

Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace

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A growing number of industrial chemicals have been identified as reproductive hazards that may present a significantly greater risk to the developing fetus than to the sperm or egg. Many employers have responded to this risk by excluding fertile women from the toxic workplace through so-called "fetal protection policies." Because these policies have cost the jobs of women only, the two circuit courts to face the issue have considered the problem exclusively in the context of Title VII of the Civil Rights Act of 1964. In their effort to find a solution, the courts have misconstrued Title VII to allow current occupational health standards, which are based on the physical vulnerabilities of men, to dictate the availability of jobs for women.

The courts' exclusive focus on Title VII guarantees a flawed solution to the problem of fetal hazards. Employers' discriminatory response has called attention to a real toxic substances problem. Because fetal protection policies mark the point where sex discrimination and toxic dangers intersect, the correct legal response can come only through examining the legislation Congress has enacted in response to *both* problems: Title VII and the Toxic Substances Control Act (TSCA). Title VII requires that the opportunity to get a job and to be protected on that job be extended equally to men and women. TSCA requires that the level of workplace protection from toxins be high enough to protect employees' offspring, as well as employees themselves, from unreasonable risks. Read together, the two statutes protect women by prohibiting policies that exclude them from the workplace, while providing an effective means of limiting the production and use of fetal toxins and stimulating the development of safer substances.

I. THE SCOPE OF THE PROBLEM

In today's industrial workplace, chemical substances frequently present serious health risks to employees and their future offspring.¹ Toxins can

1. Several commentators have discussed the issue of reproductive hazards in the workplace. *See*

interfere with the reproductive process by causing gene mutations in sperm and egg (called germ cell mutagenesis) or abnormal fetal² development (called teratogenesis).³ By excluding women from the workplace in response to these risks, employers have split the problem in two: where before there was only a health problem, there is now a discrimination problem as well.

A. Workplace Discrimination

Focusing on the evidence of toxins' teratogenic effects, employers in increasing numbers⁴ are instituting "fetal protection policies" which exclude fertile women⁵ from the industrial workplace or condition continued employment on sterilization.⁶ It has been estimated that these protective poli-

Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641 (1981); DOUBLE EXPOSURE (W. Chavkin ed. 1984); Ashford & Caldart, *The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention*, 5 INDUS. REL. L.J. 523 (1983); Finley, *The Exclusion of Fertile Women from the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate, Neutral Response to an Emerging Social Problem?*, 1985 N.Y.U. CONF. ON LAB. 16-1; Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980); Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981); Nothstein & Ayres, *Sex-based Considerations of Differentiation in the Workplace: Exploring the Biomedical Interface between OSHA and Title VII*, 26 VILL. L. REV. 239 (1981); Comment, *Employment Rights of Women in the Toxic Workplace*, 65 CALIF. L. REV. 1113 (1977); Note, *Birth Defects Caused by Parental Exposure to Workplace Hazards: The Interface of Title VII with OSHA and Tort Law*, 12 J.L. REF. 237 (1979); Comment, *Fetal Protection Programs under Title VII—Rebutting the Procreation Presumption*, 46 U. PITT. L. REV. 755 (1985).

2. For the sake of simplicity, this Note will use the words "fetus" and "fetal" to refer to all stages of prenatal development.

3. This abnormal development can be caused by an interference with the genetic material of the fetus or by a more direct interference with fetal cellular processes. See *infra* notes 13-16 and accompanying text.

4. Williams, *supra* note 1, at 642.

5. Fertile women are typically defined as all women of childbearing age who cannot prove that they are sterile. See, e.g., *Wright v. Olin Corp.*, 697 F.2d 1172, 1182 (4th Cir. 1982) ("Any woman age 5 through 63 is assumed to be fertile."). Because fetuses are especially vulnerable to teratogenic harm in the first weeks after conception when women may not know they are pregnant, see Mottet & Ferm, *The Congenital Teratogenicity and Perinatal Toxicity of Metals*, in REPRODUCTIVE AND DEVELOPMENTAL TOXICITY OF METALS 95, 95 (T. Clarkson, G. Nordberg & P. Sager eds. 1983), employers justify excluding all women, not just pregnant women, from the toxic workplace. Williams, *supra* note 1, at 697.

6. Lead, mercury, benzene, vinyl chloride and carbon monoxide are a few of the many substances for which employers have instituted these policies. Williams, *supra* note 1, at 647-48. As part of their exclusionary policies, some employers offer to cover sterilization costs for any woman who wishes to keep her job in a newly restricted area. In 1978, in response to such a policy, five women working at the American Cyanamid Company underwent surgical sterilization in order to keep their jobs. Two others who refused the operation were demoted to janitors. Shortly after the policy was implemented, the company's Inorganic Pigments Department, at the time the only department affected by the policy, was closed down and the female employees without seniority lost their jobs. American Civil Liberties Union Foundation, *Women's Rights Project Annual Report 1983* at 1-3 (discussing *Christman v. American Cyanamid Co.*, No. 80-0024 (N.D. W. Va. filed Jan. 30, 1980) (settled)); Scott, *Keeping Women in Their Place: Exclusionary Policies and Reproduction*, in DOUBLE EXPOSURE, *supra* note 1, at 180.

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cies currently exclude women from at least 100,000 jobs.⁷ The growing popularity of the policies could bar women from millions more.⁸

Many of these policies appear to be nothing but pretexts for denying women high-paying, traditionally male, blue collar jobs. The same employers who justify excluding women out of concern for their reproductive health frequently disregard evidence that the toxins also threaten male reproductive functions⁹ or that waste from these toxins threatens the health of nearby residents and their future offspring.¹⁰ In addition, fetal protection policies are conspicuously absent in the female-dominated workplaces—the “pink collar ghettos”—where women are also exposed to reproductive hazards.¹¹

B. *Non-Pretextual Fetal Danger*

Although evidence suggests that many—perhaps most—current policies are pretextual, it does not indicate that the entire problem of fetal hazards is fictional, dreamed up by employers looking for a new way to shut women out of jobs. Information about the reproductive risks posed by toxins is limited,¹² but our current knowledge of the physiology of the male and female reproductive systems suggests that some toxins may pose a greater threat to reproductive health through maternal exposure than through paternal exposure.

Teratogens can interfere with fetal development in two ways. First, they can alter the genetic blueprint of the fetus so that, in essence, the fetus grows according to the wrong plan.¹³ A teratogen that causes genetic damage in the developing fetus might cause that same damage in the developing sperm (or egg) and could therefore threaten reproductive health

7. Wash. Post, Nov. 3, 1979, at A6, col. 4.

8. See Equal Employment Opportunity Commission and Department of Labor, Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514, 7514 (proposed Feb. 1, 1980) (“Preliminary evidence indicates that as many as 20 million jobs may involve exposure in the workplace to alleged reproductive hazards.”), *withdrawn*, 46 Fed. Reg. 3916 (1981).

9. See Williams, *supra* note 1, at 656–60.

10. See Lytle, *Bitter Trade Leaves Worker Sterile*, (discussing American Cyanamid Company’s fetal protection policy, described *supra* note 6); Lytle, *American Cyanamid Co.: Good Neighbor or Hazard?* (discussing environmental risks posed by American Cyanamid’s presence in community and allegations of company’s illegal disposal of toxins); New Haven Reg., Dec. 16, 1984, at 1, col. 1. The two articles appeared together.

11. See Williams, *supra* note 1, at 649. For example, nurses exposed to anesthetic gases, anti-cancer drugs, ionizing radiation, and even particular detergents are more likely to suffer spontaneous abortions or bear children with birth defects. Coleman & Dickinson, *The Risks of Healing: The Hazards of the Nursing Profession*, in DOUBLE EXPOSURE, *supra* note 1, at 45–47, 49–50. Similarly, secretaries who spend most of their working day in front of video display terminals (VDTs) have complained that their exposure to ionizing and non-ionizing radiation increases the risk of problem pregnancies. Henifin, *The Particular Problems of Video Display Terminals*, in DOUBLE EXPOSURE, *supra* note 1, at 72.

