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HAZARDOUS WORKING CONDITIONS AND FETAL PROTECTION POLICIES: WOMEN ARE GOING BACK TO THE FUTURE

Joni F. Katz*

I. INTRODUCTION

"Women should be barefoot, pregnant, and in the kitchen." This message is being echoed by numerous employers who have instituted fetal protection policies. Fetal protection policies exclude pregnant and fertile women from jobs because the particular work environment is considered hazardous to the reproductive health of women and to the health of their offspring.1

There is a large number, and possibly millions, of jobs involving chemicals with reproductive effects.2 Furthermore, there is evidence that the continuing high-technology revolution may escalate the number of jobs that adversely affect reproductive capacity.3 Conseq-

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2 Equal Employment Opportunity Commission, Policy Guidance on Reproductive and Fetal Hazards 1 n.2 (approved October 3, 1988) (on file with author) (to be filed in 2 EEOC, COMPLIANCE MANUAL § 624 (policy on reproductive and fetal hazards)) [hereinafter EEOC Policy Guidance]. In 1987, it was estimated that fifteen to twenty million jobs involved chemicals with reproductive effects. See id. A more recent study, done in Massachusetts in 1988, surveyed 198 firms and found that 53% of those firms reported the use of at least one of four chemicals known to affect reproduction, namely, glycol ethers, lead, organic mercury, and radiation. See Butterfield, Study Says Job Hazards Go Unrecognized, Boston Globe, Nov. 11, 1988, at 1, 12.

3 See Lewin, Protecting the Baby: Work in Pregnancy Poses Legal Frontier, N.Y. Times, Aug. 2, 1988, at A1, A15, col. 3. In 1987, a study by the University of Massachusetts found a higher rate of miscarriages among women whose jobs exposed them to the manufacture of computer chips. Id. In June of 1988 another study provided evidence that women who work with video display terminals also had a higher rate, almost double, of miscarriages. Id. at A15, col. 3.

The recent findings that various jobs in high-technology companies pose reproductive haz-
quently, pregnant and fertile women in the high-technology and chemical industries, such as electronic companies, chemical companies, manufacturing companies, microchip factories, laboratories, automated office environments, and other working environments involving reproductive hazards, could be fired from their jobs. \(^4\) Employers who remove women from these hazardous working environments justify their actions as necessary to protect the women and their future offspring. \(^5\)

Although worker protection is the goal of both the Occupational Safety and Health Act (OSH Act) \(^6\) and Title VII of the Civil Rights Act of 1964, \(^7\) the scenario presented by reproductively hazardous workplaces appears to bring these two Acts into conflict. The OSH Act requires employers to provide a safe workplace for all employees, \(^8\) while Title VII prohibits employment exclusion based on sex. \(^9\) Fetal protection policies provide a safe workplace at the expense of excluding fertile and pregnant women from the workplace. \(^10\) Such policies undermine the OSH Act in the sense that the OSH Act encourages employers to abate hazards before taking action detrimental to the employees. \(^11\) An employer who merely excludes a particular class of employee, failing to take action to abate the hazard, thus undermines the OSH Act.

Fetal protection policies also undermine the purpose of Title VII. \(^12\) Title VII dictates that women should be treated equally with men,

ard have prompted action to increase recognition industry-wide. A 1988 Massachusetts study calls for education of employers and workers in the high-technology industry regarding reproductive hazards as well as the creation of a special task force. Butterfield, *Study Says Job Hazards Go Unrecognized*, Boston Globe, Nov. 11, 1988, at 12.

\(^4\) See supra notes 2–3 and accompanying text.


\(^11\) See infra notes 81–87 and accompanying text.

\(^12\) Title VII states that:

[it shall be an unlawful employment practice 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 his employees . . . in any way which would deprive or tend to deprive any
and that women should have the power to make their own decisions regarding employment. Fetal protection policies deprive women of their power to decide and erode equality in the workplace. The United States Circuit Courts have helped undermine Title VII by rubber-stamping the validity of fetal protection policies.

To date, none of the circuit courts have upheld a specific fetal protection policy under a Title VII theory. Nevertheless, the distorted framework the courts have given Title VII in fetal protection cases rubber-stamps the legality of such policies. The framework, in effect, rekindles the arguments that were once advanced in favor of sex-specific protective labor legislation. Unless employees challenge the legality of these policies, vast numbers of women could find themselves back in the days when discrimination was an accepted societal norm.

This Comment challenges the validity of fetal protection policies on two grounds. First, Title VII dictates that an employer cannot individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.


For discussion of how courts have allowed fetal protection policies to undermine Title VII, see infra notes 107–96 and accompanying text.

13 See Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969).

14 Only three such cases have been decided in the circuit courts under Title VII. See Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984) (court deemed the policy discriminatory because employer showed no substantial danger to fetus, thereby failing to establish appropriate defense); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (remanded to determine legality of fetal protection policy under the disparate impact theory of Title VII); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982) (fetal protection policy was not the least restrictive alternative, therefore the policy was discrimination based on sex). The Court of Appeals for the Seventh Circuit also heard a case concerning a fetal protection policy on September 15, 1988, which was reheard en banc in June 1989, but its decision is still pending. See International Union v. Johnson Controls, Inc., No. 88-1308 (7th Cir. argued Sept. 15, 1988, reargued en banc June 1989). The plaintiff appealed the lower court's decision in Johnson Controls for two reasons: (1) impropriety of summary judgment for employer in light of conflicting scientific evidence regarding substantial harm to women only; and (2) failure to explore less discriminatory alternatives. Id. In the analogous case of Oil, Chemical & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984), the court applied the OSH Act standard. The standard required American Cyanamid to provide each of its employees with a safe working place free from recognized hazards likely to cause death or serious physical harm. See id. at 447. The court in American Cyanamid did not find, however, that sterilization as a condition of employment constituted a “hazard” under the general duty clause of the OSH Act, and, therefore, upheld the fetal protection policy. Id. at 450.

15 See infra notes 107–55 and accompanying text.

16 See generally Becker, supra note 1, at 1221–43. The essence of the protective labor legislation was that “healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.” Muller v. Oregon, 208 U.S. 412, 421 (1908).

17 See We Only Want What's Best For You, STUDENT LAW., Nov. 1988, at 4.
institute a policy that overtly discriminates against women unless a Bona Fide Occupational Qualification (BFOQ) defense is established.\textsuperscript{18} Second, the United States Constitution protects a woman’s choice regarding procreation and prohibits interference with this choice except under narrow circumstances.\textsuperscript{19} Title VII precedent, coupled with the right to privacy implications of fetal protection policies, mandates importing the constitutional privacy concerns to Title VII and invalidating the distorted Title VII framework courts have used to rubber-stamp fetal protection policies.

Section II of this Comment discusses the statutory protection afforded workers. It begins by setting out the history of Title VII and its analytical framework, as well as the impact of the Pregnancy Discrimination Act (PDA)\textsuperscript{20} on Title VII analysis. It then briefly discusses the OSH Act standards. Section III presents the two most prevalent reasons offered in support of fetal protection policies. Section IV analyzes how courts have applied Title VII in fetal protection cases. Section V discusses how the courts have distorted the traditional Title VII framework to rubber-stamp the validity of fetal protection policies and the constitutional right to privacy implications that result from these policies. Finally, this Comment proposes an alternative to fetal protection policies. This alternative involves an educational program coupled with an employment options program designed to assist women in making their own decisions.

\section*{II. Worker Protection}

\textbf{A. History of Title VII and Its Analytical Framework}

Historically, there are two categories of Title VII violations: (1) employers classifying employees on the basis of one of the statutorily specified characteristics, and (2) employers classifying employees on the basis of a neutral characteristic, when such classification leads to a disparate impact upon a protected class.\textsuperscript{21} The first step in any Title VII case requires that a plaintiff establish a prima facie case

\textsuperscript{18} See infra notes 24–40 and accompanying text.
\textsuperscript{19} See infra notes 197–212 and accompanying text.
\textsuperscript{21} Williams, supra note 5, at 668–69. Williams discusses three frameworks of Title VII. See id. For purposes of discussion in this Comment, the author has consolidated facial discrimination with pretext discrimination because both are considered under the disparate treatment theory. See id. at 669.
of employment discrimination. A plaintiff can establish a prima facie case by showing discrimination through either disparate treatment or disparate impact.

