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**MEN MAY WORK FROM SUN TO SUN, BUT WOMEN'S WORK IS NEVER DONE:
INTERNATIONAL LAW AND THE REGULATION OF
WOMEN'S WORK AT NIGHT**

by Christine Haight Farley¹

Women workers in all countries require special treatment obviously because they need more protection than men in their working environment in view of their tenderness, sensitiveness and their influence in home including reproductive function and in bringing up future generations of the country.

--Labour Ministry of India²

INTRODUCTION

At the turn of the century in both the United States and in Europe, governments enacted special legislation to protect women from the most harmful aspects of industrialization. One such piece of protective legislation was the ban on the employment of women at night. Discovering that regulation of working hours had a negative effect on their competition in the world market, these western states looked to impose this standard internationally. Thus in 1919 the International Labor Organization enacted the Convention Concerning Employment of Women During the Night.

Although the "Night Work Convention" was revised in 1934 and 1948, both revisions were only responding to pressure from employers' groups to add flexibility to employ some women. It was not until the 1980s that the convention was seriously contested on the grounds that it is discriminatory to women. Responding to a movement originating in Europe, the convention was finally revised again in 1990. Based on recent evidence that night work is a serious health hazard, this new revision aims to protect both women and men from the harmful effects of night work.

By the time the International Labor Organization responded in 1990, many states had already denounced the previous conventions. It is unlikely that others will choose to ratify the newer convention as it would prohibit widespread use of shiftwork, the most economical form of labor. Given this trend, it must seriously be considered whether the former special legislation should be denounced or whether it has any use today.

For most Americans the only remarkable aspect of this account may be that it took so long for the convention to be denounced. However, a closer look at the American experience reveals that the issue is not that simple.

The American experience of protective legislation for women has been mixed and complicated. Almost from the beginning there has existed a fundamental tension between labor standards that protect the rights of working women and standards that promote equality of opportunity. This tension has been

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² LABOUR BUREAU MINISTRY OF LABOUR GOVERNMENT OF INDIA, WOMEN IN INDUSTRY 85 (1975).

debated among women since the earliest examples of protective statutes. Although regulation of women's work may have been enacted because of notions about women's place in society, and championed by labor unions because it protected men's jobs, women for the most part still supported these safeguards as a protection against a system of exploitation to which they were most vulnerable. It was not long, however, before many women concluded that these laws not only protected them from some lucrative and convenient employment,³ but also reinforced dangerous stereotypes about women's abilities. Even though most protective legislation in the United States was long ago repealed, the debate over whether these measures are helpful or harmful to women continues, especially in contexts in which men and women are not similarly situated. In such contexts, some feminists argue that women's social and biological differences should not be denied.

The tension between special treatment and equality is more pronounced in the developing world than it is in the West, where many of these issues have been resolved on the side of equality. In the West, the "emancipation" of women has rendered many protective statutes obsolete and discriminatory. It is therefore interesting to contrast the early twentieth century American experience with protective legislation for women against the current debate over protecting working women in the developing world. Women workers in the developing world, as western women were at the turn of the century, are reluctant to accept the removal of a safeguard until similar protection is provided by other means.

Women workers in the developing world are neither similarly situated to men in their country nor to women in the West. In developing countries where employers are often unfettered by regulations and trade unions are relatively weak, women fear that without protection, employers will be free to schedule women onto the night shift where the danger of harassment and sexual exploitation is great. Given the unequal status of women in developing countries and the extra exploitation they face, should the prohibition on night work be lifted for them?

Part I of this article will describe the history of the international ban on the employment of women at night. Part II will discuss the denunciation of the ban in Europe in favor of equal treatment. Parts III and IV address the International Labor Organization's recent attempt to protect both women and men from the harmful effects of night work. Part V will analyze the experience of working women with protective statutes in the United States. And finally, part VI of this article will look at the particular situation of women workers in the developing world and illustrate how formal equality overlooks the socially constructed nature of difference. Just as it may be unwise to treat women like men in all contexts, treating women in different cultural contexts alike may also be unwise.

I. THE HISTORY OF THE INTERNATIONAL BAN ON NIGHT WORK FOR WOMEN

Protective legislation reflects a "societal conceptualization of women as a group which either should not or cannot engage in specified activities."⁴ Protective statutes, therefore, may "serve to perpetuate the presumption of their general legal incapacity to make independent judgments."⁵

³ For instance, night work may be preferential for some women because it allows women to work hours that are more convenient for child rearing and is often better paid.

⁴ NATALIE KAUFMAN HEVENER, *INTERNATIONAL LAW AND THE STATUS OF WOMEN* 4 (1983).

⁵ *Id.* at 7. This type of legislation "implicitly accept[s] the traditional social definition of a woman as wife and mother. Under the protective approach, the identity of the woman who moves beyond the domestic sphere does not alter, and she continues to be treated by the law with regard to this primary role. The focus of the legislative attention is not on her actual activity but rather remains on her domestic role, and it is the perceived characteristics of this role that the law allegedly seeks to protect. Thus, when the sphere of her actual work involvement is viewed as being outside the normal domain of women, her presence may be seen as necessitating protection if her primary role is to be preserved. Since under this view, women are usually treated as subordinates when acting outside their traditional domestic sphere, protective laws may openly authorize permanent inferiority and thereby operate to maintain this subordinate status." *Id.* at 6. The view of women which informs such statutes is analogous to that of children. "Since women, like children, are considered unable to make intelligent, informed, and rational decisions about their own lives, they are subjected to the paternal power of the State, which seeks to protect them by completely proscribing or restricting their participation in certain areas of activity." *Id.* at 6-7.

The rationale advanced in defense of protective legislation is that society must protect the health, safety, and morality of women in order to ensure the welfare of the family unit. Presumably only women need this kind of protection. Men are assumed to have no family responsibilities in the home and to be capable of making rational decisions. "[T]hose men who are not physically or mentally equipped . . . are capable of making the individual judgment to refrain from work of this sort."⁶

In the 1890s and early 1900s many western countries enacted protective labor legislation which prohibited women from working at night and in dangerous occupations, and limited the number of hours they could work.⁷ Governments soon realized, however, that this type of legislation put them at a disadvantage in the international market and therefore sought international treaties. Initially, governments negotiated bilateral treaties to address these issues. However, at the turn of the century a series of international conferences were held⁸ which resulted in the first multinational agreement dealing with the prohibition of night work⁹ for women.¹⁰ Although World War I halted action on these conventions, they were placed on the agenda of the annual International Labor Organization conference held in 1919.

The International Labor Organization (ILO) is a United Nations specialized agency dedicated to the promotion of worker rights.¹¹ The ILO was created to bring governments, employers, and trade unions together to improve working conditions throughout the world.¹² The ILO utilizes international conventions and recommendations to set international labor standards.¹³

Although most ILO conventions apply to workers generally, some treat women as an identifiably separate group. These conventions provide insights into the conventional wisdom on particular problems regarding the treatment of women and make implicit assumptions about the role of women in society. One

⁶ *Id.* at 9.

⁷ CAROL RIEGELMAN LUBIN & ANNE WINSLOW, *SOCIAL JUSTICE FOR WOMEN 2* (1990).

⁸ In 1891 an international conference was convened to discuss a broad range of issues related to international labor legislation. *Id.* at 2-3. This conference prompted the International Congress on Labor Legislation which was held in 1897. *Id.* Three years later, the International Association for Labor Legislation was founded. *Id.* Under the aegis of this association, two major conferences were held. *Id.*

⁹ Work during the night may also be referred to as "shift work." "Shift work is popularly regarded as work in which employees 'shift' schedules on some regular basis from daytime to evening to nighttime." Peter Finn, *The Effects of Shift Work on the Lives of Employees*, 104 MONTHLY LAB. REV., Oct. 1981, at 31.

