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Employment Rights of Women in The Toxic Workplace

Women seeking high paying industrial jobs are faced with a new obstacle: employers' assumptions that exposure to toxic substances in the workplace threatens the reproductive health of women more than that of men. This Comment, applying the doctrine of Title VII of the 1964 Civil Rights Act, contends that outright exclusion of women based on such assumptions cannot be supported under either the statutory or judicial exceptions to Title VII. The author suggests measures to counteract employment practices that disfavor women, and argues that the issue should be viewed as part of a broader concern for overall worker safety and health.

Public attention has recently focused¹ on the risk and consequences of injury from toxic substances in working environments.² Much of the discussion has concerned potential injury not only to the worker exposed to toxic substances, but also to the worker's capacity to produce healthy offspring.³ One recent response to this concern is a wholesale exclusion of women of childbearing age from certain toxic⁴ workplaces.⁵

1. See, e.g., *Rally and Rites for Asbestos Victims*, San Francisco Chronicle, June 30, 1976, at 11, col. 1 (from New York Times); *Workers Who Face Cancer Risk*, San Francisco Chronicle, April 25, 1977, at 8, col. 1 (from New York Times); *Emergency Curb on Benzene Exposure*, San Francisco Chronicle, April 30, 1977, at 7, col. 1.

2. Workers risk injury from toxic substances in industrial workplaces, service industries, clerical jobs, and other employment areas. This Comment will focus on industrial workplaces, since the problems of sex-based discrimination are most pronounced there.

Many substances present in occupational environments—such as benzene, asbestos, vinyl chloride, certain ethers and various metals—are considered to be carcinogenic (capable of inducing or promoting cancer). Many others—such as silica, coal dust, beryllium and, again, asbestos—are causally related to lung diseases and other respiratory problems such as silicosis, black lung, berylliosis, asbestosis, and emphysema. See generally *Occupational Carcinogenesis*, 271 ANNALS OF THE N.Y. ACADEMY OF SCIENCES (1976) [hereinafter cited as ANNALS]; HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94th CONG., 2d SESS., LEGISLATIVE HISTORY OF THE TOXIC SUBSTANCES CONTROL ACT, at 773 (1976) [hereinafter cited as LEGISLATIVE HISTORY]; *The Toxic Substances Control Act: Hearings on H.R. 7229, H.R. 7548, and H.R. 7664 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. (1975)*; *The Toxic Substances Control Act: Hearings on S. 776 Before the Subcomm. on the Environment of the Senate Comm. on Commerce, 94th Cong., 1st Sess. (1975)*.

3. See, e.g., *Rise in Birth Defects Laid to Job Hazards*, New York Times, March 14, 1976, at 1, col. 4; *Job Hazards Termed Threat to the Unborn*, Washington Star, June 17, 1976, at 1, col. 1; Occupational Safety and Health Administration, *Proposed Standard for Exposure to Lead*, 42 Fed. Reg. 808, 809 (1977).

4. The author apologizes for the use of the word "toxic" to modify the word "workplace." The phrase is substituted, in the interest of brevity, for "workplace subject to hazards from toxic substances."

5. Examples of employer practices are discussed at notes 24-27 *infra*. See also

This exclusionary practice is based on an asserted belief, part fact and part speculation, that women workers face greater risks of reproductive injury from toxins in the workplace than do their male counterparts.

Such exclusion reveals a growing tension between two social objectives: safety and health for the working force, and equal employment opportunity. While employers may attempt to justify the exclusion of women in the interest of employee health, this solution is extremely costly to the workers who are affected.⁶ Moreover, since many jobs that are subject to potential toxic exposure are just opening to women,⁷ exclusion of women from those positions retards the recent progress toward equal employment opportunity made through legislation and judicial action. The entry of female workers into skilled, unionized blue-collar jobs may be halted because of presumed differences in health effects from toxic exposure.⁸ Thus, women are

Job Safety: Women's Work? NEWSWEEK, June 28, 1976, at 56; *To Hire or Fire: The Case of Women in the Workplace*, TECH. REV., October-November 1976, at 16; *Women's Work: Biology vs. Civil Rights*, Los Angeles Times, June 27, 1976, § V at 1, col. 3. In addition, some job positions potentially threatening to reproductive health, such as garment workers and electronics assemblers, are traditionally held by women. The textile and garment industries, where 46% and 81% respectively of the employees are female, use a variety of chemicals for dyeing, finishing, rotproofing, mercerizing and bleaching, flame retarding, and making fabric wrinkle-resistant. A. HRICKO, WORKING FOR YOUR LIFE; A WOMAN'S GUIDE TO JOB HEALTH HAZARDS (Labor Occupational Health Project, U.C. Berkeley, 1975) D-10 [hereinafter cited as HRICKO]. Serious hazards have been identified with many of these chemicals. *Id.* at D-14 & D-15. Women also comprise over 75% of electronics workers, and these workers are exposed regularly to solvents and other health-threatening chemicals. *Id.* at D-30.

In workplaces largely dependent on a female work force, however, attempts to exclude all women, or all fertile women, on the basis of chemical risks have not been reported.

6. Compare 1973 annual median wage for female sales workers (\$4,650) and female clerical workers (\$6,469), traditional women's occupations, with that of male craft and kindred workers (\$11,245) and male operatives (\$9,503). U.S. EMPLOYMENT STANDARDS ADMINISTRATION, WOMEN'S BUREAU, DEP'T OF LABOR, BULL. NO. 297, HANDBOOK ON WOMEN WORKERS 135 (1975) [hereinafter cited as 1975 HANDBOOK].

7. The Department of Labor's 1975 Handbook on Women Workers states:

Perhaps the most dramatic shift that occurred between 1960 and 1970 was the large influx of women into the skilled trades. In 1970 almost half a million women (495,000) were working in the skilled occupations (craft and kindred worker group), up from 277,000 in 1960. The rate of increase (nearly 80%) was twice that for women in all occupations. It was eight times the rate of increase for men in the skilled trades.

1975 HANDBOOK, *supra* note 6, at 92.

As of April, 1974, 45% of all American women were employed, comprising 39% of the work force. *Id.* at 8-9.

8. The majority of all working women are in their childbearing years. In 1974, the median age of women in the work force was 36 years, with the median declining by five years since a 1960 survey. 1975 HANDBOOK, *supra* note 6, at 15. Approximately 1,000,000 prenatal infants are believed to be in workplaces each year. V. HUNT, OCCUPATIONAL HEALTH PROBLEMS OF PREGNANT WOMEN, A REPORT AND RECOMMENDATIONS FOR THE OFFICE OF THE SECRETARY, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE 114

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beginning to demand review of the problem by the courts and by federal agencies responsible for the health and employment rights of the work force.⁹

This Comment will initially discuss the scope of the problem of toxic substances in the workplace, and describe the inaction of regulatory agencies—principally the Occupational Safety and Health Administration. It will then analyze the relationship between toxic workplace exclusions and the mandate of Title VII of the Civil Rights Act of 1964 forbidding sex-based discrimination in employment. Finally, the Comment will explore and evaluate possible employer responses to sex-based discrimination charges that might arise from practices that exclude solely women from toxic workplaces.

I

THE ISSUE—THE RISKS PRESENTED TO WORKERS BY TOXIC SUBSTANCES

Understanding and regulation of the effects of toxic substances on health generally, and on reproductive health in particular, are quite limited.¹⁰ For the purposes of this analysis, toxic substances that

(1975) [hereinafter cited as HUNT]. Thus, if fertile women are removed from work environments containing substances dangerous to reproductive health, the bulk of the female workforce might be affected.

9. See, e.g., *Read v. St. Joe Minerals Corp.*, Nos. E-8113PD, E-9654PD and E-9754 (Letter of March 2, 1976, from Harriet E. Hendler, Director, Affirmative Enforcement Project, Pa. Human Rights Comm'n, stating that probable cause exists to credit allegations of discrimination and recommending a hearing on the merits); *Toomer v. General Motors Corp., Delco-Remy Div.*, No. 76-101c (S.D. Ind., filed Feb. 17, 1976).

10. The first discovery of occupational carcinogenesis was made by Percival Pott, who in 1775 reported scrotal cancer among London chimney sweeps. Today, however, thousands of coke oven workers in the United States steel industry are inhaling the same class of substances and are dying of lung cancer at a rate 10 times that of other steel workers. Wagoner, *Occupational Carcinogenesis: The Two Hundred Years Since Percival Pott*, in *ANNALS*, *supra* note 2, at 1.

Environmental toxins are tabulated regularly. In 1971, 1,800,000 chemical compounds were registered by the Chemical Abstracts Service Registry Number System. COUNCIL ON ENVIRONMENTAL QUALITY, 1971 REPORT ON TOXIC SUBSTANCES, LEGISLATIVE HISTORY, *supra* note 2, at 766. Twenty-five thousand chemical compounds are believed to be in industrial use today, *Discussion*, *ANNALS*, *supra* note 2, at 470. Of these, 13,000 were placed on the Department of Health, Education and Welfare's Toxic Substances Control List, and 1300 of those listed in 1974 have been cited as having neoplastic or carcinogenic properties. Lassiter, *Prevention of Occupational Cancer—Toward an Integrated Approach*, *ANNALS*, *supra* note 2, at 214. It is also estimated that 1000 are mutagenic. *The Toxic Substances Control Act: Hearings on H.R. 7229, H.R. 7548, and H.R. 7664 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 159 (1975). Such tabulation barely keeps pace with the increase—approximately 700 new chemical compounds are introduced into industrial use each year. Fairchild, *Guidelines for NIOSH Policy on Occupational Carcinogenesis*, *ANNALS*, *supra* note 2, at 201. In addi-

adversely affect the reproductive system may be classified in four groups. *Mutagens* cause no noticeable injury to the worker's bodily functions, although they change the genetic structure of reproductive cells and may cause injury or death to several future generations.¹¹ Toxins can also be *gametotoxic*, that is, they can limit the fertility of both sexes by reducing or damaging the sperm and ova themselves.¹² In contrast, *teratogens* act directly upon a fetus.¹³ Most teratogenic substances leave the system after a limited period of time, but at least one substance is cumulative,¹⁴ and thereby capable of reproductive harm

tion, regulation of exposure is very limited. See note 24 *infra*. OSHA has begun its first regulatory attempt to consider reproductive harm when setting standards. In setting a lead exposure standard, the agency has solicited and received testimony on lead's reproductive health effects in exposed men and women. See note 25 *infra*, and testimony of Dr. Ioana Lancrajan, Dr. Vilma Hunt, and Andrea Hricko, *Hearing on Occupational Exposure to Lead*, Occupational Safety and Health Administration, March 17, 1977.