12. Williams, *supra* note 1, at 661.

13. Mottet & Ferm, *supra* note 5, at 96.

through either parent.¹⁴ Alternatively, even if the genetic blueprint remains correct, a teratogen can poison the growing fetus throughout the pregnancy by interfering with its ability to respond to genetic instructions.¹⁵ Unlike genetic damage, this developmental poisoning threatens only the fetus itself, and not the sperm or egg. This second teratogenic mechanism therefore threatens reproductive health through the mother alone.¹⁶

Even those teratogens shown to affect the reproductive process through both sexes may have a significantly greater effect on women.¹⁷ A woman's period of vulnerability is much greater than a man's,¹⁸ and the most vulnerable segment of the reproductive process—when the fetus is undergoing rapid cell proliferation and differentiation—occurs within her.¹⁹ In addition, women may absorb some toxins faster than men,²⁰ and may absorb and circulate them in greatest quantities when pregnant.²¹

14. *See id.* The sperm and egg, joined at conception, supply all the genetic material for the offspring. Any damage to the genetic material of the sperm or egg through mutagenesis will therefore threaten the reproductive process.

15. *Id.* at 96. These "epigenetic" injuries can lead to abnormal cell death, an alteration of cell proliferation, differentiation, biosynthesis and migration, and an interference with intercellular processes. *Id.* at 97.

16. *See* Susanne, *Mutagenesis as a Health Problem*, in *MUTAGENICITY, CARCINOGENICITY, AND TERATOGENICITY OF INDUSTRIAL POLLUTANTS* 1, 2 (M. Kirsch-Volders ed. 1984) (many agents cause teratogenesis through mechanisms not related to mechanisms of mutagenesis and carcinogenesis). Some scientists have speculated that an exposed male may be able to transmit teratogenic substances to a pregnant female during intercourse. *See* Hatch, *Mother, Father, Worker: Men and Women and the Reproductive Risks of Work*, in *DOUBLE EXPOSURE*, *supra* note 1, at 169; Williams, *supra* note 1, at 657. Although such speculation suggests that a man's exposure may continue to threaten reproductive health after conception, that threat of indirect maternal exposure is likely to be far less significant than the threat posed by the pregnant woman's direct and continuous exposure on the job.

17. *See, e.g.*, Hricko, *Social Policy Considerations of Occupational Health Standards: The Example of Lead and Reproductive Effects*, 7 *PREVENTIVE MED.* 394, 402 (1978) (citing study showing that anesthetic gases adversely affected male and female reproductive health, but effect on women more statistically significant).

18. Because a woman is born with her life supply of eggs and carries the developing fetus until its birth, she exposes her potential offspring to the environment for many years, whereas a man, who continually produces new sperm, exposes a potential offspring to the environment for only a brief period. Clarkson et. al., *An Overview of the Reproductive and Developmental Toxicity of Metals*, in *REPRODUCTIVE AND DEVELOPMENTAL TOXICITY OF METALS*, *supra* note 5, at 5.

19. *Id.* at 95; *cf.* Haas & Schottenfeld, *Risks to the Offspring from Parental Occupational Exposures*, 21 *J. OCCUPATIONAL MED.* 607, 608 (1979) (transplacental carcinogens especially threatening to fetus, which is "inherently more vulnerable because of the high rate of cell division, high proportion of undifferentiated cells and immaturity of immunosurveillance mechanisms").

20. *See* R. ZIELHUIS, A. STYKEL, M. VERBERK & M. VAN DE POEL-BOT, *HEALTH RISKS TO FEMALE WORKERS IN OCCUPATIONAL EXPOSURE TO CHEMICAL AGENTS* 2 (1984).

21. The physiological changes a pregnant woman undergoes, which allow her absorption, restoration and distribution processes to operate at peak efficiency, draw excessive concentrations of toxins into her blood supply. Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work*, in *DOUBLE EXPOSURE*, *supra* note 1, at 198-99. This blood supply nourishes her fetus. In some instances, a toxin is distributed "preferentially" to the fetus. Clarkson et. al., *supra* note 18, at 6, 24 (citing evidence showing that concentration of methylmercury is higher in fetal than maternal blood after exposure).

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Most important, a reproductive error that occurs during fetal development is far more likely to lead to tragic results than an error that occurs during spermatogenesis. In both sexes, the reproductive process protects itself by detecting and rejecting abnormalities. In a man, this means that abnormal cells are far less likely to develop into mature sperm²² or reach the egg to fertilize it.²³ These protective responses are not themselves traumatic events. In a pregnant woman, on the other hand, both the protective event, miscarriage, and the failure of that event to occur, which leads to live birth with defects, are tragedies.²⁴

II. THE RESPONSE OF THE LEGAL COMMUNITY: FITTING FETAL PROTECTION POLICIES WITHIN TITLE VII

Employers' facially discriminatory policies and the apparent pretextual nature of many of these policies have focused the attention of courts, litigants and commentators on Title VII. In their efforts to attack pretextual policies, they have decided, without sufficient consideration, that fetal protection policies based on real differences between men and women's vulnerability are legal under Title VII.²⁵ This conclusion does violence to anti-discrimination doctrine and provides inadequate health protection for women in both male-dominated and pink collar workplaces.

A. *Professor Williams' Analysis*

Professor Wendy Williams, the foremost academic critic of fetal protection policies, has focused on the pretextual or stereotyping nature of many of these policies.²⁶ Williams suggests that employers' improper reliance

22. Manson & Simons, *Influence of Environmental Agents on Male Reproductive Failure*, in V. HUNT, *WORK AND THE HEALTH OF WOMEN* 155, 157 (1979).

23. *Id.* at 175. Even where the interference with sperm production is severe enough to prevent all sperm from fertilizing the egg, the constant replenishment of a man's sperm supply makes it less likely that the injury will be permanent. See Hatch, *supra* note 16, at 166 (evidence suggests that agents' effect on sperm development is only associated with recent exposure and "once exposure is removed . . . healthy sperm regenerate"); Manson & Simons, *supra* note 22, at 156 (most agents studied "cause reversible effects on male reproductive function").

24. This is not to say that damage to sperm could not lead to either of these tragedies. However, the body's selective mechanisms, discussed above, significantly reduce the chance that these events will occur. Even if a genetic defect in the sperm does lead to fetal death, that death is likely to occur early in the pregnancy, because the defect will be present in every fetal cell. Manson & Simons, *supra* note 22, at 155.

25. Those few commentators who suggest that these policies violate Title VII as it is now applied advocate a change in the law to allow for the policies. See Furnish, *supra* note 1, at 65, 102-03, 115-18 (advocating statutory amendment of Title VII to permit employers to exclude potential child bearers from workplace where scientific evidence shows special reproductive threat through women and where no less discriminatory alternative available); Howard, *supra* note 1, at 813-14, 839 (advocating change in judicial interpretation of Title VII business necessity defense to allow for exclusionary policies where no less discriminatory alternatives available).

26. See Williams, *supra* note 1, at 653-65.

upon inadequate and sex-biased scientific research and their disregard for any research identifying male reproductive risks can account for employers' conclusions that their female employees are at special risk.²⁷ Perhaps because she considers remote the chance that employers will develop non-pretextual policies based on sound scientific evidence, Williams concludes that such unbiased policies should be permissible under Title VII.²⁸

Although Williams is right to criticize the dearth of scientific data on the reproductive risks posed by toxins, she is on shaky ground in assuming that more complete and objective research and a fairer evaluation of all available data will show that men and women face comparable reproductive risks.²⁹ Any advancement in knowledge that shows that women are indeed at greater risk will undermine Williams' argument. Because superior data may emphasize rather than obscure sex-based distinctions in vulnerability, an analysis of fetal protection policies must look beyond a consideration of pretext and carefully consider the legal and political significance of the more objectively supportable claims employers will inevitably make.³⁰

B. *The Courts' Analysis*

To date, only two circuit courts have considered the legality of fetal protection policies under Title VII. In *Wright v. Olin Corporation*,³¹ the Fourth Circuit vacated the district court's decision upholding the Olin Corporation's exclusionary policy and articulated a standard of evaluation for the district court to apply on remand. The Fourth Circuit's opinion suggested that a proper application of the standard to the facts of the case would lead to a finding that Olin's policy violated Title VII.³² In *Hayes v.*

27. *Id.* at 660-61.

28. *Id.* at 667 (in "extremely rare" event that substance found harmful to fetus solely through maternal exposure, employer could "apply its facially-neutral reproductive policy only to the affected workers—who happen to be women").

29. *See supra* text accompanying notes 13-24.