1. Disparate Treatment Theory

Discrimination by disparate treatment occurs when some people are treated less favorably by their employer because of their race, color, religion, sex, or national origin. To establish a prima facie case of discrimination under the disparate treatment theory, a plaintiff must offer proof of discriminatory motive. In disparate treatment cases, the requisite intent to discriminate is established by the employer's act of classifying employees on a prohibited basis.

Once a plaintiff establishes a prima facie case of disparate treatment, the burden shifts to the employer to establish a defense to the discriminatory allegations. The BFOQ defense is the only statutory defense available for a disparate treatment claim. The BFOQ exception allows an employer to classify employees on the basis of sex legally where sex is "reasonably necessary to the normal operation of that particular business."

In sex discrimination cases, courts traditionally have construed the BFOQ exception narrowly.

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23 See Burwell, 633 F.2d at 369.
24 Id.; see, e.g., Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983) (smaller payment to women than men under retirement plan); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (female employees required to make larger monthly contribution to retirement, disability, and death-benefit programs than male employees).
25 See Wards Cove Packing Co. v. Antonio, 57 U.S.L.W. 4583, 4584 (U.S. June 6, 1989); Burwell, 633 F.2d at 369; Williams, supra note 5, at 669.
26 Williams, supra note 5, at 669 n.176.
27 The requisite intent is more difficult to establish when the plaintiff claims that a neutral characteristic is a mere pretext to discriminate. See id. If the requisite intent is established, then the pretext case is treated as a disparate treatment case. If, however, intent is not shown, then the pretext case is treated as a disparate impact case. See infra notes 41-51 and accompanying text.
28 Burwell, 633 F.2d at 368; Levin v. Delta Air Lines, 730 F.2d 994, 997 (5th Cir. 1984).
30 Id. The statutory language of 42 U.S.C. § 2000e-2(e) clarifies that clear disparate treatment sex discrimination cases will be tested by the BFOQ defense. See Burwell, 633 F.2d at 370; Levin, 730 F.2d at 997.
31 See Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (Court persuaded by restrictive language of Title VII's legislative history that Congress intended the BFOQ exception to be a very narrow exception to Title VII's antidiscrimination principle); see also Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (1969) (court concluded that, if the BFOQ exception were to be interpreted broadly, the exception would swallow the rule). One commentator has
The only apparent expansion of the BFOQ exception has occurred in the context of the transportation industry where the safety of third parties has been at risk.\(^{31}\) For example, courts have upheld policies that require the layoff of pregnant airline stewardesses at a certain point in their pregnancy on the basis that passenger safety is at risk.\(^{32}\) Although a safety exception appears to be an expansion of the traditional BFOQ, the safety of third parties is only jeopardized because pregnancy interferes with a stewardess’s ability to perform adequately all the duties of her job in the event of an emergency.\(^{33}\)

Similarly, the requirement that only men are eligible for correctional counselor positions in a male maximum-security penitentiary has been held to be an example of a legitimate BFOQ.\(^{34}\) A female correctional officer poses a potential security problem because of her sex.\(^{35}\) Maintaining security at the penitentiary is the essence of a correctional counselor’s responsibilities, and therefore, being female interferes with a counselor’s ability to do the job.\(^{36}\)

The BFOQ defense has been interpreted in various ways,\(^{37}\) but in essence it maintains Title VII’s prohibition against employers refusing employment to a woman or a man based on stereotyped characterizations of the sexes.\(^{38}\) Stereotyped characterizations will not meet the standard for a BFOQ defense whether they are real or fictional because Title VII focuses on the individual.\(^{39}\)

\(^{31}\) See Becker, supra note 1, at 1251-53.

\(^{32}\) See Becker, supra note 1, at 1252-53.


\(^{34}\) See Becker, supra note 1, at 1253.

\(^{35}\) See Dothard, 433 U.S. at 336-37.

\(^{36}\) Id. at 336. In Alabama penitentiaries aggressive inmates live in dormitories instead of single-cell lockups. Id. In such a situation where some of the inmates have been convicted of sex crimes, there is a likelihood that inmates would assault a woman because she was a woman. Id.

\(^{37}\) See, e.g., Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) (the BFOQ defense is valid in sex discrimination cases only when hiring members of both sexes, instead of members of one sex exclusively, would undermine the essence of the business), cert. denied, 404 U.S. 960 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (BFOQ defense valid where there is a factual basis for believing that substantially all women would be unable to perform the duties of their job safely and efficiently).


\(^{39}\) See Manhart, 435 U.S. at 708. If a stereotype is fictional, then the reason is obvious for its failure to meet the BFOQ standard. The rationale for denying real stereotypes as well is
In sum, a plaintiff can establish a prima facie case of sex discrimination under a disparate treatment theory by showing that the employer is classifying employees on the basis of sex or by showing that the employer, while classifying employees on the basis of a neutral characteristic, intends to discriminate against either males or females.\textsuperscript{40} The burden then shifts to the employer, whose only defense is the BFOQ. Even if discriminatory motive cannot be shown, the plaintiff may still be able to establish a prima facie case of discrimination under the disparate impact theory.

2. Disparate Impact Theory

Discrimination by disparate impact, unlike discrimination by disparate treatment, involves employment practices that are facially neutral, but that have a disproportionate impact upon a protected group.\textsuperscript{41} To establish a prima facie case of discrimination under a disparate impact theory, a plaintiff need not show that an employer had a discriminatory intent.\textsuperscript{42} Instead, a plaintiff need show only that the employment practice in question has a disparate impact upon a protected class. Disparate impact can be established by the use of statistical data, showing that a protected group is disproportionately affected by the employer's actions.\textsuperscript{43} Title VII requires,

\begin{itemize}
\item based on the statutory language of Title VII, which prohibits invidious discrimination. The individual must be distinguished from the class as a whole. The extent to which an individual may or may not possess that particular stereotypical characteristic is irrelevant in applying Title VII's antidiscrimination principle. See id. at 707–08.
\item In contrast to disparate impact theory, disparate treatment requires a prima facie case of sex discrimination based on the requisite showing of discriminatory intent to prove disparate treatment from a neutral classification. Such disparate treatment is often referred to as "pretext discrimination." See Williams, supra note 5, at 669.
\end{itemize}

The Court in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), held that Title VII not only proscribed overt discrimination, but also proscribed facially neutral employment practices that have a discriminatory impact upon a protected class. The Court justified this expansion by reference to the purpose of Title VII, which is the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." \textit{Id}.

\begin{itemize}
\item See Wards Cove Packing Co. v. Antonio, 57 U.S.L.W. 4583, 4584 (U.S. June 6, 1989); \textit{Burwell}, 633 F.2d at 369. Title VII is directed at the consequences of certain employment procedures. \textit{Griggs}, 401 U.S. at 432. It is designed to prevent invidious discriminatory results, not simply the motivation of the employer. \textit{Id}. Consequently, the employer's motive is irrelevant unless it constitutes an acceptable justification for a particular employment practice. \textit{See id}.
\item See generally B.L. \textsc{Schleil} & P. \textsc{Grossman}, \textsc{Employment Discrimination Law} 1331-1389 (2d ed. 1983); \textit{Wards Cove Packing}, 57 U.S.L.W. at 4585-87.
\end{itemize}
however, more than a mere showing of a statistical imbalance to make out a prima facie case of disparate impact.\(^{44}\) The plaintiff must show causation by demonstrating that the application of a particular employment practice created the disparate impact.\(^{45}\)

Once a plaintiff establishes a prima facie case of disparate impact, the burden shifts to the employer to assert a defense.\(^{46}\) The typical defense in disparate impact cases is the "business necessity" defense.\(^{47}\) This defense, unlike the statutorily created BFOQ defense, has been developed judicially.\(^{48}\) The defense recognizes that employers may be justified, under certain circumstances, in maintaining an employment practice despite its differential impact upon a protected class.\(^{49}\) To assert the business necessity defense effectively, an employer must meet a two-pronged test. First, an employer must produce evidence that the particular employment practice serves legitimate employment goals significantly.\(^{50}\) Second, there cannot be a less discriminatory alternative that would serve the same business purpose that the current practice purports to fulfill.\(^{51}\)

In sum, a plaintiff can establish a prima facie case of disparate impact discrimination by showing that a particular employment practice causes a harsher effect on a protected class than it does on other classes. The burden then shifts to the employer to establish a business necessity defense. To rebut the discriminatory allegations successfully, the employer must show that the employment practice not only serves legitimate employment goals successfully, but also is the least discriminatory alternative available to satisfy that goal.