11. A mutagen is a chemical or other agent that can cause a change (mutation) in the genetic material of living cells. Mutations can cause death of individual cells or abnormal cell division, which can result in cancer (unchecked growth and multiplication of cells) or altered functioning of the cells (e.g., sickle cell anemia). If a mutation occurs in the germ cell of a person (either the sperm cell of males or the egg cell of females), the mutation can be passed on to offspring. If the germ cell with the mutation is fertilized, the resulting fetus may die before birth by spontaneous abortion, or develop genetic defects such as physical or mental abnormalities. If a teratogenic mutation occurs in a germ cell, cancer may develop even years after birth in the child who is the product of the cell. If the child survives, even without apparent injury, the defect may be passed on to its offspring. COUNCIL ON ENVIRONMENTAL QUALITY, 1971 REPORT ON TOXIC SUBSTANCES, LEGISLATIVE HISTORY, *supra* note 2, at 772; HRICKO, *supra* note 5, at B-5 & B-6.

12. *Testimony on Reproductive Effects of Lead Exposure: Scientific Evidence and Policy Issues*, *Hearing on Occupational Exposure to Lead*, Occupational Safety and Health Administration, March 17, 1977, at 3-4, 6-7, Appendix at i-vi (statement of A. Hricko).

13. A teratogen is a chemical or other agent that interferes in some way with the development of the fetus after conception, by entering the mother's bloodstream and reaching the fetus by way of the placenta. Even if the exposed mother is unharmed, the harmful agent may cause abnormal development of the fetus, resulting in miscarriage or birth defects. Thalidomide is an example of a teratogen. Almost all mothers who took the drug between 20 and 35 days after conception gave birth to babies with some type of deformity. HRICKO, *supra* note 5, at B-8 & B-9. Although the term is sometimes used to refer only to structural birth defects (such as malformed limbs), for the purposes of this article it encompasses all injury resulting from placental transfer of toxins (for example, mental retardation in the child). HRICKO, *supra* note 5, at B-8 & B-9.

The Priority List for Toxic Substances and Physical Agents of the National Institute for Occupational Safety and Health (NIOSH) in 1974 comprised 112 items. Of these at least 21 toxic substances have evidence of teratogenicity in animals or humans. HUNT, *supra* note 8, at 64. See HRICKO, *supra* note 5, at C-10, C-15, C-26 & C-35, for other examples of workplace teratogens.

14. Some toxic substances accumulate in the body after initial exposure and affect the system as quantities increase, causing injuries that would not occur at lower levels. A cumulative *teratogen* can remain in a woman's system and adversely affect a fetus upon conception, even at levels below that hazardous to the worker herself, and even if the worker is no longer working in the toxic workplace. One study found that, during

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Women workers might be regarded as more susceptible to reproductive health risks due to their principal role in the childbearing process. That assumption, however, is difficult to support. Men's workplace exposure to hazardous substances has been linked to not only personal procreative disorders,¹⁶ but also to reproductive abnormalities in their wives (such as miscarriage) and to deaths of and defects in their children.¹⁷ Although only women are capable of carrying unborn children, and thereby exposing them directly through placental transfer to workplace hazards, differentiating between mutagenic, gametotoxic, and teratogenic causes of injury is difficult where a particular toxin has several harmful properties.¹⁸ This difficulty is further aggravated by the general

gestation, lead retained in a woman's skeleton was transmitted to the developing fetus at a rate paralleling its skeletal growth. The study also found that high lead levels may cause abortion during the first three months of gestation. Hansmann and Perry, *Lead Absorption and Intoxication in Man Unassociated with Occupations or Industrial Hazards*, 30 *ARCHIVES OF PATHOLOGY* 226 (1940). See also Scanlon, *Human Fetal Hazards from Environmental Pollution with Certain Non-Essential Trace Elements*, 11 *CLIN. PEDIATRICS* 135 (1972) (describing lead as possibly cumulative).

15. *Testimony on Reproductive Effects of Lead Exposure: Scientific Evidence and Policy Issues, Hearing on Occupational Exposure to Lead*, Occupational Safety and Health Administration, March 17, 1977, at 3-4, 6-7, Appendix at i-vi (statement of A. Hricko).

16. Lancranjan, Popescu, Găvănescu, Klepsch, & Serbănescu, *Reproductive Ability of Workers Occupationally Exposed to Lead*, 30 *ARCHIVES OF ENVIRON. HEALTH* 396 (1975).

17. Studies have revealed that wives and children of men who worked with asbestos, lead, beryllium, and various organic solvents have suffered the same consequences of exposure—for example, mesothelioma, a uniformly fatal form of cancer, lead poisoning and its adverse effects, and other malignant diseases—as did the workers themselves. This effect has been linked to mutagenic effects in exposed male workers, transportation of teratogens by males from the workplace to home, and direct environmental exposure of families living near toxic jobsites. See, e.g., Anderson, Lillis, Daum, Fischbein, & Selikoff, *Household-Contact Asbestos Neoplastic Risk*, *ANNALS*, *supra* note 2, at 311; Baker, *Lead Poisoning in Children of Lead Workers*, 296 *N.E.J. OF MED.* 260 (1977); Fabia & Thuy, *Occupation of father at time of birth of children dying of malignant diseases*, 28 *BRIT. J. PREV. SOC. MED.* 98 (1974); Infante, *Oncogenic and Mutagenic Risks in Communities with Polyvinyl Chloride Production Facilities*, *ANNALS*, *supra* note 2, at 49; Wagoner, *Occupational Carcinogenesis: The Two Hundred Years Since Percival Pott*, *ANNALS*, *supra* note 2, at 1, 2. Studies summarized in *New York Times*, February 3, 1977, at 19, col. 1.

18. Direct observation of chromosomal or cellular effects of toxins is technically difficult. Instead, most scientists study clinical manifestations of injury such as decreased fertility, spontaneous abortion and birth defects. See, e.g., Carson, *Slowed Learning in Lambs Prenatally Exposed to Lead*, 29 *ARCHIVES OF ENVIRONMENTAL HEALTH* 154-56 (1974) (decreased mental capacity in offspring of lead-exposed pregnant ewes); Infante, *Oncogenic and Mutagenic Risks in Communities with Polyvinyl Chloride Production Facilities*, *ANNALS*, *supra* note 2, at 49 (increase in congenital malforma-

limited state of scientific diagnostic capability.¹⁹ Thus, an abnormality could have been the result of either parent's exposure to toxic substances. Although it is possible that reproductive health risks to some women may be greater in certain cases, such distinctions are quite inexact, especially for predictive purposes.

It follows that rough categorizations of risk to reproductive health are clearest when classified by reproductive capacity, rather than by sex. Men and women without reproductive capacity—due to injury, surgery, or age—will not suffer any tangible injuries. Men and women with current reproductive capacity, who are all potential victims, may be divided into several different groups: (1) Persons having reproductive capacity and an expressed present or future intention not to exercise it, due to abstinence from sexual activity with the opposite sex or a comprehensive practice of birth control; (2) fertile men and women practicing celibacy or birth control at present and with the possibility or desire to conceive children in the future; (3) fertile men and women for whom conception is a current possibility; and (4) pregnant women. Employers' failure to recognize that reproductive health hazards classify along these lines, and to order their employment practices accordingly, are the concerns of this Comment.

tions in Ohio communities where polyvinyl chloride is manufactured). Where, as in most cases, toxins have several adverse reproductive effects, a vinyl chloride, which is mutagenic, teratogenic and gametotoxic, *Infante, id.* study of the end result proves nothing about the initial cause. Thus, even if scientists theoretically attribute a specific reproductive injury (e.g., teratogenesis) to women only, tracing of a clinical result to that theoretical cause is difficult. Where studies compare the incidence of reproductive injury between exposed men and women, one might infer disproportionate susceptibility from differences between overall levels of reproductive injury. See, e.g., Ad Hoc Committee on the Effect of Trade Anesthetics on Health of Operating Room Personnel, American Society of Anesthesiologists, *Occupational Disease Among Operating Room Personnel*, 41 *ANESTHESIOLOGY* 321 (1974) (female workers had twice the normal rate of miscarriage and birth defects; the wives of male workers bore defective children 1½ times more frequently than normal). Given the overall harm of exposure to reproductive capacity of either sex, however, it is questionable whether the difference is significant.

19. Scientists have great difficulty extrapolating experimental findings with laboratory animals, bacteria, and other agents, to humans. COUNCIL ON ENVIRONMENTAL QUALITY, 1971 REPORT ON TOXIC SUBSTANCES, in LEGISLATIVE HISTORY, *supra* note 2, at 772-73; Hoel, *Statistical Extrapolation Methods for Estimating Risks from Animal Data*, *ANNALS*, *supra* note 2, at 418; Schneiderman, Mantel, & Brown, *From Mouse to Man—or How to Get from the Laboratory to Park Avenue and 59th Street*, 246 *ANNALS OF THE N.Y. ACADEMY OF SCIENCES* 237 (1975).

Even among individuals, factors such as age, sex, health condition and history, metabolic patterns, and stress vary greatly and affect susceptibility to disease. See Bingham, Niemeier, & Reid, *Multiple Factors in Carcinogenesis*, *ANNALS*, *supra* note 2, at 14. The latency period between exposure and diagnosis further complicates analysis of risks of occupational exposure. Delays of 20 to 30 years are common. Lassiter, *Vinyl Chloride—Best Available Technology*, *ANNALS*, *supra* note 2, at 176, 177; Newhill, *Methodologies of Risk Assessment*, *ANNALS*, *supra* note 2, at 413.

