Hastings Law Journal

Volume 43 | Issue 4 Article 12

1-1992

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by
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Introduction

Attorneys often view academic perspectives on law as excessively "theoretical"—discounting legal theory as abstract and irrelevant to the practice of law. Certainly, theory can be abstract and irrelevant, but in some measure this resistance to theory derives from an unnecessarily limited understanding of the "theoretical." That limited understanding is encouraged by an academic focus on doctrine, that is, abstract legal rules divorced both from the context of how they are used by attorneys and how they work—or don't work—in practice, and also from any but the most superficial explanations for those rules based on history, philosophy, economics, anthropology, or other academic disciplines.

The following case study analyzes an aspect of the theory-practice relationship as it played out in one case, suggesting that, when broadly understood, theory is both critical to and inevitably intertwined with the representation of clients in law practice.

I. Theory/Practice Relationships: Feminist Theory and Legal Change

A broad view of legal theory is that it encompasses any effort to think about, struggle with, and shed light on the intractable problems of

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The analysis developed in this case study was generated in litigation on behalf of Ms. H undertaken by the University of Washington Civil Law Clinic, for which I was the supervising attorney. Although the litigation was resolved on other grounds, the substantive law issue is likely to recur. Thanks to Doug Barrett, Karen Charvet, Rob Lopez, and Nona Skumanich for their work in representing Ms. H; and to Janet Ainsworth, Jane Ellis and Rachel Paschel for thoughtful comments on an earlier draft of this case study.

our time. A doctrinal approach, by contrast, operates in a middle level of abstraction, neither practical nor truly theoretical, in the sense of attempting to provide explanations or insight into the multiplicity of lives that we lead.[1]

At the most basic level, theory can refer to any attempt to generalize from experience. In this sense, the process of linking language to events virtually always can be described as one implicating theory.[2] Even three-year-olds engage in theory as they attempt to learn about the world,[3] and all attorneys engage in theory, however unreflective or unsophisticated. At a second level, we engage in theory when we attempt to critique or challenge those initial generalizations and assumptions.[4] A third, and in some academic circles dominant, view is that theory consists of detached and objective explanations for the world—generalizations from which we deduce the appropriate response in particular cases.[5]

The concept of legal practice is equally complex, including activities ranging from interacting with clients and legal institutions to developing legal strategies and arguments. Thus, theories about legal practice can be directed at understanding the ways in which acting the role of the lawyer restricts the lawyer's freedom in relating to both clients and legal institutions,[6] the effects on the lawyer-client relationship of different approaches

1. I claim no originality for this analysis, having heard it as a law student from Duncan Kennedy.

2. The recent literature on the role of metaphor in language illustrates how the use of a particular category to name experience has major implications for the way we understand that experience. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980); GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987). My two favorite examples are the contention that our understanding of argument is structured by the *Argument is War* metaphor and the contention that problems are more profitably viewed as *Chemical* solutions than as *Puzzles*. LAKOFF & JOHNSON, *supra* at 61-65, 143-45.

3. At the Theoretics of Practice conference, Bob Dinerstein told a story that illustrates this point wonderfully. Bob told us that he is a coffee drinker; his wife drinks tea. After a dinner party attended by two family friends, a male/female couple, Bob's three-year-old son asked, "Daddy, is Leslie a man or a woman?" Somewhat surprised by the question, Bob said, "She's a woman." "Is she a special kind of woman?" asked Bob's son dubiously. Finally, Bob said "Why do you ask?" to which little Michael replied "But she drinks coffee after dinner . . . whenever you and mommie finish dinner you always have coffee and mommie always has tea."

4. I take this to be the view of theory articulated by Phyllis Goldfarb in her article, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991).

5. *See, e.g.*, Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987), *reprinted in* DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989) *critiqued in* Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990).

6. *See, e.g.*, Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992) (exploring the long-term nature of a style of

to lawyering skills,[7] the implications of gender differences for lawyering,[8] and the ways in which new legal arguments can be developed with the assistance of critical social theories that change our understanding of the world.[9]

The difficulty in sorting out the different meanings of the terms theory and practice helps explain why calls to integrate theory and practice are often accompanied by expressions of concern that theory should not become too remote from practice. To the extent that theory implies Grand Theory deductively applied, or even abstract doctrine deductively applied, such theory often seems impervious to correction by reference to reality. Even efforts made at the second level of theory to challenge our underlying assumptions become ossified and pejoratively "theoretical," unless we treat our generalizations merely as working hypotheses and constantly revisit seemingly settled issues as the world changes around us.

