Exclusionary Employment Practices in Hazardous Industries: Protection or Discrimination?

I. INTRODUCTION

The number of women in industry is rising at a time when the effects of workplace exposures to hazardous substances are becoming increasingly evident. Presented with the possibility that a substance may pose dangers to workers' reproductive capacities, some employers are viewing women workers as the group threatened by the hazards and excluding them from the workplace as the most efficacious means of protecting them from injury and the company from potential legal liability.[1]

1. In September, 1978, the American Cyanamid plant in Willow Island, West Virginia, instituted a policy of excluding women from the pigment department of the plant because of exposure to lead dust. Five women had themselves sterilized rather than face transfers to other jobs. *Company and Union In Dispute as Women Undergo Sterilization*, N.Y. Times, Jan. 4, 1979, at 7, col. 1. At an Allied Chemical Corporation plant in Danville, Illinois, the company laid off five women working with fluorocarbons to protect them from suspected reproductive hazards. Almost two years later, after determining that its fears were unfounded, the company reinstated the women. Bronson, *Allied Chemical Compensates 5 Women Laid Off to Protect Childbearing Ability*, Wall St. J., Jan. 5, 1979, at 1, col. 1. In 1975, all women with childbearing capacities at the Bunker Hill lead smelter in Kellogg, Idaho, were transferred to less hazardous jobs with reductions in pay and seniority, Hricko, *Today's Job Hazard vs. Tomorrow's Baby*, L.A. Times, May 28, 1976, § II, at 7, col. 3, while a woman employed at General Motors' lead battery plant in Toronto had herself sterilized to keep her job. A. HRICKO, WITH M. BRUNT, WORKING FOR YOUR LIFE: A WOMAN'S GUIDE TO JOB HAZARDS A-40 (1976) [hereinafter cited as HRICKO & BRUNT].

It is not surprising that the possibility of reproductive harm evokes a stronger reaction from employers than does the possibility that an employee will develop a chronic disease as a result of workplace exposure. When exposure results in malformed children, increased incidences of spontaneous abortions, or the inability to conceive, the manifestation of the injury incurred is far more immediate, and thus more apparent, than when a worker develops cancer some 20 years after his or her initial exposure. The employer therefore runs a greater risk that a causal connection will be established and liability imposed. It is also not surprising that women are the focus of this concern. The link between a woman being exposed to a toxic substance and experiencing reproductive difficulties is more readily made than is the connec-

Both the increased numbers of women in industry and the heightened attention being paid to workers' health are linked, at least in part, to recent Congressional enactments. Title VII of the Civil Rights Act of 1964[2] (Title VII) makes sex-based discrimination in employment unlawful and has aided women in entering previously male-dominated sectors of the economy. The Occupational Safety and Health Act of 1970[3] (the OSH Act or the Act) obligates employers to protect the health of their workers. When facing the possibility that toxic substances in their plants may cause reproductive problems, employers tend to see themselves trapped between the mandates of the two statutes. Either they provide women with equal employment and risk violating the Act, or they protect their workers and face charges of employment discrimination.

The same apparent tension confronts the Secretary of Labor (the Secretary) who, under the Act, is authorized to promulgate[4] and enforce[5] standards to safeguard workers' health and safety. The Secretary's standards are based on evidence of the hazards posed by the condition or toxic substance to be controlled.[6] When promulgating standards to control substances which threaten reproductive health, especially when scientific documentation of the particular hazards involved is incomplete, the Secretary must also consider the policies underlying the Act and Title VII, as well as the constitutional limitations the Fifth Amendment places on governmental action.

This Note questions whether the goal of providing safe and healthful working conditions conflicts with the goal of providing equal employment opportunities. First, it addresses the facts and assumptions underlying the view that barring women with childbearing capacities from the workplace is a necessary and effective way of protecting the reproductive capacity of the workforce. It

tion between a male worker being exposed to a substance and his wife having difficulty bearing children. There are also longstanding assumptions built into this problem. Traditionally, women have been viewed primarily as childbearers, and have long been barred from participation in certain sectors of the workforce in part because it is assumed they will soon leave to fulfill this function, and in part because it is assumed they are not able to function effectively in the work environment. While these assumptions are not surprising, the question is whether they are appropriate.

2. 42 U.S.C. § 2000e (1976).

3. 29 U.S.C. §§ 651-678 (1976). The Occupational Safety and Health Administration will hereinafter be referred to as OSHA.

4. *Id.* § 655.

5. *Id.* §§ 657-659.