30. In assessing the validity of an employer's policy, a court generally considers the information that was available to the employer at the time of implementation. *See Burwell v. Eastern Air Lines Inc.*, 633 F.2d 361, 373 (4th Cir. 1980) (en banc) (employer need only show that all information available to it at time of decision reasonably required challenged practice), *cert. denied*, 450 U.S. 965 (1981); *cf. Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1548 (11th Cir. 1984) (employer need only show that body of opinion identifying significant risk is so great "that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one") (quoting *Wright v. Olin Corp.*, 697 F.2d 1172, 1191 (4th Cir. 1982)).

31. 697 F.2d 1172 (4th Cir. 1982).

32. *See id.* at 1187 ("evidence adduced on trial would not suffice to support a finding of business necessity as we think it should be applied"). In fact, the district court heard only Olin's defense on remand, because there was no representative available for the plaintiff class. Although the district court decided that Olin's policy complied with the Fourth Circuit's standard without even hearing plaintiff's opposing argument, 585 F. Supp. 1447 (W.D.N.C. 1984), the Fourth Circuit vacated that decision, 767 F.2d 915 (4th Cir. 1984).

Shelby Memorial Hospital,³³ the Eleventh Circuit applied its own standard of evaluation and found the hospital's policy in violation of Title VII.³⁴ An application of the two standards indicated that the particular policies before the courts unlawfully discriminated against women. Both standards, however, provide that an exclusionary policy that prevents exposure to substances that pose a scientifically recognized significant reproductive risk to pregnant women alone, and for which there is no less discriminatory alternative, could be defended as a business necessity.³⁵ In keeping with Williams' analysis, both courts would cut short the protection guaranteed to women under Title VII by endorsing an interpretation of the statute that allows male-based occupational health standards to determine the scope and safety of job opportunities for women. And like Williams, both courts have intimated to employers that a more exhaustive consideration of information and more carefully crafted language will make their exclusionary policies legally acceptable.³⁶

In their effort to solve a difficult industrial problem exclusively within the framework of Title VII—the only statute litigants put before them—the *Olin* and *Hayes* courts misconstrued the terms and principles of the law. In reaching the conclusion that Title VII allows for scientifically justified fetal protection policies, the courts made two interpretive errors. First, they employed disparate *impact* analysis when the law mandates the more rigorous disparate *treatment* analysis. Second, within the inappropriate disparate impact framework, the courts improperly expanded the business necessity defense allowed the employer.

1. *Disparate Treatment Through Fetal Protection Policies*

In interpreting Title VII, the Supreme Court has developed two frameworks of analysis: the disparate treatment framework and the disparate impact framework.³⁷ The courts employ disparate treatment analysis

33. 726 F.2d 1543 (11th Cir. 1984).

34. In *Hayes*, the Eleventh Circuit affirmed a district court ruling that the discharge of a pregnant x-ray technician violated Title VII. While the facts of *Hayes* differ significantly from the facts considered in *Olin* and this Note, the *Hayes* court attempted to improve upon the analysis in *Olin* and "present a clearer picture of the overall framework" under which all fetal protection policies should be analyzed. *Id.* at 1546 n.2. This Note confines its scope to the consideration of fetal protection policies that deny employment to all fertile women.

35. *Olin*, 697 F.2d at 1190-92; *Hayes*, 726 F.2d at 1554.

36. A well-crafted policy would, of course, serve the interests of the bad faith employer hiding discriminatory intent as well as the good faith employer genuinely concerned with the health of its employees' offspring.

37. In the interest of brevity, I confine my explanation of the doctrine to the bare bones. As a result, many details that are essential to a full understanding of the law, but not to my analysis here, will not be discussed. For a more complete discussion of the doctrine, see, for example, Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. Rev. 419 (1982).

whenever they determine that the employer intended to make a sex-based distinction with its policy, whether the distinction is expressed or concealed.³⁸ Within the disparate treatment framework, employers have only one narrow defense: Unless sex is shown to be a bona fide occupational qualification (BFOQ)³⁹—a qualification directly related to applicants' ability to perform the job—the sex-based distinction violates Title VII.⁴⁰

In contrast, the courts employ disparate impact analysis only when they determine that an employer did not intend to make a sex-based distinction, but promulgated a neutral policy which had significantly different effects on the two sexes.⁴¹ The proper employer defense to a claim of disparate impact is that the policy is dictated by business necessity.⁴² Although the requirements of the business necessity defense have not been well defined, it is clearly easier for an employer to defend a policy as a business necessity than as a BFOQ.⁴³

As defined in Title VII, sex discrimination includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions."⁴⁴ This definition, added by the Pregnancy Discrimination Act (PDA)⁴⁵ in 1978, makes clear the Title VII requirement that a policy that by its terms excludes potential child-bearers from the workforce is facially discriminatory on the basis of sex.⁴⁶ As such, a fetal protection policy must be analyzed

38. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

39. 42 U.S.C. § 2000e-2(e) (1982).

40. See *Dothard v. Rawlinson*, 433 U.S. 321, 334-35 (1977) (although BFOQ defense is "extremely narrow," defense properly claimed for job of correctional counselor where "woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary . . . could be directly reduced by her womanhood"); *Phillips v. Martin Marietta Co.*, 400 U.S. 542, 544 (1971) (per curiam) (only if family responsibilities were "demonstrably more relevant to job performance for a woman than a man" could sex arguably be defended as BFOQ); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (to claim BFOQ successfully, employer must show factual basis for believing all or most women would be unable to perform job).

41. *International Bhd. of Teamsters v. United States*, 431 U.S. at 336 n.15.

42. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The business necessity defense is a judicial creation, first articulated in *Griggs*.

43. See, e.g., *Williams*, *supra* note 1, at 672; see also *infra* text accompanying notes 58-61 (discussing lower courts' articulation of defense).

44. 42 U.S.C. § 2000e(k) (1982).

45. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)). For a discussion of the events leading up to the amendment's enactment, see *Furnish*, *supra* note 1, at 74-83, and *Williams*, *supra* note 1, at 673-78.

46. Although the legislative history of the PDA indicates that Congress was primarily concerned with requiring employers to treat pregnancy like medical disabilities when developing payment and leave policies and did not directly confront the problems associated with fetal hazards, see *Furnish*, *supra* note 1, at 77-82, Congress clearly intended to include discrimination on the basis of child-bearing capacity within the amended definition, see H.R. REP. NO. 948, 95th Cong., 2d Sess. 5, 6-7, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749, 4753, 4754-55. In any event, there was no suggestion in *General Elec. Co. v. Gilbert*, the Supreme Court decision overruled by the PDA, that discrimination based on the capacity to bear children would not be sex discrimination. 429 U.S. 125 (1976). The Court based its *Gilbert* decision on the fact that a pregnancy classification distinguished some women from other women and all men. *Id.* at 135 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496-97 & n.20 (1974)). Plainly, that cannot be said of a classification based on child-bearing capacity

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not as an instance of disparate impact, but as disparate treatment, which can be defended only by showing that sex is a BFOQ.⁴⁷ In other words, unless an employer can show that the presence of fetal hazards prevents female employees from performing their jobs effectively,⁴⁸ a court must find a policy that excludes all⁴⁹ women and only women in violation of Title VII.

Both the *Olin* and *Hayes* courts, however, failed to follow the dictates of Title VII and the PDA. The *Olin* court conceded that the claim was “arguably one of ‘overt’ discrimination,”⁵⁰ but then disregarded well-established Title VII doctrine and concluded that defendants were not limited to the BFOQ defense.⁵¹ Although the *Hayes* opinion was more attentive to doctrinal requirements, it, too, bent the doctrine by concluding that the facially discriminatory nature of a fetal protection policy was merely a presumption that could be rebutted by a showing that “although [it] applie[d] only to women, the policy [was] neutral in the sense that it effectively and equally protect[ed] the offspring of all employees.”⁵² Echo-

which distinguishes virtually all women from all men. *See id.* at 162 (Stevens, J., dissenting) (“it is the capacity to become pregnant which primarily differentiates the female from the male”).

47. The PDA provides that women affected by these conditions “shall be treated not the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . .” 42 U.S.C. § 2000e(k). Nothing in the legislative history of the PDA suggests that “ability or inability to work” was intended to evaluate anything more than an employee’s ability to perform the job. Job-created health and safety risks affecting child-bearing or fetal health do not affect job performance as it is contemplated by the Act.