This case study addresses but one of the many intersections between theory and practice: the way in which a legal practitioner can recognize the potential for new legal arguments through a familiarity with feminist theory's insights concerning the gendered effects of our legal institutions.

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lawyering that empowers clients, and the institutional and ethical limits which hamper implementation of such a practice); Dianne L. Martin, Organizing for Change: A Community Law Response to Police Misconduct, Presentation at Theoretics of Practice Conference (Feb. 1, 1992) (tape on file with the *Hastings Law Journal*) (arguing for collaborative community initiative to combat the problem of police racism and sexism in Toronto); Nancy Polikoff, Am I My Client: A Lesbian Activist Lawyer Represents Gay and Lesbian Activists, Presentation at Theoretics of Practice Conference (Jan. 31, 1992) (tape on file with the *Hastings Law Journal*) (exploring role definition issues that arise when a lawyer who identifies as part of a movement represents others in that movement).

7. *See, e.g.*, Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991 (1992) (arguing that the positive judgment latent in empathy may be used more effectively by lawyers to express approval of client feelings).

8. Naomi Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992) (exploring issues concerning the identification of male and female styles of lawyering); Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L.J. 1071 (1992) (arguing that feminist transformation of lawyering must be based on contextual reform rather than stylistic change).

9. *See, e.g.*, Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992) (arguing for refiguring of the role of the "bad mother" from object to subject within family law and other practices); Margaret Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992) (discussing deconstruction of institutional practices that foster division between roles and resistance to "boundary-drawing" which discourages empathy and coalition); *cf.* Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992) (arguing that concrete clinical experience can usefully change the perspectives of social theory); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992) (stressing the dangers of imposing on poverty law practice theoretical insights that are not grounded in the concrete).

The case studied here is by no means unique. Rather, it provides an "everyday" illustration of a process that underlies a wide range of legal change during recent decades. That process reflects a constant interaction between feminist theory and legal practice.

The feminist movement was founded on consciousness raising—an attempt to move from concrete personal experience to broader theoretical insights into the political implications of everyday experience.[10] Because of that foundation, many feminists contest the validity of the dichotomies that traditionally characterize Western thought,[11] including the dichotomy between theory and practice.[12] Not surprisingly, therefore, many leading feminist theoreticians also have been actively involved in feminist legal practice—whether developing strategies for new legal claims,[13] writing amicus briefs,[14] or representing individual women.

Sustained theoretical attention to questions of gender, as well as the legal response to difference generally, has accompanied the increase in women entering legal academia during the past decade and a half.[15] A

10. Catharine MacKinnon describes consciousness raising as the epistemological underpinning of feminist method. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83-87 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY]; *see* Katharine T. Bartlett, *Feminist Legal Methods,* 103 HARV. L. REV. 829 (1990); Goldfarb, *supra* note 4, at 1599.

11. On the role of dichotomies in Western thought, see ROBERTO UNGER, KNOWLEDGE AND POLITICS (1977). Frances Olsen analyzes three feminist options for challenging these dichotomies in *Feminism and Critical Legal Theory: An American Perspective,* 18 INT'L J. SOC. L. 199 (1990).

12. *See, e.g.,* Goldfarb, *supra* note 4, 1601 & nn.3, 6.

13. Catharine MacKinnon is widely credited for developing sexual harassment as a legal concept. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). More recently, she codrafted an ordinance enacted in Minneapolis, Minnesota, Indianapolis, Indiana, and Bellingham, Washington that provides civil remedies for victims of pornography. Elizabeth Schneider played a leading role in developing the "battered woman syndrome" defense in criminal cases. See also Ruth Colker, *The Practice/Theory Dilemma: Personal Reflections on the Louisiana Abortion Case,* 43 HASTINGS L.J. 1195 (1992), for an account of using the alternative legal strategy of equal protection arguments in abortion cases.

