Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker's Right to Job-Protected, Paid Leave

Patricia A. Shiu

Stephanie M. Wildman

Follow this and additional works at: http://digitalcommons.law.yale.edu/yjlf

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/yjlf/vol21/iss1/6

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Law & Feminism by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker’s Right to Job-Protected, Paid Leave

Patricia A. Shiu† and Stephanie M. Wildman‡†

ABSTRACT: This Article examines the change over the past few decades in U.S. law and societal attitudes concerning a worker’s right to job-protected, paid leave. Though common around the world, job-protected, paid leave eludes the U.S. workforce. The authors begin by considering the concept of work, its relation to identity, and the construction of safety nets for workers when they need income replacement. The Article considers the movement to establish job-protected, paid leave that encompasses and values a worker’s work, family, and personal life.

The modern movement originated with pregnant workers’ need for time away from work during pregnancy. Women who believed that employer policies had discriminated against them on account of pregnancy did not fare well in early cases. As a response Congress enacted the Pregnancy Discrimination Act (PDA) in 1978, amending Title VII of the 1964 Civil Rights Act and defining discrimination on account of pregnancy as prohibited sex discrimination. This amendment set the stage for California Federal Savings & Loan Association v. Guerra and a debate on the meaning of equality for women in the workplace. Lillian Garland’s pregnancy served as the catalyst for this debate which fueled a long-term California coalition. The Article

† Patricia A. Shiu is Vice President for Programs at the Legal Aid Society—Employment Law Center and head of the Gender Equity Program. She represented Lillian Garland in California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987). She represents low-wage workers in California and throughout the nation in class-action and individual Title VII cases as well as Title IX and educational access class actions.

‡‡ Stephanie M. Wildman is Professor of Law and Director of the Center for Social Justice and Public Service at Santa Clara University. She has taught and written extensively on women’s issues, race and the law, and social justice.

The authors thank law librarian Ellen Platt for excellent research support. Thank you to Tracy Gondo and especially to Lea Patricia L. Francisco for superlative research assistance. Special thanks to Barbara Flagg, Ivy Flores, Sharon Hartmann, Beverly Moran, Ann M. Noel, and Gary Spitko for comments on early drafts of this material. Thank you to Dean Donald J. Polden and the Santa Clara Law Faculty Scholarship Support Fund for funding early research that led to this Article. Another version of portions of this material appears in Stephanie M. Wildman, Pregnant and Working: The Story of California Federal Savings & Loan Assn. v. Guerra, in WOMEN AND THE LAW STORIES (Elizabeth M. Schneider & Stephanie M. Wildman eds., forthcoming 2010).

Copyright © 2009 by the Yale Journal of Law and Feminism, Patricia A. Shiu & Stephanie M. Wildman
discusses the legislative efforts in California over the last thirty years to expand workplace protections, accommodations, and benefits. It concludes by reflecting on social change through the lens of this movement to provide a coherent and comprehensive safety net for all workers.

**INTRODUCTION**

Commemorating the thirtieth anniversary of the Pregnancy Discrimination Act (PDA), this Article reflects upon the movement to establish a worker’s right to job-protected, paid leave. Although common around the world, job-protected, paid leave remains an unachieved goal for the U.S. workforce. Awareness of the leave issue originated in the context of a pregnant worker’s need for time away from work during pregnancy and birth. Yet in a truly inclusive, equitable, humane, and global workplace, job-protected, paid leave would include not only parents but also siblings, grandparents, and others as the caregivers covered within its protective ambit. Such a leave would provide full income protection. Finally, an ideal job-protected, paid leave would

---

Pregnancy Discrimination and Social Change

provide not only time off from work for family-related reasons, but also time away from the job for the pursuit of other life endeavors such as education, rest, or rejuvenation that would make a worker more productive. These workplace protections remain long-term aspirations. Currently and for the purposes of this Article, the phrase “job-protected, paid leave” refers to time away from work during pregnancy or to care for one’s own serious health condition or the serious health condition of a family member. The phrase also includes time taken to bond with a newborn, adopted, or foster child.

The passage of the PDA in 1978 helped raise public awareness about the need for job-protected, paid leave and pushed the legislators and judges who function within the realm of existing culture to imagine a pregnant worker who needed basic workplace protection. But the language of the PDA left the content of that protection amorphously defined in the public eye as “equality.” Equality of rights remains a powerful tenet in the U.S. judicial system, yet the notion of equality alone does not define the parameters for workplace protection. This Article explores the interactions of law, culture, and pregnancy with the struggle over the meaning of equality. It also traces the post-PDA movement that sought to raise public consciousness about workers’ need for job-protected, paid leave, as it took incremental steps toward achieving this basic job protection.

In California that movement sought to help all workers who were grappling with the competing demands of work and family by expanding rights to workplace accommodations and benefits. In devising a strategy for promoting paid leave, this California movement was cognizant of clients’ needs for workplace accommodations, which dictated choices about legislative policy and informed litigation strategies. The wide acceptance of paid leaves internationally spurred the California movement’s realization of just how far the United States lagged behind other countries that provide a host of health care and child-care benefits, workplace accommodations, and job protections.

These workplace policies and benefits were and are common in Europe and other countries and would greatly benefit American workers and families.9

Part I of the Article places the movement for job-protected, paid leave in the societal context of attitudes about work, welfare, and identity. Everyone needs some form of subsistence to survive. For those in the workforce, income provides that source of survival. For those without work, government income-supplement programs have provided the safety net to meet human needs, but such programs have not provided the identity and inclusion in society provided by work. Part II considers two different responses to the Supreme Court’s ruling in General Electric Co. v. Gilbert,10 which held that differential treatment based on a pregnancy-related condition did not constitute sex discrimination under Title VII of the 1964 Civil Rights Act. It contrasts the federal response, as exemplified by Congress’s amendment to Title VII, enacting the Pregnancy Discrimination Act (PDA),11 with the response of the California State Legislature, which enacted an unpaid, job-protected, pregnancy disability leave.12 Part III revisits the struggles of Lillian Garland, one of the heroines of this movement, and her role in California Federal Savings & Loan v. Guerra (Cal. Fed.),13 which concerned her right to give birth to her child and keep her job. Part IV reconsiders the debate that Garland’s case brought to the forefront in the feminist legal community about the meaning of workplace equality. Part V considers the U.S. Supreme Court’s ruling in Cal. Fed., and Part VI examines the post-Cal. Fed. movement in California to establish expanded workplace leaves and accommodation. This movement included extending protection to siblings and grandparents and establishing paid sick leave under California law. The Article concludes with reflections on lessons learned about social change.

9. See generally Saul Levmore, Parental Leave and American Exceptionalism, 58 CASE W. RES. L. REV. 203, 203-04 (2007) (characterizing the American approach to parental leave as “exceptionalism” because it is so drastically different from leave policies in other nations and is “one of the least generous parental leave policies in the world”).

However, not every country provides progressive workplace protections and accommodations. The LAS-ELC, in collaboration with lawyers and advocates in China, is engaged in a project to protect Chinese female workers from workplace sexual harassment. See Legal Aid Society–Employment Law Center (LAS-ELC), http://www.las-elic.org/index.html (last visited March 10, 2009); see also discussion infra note 50 (discussing the work of LAS-ELC). This project seeks to implement the Chinese Law on Protection of Women’s Rights and Interests. Similar questions regarding federal versus state rights, or in the Chinese context, the role of provincial laws’ interpretation and implementation of this national law, are an important component of the project. For an interesting discussion of Chinese employment discrimination laws, see Ronald Brown, China’s Employment Discrimination Laws During Economic Transition, 19 COLUM. J. ASIAN L. 361 (2006).


12. CAL. GOV’T CODE § 12945(a) (West 2009) provides pregnant employees who work for employers with five or more employees an unpaid, job-protected leave for a disability related to pregnancy, childbirth, or related medical conditions. The maximum amount of leave is four months, and an employee is entitled to return to the same or a similar job.

I. WORK, WELFARE, IDENTITY, AND SAFETY NETS

The tapestry of laws and attitudes surrounding work, welfare, and dependency provides insight into workers' lives and shows how far the United States still needs to travel to achieve a coherent safety net for all workers. Consider this hypothetical worker.14

Diane Benson, a twenty-five-year-old woman with two children, John, six, and Alicia, four, terminated her marriage three years ago. Her ex-husband pays no child support and has moved out of town. She does not know his address. Diane owns only her modest household furnishings: beds for herself and the children, a couch, some tables and chairs, a television, DVD player, and small CD player.

After high school, Diane attended her local community college for one semester while working part-time for minimum wage. After getting married, she dropped out of school, but continued to work until her son John was born. Just when she planned to return to work, she became pregnant with Alicia. After Alicia was born, Diane stayed home to care for Alicia one year. When Diane's marriage ended, she worked in a daycare center for a few weeks at minimum wage. She left when she found a retail job close to home earning $8.25 an hour (above the minimum wage) selling imported kitchenware and decorations, although it did not provide any health insurance.

Diane has just learned that she is pregnant. What will be Diane's fate, if she misses several weeks of work or as much as four months of work to have her baby? Might she lose her apartment because she cannot afford to pay her rent? Might she lose custody of her children, if she is unable to provide and care for them?

Work in the United States is a fundamental aspect of identity.15 Yet much of women's traditional work, including homemaking, housework, and childcare, remains defined as outside of the world of work.16 The culture of domesticity in the nineteenth century kept middle-class women outside the world of paid work, even as working-class women remained in the workforce. Cultural imagination continued to place women's work in the home, even as economic realities meant many women labored for wages.17

---

14. This hypothetical is based on a classroom exercise developed by Professor Martha R. Mahoney, University of Miami School of Law, for use in her Social Justice Law Class. See MARTHA R. MAHONEY, JOHN O. CALMORE & STEPHANIE M. WILDMAN, TEACHER'S MANUAL TO ACCOMPANY SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW: CASES AND MATERIALS 173 (2003).


17. In the late 1700s, "approximately 64 percent of the non-native population lived in families engaged in self-employment, 20 percent were slaves, and only 16 percent were wage workers or indentured servants." TERESE AMOTT & JULIE MATHIAEI, RACE, GENDER, AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES 295 (2d ed. 1996). With the rise of
Federal regulators monitor the U.S. economy to ensure some level of unemployment. Specifically, the economy functions by maintaining a flexible or contingent workforce so that a certain number of workers stand ready to take jobs as needed in the economy, creating a human ebb and flow. Yet how can these contingent workers subsist when employers lay them off?

The unemployment insurance benefits system, a federally mandated program jointly-funded with states, serves as one safety net. Deborah Maranville has documented the gender bias inherent in unemployment insurance that does not take women's working biographies into account. Women comprise large numbers in the contingent workforce and often leave jobs as Diane Benson did because of family-related reasons. These workers often do not qualify for unemployment insurance. Furthermore, since unemployment benefits are based in part on the amount of salary earned over time while working outside the home, this system fails to credit non-salaried, unpaid work inside the home.

