FEMINIST JUDGMENTS AND WOMEN'S RIGHTS AT WORK

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The history of the law's treatment of working women is largely a history of the law's treatment of women's bodies. Overwhelmingly created by male judges, that jurisprudence considers women from a remove—their physicality, their reproductive capacity, their stature, their sexuality—eclipsing meaningful consideration of their lived experience, on or off the job. As vividly illustrated by so many of the alternative rulings contained in *Feminist Judgments*,[1] that erasure resulted in Supreme Court decisions that—even when they came out the "right" way, that is, in favor of the female litigant—squandered opportunities for advancing sex equality.

The tantalizing notion of "what might have been" is much of the pleasure in reading this collection, of course. But the book's overarching thought experiment also offers invaluable lessons to today's practitioners, myself included, who must tell clients' stories. Long before we get the opportunity to tell those stories to juries—itself an increasingly rare occurrence[2]—we must tell those stories to judges who themselves may be years, even decades, away from "real" jobs, and who have remained isolated from the realities of working women's lives.

Women's capacity for pregnancy always has been the primary driver of their inequality, especially on the job. As *Feminist Judgments* makes plain, it is that physical fact—or more accurately, that physical *difference* from male bodies—that has preoccupied legislatures, employers, and the Court and has impeded women's full status as workers. The "special treatment" approach to women's reproductive capacity has cut both ways, neither of them advantageous to women. The 1908 decision in *Muller v. Oregon*,[3] in which the Court upheld a state law limiting the

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1 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

2 *See, e.g.*, John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

3 208 U.S. 412 (1908).

number of hours women could work in laundries or factories to ten hours a day, epitomizes this catch-22. As Andrea Doneff's introductory remarks explain, legislation limiting women's hours was intended by pro-labor forces as an "entering wedge" in the fight for humane working conditions, which had been dealt a blow three years earlier in *Lochner v. New York*,[4] when the Court invalidated a similar, gender-neutral law governing bakery employees.[5] But the reasoning employed by the Court to uphold Oregon's statute rested not on consideration of women's freedom to contract, or a finding that the distinct dangers of laundry work warranted special regulation, both of which principles underpinned the result in *Lochner*.[6] Rather, the *Muller* Court relied on society's collective purported interest in protecting female laborers' wombs: "[A]s healthy mothers are essential to vigorous offspring," opined the Court, "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[7]

The imaginary dissent written by Pamela Laufer-Ukeles takes the majority to task for ignoring the extent to which, for large swaths of female workers, the "benefit" accorded by the Oregon law actually posed a significant "burden."[8] Specifically:

> While the individual who would benefit immediately if my dissent became law is the male employer who can be said to be taking advantage of working women by employing them for an exorbitant number of hours, the majority opinion hurts all women in the long run by demeaning them in the eyes of the law and impeding the momentum of the law and history towards recognizing women's intellectual equality and significant ability to contribute to the work force.[9]

Moreover, she observes, the statute did nothing to assist the women who needed such safety regulations most—namely, women who were *actually* pregnant, rather than merely potentially so.[10] (In this way, Laufer-Ukeles foreshadows the contemporary finding by the Court in *Young v. United Parcel Service, Inc.*[11] that, under the Pregnancy Discrimination Act employers must "accommodate" pregnant workers needing job modifications on the same basis as they do other workers "similar in their ability or inability to work."[12]) And even more fundamentally, writes Laufer-Ukeles, by embracing a women-only approach to occupational health, the majority missed an opportunity to situate women within a universalized approach to work and well-being that would have avoided the benefit-burden conundrum altogether:

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4 198 U.S. 45 (1905).

5 Andrea Doneff, *Commentary on* Muller v. Oregon, *in* FEMINIST JUDGMENTS, *supra* note 1, at 78, 80.

6 198 U.S. at 64.

7 208 U.S. at 421. Of course, it is plain to which race the Court was referring; the law's centuries-long indifference to the toll of the brutal labor extracted from women of color speaks for itself.