14. For example, Christine Littleton helped draft the Brief *Amicus Curiae* for the Coalition for Reproductive Equality in the Workplace in California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 274 (1987). Catharine MacKinnon wrote briefs defending the Indianapolis pornography civil rights ordinance, American Booksellers v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd,* 475 U.S. 1001, *reh'g denied,* 475 U.S. 1332 (1986); Sylvia Law co-authored a Seventh Circuit amicus brief opposing the ordinance, Brief *Amicus Curiae* of Feminist Censorship Task Force et al., *Hudnut,* 771 F.2d at 323. Martha Minow co-authored a Supreme Court amicus brief on behalf of a number of groups, including the American Jewish Congress, in Webster v. Reproductive Health Services, 492 U.S. 490 (1989). The *Webster* brief has been widely cited for its use of narratives from multiple perspectives.

15. A small sample of the growing literature includes: MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 10; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); MARTHA MINOW, MAKING ALL THE DIFFERENCE:

new generation of theorists has struggled with the inadequacies of equal protection and discrimination analysis, traditionally premised on the norm of formal equality,[16] to recognize or remedy the real inequalities in women's lives.[17] At the same time practitioners have fought for legal change in such areas as fetal protection polices, maternity or parental leave policies, sexual harassment, the legal response to pornography, and the battered woman syndrome defense.

The unemployment compensation case of Ms. H, handled by interns at the University of Washington Law School's Civil Law Clinic,[18] provides a classic illustration of this theory/practice interaction. Feminist theory's efforts to name or rename the social world helped Ms. H's representatives transform their understanding of social life and develop legal theories based on that new understanding.

In Ms. H's case, the Clinic challenged a policy of the Employment Security Department that limited benefits to individuals seeking full-time work (the "full-time work rule"). The Clinic built its legal strategy on two key insights of feminist jurisprudence. The first is that our current legal system often affects women differently, and less favorably, than men, and especially disadvantages the majority of women whose lives are

INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Herma Hill Kay, *Models of Equality,* 1985 U. ILL. L. REV. 39; Sylvia A. Law, *Rethinking Sex and the Constitution,* 132 U. PA. L. REV. 955 (1984); Christine A. Littleton, *Reconstructing Sexual Equality,* 75 CAL. L. REV. 1279 (1987); Joan C. Williams, *Deconstructing Gender,* 87 MICH. L. REV. 797 (1989); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate,* 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

16. Discussions of equality typically contrast formal equality and substantive equality. Under a regime of formal equality, often misleadingly named equal opportunity, all individuals are subjected to the same laws, even though the laws may affect them differently. The classic example comes from Anatole France: "[T]he majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread . . . ." THE RED LILY, *cited in* EUGENE C. GERHART, QUOTE IT II: A DICTIONARY OF MEMORABLE LEGAL QUOTATIONS 224-25 (1989). Substantive equality, by contrast, is concerned with equality of result.

17. *See, e.g.,* Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law,* 89 COLUM. L. REV. 264, 276 (1989) (structural discrimination in the social security system results in "less effective old-age financial security to typical women than to typical men"); Mary E. Becker, *Prince Charming: Abstract Equality,* 1987 SUP. CT. REV. 201 (arguing that general standards of formal equality disadvantage women); sources cited *infra* at notes 34-40.

18. The University of Washington Civil Law Clinic is a law school-based program in which students have an opportunity to represent clients as part of a law school course. The students have primary responsibility for cases, while working in teams of two under the supervision of experienced attorneys. The Clinic handles about thirty unemployment compensation hearings a year on referral from the Unemployment Law Project, a small nonprofit agency in Seattle that specializes exclusively in such cases.

significantly affected by their roles as mothers.[19] This understanding allowed us to question whether the full-time work rule had a differential impact on women and thus to identify a potential challenge to that rule.

The second insight is that the disfavored situation of women often results because laws implicitly have been structured to fit male life patterns—male norms[20] that are not stated as such, but are instead mistaken for the inevitable, natural state of being.[21] This insight provided a basis for contending that because the existing interpretation of the statute was based on such a male norm, a more inclusive understanding of work patterns could lead to an interpretation of the statute that accommodated both women's and men's experience.