In contrast to unemployment insurance, created without women's needs in mind, the federal government originally enacted welfare to provide supplemental income for predominantly white women. Yet the cultural meaning of welfare has evolved into a notion of "undeserving poor" as recipients. By contrast, persons with physical and mental disabilities, as well as social security recipients, constitute the "deserving poor" in the cultural imagination.

All individuals require some form of livelihood to subsist. Without paid work, some other means must provide daily subsistence. Thus, work is related
Pregnancy Discrimination and Social Change

...to the systemic and cultural operation of these programs—unemployment insurance, welfare, and social security. If a Diane Benson is unable to work, should she get welfare or unemployment insurance? Would a paid leave, enabling her to have her child and care for herself and her family, better serve her needs as well as society’s goal of individual economic self-sufficiency?

Beyond providing economic self-sufficiency, work creates a sense of self-identity and pride. The venerable adage “an honest day’s work for an honest day’s pay” reflects a philosophy that is ingrained in American society. Work itself retains value and integrity, regardless of the status or salary of the job. The opportunity for paid employment provides an inclusiveness that weaves individuals into the fabric of society. This connection furnishes not only a sense of financial worth but also creates membership in a workplace community and in society at large.

The PDA was an important legislative piece in this mosaic of work, subsistence, and safety nets, seeking to ensure that paid work remained open to women who became pregnant. Nondiscrimination on account of pregnancy remains an important aspect of this scheme providing a safety net to workers, but it alone cannot afford the security that all workers, particularly women, need. The PDA illustrated the powerful role of federal legislation in the subsistence and nondiscrimination package. Yet state laws also have played a key role in this struggle for workplace equality.

By inscribing the notion that differential treatment of a woman worker on account of pregnancy constitutes sex discrimination under federal law, the PDA remains a crucial piece of federal antidiscrimination legislation. As a federal law, it carried particular significance when passed, since many state laws had not considered the potential plight of pregnant workers who might lose their jobs as a result of pregnancy. California was one exception. The California Legislature, recognizing that nondiscrimination alone could not provide adequate security for women workers, enacted the Pregnancy Disability Leave law (PDL) to provide an affirmative safety net. The PDL created a substantive guarantee of unpaid leave for pregnant workers rather than only prescribing an equality path that treated such women the same as other workers with temporary disabilities.

Indeed, these divergent federal and state responses set the stage for the conflict epitomized by the different arguments proffered by women’s rights advocates in California Federal Savings & Loan Association v. Guerra.

26. See id. (discussing how paid work fosters a robust conception of equality in society).
by the Pregnancy Discrimination Act of 1978, pre-empts a state statute that requires employers to provide leave and reinstatement to employees disabled by pregnancy.”

The case focused feminist litigators on the need for greater workplace protection and how best to achieve that goal for the Diane Bensons in the workforce.

II. THE PDA AND THE CALIFORNIA PREGNANCY DISABILITY LEAVE LAW: LEGISLATION LEADING TO CAL. FED.

The U.S. Supreme Court held in General Electric Co. v. Gilbert that pregnancy-based classifications did not constitute sex discrimination under Title VII of the 1964 Civil Rights Act. The employer in the Gilbert case had provided comprehensive disability insurance but had excluded only pregnancy-related disabilities. The U.S. Congress passed the Pregnancy Discrimination Act (PDA) in 1978 as a response to the Gilbert decision. Architects of the PDA believed and intended that the statute mandated treating pregnant women workers exactly the same as male workers with temporary disabilities.

The PDA failed to provide any job-guaranteed protection for the countless women of childbearing capacity in California who work, women like Diane Benson. Many of these workers were single heads of households and most worked out of economic necessity. In essence, under the PDA, pregnant employees could be treated as well or as poorly as similarly situated male

29. Id. at 274-75.

The PDA added subsection (k) to § 701, the definitional section of Title VII. Subsection (k) provides, in relevant part: “The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.”

479 U.S. at 277 n.6.
32. See Brief for the American Federation of Labor and Congress of Industrial Organizations as Amici Curiae, Cal. Fed., 479 U.S. 272 (No. 85-494) (additionally arguing that the state law can be reconciled with the PDA under their analysis of preemption).
33. See Brief for California Women’s Law Center as Amici Curiae, Cal. Fed., 479 U.S. 272 (No. 85-494) (arguing that minority women have a slightly greater workforce participation rate than white women and that more than half of the total number of families at the poverty level are headed by women); see also HOWARD BERMAN, PREGNANCY DISCRIMINATION AND PREGNANCY BENEFITS—A BRIEF HISTORY, 1 (1978), in FAIR EMPLOYMENT AND HOUSING COMMISSION, INDEX FOR RULEMAKING (1978) app. J.1 (asserting that the denial of temporary disability benefits for pregnant workers had "potentially devastating economic consequences for millions of working women," the bill added Cal. Labor Code § 1420.35 to the Fair Employment and Housing Act, now codified at CAL. GOV’T CODE § 12945) (on file with authors).
employees who had an incapacitating, non-pregnancy related, temporary medical condition. Employers decided the fate of these workers, including if and to what extent they might be provided or be denied workplace leave or other accommodations.

In contrast to the approach taken by Congress, California had already enacted the PDL, which Governor Jerry Brown signed on September 28, 1978. The PDL provides that a pregnant employee of an employer with five or more employees is entitled to up to four months of job-protected leave because of pregnancy, childbirth, or a related medical condition. Instead of equating pregnancy to non-pregnancy related, incapacitating, temporary disabilities which affect both men and women, the California law sought a proactive measure designed to provide an affirmative accommodation to pregnant employees. This accommodation came in the form of an unpaid pregnancy leave to be used solely for the actual period of time that an employee was unable to work. While adding job-guaranteed leave, the PDL also contained a provision making it an unlawful employment practice to refuse such accommodation. Thus the California Legislature addressed the onerous impact on pregnant women who worked for employers without any job-guaranteed leave.

Prior to the Gilbert decision in 1976, the Federal Equal Employment Opportunity Commission (EEOC) had promulgated generally accepted sex discrimination guidelines, which banned benefit plans that excluded pregnancy-
related disabilities while covering temporary disabilities. California's Fair Employment Practices Commission (FEPC) had similar guidelines. In spite of these guidelines, Gilbert ruled that the differential treatment violated no law.

In order to remedy the holding of the Gilbert case and provide a level playing field for pregnant women, California State Assembly Member and Majority Leader Howard Berman articulated the demographic foundation for enacting the PDL:

Given the fact the number of working mothers has more than tripled since 1950, and about 85 percent of all working women are presumed to become pregnant at some time during their working lives, it was asserted that the denial of temporary disability benefits for that period when a woman is physically unable to work due to pregnancy, childbirth or related medical conditions had potentially devastating economic consequences for millions of working women.

Berman recognized that disparate health and disability plans, such as the one contested in Gilbert, were only the tip of the pregnancy discrimination iceberg impacting women workers with regard to the terms, conditions, and privileges of employment.

Prior to the enactment of the PDL (A.B. 1960), California pregnancy laws applied only to school board and school district employees. "It was the intent of [the PDL] to expand protections and benefits to all workers affected by pregnancy, yet not set a limit on what constitutes pregnancy discrimination as contained in FEC sex discrimination regulations." A pregnant employee was allowed to return to "her same job, or a similar job with at least the same rate of pay with full accrual of benefits, if she has taken a pregnancy leave for a period not exceeding four months (unless greater leave time is available . . . ; in that case for a period consistent with employer leave policy)."

As one involved lawyer stated,

37. See EEOC Employment Policies Relating to Pregnancy and Childbirth, 29 C.F.R. § 1604.10(d) (2009) (requiring that any benefit plan "which is in effect on October 31, 1978, which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work," must comply with § 1604.10(b), which requires pregnancy-related disabilities to be "treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment."); see also EEOC Agency Program to Promote Equal Employment Opportunity Rules, 29 C.F.R. § 1614.102(a)-(b) (2009) (authorizing the agency to "develop the plans, procedures and regulations necessary to carry out its program" to "maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies.").

38. Formerly known as the Fair Employment Practices Commission, the California agency whose mandate is to enforce the Fair Employment and Housing Act, California's civil rights employment and housing law, is now known as the Fair Employment and Housing Commission. See CAL. CODE REGS. tit. 2, § 7410 (2009).

39. Berman, supra note 33, at 1; see also Brief for California Women's Law Center, supra note 33, at 6, 8.

40. Berman, supra note 33, at 2.

The PDA did not go far enough, and we could do better in California and we did. Treating all employees the same is fine if you work for a progressive employer, but it is a particular hardship for pregnant women who do not have job-guaranteed leave that gives women the time off they need to recuperate from pregnancy, childbirth or related medical conditions.\footnote{Telephone Interview with Ann Noel, Executive and Legal Affairs Sec’y, Cal. Fair Employment & Hous. Comm’n (Oct. 29, 2008).}

Judith Kurtz, who filed an amicus curiae brief in the \textit{Cal. Fed.} case remarked:

Without a law like the PDL, poor women and women of color faced harsh consequences because they were particularly susceptible to job loss, denial of advancement and promotional opportunities, and other employee benefits such as vacation and sick leave, to the extent that they were provided. Women in higher paying jobs often had the ability to negotiate a better deal for themselves on their own behalf.\footnote{Telephone Interview with Judith E. Kurtz, former counsel for Equal Rights Advocates, Inc. (Dec. 21, 2008); see Brief for Equal Rights Advocates et al. as Amicus Curiae Supporting Respondents at 2, \textit{Cal. Fed. Sav. \\& Loan Ass’n v. Guerra}, 479 U.S. 272 (1987) (No. 85-494) (arguing that, without a right to return, a pregnant worker faces termination at a time when family income is most dependent on her contributions).}

California lawyers supported the PDL, believing it was the best next step on the road to workplace protection.

\section*{III. Lillian Garland’s Role in Establishing a Right to Have a Child and Keep One’s Job}

While Diane Benson is a hypothetical person, her circumstances typify those of many working women. One woman, Lillian Garland, lived a nightmare not unlike that of Diane Benson. Lillian Garland had worked for several years as a receptionist in commercial loans for California Federal Savings and Loan Association (Cal. Fed.). She enjoyed her work, which required eight and a half-hour days with a forty-five-minute lunch and two fifteen-minute breaks. She answered telephone calls and interacted with bank clients, many of whom were celebrities.

When Ms. Garland became pregnant, she expected to return to work after her baby’s birth. Her supervisor had asked her on several occasions when the baby was due and when Garland planned to resume her job. Garland trained her replacement\footnote{Brief for Lillian Garland, Real Party in Interest as Amicus Curiae at 5, \textit{Cal. Fed.}, 479 U.S. 272 (No. 85-494).} and took an unpaid “pregnancy disability leave”\footnote{\textit{Cal. Fed.}, 479 U.S. at 278.} to have her child. When she informed Cal. Fed. that she wished to return to work on April 20, 1982, at the end of the eight week leave, Cal. Fed. told her that they had filled the position in her absence and that no similar position was available. Ms.
Garland, mother of an infant daughter and the sole support of her child, was out of a job.