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II

THE GOVERNMENT AND EMPLOYER RESPONSE

Congress has delegated the responsibility to assure "healthful working conditions"²⁰ for the American work force to the federal Occupational Safety and Health Administration (OSHA) and its state counterparts. OSHA's role in regulating toxic substances is set out in a separate statutory provision.

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.²¹

Despite the limitation of the "feasible" clause, courts have interpreted the provision strictly to require substantial employer responsibility. Safety conditions may be required beyond levels considered technologically feasible at the time of standard setting.²² Economic infeasibility is a limited defense.

OSHA, however, has taken very few steps to implement its mandate to control toxic exposure. Despite the presence of more than a thousand substances in the work environment with some harmful capacity, only a fraction are effectively regulated.²⁴ OSHA is now beginning

20. 29 U.S.C. §§ 651-678 (1970). The Occupational Safety and Health Act (OSHA) expands this general intent in the General Duty Clause: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1) (1970). State statutes enacted as companion legislation to the Federal OSHA have generally incorporated similar or identical language. See, e.g., CAL. LAB. CODE § 144.6 (West Supp. 1977).

21. 29 U.S.C. § 655(b)(5) (1970) (emphasis added).

22. In *Society of Plastics Indus., Inc. v. Occupational Safety and Health Administration*, 509 F.2d 1301 (2d Cir. 1975), an industrywide challenge by the plastics industry to the standard sharply reducing worker exposure to vinyl chloride, the Second Circuit ordered industrywide compliance by the plastics industry with a standard sharply reducing worker exposure to vinyl chloride even though at the time of rulemaking the required low levels of exposure were not known to be technologically or financially feasible. The Court stated that the Secretary of Labor "is not restricted by the *status quo*. He may raise standards which require improvements in existing technologies or which require the development of new technology, and he is not limited to issuing standards based solely on devices already developed." *Id.* at 1309.

23. The D.C. Circuit Court of Appeals has ruled that economic infeasibility will be a limited defense. *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974) (standards may be economically feasible even where they are financially burdensome and affect profit margins adversely).

24. OSHA presently has detailed regulations for only 17 toxic substances—vinyl chloride, coke oven emissions, asbestos, and 14 other carcinogenic chemicals such as

to regulate toxic substances,²⁵ and the issue of worker exclusion could diminish as the amount of regulation increases.²⁶ The slowness of its pace and the inherent limitations of the "feasible" clause, however, limit its present role considerably. As a practical matter, employers are free to exercise considerable discretion in controlling such hazards. Without government regulation to protect reproductive health, industry has tended to respond in a single-minded and simplistic manner.²⁷ Most employers identify persons they feel face the greatest risk from toxic exposure and remove them from the workplace. From the employers' viewpoint, the workers to be excluded are women:

—The Bunker Hill smelter in Kellogg, Idaho, and St. Joe Minerals Corporation in Pennsylvania recently transferred all women capable of bearing children out of areas with lead exposure to "less hazardous" jobs with reductions in wages and seniority.²⁸

benzidine and methyl chloromethyl ether. HRICKO, *supra* note 5, at A-28. The standards' exposure levels were not set with protection from reproductive injury in mind, nor do they address the issue of reproductive health at all. Approximately 450 other chemicals have exposure limits adopted by OSHA, but these regulations do not mandate monitoring of exposure through medical examinations, air monitoring, or other measures.

25. For example, OSHA is presently promulgating standards to regulate exposure of workers to lead, a substance that is suspected to be mutagenic, gametotoxic, and teratogenic. See 40 Fed. Reg. 45935 (1975); 42 Fed. Reg. 808 (1977). OSHA has sought public comment on the effect of lead on reproductive health and the disproportionate risks of injury by sex. *Id.* See also Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (to be codified in 15 U.S.C. § 2601). It provides for pre-market testing and reduction of exposure to substances believed to present an "unreasonable risk of injury."

26. If, on the other hand, the government promulgates sex-based regulations, additional conflicts would ensue. For example, if OSHA's forthcoming lead standards require differential employment treatment by sex for safety purposes, the government could be subject to allegations (based on the due process and equal protection clauses of the fifth amendment, rather than Title VII) that it is compelling differential treatment of certain classes of workers without a factual justification, and is thereby causing unconstitutional discrimination on the basis of sex. See *Craig v. Boren*, 97 S. Ct. 451 (1976); *Hearings of the U.S. Dep't of Labor, Occupational Safety and Health Admin., on the Proposed Standard for Exposure to Lead*, March 15, 1977 at 11-14 (comments of the Women's Legal Defense Fund).

27. This is typical of industry responses to other worker health issues. See, e.g., *Society of Plastics Indus., Inc. v. Occupational Safety and Health Administration*, 509 F.2d 1301 (2d Cir. 1975). See also *Hearings before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 389 (1975) (response of Prof. Norton Nelson to written questions of Anita Johnson) (detailing both industry's withholding of information concerning toxic effects of substances and the preventable injuries and deaths caused by lack of information).

28. HRICKO, *supra* note 5, at A-40; see *Read v. St. Joe Minerals Corp.*, Nos. E-8113PD, E-9654PD and E-9754 (Letter of March 2, 1976 from Harriet E. Hendler, Director, Affirmative Enforcement Project, Pa. Human Rights Comm., stating that probable cause exists to credit allegations of discrimination and recommending a hearing on the merits).

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—The Delco-Remy Division of General Motors Corporation in Indiana, a battery plant, rejects female applicants capable of bearing children for all jobs with lead exposure.²⁹ When another General Motors plant refused to hire a Toronto, Canada, woman for the same reason, she underwent a hysterectomy to qualify.³⁰

—A woman working with formaldehyde at a fiberboard plant was advised to quit working in the second month of her pregnancy due to the possible danger to the fetus. The company fought her efforts to receive a transfer or disability benefits, and she received only unemployment compensation during the remainder of her pregnancy.³¹

—A New England plastics factory refused to reinstate a worker laid off from its vinyl chloride operation. The company cited possible hazards if she became pregnant, and informed her that she could return to her former job only with a physician's note stating that she was no longer able to bear children.³²

Thus, a fertile woman employed in or seeking an industrial job where there is exposure to potentially dangerous toxins may have to choose between unemployment and a possible loss of childbearing capacity. An employer may not violate either federal or state regulation of workplace hazards by forcing this choice. The solution employers have chosen, however, directly conflicts with another federal mandate: the prohibition of discrimination in employment on the basis of sex.

III

THE RELATIONSHIP OF TITLE VII

Title VII of the Civil Rights Act of 1964 outlaws discrimination in employment on the basis of race, sex, color, religion, or national origin.³³ The prohibition against sex-based discrimination requires em-

29. *Toomer v. General Motors Corp., Delco-Remy Div.*, No. 76-101c (S.D. Ind. filed Feb. 17, 1976).

30. *Medical World News*, June 14, 1976, at 57-62.

31. Interview with Andrea Hricko, M.P.H., Health Coordinator, Labor Occupational Health Program, Univ. of California, in Berkeley, California (April 12, 1977).

32. *Id.*

33. Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. § 2000e (Supp. V, 1975). Section 703(a) of Title VII makes it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . [or] (2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . .

Id. at § 703(a), 42 U.S.C. § 2000e-2(a)(1).

ployers to treat employees in a sex-blind fashion. Employers may not generalize characteristics that may be commonly associated with one sex or the other, but are not attributable to all members of that sex.³⁴ Overgeneralization of characteristics that are not necessarily related to sex (strength, for example) has been held unlawful when used to limit otherwise qualified women from full and equal participation in employment.³⁵

The relevance of Title VII to the treatment of women exposed to toxic hazards at the workplace derives from the sex-based, generalized nature of employer responses to the problem. Employers seem to exclude women from the toxic jobsite on the assumption that they *all* will become pregnant, and thereby face a greater risk of injury than men who are not excluded. While exclusion of pregnant women might sometimes be justified because of the increased danger of teratogenic injury,³⁶ the exclusion of all women, or fertile women, is based on an inaccurate assumption of universally disproportionate risk. This assumption may not be applicable to all members of the excluded group,³⁷ and may be applicable to men who are not excluded.³⁸ If a woman is excluded where men facing the same or similar risks of injury are not, the employer is discriminating against the woman solely on the basis of her sex.

IV

EMPLOYER RESPONSES TO CHARGES OF SEX-BASED DISCRIMINATION

In response to an allegation that exclusion of women violates Title VII, an employer might argue that the exclusion is not sex-based, but is instead based on sex-neutral classifications. If differential treatment is found to be based on factors other than the sex of the employee, the plaintiff has failed to make a *prima facie* showing of sex discrimination,

34. Common examples of such generalizations that have been struck down as discriminatory are: Weight-lifting requirements, *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971), limitations on working hours, *see, e.g., Kober v. Westinghouse Elec. Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971), and absolute job prohibitions (e.g., bartending), *see, e.g., Krause v. Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973).

35. *See, e.g., Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971). For a more thorough analysis of the application of Title VII to sex-based discrimination, *see K. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS* 637 (1974).

36. Although if this were the justification, men with pregnant wives might also face higher risks warranting exclusion. *See note 17 supra.*

37. Except, perhaps, in the case of a cumulative teratogen. *See note 14 supra.*

38. *See text accompanying notes 11-19 supra.*

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and Title VII is inapplicable. On the other hand, if the plaintiff successfully makes a prima facie showing, the burden of proof shifts to the defendant to show adequate justification for the discrimination.³⁹

A. Denying that the Discrimination is Sex-Based

The argument that the exclusion of women from the toxic workplace is not sex-based will likely focus on the potentially different risks to the reproductive systems of men and women. One might say that the risk of teratogenic injury uniquely threatens those workers who are pregnant or can become pregnant, and their exclusion from the workforce stems from actual differences in susceptibility to disease rather than from sex-based classifications. This argument seems transparent in view of its focus on women from the outset—only women can become pregnant. Arguably, the burden should shift at this point to require an employer to provide an affirmative defense for such sex-based differential treatment. Recent developments, however, in the Supreme Court's view of pregnancy in employment discrimination cases lend support to this approach.