¹⁰ "In 1913 another technical conference drafted two new conventions, one limiting the hours of work for women and young persons, and the other prohibiting night work for young persons." LUBIN, *supra* note 7, at 2.

¹¹ *Id.* at 3. The International Labor Organization (ILO) was established in 1919 at the Paris Peace Conference, which formally ended the First World War. *Id.* The ILO is headquartered in Geneva, Switzerland.

¹² The tripartite structure of the ILO is unique among intergovernmental bodies and remains an integral part of its operation. *Id.* Not only does it provide for participation by governmental representatives, but it also provides for workers' and employers' organizations voting independently. *Id.* "Each member nation is authorized to have four delegates--two government and one each from employer and labor organizations, as well as one advisor for each delegate." *Id.*

¹³ "An annual tripartite International Labor Conference is the legislative organ. The Conference operates through a plenary and a series of committees . . . Depending on the circumstances, the Conference adopts conventions, recommendations, resolutions, or declarations." *Id.* at 4. These legislative acts collectively constitute the International Labor Code. *Id.* "Recommendations are adopted either when the subject matter is not suitable or opportune for a convention, or to complement a convention by administrative actions and detailed procedures that may be carried out by national or local governments . . . Resolutions are much more general, and may contain statements of objectives, requests for further study or conference action." *Id.* at 5. When there is enough support for formal action, and the subject matter is appropriate for national legislation, the conference may adopt a convention. ILO conventions, like treaties, are subject to ratification. ILO recommendations do not require ratification because they are intended to be guidelines on labor issues for domestic policy. Members who ratify conventions are obliged to bring their domestic legislation into conformity with the terms and provisions of the convention and to report annually on their progress. Even members who do not ratify are required to report what action they have taken or intend to take on the convention. Constitution of the International Labour Organization, Chapter II, Art. 19, cl. 7(iv). "A tripartite conference committee and an independent Committee of Experts monitor the observance by governments of the obligations they have undertaken . . . [O]rganizations of workers, of employers, or governments have the right to submit complaints which may lead to the dispatch of a commission of enquiry." LUBIN, *supra* note 7, at 4. The commission's report is then considered by the tripartite Governing Body, the executive organ of the ILO, and if no solution is found, the issue may be submitted to the International Court of Justice for an Advisory Opinion. *Id.* at 4-5.

way the ILO has sought to protect women workers from dangerous or harmful working conditions is by regulating the time and place of their work.¹⁴

A. *The Convention Concerning Employment of Women During the Night (1919)*

Protective action by the ILO has totally excluded women from at least one category of work: night work. This protective action by the ILO implies that the work concerned is undesirable for women. Rather than seeking to impose limits on night work generally, the ILO instead sought to totally forbid night work for given categories of workers, such as women.

The 1919 Convention Concerning Employment of Women During the Night¹⁵ was adopted to curb the exploitation of women workers by outlawing the night employment of women in public and private industry.¹⁶ Article 3 of the 1919 Convention provides that "[w]omen without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed."¹⁷

For those Member States who ratified this convention, and have not since denounced it, the convention is still in effect today and is binding on them.¹⁸

B. *Revisions of the 1919 Convention*

Unlike United Nations conventions, International Labor conventions may not be ratified subject to the reservations of member states. Therefore, in order to break down such barriers to ratification, the ILO has attempted to induce a greater number of states to become parties to conventions by revising those conventions to add more flexibility.¹⁹

In 1934, the General Conference requested a Conference Committee²⁰ to consider possible revisions of the 1919 Convention to give it greater flexibility. The first proposed revision sought to exempt women in higher posts from the Convention's terms.²¹ A new provision to exempt such women was

¹⁴ Similar to the blanket prohibition on night work is Convention No. 45, the Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds; originally drafted in 1935 and revised in 1946. Jun. 21, 1935, 40 U.N.T.S. 63 (entry into force May 30, 1937). Article 2 proclaims that "[n]o female, whatever her age, shall be employed on underground work in any mine." *Id.*

¹⁵ Nov. 28, 1919, 38 U.N.T.S. 67. Hereinafter the "Night Work Convention" or the "1919 Convention." The Convention Concerning Employment of Women During the Night of 1919 is formally referred to as Convention No. 4. For the purposes of this article, to make the conventions more easily identifiable for the reader, each Convention will be referred to by its year of adoption.

¹⁶ The original convention was adopted in 1919 by the General Conference of the ILO and came into force on June 13, 1921. Recommendation 13, Recommendation Concerning Night Work of Women in Agriculture was also adopted in 1921. International Labor Conference: Conventions and Recommendations (1919-1949), Geneva International Labor Office 46 (1949).

¹⁷ Convention Concerning Employment of Women During the Night, 1919, Art. 3.

¹⁸ A Member State may withdraw from a convention when it is revised or when changed social circumstances give grounds for doing so.

¹⁹ Approximately 40 international labor conventions have been revised. Theodor Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT'L L. 754, 773 n.100 (1982).

²⁰ Kerstin Hesselgren of Sweden was elected chair of the Night Work Committee, Julia Varley of Great Britain was the labor vice chair, Milena Atanatskovitch of Yugoslavia was the reporter. LUBIN, *supra* note 7, at 44-45.

²¹ The first movement to revise the Night Work Convention rallied to exempt women in higher posts from the terms of the Convention. Proposals for a revision to exempt women in higher posts were considered by the International Labor Conference during the Fifteenth Session in 1931. *Partial Revision of the Convention Concerning Employment of Women During the Night*, International Labour Conference, 18th Sess., Report VII, at 5 (1934). Eighteen women were members of the Committee which dealt with the proposed revision of the Convention of whom eleven were workers. LUBIN, *supra* note 7, at 40. Gabrielle Letellier was the reporter of the committee. *Id.* Gertude Hanna, secretary of the Confederation of German Trade Unions, served as vice chairman of the committee. *Id.* In the plenary session of the Conference, Kerstin Hesselgren of Sweden and Ms. Martindale of the United Kingdom spoke on behalf of the proposed revision. *Id.* The revision was approved by 54 to 43, but fell short of the two-thirds majority necessary for adoption. *Record of Proceedings*, International Labour Conference, 15th Session, Geneva: ILO (1931). The ILO then requested an Advisory Opinion from the Permanent Court of International

adopted by the Committee. The second revision involved a redefinition of "night" to facilitate further ratifications by broadening the possible work hours to allow the running of a two shift workday. The 1934 Convention,²² reflecting these two modifications, was overwhelmingly adopted by the Conference.²³

This revised convention does not supersede the original convention. Instead, Member States may elect to withdraw from the former convention and ratify the revised convention.

After World War II the need for a second revision was raised. Those who called for a revision were primarily concerned with providing a still more flexible definition of "night." Members felt it was necessary to allow for the growth of the double day-shift system. A Conference Committee considered suggestions and recommended that "night" be defined as the period between 10 p.m. to 7 a.m. with some qualifications.²⁴ In addition, the Committee recommended that the Convention further broaden the exemption for women in management positions by excluding all posts not requiring manual labor.²⁵ The proposed Convention also provided for the suspension of the treaty's terms in cases of emergency when justified by national interests.²⁶ Finally, the proposed Convention broadened the definition of industrial undertakings.²⁷ The 1948 Convention²⁸ was adopted by a majority of the General Conference.²⁹

Justice (now the International Court of Justice) to determine whether women in higher posts were covered by the 1919 Convention. INTERNATIONAL LABOR OFFICE, 1932 INTERNATIONAL SURVEY OF LEGAL DECISIONS ON LABOUR LAW 1 (1934). In November of 1932, the court established that women in such posts did fall under the Convention's terms. This determination provoked another consideration of the issue. *Id.*

²² June 19, 1934, 40 U.N.T.S. 33. The 1934 Convention is formally known as Convention No. 41.