48. *See* Furnish, *supra* note 1, at 94 (BFOQ inadequate defense for exclusionary policies unless shown that women’s concern for fetal health interferes with their ability to perform job).

49. The fact that fetal protection policies allow sterile women to work does not undercut this characterization. The number of verifiably sterile women is small. *See* R. EDWARDS, CONCEPTION IN THE HUMAN FEMALE 7 (1980). Although it can be argued that many women could choose to be sterilized in order to qualify for employment, it is an argument that loses sight of the issue: To make job offers to women contingent on sterilization is to exclude *all* women from the normal hiring process.

50. 697 F.2d at 1186 n.21.

51. *Id.* The court dismissed concern over how to characterize the policy as “mere semantic quibbling,” *id.* at 1186, and concluded:

While the loose equation—overt discrimination/only b.f.o.q. defense—is therefore properly descriptive of a paradigmatic litigation pattern, it is not an accurate statement of any inherent constraints in Title VII doctrine.

In this case, where the defendant-employer has not attempted to present a classic b.f.o.q. defense, it may not properly be forced to do so.

Id. at 1186 n.21. The *Olin* court’s blatant disregard for doctrinal requirements is troubling not only because it permits the wrong result in cases similar to *Olin*, but also, more generally, because it threatens to undermine the rigorous protection Title VII provides against all instances of overt discrimination in employment. *See* Furnish, *supra* note 1, at 114 (expressing concern that courts’ willingness to shift focus of Title VII defenses away from “‘ability to perform the job’” in context of fetal protection policies would create “possibility for abuse of the title VII defenses in other contexts”).

52. *Hayes*, 726 F.2d at 1548. According to *Hayes*, an employer rebuts a prima facie case of disparate treatment when it can point to a body of scientific opinion that believes that a particular workplace hazard presents a significant risk of reproductive harm to women and not to men. *Id.* In the case before it, however, the *Hayes* court found that because the employer failed to make the proper showing that *Hayes*’ exposure to ionizing radiation presented a significant risk of harm, the employer’s policy was facially discriminatory. *Id.* at 1550–51.

ing Williams,⁵³ *Hayes* suggested that a neutral, non-discriminatory goal renders the discriminatory policy itself neutral. But a policy does not become neutral simply because it has a neutral goal when the means of achieving that goal are explicitly discriminatory.⁵⁴

2. *The Limits of the Business Necessity Defense*

The faulty analysis in *Hayes* and the lack of analysis in *Olin* led both courts to consider fetal protection policies within the disparate impact framework. This interpretive error allowed employers to raise the business necessity defense rather than the narrower BFOQ defense. The courts compounded their error by inappropriately expanding the scope of the business necessity defense.

Although the Supreme Court has made no clear pronouncement on the scope of the business necessity defense, it indicated in *Griggs v. Duke Power Co.*⁵⁵ that an employment qualification inspired by business necessity, like a bona fide occupational qualification, must be tied to applicants' ability to perform the job.⁵⁶ In subsequent cases the Court has echoed that requirement.⁵⁷

The lower courts, which have attempted to develop more specific criteria for an acceptable business necessity defense, have focused on the need to operate a business safely and efficiently.⁵⁸ Although the definition of

53. The *Hayes* court frequently referred to Williams' article and even stated, "[w]e agree with the Williams approach." 726 F.2d at 1549.

54. In *City of Los Angeles Dep't of Water v. Manhart*, 435 U.S. 702 (1978), the Supreme Court considered the validity of a pension plan that required women to make larger contributions than men because mortality tables indicated that women generally live longer than men. Although the employer's goal—to see that each employee paid his or her own way to the extent that could be determined in advance—was clearly neutral, the Court had no trouble recognizing that the policy represented facial discrimination against women, because it "treat[ed] . . . a person in a manner which but for the person's sex would be different." *Id.* at 711 (quoting *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971)). Similarly, a fetal protection policy which, by its terms, excludes all fertile women because they are capable of bearing children is not neutral in the language of discrimination law.

55. 401 U.S. 424 (1971).

56. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

57. See *Dothard*, 433 U.S. at 332 n.14 (business necessity standard requires that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance"); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 & n.13 (1979) (statistical showing of disparate impact is rebutted by demonstration that policy is "job related").

58. The Fourth Circuit's test, articulated in *Robinson v. Lorillard Corp.*, has served as a model for other courts: "The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971). See, e.g., *Blake v. City of Los Angeles*, 595 F.2d 1367, 1376 (9th Cir. 1979); *Muller v. United States Steel Corp.*, 509 F.2d 923, 928-29 (10th Cir.), cert. denied, 423 U.S. 825 (1975); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973); *United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 308 (8th Cir. 1972), cert. denied, 409 U.S. 1116 (1973). By emphasizing safety and making the somewhat subtle shift from performance to operation, this lower court definition clearly expands upon the Supreme Court's char-

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business necessity notably does not include the need to control expenses,⁵⁹ it does embrace an employer's concern for the safety of fellow workers and customers.⁶⁰ The courts make clear, however, that an employer's concern for the health and safety of the woman it wishes to exclude cannot justify the exclusion as a business necessity.⁶¹ An applicant's right to equal opportunity in employment cannot be compromised by an employer who wishes to protect her from harm.

The *Olin* and *Hayes* courts' analysis of fetal protection policies as instances of disparate impact forced them to consider whether an employer's efforts to protect the safety of employees' potential fetuses could be defended as a business necessity. In the case most nearly on point, *Burwell v. Eastern Air Lines, Inc.*,⁶² the Fourth Circuit refused to consider the employer's concern for the health of an employee or her fetus a valid business necessity.⁶³ *Burwell* involved Eastern's decision to ground pregnant stewardesses in part because it claimed that continuing in-flight work might harm the fetus. The court rejected Eastern's business necessity defense based on this claim and suggested that only the employee herself could properly make judgments for her fetus:

Eastern's contention that an element of business necessity is its consideration for the safety of the pregnant flight attendant and her unborn child is not persuasive. If this personal compassion can be attributed to corporate policy it is commendable, but in the area of civil rights, personal risk decisions not affecting business operations are best left to individuals who are the targets of discrimination.⁶⁴

acterization of business necessity in *Griggs*. Nevertheless, the *Robinson* test, which does not indicate the scope of the "safe operation of a business," presumably satisfies the job-relatedness standard outlined in *Griggs*. The Supreme Court has not embraced the *Robinson* standard. The Court's closest equivalent makes explicit the link between job qualification and job performance. See *Dothard*, 433 U.S. at 332 n.14.

59. The Supreme Court declared in *City of Los Angeles Dep't of Water & Power v. Manhart* that "neither Congress nor the courts have recognized [a cost-justification] defense under Title VII." 435 U.S. at 716-17. Lower courts have applied the prohibition within the disparate impact framework as well. See, e.g., *United States v. N.L. Indus.*, 479 F.2d 354, 366 & n.11 (8th Cir. 1973); *Robinson v. Lorillard Corp.*, 444 F.2d at 799 n.8, 800; *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981).

60. See, e.g., *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d at 371, 373.

61. *Id.*; *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d at 236; see also *Dothard*, 433 U.S. at 335 (citing lower court decisions to support assertion that it is "purpose of Title VII to allow the individual woman to make [risk decisions] for herself").

62. 633 F.2d 361 (4th Cir. 1980) (en banc), cert. denied, 450 U.S. 965 (1981).

63. *Id.* at 371. Because Eastern's policy was instituted before the PDA's enactment, the court in *Burwell* analyzed it within the disparate impact framework.

64. *Id.* Unlike the *Olin* and *Hayes* courts, the *Burwell* court refused to limit its condemnation of protective exclusionary policies to those that could not be objectively justified. Regardless of how pure or "commendable" the employer's motives, *Burwell* concluded, excluding women from the workplace denies them their civil right to equal opportunity in employment.