II. The Washington Unemployment Compensation System and the Worklife of Women

As currently interpreted by the Washington Employment Security Department, the unemployment compensation system is structured to fit a worklife more typical of male than female workers.[22] In that typical worklife, a worker is employed full-time, without breaks except for periods of involuntary unemployment, needs the pay that accompanies full-time employment, and has no domestic responsibilities that limit the worker's availability for all shifts. In contrast, Ms. H, along with a significant portion of American women today, faces a quite different reality. Because the daily realities of adult work lives remain heavily gendered,

19. *See, e.g.*, Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1118-22 (1986); Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 57 (1979); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1325-28 (1983) [hereinafter Law, *Women, Work, Welfare*].

20. A central contention of feminist theory is that males are taken as the cultural norm around which the world revolves. Thus, work equipment ranging from jet cockpits to telephone pole climbing equipment have been sized to fit the typical male body; acceptable work behavior fits traditionally male expectations—for instance, while aggressiveness may be acceptable on the job, tears most certainly are not; and the possibility that workers might have child-care obligations is ignored in developing expectations about availability for work. *See generally* Frug, *supra* note 19, at 57 (discussing how women are handicapped by the structure of the labor market); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638 (1983); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1377 (1986) (arguing that the "abstract universality" approach underlying Supreme Court decisions reflects a male norm because it cannot account for difference).

21. *See* MINOW, *supra* note 15, at 70-74.

22. The lessons of the debate over "essentialism" among feminist theorists impel me to recognize that this typical worker does not always fit the worklife of all men, though as a group men fare much better than women. *Cf.* ELIZABETH V. SPELMAN, INESSENTIAL WOMAN (1988).

many women are significantly disadvantaged by the structure of the Washington unemployment compensation laws.

The following sections describe in more detail the structure of the Washington unemployment compensation statutes, the responsibilities faced by Ms. H, and the impact of the statutory scheme on Ms. H and the many women (and some men) with similar work and family lives.

A. The Washington Unemployment Compensation Scheme

A claimant seeking unemployment benefits in Washington must meet a series of requirements. First, the individual must have worked at a job covered by the unemployment insurance system for the equivalent of seventeen weeks of full-time work during the fifteen months before becoming unemployed and applying for benefits.[23] Second, the claimant must be unemployed in accordance with the statutory definition.[24] Third, the person must meet a series of basic eligibility conditions, including being "able to work, and . . . available for work in any . . . occupation . . . for which he or she is reasonably fitted," which means "ready, able, and willing, immediately to accept any suitable work."[25] Fourth, the individual must avoid disqualification from benefits under the statutory provisions that, among other things, deny benefits to claimants who voluntarily quit work,[26] are fired for misconduct,[27] or are on strike.[28]

Under this statutory scheme, a woman who works steadily at a part-time job, say for twenty hours per week, easily will meet the first requirement of having worked and paid into the system for the equivalent of seventeen full-time work weeks. Upon becoming unemployed, however, she will not qualify for benefits if she plans to continue working part-time and limits her job search to such work. This is because the Employment Security Department has interpreted Revised Code of Washington section 50.20.010(3), the statute requiring a claimant to be available for work, to mean that a claimant must be available for full-time work.[29]

23. WASH. REV. CODE ANN. § 50.04.030 (West 1990).

24. *Id.* § 50.04.310. The definition states:

> An individual shall be deemed to be "unemployed" in any week during which the individual performs no services and with respect to which no remuneration is payable to the individual, or in any week of less than full time work, if the remuneration payable to the individual with respect to such week is less than one and one-third times the individual's weekly benefit amount plus five dollars.

Id.

25. *Id.* § 50.20.010(3).

26. *Id.* § 50.20.050.

27. *Id.* § 50.20.060.

28. *Id.* § 50.20.090.