²³ The 1934 Convention came into force on November 22, 1936.

²⁴ Namely, that work extend for eleven consecutive hours. Article 2 of the 1948 Convention, July 9, 1948, 81 U.N.T.S. 147, provides that:

For the purpose of this Convention the term 'night' signifies a period of at least eleven consecutive hours, including an interval prescribed by the competent authority of at least seven consecutive hours falling between ten o'clock in the evening and seven o'clock in the morning; the competent authority may prescribe different intervals for different areas, industries, undertakings or branches of industries or undertakings, but shall consult the employers' and workers' organisations concerned before prescribing an interval beginning after eleven o'clock in the evening.

Id.

²⁵ *Id.* at 152. Article 8 provides that "This Convention does not apply to--
(a) women holding responsible positions of a managerial or technical character; and
(b) women employed in health and welfare services who are not ordinarily engaged in manual work."

Id.

²⁶ *Id.* at 150. Article 5 (1) provides that "the prohibition of night work for women may be suspended by the government, after consultation with the employers' and workers' organisations concerned, when in case of serious emergency the national interest demands it." *Id.* This provision is interesting since it indicates that "women's need of protection was not deemed to be absolute." HEVENER, *supra* note 4, at 8. Interestingly, the willingness to cease worrying about women's various alleged incapacities for night work in times of national emergency allows for some skepticism about the 'protective' assumptions and intentions of the drafters of this type of law. See Note: *Night Work Laws*, in B. BABCOCK, ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 470 (1975).

²⁷ 81 U.N.T.S. 147, *supra* note 24. Article 1 provides that

(1) For the purpose of this Convention, the term 'industrial undertaking' includes particularly--

- (a) mines, quarries, and other works for the extraction of minerals from the earth;
- (b) undertakings in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed, including undertakings engaged in shipbuilding or in the generation, transformation or transmission of electricity or motive power of any kind;
- (c) undertakings engaged in building and civil engineering work, including constructional, repair, maintenance, alteration and demolition work.

(2) The competent authority shall define the line of division which separates industry from agriculture, commerce and other non-industrial occupations.

Id.

²⁸ 81 U.N.T.S. 147, *supra* note 24. The 1948 Convention, No. 89, is formally referred to as the Convention Concerning Night Work of Women Employed in Industry.

²⁹ 81 U.N.T.S. 147, *supra* note 24. The 1948 Convention was entered into force February 27, 1951, twelve months

II. DENUNCIATION OF THE NIGHT WORK CONVENTIONS IN EUROPE

Throughout history, the need to protect women by restricting their night work has been the subject of considerable debate. One of the first attacks on the protective legislation model as epitomized by the Night Work Convention was made by Betzy Kjelsberg of Norway during the International Labor Conference in Washington, D.C. in 1919. She opposed such legislation stating:

I am against special protective laws for women, except pregnant women and women nursing children one year of age because I believe that we are furthering the cause of good labor laws most by working toward the prohibition of all absolutely unnecessary night work. It is hard to see old worn out men and young boys in the most critical period of development work during the night. Many accidents take place in the middle of the night when the workers are most tired.³⁰

Kjelsberg was among the first to articulate the opposition to protective legislation for women in the ILO, and she was revolutionary in recommending that night work should be prohibited for both men and women.

More recently, women's groups have urged denunciation of the Night Work Conventions on the grounds that they are incompatible with gender equality.³¹ The principle of equality between the sexes is proclaimed in the ILO Convention on Discrimination in Respect of Employment and Occupation and Recommendation of 1958.³² The 1958 Convention defines discrimination as "any distinction, exclusion or preference [on any of the grounds specified] which has the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation."³³ Furthermore, the Declaration and Resolution on Equality of Opportunity and Treatment states that there shall be equality of opportunity and treatment for all workers, and that all forms of discrimination on the grounds of sex which deny or restrict such equality are unacceptable and must be eliminated.³⁴

In 1987, the Council of European Communities adopted a directive to implement the principle of equal rights for men and women, and called for the revision or abolishment of all conflicting laws and regulations. Among those laws was the international prohibition of night work for women "with the introduction of a general improvement in working conditions including, if possible, a reduction in night work."³⁵

As a state ratifying the Night Work Convention, France enacted implementing legislation banning night work for women in industry. Thereafter, a case arose involving a company which allowed women to work at night. The case was removed to the European Court of Justice (ECJ). In a 1991 ruling, the ECJ held that the French law prohibiting night work for women is incompatible with the 1976 European Council directive³⁶ upholding equality between men and women.³⁷ Interestingly though, the ECJ stated that some prohibitions on women's night work would be allowed considering the important state interest in protecting women.³⁸ A similar dispute also arose in Germany where in 1992, the highest German court ruled that all

after the registration of ratification by two Members, in accordance with Article 14. *Id.*

³⁰ International Labor Conference, RECORD OF PROCEEDINGS 103 (1919).

³¹ For instance, the Convention on the Elimination of All Forms of Discrimination Against Women, ("The Women's Convention"), mandates in Article 11 the equality of work opportunities: "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women the same rights, in particular . . . [t]he right to the same employment opportunities." G.A. Res. 34/180, U.N. Doc A/Res/34/180 (1980).

³² June 15, 1960, 362 U.N.T.S. 31. This Convention was entered into force June 15, 1960 and has 11 ratifications. *Id.*

³³ *Id.* The 1958 Convention is formally referred to as Convention No. 111.

³⁴ See LUBIN, *supra* note 7, at 114-15.

³⁵ International Labor Conference, 76th Session, REPORT V (I) NIGHT WORK, FIFTH ITEM ON THE AGENDA, Geneva: ILO (1989).

³⁶ Council Directive 76/207, 1976 O.J. (L 39/40).

³⁷ *Ministere Public et Direction du Travail et de L'emploi v. Levy*, C-158/91.

³⁸ See *European Community Cannot Ban Night Work For Women*, *Court Rules*, 9 EMPLOYEE REL. WKLY. (BNA) Aug. 5, 1991, at 856.

women must be able to work nights and both male and female night workers must receive better health protection.³⁹

The seeming incompatibility of the Night Work Conventions with principles of equality has provoked their widespread denunciation, and has prevented some states from ratifying the Night Work Conventions. Many Member States have indicated that their reason for denouncing the Night Work Conventions was that the Conventions were discriminatory to women.⁴⁰ To date, fifteen countries have denounced the 1948 Convention,⁴¹ including all EEC member states who had previously ratified.⁴² In fact, denunciations of the Night Work Conventions and other conventions concerning special protections for women account for more than half of all denunciations of ILO conventions.⁴³ At the 1983 International Labour Conference, the Nordic countries observed that the recent denunciations of the Conventions on the night work of women indicated acceptance by other countries of their position that such special standards for women were no longer desirable.⁴⁴ Across Europe, the consensus from women's organizations was "that women, as men's equals, have a right to the extra jobs provided by night work, and to the extra money paid for night work."⁴⁵

III. THE 1990 REVISION OF THE NIGHT WORK CONVENTION

The two revisions in 1934 and 1948 both were attempts to provide the 1919 Night Work Convention with greater flexibility to enable wider ratification. Neither revision, however, addressed the inherent problems in sex-based protections. In fact, the ILO has historically been reluctant to repeal protective standards for women in order to promote equality.⁴⁶ However, due to international attention, and perhaps responding to the expanding number of women entering the labor force worldwide, the ILO again sought revision of the 1948 Night Work Convention--this time to address its discriminatory foundation.

³⁹ See *Bern Won't Ratify ILO Agreement*, BUS. INT'L, Mar. 16, 1992; A. C. Evans, *European Community Law: Prohibition on Night Work; Compatibility with EEC Treaty*, 11 INDUS. L.J. 199, 201 (1982).