6. *Id.* § 655(b)(5).

then analyzes the statutory and constitutional guidelines that the Secretary and individual employers must follow in devising an approach that effectively protects workers' reproductive health.

A. *Background*

The premise behind the practice of excluding women from a work environment to protect their reproductive health is that women as a group are hypersusceptible to certain toxic substances, *i.e.*, that women constitute a "high risk group." A high risk group consists of individuals possessing a trait in common which renders them particularly vulnerable—or hypersusceptible—to a specific health threat.[7] It is unclear, however, whether such groups can be accurately defined. The number of variables which influence any individual's susceptibility to a particular substance is great,[8] and it is not always possible to isolate the cause of an individual's illness or disease. Thus, the very notion that high risk groups per se can be isolated is a problematic one.[9]

In examining the premise that women workers are more susceptible to reproductive hazards than are men and thus must be removed from certain work environments, a number of factors must be considered. The first is the way in which toxic substances adversely affect human reproductive processes.[10] A *mutagenic substance* damages the genetic material of the parent, causing chromo-

7. The identifiable variable may be a genetic trait (*e.g.*, sickle cell), or other physical characteristic (*e.g.*, heart disease, past history of cancer); it may be a behavioral pattern (*e.g.*, smoking or consuming alcohol); or it may be a vulnerability incurred by previous exposure to toxic substances.

8. For example, age, muscle mass, obesity, alcohol consumption, nutritional status and lung or kidney function are all variables which may influence an individual's susceptibility to any given level of exposure to a toxic substance. V. Hunt, Protection of Worker's Health 20 (Nov. 3, 1977) (paper presented at A Conference on Protective Legislation and Women's Jobs: Reevaluating the Past and Planning for the Future) [hereinafter cited as Hunt].

9. Because of these factors, any grouping is liable to be inappropriate. Indeed, the entire notion of hypersusceptibility has been attacked as "specious." *Id.* at 19. It also is of questionable value as a public health approach, since it entails focusing on the victim, rather than eliminating the source of the problem.

10. In addition to the adverse effects on parental fertility and the developing fetus discussed in the text, a toxic substance may also affect the exposed parent's newborn child. For example, the substance may be passed through a mother who is breastfeeding. A. Hricko, Testimony on Reproductive Effects of Lead Exposure: Scientific Evidence and Policy Issues 4 (Mar. 17, 1977) (presented at OSHA Hearings on Occupational Exposure to Lead) [hereinafter cited as Hricko, Testimony]. Substances may also be carried home on the clothing of working parents. Baker, Folland, et al., *Lead Poisoning in Children of Lead Workers*, 296 N.E.J. MED. 260 (1977). This "carry-home" effect may have far-reaching implications. *See* note 17 *infra*.

somal alterations.[11] If the mutagen acts on either egg or sperm cells prior to conception, the genetic change will be passed on to successive generations.[12] *Gameotoxic substances* also act on either egg or sperm cells by limiting the fertility of the parents.[13] Toxic substances may also cause *sexual dysfunction* in both sexes.[14] *Teratogens* are toxins which, if present in a pregnant woman's body, may affect the developing fetus by passing through the placenta of the mother.[15] Although it is thought that most teratogens leave a woman's body after a limited period of time, at least one (lead) has been identified as cumulative, and thus capable of being stored in the mother's tissues and causing reproductive harm long after her exposure to it.[16] If a substance has only teratogenic properties, the hazard it poses is limited to women who intend to bear children.[17] Unless such a determination can be made, however, it is not reasonable to assume that a substance which causes reproductive problems threatens only women.

11. HRICKO & BRUNT, *supra* note 1, at B-5-6. The 1973 Toxic Substances List compiled by the National Institute for Occupational Safety and Health (NIOSH) contained more than 12,000 materials of known toxicity then in commercial use. N. ASHFORD, CRISIS IN THE WORKPLACE 275 (1976). Of these substances, 1300 are identified as carcinogens, and it is estimated that 85% of all carcinogens are also mutagens. McCann & Ames, *Discussion Paper: The Detection of Mutagenic Metabolites of Carcinogens in Urine with the Salmonella/Microsome Test*, 269 ANNALS OF THE N.Y. ACAD. OF SCI. 21 (1975).