The characterization of a particular employment policy under the alternative discrimination theories can be critical to the viability or demise of that policy. If a disparate treatment characterization is recognized, the employer can invoke only the very narrow BFOQ defense, which is more difficult to establish than the business necessity defense.\(^{52}\) Alternatively, if a disparate impact characterization

\(^{44}\) Wards Cove Packing, 57 U.S.L.W. at 4587.

\(^{45}\) Id.

\(^{46}\) Burwell, 633 F.2d at 368; Levin v. Delta Air Lines, 730 F.2d 994, 997 (5th Cir. 1984).


\(^{48}\) Williams, supra note 5, at 671.

\(^{49}\) Robinson, 444 F.2d at 797.

\(^{50}\) Wards Cove Packing, 57 U.S.L.W. at 4588. To fulfill the first prong of the test an employer need not show that the particular employment practice is essential or indispensable to the business, but must show more than an insubstantial justification. Id.

\(^{51}\) See id.; Robinson, 444 F.2d at 798.

\(^{52}\) See Williams, supra note 5, at 670–72. The BFOQ only allows class-based exclusions when
is recognized, the employer has the broader, more flexible defense of business necessity at his or her disposal.

Prior to 1978, judicial characterizations of pregnancy-based classifications swung from the disparate treatment pole to the disparate impact pole. Consequently, Congress passed the PDA to settle the status of pregnancy-based classifications.

B. Pregnancy Discrimination Act

During the 1970s, United States Courts of Appeals decisions regarding pregnancy classifications accepted pregnancy as a sex-based classification. The Supreme Court, however, disregarded that trend. In General Electric v. Gilbert, the plaintiff challenged the validity of a disability insurance plan that paid benefits to employees disabled as a result of nonoccupational sickness or accident. The company routinely denied disability-benefit claims for absences due to pregnancy, claiming that the plan did not cover pregnancy-related disabilities. The plaintiffs alleged that, because the company refused to pay women disability-benefits for pregnancy-related absences, the policy impermissibly discriminated on the basis of sex. The Court held that classification by pregnancy is not sex-based discrimination, and, therefore, does not by itself establish a prima facie case of discrimination under a disparate impact theory. The General Electric Court relied heavily on Geduldig v. Aiello in reaching its decision. The plaintiff in Geduldig challenged a disability plan identical to the one upheld in General Electric because such exclusions are reasonably necessary to the normal operation of that particular business. Id. at 670–71. In contrast, the business necessity defense justifies employment policies when they are the only effective way to meet central business concerns. Id. at 672.

56 See id. at 128.
57 Id. at 129.
58 Id.
59 Id. at 136–37, 145–46. The Court considered pregnancy to be a neutral classification and stated that, to establish a prima facie case of sex discrimination, the plaintiff had to show a gender-based effect resulting from the disability plan. See id. at 137.
it also excluded pregnancy-related disabilities from coverage.\textsuperscript{61} The \textit{Geduldig} case, however, was brought under the equal protection clause of the fourteenth amendment, rather than Title VII.\textsuperscript{62} The \textit{Geduldig} Court held that the plan did not violate the equal protection clause because it did not discriminate against any defined group in terms of its overall protection.\textsuperscript{63} The Court reasoned that there was no risk from which men were protected and women were not, or vice versa.\textsuperscript{64}

\textit{General Electric} relied on \textit{Geduldig}'s finding that exclusion of pregnancy-related disabilities did not discriminate against any gender, and applied this rationale to Title VII.\textsuperscript{65} The Court stated that exclusion of pregnancy from coverage under the disability plan was not sex-based, implying that a prima facie case of discrimination by disparate treatment was not established.\textsuperscript{66} The Court in \textit{General Electric} delineated the position of the federal judiciary: for the purpose of Title VII, pregnancy classification is not sex-based discrimination.\textsuperscript{67}

The \textit{General Electric} decision provided impetus for the PDA.\textsuperscript{68} The PDA made Congress's dissatisfaction with the Supreme Court's interpretation of sex-based discrimination under Title VII\textsuperscript{69} crystal clear.\textsuperscript{70} The PDA states that the word "sex" in Title VII includes, but is not limited to, pregnancy, child-birth, or related medical conditions.\textsuperscript{71} The effect of the PDA on Title VII analysis is that any classification based on pregnancy, child-birth, or related medical conditions is discrimination on the basis of sex and constitutes a per se violation of Title VII.\textsuperscript{72}

Thus, Title VII analysis in a sex discrimination case begins by determining if an employer's policy is based on a classification pro-

\begin{itemize}
\item \textsuperscript{61} \textit{Id.} at 486.
\item \textsuperscript{62} \textit{See id.} at 487.
\item \textsuperscript{63} \textit{See id.} at 496.
\item \textsuperscript{64} \textit{Id.} at 496–97.
\item \textsuperscript{65} \textit{General Elec. v. Gilbert}, 429 U.S. 125, 136 (1976).
\item \textsuperscript{66} \textit{See id.} at 136.
\item \textsuperscript{67} \textit{See id.} at 145–46. The \textit{General Electric} decision had a major impact upon the circuit courts, prompting requests for certiorari and vacations. \textit{See} \textit{Gardner v. National Airlines}, 434 F. Supp. 249, 256 n.8 (S.D. Fla. 1977).
\item \textsuperscript{68} 42 U.S.C. \textsection{2000e(k) (1982).
\item \textsuperscript{69} 42 U.S.C. \textsection{2000e-2(a) (1982 & Supp. IV 1986).
\item \textsuperscript{70} 42 U.S.C. \textsection{2000e(k) (1982). Subsection (k) clarifies the meaning of the term "sex" within section 2000e-2(a). \textit{Id.}
\item \textsuperscript{71} 42 U.S.C. \textsection{2000e(k) (1982).
hibited by the PDA. If a policy is grounded in a prohibited classification, then a clear case of sex discrimination by disparate treatment exists. The only available defense to an employer is the BFOQ defense.

Title VII protects workers by protecting employment opportunities from unjustifiable discriminatory practices. The OSH Act also protects workers. Whereas Title VII attempts to guarantee access to the workplace, the OSH Act attempts to guarantee that the workplace is a safe place in which to work.

C. OSH Act Standards

The primary objective of the OSH Act is to make the workplace safe for all employees. The general duty clause of the OSH Act requires employers to furnish a workplace that is free from recognized hazards that cause or are likely to cause death or serious injury. Thus, the OSH Act places the burden of providing a safe workplace on employers.

Furthermore, the OSH Act encourages employers to abate hazards before taking action that may be detrimental to employees. Courts have not yet decided, however, whether employers may comply with the OSH Act by excluding employees rather than implementing steps to abate a hazard in order to save time and money. Congress's use of the language "to the extent feasible" in the OSH

73 See supra notes 54–72 and accompanying text.
74 See supra notes 24–40 and accompanying text.
75 See id.
79 Id.
81 Id.
82 Id. at 533–34.
Act’s standard-setting provision\textsuperscript{83} implies that Congress did not ignore the enormous financial cost associated with the abatement of workplace hazards.\textsuperscript{84} Feasibility is limited, for example, when the costs of compliance threaten the viability of an entire industry.\textsuperscript{85} Nevertheless, feasibility for the purposes of the OSH Act is defined as "capable of being done,"\textsuperscript{86} and the substantial costs associated with compliance are often viewed as a cost of doing business.\textsuperscript{87}

Despite the OSH Act’s emphasis on feasible abatement and Title VII’s antidiscrimination principle, employers have instituted fetal protection policies in response to reproductive hazards in the workplace. Employers justify such policies on a moral responsibility for protecting health and as insurance against tort liability.