8 Pamela Laufer-Ukeles, *Rewritten Opinion in* Muller v. Oregon, *in* FEMINIST JUDGMENTS, *supra* note 1, at 83, 91–93.

9 *Id.* at 96.

10 *Id.* at 92.

11 Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).

12 *Id.* at 1359 (quoting 42 U.S.C. § 2000e(k) (2012)).

> [B]oth men and women are vulnerable and need protection at various times in their lives . . . . [M]en and women both become ill, suffer from overwork and stress, suffer from loss and physical and emotional challenges over their lifetimes . . . . [R]ecogniz[ing] and protect[ing] against such vulnerabilities is constitutionally justified by the state for the purpose of protecting its citizens' health and well-being and is certainly not arbitrary.[13]

Where *Muller* failed in assuming that only women needed "protection" from toxic workplaces—and that among women, *all* anticipated becoming mothers—the Court's decision nearly seventy years later in *Geduldig v. Aiello*[14] failed for the opposite reason: it assumed that the male body was the baseline for measuring equal treatment under California's temporary disability benefits program. It further evinced willful blindness to the very real incapacity posed by childbirth, and the very real economic harm effected by excluding new mothers from the program. As the Court infamously concluded, the California scheme passed muster because "[t]here is no risk from which men are protected and women are not," and "there is no risk from which women are protected and men are not."[15] One can only draw the conclusion that *Muller*'s singling pregnancy out for "protection" paved the way for *Geduldig*'s singling it out for detriment. Under either frame, it is *sui generis*, a "plus" factor to be added to or subtracted from any given regulatory scheme.

Indeed, as Maya Manian observes, what should have mattered was "the effect of pregnancy exclusions," not merely "the risks covered."[16] Lucinda Finley's alt-opinion rights this schematic wrong. "The question whether the exclusion of pregnancy-related disabilities leaves women similarly situated to men cannot be answered by facile resort to the uniqueness of pregnancy," she writes.[17] "It must be answered solely with reference to the purpose of the program, not to the nature of the underlying risk or cause of the temporary disability."[18] (That program, in the California legislature's words, was "to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom"[19]—criteria plainly qualifying those recovering from childbirth.) Finley goes on to situate the exclusion of pregnancy benefits within historical context: "An equality doctrine that implicitly says that women can claim equality only insofar as they are just like men is an impoverished concept of equality, unable to protect women from the disadvantages they have long suffered because of sex role stereotypes often based on their biological, reproductive 'uniqueness.'"[20]

Stereotypes, Finley contends, also underpinned the state's insistence that covering pregnancy leaves would be too expensive—namely, the stereotypes that,

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13 Laufer-Ukeles, *supra* note 8, at 95–96.

14 417 U.S. 484 (1974).

15 *Id.* at 496−97.

16 Maya Manian, *Commentary on* Geduldig v. Aiello, *in* FEMINIST JUDGMENTS, *supra* note 1, at 185, 188.

17 Lucinda M. Finley, *Rewritten Opinion in* Geduldig v. Aiello, *in* FEMINIST JUDGMENTS, *supra* note 1, at 190, 196.

18 *Id.*

19 *Id.* at 192 (quoting CAL. UNEMP. INS. CODE § 2601 (West 2018)).

20 Finley, *supra* note 17, at 198.

on the spectrum of physical impairments, childbirth is distinctly debilitating, and on the spectrum of beneficiaries of the program, new mothers were especially prone to abuse its benefits.[21] "The exclusion reflects the idea that women are mothers first, and workers second," she explains.[22] "This ideological belief assumes that most women will, and should, leave the workforce when they have children."[23] Rather, the economic reality for most working women—and indeed, for the four original plaintiffs in the case, all of whom were the sole or primary breadwinners in their households—supported, rather than undermined, their rightful inclusion in the California program.