29. *In re* Hogan, Comm'r Dec. (1st) No. 951, at 1711 (Wash. Empl. Sec. Dep't Jan. 22,

The Department claims that by restricting her availability to part-time work, the worker materially and impermissibly restricts her availability for employment.[30]

The Department also considers domestic responsibilities an impermissible reason for the part-time worker to restrict her availability for employment. Although the statute does not explicitly state that a worker may not limit work availability based on her responsibilities at home, such a position is implicit in section 50.20.050, which provides that domestic responsibilities do not constitute good cause for voluntarily leaving employment.[31]

B. The Full-Time Work Requirement: Differential Impact on Women

The Clinic's opportunity to challenge these restrictions began, of course, with a client:[32] Ms. H. A single parent of a special needs child, Ms. H had worked part-time as an assembly line piece-worker making buttons used for political campaigns. The workload fluctuated and during a slow period before the December holidays, Ms. H's hours were reduced by more than a third. She continued working these reduced

1973) (denying benefits to medical technologist who was available only for part-time or temporary employment because, since the majority of medical technologists work forty hours per week, claimant was not willing to accept "*any* suitable employment").

30. Similarly, the Employment Security Department will deny benefits to a woman who has child-care responsibilities that prevent her from working a swing or graveyard shift in the evening or nighttime. The Department will consider these responsibilities a material and impermissible restriction on her availability for work. *In re* Yeoman, Comm'r Dec. (1st) No. 1200, at 2255 (Wash. Empl. Sec. Dep't Dec. 24, 1974) (denying benefits to claimant who limited her job search to exclude the graveyard or late evening shift because she needed to care for her ten-year-old son and alternative caretakers were unavailable; facts suggest that claimant may have quit prior job to escape an abusive husband); *In re* Wright, Comm'r Dec. (1st) No. 1173, at 2201 (Wash. Empl. Sec. Dep't Oct. 21, 1974) (denying benefits to woman who was unwilling to work afternoon and evening shift as cook, due to husband's disapproval and impact on her relationship with her daughters).

31. A person who leaves employment for this reason, however, is subject to a less onerous disqualification provision than one who leaves for other reasons. Section 50.20.050(4) provides that a person who leaves work for domestic reasons is disqualified for ten weeks or until she earns wages equivalent to the weekly benefit amount for five weeks. WASH. REV. CODE ANN. § 50.20.050(4) (West 1990). An individual disqualified for misconduct may requalify only by meeting the five weeks of earnings requirement. *Id.* § 50.20.060(1).

32. Before we encountered Ms. H, the Director of the Unemployment Law Project had already mentioned that the Washington Employment Security Department was interpreting its statutes to disqualify unemployed workers who were not available for all shifts. We were aware that the Washington unemployment compensation system did not provide benefits for workers whose availability for work might be subject to restrictions, and we had already handled a hearing for Mr. T, a male student who wanted to work as a waiter at night. Having litigated cases raising feminist issues, and having taught a course on feminist theory, I was particularly interested in the implications of those restrictions for women.

hours, but applied for unemployment compensation benefits and began looking for other, more stable, part-time employment. During the process of applying for unemployment benefits, Ms. H explained to the Employment Security Department that she was not seeking full-time employment and was not available to work full-time. As justification for this decision, Ms. H referred to pending judicial proceedings concerning residential care[33] of her son, in which a Family Law Commissioner had suggested that the son's needs could not be met adequately if the parents were both working full-time. The Department denied Ms. H's application for benefits on the ground that she was not "available for work."

The two Clinic interns initially assigned to the case began their challenge to the full-time work requirement by pursuing the feminist insight that the law often works a differential, negative impact on women. The students quickly gathered data to support our (fairly obvious) intuition that such a process was at work here.

That research demonstrated that the Department's full-time work requirement has a differential, negative impact on women for three related reasons. First, women continue to bear significantly greater domestic responsibilities than men for both child-care and caring for elderly relatives.[34] Second, as a consequence of their greater domestic responsibilities, far more women than men work part-time.[35] Third, part-time workers fare significantly worse financially than full-time workers.[36] The availability of part-time employment has increased primarily in the lower paying sectors that traditionally hire women.[37] Part-time workers also suffer higher levels of involuntary unemployment.[38]

Because women currently are more likely to work part-time and to need to work part-time, a policy that disqualifies part-time workers from receiving unemployment compensation benefits unless they are available for full-time work disadvantages women. And that disproportionate ef-

33. The Washington legislature has rejected the conventional custody/visitation terminology for proceedings involving parental access to their children in favor of the phrase "residential time" and a procedure involving the preparation of "parenting plans." WASH. REV. CODE ANN. §§ 26.09.181-26.09.187 (West 1990).