12. J. Manson, Reproductive Hazards in the Workplace: Inadequacy of Current Testing Methods 12 (Nov. 3, 1977) (paper presented at A Conference on Protective Legislation and Women's Jobs: Reevaluating the Past and Planning for the Future) [hereinafter cited as Manson]. Exposure to mutagens may result in miscarriages, and in birth defects and cancer in the offspring. *Id.*

13. Hricko, Testimony, *supra* note 10, at 4.

14. *Id.* at 3-4, 6-7, Appendix i-vi. *See also*, Hunt, *supra* note 8, at 7.

15. HRICKO & BRUNT, *supra* note 1, at B-7-9. Teratogens induce structural malformations, metabolic or physiological dysfunctions and psychological or behavioral alterations in infants. These abnormalities may be evident at birth or manifest in the immediate postnatal period. Manson, *supra* note 12, at 10.

16. Comment, *Employment Rights of Women in the Toxic Workplace*, 65 CALIF. L. REV. 1113, 1116-17 n.14 (1977) [hereinafter cited as *Employment Rights in Toxic Workplace*], citing Hansmann & Perry, *Lead Absorption and Intoxication in Man Unassociated with Occupations or Industrial Hazards*, 30 ARCHIVES OF PATHOLOGY 226 (1940); Scanlon, *Human Fetal Hazards from Environmental Pollution with Certain Non-Essential Trace Elements*, 11 CLIN. PEDIATRICS 135 (1972). A teratogenic substance may be stored in the maternal fat compartment and when the fat stores are mobilized during pregnancy, the stored compounds may be released into the mother's system and pass through the placenta. Manson, *supra* note 12, at 10.

17. The women threatened by teratogens may include the wives of exposed male workers who carry the substances home with them. *See* Manson, *Human and Laboratory Animal Test Systems Available for Detection of Reproductive Failure*, 7 PREV. MED. 322, 327 (1978).

A second factor to consider in assessing the validity of labeling women as hypersusceptible is the incidence of reproductive injury which has been found among male workers. While the lead industry has utilized exclusionary policies directed at women, studies indicate that male workers exposed to lead experience decreased sex drive and alterations in spermatogenesis (sperm production).[18] Similarly, while women exposed to anesthetic gases in operating rooms experience up to twice the rate of miscarriages as women in the general population, the wives of exposed male operating room personnel experience a twenty-five percent increase in miscarriages.[19] Studies also indicate elevated rates of miscarriages and birth defects among the wives of workers exposed to vinyl chloride.[20] Finally, in perhaps the most publicized experience with a toxic substance implicated as a reproductive hazard, a pesticide plant which produced 1,2 dibromo-3-chloropropane (DBCP) was shut down when the men working there discovered that they had an exceedingly high incidence of infertility.[21]

A third factor to consider is that exclusionary plans are being instituted only in industries where women comprise a small proportion of the workforce. This fact raises suspicions about whether exclusion is a necessary measure, or whether it is merely a simple and inexpensive one. For example, traditional exclusion of women from the lead trades means that a relatively small number of women are currently employed there.[22] Removing them therefore has a minimal impact on production. Similarly, the American Cyanamid Corporation, which announced in 1977 that it would bar women from jobs involving exposure to certain toxic chemicals, employs 41,000 workers, only four hundred of whom are women.[23] By con-

.18. Manson, *supra* note 12, at 12; Occupational Exposure to Lead: Attachments to the Preamble for the Final Standard, 43 Fed. Reg. 54,354, 54,389-93 (1978) [hereinafter cited as Lead Standard: Attachments].

19. Corbett, *Cancer, Miscarriages, and Birth Defects Associated with Operating Room Exposures*, PROCEEDINGS: CONFERENCE ON WOMEN AND THE WORKPLACE 96 (1977) [hereinafter cited as PROCEEDINGS].

20. Infante, *Oncogenic and Mutagenic Risks in Communities with Polyvinyl Chloride Production Facilities*, 271 ANNALS OF THE N.Y. ACAD. OF SCI. 49 (1976). Elevated incidents of congenital anomalies have also been observed among residents living in communities surrounding polyvinyl chloride production facilities, *id.*, further indicating the necessity of treating the problem at its root—elimination of exposures—rather than focusing on the exposed individuals.

21. Stevens, *Sterility Linked to a Pesticide Sharpens Fear on Chemical Use*, N.Y. Times, Sept. 11, 1977, at 1, col. 1.

22. Hricko, Testimony, *supra* note 10, at 10.

23. Bronson, *Chemical Firms Move to Protect Women From Substances That May Harm Fetuses*, Wall St. J., Nov. 7, 1977, at 7, col. 1.

trast, while studies indicate that anesthetic gases pose severe threats to the reproductive capacities of operating room personnel,[24] there has been no attempt to move nurse anesthetists out of the operating rooms.[25] Moreover, when male workers producing DCPB discovered that they were experiencing a high incidence of sterility due to exposure to the pesticide, the manufacturers voluntarily ceased production.[26] Although DCPB plays a significantly different role in the overall economy than a substance like lead does, the reaction of employers to these problems still raises questions about the factors they consider in deciding how to deal with the fact that toxic substances in the workplace may cause reproductive problems.