"I just felt faint, I was cold all over," reported Ms. Garland. "Before the baby was born, my supervisor kept asking when I was leaving and when I'd be coming back, so it never occurred to me that I might lose my job because I'd had a child. I was in total shock." Ms. Garland had been born and grew up on her grandmother's farm in Finleyville, Pennsylvania, attending high school in Pittsburgh. The granddaughter of a white woman, a former chorus girl who had married a black man, her family raised her to "fight for her beliefs." She also derived "strength and comfort" from her religious roots. And she needed her job; she was a loyal employee who felt "betrayed and hurt." Ms. Garland looked for work in bars and restaurants, in sales, and in finance companies. Without a job, she could not pay rent, and she lost her apartment. She moved into a friend's living room and slept on the couch. She agreed to let her ex-husband, the baby's father, care for the child until she found a job. By the spring of 1983 he had sued for and obtained custody.

Understandably distraught, Ms. Garland tried calling unions and legal aid organizations, seeking redress. Eventually she spoke with a lawyer at the state Department of Fair Employment and Housing, the state's civil rights agency, and asked, "Is there anything I can do?" The lawyer responded, "Oh, you betcha," but he also told her that this case would be "really big." He asked if she could handle it. He also advised her to find an attorney and gave her a list of names. Ms. Garland bonded with Linda Krieger at the Legal Aid Society--Employment Law Center (LAS-ELC) in San Francisco. Later in the litigation, another LAS-ELC attorney, Patricia Shiu, took over the case. For these attorneys, Lillian Garland symbolized many working class women who had no safety net when faced with loss of a job.

From the employer's perspective, it had done nothing wrong and was merely following the law. The employer claimed it had a right to terminate any employee who had taken a leave if a similar position were not available when

---

50. Founded in 1916, the Legal Aid Society--Employment Law Center (LAS-ELC) is a private, non-profit civil rights organization devoted to serving and advancing the workplace rights of low-income workers and their families. The LAS-ELC has five program areas: Gender Equity; Community Legal Services; Racial Equality; Disability Rights; and National Origin, Immigration, and Language Rights. The LAS-ELC engages in litigation, education, counseling, legislative and policy work in California and throughout the United States. See Legal Aid Society--Employment Law Center http://www.las-elc.org/index.html (last visited March 10, 2009).
the employee chose to return. But several laws, both state and federal, governed the dispute between Ms. Garland and Cal. Fed. over the proper treatment of a pregnant employee. State fair employment law, federal anti-discrimination law, and a specially-enacted congressional amendment to the federal law all interacted to require further judicial interpretation concerning a pregnant worker's rights and remedies.

In Lillian Garland's case, Cal. Fed.'s policy had made unpaid leaves available to all workers for "a variety of reasons, including disability and pregnancy." However, Cal. Fed. expressly reserved the right to terminate an employee returning from leave, if no similar position were available. Cal. Fed. did terminate her employment, following the birth of her child and her attempt to return to work. Ms. Garland filed a complaint with California's Department of Fair Employment and Housing, the state civil rights enforcement agency. She "wanted to be the last woman to have to suffer for deciding to have a baby." The Department charged Cal. Fed. with violating the Fair Employment and Housing Act (FEHA). Cal. Fed. responded by filing a suit against the Department in federal district court, seeking a declaration that Title VII, the federal employment statute as amended by the PDA, pre-empted the state fair housing and employment law. Because, reasoned Cal. Fed., it had complied with federal law by treating all workers in the same manner, its conduct must be legal.

The Federal District Court of the Central District of California agreed with Cal. Fed. and with the Merchants and Manufacturers Association and the California Chamber of Commerce, which had joined the lawsuit seeking declaratory and injunctive relief. Judge Manuel Real held that the California PDL mandating pregnancy leave required illegal preferential treatment of female workers. He held that Title VII of the 1964 Civil Rights Act, as amended by the PDA, preempted the state pregnancy leave policy, and he declared the state policy void pursuant to the Supremacy Clause. The Court reasoned that the state statute would subject California employers to liability under Title VII for reverse discrimination suits brought by temporarily disabled males. Disabled males would not receive the same treatment as female employees disabled by pregnancy, who were entitled to take a leave under the state law.

51. See generally Brief for Petitioners at 12, Cal. Fed. 479 U.S. 272 (No. 85-494) (arguing that "there is no evidence in the record to support the notion that neutral disability leave practices that do not provide the reinstatement guarantees required by the California law fall more harshly on women").
53. Id.
56. CAL. GOV'T CODE § 12945(a) (2009).
After the district court ruling, Ms. Garland filed a motion to intervene in the litigation to protect her legal interest in the outcome of the case. She was concerned about her lack of status as a party, not knowing whether the state’s Department of Fair Employment and Housing or its Fair Employment and Housing Commission would pursue an appeal beyond the circuit court level, if that appeal became necessary. Judge Real denied her motion. Ultimately, the Ninth Circuit upheld that denial.

California appealed to the U.S. Court of Appeals for the Ninth Circuit, seeking to uphold the state law. In an opinion authored by Judge Warren Ferguson, the appeals court reversed the lower court decision. The Ninth Circuit ruled that “the conclusion that . . . [California’s pregnancy leave law] discriminates against men on the basis of pregnancy defies common sense, misinterprets case law, and flouts Title VII and the PDA.” Reasoning that Title VII’s preemption clause did not prevent states from “extending their nondiscrimination laws to areas not covered by Title VII,” the court emphasized the theory of federalism that permits a state to legislate for the welfare of its citizens. The court reviewed the pregnancy exclusion cases, including Geduldig v. Aiello and Gilbert, observing that Congress had enacted the PDA to counter the false logic of those cases that had held that the exclusion solely of benefits affecting pregnancy was not sex discrimination. According to the Ninth Circuit, the PDA did not require a state to ignore pregnancy in its quest to achieve equal opportunity in employment. The Ninth Circuit found that the PDL did not violate Title VII as amended by the PDA nor did Title VII preempt the state law.

Once the Ninth Circuit ruled in favor of the State of California, the Fair Employment and Housing Commission began to fashion regulations pursuant to the newly enacted PDL that would elaborate and clarify the rationale and enforcement of the PDL. The regulations were designed with the impending litigation of Cal. Fed. before the Supreme Court in mind. The Commission intended to promulgate regulations that supported the holding and rationale set forth in the Ninth Circuit opinion. In fact, the Supreme Court’s opinion in

58. See generally Brief for Lillian Garland, supra note 44 (arguing that the Fair Employment and Housing Commission’s appellate interests diverged from those of Ms. Garland).
60. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 758 F.2d 390, 393 (9th Cir. 1985).
61. Id. at 394 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 (1983)).
62. Telephone Interview with Ann Noel, supra note 42.
63. Id.
64. E-mail from Ann Noel, Executive and Legal Affairs Sec’y, Cal. Fair Employment and Hous. Comm’n, to Patricia Shiu (Nov. 23, 2008, 18:21:00 PST) (on file with authors). Ann Noel participated in the drafting of these regulations. She noted:

The Commission wanted to set forth clearly for the Court the proposition that the California Legislature had understood in passing then 12945(b)(2) [which is now renumbered to be 12945(a)] that ‘equal’ treatment of pregnant women—giving them the same leave that was available to men or non-pregnant women—could have an adverse impact if the employer’s leave policy did not give women time to be off for pregnancy, childbirth and recovery from
Pregnancy Discrimination and Social Change

Cal. Fed. ultimately referred to the Commission's proposed regulation, its interpretation of § 12945(b)(2). The Court also cited to a precedential commission decision construing § 12945(b)(2).

Once the Supreme Court granted Cal. Fed.'s petition for certiorari, Ms. Garland and her counsel responded to a flurry of media requests for radio interviews, television appearances, and newspaper interviews. Ms. Garland and her counsel, including counsel for the State of California, Marian Johnston, accepted many of these invitations. After having been denied access to the case as a party entitled to briefing and oral argument, Ms. Garland and her counsel utilized the media as a channel to present her case. They sought to educate the public, not only in California, but throughout the country, about all workers' need for a job-guaranteed pregnancy disability leave like that provided for pregnant employees in California, and for workplace leaves and accommodation for the American workforce. Ms. Garland symbolized the single working mother who should not be forced to choose between her job and her child. She was the person whose story resonated with thousands of workers. Some cases, such as this one, lend themselves to a public education campaign that captures the imagination of society and provide a human face to a legal issue. These appearances continued through the U.S. Supreme Court litigation including oral argument and the decision.

IV. FEMINISTS DEBATE THE MEANING OF EQUALITY

Lillian Garland's situation—her need to merge her life roles as a worker and as a pregnant woman—was not unique. Many women combined workforce childbirth. This was the argument in our briefs to the Ninth Circuit and the Supreme Court and we wrote our regulations with this in mind. In addition, we wanted to clearly state (also disputed by employers) that a 'leave' meant that one had a right to return to the job (this was not articulated in the statute at the time). Further, that discrimination on the basis of pregnancy was a form of sex discrimination and thus, a failure to hire, discharge, pay less, etc., because of pregnancy was a violation of the FEHA as a form of sex discrimination. The Supreme Court seemed to buy all of this and we were very, very pleased with the outcome of the Cal. Fed. decision.

Id.

66. Id. at 276 n.4 (citing Matter of Accusation of Department of Fair Employment and Housing v. Travel Express, FEHC Dec. No. 83-17, 1983 WL 36466 (Cal. F.E.H.C. Aug. 4, 1983) (holding that employer's termination of a pregnant employee and failure to reinstate her after her pregnancy disability leave violated Section 12945(a) and (b)(2), which prohibit pregnancy discrimination and require employers to provide job-protected leave while an employee is disabled because of pregnancy, childbirth or related medical condition)).

participation and motherhood. In 1986, 49.8% of women aged fifteen to forty-four years old who gave birth to a child participated in the labor force.68 Yet the reality of a pregnant woman worker presented challenges to the U.S. legal system that had consistently conceptualized the ideal worker as one unencumbered by family obligations.69 Industrialization led to debate in the feminist legal community about how best to achieve the inclusion of women in the world of work, even as women’s presence in that world continued to increase. This debate implicated both the meaning of equality and the attainment of safe and healthy job conditions for all workers.

Even before women’s rights litigators had ever heard of Lillian Garland or California Federal Savings and Loan, they were arguing in Montana about a pregnancy leave issue similar to that which the Cal. Fed. case would ultimately bring to the U.S. Supreme Court.70 In 1979 the Miller-Wohl Company, owner of several women’s apparel stores, had hired Tamara Buley to work as a sales clerk in its Three Sisters store in Great Falls, Montana.71 During her first month on the job, Ms. Buley missed several days of work as a result of a pregnancy-related illness.72 Company policy denied sick leave to all employees with less than one year of service.73 As a result of these absences, the company fired Ms. Buley.74

Ms. Buley filed a complaint with the Montana Commissioner of Labor and Industry, claiming pregnancy discrimination in violation of the Montana Maternity Leave Act (MMLA).75 Miller-Wohl responded by filing a declaratory judgment action in federal court, seeking a ruling that the Montana statute was both unconstitutional and violated Title VII.76 The district court upheld the Montana pregnancy leave statute against this challenge, finding that the statutory protection of pregnant women posed no problem.77

68. U.S. Census Bureau, Current Population Survey, June 1990-2006, Supplemental Table 5 (2008), available at http://www.census.gov/population/socdemo/fertility/cps2006/SupFertTab5.xls. By 2006 the number of women who gave birth to a child and also worked had climbed to 55.9% of women. Id.