34. *See* ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989).

35. Women make up approximately 41% of the total work force, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, VOL. 38 EMPLOYMENT AND EARNINGS, tbl. A-9, at 26 (1991), but women hold 67% of the part-time jobs, *id.* tbls. A-9, A-30, A-31, at 26, 43-44. Approximately 18% of all jobs are part-time. *Id.*

36. Diana M. Pearce, *Toil and Trouble: Women Workers and Unemployment Compensation*, 11 SIGNS 439, 447 (1985).

37. *Id.* at 444-45.

38. *Id.* at 447.

fect magnifies the disadvantages inherent in a context in which women earn lower wages than men,[39] have a lower standard of living than men after divorce,[40] and make up a disproportionate percentage of the American poor.[41]

III. Feminist Theory and the Full-Time Work Requirement: Unmasking the Male Norm

Recognizing and demonstrating that the Department's "full-time work" requirement differentially affects women was not too difficult. The next step—challenging the Department's anticipated defense of the requirement—was not as easy. That step required recognizing and unmasking the male norm underlying the unemployment compensation statutes.

The Department's argument—that a claimant who seeks only part-time employment materially limits her availability for work—initially seems well-founded. The policy is not based on an explicitly gender-based classification,[42] and it seems justified by the ways in which part-time workers differ from full-time workers. A worker who is available only for part-time work presumably decreases the pool of jobs for which he or she might qualify, and consequently increases the likelihood of extended unemployment.

One could argue, however, that the old saw applies here: What's good for the goose is good for the gander. If the part-time worker must be available for full-time work in order to increase the pool of jobs for which she will qualify, why not apply the same analysis to full-time workers? Full-time workers would also have more job opportunities if they were required to be available for part-time work. I suspect most readers would view such a requirement as ridiculous, and, indeed, the

39. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NO. 111, STATISTICAL ABSTRACT OF THE UNITED STATES, MEDIAN EARNINGS OF WORKERS BY WORK EXPERIENCE AND SEX: 1977, at 415 (1991); *see also* Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1179-80 (1988) (citing statistics). *Compare* Gene Koretz, *Economic Trends*, BUS. WK., Dec. 24, 1990, at 14 (economist June O'Neil's work indicates a sudden marked narrowing of the wage gap between women and men), *with* SUSAN FALUDI, BACKLASH: THE WAR ON AMERICAN WOMEN 363-65 (1990) (critiquing claims that the wage gap has narrowed).

40. LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 337-40, 355-56 (1985).

41. GREG J. DUNCAN, YEARS OF POVERTY, YEARS OF PLENTY 48-52 (1984); Diana Pearce, *The Feminization of Poverty: Women, Work, and Welfare*, 11 URB. & SOC. CHANGE REV. 28, 28 (1978).

42. As a doctrinal matter, gender based classifications are potentially subject to challenge under the Equal Protection Clause, but a challenge to a facially neutral classification must show intentional discrimination, not simply discriminatory impact. Washington v. Davis, 426 U.S. 229, 238-39 (1976).

Department does not extend this apparently logical requirement to the would-be full-time worker. Such workers are permitted to look only for full-time work. Why?

Underlying the Department's full-time requirement is a classic, unstated male norm: that of the male "head-of-household," whose primary domestic responsibility consists of providing economic support to a wife and children. The unemployment compensation system was enacted in response to unprecedented levels of unemployment among such males during the Great Depression of the 1930s.[43] As "primary wage earners" with wives at home to handle the domestic responsibilities, those men wanted and needed full-time work.