In both an equal protection case, *Geduldig v. Aiello*,⁴⁰ and a Title VII case, *Gilbert v. General Electric Co.*,⁴¹ the Supreme Court has distinguished between discrimination based on pregnancy and discrimination based on sex. In *Aiello*, women alleged that the equal protection clause of the fourteenth amendment prohibited California from excluding pregnancy-related disabilities from the coverage of the state disability insurance system. The Court ruled that the exclusion of pregnancy-related disabilities did not constitute sex discrimination because the distinction was not based strictly on gender, but rather on a unique "physical condition":

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.⁴²

The Court applied *Aiello's* reasoning again in *Gilbert*, finding sex-based

39. Where a prima facie claim of sex discrimination is established, an employer has the burden of justifying the practice through affirmative showings of a "bona fide occupational qualification" or "business necessity." See text accompanying notes 60-122 *infra*.

40. 417 U.S. 484 (1974).

41. 97 S. Ct. 401 (1976).

42. 417 U.S. 484, 496-97 & n.20 (1976).

discrimination absent because, outside the "unique" case of pregnancy,⁴³ men and women are treated "alike."⁴⁴

The *Gilbert* and *Aiello* doctrine might immunize an employment practice that treats women differently, due to the disabling condition brought about by their unique reproductive systems, from further scrutiny under Title VII. There are, however, two obstacles to applying this approach to toxic workplace exclusion cases.

First, in many toxic workplace exclusion cases, employers are not treating men and women "alike" because only women are excluded for protection from reproductive health risks that both sexes share. It is well established that toxic substances pose substantial reproductive health risks to fertile men.⁴⁵ Given the limitations of scientific knowledge and the tenuous causal links between exposure to a given toxin and ultimate injury,⁴⁶ employers may be unable to substantiate claims that their women employees face a greater risk of reproductive injury than their male workers. If the objective of exclusion is the minimization of health risks, classification on the basis of pregnancy may be underinclusive. That weakness alone might be acceptable under *Gilbert*,⁴⁷ but the classification also suffers from overinclusiveness since many women in the excluded class delay or plan to avoid childbearing, and thus face no additional risk at all. By excluding these women, while employing susceptible males in their place, the employer eliminates any legitimate rationale for a classification on the basis of pregnancy. This leaves only the conclusion that employers are discriminating on the basis of sex.

In another sense, the excluded class of women hardly receives equal treatment. Unlike the *Gilbert* situation, where women workers unable to qualify for pregnancy benefits at least receive other benefits on the same basis as fellow male workers, the exclusion of fertile women

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43. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.

. . . Pregnancy is of course confined to women, but it is in other ways significantly different from the typical covered disease or disability.

Gilbert v. General Elec. Co., 97 S. Ct. 401, 407-08 (1976).

44. The Court stated:

There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class. . . .

There is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not.

Id. at 408.

45. See notes 11-19 *supra*.

46. See notes 18-19 *supra*.

47. General Electric's disability insurance scheme was recognized as "underinclusive" by the Court. *Gilbert v. General Elec. Co.*, 97 S. Ct. 401, 409 (1976). Note, however, that in the toxic workplace case, there is no discrete group that shares a "unique" characteristic like pregnant women in *Gilbert*. Similar reproductive risks may extend to both sexes when toxic exposure occurs.

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from the workplace leaves few women behind to benefit from the otherwise "neutral" treatment.⁴⁸ Title VII's goal—putting women on equal footing with men in employment opportunity—is completely disregarded by the practice.⁴⁹

Second, the holdings of *Gilbert* and *Aiello* are stretched beyond reasonable limits when used to prevent a shifting of the burden of proof. Although the Court's findings in *Gilbert* obviated the need for scrutiny of the employer's rationale for discriminatory treatment,⁵⁰ the relative costs of alternative practices were briefly reviewed beforehand, giving the Court a sense of the equities in that case.⁵¹ Even where evidence may indicate differences in the adverse impact of toxins on men and women, it is arguable that simple one-tier review of the type used in *Gilbert* is inadequate to assess the complicated situations present in toxic workplace exclusion cases, much less the equity of excluding only women workers.

Whereas the focus in *Gilbert* was on the "voluntariness" of pregnancy, any woman with child-bearing capacity—an involuntary "status"⁵²—faces an irrebutable presumption of disproportionate risk in toxic workplace exclusion cases. Furthermore, unlike *Gilbert*, where only "pregnancy per se" was at issue,⁵³ reproductive injuries are clearly disabilities, and the employer in a toxic industry is at least partly

48. See note 8 *supra*.

49. See HUNT, *supra* note 8, at 2-13, where she describes several common hazards of employment during pregnancy. Despite this, many women cannot afford the luxury of a pregnancy free from strain. If employers are allowed to begin to impose their paternalistic safety concerns on fertile or pregnant women—particularly without bearing the burden of proof—the doctrine of equal employment opportunity could be meaningless for many women workers who would be forced to choose between economic well being and childbearing. Given the obviousness of women's childbearing role, use of that fact to sanction differential employment treatment seems to ignore Congressional intent.

50. 97 S. Ct. 401, 408 (1976). Title VII does not provide for review of an employer's rationale for differential treatment of a protected group at the *prima facie* stage. Affirmative defenses are evaluated only after findings of discrimination are made. See note 39 *supra*.

51. 97 S. Ct. 401, 407-12 (1976).

52. Childbearing potential is more a status than a physical, tangible reality. Physical characteristics, which may legitimately support an exclusionary employment practice, are to be distinguished from status, which does not provide such support. There are only two instances when childbearing "status" may become a physical condition necessitating disproportionate protection: When a cumulative teratogen in the work environment significantly increases the likelihood of injury, or when the inadequacy of pregnancy testing or unreliability of individual "pregnancy planning" necessitates the assumption that fertile women may be pregnant at any time. See K. DAVIDSON, R. GINSBURG & H. KAY, *SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS* 638-40 (1974).

53. *Gilbert v. General Elec. Co.*, 97 S. Ct. 401, 408 (1976). But note that the Court's analysis ignored the fact that General Electric's plan excludes non-pregnancy-related disabilities suffered during pregnancy. *Id.* at 416 (Brennan, J., dissenting).

responsible for the disability. Were it not for the employer's failure to eliminate hazardous substances, the injury would not ensue regardless of the employee's reproductive status. Requiring workers to bear the entire burden of persuasion or else suffer differential treatment disregards the joint responsibility of employer and employee in the circumstance.

The necessity of exploring an employer's affirmative justifications for exclusion appears particularly compelling when one compares the application of Title VII doctrine in cases where a completely "neutral" employer practice has disparate adverse effects.⁵⁴ In *Griggs v. Duke Power Co.*,⁵⁵ the Supreme Court required the employer to demonstrate an essential business purpose for a practice that effected a disproportionate impact on racial minorities. *Griggs'* premise, that historic patterns of employment discrimination make disparate treatment inherently suspect,⁵⁶ similarly applies to the toxic workplace exclusion case.⁵⁷ Most

54. One might attempt to characterize the exclusion of fertile women as differentiation among workers on the basis of their relative "susceptibility to injury" or "resistance to reproductive damage," and thereby establish a "neutral" classification. The class excluded, however, is that of fertile women. Regardless of the "neutrality" of the rationale, this is not a "neutral" classification in the traditional sense. See, e.g., *Meadows v. Ford Motor Co.*, 9 FEP Cases 180 (6th Cir. 1975); *Rose v. Bridgeport Brass Co.*, 487 F.2d 804 (7th Cir. 1973); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

55. 401 U.S. 424 (1971). In *Griggs*, black employees of a generating plant challenged the employer's requirement of a high school diploma or passage of a standardized intelligence test as a condition of employment. The Court found that where job requirements have a disparate impact on a protected class, such requirements are prima facie violations of Title VII, and must be justified by an affirmative defense of business necessity. The Court stated, "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

56. In *Griggs* the Court stated:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

401 U.S. 424, 429-30 (1971).

The Seventh Circuit gave a similar rationale in a sex discrimination case. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 198 (7th Cir.) cert. denied, 404 U.S. 991 (1971).

57. It should be noted that recent cases may have undermined the *Griggs* doctrine. In *Washington v. Davis*, 96 S. Ct. 2040 (1976), the Court was disinclined to rely on evidence of disparate effect to find racial discrimination. Although the case was decided on the basis of the fifth amendment due process clause, rather than Title VII, Justice Brennan's dissent describes the decision as inhibiting future application of Title VII where only discriminatory effect, not intent, can be proved. *Id.* at 2057. Further, in *Gilbert v. General Electric Co.*, 97 S. Ct. 401 (1976), the majority opinion inferred that discriminatory effect, without an identifiable discriminatory motive, may be insuf-

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industrial workplaces in question have long practiced sex discrimination, and paternalistic notions of women's disproportionate susceptibility to dangers of all sorts are still prevalent.⁵⁸ Discrimination that excludes women in order to "protect" their health should be carefully scrutinized so that past discrimination against women in such occupations can be alleviated and historic assumptions of physical and vocational inferiority might be neutralized.⁵⁹

B. Affirmative Defenses

Assuming that the plaintiff makes a sufficient prima facie showing of sex discrimination, Title VII doctrine provides two affirmative defenses upon which the defendant may rely.

1. Bona Fide Occupational Qualification

Title VII offers one statutory defense to its general prohibition of discrimination on the basis of sex. Section 703(e) provides that discrimination in hiring and employment on the basis of sex is not an unlawful employment practice "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"⁶⁰

Analyzing the toxic workplace problem under the "occupational qualification" exception presents difficulties.⁶¹ An occupational quali-

ficient to prove a Title VII violation. *Id.* at 409. In the toxic workplace case, employers might point to their concern for employee health and safety to show their nondiscriminatory intent, and thereby escape Title VII scrutiny altogether.