71. Id. at 1265.

72. Id.

73. Id.

74. Id.

75. The Montana Maternity Leave Act provided, in relevant part, that it is unlawful to (1) "terminate a woman's employment because of her pregnancy;" and (2) "refuse to grant to the employee a reasonable leave of absence for such pregnancy." MONT. CODE ANN. §§ 39-7-203(1), 39-7-201 (prior to 1983 amendment).


77. Id.
Following the Geduldig reasoning, the court wrote: "Merely because pregnancy is a physical condition singled out by the law does not necessarily make it a sex based classification or violate the Equal Protection Clause." The court further explained that the Montana Act's legislative purpose was gender neutral because it sought to place male and female workers on an equal footing, allowing both to work when they had children. A pregnancy leave would ensure that a working wife's salary would not be lost to the family unit. Finally, the court noted that Miller-Wohl could easily comply with the PDA and the Montana law by allowing reasonable sick leaves to all its employees.

Commenting in a law journal about the case and its implications, Linda Krieger and Patricia Cooney wrote that "Miller-Wohl sparked a serious controversy, one might even say a crisis, in the feminist legal community over the meaning of equality for women." Women's rights attorneys involved in the passage of the PDA viewed equality as mandating equal treatment of women and men. If non-pregnant employees would lose their jobs for absence in the first year of employment, then pregnant employees should suffer a similar fate. Any other policy would contravene Title VII and be "dangerous for women." Other feminists regarded such "equal treatment" as resulting in more inequality for women. Under this view, employers should be required to take positive action, often in the form of reasonable accommodation, to ensure fairness in the workplace for all workers.

Miller-Wohl appealed from the adverse district court ruling against it, but the Ninth Circuit Court of Appeals dismissed the case, setting the stage for Lillian Garland and her dispute with Cal. Fed. to become the center of the debate. This controversy, begun by Miller-Wohl and continued through Cal. Fed., revealed the "absence of consensus among feminists" as to the definition of equality. It also, as Krieger and Cooney pointed out, illuminated different conceptions of the process of social change.

78. Id.
80. See Brief for State of Oregon at 18, Muller v. Oregon, 208 U.S. 412 (No. 107) (1908) (arguing that "long hours of labor are dangerous for women primarily because of their special physical organization").
81. See Cooney & Krieger, supra note 79, at 537 (questioning the dangers presented by some equality models, arguing that "equality can't, in and of itself, effectuate equality between sexes," and advocating for "equality of effect").
82. The Ninth Circuit dismissed the appeal because the "federal claims contained in employer's declaratory judgment complaint were defenses to employee's state claim and thus failed to create requisite federal question." Miller-Wohl Co. v. Comm'r of Labor & Indus., 685 F.2d 1088, 1088 (9th Cir. 1982).
83. Cooney & Krieger, supra note 79, at 536.
84. Id. at 516.
In a much-cited article, Wendy Williams reflected on the limitations of litigation as a strategy for achieving full societal participation for women.\(^8\) Reflecting on the limited role that courts could play in social change, Williams emphasized that change needed to come from legislatures. According to Williams, courts could “only review in limited and specific ways the laws enacted by elected representatives.”\(^8\) She elaborated: “[Courts’] role in promoting gender equality is pretty much confined to telling legislators what they cannot do, or extending the benefit of what they have done, to women.”\(^8\) Williams acknowledged, however, that how courts thought about equality impacted decisions, judgments, and strategies in other spheres of decision-making.\(^8\)

Turning to the Montana law, Williams pointed out that well-meaning legislators who intended to help pregnant workers passed the Act.\(^9\) But, she argued, “[t]he philosophy underlying [the statute was] that . . . the law should take special account of pregnancy to protect that role for the working wife.”\(^9\) Advocates for such protection could argue that procreation provides women with an important role worthy of special protection, and that without such guardianship, society could not adequately ensure women’s safety.\(^9\) These arguments, according to Williams, illustrate how deeply and culturally embedded in society is this urge to treat pregnancy as unique.\(^9\) Williams cautions against succumbing to that argument, urging rather the benefits of the equal treatment approach that she saw embodied by the PDA. For Williams, the PDA equal treatment mandate presented a clear alternative to the special treatment model. “If we can’t have it both ways, we need to think carefully about which way we want to have it.”\(^9\) Williams chooses equal treatment and concludes with a call to create a new order that would leave stale cultural assumptions in the past.\(^9\)

As women’s rights lawyers debated litigation theories and strategies, change was brewing in Washington, D.C. As a California state assembly member, Howard Berman had helped to pass the 1978 PDL that created a four-month disability leave for new mothers.\(^9\) Berman had been representing California on Capitol Hill for a little over a year when Judge Manuel L. Real

---


\(^9\) Id. at 175.

\(^9\) Id.

\(^9\) Id.

\(^9\) Id. at 194.

\(^9\) Id.

\(^9\) Id. at 195.

\(^9\) Id.

\(^9\) Id. at 196.

\(^9\) Id. at 200.

ruled in the federal district court that the state law Berman had helped to pass violated Title VII. Berman wanted to change federal law to ensure that employers would grant leaves for new mothers.

Berman contacted Donna Lenhoff, then Associate Director for Legal Policy and Programs at the Women's Legal Defense Fund, for assistance. She reached out, in turn, to Wendy Williams and Susan Deller Ross, both of whom had worked on the issue before. Williams had been counsel of record in the Geduldig case, and Ross had written a brief in the Miller-Wohl case. They agreed with Lenhoff in characterizing Berman's approach as special treatment for pregnant women, viewing it as a dead-end for leave policies. In an early meeting with Congress member Maxine Waters and others, Berman argued for a legislative strategy to enact a federal pregnancy leave policy. However, Lenhoff critiqued that approach as short-sighted and urged a different tactic: a leave policy that would apply to women and men.

A month after the district court decision in Cal. Fed., another California representative, George Miller, convened a hearing before a new congressional committee that targeted problems of young people and families. Hearing testimony from Congress member Patricia Shroeder, Columbia University Professor of Social Work Sheila Kamerman, and others, the hearing introduced, for the first time at a national level, the suggestion of parenting leave for all workers.

Against this backdrop of potential legislative change, advocates prepared briefs for the Cal. Fed. oral argument before the U.S. Supreme Court. Following California's victory in the Ninth Circuit, the feminist legal community was "in a state of tension and disarray." The Southern California chapter of the American Civil Liberties Union (ACLU) wanted to file a brief supporting the state law. But the national ACLU overruled that decision. Ultimately the national ACLU filed a brief, declaring it supported neither party, but rather "more fully represent[ed] the interests of women workers than the positions taken by either of the parties." The ACLU argued that protectionist laws value women for their childbearing roles and undermine women's

96. Id. at 19.
97. Id.
98. Id.
99. Id. at 20.
100. Id.
101. Id.
102. Id.
103. Id. at 21-22.
104. Id. at 23-25.
105. Id. at 26.
107. Id. at 216.
capacity and reliability in the workplace.\textsuperscript{109} Emphasizing biological differences between men and women could justify protectionism and relegate women to "a separate sphere of home and family."\textsuperscript{110}

Members of the Southern California ACLU chapter, led by UCLA law professor Christine Littleton and then-USC law professor Judith Resnik, formed the Coalition for Reproductive Equality in the Workplace (CREW) to file an amicus curiae brief in support of the state law and a remedy for Lillian Garland.\textsuperscript{111} This group included "Betty Friedan, Planned Parenthood, the International Ladies Garment Workers Union (ILGWU), the California Federation of Teachers, and 9 to 5," as well as "Hispanic groups that wanted to retain the protection of the maternity-leave law for minority women working in unorganized job situations."\textsuperscript{112} CREW's brief argued that the state statute remedied "a form of sex discrimination not . . . addressed by federal law—the discriminatory impact that inadequate leave policies have on working women's right of procreative choice."\textsuperscript{113}

The Women's Rights Project of the ACLU and National Organization for Women (NOW) agreed with Cal. Fed. that the state law violated Title VII. They urged: "We don't think women are weak and in need of special assistance."\textsuperscript{114} Describing those arguing in favor of relief for Garland by upholding the state law, a NOW Legal Defense and Education Fund spokesperson said: "It is history repeating itself. It is an invitation to discriminate. . . . [Such an employment law says,] 'you pregnant women, you're different.'"\textsuperscript{115} Advocates siding with Cal. Fed. feared not only different treatment for pregnant women, but also discrimination against all women that might result from the burden of accommodating pregnancy.

The dispute between the parties and the feminist amici on both sides turned on whether equality meant identical treatment or whether equality meant identical opportunity. For example, equal treatment proponents argued that no worker should get his or her job back unless every worker could return from a leave with a guarantee of a job. Alternatively, equal opportunity advocates urged that equality meant providing the same opportunity to all workers. For

\footnotesize

\textsuperscript{109} Id. at 13-17.

\textsuperscript{110} Id. at 18.

\textsuperscript{111} HARRINGTON, supra note 106, at 216.

\textsuperscript{112} Id.


\textsuperscript{115} KATHERINE R. ALLEN & KRISTINE M. BABER, WOMEN AND FAMILIES: FEMINIST RECONSTRUCTIONS 193 (1992). According to Baber and Allen, "Don Butler, president of the California Merchants and Manufacturers Association, stressed this likelihood in his comments after the . . . decision: 'If I'm an employer and I've weighed all the candidates, I'm going to hire either a male or an older woman. . . . And that is discrimination we don't want, but it will happen because business people are practical.'" Id.
example, men could have children without risking loss of their jobs, so the state pregnancy leave statute protected women in the same way that men already were protected. The word equality, itself, did not provide an answer as to how to look at the case.

Commentators often characterized the debate as one between sameness and difference. Reflecting this tendency, Martha Chamallas identified the 1980s as marking the emergence of the “Difference Stage” in feminist legal theory.\footnote{116. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 39 (2d ed. 2003).} This debate between sameness and difference has also been couched as a choice between equal treatment versus special treatment. Yet that very “equal/special” language created bias as to the debate’s preferred outcome, making it difficult to find language for an even-handed discussion about the meaning of equality. Cultural favor for equality is strong, while the American work ethic frowns upon special treatment. Missing from the “sameness/difference” and “equal/special” sound bites to describe the debate was any language that would include woman in the fullness of her potential identity. The woman of color, poor woman, lesbian, or older woman who did not fit the default privileged categories unthinkingly ascribed to “woman,” remained invisible in this formulation of the choice about the meaning of equality.