In Washington, the need of the male norm worker for full-time work is implicitly accommodated under the availability requirement of Revised Code of Washington section 50.20.010(3).[44] Under that statute claimants are required only to be available to accept "suitable" work. In practice, however, a worker seeking full-time work is not required also to seek part-time work. Though never articulated, the logic is apparently as follows: The typical full-time worker (male or female) requires full-time work for self-support and, often, to support additional family members. Part-time work will not be sufficient to pay the bills, or at least will be insufficient to support the desired lifestyle. For such workers, therefore, part-time work does not constitute "suitable" work because it conflicts with their economic needs.[45]

Yet the need for full-time work can be conceptualized as a "domestic" need or responsibility, as well as an "economic" need. The traditional family responsibilities of women are viewed as "domestic," and the corresponding family responsibilities of men as "economic," because of a "separate spheres" ideology and practice in the white middle class during

43. Or, more precisely, the system responded to unemployment among white males. Unemployment among other men, especially blacks, has been approximately double that of white males going back at least to 1948. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, series D 87-101, at 135 (1976). The experience of the past several decades suggests that extraordinary levels of unemployment among black males does not necessarily generate a significant governmental response.

44. *See supra* note 29 and accompanying text. I say "implicitly" because, as with most male norms, the issue is never raised. To my knowledge, no statute, regulation, or case states that a worker must seek only full-time work, and not part-time work. This requirement is simply one of the background assumptions of the unemployment compensation program.

45. Another unstated norm, of course, underlies the assumption that full-time work is required to accommodate the economic needs of the male-norm worker. That norm, derived from the U.S. standard of living, arises from our assumptions about how much money is "needed" to support a family.

the nineteenth and early twentieth centuries.[46] The separate spheres ideology allocates the world of work to males and the world of family and home to females.[47] Once we recognize that the male norm worker's need for full-time work is a domestic need and that the unemployment compensation statute implicitly accommodates that domestic need, we can make a similar "suitability" argument on behalf of part-time workers. For workers who have heavy child-care, elder-care, or other domestic responsibilities,[48] full-time work is not suitable work because it conflicts with their need to satisfy domestic obligations.

The ultimate question is not whether workers seeking only full-time, or only part-time, work limit their availability for work. Of course they do. Nor is the question whether male norm workers seeking only full-time work and part-time workers with child-care duties limit their availability for employment based on "domestic responsibilities." Clearly they do. Rather, within the framework of the unemployment compensation system,[49] the question is whether such limitations should place the workers beyond the purview of the unemployment compensation system—a system that provides benefits only to individuals who are genuinely attached to the labor market. Within that framework, it makes sense to require that a worker be available for a wide enough range of job openings that she has a reasonable chance of obtaining a job. Such a requirement, however, need not encompass a full-time work rule.[50]

IV. So Where Does That Get Us?

Applying the insights of feminist theory provided an opportunity for a classic "Aha!" reaction. The feminist insight that unstated male norms

46. CAROL HYMOWITZ & MICHAELE WEISSMAN, A HISTORY OF WOMEN IN AMERICA 64-75 (1978); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform,* 96 HARV. L. REV. 1497 (1983).

47. Wives might be expected to work to support themselves, which is happening to a significant extent in this culture. Even children might be expected to work at a much younger age than is common today. I make this observation not as a normative point, but merely to support the claim that the male norm worker's need for full-time work should not be characterized as economic, while the woman's need for part-time work is treated as domestic.

48. For simplicity's sake, I will refer only to child-care responsibilities for the remainder of the discussion.

49. The basic framework of the unemployment compensation system can itself be challenged as failing to accommodate the needs of many women. *See* Law, *Women, Work, Welfare, supra* note 19, at 1282-318; Pearce, *supra* note 36, at 447.

50. An unemployed worker will be more likely to find employment if the number of jobs available equals or exceeds the number of applicants. Depending on the state of the economy, the pool of unfilled jobs in either the full-time or part-time category may be either great or limited. The fact that a worker limits a job search to either category of jobs does not by itself say anything about the worker's chances of employment.

often underlie statutes that disadvantage women allowed us to say, "Hey, I see what's going on here," by providing a conceptual framework for recognizing and naming the way the unemployment compensation statute operates. From this understanding, we could then develop a traditional combination of statutory and constitutional arguments. Our primary contention was that the existing statute could be interpreted to authorize benefits for individuals who were seeking part-time work. We hoped to make that argument more palatable by highlighting constitutional problems with the Department's "full-time work" rule.[51] Given developments in constitutional equal protection doctrine, an effort to mount a federal challenge to the state statute would have been problematic because we were forced to rely on the statute's differential impact on women.[52] Fortunately, Washington state law, although unsettled on this point, leaves room for argument.[53]