Although neither the *Olin* nor the *Hayes* court addressed *Burwell's* assertion that fetal protection was outside the province of the employer,⁶⁵ both courts conceded that they had to exceed the established definition of business necessity in order to allow for any fetal protection policies.⁶⁶

The *Olin* court "adapted"⁶⁷ the business necessity defense to include fetal protection by drawing an analogy between the fetus and the business invitee or licensee.⁶⁸ Title VII, the Court reasoned, should not "deprive employers of the right" to protect all "visitors" legitimately on the business premises, especially those "visitors" related to employees.⁶⁹ In drawing its analogy, the court addressed neither the uniqueness of the relationship between mother and fetus,⁷⁰ nor the logical inconsistency of using the analogy to justify preventing not-yet-existent fetuses from ever becoming "legitimate visitors."⁷¹ The court was content to attribute its liberal use of analogy and the consequent "adaptation" of the business necessity defense to society's general interest "in having [business] enterprises operated in ways protective of the health of workers and their families, consumers and environmental neighbors."⁷²

The *Hayes* court, in explicitly rejecting the employer's claim that a de-

65. This omission is particularly noteworthy in *Olin*, both because *Burwell* has precedential value for the *Olin* court, and because the *Olin* court cites to *Burwell* several times to support other assertions of law. *Olin*, 697 F.2d at 1184 (theories applied to Title VII litigation not intended to be rigid); *id.* at 1186 (disparate impact theory should be applied to fetal protection policies); *id.* at 1190 ("objective proof required to establish business necessity"); *id.* at 1191 (discriminatory protective policy should be "judged by contemporaneously available information"); *id.* (dual relevance of rebutting prima facie defense against allegation of Title VII violation). *Olin* even cites to the pertinent passage, but only to support the assertion that employers cannot discriminate against women to protect the health of the women themselves. *Id.* at 1188.

The *Hayes* court obscures the message of *Burwell* in another way: It cites to *Burwell's* damaging language to support the contradictory conclusion that "federal courts . . . [which] have considered the issue of employer fetal protection plans have recognized the need for a narrowly circumscribed business necessity defense." 726 F.2d at 1552.

66. *Olin*, 697 F.2d at 1187; *Hayes*, 726 F.2d at 1552 & n.15; see also *Furnish*, *supra* note 1, at 100-01 (business necessity defense must be dangerously "watered down" to include employers' moral concern with health of employees' potential offspring).

67. *Olin*, 697 F.2d at 1187.

68. *Id.* at 1189.

69. *Id.*

70. The Supreme Court has recognized a woman's unique right to make fundamental decisions about the destiny of her fetus, free from interference by the state or other interested parties. *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing special nature of relationship between mother and fetus by extending right of privacy to woman's choice whether to carry fetus to term); *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-75 (1976) (finding statute's spousal and parental consent requirements unconstitutional constraints upon woman's right to choose abortion). The business invitee is neither as dependent upon the one who "invites" her to the workplace nor as insulated from other actors as is the fetus.

71. When the employer excludes women from the workplace, it precludes the potential legal relationships between the fetus and itself. Fetuses cannot fill the role of invitees if they are disinvented from the employer's premises before they exist.

72. *Olin*, 697 F.2d at 1190 n.26. The *Olin* court cites to a number of general regulatory statutes to demonstrate that our "national laws" support these laudable goals. *Id.*

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sire to avoid tort liability constituted a valid business necessity,⁷³ emphasized that it, too, was willing to expand the business necessity defense for reasons of policy alone.⁷⁴ A concern for the health of employees' offspring, the *Hayes* court contended, is a valid business necessity despite the fact that this concern is entirely unrelated to job performance.⁷⁵ Refusing to adopt the Fourth Circuit's analogy between fetus and invitee,⁷⁶ and unable to find a doctrinal justification of its own, the *Hayes* court justified its expansion of the defense with the bald assertion that "we simply recognize fetal protection as a legitimate area of employer concern to which the business necessity defense extends."⁷⁷

Both the *Olin* and *Hayes* courts suggested that Title VII affords the plaintiff an opportunity to rebut an employer's claim of business necessity by showing that the employer could have achieved the same necessary result in a less discriminatory manner.⁷⁸ For the workplace permeated with toxins, however, a court, limited by its own inexpertise⁷⁹ and by its concern for feasibility,⁸⁰ effectiveness⁸¹ and industrial autonomy,⁸² is unlikely

73. *Hayes*, 726 F.2d at 1552 n.15. ("our extension of the business necessity defense beyond a strict relationship to job performance is based on a higher public policy than simply protecting employers from lawsuits"); cf. *Olin*, 697 F.2d at 1190 n.26 (because consideration of societal interest is enough to justify business necessity defense for fetal protection policy, court need not consider whether avoiding tort liability, alone, could establish business necessity defense). Although the *Hayes* court found that the employer policy before the court failed the initial neutrality test, it justified its consideration of the business necessity defense as an attempt to be "fair" to the employer. 726 F.2d at 1552.

74. *Hayes*, 726 F.2d at 1552 n.15.

75. *Id.* at 1552 & n.15.

76. *Id.* at 1552 n.14 ("We believe it unnecessary to place the fetus into a legal classification developed for an entirely different aspect of the law, and therefore decline to endorse *Olin's* approach of equating a fetus with a business invitee or licensee.").

77. *Id.*

78. *Olin*, 697 F.2d at 1191; *Hayes*, 726 F.2d at 1553; see also *Robinson v. Lorillard Corp.*, 444 F.2d at 798 (showing that no "acceptable, less discriminatory policies or practices" available required to establish business necessity). The use of less-discriminatory-alternative analysis to determine the strength of a business necessity claim, rather than to discover a pretext for intentional discrimination, raises doctrinal questions beyond the scope of this Note. For two divergent treatments of the issue, compare *Furnish*, *supra* note 37, at 423-24 (consideration of less discriminatory alternatives could appropriately be used to determine whether policy is business necessity) with Note, *Rebutting the Griggs Prima Facie Case under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. ILL. L. REV. 181, 207-10 (consideration of less discriminatory alternatives is only appropriate to show policy was pretext for purposeful discrimination). See also *Williams*, *supra* note 1, at 693-94, 699 n.329 (Supreme Court has not yet clearly established appropriate application of less-discriminatory-alternatives analysis).

79. See *infra* notes 87-88 and accompanying text.

80. See *Olin*, 697 F.2d at 1191 n.29 (whether less discriminatory alternatives are economically and technologically feasible is "factual/legal issue to be addressed by the district court").

81. Workplace modifications may be of only limited effectiveness. Protective clothing and respirators often provide inadequate protection. See Rothstein, *Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example*, 12 B.C. ENVTL. AFF. L. REV. 627, 685 (1985); *Williams*, *supra* note 1, at 701 n.339. Leave policies cannot guard against fetal damage that occurs before an employee knows she is pregnant unless she wishes to leave the job for the entire period during which she is trying to conceive. Even such an extended leave cannot protect a woman from toxins stored in her bone or fat for years. See Nothstein & Ayres, *supra* note 1, at 256; Rothstein, *supra*, at 687. Work rotation programs are only effective when other jobs at a comparable level

to identify less discriminatory alternatives it feels comfortable imposing on the industry. Where the only effective means of protecting women from reproductive damage may be severely limiting or banning the use of a substance, the courts, unqualified to make that judgment, will refuse to recognize the existence of less discriminatory alternatives. In short, a finding of business necessity by the *Olin* or *Hayes* standards will generally end the inquiry and excuse the exclusionary policy under Title VII.

Unaided by precedent, the *Olin* and *Hayes* courts turned to policy to justify overstepping the established bounds of the business necessity doctrine.⁸³ But the policy the courts embraced is fundamentally inconsistent with the terms and principles of Title VII. To suggest that running a safe and efficient business may necessitate hiring only men is tantamount to suggesting that safe need only mean safe for men. With the extension of employment opportunities to a new class of citizens must come an adjustment of workplace conditions to meet the basic health and safety needs of that class.⁸⁴

Working conditions, especially where toxins are prevalent, cannot be perfected overnight. Nevertheless, the system of incentives created by the courts will strongly influence the quality of those conditions in years to come. In allowing employers to exclude women from the teratogenic workplace, the *Olin* and *Hayes* courts give the chemical industry the wrong incentive. They send the message that as long as toxins are only teratogenic, they are marketable. In permitting the perpetuation of a male-based health and safety standard, the Fourth and Eleventh Circuits are "freez[ing]" the status quo," contrary to the Supreme Court's admo-

of skill are toxin-free.

82. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

83. Commentators who advocate the application of the business necessity defense to fetal protection policies also suggest that such a move is justified by public policy considerations. See, e.g., Williams, *supra* note 1, at 695 (interpretation of business necessity defense that protects effective "neutral" fetal protection policies is "consistent with . . . public health policy").