A fourth factor which policymakers must consider in dealing with exclusionary practices is the nature and extent of women's current participation in the workforce. Women constitute forty percent of the total working population.[27] More than fifty percent of working women are single, divorced, separated or widowed, or have husbands earning less than $7,000 per year.[28] They are therefore working out of necessity, and it can be assumed that they will be working for a significant proportion of their lifetimes. Moreover, sixty-five percent of the female workforce is of childbearing age.[29] Protection of their reproductive capacities is a pressing need, as is protection of their employment status.

II. THE OCCUPATIONAL SAFETY AND HEALTH ACT

Congress's declared purpose in enacting the Act was "to assure, so far as possible, every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[30] To fulfill this objective, the Act imposes duties upon the Secretary to promulgate[31] and enforce[32] health and safety

24. Corbett, *Cancer, Miscarriages, and Birth Defects Associated with Operating Room Exposures*, PROCEEDINGS, *supra* note 19, at 96.

25. Prieve, *Job Placement in the Lead Trades: A Worker's View*, PROCEEDINGS, *supra* note 19, at 255.

26. Stevens, *Sterility Linked to Pesticide Sharpens Fear on Chemical Use*, N.Y. Times, Sept. 11, 1977, at 1, col. 1.

27. Hricko, Testimony, *supra* note 10, at 12 (statistics from Bureau of Labor Statistics study, Mar., 1977).

28. *Id.*

29. *Id.*

30. 29 U.S.C. § 651(b) (1976).

31. *Id.* § 655.

32. *Id.* §§ 657-659.

standards. Each employer covered by the Act is obligated to comply with these standards[33] and generally must provide a workplace free from "recognized hazards."[34] To begin to answer the question of how to protect workers from reproductive hazards in a manner consistent with congressional intent, it is important to understand the policies which are stated in the Act and further articulated through the Secretary's rulemaking and enforcement activities, and to examine the options available in fulfilling Congress's mandate. Part A of this section focuses on the Secretary's standard-setting; Part B on the responsibilities of individual employers under the general duty clause.

A. *Standard Setting*

1. General Mandate of the Act

The Act's statement of purpose embodies two basic principles which often are viewed as being inconsistent: (a) working people are to be protected against hazards posed to their safety and health by their working environment, (b) to the extent that it is feasible to do so.

The first party of this objective, that the nation's workers must be employed in environments which threaten neither their health nor their safety, expresses two related concerns. First, the Act emphasizes Congress's intent to prevent disease and injury, not to remedy or compensate a victim after harm has been done.[35] Health standards are designed to safeguard against diminished health, functional capacity and life expectancy. In promulgating standards to fulfill this function, the Secretary must deal with complex and uncertain issues. For example, latency periods between exposure and onset of disease often obscure causal connections; there are technological difficulties in detecting low levels of exposure; and the data available are often inadequate for making clear decisions. Moreover, controversy persists in the scientific community over the basic premises for drafting health standards.[36] Congress in-

33. *Id.* § 654(a)(2).

34. *Id.* § 654(a)(1). *See* § II. B. *infra*.

35. *See* 29 U.S.C. § 653(b)(4) (1976): "Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to . . . affect in any . . . manner the common law or statutory rights, duties or liabilities of employers and employees. . . ."

36. Among these questions are whether extrapolation from animal data to human experience is valid; whether there exists any safe levels of exposure to "known"

tended the Secretary to protect the nation's workforce even in the face of these kinds of disputes, and, as will be discussed, the courts have generally sanctioned the Secretary's resolutions of these underlying questions.

The Act focuses on the work environment. The statute is not a general public health measure, but is specifically intended to prevent illness and injury at work. While this is perhaps self-evident, the notion that workers must be protected *at their jobs* rarely needs to be squarely addressed in drafting standards. Yet the suggestion that workers be removed from their jobs as a method of affording them protection forces an examination of the obvious. If the focus is on working people, protective plans should be designed to keep them both healthy and at work.