Still, the majority in *Davis* and a concurrence in *Gilbert* make reference to *Griggs*. This may indicate a continued reliance on the basic *Griggs* doctrine.

58. See generally cases cited note 34 *supra*.

59. The first Supreme Court review of Title VII's sex discrimination component provides a clear analogy. In *Phillips v. Martin-Marietta*, 400 U.S. 542 (1971), an employer sought to justify exclusion of all women with preschool children on the basis of assumed conflicts between work and motherhood. The Court declared the classification to be "sex-plus" discrimination and remanded, directing the employer to provide factual support for such a universal conflict or abandon the practice.

60. Civil Rights Act of 1964, § 703(e), 42 U.S.C. § 2000e-2(e) (Supp. V, 1975).

61. One problem with applying the statutory test in these cases is that the statute permits sex to be an occupational qualification only in the "hiring and employment" of women, not in fixing "compensation, terms, conditions or privileges of employment," 42 U.S.C. § 2000e-2(e)(1) (1970). See, e.g., *Hutchison v. Lake Oswego School Dist.*, 519 F.2d 961 (9th Cir. 1975); *Communication Workers of America v. American Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975); *Manhart v. City of Los Angeles, Dep't of Water & Power*, 553 F.2d 581 (9th Cir. 1976). An employer would not be able to use the bona fide occupational qualification exception to treat a previously hired female employee differently when fixing compensation, seniority or other benefits. Many issues of alleged discrimination in toxic workplaces, outside the basic question of exclusion, revolve around the terms and conditions of employment—for instance, reduced pay in exchange for transfers to less hazardous jobsites, elimination of seniority, or loss of other

fication generally requires employees to possess some physical quality necessary for satisfactory performance of the job.⁶² In the case of unsafe jobsites, however, the relevant qualification relates not to an employee's ability to perform, but to an employee's ability to withstand hazards in the work environment. The closest way of describing this as an occupational qualification is to label fertile or pregnant women as somehow "defective" because of their alleged inability to tolerate high levels of toxicity.

Some courts have looked to safety issues to determine occupational qualifications. Those cases, however, have involved the exclusion of an employee with physical attributes that endanger the health and safety of consumers or fellow workers.⁶³ Courts have not yet considered a concern for a worker's own safety to be a bona fide occupational qualification under Title VII where the safety of other persons was not at stake.⁶⁴

A widely accepted judicial interpretation of the occupational qualification clause has been articulated by the Fifth Circuit Court of Appeals:

[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a *factual basis for believing*, that *all or substantially all women* would be unable to perform safely or efficiently the duties of the job involved.⁶⁵

accrued benefits during forced absence from toxic workplaces during pregnancy. See text accompanying notes 77-83, 100-22 *infra*. When an employer's actions relate to these conditions of employment, defenses are limited to the judicially-created business necessity exception.

62. In *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1199 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the court of appeals looked to "inherent qual[ities] reasonably necessary to satisfactory performance." The Fifth Circuit Court of Appeals, in *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), proscribed discrimination unless "the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." See also *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1224 (9th Cir. 1971) (requiring sexual characteristics to be "crucial to the successful performance of the job").

63. In *Condit v. United Air Lines*, [1976] 12 EMPL. PRAC. GUIDE (CCH) EMPL. PRAC. DEC. ¶ 5496, the court approved mandatory leave for pregnant stewardesses based on evidence that due to impaired mobility and a greater likelihood of incapacitating illness (such as nausea) pregnant stewardesses were less able to care adequately for passengers during emergencies.

64. See, e.g., *Warshafsky v. Journal Co.*, 7 FEP Cases 189, *rev'd*, 63 Wis. 2d 130, 216 N.W.2d 197 (1974). The trial court held that the disproportionate threat of assault to a female paper carrier is not a bona fide occupational qualification. It stated, "[a] female carrier able to adequately perform her job is not made less able to do so simply because she may be subject to a greater risk of attack." *Id.* at 191. The case was reversed on other grounds.

65. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (emphasis added). See also EEOC guidelines requiring that the clause be given narrow

Thus, to exclude from the workplace a woman on the basis of pregnancy is a violation of the Equal Employment Opportunity Act, 29 C.F.R. § 1604.11, which prohibits discrimination on the basis of sex. The Supreme Court has held that pregnancy is a condition unique to women, and that the exclusion of pregnant women from the workplace is a form of sex discrimination. *See* *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

As previously noted, the Supreme Court has held that the exclusion of pregnant women from the workplace is a form of sex discrimination. The Court has also held that the exclusion of pregnant women from the workplace is a form of sex discrimination. The Court has also held that the exclusion of pregnant women from the workplace is a form of sex discrimination.

2. The Business Necessity Exception

The judicially developed business necessity exception to the bona fide occupational qualification exception in Title VII is a narrow exception to the general rule that an employer may not discriminate on the basis of sex.

The basic principle is that an employer may not discriminate on the basis of sex unless the discrimination is necessary to the safe and efficient operation of the business.

application, 29 C.F.R. § 1604.11, 711, 716 (1977), *cert. denied*, 433 U.S. 905 (1977).

66. Courts have linked each woman's pregnancy to her ability to perform her job. *See* *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (refusal to hire pregnant women as prison guards was closely correlated with sex discrimination). *See* *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (discrimination against pregnant women was necessary to the safe and efficient operation of the business).

67. See text.

68. Today's decision about the likelihood of a woman's life plan is *supra* note 8, at 139. The Court expected that a woman's life plan would be reversed on other grounds.

69. *Robinson v. U.S. 1006* (1971).

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Thus, to exclude women workers because of their peculiar susceptibility to the workplace's toxic risks and, at the same time, avoid a Title VII violation, an employer must show two things: First, that there is a factual basis for assuming that women workers face greater risks from workplace hazards; second, that "all or substantially all" women excluded from a toxic workplace because of alleged disproportionate risk in fact face greater risks than non-excluded male workers.⁶⁶

As previously mentioned, the employer would find it difficult to prove disproportionate risk.⁶⁷ The "all or substantially all" requirement would present additional difficulties. If employers excluded only pregnant women, the fact of pregnancy might substantiate their disproportionate risk. But, "all or substantially all" fertile women do not face unique risks from teratogenesis. Many face risks similar to those faced by men, and women who have decided not to bear any future children face no risks from teratogens.⁶⁸ Thus, an employer seeking to justify the exclusion of fertile women because of teratogenic risk will face major hurdles in making the factual case.

2. The Business Necessity Exception

The judicially created business necessity exception to Title VII developed subsequent to enactment and judicial interpretation of the bona fide occupational qualification clause. Since race cannot be an occupational qualification, courts first applied the business necessity exception in race discrimination cases. As in those cases, this affirmative defense is a better tool of analysis than the occupational qualification exception in toxic workplace exclusion situations.

The basic test of business necessity is "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."⁶⁹ In order to meet

application, 29 C.F.R. § 1604.2(a) (1970) (cited in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 716 (1969)); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

66. Courts have differed on how closely the "exclusionary characteristic" must be linked to each woman. Compare *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) (refusal to give effect to differential treatment based on characteristics closely correlated with many or all members of one sex, but not held exclusively by each member) with *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (discrimination would be allowed on the basis of a trait that "all or substantially all" women possess).

67. See text accompanying notes 11-19 *supra*.

68. Today reproduction is largely discretionary. Young women may be uncertain about the likelihood of future child-bearing. Older women, whose families are complete or whose life plans have solidified, may be certain of their future plans. See HUNT, *supra* note 8, at 12 (one-quarter of wives aged 18 to 24 and two-thirds of wives 18 to 39 years old expect no more births).

69. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

this test, an employer must establish three factors: (1) A business purpose "sufficiently compelling to override any discriminatory impact"⁷⁰; (2) the effectiveness of the discriminatory practice in carrying out the business purpose;⁷¹ and (3) the absence of any practicable, less discriminatory alternatives capable of effecting the business purpose.⁷² Thus, an employer attempting to justify the exclusion of women from the toxic workplace by means of the business necessity defense faces a heavy burden of justification.

a. *Compelling Business Purpose*

There are at least two "business purposes" that might be offered by employers seeking to meet the business necessity test. The first would be an asserted business need to care for the job-related health needs of the work force.⁷³ Where an employee suffers a specific health risk not protected by existing safety techniques, the employer might assume responsibility for employee safety. The asserted threat of disease, defect or death to employees and their offspring is certainly "compelling" in its dramatic impact, perhaps "sufficiently" so as to justify exclusion from the workplace. However, there are several problems with employer protectionism as a business necessity.

Given the wide range of adverse health consequences resultant from occupational exposure by any worker,⁷⁴ an employer using employee safety as a business purpose might have to show that protecting some women's safety is more "compelling" than protecting other workers facing high risks from different workplace hazards. The anti-paternalistic approach of Title VII and the tarnished credibility of historical efforts to "protect" women through discriminatory treatment render that showing immediately suspect. Moreover, an employer's paternalistic concern for workers, even if genuine, is not a clear "business" purpose. A business enterprise can function efficiently and productively with a high level of adverse reproductive health impacts. Such injuries do not, for the most part, affect the worker's present performance, but rather affect the offspring. Although employer concern for employee health and safety is desirable, the history of American industry does not evidence a level of this concern that even competes with traditional productivity and profit interests.⁷⁵

70. *Id.*

71. *Id.*

72. *Id.*

73. The EEOC has found that protection of women's reproductive health is a "business necessity." Whether it viewed the employer's concern as employee safety or business efficiency is unclear. [1974] 2 EMPL. PRAC. GUIDE (CCH) EEOC Dec. ¶ 6442.

74. See text accompanying notes 1-2 *supra*.

75. See note 27 *supra*.

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Finally, where an employer asserts a protective responsibility to employees as a compelling business purpose, and the employee asserts a right to work, the court must balance two important but unquantifiable social objectives: job safety and equal employment opportunity. Given the importance of each interest, a court will find it difficult to assign priority to one over the other. Moreover, it is doubtful that Congress intended the goals in one area to be compromised to advance the goals of the other,⁷⁶ especially when compromise is not absolutely necessary.