⁴⁰ Comments made at the 183rd Session (1971) called for denunciations to include explanations of the need for denunciation. Kelvin Widdows, *The Denunciation of International Labour Conventions*, 33 INT'L & COMP. L.Q. 1052, 1053-57 (1984). During the 184th Session, the Governing Body unanimously adopted a recommendation by the Committee that reasons be included. *Id.* Ireland, Luxembourg, New Zealand, and Sri Lanka, among others, indicated that the denunciation was due to the fact that they now found the Convention to be discriminatory to women. *Id.*

⁴¹ All ILO conventions, as a matter of policy, contain a denunciation clause. *Id.* For instance, Article 15 of the 1948 Convention provides that

(1) A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

(2) Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this article.

81 U.N.T.S. 147, *supra* note 24, at 155-56.

⁴² See *Equality: EC Ends Sex Discrimination in Night Work*, EUROPE 2000-HUMAN RESOURCES, Apr. 1992. In addition, Malta, Cuba, the Netherlands, New Zealand, Ireland, Luxembourg, Uruguay, and Sri Lanka have denounced Convention No. 89. "Women: ILO Ban on Night Work Condemned by Signatories," *Inter. Press Svce.*, Mar. 2, 1992, available in LEXIS, Nexis Library, INPRES file.

⁴³ Widdows, *supra* note 40, at 1062.

⁴⁴ RECORD OF PROCEEDINGS, *supra* note 30 at 31/3.

⁴⁵ STRASBOURG: COUNCIL OF EUROPE, CO-ORDINATED RESEARCH FELLOWSHIPS IN THE SOCIAL FIELD, NIGHT WORK: COMPARATIVE STUDY OF LEGISLATION AND REGULATIONS, PROBLEMS AND SOCIAL REPERCUSSIONS 42 (1981).

⁴⁶ See Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT'L L. 151, 157 (1992).

Extensive discussions in the ILO and in the Governing Body on the question of night work led to a Tripartite Advisory Meeting on Night Work in Geneva in 1978.⁴⁷ At that time, however, there was not unanimity for adopting new standards.⁴⁸ Ten years later, the Committee on the Application of Conventions and Recommendations reported that employers' members and several government members were concerned over the "contradiction existing between special standards of protection and the principle of equality between women and men and considered that certain employment prohibitions had to be re-examined in the light of technical and medical progress."⁴⁹

The ILO Conference asked for a review of ILO's protective legislation in 1975 and again in 1985. Finally, in 1989, an expert committee was convened to consider the issue.⁵⁰ The committee's discussions revealed a consensus that, in a perfect world, these measures would be a barrier to women, but that in some developing countries these measures are necessary to protect women. The concerns discussed by the Committee on Night Work for Women expressed the tension between "protecting the special needs of women and achieving equality of employment between men and women."⁵¹

Mounting opposition to the 1948 Convention led the Governing Body to place on the 1989 Conference agenda the question of another revision.⁵² The Government members of Australia, Canada, Malta, and the United States, expressed the view that 1948 Convention was contrary to the principle of equality of opportunity and treatment between men and women.⁵³ These governments felt that, with the exception of maternity protection, general protective measures were incompatible with equality. The argument that in some circumstances it was necessary to protect women to establish equality of treatment appeared to the Canadian Government Member to be "condescending, paternalistic, and discriminatory."⁵⁴ In contrast, the Government Members of Egypt, India, and the USSR considered the 1948 Convention to be "valid and relevant."⁵⁵

Comments made during the 1990 Conference indicate a high degree of consensus between Member States, but with widely varying motivations.⁵⁶ Employers generally wanted the freedom to use women on night shifts, but couched their position in terms of a concern for equal opportunity. European employers have long maintained that any protection afforded women was "unnecessary" and wanted "all obstacles to employing women removed."⁵⁷ Employers also argued that the ban on women's night work hurt the international competitiveness of ratifying members. The United States, Canada, and a number of other developed countries frequently agreed with the employers, but on different grounds. They argued that since women now increasingly work in occupations previously dominated by men, women should be able to work at night.⁵⁸ Government Representatives from developing countries wanted enough flexibility to allow their governments to implement the proposals in accord with their own legal and administrative practices. The

⁴⁷ *Report of the Tripartite Advisory Meeting on Night Work*, Governing Body, 208th Session, Geneva, Doc. GB. 208/8/4 (25 Sept.-4 Oct. 1978).

⁴⁸ *WOMEN AT WORK* 30, No. 1 (1985).

⁴⁹ LUBIN, *supra* note 7, at 87.

⁵⁰ *Id.*

⁵¹ *Id.* at 89. "The committee comprised seventy-eight government members, fifty-four employer representatives, fifty-six worker representatives, balanced fairly equally with respect to sex." *Id.*

⁵² *Id.* at 87.

⁵³ *RECORD OF PROCEEDINGS*, *supra* note 30 at 26/4.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *ILO Adopts New Standards on Night Work, Hazardous Chemicals*, 113 *MONTHLY LAB. REV.* 52 (1990). Central to the 1990 Conference debate was the question of whether the new standards should be implemented through collective bargaining or legislation. The employers argued that any new standards should be implemented through collective agreements. Governments of the industrialized countries, particularly members of the European community, argued for greater reliance on collective agreements. Governments of the developing countries argued for legislatively enforced minimum standards. The workers feared that recourse to collective agreements, rather than through legislation, would weaken national enforcement. International Labor Conference, 76th session, REPORT V (I) NIGHT WORK, FIFTH ITEM ON THE AGENDA, Geneva: ILO (1989).

⁵⁷ *COUNCIL OF EUROPE*, *supra* note 45, at 42.

⁵⁸ LUBIN, *supra* note 7, at 88.

workers, on the other hand, sought to maintain adequate protective features, but argued for greater flexibility to allow women to adjust their work schedules to accommodate family needs. Workers' representatives argued that both women and men should be protected from harmful night work.

The Office report recommended the adoption of a protocol to give more flexibility to the revised Night Work Convention and the adoption of new standards in the form of a convention supplemented by a recommendation.⁵⁹ Such new instruments would apply to both genders. The 1990 Convention⁶⁰ entered into force on June 6, 1990.

The 1990 Convention is more flexible than the 1948 Convention and allows women and men to be employed at night with the following caveats. "Night" has been redefined as midnight to 5 a.m. It aims to improve conditions for both male and female night workers, but preserves the ban on women's night work during pregnancy. The 1990 Convention provides: (1) health monitoring--medical exams, advice, information on possible health consequences; (2) increased pay for unsocial hours; (3) maternity protection--alternative work or extension of leave up to 8 weeks before and after birth; and (4) the right to transfer to day work for medical reasons.

IV. BOTH WOMEN AND MEN NEED PROTECTION FROM NIGHT WORK

Recently, the United States Supreme Court reaffirmed the principle that protective legislation must succumb to equality of opportunity. In *United Auto Workers v. Johnson Controls, Inc.*⁶¹ an employer prohibited women workers of childbearing age from working with lead-based products.⁶² The Court held that the ban must be lifted because it discriminated on the basis of gender since it did not apply to male employees, despite strong evidence that these conditions were also harmful to men's reproductive system. This decision is consistent with the new ILO attitude expressed in the 1990 Night Work Convention. Both conclude that if something is detrimental to both men and women, both men and women should be protected.⁶³ This is no doubt a better response than mandating an equality where women should be allowed to work in unsafe conditions. The best response to reform of protective legislation for women is to extend protective legislation to apply to both men and women.

Non-discriminatory protective action is far preferable to a gender specific approach. The undesirable aspects of night work for all workers must be acknowledged and international efforts should be aimed at improved treatment and conditions for all workers regardless of sex. Non-discriminatory protective legislation would also create more opportunities for men to assume family responsibilities.

Night work presents serious health risks to workers--women and men. Studies show that night workers have more physical, psychic, and social difficulties than day workers.⁶⁴ The main problem is that

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Id.