Catharine MacKinnon elaborated upon the critique of the comparison mode prevalent in equality theory that underlay the debate, explaining that only two paths to equality have been allowed to women. Women must either “be the same as men” or “be different from men.”\footnote{117. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 33 (1987); see also Elizabeth M. Schneider, Resistance to Equality, 57 U. PITT. L. REV. 477, 492 (1996) (describing the tension between equal treatment and special treatment as “especially problematic” in cases involving battered women as defendants).} MacKinnon continues:

Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.\footnote{118. MACKINNON, supra note 117, at 34.}

Under “sameness/difference” language, men remain the measure of equality, again shifting focus away from “woman” as her characteristics cut across numerous identity categories.\footnote{119. WILDMAN, supra note 16, at 22-24 (arguing that the Koosh ball, with its multiple moving strands, best encapsulates the dynamic and multidimensional nature of identity).}

Also critiquing the debate, Deborah Rhode illuminated the “mixed ideological consequences” of its legacy.\footnote{120. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 122 (1989).} Legislation that mandates maternity
leaves “may help to break the stereotype of childbearing women as provisional employees” with no real commitment to work outside the home. Yet when employers offer maternity rather than parenting leaves, they maintain stereotypes of children being women’s responsibility and render women’s role as wage earners less visible, because the linguistic emphasis remains centered on mothering.

V. CAL. FED. IN THE U.S. SUPREME COURT

Amici filed thirteen briefs and the Supreme Court set the case for oral argument on October 8, 1986. David Savage reported on the beginning of the oral argument when Theodore Olson argued for the bank. Olson began by arguing that “the federal mandate of equal protection must prevail over the state policy of special protection.” He explained that California employers were trapped: If they complied with federal law they violated the state law. He urged that the federal law should preempt the state statute.

Justice O’Connor interrupted early on. She said, “Well, Mr. Olson, I guess in theory an employer could comply with the California law by offering female employees a pregnancy leave and comply with Title VII by offering a comparable leave to other disabled employees. If that is the case, how is the California law preempted?”

Olson conceded that the compliance suggested by her hypothetical was theoretically possible, but he called it “an end run” around the issue. Justice O’Connor’s question and this interchange provided a glimpse into the reasoning that would prevail in the majority opinion authored by Justice Marshall.

Marian Johnston, a Deputy Attorney General, argued on behalf of the State of California that California’s “guarantee that pregnant employees not lose their jobs” was not inconsistent with the federal goal of eliminating discrimination on the basis of pregnancy as articulated by Title VII as amended by the PDA. She urged that pregnancy disability leave was “neither preferential nor prejudicial to either men or women; it’s simply an equalizer making sure that women, like men, don’t have to choose between employment and childbirth” and that “women can compete equally with men on that basis.”

121. Id.
123. Id.
124. Id.
125. Id.
127. Id.
observed that in situations in which individuals are not similarly situated, “similar treatment may in fact lead to inequality.”

Garland had traveled to Washington, D.C. to observe the oral argument before the Supreme Court. Outside the courthouse, she was speaking with reporters and video crews when she saw a group of teenage girls staring at her. She left the cameras and approached the group, telling them, “I am fighting for you; I am fighting so you will be able to one day, if you decide to get married and have a family, you’ll be able to keep your job if you want to have a baby.” One of the young women looked at her and said, simply, “Thank you.”

On January 13, 1987, the Supreme Court affirmed the Ninth Circuit ruling, uphold[ing California’s law against Cal. Fed.’s challenge, but relying upon a slightly more nuanced analysis. The Court held that the PDL is not inconsistent with the PDA because compliance with both statutes is not a “physical impossibility” since “employers are free to give comparable benefits to other disabled employees.” Writing for the majority, Justice Thurgood Marshall quoted the court of appeals language that “in enacting the PDA Congress intended ‘to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.’

The Court first considered whether federal law preempted the California state statute, examining congressional intent. The Court noted that Congress had disclaimed any intent to “occupy the field of employment discrimination law” in passing Title VII. The Court then turned to the issue of whether the state law conflicted with the federal law and “whether the PDA prohibit[ed] states from requiring employers to provide reinstatement to pregnant workers, regardless of their policy for disabled workers generally.” To analyze the question, the Court returned to the PDA’s language, legislative history, and historical context, commenting that Congress had passed the PDA as a response to Gilbert. The PDA reflected Congress’ disapproval of the Gilbert court’s reasoning that discrimination against pregnant workers did not constitute sex discrimination. Congress had conducted hearings that included extensive evidence of discrimination against pregnant workers. That history, observed the Court, was “devoid of any discussion of preferential treatment of pregnancy.” Rather, opposition to the PDA had arisen from those who wished to continue to treat pregnancy differently, to the detriment of pregnant women, by excluding pregnancy coverage in health or disability benefit plans.

128. Id.
129. Morrison, supra note 54.
131. Id. at 279-80 (quoting 758 F.2d 390, 396 (9th Cir. 1985)).
132. Id. at 281.
133. Id. at 284.
134. Id. at 285.
135. Id. at 286.
Congress was aware of state statutes like California’s, but “apparently did not consider them inconsistent with the PDA.”

The Court noted the common goal of the PDA and California statute was “to achieve equality of employment opportunities and remove barriers.” The Court observed that the state statute did not require employers to violate Title VII. Employers could comply with both statutes by giving all employees comparable benefits to those given to pregnant workers.

For Justice Scalia, the case turned on the PDA language which stated, “Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field . . . to the exclusion of State laws on the same subject.” Cal. Fed.'s tactic, suing in federal court and claiming the PDA overrode state law, offended Scalia as directly contrary to the plain statutory language. Concurring in the judgment, Scalia wrote, “no more is needed to decide this case.”

Writing in dissent, Justice White found that conclusion of the majority to be “untenable.” Rather, the dissent opined that California could not have intended to require employers to make broader disability leaves available to all workers: “Congress intended employers to be free to provide any level of disability benefits they wished—or none at all—as long as pregnancy was not a factor in allocating such benefits.” The dissent viewed the California statute as providing preferential treatment in violation of the PDA, echoing the disagreement that some of the feminist legal community had also voiced.

The battle between sides of the litigation had become painfully divisive in the feminist legal community. As friendships fractured over the disagreement, the schism wrought by the case highlighted the important goal of permitting women to both bear children and remain employed. The passion in the arguments for accommodation and the vigor of those pressing equal treatment led to a decision that helped society envision a world where both outcomes were possible. As Justice Marshall opined, the California law was a “statute that allows women, as well as men, to have families without losing their jobs.”

The California response to pregnancy leave, vindicated by the U.S. Supreme Court in *Cal. Fed.*, may have grown out of the disability rights movement that originated at the University of California at Berkeley in the

---

136. *Id.* at 287.
137. *Id.* at 288 (citations omitted).
138. *Id.* at 282 (quoting Civil Rights Act of 1964, 42 U.S.C. § 2000h-4 (West 2009)).
139. *Id.* at 296.
140. *Id.* at 302.
141. *Id.* at 303-04.
142. *Id.* at 304.
143. *Id.* at 289.
California’s employment laws, among the most progressive state laws, have provided greater protections for workers with disabilities than federal disability law since the 1970s. Today, the Prudence Kay Poppink Act, named after a woman who championed employment rights for all workers in California, continues to be a model for federal law. In 2000, the state legislature amended the Act extensively to redefine disability much more broadly, and to limit, if not invalidate, any interpretation of the federal Americans with Disabilities Act that might circumscribe the scope and application of the California law.

In fact, the amicus curiae brief that Lillian Garland had filed in the Supreme Court analyzed the breadth and scope of California’s state disability discrimination law, urging the Court to see the pregnancy leave provision in the context of the entire statutory scheme. Advancing a unique argument, Ms. Garland asserted that California’s PDL, as just one provision of California’s Fair Employment and Housing Act, did not conflict with the PDA because the disability discrimination protections also found within the FEHA provided reasonable accommodation to all covered employees with disabilities, ensuring equal treatment to all workers.

Ms. Garland’s brief argued that California’s expansive view articulated by the FEHA extended employment protection to a wide range of individuals who are disabled. The California Supreme Court broadly interpreted the definition of “physical handicap” to include such diverse disabilities as allergic conditions, smoking related illnesses, high blood pressure, and various types of diseases, including conditions that are both “physical” and “handicapping.” The term “handicap” includes not only current, manifest, physical limitations, but also future conditions. This extensive definition would have covered a

147. Brief for Lillian Garland, supra note 44, at 10, 14.
148. Id. at 15-17.
149. Id. at 13-16; see also Gelb & Frankfurt, supra note 145, at 1105.
151. Id. at 610. Arguably, the accommodation provided to pregnant women under FEHA §12945(b)(2) is no more extensive than that provided to employees with non-pregnancy related disabilities under the FEHA’s other disability provisions and regulations. Both the pregnant employee and the employee with a non-pregnancy related disability are afforded reasonable accommodation under the FEHA. The former is entitled to reasonable accommodation which California’s legislature defines as an unpaid leave of up to four months. CAL. GOV’T CODE §12945(b)(1) (West 2009). The latter is also entitled to reasonable accommodation, which, depending on the particular disability, may include a
disability suffered by a male employee that was similar to pregnancy.\footnote{152} Moreover, the FEHA’s mandate for reasonable accommodation, which included a reasonable period of unpaid leave for males with non-pregnancy related disabilities, is equivalent if not tantamount to providing leave to pregnant workers.

California’s history of promoting the rights of workers, specifically rights for women and persons with disabilities, paved the way for the PDL. It is no coincidence that, even prior to Ms. Garland’s termination from California Federal Savings and Loan, advocates were working closely with the California Legislature to expand further the rights of all employees who were struggling to grapple with the competing demands of work and family.

VI. THE MOVEMENT IN CALIFORNIA FOR EXPANDED WORKPLACE LEAVES AND ACCOMMODATION

Beginning in the 1980s and continuing after the Cal. Fed. decision, California advocates sought to enact job protections for workers with families. They recognized that all workers needed time away from work to care for themselves and their families and to bond with their children. The California Legislature\footnote{153} and many California advocates knew that female workers were

---

\footnote{152}{In 1986 when the LAS-ELC filed its amicus curiae brief on behalf of its client, Lillian Garland, California’s FEHA did not require that a covered disability be permanent or have a defined duration. See Cal. Gov’t Code § 12940(a) (West 1980). Indeed, the California Supreme Court’s opinion in American National Insurance. Co. v. Fair Employment & Housing Commission., 32 Cal. 3d 603, 610 (1982), held that high blood pressure is a physical disability because it is “physical” and “often it is handicapping.” This very broad definition of the term “physical disability” preceded the passage of the Americans with Disabilities Act, 42 U.S.C. § 12111, in 1990, which severely restricted the definition of disability under federal law. See Center & Imparato, supra note 146, at 323.}

\footnote{153}{See Berman, supra note 33, at 1 (stating that because “the number of working mothers has more than tripled since 1950, and about 85 percent of all working women are presumed to become pregnant at some time during their working lives... den[y]ing temporary disability benefits” to women who are disabled because of “pregnancy, childbirth or related medical conditions had potentially devastating economic consequences for millions of working women”).}
likely to become pregnant at least once during their working lives.\textsuperscript{154} Without job-guaranteed leave, these women could lose their jobs. Thus a greater percentage of women than men would be adversely affected by the absence of job-protected leave. Male employees needed time off work for non-pregnancy related, incapacitating medical conditions.\textsuperscript{155} Many women in the workforce at that time were, as now, low-income female workers, women of color, and single heads of their households who were the primary wage earners.\textsuperscript{156}

California advocates labored to expand workplace rights to leaves and to other forms of accommodation for all workers at the same time that they fought against attacks on the PDL, like the \textit{Cal. Fed.} litigation.