The second "business purpose," more consistent with traditional notions of productivity, would arise from the need to protect the enterprise (rather than the worker) from additional expense as a result of disproportionate levels of injury. Anticipating liability for the consequences of injury to a worker or her offspring, an employer might argue that inclusion of women with reproductive capacity in the workplace subjects the industry to inevitable and overwhelming costs.

Due to the progressive trend of enterprise liability,⁷⁷ there are a variety of actions in which an employer might be found liable. A worker might recover in worker's compensation or tort for reproductive injuries suffered.⁷⁸ Should a worker's child die due to toxic ex-

76. Legislative history of the Civil Rights Act of 1964 and the Occupational Safety and Health Act indicate no evidence that Congress intended greater deference to one objective—occupational safety or equal employment opportunity—than to the other. See *Legislative History of Title VII of the Civil Rights Act of 1964*, [1964] U.S. CODE CONG. AND AD. NEWS 2355; *Legislative History of the Occupational Safety and Health Act*, [1970] U.S. CODE CONG. AND AD. NEWS 5177; *Legislative History of the Equal Employment Opportunity Act of 1972*, [1972] U.S. CODE CONG. & AD. NEWS 2137.

77. See, e.g., RESTATEMENT OF TORTS §§ 519, 522 (1938) (a person carrying on an ultrahazardous activity is strictly liable for harm resulting from that activity, even though the harm is caused by the conduct of an innocent, negligent or reckless third party or by force of nature); accord, RESTATEMENT (SECOND) OF TORTS § 519 (Tent. Draft No. 10, 1964) and RESTATEMENT OF TORTS § 402a (1938), (a manufacturer or distributor of an "unavoidably unsafe" product has a duty to warn "ultimate users" of the product). Whether § 402a includes employees involved in the manufacturing of such products is unclear. In *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), an asbestos installer recovered worker's compensation and additional damages under the theory of § 402a. The court found the employer's warning of the hazards of asbestos inadequate since it did not mention the likelihood of lung cancer and death from asbestosis. See also *Karjala v. Johns-Manville Prod. Corp.*, 523 F.2d 155 (8th Cir. 1975). In *Borel* and *Karjala* the plaintiff recovered from the asbestos manufacturer, rather than the installer's immediate employer. In many toxic workplace cases, however, the employer is also the manufacturer. These holdings emphasize the high degree of accountability placed by the courts on industrial enterprises.

78. Under worker's compensation, recovery would be for compensable medical expenses and lost wages; in a tort action, for exemplary damages, emotional distress and other less traditional remedies. Note also an expansion of worker's compensation. *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975) (worker's acute depression from job-related "psychic trauma" compensable under worker's compensation).

posure, a wrongful death action might be maintained.⁷⁹ Additionally, a child conceived with a defect would possibly have standing to sue.⁸⁰ In short, the potential costs of employer liability are great. The fact that workplace injury has traditionally been viewed as a cost of doing business⁸¹ weakens the characterization of these costs as a compelling business purpose. So does the risk of male reproductive injury—there is no guarantee that liability will decrease where only fertile males are exposed. On the other hand, where the injury is beyond the employer's preventive control and results in substantial additional costs, the defense seems plausible.⁸²

Such financial constraints will likely constitute the major part of a "business necessity" defense. In addition to providing the basis for the employer's business purpose, the argument of prohibitive costs will be a major impediment to the adoption of less discriminatory alternatives.⁸³

The use of financial burdens as the principal defense to a Title VII claim has not yet been accepted by the courts or the Equal Employment Opportunity Commission (EEOC).⁸⁴ Historical reluctance to sanction discriminatory treatment because of increased costs has reflected legiti-

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79. See, e.g., CAL. CIV. PROC. CODE § 377 (West 1977). But compare *Justus v. Atchison*, 19 Cal. 3d 564 (1977) (no recovery for wrongful death of fetus) (12 states concurring) with *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971) (action available for stillborn fetus) (24 states concurring).

80. For example, a child injured by toxic exposure can maintain a cause of action for personal injury in California. *Justus v. Atchison*, 19 Cal. 3d 564, 577 (1977). The child may elect to sue while a minor (represented by a guardian ad litem), CAL. CIV. PROC. CODE § 352 (West 1977), or retain the right of action until the age of majority. CAL. CIV. PROC. CODE § 29 (West 1977).

81. Consider, for example, the financial impact on industry of present levels of injury. In 1973, 15.3 cases of occupational injury or illness per 100 fulltime employees were reported in the manufacturing industry, *Statistical Abstract*, U.S. Dep't of Commerce, Bureau of the Census 376 (1975), incurring costs of lowered productivity, medical care, and sick leave.

82. Where the fear of future litigation is a "business necessity" justifying exclusion of women workers, some compromises may be available—for example, payment of a portion of wages into an insurance fund to indemnify the employer from future liability, or possibly a waiver of future liability. See generally the discussion of less restrictive alternatives, Section B.2.c. *infra*. But see notes 120-22 *infra* concerning limitations to the waiver concept. Women's advocates strongly oppose these alternatives, arguing that such trade-offs for equal employment are coercively designed and are continuations of historic discrimination. In some instances, however, they may be desirable alternatives to some women seeking certain job opportunities.

83. See text accompanying notes 100-22 *infra*.

84. Costs rejected as adequate "business necessities" include validation of tests (*Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)), customer preference (and resultant business losses where patronage is thereby reduced) (*Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)), training costs (*United States v. N.L. Indus., Inc.*, 479 F.2d 354, 366 (8th Cir. 1973)), and "reasonable adjustments" in berth and toilet facilities to accommodate women Merchant Marine officers and sailors [1969] EMPL. PRAC. GUIDE (CCH) EEOC Dec. ¶ 6010).

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mate skepticism of industry's inability to absorb them, especially where slight increases in financial responsibility might rectify a long record of active discrimination.⁸⁵ However, legislative history and Supreme Court dicta indicate that cost differentials, where amounting to "economic penalties," may yet be valid defenses for employers.⁸⁶

b. Effectiveness of the Discriminatory Practice in Carrying Out the Business Purpose

Both previously mentioned "business purposes" rely upon the supposition that the excluded group faces a disproportionate risk of injury. The exclusion of fertile women from the workplace will obviously fail to carry out either business purpose if, in fact, this disproportionate risk does not exist. If workers remaining in the workplace are equally at risk, then the exclusion of only women will neither maximize worker safety nor minimize employer liability. Thus, the employer has the burden of demonstrating the effectiveness of the discriminatory practice in carrying out the business purpose by making a factual showing of disproportionate risk.

Scientific support for the assumption that female workers face greater risks than male workers is frequently lacking.⁸⁷ In other cases, some evidence of disproportionate risk exists, but the studies' conclusions rest upon less than thoroughly conclusive findings.⁸⁸ Perhaps sometimes the health risks at stake are sufficiently serious to justify

85. For example, the District Court decision in *Gilbert v. General Elec. Co.*, 375 F. Supp. 367, 383 (E.D. Va. 1974), *rev'd*, 97 S. Ct. 401 (1976), recognized the existence of a "cost differential defense," but concluded that the facts called for an exception to the rule in view of the Congressional purpose to "sexually equalize employment opportunity." The Supreme Court noted the lower court's conclusion but, having ruled that defendant's plan had no discriminatory effect, did not reach the issue. 97 S. Ct. 401 (1976). See also *Manhart v. City of Los Angeles, Dep't of Water & Power*, 553 F.2d 581 (9th Cir. 1976), which required the employer to provide equal employment benefits to both sexes, although "[a]ctuarial distinctions arguably enhance the ability of the employer and the pension administrators to predict costs and benefits more accurately. . . ."

86. See, e.g., *Manhart v. City of Los Angeles, Dep't of Water & Power*, 553 F.2d 581, 588 (9th Cir. 1976).

87. See text accompanying notes 11-19 *supra*.

88. The difficulty of making regulatory or remedial rulings on the basis of inconclusive scientific findings is a growing problem. Although standards regulating toxic exposure must be developed on the basis of the "best available evidence," Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1970), or "sufficient" to form "reasoned evaluation[s]," Toxic Substances Control Act, Pub. L. 94-469, 90 Stat. 2003 (1976) (to be codified at 15 U.S.C. § 2601(5)(e)), the predictive value of such data varies widely. The problems of prediction are discussed at notes 18-19 *supra*. In response the scientific world is developing terminology to predict the impact of exposure where actual scientific findings are inconclusive. See, e.g., Kotin, *Dose-Response Relationship and Threshold Concepts*, *ANNALS*, *supra* note 2, at 22, 26.

selective exclusion on less than conclusive findings.⁸⁹ Such determinations deserve close scrutiny, however, and in no case should courts rely on essentially hypothetical or speculative evidence.⁹⁰

Courts will also have to determine what degree of differential risk of injury is sufficiently disproportionate so as to justify discriminatory treatment. Where the risk of injury to fertile women is only incrementally greater than that to their male counterparts,⁹¹ it must be determined that such risk is sufficiently distinct and disproportionate to warrant differential treatment on the job.

Another problem arises where an employer seeks to exclude all women of childbearing capacity on the basis of risks to pregnant women, without demonstrating the likelihood of pregnancy for all members of the excluded class. The aforementioned occupational qualification doctrine frequently adopted in business necessity cases⁹² requires that "all or substantially all" members of the class under question share the characteristic that makes them unable to perform a job "safely or efficiently."⁹³ Assuming a factual basis for the claim that pregnant women face higher risks of teratogenic injury from a toxin, excluding all fertile women still affects many women who, due to luck or design, will not become pregnant during or soon after their working careers. At least one court has, in dictum, recognized the potential need for "reasonable general rule[s]" where "it is impossible or highly impractical to deal with women on an individualized basis."⁹⁴ If individual testing or

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89. See generally Schneiderman, Mantel, & Brown, *From Mouse to Man—or How to Get from the Laboratory to Park Avenue and 59th Street*, 246 ANNALS OF THE N.Y. ACADEMY OF SCIENCES 237, 244 (1975).