III. EMPLOYER JUSTIFICATIONS FOR FETAL PROTECTION POLICIES

Employers proffer two reasons for the institution of fetal protection policies. First, employers state that they have a moral obligation, as does society, to protect the health of the next generation.\textsuperscript{88} Second, employers are concerned that reproductive hazards will expose them to extensive tort liability.\textsuperscript{89} Neither of these reasons is unfounded.

Society’s interest in protecting health is reflected in the numerous national laws that impose restrictions and obligations upon business enterprises.\textsuperscript{90} Examples of these laws include the Consumer Product Safety Act,\textsuperscript{91} the Federal Food, Drug, and Cosmetic Act,\textsuperscript{92} and the OSH Act.\textsuperscript{93}

Employers’ fear of future tort liability arising from exposure to workplace hazards is equally legitimate. Generally, workers’ compensation provides relief for loss resulting from injury, disablement,
or death of workers resulting from industrial accident, casualty, or disease. In order to obtain such relief, however, an employee must show that an employment contract existed at the time of injury to warrant compensation. Furthermore, workers' compensation operates as an exclusive remedy precluding all other remedies and liabilities, including a tort cause of action.

Despite the breadth of workers' compensation coverage, it has not been extended to children who suffer prenatal injuries resulting from reproductive hazards in the workplace because "employees" has not been construed to include unborn children. Consequently, children who suffer such prenatal injuries may sue the employer in tort for limitless money. Moreover, even if a female employee risked the exposure to a reproductive hazard and sought workers' compensation, she could not forfeit the tort cause of action that accrues to the child. Employers are therefore exposed to a potentially tremendous financial burden.

Title VII also exposes employers financially because courts hearing Title VII cases have not historically accepted a cost-based defense as valid. Although recently a cost-defense has been creeping into Title VII litigation, its emergence has occurred only where economic risks, and not human risks, are at stake. Courts examining the legality of fetal protection policies have held that a desire to avoid tort liability cannot stand alone as a defense against allegations of discrimination.

Despite the invalidity of cost-based defenses, courts have been willing to uphold the legitimacy of fetal protection policies based on the proper criteria. Courts have held that the societal interest in protecting unborn children may legitimate an otherwise illegitimate

94 81 AM. JUR. 2D Workmen's Compensation § 1 (1976).
95 Id. § 153.
96 Id. § 50.
97 See Sloan, Employer's Tort Liability When a Female Employee is Exposed to Harmful Substances, 3 Employee REL. L.J. 506, 511 (1978).
99 See Brodin, supra note 10, at 353. For a detailed discussion of the cost-defense to Title VII allegations, see id. at 344-65.
100 See, e.g., Wright v. Olin Corp., 697 F.2d 1172, 1190 n.26 (4th Cir. 1982).
101 See Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984) (although court invalidated hospital's fetal protection policy, it upheld legitimacy of fetal protection policies in general, and further refined framework established by other courts); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (court remanded case to be decided consistent with disparate impact framework established by the court for examining fetal protection policies).
cost-based defense. 102 Thus, employers and courts together have subordinated society's interest in protecting human health and well-being to profit-maximization. 103 Courts have encouraged this trend by subjecting fetal protection policies to relaxed scrutiny. 104

With one exception, 105 these fetal protection cases have been brought under Title VII instead of the OSH Act. The circuit courts that have applied Title VII to fetal protection policies have not followed the disparate treatment/BFOQ analysis, but instead have allowed employers to assert a business necessity defense previously reserved for disparate impact cases. 106 This loosening of traditional Title VII analysis has left the door open for the implementation of discriminatory fetal protection policies.

IV. APPLICATION OF TITLE VII TO FETAL PROTECTION POLICIES

Wright v. Olin Corp. 107 and Hayes v. Shelby Memorial Hospital 108 form the foundation of current Title VII analysis. 109 Facialiy, the means by which each court circumvented the proper use of disparate treatment analysis appear to be quite different. The apparent differences, however, result merely from using different labels to describe essentially similar approaches.

In fact, these two Title VII approaches are consistent in at least two respects. Both approaches permit the employer to raise the business necessity defense where normally only the BFOQ defense is available. 110 Also, the proof required under each approach to justify exclusion of pregnant and fertile women is identical. 111

The policy challenged in Wright categorized reproductively hazardous jobs into three groups: (1) restricted jobs, which excluded

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102 See Wright, 697 F.2d at 1189–90.
103 See supra notes 99–102 and accompanying text.
104 See infra notes 107–55 and accompanying text.
105 See Oil, Chem. & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984) (case tried under the OSH Act to determine if sterilization as a condition for employment is a "hazard" within the general duty clause of the OSH Act).
106 See infra notes 107–55 and accompanying text.
107 697 F.2d 1172 (4th Cir. 1982).
108 726 F.2d 1543 (11th Cir. 1984).
109 Even though it involves a fetal protection policy, Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982), is irrelevant to this Comment. All the events in question occurred before 1978 and the advent of the PDA. Id. at 989 n.6. Thus, the use of a disparate impact theory was proper. Nevertheless, Zuniga's fetal protection policy, which terminated employment of a female x-ray technician when she became pregnant, was held to be invalid because it was not the least discriminatory policy. See id. at 994.
110 See EEOC Policy Guidance, supra note 2, at 4.
111 See id.
fertile women because of the exposure to "known or suspected abortifacent or teratogenic agents;"\(^{112}\) (2) controlled jobs presenting limited exposure to harmful chemicals, which allowed pregnant women to work only after an individual evaluation because of limited exposure to harmful chemicals;\(^{113}\) and (3) unrestricted jobs, which posed no reproductive hazards and which women were fully eligible to perform.\(^{114}\) The Fourth Circuit analyzed this fetal protection policy under the disparate impact/business necessity theory.\(^{115}\) The court chose the disparate impact theory over the disparate treatment theory because proper application of the disparate treatment theory would have limited the employer to the narrow BFOQ defense.\(^{116}\) The court implied that such a result was undesirable in the fetal protection area.\(^{117}\)

The Fourth Circuit, however, failed to address whether, in light of the PDA, the challenged fetal protection policy should have been considered discriminatory on its face and judged according to the disparate treatment/BFOQ standard. The court focused instead on the notion that Title VII theories admit of no bright lines in their application.\(^{118}\) Because different theories may force a court to choose among them, the Wright court determined that general principles developed in Title VII litigation should guide the decision-making process.\(^{119}\) The court thus based its selection of the disparate impact theory on certain principles underlying the development of Title VII.\(^{120}\)

The Wright decision relied on Nashville Gas Co. v. Satty\(^{121}\) and its interpretation of Title VII principles. Nashville Gas involved a mandatory pregnancy leave policy that denied sick pay, erased all accumulated job seniority, and did not guarantee job reinstatement.\(^{122}\) The Supreme Court applied the disparate impact/business

\(^{112}\) Wright v. Olin, 697 F.2d 1172, 1182 (4th Cir. 1982).
\(^{113}\) See id.
\(^{114}\) See id.
\(^{115}\) See id. at 1185.
\(^{116}\) See id. at 1185 n.21.
\(^{117}\) See id.
\(^{118}\) See id. at 1184–85.
\(^{119}\) See id. at 1185.
\(^{120}\) See id. The development of Title VII has focused on consequences of employment policies rather than their "neutral" expression. See id. at 1186. See generally Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Court expanded Title VII coverage to neutral classifications having a disparate impact upon a protected class and created the business necessity defense to accompany expansion).
\(^{122}\) See id. at 137.
necessity theory and did not uphold the policy because the employer failed to prove a business necessity for the policy.\textsuperscript{123} The Court determined, by negative inference, that a prima facie case of discrimination had been established under Title VII.\textsuperscript{124} The Court reasoned that, although Title VII does not require an employer to give a woman economic benefits, it does not permit an employer to deprive her of employment opportunities because of her biological role in life.\textsuperscript{125}