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The 1990 Convention is formally referred to as Convention No. 171.

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499 U.S. 187 (1991).

⁶²

This policy was "entirely consistent with the ILO standards set forth in the 1919 Recommendation No. 4." *Compa, supra* note 46, at 158.

⁶³

For instance in Sweden all night work is prohibited for both women and men. COUNCIL OF EUROPE, *supra* note 45, at

38.

⁶⁴

Shiftworkers More Prone to Ill-Health and Errors, HEALTH & SAFETY INFO. BULL., May, 1992, at 6-7. Human biological rhythms become disturbed by night work. Body temperature, heart rate, blood pressure, deep and shallow breathing, and intestinal tract activity follow day and night cycles. COUNCIL OF EUROPE, *supra* note 45, at 37. One study concluded that: night work, whether regular or in rotating shifts, can cause permanent damage to the hypothalamus, leading to a psychosomatic illness in the form of either a neurotic syndrome or an ulcerous type of digestive syndrome. Carpentier-Cazamian, NIGHT WORK, Geneva: ILO (1977). Night work performed in rotating shifts may give rise, furthermore, to digestive disorders liable to develop on their own or in conjunction with psychosomatic illness. *Id.* Epidemiological studies have established, in both cases, that the ailments are occupational in origin. *Id.* Second to sleep problems for night workers is gastrointestinal disfunctions. TIMOTHY H. MONK & SIMON FOLKARD, MAKING SHIFT WORK TOLERABLE (1992). Furthermore, there is evidence of higher rates both of heart disease, depression, and alcoholism in night workers. *Id.* at 33-35.

night workers are forced to perform when their circadian system is telling them to sleep, and forced to sleep when their circadian system is telling them to be awake.

Fatigue is the most common problem night workers experience.⁶⁵ Due to the interruption of their biological rhythms, night workers sleep less, do not sleep deeply enough, wake frequently, and do not feel adequately rested.⁶⁶ Research by the International Labor Organization indicates that the vast majority of workers engaged in night work do not get more than four to six hours of sleep per day.⁶⁷ Other studies reveal that night workers lose, on the average, a full night's sleep each week.⁶⁸

Another related health risk is injury due to accidents. There is a marked increased risk of serious accidents on the job during night shifts.⁶⁹ Since many workers are operating on very little sleep they may not be as alert.⁷⁰ Furthermore, the brain's circadian clock controls the sleep/wake cycle that primes the human body for peak performance during the day.⁷¹ As a result night workers are more irritable, less alert, and more likely to make errors.⁷²

Night work also negatively affects workers' social lives. Night workers experience more family-related problems than do daytime employees.⁷³ Night work not only puts workers "out of rhythm" with their minds and bodies, it also puts them out of rhythm with their families, social lives, and routines of the rest of the community.⁷⁴ Working the night shift cuts individuals off from their families and most of society.⁷⁵ The night worker suffers from social isolation and loneliness since one's circle of friends becomes narrower and family time rarer.⁷⁶

There may also be increased risks for women workers. Night work has proven to be more dangerous to the health of pregnant women. Studies show that pregnant women who work night shifts may have a substantially higher risk of miscarriage than day workers.⁷⁷ Additionally, women may be subject to increased harassment and sexual exploitation on the night shift since fewer managers tend to work at night.⁷⁸ Apart from this, the health risks associated with night work are universal to both men and women and the need for workers' protection is clear. However, it is highly unlikely that night work will be banned altogether.

⁶⁵ *Id.* at 33.

⁶⁶ COUNCIL OF EUROPE, *supra* note 45, at 47.

⁶⁷ WOMEN AT WORK 38, ILO, Geneva No. 2 (1987).

⁶⁸ KEVIN COYNE, A DAY IN THE NIGHT OF AMERICA xiii (1992).

⁶⁹ Some argue that it is no coincidence that the human errors which led to the nuclear energy accident at Three Mile Island occurred at 4 a.m. by workers on the night shift. Finn, *supra* note 9, at 34. The Chernobyl accident occurred at 1:23 a.m. COYNE, *supra* note 68.

⁷⁰ Studies indicate that night workers are more likely to work two jobs and, as a result, they may be exhausted while they are working. 23 percent of night workers and 19 percent of evening workers held second jobs compared with 11 percent of daytime employees. *Id.* at 32.

⁷¹ Susan Challer, *Body-wise: Safe Solutions for Night Work*, PSYCHOL. TODAY, Nov. 1989, at 26.

⁷² Michele Ingrassia, *Living on Dracula Time*, NEWSWEEK, Jul. 12, 1993, at 68. Not only are night workers sleepy, but they also may be preoccupied with other social and biological problems caused by night work.

⁷³ Finn, *supra* note 9, at 32. This is blamed on the lack of synchrony between their work hours and their families' daily routines. *Id.*

⁷⁴ *Id.* Kenneth Groh, a sleep expert, refers to this feeling as "jet-lag without the geographical displacements." Ingrassia, *supra* note 72, at 68. Research has revealed that many of the major biological functions of the human body are governed by a circadian (24-hour) rhythm. Finn, *supra* note 9, at 32. When this cycle is disturbed it can cause both physical and emotional problems. *Id.* Night work can cause sleep disturbances and poor eating habits. *Id.*

⁷⁵ Meals, housework, child care, holiday and family celebrations, and civic participation are abandoned to maintain night shift employment. COUNCIL OF EUROPE, *supra* note 45, at 39-40.

⁷⁶ Studies indicate that night work can also have a negative effect on marital quality. Lynn White, a sociologist, conducted a study involving 1700 night workers and found that night workers are "one and a half times more likely to get divorced than those who work normal hours." Ingrassia, *supra* note 72, at 60.

⁷⁷ Marilyn Dunlop, *Miscarriage Risk Higher for Night Workers: Study*, TORONTO STAR, Feb. 27, 1993 at B7. For women working mid-afternoon to midnight the risk of miscarriage was four times as high as day workers, and for women working the midnight to early morning shift the risk of miscarriage was twice as high as day workers. *Id.*

⁷⁸ Ingrassia, *supra* note 72, at 68.

V. THE AMERICAN EXPERIENCE WITH PROTECTIVE LEGISLATION

The Night Work Conventions have been ratified by a substantial number of Member States.⁷⁹ To date, before denunciations, 61 countries ratified the 1919 Convention, 37 countries ratified the 1934 Convention, and 63 countries ratified the 1948 Convention. These Conventions are legally binding for those countries which have ratified them. Thus, many countries still ban night work for women.

Given the movement to denounce these earlier Conventions and ratify the 1990 Convention,⁸⁰ the implications of equal treatment versus special treatment for women must be understood in all contexts. While some argue that special treatment is appropriate for some societies, most international commentators are resolute:

When an internationally established protection runs counter to equal rights claims, international labor law should favor equality over protections. If female workers need special protections, they can seek the appropriate measures themselves either by bargaining directly with employers or through legal, legislative, and political action.⁸¹

The question then is whether women have the social and political standing to achieve reforms themselves.

At the turn of the century in the United States women did not have the standing to protect themselves. The current description of women's working conditions in the developing world readily brings to mind the working conditions during the industrial revolution in the United States. For the same reasons that can be advanced in the developing world today, some women in late nineteenth century America similarly believed that it would be best to be protected against certain types of work.