90. Since liability for worker injury is the most—or only—appropriate "business purpose" for exclusion, existing tort doctrines defining foreseeability for purposes of establishing liability might provide doctrinal guidance. See generally W. PROSSER, LAW OF TORTS 267-70 (1971).

91. For example, female X-ray technicians are twice as likely to bear defective children than other women, while wives of male X-ray technicians give birth to defective children at 1 1/4 times the normal rate. HRICKO, *supra* note 5, at C-11.

92. In practice, courts have given minimal attention to the doctrinal and theoretical differences between the occupational qualification and business necessity defenses. See, e.g., *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), where the court analyzes the standard of proof to establish an occupational qualification as "business necessity"; [1971] 2 EMPL. PRAC. GUIDE (CCH) EEOC Dec. ¶ 6244, where the EEOC ostensibly used an occupational qualification test, but incorporated the *Griggs* "reasonable available alternatives" test, associated with business necessity. See also *Hodgson v. Greyhound*, 499 F.2d 859 (7th Cir.), *cert. denied*, 419 U.S. 1122 (1974), an age discrimination case, where the court accepts as a valid occupational qualification that "the essence of [Greyhound's] operations would be endangered by hiring drivers over forty years of age," thus parroting the business necessity doctrine developed in *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

93. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

94. *Id.* at 235 n.5.

95. Pregnant women are not available until the early stages of pregnancy, when it is difficult to remove the worker from the job. During pregnancy, the fetus is maximal in the first trimester, in maternal blood in later stages, after delivery. *Infant Abnormalities* also Landesman on *termination of Human Pregnancy Test*, 2 positive results from the first missed period. *Infra*.

96. Rosenfeld.

97. See also 581, 586-88 (9th Cir. 1977), *revisions of annual pregnancy tests with two Title VII violations of the policy of the employer could found discriminatory abolition of sex-based pregnancy tests*.

98. *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

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evaluation of women workers is considered impractical or ineffective,⁹⁵ courts might view the exclusion of all women of childbearing capacity as the only practicable method of protecting pregnant women.

The judiciary, however, has shown reluctance to make general assumptions about women as a class when individualized treatment is a viable alternative. The Ninth Circuit Court of Appeals has refused to give effect to a procedure where males were presumed to be physically qualified for an "arduous" position and females were rejected as impossible to evaluate.⁹⁶ If a woman could produce credible evidence—medical tests, her own affirmations of an intention not to become or remain pregnant—to show that the risk of injury to her is not greater than that of fertile male counterparts, an employer should have no right to apply general assumptions of disproportionate risk to justify excluding her from the workplace.⁹⁷

c. Least Restrictive Alternatives

The doctrine of the "least restrictive alternative," as developed under the "business necessity" exception to Title VII, requires employers to look for feasible alternatives to discriminatory action that are less burdensome to employees.⁹⁸ Even where a compelling business purpose exists, the employer must demonstrate the absence of "less restrictive alternatives" before "business necessity" will justify the discrimina-

95. Pregnancy tests are not always accurate, and a dependable result may not be available until the fourth or fifth week of pregnancy. Where teratogenic injury occurs in early stages of gestation, a pregnancy determination may not be available in time to remove the worker from harmful exposure. See, e.g., Angle & McIntire, *Lead Poisoning During Pregnancy*, 108 AM. J. DIS. CHILD. 436 (1961) (indicating a definite fetal risk, maximal in the first trimester, from intrauterine exposure to high concentrations of lead in maternal blood). On the other hand, some teratogenic effects may be harmful only in later stages, after pregnancy detection is available. See Corbett, *Cancer and Congenital Abnormalities Associated with Anesthetics*, ANNALS, *supra* note 2, at 58, 63. See also Landesman and Saxena, *Results of the First 1000 Radioreceptorassays for the Determination of Human Chorionic Gonadotropin: A New Rapid, Reliable, and Sensitive Pregnancy Test*, 27 FERTILITY AND STERILITY 357 (1976) (describing a test providing positive results from within one week after conception with 100% accuracy at the time of the first missed period). See the privacy discussion accompanying notes 108-15 *infra*.

96. *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971).

97. See also *Manhart v. City of Los Angeles, Dep't of Water & Power*, 553 F.2d 581, 586-88 (9th Cir. 1976). *Manhart* was a case challenging sex-differential provisions of annual pension benefits, which the court characterized as presenting a conflict with two Title VII doctrines: "the policy against per se discrimination directly conflicts with the policy of allowing relevant factors to be considered." *Id.* at 586. Although the employer could not predict the longevity of individual women employees, the court found discrimination per se, rejected the employer's affirmative defenses, and ordered abolition of sex-based actuarial standards for determining pension benefits.

98. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

tory practice.⁹⁹ There are at least four less restrictive alternatives to the practice of excluding women workers from the toxic workplace. Three of these alternatives—removal of toxic risks, systems for individual screening, and provision for alternative employment or benefits—are viable. A fourth less restrictive alternative, disclosure and waiver, is apparently not workable despite a certain appeal. Although each alternative presents problems—either for employer or employee—some combination thereof will often provide an alternative to exclusion or other differential treatment.

i. Removal of toxic risks from the workplace. Where the employer's inability to provide a safe working environment is at issue, rather than the incapacity of employees to perform their jobs, employers should attempt to clean up the workplace or otherwise protect workers¹⁰⁰ before adapting personnel policy to compensate for disproportionate risks. The limitations of this alternative would center around the feasibility of reducing exposure.

This approach is unorthodox insofar as it provides "worker safety" remedies in situations heretofore limited to employment and compensation remedies. Moreover, the separate mandate regulating worker safety—the Occupational Safety and Health Act—and its toxic substances control clause¹⁰¹ operate independently of Title VII, and might be said to pre-empt this sort of employer regulation. On the other hand, Title VII explicitly provides for formulation of any remedy within the reasonable grasp of the employer.¹⁰² The similarity between the two mandates argues for joint study and interpretation in order to resolve potential conflicts.¹⁰³

99. The EEOC has decided that the forced resignation of a pregnant X-ray technician violated Title VII. Although X-ray levels in the workplace were hazardous to the employee's unborn child, the resignation policy was unlawful because less discriminatory alternatives were available for accomplishing the employer's protective purpose, such as leaves of absence, sick leave and maternity benefits. The Commission found that difficulty finding a temporary replacement for the pregnant employee did not justify the employer's failure to provide alternatives to resignation. [1974] 2 EMPL. PRAC. GUIDE (CCH) EEOC Dec. ¶ 6442.

100. Employers might, for example, provide respirators or other protective equipment.

101. Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1970). See notes 18-21 *supra*.

102. See, e.g., Civil Rights Act of 1964, § 707(a), 42 U.S.C. § 2000e-6(a) (Supp. V, 1975), which provides for actions by the Attorney General "requesting such relief . . . as he deems necessary to insure the full enjoyment of the rights herein described."

103. The structure of the two laws is quite similar, particularly in their balancing of employer responsibilities and practical limitations. Just as Title VII's mandate to provide equal employment opportunity is limited to remedies within the reasonable grasp of employers, OSHA's toxic substances clause mandates a clean workplace within "feasible" limits. See notes 20-22 *supra*. It seems that a mitigating practice found to be less than an "economic penalty" for Title VII purposes, see note 86 *supra*, would also

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Additional ties between the two issues compel this alternative. First, the presence of the occupational hazard is a direct cause of the Title VII problem itself. Further, once the hazard is limited or removed, both male and female workers would benefit. Reduction of levels of exposure would not only equalize job opportunity but would simultaneously promote the goal of overall occupational health.

ii. *Systems for individual screening and evaluation.* Where an employer cannot eliminate workplace hazards and demonstrates compelling evidence of disproportionate risk, the industry should provide a mechanism for differentiating accurately between those who are and are not subject to the hazard. Where most teratogenic risks are concerned, a system differentiating between pregnant and non-pregnant workers would distinguish most readily those in need of special treatment.¹⁰⁴ Obviously, accurate and up-to-date awareness of an individual's reproductive status would be a complicated process, and appears to be cumbersome and costly.¹⁰⁵ It presents, however, one of the only ways of avoiding outright exclusion of large groups of otherwise employable women after an employer has established the disproportionate danger of retaining pregnant women in a workplace. Alternative methods of operating such a system are available. An employer might first screen employees to identify those with the capability of becoming pregnant, then provide industry-operated pregnancy testing to monitor its employee's status. As an alternative, employees might independently monitor their status and disclose relevant information—child bearing capacity, intent to become pregnant or the fact of pregnancy itself—to the employer.

Title VII doctrine strongly supports employer provision of individual screening systems. Cases have solidly upheld testing and test validation as mandatory components of anti-discrimination policy,¹⁰⁶ and have flatly rejected cost defenses.¹⁰⁷ Thus, if a system exists that can effectively assist individual assessment of disproportionate worker risk, it may be required at the employer's expense.

be a "feasible" one. See note 21 and accompanying text *supra*. If an employer is reasonably able to reduce toxic exposure sufficiently to reduce exclusionary treatment of women employees, that action is probably also required within the ambit of OSHA. Given this congruence, it seems appropriate for a court to recognize both mandates and apply them simultaneously.

104. This may not be true with regard to cumulative teratogens. See note 14 *supra*.

105. See note 95 *supra*.

106. See, e.g., *Albemarle v. Moody*, 422 U.S. 405 (1975); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 718 (1969).

107. See, e.g., *Manhart v. City of Los Angeles, Dep't of Water & Power*, 553 F.2d 581 (9th Cir. 1976) (cost of determining pension risks on more than statistical information); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (cost of testing validation).