The \textit{Nashville Gas} Court distinguished the case at bar from \textit{General Electric v. Gilbert},\textsuperscript{126} in which the Court upheld the denial of pregnancy-related disability benefits.\textsuperscript{127} The Court stated that the policy in \textit{General Electric}, unlike the one in \textit{Nashville Gas}, did not impose a substantial burden on women.\textsuperscript{128} The policy in \textit{General Electric} merely denied women benefits.\textsuperscript{129} In \textit{Nashville Gas}, however, the Court invalidated the employer's policy because the employer failed to justify imposing a burden on women.\textsuperscript{130}

The \textit{Wright} court determined that the consequences of the company's policy were similar to the consequences of the policy struck down in \textit{Nashville Gas}, in that both policies imposed a substantial burden upon women and not upon men.\textsuperscript{131} The court concluded from this similarity that the business necessity test applied in \textit{Nashville Gas} was applicable in \textit{Wright}.\textsuperscript{132}

The court elaborated upon the substantive showing that an employer must make to establish the business necessity defense.\textsuperscript{133} At the outset, an employer must prove that a substantial risk of harm to unborn children is posed by maternal exposure to toxic environments in the workplace.\textsuperscript{134} An employer's policy must effectuate its purpose of fetal protection by only restricting females and not males.\textsuperscript{135} Additionally, the scientific evidence used to support the policy must be independent, objective, and supported by expert

\textsuperscript{123} See id. at 143.
\textsuperscript{124} See id. at 142.
\textsuperscript{125} See id.
\textsuperscript{126} 429 U.S. 125 (1976); see supra notes 55–67 and accompanying text.
\textsuperscript{127} See \textit{Nashville Gas}, 434 U.S. at 141–42.
\textsuperscript{128} See id. at 142.
\textsuperscript{129} Id.
\textsuperscript{130} See id. at 141–42.
\textsuperscript{131} See \textit{Wright v. Olin Corp.}, 697 F.2d 1172, 1186 (4th Cir. 1982).
\textsuperscript{132} Id.
\textsuperscript{133} See id. at 1190.
\textsuperscript{134} See id.
\textsuperscript{135} Id.
opinions in the field.136 This prima facie defense, however, is rebut­
able if the plaintiff shows that there are less discriminatory ways to
effectuate the same goals.137

By allowing a disparate treatment case of sex discrimination to be
justified by a business necessity defense, the Wright court excepted
fetal protection policies from the traditional Title VII framework.
The Wright court thus has paved the way for other courts to uphold
fetal protection policies by giving the employer a defense where no
viable one exists under Title VII.

In Hayes v. Shelby Memorial Hospital,138 for example, the Eleventh
Circuit Court of Appeals followed the Wright court's lead and
allowed the employer to use a defense where none had previously
existed.139 Hayes involved an x-ray technician who was fired when
she informed her supervisor that she was pregnant.140 The court did
not uphold the fetal protection policy challenged by the technician,
however, because the employer-hospital could not establish a busi­
ness necessity defense.141 The hospital failed to show a substantial
risk of harm to the pregnant technician from the amount of radiation
exposure in her workplace.142 Moreover, even if the hospital had
established a business necessity defense, the policy would not have
been upheld because it was not the least discriminatory method to
ensure against fetal harm.143

In determining the Title VII framework under which to analyze
the facts, the Hayes court began with the proposition that any
classification based on pregnancy or related conditions can never be
considered neutral under the PDA.144 Although the Hayes court
stated that the case involved a facially discriminatory policy,145 it
proceeded to develop a Title VII framework inconsistent with tra­
ditional disparate treatment analysis.146 Rather than test the policy
in terms of a BFOQ defense, the court applied a business necessity
test.147

136 Id.
137 Id. at 1191.
138 726 F.2d 1543 (11th Cir. 1984).
139 See id. at 1548 n.8.
140 Id. at 1546.
141 See id. at 1550.
142 Id.
143 See id. at 1553–54.
144 Id. at 1547.
145 Id. at 1548.
146 See id. at 1548–49.
147 See id. at 1552.
The *Hayes* analysis began by presuming that any employment policy that applies only to women or pregnant women is, by its terms, facially discriminatory. The court found that this presumption, however, is rebuttable if the employer can show that the policy effectively and equally protects the offspring of all employees. The employer must satisfy a two-part test to rebut the presumption of facial discrimination. First, the employer must show that there is a substantial risk of harm to the unborn children of female employees from the women's exposure to toxic hazards in the workplace, either during pregnancy or while fertile. Second, the employer must demonstrate that the reproductive hazard poses a risk only to fertile and pregnant women, but not to men. Moreover, the scientific evidence used to establish the rebuttal must be objectively supported by the opinions of experts in the relevant scientific fields.

If the rebuttal is successful, the challenged policy is deemed neutral. Accordingly, the employee has a prima facie case of disparate impact. The employer's business necessity defense applies automatically because the employer proved previously that its policy is justified on a scientific basis and addresses a harm that only affects women and not men. Even if an attempt at rebuttal is not successful, however, according to the *Hayes* court a court may view the case as disparate treatment discrimination, giving the employer a second chance to defend the fetal protection policy. The only available defense to the employer under those circumstances would be the BFOQ defense.

Notwithstanding the difference in language, the analytical frameworks of *Wright* and *Hayes* are identical. Under each the plaintiff asserts a Title VII allegation of sex discrimination, and the employer then asserts the objective scientific evidence proving substantial risk of harm to the offspring through maternal exposure. The plaintiff then suggests less discriminatory alternatives to reach the same safety objective, and, if successful, the policy is invalidated. If the plaintiff is unsuccessful, the policy remains intact. The only factor

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148 *Id.* at 1548.
149 *Id.*
150 *Id.*
151 *Id.* at 1552.
152 *Id.*
153 *Id.* at 1553. Similar to any disparate impact case, the plaintiff may still defeat the policy by showing that it is not the least discriminatory alternative. *Id.*
154 *Id.* at 1549.
155 *Id.*
distinguishing *Hayes* from *Wright* is that the *Hayes* court acknowledged the existence of the PDA and the fact that pregnancy-based policies are facially discriminatory. Nonetheless, *Hayes* strips this acknowledgement of all significance by allowing the employer to justify fetal protection with a business necessity defense.

V. THE QUESTIONABLE VALIDITY OF FETAL PROTECTION POLICIES

A. Title VII Precedent Defied

The courts’ great concern for the potential harm to employees’ offspring has generated innovative interpretations of Title VII. These interpretations utilize the disparate impact theory to mitigate the harsh results that would follow from proper application of disparate treatment analysis. Under proper Title VII analysis, an employer has no real viable defense to uphold such a policy. Consequently, the courts have rubber-stamped the validity of fetal protection policies by defying Title VII precedent.

Title VII precedent dictates the use of the BFOQ defense for disparate treatment cases of sex discrimination.156 Both *Wright* and *Hayes*, however, allowed the employer to assert a business necessity defense.157

The *Wright* court relied on *Nashville Gas* in its decision to provide the employer with a business necessity defense.158 Reliance upon *Nashville Gas*, however, is misguided; *Nashville Gas* was decided in 1977, a year before Congress enacted the PDA.159 Prior to the PDA, a classification based on pregnancy was considered neutral, and thus was analyzed under a disparate impact/business necessity theory.160 *Wright*, however, was decided in 1982, after passage of the PDA.161 Consequently, the *Wright* decision, through its reliance

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156 See *supra* notes 24–39 and accompanying text.
157 See *supra* notes 107–55 and accompanying text.
158 See *supra* notes 121–32 and accompanying text.
160 See *supra* notes 41–72 and accompanying text.
161 Although *Wright* was decided in December 1982, the court does not mention whether the case falls under the PDA. In fact, the case makes no mention of the PDA whatsoever. Apparently, the policy challenged in *Wright* was adopted in 1978. See *Wright* v. Olin Corp., 697 F.2d 1172, 1182 (4th Cir. 1982); Becker, *supra* note 1, at 1227. Thus, it is probable that the case should have been decided in light of the PDA. Moreover, it is imperative to view this decision in light of the PDA because of its substantial contribution to the developing law in the area of fetal protection, which is clearly governed by the PDA. See 42 U.S.C. § 2000e(k) (1982).
on inapposite precedent,162 excepts fetal protection policies from the established Title VII analytical framework for disparate treatment sex discrimination.163