A. Support for Protective Legislation

In the late nineteenth century there was broad-based support for protective labor legislation for women in the United States. For the majority of working women, protective laws, "were a welcome restraint on exploitative conditions."⁸² Generally, "female workers were more vulnerable to exploitation than their male counterparts."⁸³ While male workers were unable to bargain on equal footing with employers, female workers had even less bargaining power. Men and women did not "'stand alike' in workplace settings."⁸⁴

Women's groups and trade unions came together to agitate for working hour limits and restrictions for women, although with diverse intentions. The American Federation of Labor (AFL) supported sex-based legislation to keep women out of the work force. "Prominent labor leaders typically perceived women workers more as competitors than colleagues, and often excluded them from union membership or declined to help organize predominantly female occupations."⁸⁵

⁷⁹ Compare with the "core" ILO human rights conventions which have more than 100 ratifications. There are over 150 Member States. ILO conventions dealing with the employment of women have been ratified by 22% of Member States, while conventions dealing with basic human rights have been ratified by 41% of Member States. Recommendation on Minimum International Labour Standards (1984). See also LUBIN, *supra* note 7, at 252. Membership in the ILO requires adherence to the core ILO standards regardless of whether a state has ratified a particular convention. This obligation is a result of the ILO Philadelphia Declaration and evolving ILO practice. However, the ILO Constitution does not state this obligation. See Compa, *supra* note 46, at 155.

⁸⁰ See *Women: ILO Ban on Night Work Condemned by Signatories*, Inter. Press Svce, Mar. 2, 1992, available in 1992 WL 2481282.

⁸¹ Compa, *supra* note 46, at 171.

⁸² DEBORAH RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 41 (1989).

⁸³ *Id.* at 39.

⁸⁴ *Id.* "Sex-based discrimination by employers and educational institutions restricted women's occupational choices and crowded them into the least desirable working environments." *Id.* at 40.

⁸⁵ *Id.* "Data from the 1920s indicate that female employees comprised over 20 percent of the labor force, but only 8 percent of the unionized workers." *Id.*

Between 1870 and 1910, many states passed protective labor legislation.⁸⁶ The intent of some statutes was to protect women from making the possible "wrong decision" to work at night. Having determined that it was undesirable for a woman to work at night, legislatures saw that the simplest remedy was to prohibit a woman from ever working at night, even if she so wanted.⁸⁷

"Most early protective-labor cases involved legislative efforts to curtail the eleven-to-fourteen-hour days and night-shift requirements that were common for working women during the late nineteenth and early twentieth centuries."⁸⁸ In 1908, the United States Supreme Court decided the case of *Muller v. Oregon*.⁸⁹ In *Muller*, the Court upheld a state statute limiting women's workdays to a maximum of eight hours. Justice Brewer, in the majority opinion, observed:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, 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.⁹⁰

"As one critic of the *Muller* decision noted, women routinely labored long hours at physically demanding tasks without pay and without objection; 'the pay [was] the new feature.'⁹¹

In *Muller*, Justice Brewer distinguished the Court's holding in *Lochner v. New York*,⁹² which ensured a man's freedom to contract, on the ground that women's special vulnerabilities justified special protection.

[H]aving in view not merely her own health, but the well-being of the race--justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.⁹³

This reasoning was echoed in other gender-specific protective statutes and prompted a debate among feminists about whether this approach best served their interests.⁹⁴

B. Early Reaction to Gender-Based Legislation

By the early 1920s⁹⁵ the consequences of gender-based labor regulations were being felt. As a result, some women sought to extend the protections granted in these statutes to men in order to insure that

⁸⁶ *Id.* at 38.

⁸⁷ HEVENER, *supra* note 4, at 7-8.

⁸⁸ RHODE, *supra* note 82, at 38.

⁸⁹ 208 U.S. 412 (1908).

⁹⁰ *Id.* at 421.

⁹¹ RHODE, *supra* note 82, at 41.

⁹² 198 U.S. 45 (1905).

⁹³ 208 U.S. at 422.

⁹⁴ RHODE, *supra* note 82, at 36. Rhode asserts that "[a]lthough many women's rights advocates actively lobbied for such statutes, most activists were too preoccupied with suffrage at the time *Muller* was decided to consider adequately the implications of sex-based regulation." *Id.*

⁹⁵ Significantly, women lost enthusiasm for protective legislation only after they got the vote.

there was no handicap placed on women.⁹⁶ Some in the women's movement became convinced that special legislation would ultimately serve to hurt women. Fundamentally, the rationale behind these statutory schemes stereotyped women as "different, dependent, and in need of special [protection]."⁹⁷

If the theory of protective laws hurts women, so does the practice. The consequence is that women are protected from many employment options--all of which are open to men. This unequal access to jobs and wages may be factors which perpetuate other discriminatory practices. Protective legislation, "by fostering the social definition of women as essentially familial and as incapable of functioning with full responsibility outside the home, contributes both to women's reluctance to seek access to other domains of action and to the unwillingness of men to 'allow' unrestricted opportunity once such action is taken."⁹⁸ The result of this legislation, "by making women employees more expensive than men, could too readily become 'a polite euphemism for covert discrimination.'"⁹⁹

Although it is true that working women face special disadvantages, gender specific protections often operate to perpetuate those disadvantages, rather than to alleviate them.

Gender specific legislation did curb some of the exploitative conditions to which female employees were especially vulnerable. But the price was substantial. Sex-linked statutes made it more expensive to hire women and thus limited their entry into occupations desirable to male competitors. The result was to lock female workers into crowded, sex-segregated employment and further depress their bargaining power. In both rationale and result, sex-based legislation reinforced the stereotypes that impeded women's advancement in commercial spheres and discouraged men's assumption of responsibilities in domestic spheres.¹⁰⁰

In fact, this sex-based legislation caused greater unemployment among the most marginal female workers. Banning work at night for women thus operated to keep women out of higher paid work.¹⁰¹ Further, legislation frequently forced women workers to take on second jobs without the benefit of overtime pay. Ironically, such legislation had the negative effect of preventing some women from taking care of their families either because they had to work during the day or because they had to work two jobs to make the income they could have made with one.¹⁰²

As early as 1923, the Supreme Court recognized problems in this type of legislation. In the case of *Adkins v. Children's Hospital*,¹⁰³ the Court struck down a price fixing system for women's labor. In Justice Sutherland's majority opinion he states:

[W]e cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.¹⁰⁴

⁹⁶ RHODE, *supra* note 82, at 36.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 38. Thus special treatment may be a "double-edged sword." See Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1151 (1986).

¹⁰¹ According to the Bureau of Labor Statistics, these shift premia average 10 cents an hour for the evening shift and 13 cents for the night shift. See Charles M. O'Connor, *Late-shift Employment in Manufacturing Industries*, MONTHLY LAB. REV., Nov. 1970, at 41.

¹⁰² RHODE, *supra* note 82, at 42.

¹⁰³ 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

¹⁰⁴ *Id.* at 553.

Even at this time, however, some women activists charged that those calling for the repeal of these laws were either "ignorant of, or indifferent to" the harsh consequences to working women's lives should these protections be removed.¹⁰⁵ They admonished ERA supporters not to seek "equality in form," but instead strive for "equality in fact."¹⁰⁶ They argued that equality could not be achieved by denying social differences between men and women. Instead those disparities must be the focus. The reality of women's lives were that they worked in the factory without union support, and then they were expected to work a second shift at home. Not until these disparities were addressed should protections be lifted. To prematurely eliminate protective measures would compound women's obstacles.¹⁰⁷ This debate continues even today.¹⁰⁸

VI. THE DILEMMA OF NIGHT WORK IN THE DEVELOPING WORLD

Opposition to the Conventions banning the night work of women presumes that the changed status of women in the workplace has made such special protections obsolete. However, in some countries, the conditions of work and life of women in factories belie recent progress and is reminiscent of the eighteenth and nineteenth centuries in the countries of the earlier industrial revolution. These developing countries, due to the increasing globalization of the marketplace, are also witnessing an increased demand for night shift work.¹⁰⁹

A. Multinational Corporations and Night Work

In order to maximize the use of machinery, many multinational corporations in developing countries will operate 24 hours a day.¹¹⁰ Against a background of increasing international competition in the exchange of goods and services, poorer nations can derive industrial and commercial advantage by favoring inhumane working conditions, such as night work and shift work. The Council of Europe in a study on night work, concluded that:

[I]n a more and more open world, in which economic competition . . . is the key to harmonious development, international competition may, if care is not taken, result in a downgrading of working conditions that rising living standards make intolerable. That deterioration is evidenced by the rate at which night work has been increasing at least until the recent past.¹¹¹

Decisions about whether to invest in a new factory will necessarily involve a determination of whether a return on capital can be achieved through increased use of shift work.¹¹² The availability of labor is central to this decision. Therefore, "in countries that are not yet heavily industrialised, shift work

¹⁰⁵ RHODE, *supra* note 82, at 36.