The burdens of this alternative to employees should be evaluated before it is imposed on a work force. Some employees may regard this alternative as more desirable than job loss or demotion. Others, however, might legitimately view inquiry into a worker's reproductive status, continuous monitoring of that status during their working career, and employer influence in decisions regarding procreation, as overly intrusive. Numerous constitutional rulings¹⁰⁸ have recognized the burden imposed by such intrusions.¹⁰⁹

The right to subject one's body to possible harm is not unlimited, even where constitutional protection is available. Several cases have held that a person cannot totally insulate such decisionmaking from public safety concerns.¹¹⁰ Moreover, autonomy is even further limited where future children are concerned. In *Roe v. Wade*,¹¹¹ the major decision outlining the limited right to an abortion, the Court carefully noted that "a state may properly assert important interests [through regulation] in safeguarding health, in maintaining medical standards, and in protecting potential life."¹¹² In toxic workplace cases—often characterized by injury in the first trimester and long term injurious effects—the state's interest may appear even more compelling.¹¹³

108. A constitutional privacy argument can only be made against certain employers. If the employer's inquiries derived from his private need or desire for information, his actions would be immune from constitutional scrutiny, since an individual's privacy is constitutionally protected only from governmental intrusions. See, e.g., *Moose Lodge v. Iris*, 407 U.S. 163, 173 (1972). If an employer is a governmental entity, covered by the 1972 amendments to Title VII, or is so regulated by such entity that it may be characterized as "governmental," it must respect an individual's privacy, as defined by Supreme Court decisions. For example, if OSHA promulgated regulations limiting the exposure of specified classes of individuals believed to be at risk from certain toxic substances, and employers sought to comply with those regulations by scrutinizing an employee's long range or day-to-day reproductive status, women workers might have a constitutional right of action against such regulations on privacy grounds.

109. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See generally Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 CALIF. L. REV. 1447, 1466-83 (1977).

110. See, e.g., *Minnesota State Bd. of Health v. City of Brainerd*, — Minn. —, 241 N.W.2d 624, 631 (1976) (right of bodily integrity not absolute). See also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

111. 410 U.S. 113 (1973). See also *Doe v. Bolton*, 410 U.S. 179 (1973).

112. 410 U.S. at 153-54 (1973). The Court continued:

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus The situation therefore is inherently different from marital privacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which [previous decisions were] concerned.

Id. at 159.

See also *Raleigh-Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964) (pregnant woman denied right to refuse blood transfusion because of impact on the unborn child).

113. In *Roe* the Court found a state interest in regulating abortion after the first

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The outcome of this balancing process will vary according to the facts of an individual case and the standard of review applied. In a state action situation where a governmental entity is involved, the woman's right of privacy in the reproductive area would be balanced against the government's *parens patriae* interests as in *Roe v. Wade*.¹¹⁴ In other cases, the business necessity test requires a similar but more limited analysis. Where a woman opposes a screening alternative as overly burdensome, her interests must be reviewed in contrast with those of the employer to identify the least restrictive alternative. The employer, however, cannot represent societal *parens patriae* interests unless they can be presented within the context of an appropriate business necessity.¹¹⁵

iii. *Provision of alternative employment or benefits.* If an employer can neither eliminate toxic hazards nor retain all groups of workers, either because they are at a clear disproportionate risk or because the employer cannot distinguish between them, another less restrictive alternative would be the provision of supplemental employment or benefits. Precedent exists for employers to mitigate the adverse effects on workers of toxic exposure, short of exclusion, where the exposure itself cannot be reduced. Some industries engage in extensive efforts to rid employees' systems of toxins,¹¹⁶ and transfer particularly susceptible employees.¹¹⁷ Alternatives might also include provision of compensatory benefits, with retention of seniority rights, during a pregnant worker's leave of absence. These sorts of alternatives would help to reduce the adverse employment impact that a finding of disproportionate risk carries for working women.

The EEOC frequently requires employers to compensate for the needs of pregnant employees who are disabled due to pregnancy-related causes.¹¹⁸ If the *Gilbert* decision is read as repudiating this obliga-

trimester of pregnancy and through the last trimester. 410 U.S. 153-54 (1973).

The potential outcome of the state's noninvolvement there was the elimination of the fetus, which had moral implications but left no future state role in caring for the child. In the toxic workplace case, the state's noninvolvement—that is, allowing employees to work in toxic environments regardless of reproductive status—could result in the birth of an individual with defects that may require state intervention and protective care for the rest of that individual's life. Thus, the state may well have a greater interest in this case than in the abortion cases.

114. *Id.*

115. See text accompanying notes 73-75 *supra*.

116. See, e.g., Occupational Safety and Health Administration, *Proposed Standard for Exposure to Lead*, 42 Fed. Reg. 808, 809 (1977).

117. See, e.g., Wolfe, *A Case for Worker Involvement in Risk Assessment*, *ANNALS*, *supra* note 3, at 410, 412 (workers exposed to benzene (which has been causally linked to leukemia) are routinely checked for abnormal white blood cell levels, and transferred to other parts of the plant until an abnormal count returns to normal).

118. See, e.g., [1974] 2 EMPL. PRAC. GUIDE (CCH) EEOC Dec. ¶ 6442 (al-

tion,¹¹⁹ the higher cost of compensating pregnant workers may prove to be a valid employer defense. Where, however, the employer's working conditions *necessitate* an exclusion or alternative employment, the situation is certainly more analogous to an injury from complicated or dangerous equipment than it is to a leave due to a "normal" and "voluntary" pregnancy. Any supplemental benefits afforded an excluded pregnant or fertile woman employee are arguably a mere cost of doing business in the toxic workplace exclusion circumstance.

iv. *Full disclosure and waiver.* In lieu of requiring full information concerning an employee's reproductive "status" and employment decisionmaking based on that information, an employer might provide full disclosure of the risks of exposure and then allow "high risk" employees to make individual determinations regarding exposure, with the tradeoff that the worker would thereby waive future liability against the employer. This alternative may be attractive to those women who intend to delay or defer altogether the possibility of childbearing. For them, the right of a future tort action may be valueless and their present job invaluable. Waiver, however, presents significant legal problems.

First, the alternative conflicts with an established doctrine prohibiting employment contracts from incorporating clauses waiving employer liability for work-related injury.¹²⁰ Any formal agreement between a worker and the enterprise barring future liability for injury to assertedly "high risk" employees would probably fail under this doctrine, as contrary to public policy. An informal understanding, based on full disclosure and tacit consent, might provide the industry with a defense under traditional tort law, but the fluctuating state of such doctrines renders that option an unreliable predictor of the parties' rights and obligations.¹²¹

though pregnant anesthetists were at disproportionate risk, mandatory resignation was not the least restrictive alternative where alternative benefits and employment plans, such as a temporary layoff, were available).

119. See *Gilbert v. General Elec. Co.*, 375 F. Supp. 367 (E.D. Va. 1974), *rev'd*, 97 S. Ct. 401 (1976), where the district court's order, to provide an affirmative financial obligation to assure equal employment opportunity through inclusion of pregnancy-related disabilities within the defendant's disability insurance package, was reversed on appeal. Since the Supreme Court found no sex-based discrimination, it did not reach the issue of compensatory alternatives. It implied, however, that employer obligations to mitigate adverse employment consequences of pregnancy might be minimal or nonexistent. 97 S. Ct. 401, 411-13 (1976).

120. S. WILLISTON, *CONTRACTS* § 1751A (1957) (contracts between employer and employee to waive future liability are void as against public policy).

121. See, e.g., *RESTATEMENT OF TORTS* §§ 523, 524 (1938); *accord*, *RESTATEMENT (SECOND) OF TORTS* §§ 523, 524 (Tent. Draft No. 10, 1964). Depending on the jurisdiction, the modern notion of comparative negligence or the established doctrines of contributory negligence would probably provide the same sort of bar to liability that the waiver concept would supply. *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076,

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More importantly, the actions of a parent in wilfully assuming risks of injury would probably not bar the offspring from recovering.¹²² This area of tort law is largely undeveloped, and it is conceivable that certain theories might protect employers in some instances. At present no such shelter is assured.

CONCLUSION

Perhaps most apparent in this analysis is the lack of clarity in scientific understanding and legal doctrine which the judiciary must face in resolving problems of toxic workplace exclusion. The basic framework, however, is straightforward—differential treatment without solid factual support and compelling necessity is violative of federal law. At the least, employers must bear the burden of proving the legitimacy of their actions through appropriately framed affirmative defenses.

The satisfaction of achieving equality of job opportunities in a toxic workplace is tempered, of course, by the realization that women and men still risk serious disease and injury from their exposure on the job. One might question why official energy must be directed toward equal employment when the ultimate result is to subject women workers to increased levels of injury.

There are two policy answers. First, women have the right to determine what is in their best interest. The jobsites under analysis here are not necessarily more dangerous than available alternative employment—many "women's" workplaces maintain high levels of risk. So long as workers are subject to toxic risks as a matter of course, women should not be the subject of unique protectionist treatment.

Second, the concern aroused by "special" treatment of women diverts social energies in an unproductive way. The choice confronting women workers, loss of employment or jeopardy to health, is not unique

1096-1100 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (contributory negligence of the plaintiff is a defense to strict liability where he or she voluntarily and unreasonably proceeds to encounter a known danger). See generally Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976). If certain employees are in fact at disproportionately high risk, full disclosure of the hazards of exposure might provide protection for employers from actions under either negligence or strict liability theories. The complexities that such tort analysis would require are beyond the scope of this Comment.

122. Unless the parent's actions (informed entry into the hazardous workplace) were imputed to the infant or acted as an intervening cause of injury, the infant would ordinarily not be held accountable for the parent's decision. See, e.g., W. PROSSER, *LAW OF TORTS* 102 (4th ed. 1971) (infant plaintiff is incapable of consenting to otherwise tortious injury); *Fallow v. Hobbs*, 113 Ga. App. 181, 147 S.E.2d 517 (1966); *Louisville v. Stuckenberg*, 438 S.W.2d 94 (1968) (recovery awarded child for prenatal injuries despite mother's contributory negligence).

to them, but is shared by all workers who remain employed in toxic environments due to economic necessity. Exclusion of one segment of the working force, in the interest of "safety," may act to divert public attention from the harder question—the limits to which a society can afford to subject its workers to high levels of risk and injury. Preoccupation with the issue of "women's" health in this context serves to confuse the issue, and inhibit creative thinking about long term solutions to the more general problem.

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