84. At the turn of the century, after striking down protective legislation that applied to men and women, *Lochner v. New York*, 198 U.S. 45 (1905), the courts justified upholding similar legislation that applied only to women by pointing to women's special maternal role. *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908) (limiting the number of hours women can work is appropriate because "physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race"). In the name of fetal health, this protective legislation deprived women of jobs and men of protection. To the extent that workplace threats to maternal health were real and not the product of stereotypes, the legislative response eliminated employers' incentives to diminish those threats. Title VII invalidated this sex-based legislation. See, e.g., *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971) ("state law limitations upon female labor run contrary to the general objectives of Title VII"). See generally Kessler-Harris, *Protection for Women: Trade Unions and Labor Laws*, in *DOUBLE EXPOSURE*, *supra* note 1, at 139-54 (discussing relationship between labor movement and women's movement).

dition in *Griggs*.⁸⁵ If, instead, the courts refuse employers the option of excluding women from the workplace, employers will have to improve working conditions for all employees in order to avoid tort liability and to satisfy their concern for the health of their employees' offspring.⁸⁶

III. THE SOLUTION AVAILABLE UNDER TSCA

Although a proper application of Title VII would improve upon current incentives for the development of safer substances, discrimination law alone cannot solve the problem of fetal hazards. The threat many industrial workplaces pose for the developing fetus is a serious pollution problem that requires an immediate, comprehensive response. This pollution problem has been recast as a discrimination problem only because employers have responded by discriminating against women.

As workplace pollutants, fetal hazards are more appropriately controlled through regulation than through judicial action. Courts, confined to the particular facts of a case and lacking administrative powers and scientific expertise,⁸⁷ provide inadequate protection against environmental hazards.⁸⁸ They are particularly unqualified to regulate an industry's pollution problem in the course of adjudicating other claims. Although the *Olin* and *Hayes* courts did not claim to take on the responsibility of regulating fetal hazards, their interpretations of Title VII established a standard by which individual employers' regulations will be judged. In countenancing employers' ad hoc response to the problem of fetal hazards, the courts have sanctioned a lawless form of self-help. They would have

85. 401 U.S. at 430.

86. To the extent that society's special concern for the "weaker sex" has led it to identify general problems of working conditions, a protectionist impulse serves the health and safety interests of all employees. An employer's recognition of a teratogenic risk may help to identify carcinogenic and mutagenic risks as well. See Williams, *supra* note 1, at 659 (teratogenesis, mutagenesis and carcinogenesis could all result from same action of toxic substance). Of course, the value of that impulse cannot justify an employer's illegal response.

87. Courts readily concede this lack of expertise. See, e.g., *Environmental Defense Fund v. EPA*, 598 F.2d 62, 83-84 (D.C. Cir. 1978).

88. See D. CURRIE, *POLLUTION, CASES AND MATERIALS* 80-81 (1975). Professor Currie explains the inadequacy:

In the first place, court action is entirely too fortuitous an event to serve as the basis for a reliable pollution-control program. Litigation is fortuitous in its timing, in the type of case that may arise, and in the quality of presentation. . . . An effective program of pollution control requires that the control agency possess considerable expertise in the area of regulation and that it have the capacity to plan ahead for anticipated problems. Courts manifestly are not endowed with either of these features. Further, to serve as an effective force in pollution control, the agency responsible must have the ability to administer a flexible program that involves remaining in contact with the party regulated to see that the agency's orders are complied with. . . .

Finally, and perhaps of most importance, the adversary system under which court proceedings are conducted does not adequately assure representation of the public interest in pollution control.

Id. at 80.

done better to consider the entire scope of applicable legislation before deciding to adjust their interpretation of Title VII to allow for employers' exclusionary policies.

A. *The Unique Appropriateness of TSCA*

The regulatory legislation that preceded the Toxic Substances Control Act (TSCA),⁸⁹ including the Occupational Safety and Health Act (OSHA),⁹⁰ allows the chemical industry⁹¹ to use its choice of substances and merely provides for a doctoring of the end result—the regulation of exposure levels through filtering and monitoring equipment, protective clothing and warning labels.⁹² Such responses cannot always provide adequate protection, and they create little incentive for the chemical industry to alter its menu. In addition, once unlimited *use* is allowed, the actual concentration released into the environment at each individual plant is difficult to monitor,⁹³ and a failure to control that concentration properly can be viewed more as an innocent mistake than as a defiance of the law.

The failure of existing regulatory legislation to protect workers from

89. Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2629 (1982)).

90. 29 U.S.C. §§ 651-678 (1982). Because OSHA is generally assumed to be the regulatory statute most applicable to the problem of reproductive hazards in the workplace, *see, e.g.*, Furnish, *supra* note 1, at 67-74; Nothstein & Ayres, *supra* note 1; Rothstein, *supra* note 81, at 630, I will refer to its provisions as examples throughout my discussion of the comparative merits of TSCA. OSHA has proved of only limited usefulness in the regulation of toxins in general and reproductive toxins in particular. *See* Furnish, *supra* note 1, at 67-74; *cf.* Rothstein, *supra* note 81, at 698 (attributing current lack of information on reproductive hazards in workplace in part to "historical lack of interest in the field" at agencies responsible for administering OSHA). The following discussion of TSCA's relative merits should not, however, be construed as an argument against the use of OSHA in all circumstances where protection from toxic hazards is needed. TSCA explicitly provides for the referral of regulatory decisions to other agencies where the EPA "determines, in the Administrator's discretion, that [an unreasonable] risk may be prevented or reduced to a sufficient extent by action taken under [another] Federal Law." 15 U.S.C. § 2608(a)(1) (emphasis added).

91. This Note will refer to chemical manufacturers, processors, and distributors as "the chemical industry" and "the industry." Under TSCA, this general reference is especially appropriate because the Act spreads the responsibility for the safety of chemicals among all businesses that profit from their use. This Note will also use "employer" and "the chemical industry" interchangeably, because all employers who use chemicals are subject to the requirements of the Act.

92. *See* S. REP. NO. 698, 94th Cong., 2d Sess. 1-2, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 4491, 4491-92 [hereinafter cited as SENATE REPORT]. For example, the remedies an OSHA standard can require are limited to "labels or other appropriate forms of warning," "protective equipment and control or technological procedures," "monitoring," and "medical examinations." 29 U.S.C. § 655(b)(7). In addition, when engineering and work practice controls prove inadequate to reduce concentrations to the established permissible level, employers are only required to reduce the concentration to the lowest level possible without reducing their use of a toxin. *See, e.g.*, 29 C.F.R. § 1910.1018(g)(1) (1985) (implementation requirements for OSHA standard for inorganic arsenic). The Third Circuit's recognition of a narrow exception to the general policy emphasizes how unprepared OSHA is to regulate toxins directly: "We do not question that there are industrial activities involving hazards so great and of such little social utility that . . . their total prohibition is proper if there is no technologically feasible method of eliminating the operational hazard." *AFL-CIO v. Brennan*, 530 F.2d 109, 121 (3d Cir. 1975). Not surprisingly, no such activity has yet been identified.

93. *See* Nichols & Zeckhauser, *Government Comes to the Workplace: An Assessment of OSHA*, 49 PUB. INTEREST 39, 51 (1977).

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the “cancer, mutations and birth defects” caused by chemical hazards prompted Congress to enact TSCA.⁹⁴ In sharp contrast to its predecessors, TSCA requires the EPA to begin its regulatory response by asking the question: Should the toxin be used at all? Only after the EPA finds that an absolute ban on a substance is inappropriate can it consider lesser regulatory responses ranging from a specific ban on particular uses or concentrations to the more traditional requirements of protective equipment and warnings.⁹⁵ TSCA’s ability to regulate substances directly by limiting or preventing their use creates a strong incentive for the chemical industry to develop safer products.

The EPA’s authority to ban chemicals under TSCA is buttressed by strict reporting and testing requirements imposed on the industry. For all newly developed chemicals, TSCA mandates a premarket review to determine whether any regulatory action is necessary.⁹⁶ For chemicals already on the market, TSCA requires the EPA to make a regulatory judgment within 180 days of receiving information that suggests that a toxin poses a significant risk.⁹⁷ Information is to be provided regularly by the industry itself⁹⁸ and may be supplemented by others who are concerned that toxins are properly regulated.⁹⁹ Where the EPA deems existing information inadequate, it can require the industry to sponsor additional tests for mutagenic, teratogenic and other hazardous effects.¹⁰⁰

Perhaps most important, TSCA grants citizens the ultimate policing

94. SENATE REPORT, *supra* note 92, at 1-5, 1976 U.S. CODE CONG. & AD. NEWS at 4491-95. In the words of the SENATE REPORT, TSCA was enacted to “close a number of major regulatory gaps.” *Id.* at 5, 1976 U.S. CODE CONG. & AD. NEWS at 4495.