¹⁰⁶ *Id.* at 37.

¹⁰⁷ *Id.*

¹⁰⁸ See Mary Elizabeth Bartholomew & Drucilla Cornell, Book Review: *Women, Law, and Inequality: Rethinking Human Rights: Women's Legal Rights*, 16 CARDOZO L. REV. 153, 159 (1994) (reviewing MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA?* (1987)), which argues that formal equality, which grants women the right to be treated like men, only makes sense if women are similarly situated to men which they are not in many arenas such as "contraception, abortion, pregnancy, nursing care for children, prostitution, pornography, sexual violence, and battery . . ." *Id.* See also Finley, *supra* note 100, at 1154. "To be treated as if you were the same as a norm from which you actually differ in significant ways is just as discriminatory as being penalized directly for your difference." *Id.*

¹⁰⁹ Ingrassia, *supra* note 72, at 68.

¹¹⁰ "Shift work is introduced in industry to make sure that capital invested in plant and equipment is fully used. The longer the equipment is operated during the year the more unit costs may decline." Council of Europe, *supra* note 45, at 33. A machine's working life can be extended by compressing it into a shorter period. Most Multinational corporations use a three shift system. See Robert N. Stangarone, "Why Do We Let the Nighttime Go To Waste?," *BUFF. NEWS.*, Aug. 28, 1994, at F9.

¹¹¹ COUNCIL OF EUROPE, *supra* note 45, at 8.

¹¹² "Three . . . distinct causes, economic cost, technology and demand, bring about a pressure on firms to use several shifts, and/or to work through the night." *Id.* at 32.

tends to be regarded as a means of generating employment opportunities in a situation of capital scarcity and labour abundance."¹¹³ In these cases, high costs of technology and automation are offset by the low cost of continuous, cheap labor.

Developing countries are interested in promoting investment in new factories and are very aware of the attractiveness of continuous night labor. These countries know that they can benefit from the increased use of their capital stock, giving rise to a growth in their economy.¹¹⁴ Shift and night work, therefore, may benefit a developing state by creating employment in multiple shifts.¹¹⁵

Developing countries are keenly aware of the attractiveness of cheap labor to multinational corporations that are looking to relocate in the developing world. In this competition for investment, developing countries will advertise their cheap female labor. A Malaysian brochure boasts: "The manual dexterity of the Oriental female is famous the world over. Her hands are small, and she works fast with extreme care Who, therefore could be better qualified by nature and inheritance, to contribute to the efficiency of a[n assembly line] than the Oriental girl?"¹¹⁶

Thus, governments and employers in the developing world are in favor of repealing protective labor legislation. They argue that international labor standards impede the creation of labor-intensive factory jobs and condemn developing states to a future without economic development by destroying their comparative advantage in cheap labor.¹¹⁷ According to this view, developing countries have a right to attract investment capital and new technology, and to develop their manufacturing capacity so that they can compete in the global marketplace. "If the main competitive advantage that a country brings to the marketplace takes the form of abundant, low-cost female labor, the country should be able to use this resource to attract investment and create jobs."¹¹⁸ For example, Sri Lanka's decision to withdraw from the Night Work Convention was made in the midst of negotiating with Motorola to invest in a semiconductor plant there.¹¹⁹

It is argued that this viewpoint is not inconsistent with women's equality. The root cause of women's exploitation, it is argued, is a lack of economic development and that without a comparative advantage, they will never be able to develop. Without development, women will never have improved working conditions. Worse, if foreign investment declines, women will be forced back into the fields to resume their agricultural work, which they find even more gruesome. Many of these women who would be affected would rather have the factory jobs despite the harsh working conditions rather than return to the dependence associated with farm work. Even under stark working conditions, many women prefer factory work to agricultural work because factory work enables women to be more economically independent and develop an expanded awareness of life beyond the home.

Studies in India on the problem of unemployment among women workers revealed that night work prohibitions may be a factor. "The restrictions on hours of work and prohibition of women (sic) employment during ,night shifts . . . are real obstacles in the greater absorption of women workers in jobs

¹¹³ *Id.* at 31. "In centrally planned economies, shift work is often seen as an indispensable part of economic planning, a stimulus to labour productivity, and a means of economising on scarce capital." *Id.*

¹¹⁴ The widespread use of shift work can then "lead to a reduction of a country's capital stock . . . freeing the resources for other purposes." *Id.* at 35.

¹¹⁵ Capital utilization will vary by country depending on these factors. For example, a study on the average length of time of operation of a spindle in a textile factory by country revealed that average time of operation in France was: 3,920 hours per year, in India was: 6,580 hours per year and in Hong Kong was: 8,455 hours per year. MARC MAURICE, *SHIFT WORK* 16, ILO, Geneva (1975).

¹¹⁶ Barbara Ehrenreich & Annette Fuentes, *Life on the Global Assembly Line*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 279, 286 (A. Jaggar & P. Rothenberg eds., 1984).

¹¹⁷ Compa, *supra* note 46, at 159-60. Usually factories employ a three shift system: day, evening, and night. In some countries, however, the three shift system is not common due to prohibitions against night work for women. COUNCIL OF EUROPE, *supra* note 45, at 17-19.

¹¹⁸ Compa, *supra* note 46, at 160.

¹¹⁹ Subrata N. Chakravarty, *Sri Lanka's Minimiracle*, *FORBES*, Oct. 13, 1980, at 226.

particularly in heavy industries.¹²⁰ Another source states that:

[R]estriction on hours of work has had disastrous results, as far as women are concerned When a mill works three shifts, men have to be employed to work the night shifts without being able to change over periodically with the workers of the day shifts where women are employed. This reason has also been advanced by textile mill employers for not retaining women even in day shifts.¹²¹

Thus the debate over special protection takes place within a larger debate of a nation's right to develop and a people's right to labor standards.

B. Working Conditions for Women in the Developing World

Should western notions of feminism and equality override the special concerns about women's safety and exploitation in the developing world? Perhaps principles of equality should outweigh protective standards for women in the West. However, where women are not free to associate, organize, and bargain collectively as workers and where they cannot fully participate in the legislative process to achieve reform, they may be in greater need of internationally developed protective standards. Not only are developing countries being forced to conform to standards which are developed in the West, but they are being asked to make policy based on a western ideal of gender equality that is not a present reality.

In the developing world, women are the new "proletariat" on the "global assembly line."¹²² Women are paid less than minimum wage and less than male workers of similar skill.¹²³ Moreover, women employed by multinational corporations in the developing world are among the most exploited and toil under some of the worst working conditions.¹²⁴ Free Trade Zones,¹²⁵ where profit margins totally eclipse worker safety concerns, are usually reservoirs of unskilled, mostly female labor.

