It's Time To Fight

When the Supreme Court argues that G.E. is fair because it denies benefits to pregnant males and females alike, it gives new meaning to the symbol of blind justice.

By Jeff Greenfield

The Supreme Court may have done the women's movement a favor last week by deciding that working women aren't legally entitled to sick-pay benefits during pregnancy.

Yes, the decision is wrongheaded; yes, it's the worst court defeat for the movement in years; yes, it signals a weakening of the Title VII strategy, making it more difficult to use that part of the 1964 Civil Rights Act to attack sex discrimination.

But the very nature of the decision, and the unmistakable signal the court majority gave in the case, may force the movement to adopt a more frankly political strategy.

What makes the General Electric case so revealing is the aggressive posture of the Supreme Court. Usually, when we speak of "judicial conservatism," we mean a court which is reluctant to interfere with private or legislative decisions, or with the findings of lower courts.

For example, when the Roosevelt court of the late 1930s refused to strike down New Deal laws, it was acting judicially conservative, even though the results were "liberal." It was saying, in effect, "Congress has a lot of leeway in deciding what laws to make; we'll only step in if Congress acts in a clearly unconstitutional manner." Similarly, when the court refused to strike down sodomy laws, it did so because it said that state legislatures could reasonably conclude that "abnormal" behavior should be forbidden. (You may think this particular decision irrational, as I do, but it's a case of the court staying out of a dispute.)

In the pregnancy case, however, the court—whose six-man majority (gender identity intended) included all four of Nixon's appointees—seemed to go out of its way to decide that the federal anti-sex discrimination law did not require G.E. to pay sick-pay benefits for absences during pregnancy.

Consider: Not only did the Equal Employment Opportunity Commission find G.E.'s action discriminatory, but so did six different U.S. courts of appeal. Most important, the original federal trial court had found that discrimination against women was a "motivating factor" in G.E.'s policy. Since the Supreme Court rarely substitutes its judgment about facts for that of a lower court, this decision

But in the G.E. case, vasectomies and circumcisions *were* covered; indeed, men who underwent prostectomies and circumcisions were given much better benefits than women hospitalized during childbirth.

So what did the Supreme Court mean when it said that pregnancy is "significantly different from the typical covered disease or disability"? It meant that this condition is different because it only happens to a class of workers that we're not used to thinking of as "normal." If the American work force had been composed equally of women and men for the last 30 years, the question of pregnancy-related sick pay wouldn't be given a second thought. It's only because we're still capable of surprise when we hear "my riveter just had a baby" that the court can assert that pregnancy is an atypical condition for a worker.

Contempt for Parents

By excluding a worker from protection for a pregnancy-related illness (or by permitting an employer to do so), the Supreme Court has clearly made the life of the woman worker more difficult. Health plans are the most important fringe benefits imaginable in this age of $150-a-day hospital beds. This decision is an openly contemptuous response to the assertion that parenthood and gainful employment are compatible. It also manages to go Anatole France one better. When he said the law, in its majestic equality, forbids rich and poor alike from begging or sleeping under bridges, one could at least imagine an eccentric millionaire who enjoyed such pursuits. But when the Supreme Court argues that G.E. is fair because it denies benefits to pregnant males and females alike, it gives new meaning to the symbol of blind justice.

So what's the "favor" the Supreme Court has done the women's movement? It has reminded them that the effort to remake the workplace has to be fought as a clearly political struggle. For some time now, the Nixon court has been narrowing the reach of its decisions, and even access *into* the courts. It has made "class action" suits harder to hear, thus making it hard for consumers to band together against a common defrauder. It has closed courts to lawyers trying to assert citizens' rights against ecologically destructive projects. It has been telling us that it doesn't want the judicial system used to achieve social or

Consider: Not only did the Equal Employment Opportunity Commission find G.E.'s action discriminatory, but so did six different U.S. courts of appeal. Most important, the original federal trial court had found that discrimination against women was a "motivating factor" in G.E.'s policy. Since the Supreme Court rarely substitutes its judgment about facts for that of a lower court, this decision reflected a kind of judicial "activism" usually associated with the Earl Warren court. The court seemed almost eager to sweep aside the factual context of the case and the findings of the lower courts, in order to shrink the impact of Title VII of the Civil Rights Act.

Indeed, there is in this decision an almost explicit hostility to the presence of pregnant women in the workplace. It's possible, in theory at least, for a company health plan to exclude the absences of pregnant women without being discriminatory. Suppose a company covered all disabilities equally—prostate conditions and cervical difficulties—but said that no "voluntary" condition of either sex would be covered. Thus, circumcisions and vasectomies for men, pregnancy-related absences for women, would fall outside the plan. You might not want to work for such a company, but the argument of *discrimination* would be difficult to make.

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To those of us who saw the Warren court open a new path to the redress of grievances, when presidents, legislatures, and the Congress were paralyzed by inaction or hostility, this judicial climate isn't very comforting. But it's useful to recognize that any movement looking for redemption from Warren Burger and William Rehnquist is looking in the wrong place.

Not for the Courts

More important, the treatment of pregnant women in the workplace—and the way work is shaped and limited today—can't be left to even the most friendly courts. (It took a tortuous, even irrational decision to make abortion a constitutionally protected right, and there the Supreme Court was aided by the views of some of its members that

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abortion might reduce the number of children of the poor.) Whether sick-pay coverage during pregnancy is guaranteed under Title VII or not, the important point is that it *should* be the right of a pregnant worker. So should access to some kind of child care; so should flexible work hours; so should paternity leave for fathers.

And these rights shouldn't turn on whether we can define pregnancy as a disability. They should be based on the fact that it would make work fairer, more rewarding, more in keeping with a sense of fulfillment. If people can go home from work for two or three hours a day in Western Europe, why not here? If people can work 35 hours in three days, why not let them? Why must we build this rigid separation between a person as a worker, and a person as a human being?

Courts can't grant these rights, and they shouldn't be expected to find them lurking in the crevices of federal laws or the Constitution. They have to be won by people who will fight for them. They have to be won in collective bargaining, and that means making sure union leaders understand the work force they purport to represent. They have to be won in the Congress; they have to be won in the policies and experimental programs of a new president. They have to be won by a movement that can say, "Whatever the laws mean now, we want laws which reflect a better, more just way to live and to work."

By making it clear just how fragile and transient court-won rights can be, the Nixon court has forced us to look to more enduring sources of political justice. □