Accordingly, the concept that "hypersusceptible" workers—here, women with childbearing capacities—should be identified and barred from the workplace demands careful scrutiny. If the notion of hypersusceptibility has any merit, it ideally could be useful in prescribing the highest degree of protection for the entire workforce. Theoretically, the hypersusceptible worker is prone to illness at a lower level of exposure to a particular toxic substance than is the "average" person. If the degree of exposure which presents a risk to the health of the most sensitive employee could be identified and prescribed as a limit, all employees would be assured protection. The possibility of using this approach breaks down because of the kinds of problems inherent in dealing with toxic substances and disease: the difficulty, if not impossibility of identifying a "safe" level of exposure; the limitations of control technology; and the difficulty of isolating particular susceptibilities.

In reality, therefore, the notion of hypersusceptibility fails to provide a means of assuring a safe and healthful work environment. Using it as a screening mechanism to isolate and exclude particular employees may be more possible in a technical sense, but it is not a satisfactory answer either. The premise behind separating out hypersusceptible workers is that even if exposures to toxic substances can be controlled to an extent where the workplace is generally safe, the environment will continue to pose significant health threats to certain identifiable groups of individuals. The focus of this approach is to provide a "generally safe" environment, and

carcinogens; and the kinds of inferences—if any—which can be drawn from one set of data to other problems.

eliminate those workers who require a higher degree of protection. This can only be an effective protective measure if it is possible to isolate the characteristic which distinguishes the "hypersusceptible" worker from the rest of the workforce.[37] Such a determination can rarely be made. Even it if could—if, *e.g.*, the suspicion that a substance is primarily a teratogen were validated, and thus pregnant or potentially pregnant women appropriately viewed as hypersusceptible—screening out hypersusceptible workers directly contradicts the policy of protecting employees on their jobs.

The affirmative directive of the Act, that workers be protected from disease and injury, is qualified by the requirement that protection be provided "to the extent feasible."[38] The feasibility requirement may be read either as a limitation on the Secretary (he or she may mandate *only* measures which are feasible) or as a goal toward which the Secretary should strive (he or she may mandate *all* measures which are feasible). While industry has argued that feasibility is a limitation, the courts have generally supported the Secretary in reading it as a goal. "Feasibility" has been interpreted to include both technological and economic considerations. For the most part, the courts have taken the stance that feasibility is not defined by the current state of technological development nor the current economic structure of the affected industry.

Technological feasibility is a major consideration in setting maximum allowable levels of exposures and specifying the methods of complying with those exposure limits. Once the Secretary determines that a certain level of exposure is safe, or that no safe level exists, he or she must then prescribe the amount of exposure which will nonetheless be permitted. The maximum exposure limit is generally defined by the greatest degree of control which is possible, utilizing both available technology and potential technological advances, combined with other control measures. The Act, like other environmental statutes,[39] is treated by the courts as a "technology-forcing" enactment. As the Court of Appeals for the

37. It also should require an assurance that the workplace is "generally safe" for the employees remaining there.

38. 29 U.S.C. § 554(b)(5) (1976).

39. *E.g.*, Air Pollution Control Act, 42 U.S.C. § 1857 (1970) (*see* International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973)); National Envt'l Policy Act, 42 U.S.C. §§ 4321-4361 (1970) (*see* Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971)); Auto Safety Act, 15 U.S.C. §§ 1391-1431 (1970) (*see* Chrysler Corp. v. Department of Transp., 422 F.2d 654 (6th Cir. 1972)).

Third Circuit wrote in *AFL-CIO v. Brennan*,[40] the Secretary may consider the industry's existing technological capacity plus "imminent advances in the art," and may required improvements or the development of new technology. It is unclear just how "imminent" technological advances must be, or how far the Secretary may push the industry. In the face of challenges[41] brought to standards for vinyl chloride,[42] mechanical power presses,[43] and coke oven emissions,[44] the courts have consistently honored the Secretary's determinations that required technological advances are feasible.

Just as a health or safety standard may impose technological burdens on the employer, so too may it impose substantial economic burdens. As Judge McGowen wrote in his opinion for the Court of Appeals for the District of Columbia Circuit in *Industrial Union Department v. Hodgson*,[45] "Congress did not appear to have intended to protect employees by putting their employers out of business . . . by making financial viability generally impossible."[46] Though practical considerations may temper protective requirements,

> [s]tandards may [still] be economically feasible, even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear consistent with the purpose of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of his employees. . . . As the effect

40. 530 F.2d 109, 122 (3d Cir. 1975).