As it happened, Ms. H won the first round of her case. But she did not win because the challenge outlined above was successful. Instead, and ironically, Ms. H benefited from a special statutory provision that is apparently targeted at one group of male norm workers—hourly paid individuals in industries subject to seasonal reductions in available work. The Washington statute provides that an individual is considered unemployed if working less than full-time and earning less than the payable weekly unemployment compensation benefit amount.[54] Department regulations permit such "partially unemployed individuals" to collect unemployment compensation benefits without requiring them to be

51. Federal law does not prohibit discrimination on the basis of sex in the operation of federally funded programs. *See* 42 U.S.C. § 2000d (1988). Nor do any Department of Labor regulations contain such a general prohibition. Thus, there appears to be no basis for challenging the state full-time work rule on the ground that it is inconsistent with nonconstitutional federal law.

52. In order to make out a federal constitutional equal protection claim, a plaintiff must show intentionally disparate treatment; disparate impact is not sufficient. Washington v. Davis, 426 U.S. 229, 238-39 (1976); Austin v. Berryman, 1992 U.S. App. LEXIS 951 (4th Cir. Jan. 28, 1992) (upholding provision of Virginia unemployment compensation statute against federal equal protection challenge based on disparate impact on women). Because no statutory prohibition against discrimination applies here, *see supra* note 51, we were not directly concerned with the extent to which the Supreme Court had undermined the availability of the disparate impact analysis in actions under Title VII of the Civil Rights Act of 1964, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656-58 (1989), actions subsequently modified by the enactment of the Civil Rights Act of 1990.

53. The state courts remain free to adopt a disparate impact analysis under state constitutional provisions. This course is by no means foreclosed under Washington case law. *See* Macias v. Dep't Labor & Indus., 100 Wash. 2d 263, 269, 668 P.2d 1278, 1282 (1983); Hanson v. Hutt, 83 Wash. 2d. 195, 202, 517 P.2d 599, 604 (1973).

54. *See supra* note 24.

"available" for other work.[55] Although the statute and regulations are not targeted at individuals who were employed part-time prior to a reduction in hours, they do not exclude such persons. Thus, because Ms. H was still employed part-time, she was eligible for benefits.

Ms. H's saga did not end there, however. Her employers were angry at her receipt of benefits and demanded that Ms. H quit or agree that she would not apply for unemployment benefits while she worked for their firm. She refused their condition. Now out of work, she again applied for unemployment compensation benefits. Predictably, she became embroiled in another hearing that considered both whether she voluntarily quit or was fired, and whether she was "available for work" given her restriction to part-time employment. The employer defaulted and an Administrative Law Judge ruled that full-time work did not constitute "suitable work" for Ms. H.[56]

Apart from the result in Ms. H's case, the broader problem is likely to remain, and we will face the choice of whether to pursue litigation, administrative change, a legislative strategy, or perhaps all of the above. In any event, the insights of feminist jurisprudence remain and may affect future cases.

Conclusion

Attorneys often discount legal theory as abstract and irrelevant to the practice of law, and indeed it can be. Good theory, however, has intrinsic, inspirational, and instrumental value. Thus, as illustrated by Ms. H's case, successful theory not only can help develop new categories and new strategies for thinking about old problems, but it also can help us recognize that "the way things are" is neither natural, necessary, nor in some cases desirable.

55. Section 192-12-150(4) provides that "A partially unemployed applicant for benefits who is attached to a regular job shall not be required to register for work in any week with respect to which he is partially unemployed . . . ." WASH. ADM. CODE § 192.12.150(4) (West 1990).

56. The Administrative Law Judge noted the line of decisions of the Employment Security Department Commission that disqualify claimants who restrict their eligibility for work because of childcare needs, *e.g.*, *In re* Yeoman, Comm'r Dec. (1st) No. 1200, at 2255 (Wash. Empl. Sec. Dep't Dec. 24, 1974), but found Ms. H's situation more analogous to that of a claimant who is unable to work more than five hours a day because of physical incapacity, *In re* Ashe, Comm'r Dec. (2d) No. 161, at 147 (Wash. Empl. Sec. Dep't Apr. 16, 1976).