The PDL, one of the most progressive laws of this type in the United States, served as a powerful foundation for legislating leave and workplace accommodations for working families. Aware of the debate among feminist advocates nationally, state legislators and advocates faced the challenge of expanding workplace leaves and other accommodations so that no other working woman or man would have to endure the suffering to which Lillian Garland had been subjected. Pragmatism played a major role in this movement.

In analyzing the then "current dispute over how pregnancy fits within a model of sexual equality," one commentator stated that continued adherence to the assimilationist model of racial equality and persistent efforts to draw from it an adequate model of sexual equality founder on the inescapable fact of sexual reproductive difference. We should desist from further fruitless attempts to deny that which cannot be changed and instead direct our energies to devising ways to accommodate and neutralize the impact of those differences on the lives of women and men.\textsuperscript{157}

The California movement tried to embody this spirit as it proceeded forward.

The notion of incremental change, built one step at a time with many setbacks along the way, informed this movement to advance workplace rights. In retrospect, the PDL, coupled with advancing the rights of persons with disabilities, laid the groundwork for this political process and the eventual passage of several statutes to benefit the Diane Bensons of the state workforce. These legislative enactments included the California Family Rights Act, which

\textsuperscript{154} See Brief for California Women's Law Center, \textit{supra} note 33, at 16 (noting that eighty-five percent of the women in the work force are likely to become pregnant at some point in their lives); see also \textit{BERMAN, supra} note 33, at 1.

\textsuperscript{155} See \textit{BERMAN, supra} note 33, at 1.

\textsuperscript{156} See \textit{id.; see also} Brief for California Women's Law Center, \textit{supra} note 33 (arguing that minority women have a slightly greater workforce participation rate and that more than half of the total number of families at the poverty level are headed by women); Brief for Equal Rights Advocates et al., \textit{supra} note 43, at 7 (arguing that, without a right to return, a pregnant worker faces termination at a time when family income is most dependent on her contributions); Brief for Human Rights Advocates et al., \textit{supra} note 8, at 8 (arguing that "over 127 nations around the world and many international treaties provide protection for pregnant working women, analogous to the protection afforded by the California statute here at issue."); Brief for Lillian Garland, \textit{supra} note 44, at 10.

provided a right to unpaid, job-protected leave for serious health conditions and bonding;\textsuperscript{158} the Victims of Domestic Violence and Employment Leave Act, which guaranteed job-protected, unpaid leave for survivors of domestic violence;\textsuperscript{159} and the Paid Family Leave Act, which extended California's disability insurance benefit program to cover caring for a family member with a serious health condition or bonding with a child.\textsuperscript{160} Advocates continue to promote further legislation for paid sick days and greater coverage for existing protections.

A. The California Family Rights Act

The first of these laws, the Moore-Brown-Roberti Family Rights Act,\textsuperscript{161} also known as the California Family Rights Act (CFRA), preceded the passage of the federal Family and Medical Leave Act (FMLA).\textsuperscript{162} The CFRA's legislative history reveals a circuitous path that evolved over time, although the legislature always intended to help workers meet the competing demands of both work and family responsibilities.\textsuperscript{163}

Beginning in the early 1980s, a concerted legislative effort pushed for the enactment of state laws that would provide leave to workers.\textsuperscript{164} In 1985, Assembly Member Gwen Moore introduced a bill regarding child-rearing leave entitled the Parents' Rights Act of 1985.\textsuperscript{165} This bill originally provided one year of unpaid leave for child rearing, but after several amendments between 1985-86, the bill reduced the leave allowed from one year to four months.\textsuperscript{166} The amended bill further defined "childrearing leave" as time off from work for the birth, placement, and adoption of a child or the illness of an employee's child, which was likely to require continuing treatment or confinement for at

\begin{itemize}
\item \textsuperscript{158} CAL. GOV'T CODE § 12945.2 (West 2009).
\item \textsuperscript{159} CAL. LABOR CODE § 230 (West 2009).
\item \textsuperscript{160} CAL. UNEMP. INS. CODE §§ 3300-3306 (West 2009).
\item \textsuperscript{161} CAL. GOV'T CODE §§ 12945.1-.2 (West 2009).
\item \textsuperscript{163} See 1991 Cal. Legis. Serv. 5547, ch. 462 (West) (codified at CAL. GOV'T CODE § 12945.2 (West 2009)). The Historical and Statutory Notes contained a letter, dated February 6, 1992, from Assembly Member Moore to Governor Pete Wilson regarding the intent of A.B. 77, explaining that the purpose of the bill was "to permit workers to take leave to care for their families without fear of job loss" and that the bill had evolved over a seven year period and the process involved many hearings and meetings. {id.}
\item \textsuperscript{164} These observations derive from Ms. Shiu’s participation both in the legislative process to amend CFRA to comport with the FMLA and in the regulatory process as an invited participant to the Fair Employment and Housing Commission’s discussion of these changes.
\item \textsuperscript{165} Assembly Member Moore introduced the Parents' Rights Act of 1985 (later amended to The Parents' Rights Act of 1986) on February 7, 1985 "to add Section 12945.2 to the Government Code, relating to fair employment and housing." A.B. 613, 1985-1986 Leg., Reg. Sess. (Cal. 1986) (on file with the authors). This version of the bill did not ultimately pass.
\item \textsuperscript{166} The bill was amended in the Assembly on April 8, 1985, May 14, 1985, June 24, 1985, and further amended in the Senate on June 11, 1986, July 3, 1986, and August 11, 1986. {id.} 
\end{itemize}
least one month. The final version of Assembly Bill 613 (which was never passed) read:

The Legislature finds and declares all of the following:

(a) The United States is the only industrialized country that does not have a mandated policy on child care leave.

(b) There is a shortage of out-of-home child care, particularly for infants.

(c) More than 60 percent of the women of child-bearing age in the United States are in the workforce and 40 percent of these women have children under three years of age.

(d) Because of the changing roles of men and women in the workplace and the family, both men and women should have the option of taking leave for child-rearing purposes.

(e) Close contact between parent and child is in the best interest of the child, particularly during the child's infancy and early years, and this contact promotes family stability.

On January 22, 1987, legislators proposed a similar bill, Assembly Bill 368, the Parent's Rights Act of 1987. The changes encompassed in this proposed legislation reflect a refined response to parenting responsibilities faced by workers.

Unlike the 1986 version of this bill, the Parent's Rights Act of 1987 expressly prohibited discrimination on the basis of an employee's status as a parent, a significant change in the legislation. The requirement that an eligible "full-time employee" have worked more than one continuous year with the employer and an average of thirty hours per week during the most recent six months marked another important difference. Despite the significant decrease in the amount of leave provided, the governor vetoed this bill. Over the years, numerous versions of and amendments to this bill surfaced. On January 22, 1987, legislators proposed a similar bill, Assembly Bill 368, The Parent's Rights Act of 1987.

Finally Assembly members Moore and Hayden and Senator Roberti, along with many other assembly members and senators, introduced Assembly Bill Number 77, The Family Rights Act of 1991. A.B. 77 passed the Senate on

The CFRA provides eligible employees who work for covered employers (large employers with fifty or more employees) an unpaid, job-guaranteed leave of up to twelve weeks in each twelve-month period for the following purposes: (1) to care for one's own serious health condition or that of spouse, child, parent, domestic partner; and (2) to bond with a newborn, adopted, or foster child.175 Three notable exceptions to the CFRA distinguish it from the FMLA. First, the definition of serious health condition excludes "leave taken for disability on account of pregnancy, childbirth or related medical conditions."176 Thus under California law, the entitlement to a maximum of four months of pregnancy disability leave under the PDL is separate and apart from the CFRA leave. As a result, a pregnant woman in California can take a maximum of four months of pregnancy disability leave under California's PDL and take twelve weeks of bonding leave under the CFRA. Second, the medical certification process for family members who need care is less stringent than the three-tier medical certification process under the FMLA where an employer may require a third and final medical opinion verifying the serious health condition of a family member and the duration of the leave.177 Finally, California's right to medical privacy under Article 1, Section 1 of the California Constitution prohibits the disclosure of medical conditions, diagnosis, prognosis, and treatment, and the CFRA regulations reflect these constitutional protections.178 Additionally, the Confidentiality of Medical Information Act prohibits health service providers from turning over private identifiable medical information without the express approval of the patient.179

Preserving these three principles was critical to the CFRA amendments enacted after Congress passed the FMLA.180 The FMLA's enactment precipitated a series of subsequent amendments to CFRA to ensure that the CFRA comported largely with the FMLA, except with respect to these three

175. CAL. GOV'T CODE § 12945.2 (West 2009).
176. Id. at § 12945.2(c)(3)(C).
177. See 29 C.F.R. § 825.307(c) (2009).
178. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining, safety, happiness and privacy." CAL. CONST. art. 1, § 1; see also Hill v. Nat'l. Collegiate Athletic Ass'n, 865 P.2d 633, 691 (Cal. 1994) (citing Board of Medical Quality Assurance v. Gheradini, 156 Cal. Rptr. 55, 60 (Ct. App. 1979)) (stating that "a person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected"); CAL. CODE REGS., tit. 2, § 7297.11 (2009) (permitting employers to utilize any certification form, "provided that the health care provider does not disclose the underlying diagnosis of the serious health condition involved without the consent of the patient").
179. CAL. CIV. CODE § 56 (West 2009).
provisions. Again, pragmatism reigned: The legislature amended the CFRA to enable California employers to comply with one family and medical leave law and to relieve employers from having to comply with two slightly different family and medical leave bills, which would have been an unnecessary and burdensome compliance process for employers. They are the result of a specific legislative intent to preserve the PDL, protect the medical privacy rights of California employees, and ease an unduly cumbersome medical certification process for the care of family members.

B. Protecting Victims of Domestic Violence

The passage of the California Family Rights Act (CFRA) served as a catalyst for future legislative action in California. Enacted in 2000, the Victims of Domestic Violence and Employment Leave Act, authored by Assembly Member Honda, provides a right to job-protected, unpaid leave for survivors of domestic violence who work for employers with twenty-five or more employees, under specific circumstances.