95. 15 U.S.C. § 2605(a).

96. 15 U.S.C. § 2604.

97. 15 U.S.C. § 2603(f).

98. 15 U.S.C. § 2607. TSCA requires chemical manufacturers and processors to maintain records of the allegations made by employees and consumers that health problems they suffer were caused by those chemicals. 15 U.S.C. § 2607(c). These companies are also required to submit to the EPA a list of all health and safety studies known to them which were conducted on the chemicals they manufacture or process, 15 U.S.C. § 2607(d), and to report information they obtain that suggests that any of these chemicals poses a substantial risk, 15 U.S.C. § 2607(e).

99. TSCA allows any person to petition the Administration to issue a regulation and “set forth the facts” which establish the need for the regulation. 15 U.S.C. § 2620(a), (b)(1).

100. 15 U.S.C. § 2603. No other statute shifts testing costs to industry. SENATE REPORT, *supra* note 92, at 2, 1976 U.S. CODE CONG. & AD. NEWS at 4492-93. OSHA, in contrast, limits the information upon which the Secretary of Labor can base a decision to regulate to the “best available evidence.” 29 U.S.C. § 655(b). As discussed above, the evidence available on the effects of most chemicals on reproductive health is inconclusive, and though OSHA established the National Institute for Occupational Safety and Health (NIOSH) to collect scientific data and recommend standards to the Secretary, the Act provides the Institute with no guidance about research priorities. 29 U.S.C. § 671. The funds NIOSH allocates to the study of occupational reproductive hazards are clearly insufficient. For example, in 1982, NIOSH allocated a total of only \$300,000 to fund four of the 100 proposals to study reproductive hazards submitted in response to NIOSH’s solicitation. Over the next four years, NIOSH projected it would spend only one million dollars on research about reproductive hazards. See *Scientific Data Insufficient for OSHA to Issue Generic Rules, Vance Testifies*, 12 O.S.H. REP. (BNA) 204, 204 (1982).

authority: Any citizen or activist group can enforce TSCA by suing members of the industry or the EPA.¹⁰¹ Because TSCA establishes a comprehensive system of required actions, a court can review the adequacy of agency activity without inappropriately intruding upon discretionary authority. TSCA's explicit guarantee of a private right of action preserves the value of the statute in periods of regulatory sluggishness.

TSCA provides the strong response the enormity of the problem demands, but it does not call for irresponsible solutions. It requires the EPA to weigh social and economic costs against benefits before imposing regulations¹⁰² and provides for the mitigation and sharing of the costs the EPA decides to impose.¹⁰³

101. 15 U.S.C. §§ 2619, 2620(b)(4)(A). If citizens can show, by a preponderance of the evidence at a trial de novo, that the EPA should have issued a regulation, the court must order the EPA to take the action requested. 15 U.S.C. § 2620(b)(4)(B). In contrast, OSHA affords employees and other interested citizens little opportunity to challenge the Secretary of Labor's failure to promulgate a standard. Rothstein, *supra* note 81, at 656-57. At the same time, OSHA explicitly provides employers with an opportunity to take the Secretary to court if they feel the Secretary's regulatory action will affect them adversely and is not "supported by substantial evidence in the record." 29 U.S.C. § 655(f). If the Secretary chooses not to adopt a specific standard for a particular toxin, employees are only protected by an amorphous general duty clause. 29 U.S.C. § 654(a)(1). In a companion case to *Christman v. American Cyanamid Co.*, discussed *supra* note 6, the Oil, Chemical and Atomic Workers Union alleged that American Cyanamid's sterilization option violated OSHA's general duty clause. *Oil, Chem. & Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984). The D.C. Circuit, however, refused to accept the sterilization requirement as a "recognized hazard" from which an employer had a duty to protect its employees. *Id.* at 449. Whatever protection the clause does provide is removed once OSHA promulgates any standard, even one too low to protect against recognized reproductive hazards. See Rothstein, *supra* note 81, at 648.

102. 15 U.S.C. § 2601(b)(3), (c). The costs to industry will vary depending on whether the substance being considered is new or already in use. The cost of testing a new product is relatively small when weighed against the possible benefit of discovering a serious health hazard. Short-term tests, which are becoming increasingly popular and sophisticated, can be used to screen for possible hazards. See Mottet & Ferm, *supra* note 5, at 110 (discussing increasing use of inexpensive *in vitro* tests for teratogens). Where a suspect toxin is identified, the chemical industry can either attempt to refute the initial conclusion with slower, more expensive tests, or abandon the product to cut its losses. See *Toxic Substances Control Act: Hearings on S. 776 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 84 (1975) (statement of Director of Office of Program Analysis of General Accounting Office). Although industry bears the cost of developing a substance that the EPA ultimately finds unmarketable, it can mitigate its costs by screening possible products in the early stages of development and shifting research efforts toward the development of chemicals that are more likely to be safe. *Id.* at 86.

The testing and regulation of chemical substances already in use are likely to be more costly. If necessary, the chemical industry will probably be willing to invest in more expensive, reliable tests in an attempt to prove that a marketed substance does not present a substantial risk. *Id.* at 84. Although the cost of eliminating a substance with a unique and vital function may outweigh the benefit to human health of its elimination, the EPA should carefully scrutinize claims of uniqueness. Popular products are frequently unique until there is a need to develop a replacement.

Although the difference in costs is significant, the gap between the regulation of pre-market chemicals and chemicals currently in use is not unbridgeable. A newly developed substance that is a compound based on an already marketed substance, such as lead, must still be tested and approved. If the EPA bans many new lead compounds, the chemical industry will devote resources to developing replacements. As new substances are developed, the lead compounds in use today may become increasingly replaceable.

103. See, e.g., 15 U.S.C. § 2603(c)(3)(A). TSCA also provides for an adjustment in or exemption from reporting requirements for small businesses. 15 U.S.C. § 2607(a); see also SENATE REPORT,

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B. *Applying TSCA to Fetal Hazards in the Workplace*

A comprehensive statute designed to deal exclusively with toxins, TSCA provides the proper framework in which to regulate fetal hazards. Because the EPA and the courts are just beginning to enforce TSCA, it can readily be applied to a problem to which attention has only recently been drawn by employers' exclusionary policies.

TSCA requires chemical producers, processors and distributors to report to the EPA all information that suggests that a substance presents a substantial risk.¹⁰⁴ Any employer who concludes on the basis of scientific evidence that its workplace is not safe for the developing fetus should be considered in possession of such information and thus required to report it immediately to the EPA. If the employer fails to report, the EPA should exercise its authority to penalize the employer for its omission.¹⁰⁵

The EPA itself is required to take regulatory action within 180 days¹⁰⁶ of receiving information that suggests a substance poses a significant risk of harm "from cancer, gene mutations or birth defects."¹⁰⁷ The statutory threshold for triggering EPA action is low: The information need merely indicate that "there may be a reasonable basis"¹⁰⁸ to conclude that a toxin is hazardous. Therefore, any information which could justify a non-pretextual exclusionary policy should trigger a regulatory response. Should the EPA act too slowly or refuse to act at all upon information it receives, the Administrator, like the employer who fails to report, can be brought to court. TSCA's private right of action gives citizens the power to compel the EPA and the chemical industry to respond to fetal hazards as the statute requires.¹⁰⁹

As already noted, TSCA provides the EPA with a list of possible regulatory responses which range from a published finding of no unreasonable

supra note 92, at 11-12, 1976 U.S. CODE CONG. & AD. NEWS at 4501-02 (response to claim that TSCA would hurt small business). To help employers comply with the Act, TSCA also established an assistance office which provides "technical and other nonfinancial assistance." 15 U.S.C. § 2625(d).

