protective clothing.

There appeared to be no organised demand for the setting of a single low standard either on the grounds that men would be damaged at the high levels of exposure or that the different standards would be discriminatory. In fact, the issue of discrimination was never (as far as I can ascertain) seriously considered by the working party which drafted the regulations. In the United States, on the other hand, legal scholars debated the legality of setting a dual standard, a feminist group was set up to campaign on this issue, and feminist groups presented evidence to Congress advocating the establishment of a single low standard of exposure to lead [10]. The difference between the initial position of the U.S. Equal Employment Opportunities Commission, setting extremely high burdens that employers must meet before he can treat different groups of workers differently, compares favourably with the efforts of the U.K. Equal Opportunities Commission, working merely to leave undefined women of reproductive capacity and largely accepting the setting of different stand-

ards for men and women of reproductive capacity.

It is possible that what attracted so much attention to the issue in the United States was the sterilisations — perhaps if women had just been banned from the workplace there would have been less public outcry. The issue of sterilisation is just one difference between Britain and America on this issue. Another is the level of participation of feminist groups and the activities of the EEOC and the EOC, as well as differences between the British and American policy-making processes for setting standards of exposure. In Britain, the *Control of Lead at Work Regulations* were drawn up by the Health and Safety Executive through a tripartite working group. The group drafted various consultative documents, supposedly reflecting the consensus of the group. The HSE then gave outside organisations the opportunity to submit their comments. As far as I can tell, no feminist groups (excluding the EOC) submitted opinions and only one hazard group, the British Society for Social Responsibility in Science, did so. Contrary to the United States, where feminists actively pressured the EEOC, and presented evidence to Congressional Committees that draft the legislation, there was virtually no feminist input on the setting of the lead standard.

The only opportunity for feminists to put forward their position, apart from submitting their comments on the consultative documents if they are aware that the process is going on and have the resources to write a response quickly (which will be ignored unless they can in some way apply pressure) is through the trade-union members of the working group. When the working group on lead was drafting its proposals, no group or individual expressed concern about the potential discriminatory effects of the legislation in Britain; instead, it was only the Members of the European Parliament that raised the issue. When the European Commission began drafting a new directive on ionising radiation and a working group was set up within Britain to draft new regulations, the situation was different. The trade-union health and safety specialists began to raise the discrimination issue. Several of the British unions had appointed health and safety officers in the late 1970s and these officers took a strong progressive position against discrimination. The trade-union members of the HSE working group on ionising radiation fought for a single low standard and were supported by the trade-union health and safety officers. When the HSE civil servants discussed the consultative document on ionising radiation with the TUC group of health and safety specialists, for example, they were grilled and attacked on the discrimination issue.

The Equal Opportunities Commission was more active on the ionising radiation regulations than it had been on the lead regulations: HSE employees reported daily phone contact with the EOC while the document was being drafted. The EOC wanted to ensure that a negative definition of women of reproductive capacity be incorporated in the regulations — that the issue of whether or not a woman was of reproductive capacity would not arise unless the exposure was over a certain limit (in this case 1.3 rems per quarter). In this

project, they succeeded. Thus, because the EOC was more active on the issue and because within the trade unions, health and safety officers put forward a feminist position, the HSE felt strong pressure to adopt a non-discriminatory standard that had not existed before. The efforts of the EOC were still more limited, however, than its counterparts in the U.S. and Canada. The EOC confined its efforts to defining women of reproductive capacity, unlike its counterparts in the U.S. and Canada, and did not demand a single low standard for men and women. Instead, the task of presenting that argument fell solely to the trade union health and safety specialists and thus, was contingent upon the efforts of one or two individuals.

One HSE official argues that the TUC "let its women" health and safety specialists raise the issue of discrimination so forcefully because it served to provide pressure for a lower standard for all workers. In the past, male trade unionists supported protective legislation for women in the hopes that working conditions for all workers would be improved (among other reasons). In current debates, the demand that the HSE not set discriminatory standard aided efforts to set a single low standard to protect all workers. Feminist trade unionists have been careful to emphasise the vulnerability to reproductive hazards that men and women share. Trade-union health and safety specialists have taken the view that one should never develop policies that set out special provisions for women, instead, one should always have them applicable to both sexes. To do otherwise, the argument goes, in this case would be to privilege teratogenic hazards (those that bring about harm to the fetus via either parent) and risks both economic discrimination against women and physical damage to male workers and their offspring. Perhaps the best way of ensuring male trade-unionist support for the campaign against discriminatory standards is to emphasise the way they would benefit by a single low standard and the way in which the exclusion of women workers does nothing to remove the danger to men's reproductive capacities.