In California, unemployed workers are generally entitled to unemployment insurance benefits unless they engage in misconduct connected with their most recent employment or if they leave voluntarily without good cause. However, to ensure that survivors of domestic violence do not sacrifice income while engaging in safety planning to relocate, California’s Unemployment Insurance Code grants unemployment insurance benefits where an employee quits a job for “good cause.” In California, an individual may be deemed to have left his or her most recent work for good cause if the employee leaves a job to protect his or her children, herself, or himself from domestic violence.

181. The FMLA does not preempt state laws, such as the CFRA, which provide greater protections. See 29 U.S.C. § 2651(b) (2009).
182. These observations derive from Ms. Shiu’s participation both in the legislative process to amend CFRA to comport with the FMLA and in the regulatory process as an invited participant to the Fair Employment and Housing Commission’s discussion of these changes.
183. CAL. LAB. CODE § 230.1 (West 2009). The Victims of Domestic Violence and Employment Leave Act permits employees who are victims of domestic violence or sexual assault to take time off from work:
   (1) To seek medical attention for injuries caused by domestic violence or sexual assault; (2) to obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence or sexual assault; (3) To obtain psychological counseling related to an experience of domestic violence or sexual assault; (4) To participate in safety planning and take other actions to increase safety from future domestic violence or sexual assault, including temporary or permanent relocation.
Id.
184. CAL. UNEMP. INS. CODE § 1256 (West 2009).
185. Id.
C. Paid Family Leave

The Family Temporary Disability Insurance Law, also known as the Paid Family Leave Act (PFL), the next major piece of legislation, expanded workers' rights to paid leave.\textsuperscript{186} California's existing short-term disability insurance (SDI) provided partial income replacement for qualifying employees who could not work because of sickness or injury.\textsuperscript{187} The PFL, effective July 1, 2004, builds on that SDI scheme and provides six weeks of partially paid leave each year to all employees—regardless of tenure or size of their employer—to care for a seriously ill parent, child, spouse, or domestic partner or to bond with a newborn, adopted, or foster child.

This statutory scheme interfaces with other laws for California workers in this way. The federal Family and Medical Leave Act (FMLA) provides twelve weeks of unpaid leave to address a serious health condition of an employee or family member or for bonding.\textsuperscript{188} In contrast, the California PDL provides four months of unpaid, job-protected leave for pregnancy, childbirth, or a related medical condition.\textsuperscript{189} The FMLA and PDL leaves run concurrently. The CFRA, as amended after passage of the FMLA, provides twelve weeks of bonding leave for pregnant employees that can be used in addition to the four-month PDL leave.\textsuperscript{190} Finally, the PFL provides six weeks of partially paid leave that runs concurrently with bonding leave under the CFRA and the non-pregnancy leave aspects of the FMLA. The PFL applies to all employees regardless of length of employment or size of employer.

The PFL is the most comprehensive paid leave law in the United States. It is funded completely by employee payments to California's disability insurance benefit program. PFL benefits cover a maximum of fifty-five percent of an

\textsuperscript{186} CAL. UNEMP. INS. CODE § 3301 (West 2009). The PFL was enacted October 11, 2003, to establish a temporary family disability insurance program that provides:

\textsuperscript{187} Id. The PFL simply extended the pre-existing statutory scheme for short-term disability insurance (SDI), which was originally limited to the sickness or illness of the employee, to a broader scheme whereby an employee could take partially paid leave, funded by SDI, to care for a seriously ill family member or to bond with a new child. Thus, PFL made it easier for employees to take off work by ensuring payment of benefits under the SDI program.

\textsuperscript{188} 29 U.S.C. § 2612 (2009).

\textsuperscript{189} CAL. GOV'T CODE § 12945(a) (West 2009).

\textsuperscript{190} Id. § 12945.2.
employee's salary with a maximum weekly benefit of $959.00 in 2009. The maximum benefit will increase automatically each year in accordance with increases in the state's average weekly wage. The PFL created a right, which did not previously exist, for employees of small employers (those with less than fifty employees) to take time off work. The drawback of the PFL is that it does not provide a statutory right to reinstatement, and thus does not provide a job-guaranteed leave. Nonetheless, this law has served as the model for other states, including the recently passed paid leave law in New Jersey.

The PFL, with its paid leave and broad coverage, reflects years of advocacy. Dozens of California community-based organizations, policy makers, and advocates worked together to strategize about the need for paid family leave and other initiatives that would help employees grapple with the competing demands of work and family, creating a state-wide coalition in 2001. Many members had worked together over a twenty-five year period in some capacity on the CFRA, its regulations and outreach, and on training unions and workers across California. The work to achieve the PFL provides an example of how coalitions form and strive to achieve a result that many advocates only dreamt might happen.

Senator Sheila Kuehl, with her committed legislative aide, Jennifer Richards, and Rona Sherriff from the Senate Office on Research, worked closely with the California Labor Federation. Governor Gray Davis signed the PFL amid a torrent of dire predictions from the employer community that such a benefit would bankrupt California's State Disability Insurance Program. These predictions proved to be false.

Following passage of the PFL, the Legal Aid Society-Employment Law Center, the Labor Project for Working Families, Equal Rights Advocates, Inc., and the Asian Law Caucus formalized their collective efforts on work and

---


192. PAID FAMILY LEAVE COLLECTIVE, PAID FAMILY LEAVE FACT SHEET #1: TEN QUICK FACTS (2008), available at http://www.paidfamilyleave.org/pdf/1_ten_quick_facts.pdf. The Paid Family Leave Collaborative, which includes the Legal Aid Society-Employment Law Center, the Labor Project for Working Project Families, Equal Rights Advocates, Inc., and the California Women's Law Center, created the fact sheet. The Asian Law Caucus was also a founding member. The Paid Family Leave website includes updates on California's efforts to pass Paid Sick Days legislation, as well as a brief history of the Collaborative's work to pass California's Paid Leave Law. The Collaborative is part of a broader coalition, the Paid Leave Coalition, whose members are identified. See Paid Family Leave, http://www.paidfamilyleave.org (last visited Feb. 24, 2009), Netsy Firestein, Executive Director of the Labor Project for Working Families, and Irma Herrera, Executive Director of Equal Rights Advocates, Inc., serve with Patricia Shiu as the leadership for the Paid Leave Collaborative.


family issues and formed the Paid Family Leave Collaborative. The California Women’s Law Center joined soon thereafter. Working closely with members of the PFL Coalition, the PFL Collaborative endeavored to implement the legislative priorities established by the PFL Coalition. The Collaborative conducts the day-to-day work of enforcing the law by providing training sessions, individualized advice and counseling, legal representation, and outreach to unions, community-based organizations, and others. Client concerns animate the Collaborative’s work as clients educate lawyers about needed legislative amendments to ensure the law best serves low-income workers and their families.

D. Expanding Protections for Workers: Tasks Remaining

California legislators have made numerous attempts to expand the coverage and protections under the CFRA as well as the PFL. For example, in 2000 Senate Bill 1149 attempted to decrease the 1,250 hours and one year of employment requirements under the CFRA in order to cover seasonal and migrant workers. It also clarified the medical certification process so that both employers and employees would understand its purpose and utilize it properly. Senate Bill 727 sought to expand the definition of “family member” under the Paid Family Leave Law to include siblings and grandparents in order to more accurately reflect the variety of family structures in California beyond the traditional nuclear family. These legislative efforts, which reflect the issues and barriers that the working class and the working poor have experienced in trying to access leave, will continue. The Collaborative and the Coalition will strive to assess, reassess, and redefine goals for extending leave based largely on the needs of workers.

Introduced by Assembly Member Fiona Ma on February 22, 2008, the “Healthy Families, Healthy Workplaces Act,” Assembly Bill 2716, provides that employees who work at least seven days per year will accrue one hour of paid sick leave for every thirty hours worked. Employees who work for small employers with ten or fewer employees may use up to a maximum of forty hours of accrued paid sick leave, five days per calendar year, ninety days after employment commences. Similarly, employees who work for other employers may accrue a maximum of seventy-two hours of paid sick time and may use a maximum of nine days per calendar year. Subject to these

197. A.B. 2716, 2007-2008 Leg., Reg. Sess. (Cal. 2008). In relevant part, this bill would establish a minimum rate of accrual for sick days at no less than one hour for every thirty hours worked. Sick days may be used, without discrimination or retaliation, for the diagnosis, care, or treatment of health conditions of the employee or an employee’s family member. The accrued sick days may also be used for leave related to domestic violence or sexual assault.
limitations, paid sick leave may be carried over to the following year, but employees are not entitled to payment for any unused paid sick leave upon their separation from employment.

Those employers who already provide paid sick time equivalent to that provided by this bill are not required to provide any additional paid sick leave. The bill stipulated that upon the oral or written request of an employee, an employer shall provide paid sick leave for (1) the diagnosis, care or treatment of an existing health condition of the employee or a family member, or preventative care for the employee’s own health condition or that of a family member or (2) leave related to domestic violence or assault. Although approved by the Senate Labor Committee, A.B. 2716 failed in the Senate Appropriations Committee. However, advocates will reintroduce it in 2009.198 This proposed legislation prohibits retaliation against an employee for asserting rights and includes a private right of action for retaliation.

Modeled after a San Francisco ordinance that voters passed in 2006, which required that employer provide paid sick leave to its employees, A.B. 2716 is yet another example of how the movement for workers’ rights to leave and accommodation in California continues to flourish.199

VII. REFLECTIONS ON LESSONS LEARNED

An interchange between Thomas Stoddard200 and Nan Hunter201 provides a chance to consider the role of legal change in shifting culture and social practice. Stoddard and Hunter debate about effective strategies in movements for social justice. Stoddard had viewed New Zealand as a utopia for gay and lesbian rights.202 But he found when he visited the country that, although it had enacted formal legal rules, the society lacked a transformative consciousness.203 The absence of cultural transformation in the context of the presence of

---

199. The workers’ rights movement for leave and accommodation is not unlike the California movement to outlaw fetal protection policies and provide workers with practical options for working with hazardous, toxic, and carcinogenic substances in the workplace. Since outlawing fetal protection policies was only the first step in protecting the health and safety of workers, that movement crafted very specific strategies designed to ensure that pregnant women who may be required to work with hazardous, toxic or carcinogenic substances could seek, inter alia, affirmative job protections such as job transfers, reassignments and/or temporary leaves of absence. See Caroline Bettinger-Lopez & Susan Sturm, International Union, U.A.W. v. Johnson Controls: The History of Litigation Alliances and Mobilization to Challenge Fetal Protection Policies, in CIVIL RIGHTS STORIES 211-42 (Myriam Gilles & Risa Goluboff eds., 2007).
203. Id. at 969-70.
progressive formal rules prompted Stoddard to reflect on the interconnection of law and culture as well as the use of law for social change.\textsuperscript{204}