Not only did the Wright court disregard traditional Title VII principles in its choice of a theory, but it also proceeded to fit the facts at hand into an established variation of the business necessity defense, namely, the safety of third parties.164 Such a defense is available when a third person is an invitee and the plaintiff-employee's condition inhibits his or her performance of all the duties necessary to ensure the safety of that invitee.165 By categorizing the employees' unborn children as invitees,166 the Wright court entitled unborn children to the same duty of care as invitees.167 Consequently, the court concluded that if customer safety is a valid business necessity defense, then the protection of unborn children is a valid justification as well.168

The Wright court ignored the contradictory dicta, however, in the two primary cases it relied upon to reach its conclusion. Despite the clear rejection in Burwell v. Eastern Air Lines169 and Gardner v. National Airlines170 of the protection of unborn children as a valid Title VII defense, the Wright court deemed such protection a legitimate business necessity defense against challenges to fetal protection policies.171 Burwell involved a mandatory maternity leave policy for flight attendants, effective upon knowledge of pregnancy.172 Flight attendants were deprived of seniority while on maternity leave.173 The plaintiffs alleged that this policy discriminated on the basis of sex.174 The employer argued that the policy was justified because pregnant flight attendants could jeopardize the safety of the

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162 See supra note 161 and accompanying text.
164 See Wright, 697 F.2d at 1189. The cases allowing the safety of third parties as a valid defense have involved primarily the transportation industries. See, e.g., Burwell, 633 F.2d 361; Gardner v. National Airlines, 434 F. Supp. 249, 263 (S.D. Fla. 1977); see also supra notes 31–33 and accompanying text.
165 See, e.g., Burwell, 633 F.2d 361; Gardner, 434 F. Supp. 263.
166 Wright, 697 F.2d at 1189.
167 See id.
168 See id.
169 633 F.2d 361 (4th Cir. 1980).
171 Wright, 697 F.2d at 1189–90.
172 Burwell, 633 F.2d at 365.
173 Id. at 364.
174 Id. at 365.
passengers, and that the health of pregnant flight attendants and their unborn children was at risk.\textsuperscript{175} The court held that the mandatory maternity leave policy was justified on the basis of ensuring the safety of passengers, but only after the thirteenth week of pregnancy.\textsuperscript{176} The court refused to accept concerns for the safety of pregnant employees and their unborn children as a legitimate defense, stating that, in the area of civil rights, individuals should make the decisions regarding personal risks so long as those risks do not affect business operations.\textsuperscript{177}

Similarly, the court in \textit{Gardner} found that neither the courts nor the employer should make personal risk decisions for employees.\textsuperscript{178} \textit{Gardner} involved a mandatory unpaid pregnancy leave for flight attendants effective upon knowledge of pregnancy.\textsuperscript{179} Additionally, the policy required pregnant flight attendants to notify the company in writing of pregnancy and to return to work within sixty days of giving birth.\textsuperscript{180} Furthermore, if a pregnant flight attendant failed to comply with these requirements, the company could permanently terminate her employment.\textsuperscript{181} The court held that passenger safety was jeopardized by the pregnant flight attendant's inability to perform properly all duties after the twentieth week of pregnancy, and thus justified operation of the mandatory pregnancy leave policy after the twentieth week.\textsuperscript{182} Like the \textit{Burwell} court, the court refused to justify the policy by reference to the potential danger to the fetus, stating that such a decision should be made by the mother and not the court.\textsuperscript{183} The \textit{Wright} court's reliance on \textit{Burwell} and \textit{Gardner} for policies based only on fetal protection is thus flawed.

Because of this reliance, the \textit{Wright} court's choice of disparate impact theory to the use of the business necessity defense is also inappropriate. Unfortunately, the court in \textit{Hayes v. Shelby Memorial Hospital}\textsuperscript{184} followed \textit{Wright}'s mandate to distort Title VII principles when applied to fetal protection cases. The court in \textit{Hayes} unconviningly disguised its analysis as something other than disparate

\begin{itemize}
\item \textsuperscript{175} Id.
\item \textsuperscript{176} See id. at 371.
\item \textsuperscript{177} Id.
\item \textsuperscript{179} Id. at 254.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} See id. at 263.
\item \textsuperscript{183} Id. at 259.
\item \textsuperscript{184} 726 F.2d 1543 (11th Cir. 1984).
\end{itemize}
By setting up a rebuttable presumption of facial discrimination, a court taking the *Hayes* approach actually allows an employer to assert a business necessity defense from the start, just as in disparate impact cases. A failure to rebut the presumption in effect implies that the business necessity reason proffered is not acceptable and that the policy should not be upheld.

The *Hayes* approach insulates an employer from disparate treatment/BFOQ analysis. Only if the rebuttal of facial discrimination fails does a court analyze under a disparate treatment test. Unlike under a disparate impact test, it is improbable that pregnancy or fertility under circumstances that prompt fetal protection policies would ever meet the job-related standard of the BFOQ defense. Moreover, if the employer cannot satisfy the broader business necessity defense, it is a safe assumption that the narrower BFOQ standard cannot be satisfied.

Insulating fetal protection policies from the disparate treatment/BFOQ analysis is incongruous with Title VII policy. Title VII policy is based on the removal of hindrances that are artificial, arbitrary, and unnecessary to employment when these hindrances operate to discriminate invidiously against a protected class. Fetal protection policies foster sex discrimination instead of inhibit it, and, therefore, fly in the face of Title VII's purpose. The innovative Title VII approaches to fetal protection policies employed in *Wright* and *Hayes* are difficult to rationalize in light of Title VII's intent, Supreme Court precedent, and the PDA.

Despite this defiance of precedent, the Equal Employment Opportunity Commission (EEOC) has adopted the lead of the *Hayes* and *Wright* courts. The EEOC views this choice as a balancing approach that protects women's employment opportunities from unnecessary limitations, while protecting the health of the next generation. This analytical approach, however, does not necessarily promote the health of future offspring, not to mention the health of male workers, due to the nature of reproductive hazards, judicial

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185 See supra notes 138–55 and accompanying text.
186 See id.
187 See *Hayes*, 726 F.2d at 1549 n.9.
189 See *We Only Want What's Best For You*, STUDENT LAW., Nov. 1988, at 4.
191 *Id.* at 2.
192 There are three general categories of reproductive hazards: fetal toxins, teratogens, and germ cell mutagens. Ashford & Caldart, *supra* note 80, at 524–25. Both fetal toxins and teratogens affect the fetus during pregnancy by passing through the placenta. *Id.* at 525. Teratogens additionally can alter the physiology of the mother, thereby affecting the fetus.
enforcement, and the lack of concrete scientific evidence. Consequently, this balancing approach fails to fulfill both its goals.

Title VII's purpose is to ensure that women have the same employment opportunities as men and are not unduly denied employment. Its success has largely been based on maintenance of the narrow BFOQ defense when facial discrimination is concerned. Wright, Hayes, and the EEOC Guidelines have undermined the success of Title VII by legitimizing fetal protection policies under a business necessity defense, when ordinarily the BFOQ defense would be applicable but would provide no safe harbor. Rubber-stamping the validity of fetal protection policies not only defies Title VII precedent, but also affects women's fundamental right to privacy as guaranteed by the United States Constitution.

B. Constitutional Right to Privacy Implications

The Supreme Court has long recognized the existence of a right to privacy under the due process clause of the fourteenth amend-

Id. Fetal toxins and teratogens thus act to cause reproductive harm through maternal exposure. In contrast, mutagens change the genetic structure of both male and female reproductive cells. Id. Reproductive hazards resulting from mutagens thus can occur through maternal or paternal exposure at any point during fertility. See id. Furthermore, there is evidence that hazardous substances are likely to have multiple effects, that is, carcinogenesis, mutagenesis, and teratogenesis. Williams, supra note 5, at 659. See generally McElveen, Reproductive Hazards in the Workplace, 20 FORUM 547 (1984).