Women workers in Free Trade Zones are extremely susceptible to the abuses of management and are often denied the right of association. Women are hired with the understanding that they will be more deferential to authority and less involved with union organizing. In fact most unions neglect to provide women with information of their rights so that women are without any union support or advocacy.¹²⁶

Many times women's attempts to organize and protest unacceptable working conditions have met with hostility and even violence.¹²⁷ As a result, women are forced to tolerate worse working conditions,¹²⁸ which cut a woman's working life short. Women suffer from dimmed eyesight, diminished motor skills, and strained joints due to repetitive motion.¹²⁹ Women are routinely fired for pregnancies.¹³⁰

¹²⁰ WOMEN IN INDUSTRY, *supra* note 2, at 59. However, it should be borne in mind that at the time this statement was made, domestic legislation in India such as the Factories Act of 1948, the Mines Act of 1952, and the Plantations Labour Act of 1951 prohibited women from working between the hours of 7 p.m. and 6 a.m. *Id.* at 86.

¹²¹ PADMINI SENGUPTA, WOMEN WORKERS OF INDIA 31-32 (1960).

¹²² Ehrenreich, *supra* note 116, at 280.

¹²³ UN CENTRE ON TRANSNATIONAL CORPORATIONS & ILO, WOMEN WORKERS IN MULTINATIONAL ENTERPRISES IN DEVELOPING COUNTRIES 43 (1988).

¹²⁴ In a 1986 study done in Pakistan, researchers found that: the majority of women are unskilled laborers (50% of which are illiterate); many do seasonal or temporary work on a daily wage; many have left their families migrating from rural to urban areas for factory work; many are the sole income earners for large families; few are aware of protective legislation; and few report ill health or poor working conditions for fear of being fired. *Id.* at 41-44.

¹²⁵ "Free Trade Zones" are enclaves within nations that allow multinational corporations to avoid taxes and export duties. Ehrenreich, *supra* note 116, at 288.

¹²⁶ *Id.* at 287.

¹²⁷ *Id.*

¹²⁸ Descriptions of working conditions, such as this one from the garment industry in Pakistan, are all too common: Working conditions are mostly unhygienic and many places do not have good ventilation systems. Frequently women employees have to sit on the floor with very little room for movement The hours of work per day are only eight, but the resulting fatigue due to poor working conditions makes the actual day seem much longer.

Improvement of Working Conditions, in WOMEN WORKERS IN MULTINATIONAL ENTERPRISES IN DEVELOPING COUNTRIES, Geneva: ILO 23 (1985).

The most tedious factory work is usually relegated to women. Women perform 80-90% of the low skilled assembly jobs in the third world.¹³¹ In fact, multinational corporations and developing states' governments have come to regard assembly-line work simply as "women's work."¹³² Women workers are concentrated in the lower pay sectors such as textiles, clothing, leather, and food industries. Conditions in the garment and textile industry in the developing world vividly recall the nineteenth century sweatshops. Women workers are frequently packed into poorly lit rooms where summer temperatures rise above 100 degrees and textile dust fills the air.¹³³

Night work, by far the most unpleasant and exacting work, is also the domain of women in countries without protective legislation. Shift hours are frequently worked in factories with a predominantly female workforce, including multinational corporations, particularly in export-oriented industries.¹³⁴ Women are willing to work for low wages and to work double consecutive shifts to make money. This description of the work day of a woman shift-worker in Malaysia is typical:

Ms. K. works in one of the electronics factories in the Free Trade Zone of Penang. Her husband is a labourer at the dockyard. They have three children, two of whom go to school. Ms. K. has insisted on permanent night shift because she can take care of her family in the day time. To make ends meet, she washes and irons clothes for the neighbours. All in all, Ms. K. has been getting only two to three hours' sleep in the afternoon for the last eight months. She is only 27 but she looks like a 40-year old woman.¹³⁵

In addition, women may be more likely to work long hours or shift hours because they are concentrated in the export-oriented garments and electronics industries, where rush periods more frequently occur.¹³⁶ In Singapore, for example, three times more women than men do night shift work, and in the Republic of Korea, women work ten hours more per month than men.¹³⁷ However, where there is legislation requiring employers to make extra payment for normal hours worked at night, these jobs may be filled by men.¹³⁸ Usually, however, labor laws are either lax or not enforced, and unions either are weak or non-existent so that night work is not compensated higher. In this scenario, the night work will go to women.

These horrendous working conditions make it difficult to argue against protective legislation. In those countries that have a ban on women's night work, some would be loath to take away these few safety measures. In countries without the ban, one can see how women have become the target of exploitation. Some argue that a repeal of the prohibition on women's night work will only serve to increase women's vulnerability to exploitation. Without protective labor standards, all that remains is self-interest and the imbalance of power. Significantly, the 48 remaining adherents to the 1948 Convention are almost exclusively drawn from the developing world. A protocol exists under which countries can switch their allegiance from the old to the new convention under ILO rules.

Sound public policy should neither treat difference as if it is an immutable category nor as if it is non-existent. Instead, reforms should focus on the underlying conditions that produce gender inequities. In this context, efforts should be made to improve women's union representation, political representation, and burden of family responsibilities.

¹²⁹ See Ehrenreich, *supra* note 116.

¹³⁰ *Id.*

¹³¹ *Id.* at 281.

¹³² *Id.*

¹³³ *Id.* at 284.

¹³⁴ WOMEN WORKERS IN MULTINATIONAL ENTERPRISES IN DEVELOPING COUNTRIES, *supra* note 128, at 51.

¹³⁵ WOMEN AT WORK, *supra* note 67.

¹³⁶ WOMEN WORKERS IN MULTINATIONAL ENTERPRISES IN DEVELOPING COUNTRIES, *supra* note 128, at 52.

¹³⁷ *Id.*

¹³⁸ Where legislation does not require the employer to increase pay rates for night work, the increase may be secured through bargaining agreements. Protective legislation often excludes women from higher paid work and career advancement opportunities. In Europe night shift premia can vary from 25 to 150%. COUNCIL OF EUROPE, *supra* note 45, at 38.

CONCLUSION

Surprisingly, the ILO's prohibition on night work for women has only recently been seriously challenged on the grounds that it discriminates against women. As a result, this sex-specific prohibition was reversed at the 1990 International Labor Conference. Implicit in the denunciation of the earlier Night Work Conventions is the assumption that the world has changed so much since they were adopted, that the Conventions are now out of date.

But the earlier Conventions may not have lost their relevance in all parts of the world. In many developing countries, women workers are much more vulnerable to the exploitations of industry. It is these women who would be subject to night shift work if the ban is lifted because these women take the work that men either do not want or will not do. For most women, on whose shoulders family responsibilities most often fall, this would mean working two jobs--houseworker by day and factory worker by night. Thus, an argument can be made that government neutrality on this issue translates into insensitivity to women's particular situation. Women in the developing world may, in fact, need special protection until they achieve a footing more equal to that of men. Protective laws should certainly succumb when they conflict with the principle of equal rights, but only when women workers have secured the rights of association, organization, bargaining, and political representation, so that they can protect themselves:

Still, special protections for women may perpetuate this unequal position. Special protection reinforces negative stereotypes. Women are perceived as unable to make reasonable decisions, less deserving of the freedom to contract, and suitable only for work in the home since they are more fragile. In fact, these are the precise reasons for which the original ban on the night work of women was adopted.

Early protective measures reflect implicit conceptualizations of a woman's role in society by defining her as solely wife and mother. More recent protective measures are moving towards a more dynamic conceptualization of women's roles. Continued effort to implement non-discriminatory and corrective provisions and to redraft outdated protective ones will increase the acceptance of this more dynamic view of women both domestically and internationally.¹³⁹

Only recently have we learned about the serious dangers involved in night work. All legitimate arguments to keep the ban on night work in place can also be extended to cover men, especially in light of recent research which has highlighted the effect of night work on health, regardless of gender. Developing and industrialized countries alike should ratify the 1990 Convention, because it extends "special" protection to both women and men thereby promoting equality and reducing the salience of gender while also improving the conditions of all workers.

¹³⁹ RHODE, *supra*, note 82, at 46. What is needed is a "critical process of redefining legitimate female activity beyond the traditionally limited roles of wife and mother." *Id.* at 47.