Stoddard views the traditional role of law as the formal rulemaking function for society, including the creation of new rights and remedies for victims and the alteration of the conduct of government, citizen, and private entities. But in addition to rulemaking, law can provide a culture shifting function by expressing a new moral ideal or standard and by changing cultural attitudes and patterns.\textsuperscript{205} Stoddard cites the Civil Rights Act of 1964 as the paradigm of legal reform proposed to make social change, believing it was particularly effective coming from the democratic process as a congressional enactment, rather than a pronouncement by a court or philosopher king.\textsuperscript{206}

Stoddard offers four factors that enable rule-shifting to become culture-shifting: (1) a change that is very broad or profound; (2) public awareness of that change; (3) a general sense of the legitimacy (or validity) of the change; and (4) overall continuous enforcement of the change.\textsuperscript{207} He concludes with a plea for social justice advocates seeking effective change to return to legislatures, connect with the public, and pay more attention to the process that generates desired new rules.\textsuperscript{208}

Nan Hunter criticizes Stoddard’s emphasis on legislatures, believing that “the single most common and powerful activity within social change lawyering has become the use of litigation to secure enforcement and expansive interpretation of statutes.”\textsuperscript{209} She singles out Stoddard’s implicit belief that social change can be achieved by majoritarian tactics.\textsuperscript{210} She views this assumption as particularly provocative in the area of gay and lesbian equality.\textsuperscript{211}

Hunter urges using all areas of lawyering as vehicles for mobilization and not requiring a choice between litigating and lobbying. She also cites public engagement as the key missing element in Stoddard’s characterization of ingredients necessary for culture-shifting. Her discussion of rewards for repeat players in both the judicial and legislative arenas echoes Marc Galanter’s comments about the need to strengthen the ability of clients, constituencies, or

\textsuperscript{204} Id.
\textsuperscript{205} Id. at 973.
\textsuperscript{206} Id. at 985.
\textsuperscript{207} Id. at 978.
\textsuperscript{208} Id.
\textsuperscript{209} Hunter, \textit{supra} note 201, at 1012.
\textsuperscript{210} Id.
\textsuperscript{211} Id. Nan Hunter’s skepticism of achieving goals of change through majority mobilization is particularly prescient in this era when Proposition 8, a voter-passed initiative which appeared on the November 4, 2008, ballot in California, overturned the constitutional right of same-sex couples to marry. \textit{See}, e.g., Bob Egelko & John Wildermuth, \textit{Prop. 8 Foes Concede Defeat, Vow to Fight On; Gay Rights Groups Have Challenged the Victory in Court}, S.F. CHRON., Nov. 7, 2008, at B1; Jesse McKinley & Laurie Goodstein, \textit{Bans in 3 States on Gay Marriage}, N.Y. TIMES, Nov. 6, 2008, at A1.
groups to be more effective in the repeat player role. Finally, Hunter emphasizes the need to link to non-law defined groups in the struggle for social change.

Hunter and Stoddard suggest mechanisms for transforming society. What light does the struggle for change over leave policies shed on this debate about social change and how it happens? Both litigation and legislation have been central components in this struggle. These mechanisms may not always be within the control of the proponents or advocates for progressive change; such was the situation in Cal. Fed., where the defendant, not the plaintiff, filed an action for declaratory relief, setting the stage for the Supreme Court litigation. Some goals may be more amenable to legislative action than to litigation, as illustrated by the passage of several landmark worker-friendly leave laws in California, where an empathetic legislature was committed to workers’ rights. Yet litigation and the changed consciousness that the publicity surrounding Cal. Fed. engendered also played an important role.

Analyzing this movement for job-protected, paid leave yields several observations. First, in a democracy a movement’s goal should be formulated in a way that gives voice to those who are not often participants in decision-making. Democracy and democratic movements should maximize the participation of all members of society. How can a movement ensure that the fundamental needs and interests of those with the least political power and access become integrated into the process of defining the goal and its success? The needs and interests of women like Lillian Garland and the fictitious Diane Benson ought to be at the forefront of the litigation strategy in the Cal. Fed. case or the movement for leave in California. A democratic participation lens would be helpful to any goal considerations.

Second, “words matter” in how a movement defines its goals. To define the PDL debate as one involving “special treatment” versus “equal treatment”
connoted a culturally-based preference for an outcome labeled “equality.” But if the concept of “equal” did not include or address the socio-economic status, race, immigration status, and protected classes to which many women belonged, then the definition of “equal” reflected the reality of only some women while excluding others. This term also seemed to be unduly focused on the comparison to men or the male model, making it even more attenuated. The term “special” failed, however, to bring within the fold other protected statuses that also comprise a woman’s identity, like race and class, that were particularly relevant in Lillian Garland’s case. Noticing how strategies impact identity categories like race or class, in addition to gender, might clarify goals.

Third, consider why California’s well-established jurisprudence on disability law did not play a more prominent role in determining the outcome in Cal. Fed. Is it perhaps because Ms. Garland was relegated to filing an amicus curiae brief in her own case before the Supreme Court? The Ninth Circuit’s refusal to allow Ms. Garland to participate as a party in her own case—with all of the access and power that only a party to litigation possesses—circumscribed her “day in court” and deprived her of the opportunity to articulate, other than as an amicus, the disastrous effect Cal. Fed.’s policy had on her life and her child’s. Just as movements should seek to include multiple voices, decisionmakers and policy creators should attend to voices from the bottom.

Finally, in defining a strategy for achieving success, it is vital to assess whose interests will be promoted more quickly and whose interests may be compromised. Recognizing the strengths and limitations of various short-term and long-term strategies and their effect on specific communities is critical. Only when a movement acknowledges whose interests will become paramount, secondary, tertiary, and remote when implementing a particular strategy, can it actually grapple with the available choices. These choices may be limited and less comprehensive choices than preferred, but choices remain nonetheless. A movement must make conscious decisions about what is feasible, for whom, and why.

---

219. See MACKINNON, supra note 117, at 36.
221. Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (suggesting that those who have experienced discrimination “speak with a special voice” that provides a valuable resource to legal scholars and philosophers for understanding the law and defining the elements of justice).
222. See Carolyn Lochhead, House OKs Contested Rights Bill for Gays, S.F. CHRON., Nov. 8, 2007, at A1 (“The Employment Non-Discrimination Act would ban job discrimination against gays, lesbians and bisexuals, but not against transgender people. . . . [D]ropping transgender people from the anti-discrimination bill, known as ENDA, enraged gay leaders and tore apart the gay community.”); see, e.g., Editorial, An Overdue Step for Equal Justice, N.Y. TIMES, Nov. 9, 2007, at A26 (supporting ENDA despite its exclusion of discrimination based on “gender identity,” which would have protected transgender individuals, because “[t]hroughout American history, civil rights have been achieved in
The movement in California for the PDL as well as family and medical leave under the California Family Rights Act, and later the Victims of Domestic Violence and Employment Leave Act, which secured unpaid leave for survivors of domestic violence, initially did not contain any provision for paid leave, an important and essential element for working class and working poor women without which the leave remained out of reach. It is likely that no such bill would have been introduced because it would have gone too far too soon and needed to be built up slowly. When the legislature introduced the CFRA, it appeared that the bill would pass only if it provided unpaid leave and only if it applied to large employers with fifty or more employees. The obstacles were clear to Assembly Member Moore and Senator Roberti, but they decided to press forward with a bill that was more limited in scope rather than forego an incremental step in advancing the concept of family and medical leave.

Being receptive to continuously revising strategies as circumstances arose, while devising alternate strategies during the constant struggle to assess, reassess, and modify approaches, typifies the progression of social change movements. A movement may even redefine goals to reach them, but in new and different ways than previously contemplated. From the outset, seemingly insurmountable challenges to providing paid leave via the PDL, CFRA, and FMLA mounted. But without income protection how could the working poor avail themselves of job-protected leave? While state temporary disability insurance benefits provided some income protection, the absence of paid leave was and continues to be a barrier for those who cannot take leave because they cannot forego their income. In 2004, California's Paid Leave Law provided an extension of state temporary disability benefits for employees who care for seriously ill family members. Yet it still does not contain an express right to job-guaranteed leave, meaning that those who take this leave can presumably, although not necessarily, be lawfully terminated, with no apparent legal recourse under this statute's language. Advancing a legislative strategy requires acknowledging its limitations, while nonetheless gaining the support of most, if
not all, stakeholders. Embracing visionary goals for an inclusive society demands recognition that political limitations exist.

Advancing broader job-protected, paid leave goals requires coalition-building among diverse communities.\textsuperscript{226} Voices from all walks of life must be affirmatively sought and heard. For example, the Paid Family Leave Coalition includes a wide array of more than seventy organizations representing various communities ranging from the Older Women’s League to the California Labor Federation.\textsuperscript{227} Coalition members can educate each other about the issues with which each community struggles; define and explore common ground; and, most importantly, communicate in ways that further identify and refine common goals and common measures of success. These coalition practices play an important role in setting the political, legislative, and litigation strategy. At the core, it is the clients—the workers and their families—whose voices must be heard in defining goals and how such goals might be achieved.

In examining the struggle for job-protected, paid leave, it is helpful to look at other workers’ rights movements. Existing laws (particularly in places like California that have demonstrated a commitment to workers’ rights) and the coalitions that made those laws possible may provide guidance. One successful strategy may already exist and be modified, enabling a coalition to advance social change with an informed approach. For example, California advocates modeled Assembly Bill 2716, a state paid sick day bill, after the San Francisco city ordinance providing paid sick days. State advocates conferred with the San Francisco ordinance advocates on their analysis, strategy, and language.\textsuperscript{228}

Ruth Bader Ginsburg, reflecting in 1989 on the ACLU Women’s Rights Project Supreme Court agenda, urged that feminist litigators progress from courts to legislatures to complete the work of equality for women. “If women were dominant in our legislatures, what would their program be?”, she asked.\textsuperscript{229} “Would they put through laws granting leave singularly to pregnant workers, with a guaranteed right to return to the job?”\textsuperscript{230} Or, she mused, would they shelter others within the ambit of legislation giving both women and men time to care for “a seriously ill child, spouse, elderly parent or self?”\textsuperscript{231} She concluded that such legislation was not an impossible dream.\textsuperscript{232} California has partially enacted that dream, with the bigger dream of job-protected, paid leave still in the legislative hopper. Future movements will likely be evaluated by

\begin{itemize}
\item \textsuperscript{227} See Paid Family Leave, http://www.paidfamilyleave.org (last visited March 10, 2009).
\item \textsuperscript{228} Telephone Interviews with Sharon Terman, Staff Attorney, LAS-ELC, Patricia A. Shiu, Assembly Member Fiona Ma legislative staff, Nick Hardeman, and Greg Asay who was involved in drafting the San Francisco Paid Sick Days Ordinance (Jan. 27 & 29, 2008).
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Id.
\item \textsuperscript{232} Id.
\end{itemize}
benchmarks like those of the California movement such as inclusiveness, outreach, effectiveness of coalition, and worker benefits gained. Vision and hope lie at the foundation for any workers' rights movement. Hope, tempered by a healthy dose of reality, remains the underpinning for any movement for change.  