Just as there are good strategic reasons for emphasising the similarity of women's and men's vulnerable reproductive capacities, likewise the limitations of the doctrine of discrimination law provides another reason for emphasising the similarities between men and women rather than emphasising the difference in their reproductive functions. Excluding women or setting a lower standard for women can be construed as discrimination against men. If we can establish that men's reproductive functions are at risk then to exclude women or 'protect' women leaves men exposed and is less favourable treatment on the grounds of sex. The danger of adopting the differences approach as a strategy in order to carry male trade-union support and manipulate sex discrimination doctrine is that discrimination will only be seen as a bad thing when men are worse off as a consequence and if feminists lose the argument that men and women are similarly vulnerable to hazards (i.e. women are different from men) than they lose their protection or gain it at the price of exclusion. A further drawback of adopting this approach is that an opportunity is

missed for demanding trade-union and public support for equality in the workplace, for refusing to disadvantage women in the workplace because they may carry a fetus. To put the arguments this way would be to adopt the equality approach rather than the differences approach.

To conclude, the legal doctrine of discrimination in Britain and America incorporates the differences approach, despite the potential for using the equality approach under the provisions for indirect discrimination and disparate impact. Discrimination is treated equally differently, when the differences between men and women are construed by the courts and policy-makers as significant, women lose their claim to equal treatment. Alternatively, if they bring a claim of indirect discrimination (or disparate impact), in Britain, the employer can easily justify the treatment and is not required to pursue a less discriminatory alternative. The equality approach claims the relationship between men and women as one of domination and oppression. It looks especially closely at those areas in which men and women are seen to be different in order to ensure that women are in no way penalised for these differences. It attempts to incorporate what McCrudden (1982) calls the concept of institutional discrimination instead of seeing discrimination as merely prejudice. Under the differences approach, women have a unique role in reproduction and only they may actually carry a fetus into the workplace. Despite the fact that men may cause malformations in their offspring, induce miscarriages in their partners or become infertile because of damage to their reproductive systems from exposure to toxic substances, many employers and policy-makers may see women's role in reproduction as a justification for differential treatment. Somehow the issue of workplace hazards to reproduction gets raised mainly when women are introduced into the workplace. Women in Britain have to pay the price for their different biological role in reproduction by being excluded from jobs without any compensation.

Under the equality approach, even if men and women are different, this difference would never justify differential treatment that disadvantages women. Thus, women's having a special role in reproduction can not justify excluding them from certain jobs. Either the exposure must be reduced, the women must have a right to transfer to non-hazardous work, or be laid off with full pay for the duration of their pregnancies. Those planning to conceive, just as those pregnant, should have the same rights. These entitlements must also be conferred in some way without providing the employer with an excuse not to hire women.

While the equality approach is the better position for feminists to adopt in an ideal world, the constraints of legal doctrine, the attitudes of policy makers, and the need to win trade-union support may justify using the differences approach in our arguments and campaigns. Given this state of affairs, however, we want to make sure that the arguments are also put forward using the equal approach. Although prudence dictates that we try to achieve the best we can within the discourse of the differences approach — that is to say, we draw as

close an analogy between women's and men's vulnerability to reproductive hazards as is possible, I do not want to argue that feminists should pursue the analogy between men and women or advocate single, sex-neutral standards on other issues. Choosing this strategy is contingent on the compelling nature of the medical evidence that allows us to draw a comparison between men's and women's vulnerability to reproductive hazards. If there were no evidence that men were vulnerable to reproductive hazards, than we would have to adopt a different strategy. Thus, my recommendations are very much determined by this contingent empirical situation which may vary from issue to issue — i.e. in other areas the analogy might not be as persuasive. And just as my conclusions of strategy are determined by the strength of the case for an analogy my conclusions are not shaped by any theoretical disposition for sex-neutral standards. I reject the view that feminists should always seek formal legal equality. Instead, we should operate from the equality approach, that is only advocate one standard for both sexes as a matter of strategy when it can be shown that the consequences promote a substantive equality for women and neither reduce their employment opportunities nor force them to choose between a job and healthy offspring.