The perniciousness of sex stereotypes, and their power to shape employers' notions of who is an ideal worker, were on full display in the Court's 1977 decision in *Dothard v. Rawlinson*.[24] On the one hand, the Court's ruling was a progressive one in that it rejected Alabama's height and weight thresholds for prison guards, which in combination posed an insurmountable barrier to most female applicants; the state, concluded the justices, had adduced no evidence to show that those thresholds, and their disparate impact on women, were justified by "business necessity," in that there were no data reflecting that bigger prison guards made better prison guards.[25] Yet, maddeningly, when the Court turned to consideration of the state Board of Corrections' ban on women serving in maximum security prisons that put them in direct contact with inmates, it ignored the ample factual record put forward by Kim Rawlinson's attorneys—which confirmed that women around the country were succeeding in maximum security facilities—and found Alabama's rule was justified by Title VII's bona fide occupational qualification (BFOQ) exception.[26] Despite recognizing that the statute banned "stereotyped characterizations of the sexes," the Court nevertheless resorted to just such preconceptions about male inmates' propensity for sexual assault in finding women per se unqualified to be correctional officers.[27]

In her concurring and dissenting opinion, Maria Ontiveros calls out the majority for its paternalism.[28] The Court has, she observes, decided for women what risks they may assume. Indeed, by accepting the assumption that female guards are more susceptible to sexual assault than male guards are to physical assault generally, the Court constructs a no-win proposition: the woman's *very body* poses a risk. (As Judson Locke, the Commissioner of the Board of Corrections, had put it in his deposition, "[The female guard] is a sex object."[29]) In addition to "reinforc[ing] the subordination of women, in general, and of female workers in particular," says Ontiveros, the Court's analysis is further infected by twin blind spots: racism—in

21 *Id.* at 205–06.

22 *Id.* at 206.

23 *Id.*

24 433 U.S. 321 (1977).

25 *Id.* at 328–31.

26 *See id.* at 336–37.

27 *Id.* at 333, 335–36.

28 Maria L. Ontiveros, *Rewritten Opinion in* Dothard v. Rawlinson, *in* FEMINIST JUDGMENTS, *supra* note 1, at 213, 213–27.

29 Brief for the Appellees at 53, Dothard v. Rawlinson, 433 U.S. 321 (1977) (No. 76-422), 1977 WL 189473, at *53 (brief filed *sub nom. Dothard v. Mieth*).

deeming the "jungle-like" environment of Alabama prisons singularly unfit for women—and ignorance, in framing sexual assault as a crime of passion, not violence.[30]

As satisfying as Ontiveros's methodical puncturing of the majority's BFOQ decision is, however, I found myself even more compelled by her critique of its business necessity analysis with respect to the disparate impact claim. While applauding the majority for concluding that Alabama had failed to produce any evidence that height and weight correlated with the state's stated job criterion of "strength," Ontiveros's imagined concurrence goes one step further: Who decided that "strength" made a better prison guard, anyway? That criterion was itself based on a stereotype, and its resulting disparate impact demanded further probing inquiry. Ontiveros further questions the extent to which the carceral state has deformed the qualifications deemed a "necessity" to the "business" of running a prison:

> In this case . . . the employer has chosen to operate its prison with inadequate staffing and facilities. It has chosen not to classify or segregate its population by type of offense or level of dangerousness . . . . It has also designed prisons in a dormitory style and incorporated extensive farming operations that it argues require a large number of strip searches.[31]

Indeed, Ontiveros notes, employers make all sorts of choices that dictate what makes the "ideal worker," among them, the standards of performance that it will reward and the structure of its workplace operations, like scheduling procedures.[32] As a glimpse at the top ranks of virtually any field will tell you, that worker is a man.

It is deep dives like this one that make *Feminist Judgments* such a rewarding endeavor. The gendered nature of work is a Jenga-like construct of assumptions, stereotypes, and anachronistic traditions. It is built on notions of what jobs women's bodies are capable of, and judgments about what they are not. Reimagining how the Court could have, and should have, untangled these puzzles reminds us that our best legal arguments arise from asking "why?"—or better yet, "why not?"—and answering those questions with our clients' stories.

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30 Ontiveros, *supra* note 28, at 223.

31 *Id.* at 217.

32 *Id.* at 216–17.