193 See, e.g., International Union v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D. Wis. 1988). The district court in Johnson Controls used the framework established by Wright and Hayes, but, in doing so, it misapplied the criteria set up under that framework. See id. at 314–17. The Johnson Controls court should have at least scrutinized the scientific evidence under the Wright/Hayes test. See supra notes 133–37, 148–50 and accompanying text. The Occupational Safety and Health Administration (OSHA) submitted findings from extensive hearings and testimony that “[e]xposure to lead has profoundly adverse effects on the course of reproduction in both males and females.” ACLU Amici Curiae Brief in Support of Appellants at 11, International Union v. Johnson Controls, Inc., No. 88-1308 (7th Cir. argued Sept. 15, 1988, reargued en banc June 1989). There was also evidence that lead exposure has nonreproductive effects as well. See id. at 12. Lead Industries Association (LIA) proposed that lead exposure only affected female reproduction and the defendant, Johnson Controls, Inc., relied on this evidence. See id. Despite conflicting evidence, see Johnson Controls, 680 F. Supp. at 315, the court granted summary judgment for the defendant without further investigation whether women were appropriately restricted and not men. See id. at 318; American Public Health Association Amici Curiae Brief in Support of Appellants at 3, International Union v. Johnson Controls, Inc., No. 88-1308 (7th Cir. argued Sept. 15, 1988, reargued en banc June 1989).

194 Risk-evaluation regarding reproductive hazards is difficult because such evidence is largely inconclusive. EEOC Policy Guidance, supra note 2, at 7–8. This problem is compounded by the lack of studies focusing on paternal risks. See Becker, supra note 1, at 1236. Most studies have focused on maternal exposure, thereby leaving a gap in the evidence whether offspring health is endangered through paternal exposure as well. See id. at 1236–37.


196 See supra notes 24–40 and accompanying text.
The right to privacy includes the right to choose whether or not to conceive or to carry a child to term. Although the right to make such a choice in privacy is constitutionally protected, it is not absolute. The state can constitutionally interfere with a woman's freedom of choice with respect to child-bearing only after a fetus becomes viable and only so long as the regulation or policy is narrowly tailored to serve a compelling state interest.

Over the past thirty years, the United States Supreme Court has established the fundamental right to privacy for individuals even though it is not explicitly spelled out in the Constitution. See generally Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (right of personal privacy, with right to procreate at the heart of the matter); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (husband cannot interfere with wife's right to terminate pregnancy; parents cannot interfere with minor daughter's choice); Roe v. Wade, 410 U.S. 113 (1973) (right to privacy, including a woman's qualified right to choose to terminate her pregnancy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to privacy for the individual); Loving v. Virginia, 388 U.S. 1 (1967) (right to privacy in marital relationship); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy and contraception).

Courts have held that a state government's interference with an individual's right to privacy violates the due process clause of the fourteenth amendment. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (husband cannot interfere with a woman's decision to terminate pregnancy); Roe v. Wade, 410 U.S. 113, 153 (1973) (fourteenth amendment is broad enough to allow a woman to choose to terminate her pregnancy); Doe v. Bolton, 410 U.S. 179, 190 (1973) (cannot require a woman to carry a pregnancy to term); Griswold v. Connecticut, 381 U.S. 479 (1965) (cannot forbid use of contraceptives). Thus, the fourteenth amendment protects the interest in making important decisions regarding matters of marriage, procreation, contraception, family relationships, child rearing, and education. Whalen v. Roe, 429 U.S. 589, 599-600 (1977). These cases demonstrate the limitations placed on state intrusion into private conduct. See id. at 600 n.26.

In Roe, the constitutionality of a state criminal abortion statute was challenged. Id. at 116. The statute made it a criminal act to have an abortion, except under medical advice to save the life of the mother. Id. at 117-18. The Supreme Court held that the state had a legitimate interest in protecting potential life, but this interest was not compelling until the point of viability. Id. at 163.

The Supreme Court recently examined a Missouri statute restricting abortions in Webster v. Reproductive Health Services, 57 U.S.L.W. 5023 (U.S. June 27, 1989). The Court stated in dicta that the state has a legitimate interest in protecting potential human life before viability as well as after viability. Id. at 5030. Missouri legislators, however, chose viability as the point at which the state's interest in potential life must be protected. Id. at 5030-31. Thus, viability remains the point at which a state may constitutionally interfere with a woman's choice to obtain an abortion.

The Court in Webster did not overrule Roe v. Wade, 57 U.S.L.W. at 5031, it rejected the use of the rigid trimester framework established in Roe to determine viability of a fetus. See id. at 5030-31. The Supreme Court, instead, upheld the constitutionality of a testing requirement to determine viability, irrespective of the trimester, prior to performing an abortion. Id. at 5031.

A compelling state interest is analogous to Title VII's business necessity defense in that it justifies the interference into otherwise protected areas. See Gardner v. National Airlines, 434 F. Supp. 249, 258 (S.D. Fla. 1977) (court equated legitimate
Fetal protection policies infringe upon a woman's freedom of choice regarding procreation. These policies force women to choose between pregnancy, or even fertility, and employment. Fetal protection policies are analogous to the mandatory maternity leave policy struck down in Cleveland Board of Education v. LaFleur.

In LaFleur, the plaintiffs challenged the constitutionality of the Board of Education's rule requiring pregnant teachers to take an unpaid maternity leave starting with the fifth month of pregnancy. The rule did not guarantee reemployment after the birth of the child. Failure to comply with any of the specific requirements of the rule was grounds for dismissal. The Court held that the policy violated the due process clause of the fourteenth amendment because it seriously burdened the exercise of a constitutionally protected right.

Similar to LaFleur's mandatory maternity leave policy, fetal protection policies burden the exercise of a constitutionally protected right. Fetal protection policies, however, impose a much more onerous burden on women than LaFleur's policy because they penalize not only pregnant women, but also all women of child-bearing capacity. Employers have forced women to make choices regarding their procreative capacity as a condition to maintaining their employment status. Moreover, in cases presenting a choice between fertility and sterility, employers have not only burdened women in the exercise of constitutionally protected choices, but have deprived them of any meaningful choice altogether. If a husband, who has governmental interest, with regard to the due process clause of the fourteenth amendment, to the BFOQ defense, with regard to Title VII).


See, e.g., Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984).


See id. at 634.

Id. at 635.

Id.

Id. at 651.

See, e.g., Oil, Chem. & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984) (five women underwent surgical sterilization after their employer informed them that all women would be excluded from reproductively hazardous jobs unless they presented proof of surgical sterilization).

Id.; see also supra notes 202–03 and accompanying text.

See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (legislation requiring sterilization
a genuine interest in the potential life and health of the fetus, cannot
interfere with a woman's choice in matters of procreation,212 then an
employer certainly should not be granted this power.

If the employer is a private employer, however, constitutional
protection is not invoked.213 Generally, the fourteenth amendment
does not apply to actions between private individuals, but instead
applies to governmental conduct that infringes upon protected
rights.214 Although it has been held that state action includes any
action officially taken by the courts or their judicial officers,215 it is
unlikely that all private conduct will be subject to constitutional
scrutiny merely because the plaintiff gets into court.216

Nonetheless, even though a private employer is involved, courts
should not ignore privacy rights when dealing with private conduct.
At least one court has followed this line of thinking in its rationale
for invalidating a discriminatory employment policy.217 The court in
Gardner considered the LaFleur court's decision relevant, even
though LaFleur involved a public employer and was decided on due
process grounds. Noting that LaFleur's decision under the due pro­
cess clause was a "distinction without a difference,"218 the Gardner
court stated that LaFleur suggested the invalidity of any employ­
ment practice that has a disproportionate impact upon females ab­
sent a legitimate governmental interest or BFOQ.219

Unlike other private conduct, the legislature has already chosen
to regulate employer/employee relations by enacting Title VII.
Regulation of this relationship, coupled with the strong constitutional
policy protecting the right to privacy, militates against distorting

of habitual criminals forever deprives a basic liberty). Although the policy in Skinner provided
for mandatory sterilization for criminals guilty of crimes of moral turpitude, id. at 536, fetal
protection policies may also be interpreted as requiring mandatory sterilization because women
may see no other choice but to maintain their employment.