104. 15 U.S.C. § 2607(e). "Any person who manufactures, processes or distributes in commerce as [sic] chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the [EPA] Administrator of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information." *Id.*

105. The EPA has the authority to assess civil penalties of up to \$25,000 each day for violations of the Act. 15 U.S.C. § 2615(a). In addition, an employer who willfully fails to comply is criminally liable for up to \$25,000 per day and/or one year in prison. 15 U.S.C. § 2615(b).

106. TSCA allows the EPA an extension of no more than 90 days if, having made a good faith effort, it is unable to act within the first 180 days. 15 U.S.C. § 2603(f)(2).

107. *Id.*

108. *Id.*

109. 15 U.S.C. § 2619. The resources for such litigation can be pooled by environmental, health, and women's organizations who can then, in the name of their constituents, police agency and industry action more effectively.

risk¹¹⁰ to the limitation or prevention of production.¹¹¹ What TSCA does *not* include on the list is as significant as what it does. Despite the fact that the statute is aimed at reproductive problems that may affect one sex to a greater degree, TSCA's itemization of regulatory responses does not provide for any gender-specific distinctions in treatment. Lacking such provisions, TSCA cannot be read to modify Title VII, and any remedies that the EPA imposes under TSCA's authority must comply with Title VII's mandate against the exclusion of women from jobs.¹¹² The EPA cannot, by issuing exclusionary regulations, authorize action that would otherwise violate Title VII.

Of course, the EPA may make a judgment that society values a particular toxin so highly that it is willing to sacrifice the health or life of the threatened number of employees' offspring for its continued use. This sort of cost-benefit evaluation is not new; only the inclusion of risks to women in the evaluation, as required by Title VII, is new. Because of women's special reproductive vulnerabilities, including them in the evaluation may tip the scales toward a decision to regulate. A consideration of teratogenic effects may lead society to conclude that the costs of use outweigh the benefits, but such a conclusion is no more inevitable than when risks to men alone are considered.

IV. FETAL HAZARDS IN THE TRANSITION PERIOD: THE INTERACTION OF TSCA AND TORT LAW

Although TSCA provides for time limits,¹¹³ a priority list,¹¹⁴ and premarket scrutiny¹¹⁵ to hurry the EPA into action, the Act requires the development of new regulatory machinery, which takes time. In the interim, employees will continue to be exposed to dangerous quantities of hazardous chemicals, and the prospect of leaving their fetuses unprotected during this period is troubling. Courts have expressed a willingness to tolerate employers' exclusionary policies simply because they provide a short-term solution. If courts continue to be tolerant, there will be no

110. 15 U.S.C. § 2603(f)(2).

111. 15 U.S.C. § 2605(a).

112. Conversely, in the absence of a court finding that fetal protection policies violate Title VII, the EPA can enforce TSCA by requiring an employer to promulgate a scientifically based discriminatory policy. In 1979, acting under the assumption that discriminatory policies were permissible under Title VII, the EPA enforced the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 (1982), by prohibiting the use of pesticides containing Mirex by fertile women. *See Women Prohibited From Using Pesticide: EPA Defends Decision as "Justifiable,"* 8 O.S.H. Rep. (BNA) 1481 (1979). No similarly sex-biased regulations have been promulgated under TSCA, but unless the courts find non-pretextual fetal protection policies in violation of Title VII, such regulations may arise.

113. *E.g.*, 15 U.S.C. § 2603(f)(2).

114. 15 U.S.C. § 2603(e).

115. 15 U.S.C. § 2604.

long-term solution. Allowing a business necessity defense to facially discriminatory policies encourages the chemical industry to continue using and developing teratogens, and signals to the EPA that it, too, can take short cuts and fulfill its regulatory obligation by excluding women from the workforce. While the EPA develops its regulatory machinery, agency action should be supplemented by traditional tort law protection, not discriminatory exclusion.¹¹⁶

This interaction between tort law and TSCA is appropriate, because TSCA represents an expansion rather than a refutation of the common law doctrine. That doctrine requires those whose conduct poses a risk that society deems unreasonable¹¹⁷ to compensate the victims of their negligence with monetary damages.¹¹⁸ TSCA draws upon this common law language of cost-benefit analysis, identifying "unreasonable risks"¹¹⁹ and requiring those responsible for such risks to pay for their imposition. Where tort law requires those who impose unreasonable risks to compensate victims for the actual damage they cause,¹²⁰ TSCA blocks the imposition of unreasonable risks and forces the imposer to pay for a less risky replacement. Turning the general principles of common law into a specific statute, Congress indicated that it was not satisfied with a remedy that only protected victims from the economic cost associated with cancer, mutations and birth defects, but not from the injuries themselves. While that more rigorous regulatory structure is being put into place, however, tort law's retrospective assessment of risks will continue to provide some protection against employers' unreasonable use of toxins.¹²¹

Tort law and TSCA should also interact in another way: A finding of

116. The few courts to consider the relationship between tort law and TSCA have recognized their compatibility. *See, e.g.*, *Chappell v. SCA Servs., Inc.*, 540 F. Supp. 1087, 1100 (C.D. Ill. 1982) ("it appears to the court that the TSCA does not preempt state common law nuisance actions for damages"); *State v. Monarch Chems., Inc.*, 111 Misc. 2d 343, 346, 443 N.Y.S.2d 967, 969 (Sup. Ct. 1981), *aff'd*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (1982) (TSCA's preemption provisions, which recognize states' continuing authority to regulate toxins, extend to states' power to impose tort liability).

117. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 31 (5th ed. 1984) [hereinafter cited as *PROSSER & KEETON*].

118. *Id.* § 1, at 1-4.

119. 15 U.S.C. § 2601(b)(2).

120. *PROSSER & KEETON*, *supra* note 117, § 4, at 20.

121. The principles embodied in Title VII require that women be allowed to decide for themselves whether they will work in a toxic environment. A well-informed prospective mother may choose not to work to avoid a risk or to work because she feels the risk is slight or because she is willing to postpone her pregnancy. In making her decision, she is not likely to be influenced by liability considerations. Therefore, a tort system that required her to bear the cost of a bad decision would not effectively deter the unreasonable risk. No woman considering the prospect of bearing a severely deformed child is less troubled by that prospect because she knows the child will be cheap.

Employers, on the other hand, often make decisions on the basis of tort liability. Prior to the issuance of an EPA regulation that could prevent a hazard from causing an injury, responsibility for prenatal damage should rest with the employer who exposed its employees to an unreasonable risk. The factfinder would reach its decision by conducting a cost-benefit analysis similar to, but less sophisticated than the analysis the EPA would conduct under TSCA.

tort liability, as information that indicates that a chemical substance presents a significant risk of harm, should trigger immediate action under TSCA.¹²² If the factfinder determined that the employer had knowledge of the unreasonable risk which it kept secret, the employer would be subject to criminal sanctions under TSCA in addition to its liability in tort.¹²³ Should the EPA choose to issue a regulation, employees in the future will be better protected from damage to their offspring as well as from the cost of raising a deformed child. On the other hand, should the EPA choose to publish a finding of "no unreasonable risk" in the Federal Register,¹²⁴ that public notice will support an employer's claim in future tort actions that it did not act unreasonably by exposing its employees to the toxin.¹²⁵ As TSCA is put into effect in response to private pressure or government support, the law surrounding the use of toxic substances will become more certain, more specific, and more effective at preventing injury than it could ever be at common law.

CONCLUSION

To allow employers to escape liability under TSCA and at common law by excluding women from the toxic workplace is to embrace a discriminatory status quo: the workplace that is only safe for men. Title VII rejects a status quo that deprives a protected class of its right to equal opportunity in employment.

TSCA guarantees women a protection against reproductive hazards that goes well beyond the protection the courts have attempted to provide with their strained interpretation of Title VII. The Act ensures that *all* women—not just women in the male-dominated workforce—can be protected from teratogenic toxins. And instead of leaving protection in the hands of employers, it empowers women to protect themselves by suing their employers or the EPA. A consideration of the grave problem of fetal hazards within the framework of TSCA will direct the chemical industry toward a long-term solution far safer and more fair than any available today.

122. 15 U.S.C. § 2603(f)(2). Environmental and health organizations, as part of their policing efforts, should immediately inform the EPA of such decisions and the information upon which they were based.

123. 15 U.S.C. § 2615(b).

124. 15 U.S.C. § 2603(f)(2).

125. See PROSSER & KEETON, *supra* note 117, § 36, at 233 ("compliance with a statutory standard is evidence of due care").