## Notes

- 1 For example the Mines and Collieries Act 1842 and the Factory Act 1844.
- 2 Coote, A. (1975) *Women Factory Workers: the Case against Repelling the Protective Laws*. Rye Express: Peckham; Cousins, J. (1970). *The Shiftwork Scandal*. National Council for Civil Liberties: London; Trades Union Congress (1985) *Women's Health at Risk*, TUC: London.
- 3 There is some evidence that this is changing. At a recent Society of Toxicologists meeting over half of the posters were on male reproductive effects.
- 4 In fact, it may develop in such a way as to incorporate the differences approach. The more women diverge from male standards of behaviour, the less the courts will require an employer to change to accommodate them. Or the exact opposite may happen — the courts may deny a difference exists and that women are disproportionately harmed and therefore they do not deserve to have the 'sex-neutral' requirements altered on their behalf. (See the discussion of *Kidd v. DRG (UK) Ltd* [EAT 8 February 84 in (1985) *Equal Opportunities Review May/June* p. 31]. This is just one example of the many tensions inherent in the legal doctrine of sex discrimination.
- 5 See Mackinnon (1979) and Rubenstein, M. (1983) The Law on Sexual Harassment at Work, *Industrial Law Journal* 12, 1–16. See *Hartley v. Mustoe* (No. 2) 1981, ICR 490 and *Phillips v. Martin Mantel Corp.* 400 U.S. 542 (1971).
- 6 Section 51 states: "Nothing in Parts II to IV shall render unlawful any act done by a person if it was necessary for him to do it in order to comply with a requirement — (a) of an Act passed before this Act: or (b) of an instrument made or approved (whether before or after the passing of this Act)".
- 7 27 March 1980 *The Northern Echo*, 13.
- 8 *Federal Register* (No. 23, Friday, February 1 1980) 7515 and *Federal Register* (No. 11, Friday, January 16 1981) 3916.

9 The actual recommended exposures are contained in the codes of practice which do not have the status of law. Instead, they can be introduced in court as prima facie evidence that the employer was or was not meeting his obligations under the Health and Safety at Work Act 1974. Conversely, it would be very difficult to demonstrate that the employer was not meeting his obligations if he was following the recommendations of the code of practice.

10 CROW, the Coalition for the Reproductive Rights of Workers was formed in the spring of 1979 and was made up of union representatives, representatives from the women's health and reproductive rights movements, from the Coalition of Labor Union Women, the National Lawyers' Guild, and others. See Petchesky, R. (1979) Reproductive Hazards and the Politics of Protection: an Introduction. *Feminist Studies* 5, 234 and other articles in that volume.

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## Book Reviews

SUSAN ATKINS AND BRENDA HOGGETT: *Women and the Law*, Basil Blackwell, Oxford, 1984, 234 pp., £6.95.

There are very different ways to deal with the law from women's perspective. *Women and the Law* is not meant to be an ordinary textbook or a handbook, where women, solicitors etc. can seek advice on a legal dispute. The purpose of the authors is more 'academic' in so far as they "seek to understand how the law has perceived women and responded to their lives", and "to uncover the extent to which the law itself is biased towards a particular view of life"—namely a male view (p. 1). In this review I will not comment upon the technical details. I will concentrate upon Atkins & Hoggett's approach to women and to the law, their starting point, their conception of the 'female problem' and their legal politics seen as underlying legal strategies and as demands for specific changes.

The authors' approach to the law differs from the traditional by being so explicitly political. It also differs in the sense that they take up areas, which earlier have been almost neglected—for instance abortion and violence in the home. The third difference is seen in the fact that Atkins & Hoggett use women as a delimiting criterion. This criterion in itself is a challenge to the establishment, because women enter into all sorts of relations. They are more than half of the world; they are of different ages, they are mothers, wives, workers, consumers, users of the social security system etc. Thus women as the delimiting criterion makes the research field unlimited by insisting upon sex/gender as a relevant factor, but it also involves a need to discuss whether a women's perspective on law should be added to the existing jurisprudential subjects and categories—*women and the law*—or whether it should lead to new methods and theories, to new systematizing criteria in order to build up a subject on its own—*women's law*—and to renew the jurisprudence as a whole. The authors do not discuss this problem, but already the title of the book, *Women and the Law*, indicates their choice. Atkins & Hoggett take their starting point in the law and in the established concepts and subjects and then they add a women's perspective. The main structure is a separation between women in the market (society), women in the private domain and women and the state. All the same, they quite often break through the traditional subjects and concepts, and I will return to this interesting perspective later in my review. For the moment I will concentrate upon the 'additional perspective'.

The addition of a women's perspective is very valuable. Sex and gender