215 Id. at 14.
216 Two cases that have applied constitutional scrutiny to private conduct are Shelley, 334
U.S. 1 (1948) (court could not enforce restrictive covenant between private buyer and seller
without violating the fourteenth amendment rights guaranteed to blacks) and Palmore v.
Sidoti, 466 U.S. 429 (1984) (court cannot enter order denying custody to mother because of
relationship with black man without violating the fourteenth amendment). These cases would
most likely be limited to their facts because they involved classification based on race. Courts
would be unlikely to rely on these decisions for classifications based on sex.

217 See Gardner, 434 F. Supp. at 258.
218 Id.
219 Id.
traditional Title VII framework to affirm fetal protection policies. Thus, despite the lack of state action, courts should import all the constitutional privacy concerns into Title VII.

If constitutional privacy concerns are imported to Title VII, the future of fetal protection policies would be affected. The judiciary would be precluded from distorting the framework of Title VII to exclude fertile and pregnant women from proper Title VII coverage in an effort to protect the health of their offspring. Thus, employers would be unable to institute fetal protection policies lawfully unless pregnancy or fertility constituted a BFOQ.

Invalidating these policies as a means of coping with reproductive hazards in the workplace will force employers to confront the situation directly without violating either Title VII's promise of equality and choice or the OSH Act's goal of eliminating workplace hazards. Workable alternatives to fetal protection policies certainly exist, including ones that will assist women in making the best decisions for themselves regarding reproductive hazards.

C. An Alternative to Fetal Protection Policies

Proper Title VII analysis of fetal protection policies precludes anyone, other than the woman herself, from making the decision concerning continued employment in a reproductively hazardous workplace. Consequently, employers must take an alternative course of action in complying with the OSH Act's requirement of furnishing a safe workplace for all employees, protecting the health of the next generation, and mitigating future tort liability. Employers could institute a program with an objective of assisting each woman at risk in making the best possible decision for herself. Such a program should consist of education regarding the reproductive hazards present in the workplace, and employment options for employees at risk.

Lack of education is one of the primary problems in the area of reproductive hazards in the workplace. Evidence of confusion and lack of awareness permeate industries in which work conditions expose employees to reproductive hazards. A 1988 Massachusetts study conducted by the University of Massachusetts Medical Center and the Department of Health, which surveyed 198 chemical, computer, and electronic firms, found that fifty-three percent of those

221 Id. at 12.
firms used at least one of four known reproductively hazardous chemicals. 222 Only forty percent of the firms using these substances, however, were aware of the possible adverse effects on reproduction, while only twenty percent restricted workers' exposure to these substances. 223 The study also reported that the firms restricting workers often followed discriminatory practices and mistakenly removed workers who were at a low risk, while leaving the high-risk workers in the workplace. 224 None of the companies surveyed transferred men even when there was evidence of a reproductive risk for men. 225 For example, glycol ethers are known to be an even greater risk to the reproductive system of men than of women, yet men remained on the job. 226 The study concluded that inaccurate information has led employers to institute inappropriate policies in an effort to counteract reproductive hazards. 227

The first goal of education would be to ensure that employers take appropriate, nondiscriminatory action toward employees at risk. The education of all employers in a specific industry would promote recognition of reproductive hazards industry-wide and would allow for a concerted effort and pooling of resources to discover methods for abatement of the hazards apart from the exclusion of pregnant and fertile women. 228 In fact, many of the major firms in the industry are already moving toward a substitution of nonhazardous chemicals for hazardous chemicals. 229 Moreover, such information would make employers aware of which jobs are hazardous and which employees are actually at risk, whether it be pregnant women, fertile women, fertile men, or all workers. This knowledge in turn should be used to educate the employees about reproductive hazards and to structure an appropriate options program for employees at risk.

Education for employees is necessary as well to assist each individual in reaching the best decision regarding the individual's em-

222 See id. at 1, 12. These four reproductive hazards were glycol ethers, lead, organic mercury, and radiation. Id. at 12.
223 Id. at 12.
224 Id. at 1, 12.
225 Id. at 12.
226 Id.
227 Id.
228 Abatement could take various forms, such as new safety equipment, safety guidelines, discovery of chemical substitutes, new methods using lower levels of hazardous substances, and nonhazardous substances.
229 Statement by Christopher Anderson, spokesperson for the Massachusetts High Tech Council. Id. at 12.
employment. A thorough and accurate knowledge of all the potential adverse effects associated with one's job, as well as the probability of occurrence, is necessary for employees to make an informed choice whether to remain in that job or to pursue other options.

The second prong of an alternative program should provide attractive options to the employee at risk. Often, an employee would rather bear the risk of development of reproductive problems than face unemployment, which has its own adverse effects. In contrast, if employers provided reasonable options, employees might view the situation as presenting something other than a Hobson's choice. The available options should be tailored to those general categories of employees affected as well as to feasible options within the industry. These options could include permanent or temporary transfers within the company to other jobs comparable in level and pay, reciprocal transfers between industries or employers to comparable positions, nine-month paid maternity leave, alternative career counseling and placement, and continuing education with reemployment in less hazardous jobs. Creative and numerous options in conjunction with education as to the potential risks would allow the individual to reach a healthy and more personally fulfilling decision.

Programs designed to assist employees in making decisions about potential reproductive risks are the only viable alternative to fetal protection policies. Although the best solution would be to remove all toxic substances from the workplace, it is an unrealistic alternative. Nonetheless, banning fetal protection policies and forcing em-

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230 The Massachusetts study also found that less than half of the firms using substances hazardous to reproduction informed their employees of the potential risks. *Id.*

231 Some employees are willing to neither risk development of a reproductive hazard nor suffer the effects of unemployment, and consequently have been forced to give up their fertility to maintain their employment status. *See, e.g.,* Oil, Chem. & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984); *see also supra note 202 and accompanying text.*

When Judge Bork was asked about his ruling in *American Cyanamid* during the nomination proceedings, he stated, "I suppose the five women who chose to stay on that job with higher pay and [who] chose sterilization—I suppose that they were glad to have the choice." Totenberg, *The Confirmation Process and the Public: To Know or Not to Know,* 101 HARV. L. REV. 1213, 1222 (1988). Betty Riggs, one of the women who had been sterilized, responded to Judge Bork's comment, stating, "I cannot believe that [he] thinks we were glad to have the choice of getting sterilized or getting fired. . . . I was only [twenty-six] years old, but I had to work, so I had no choice. . . . This was the most awful thing that happened to me." *Id.*

232 The Massachusetts study found that only 13% of the firms surveyed allowed for voluntary transfers, which generally were restricted to pregnant women. Butterfield, *Study Says Job Hazards Go Unrecognized,* Boston Globe, Nov. 11, 1988, at 12. Furthermore, no men were allowed transfers from jobs involving substances known to affect reproduction in men. *Id.*
ployers to institute an alternative program may provide an impetus to make the workplace safer for all employees.

VI. CONCLUSION

Employers justify fetal protection policies as a means to protect employees' offspring and as a means to insure against future tort liability. The courts have rejected such an economic argument, but appear, however, to be concerned by the moral question presented by reproductive hazards in the workplace. The courts have decided that protecting the future generation should prevail over women's rights as employees. Thus, courts have proceeded to distort Title VII principles, providing the employer with a viable defense to sex discrimination allegations where none previously existed, thereby validating fetal protection policies. These policies supposedly promote the health of our future generation, but at the expense of women's rights.

Fetal protection policies are at odds with the purpose of Title VII and the PDA. These policies also implicate women's constitutionally protected right to privacy, specifically in the area of procreation. This infringement mandates an importation of the constitutional privacy concerns to Title VII to invalidate fetal protection policies unless they comply with traditional Title VII requirements.

Consequently, the scenario established in this Comment is one where women can rarely be mandatorily excluded from employment because of reproductive hazards. Thus, the only person left to make the decision is the woman herself. This approach will force employers to take alternative routes. This Comment suggests a program consisting of education and employment options in order to assist women in making rational decisions for themselves.

Over time, this approach should also promote the health of all employees' offspring and help employers avoid future tort liability. Banning fetal protection policies as a means of complying with the OSH Act and discharging a moral duty will force employers to make the workplace safer for all their employees, from reproductive as well as nonreproductive hazards.