41. Any person adversely affected by a standard may challenge it by petitioning a court of appeals within 60 days of the date on which the standard is promulgated. 29 U.S.C. § 655(f) (1976). Most of the cases discussed in the text are such pre-enforcement challenges. In addition, an employer contesting a citation issued against him or her for violating a standard or the general duty clause, or an employee challenging the reasonableness of the abatement period designated in such a citation may secure a hearing before the Occupational Safety and Health Review Commission (OSHRC or the Commission). *Id.* § 659(c) (1976). Any party adversely affected by an order of the Commission may obtain review in the court of appeals. *Id.* § 660(a)-(b) (1976).

42. 29 C.F.R. § 1910.1001 (1978), challenged in Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301 (2d Cir.) *cert. denied*, 421 U.S. 992 (1975).

43. 29 C.F.R. § 1910.1017 (1978), challenged in AFL-CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975).

44. 29 C.F.R. § 1910.1029 (1978) challenged in American Iron and Steel Inst. v. OSHA, 577 F.2d 825 (3d Cir. 1978) [hereinafter cited as AISI v. OSHA].

45. 499 F.2d 467 (D.C. Cir. 1974) [hereinafter cited as IUD v. Hodgson].

46. *Id.* at 478.

> becomes more widespread within an industry, the problem of economic feasibility becomes more pressing.[47]

Economic feasibility is thus measured by looking at the effect on the entire industry. "Infeasibility" is characterized by "massive dislocation."[48]

Until recently, neither OSHA nor the courts viewed the Act as requiring a balancing of the expected benefits of a proposed standard against the risks it is designed to prevent in the assessment of economic feasibility. While mentioning the tension between protection and feasibility, the courts generally have upheld the Secretary's characterization of standards as economically feasible without requiring precise calculations of the elements involved.[49] As two commentators have noted, the lesson from the courts' responses to challenges brought against newly promulgated standards has been that standards may expose workers' health to risk only to the minimum extent and for the minimum length of time that feasibility requires.[50]

47. *Id.*

48. *See, e.g.*, AFL-CIO v. Brennan, 530 F.2d 109, 123 (3d Cir. 1978); AISI v. OSHA, 577 F.2d 825, 836 (3d Cir. 1975).

49. This was particularly evident in the Third Circuit's treatment of the steel industry's challenge to the coke oven regulation. The appellate argument in the case was heard on January 5, 1978, at a time when the media was portraying the steel industry as crumbling. On the day preceding the argument one page of the Wall Street Journal had carried the following articles: *Steel Reference Price Plan Offered By Treasury to Curb Cheap Imports*, Wall St. J., Jan. 4, 1978, at 3, col. 1; *U.S. Steel Has No Plans For Youngstown Plant, id.* at col. 3; *Steel Output Fell 3.3% in Week, id.*; *Bethlehem Steel to Close Mine, id.* at col. 4. The court seemed particularly anxious for assurance that the standard would not deal a final blow to the industry's economic viability, and noted at the beginning of its opinion in AISI v. OSHA, 577 F.2d 825, 831 (3d Cir. 1978), that underlying its review task was the recognition of the "congressional mandate to protect the health of industrial employees and to weigh the burdens of an important but currently beleaguered industry." Despite this, the court did not require quantification of the risks and benefits involved, but rather accepted the Secretary's reasoning that

> [C]ompliance with the standard (even if the higher cost estimate were used) is well within the financial capability of the coking industry. Moreover, although we cannot rationally quantify in dollars the benefit of the standard, careful consideration has been given to the question of whether these substantial costs are justified in the light of the hazards. OSHA concludes that these costs are necessary to protect employees from the hazards associated with coke oven emissions.

Id. at 836, citing from 41 Fed. Reg. 46,751 (1976).

50. Berger & Riskin, *Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act*, 7 ECOL. L. Q. 285, 323 (1978).

A single but large departure from this view was made by the Court of Appeals for the Fifth Circuit in *American Petroleum Institute v. OSHA*,[51] where it set aside OSHA's benzene standard. While not mandating an "elaborate cost-benefit analysis," the court interpreted the statute to require the Secretary to estimate the benefits expected to result from the decreased exposures, and to show that those benefits bear a reasonable relation to projected high costs.[52] The court's conclusion rested on an analysis of the statutory definition of "standard," rather than an interpretation of what is involved in evaluating feasibility. For practical purposes, however, it addressed the same question of the role economics must play in standard setting under the Act. Its answer is far stricter than that given by other circuits, although it failed to indicate the point at which costs begin to outweigh benefits.

Whether the Fifth Circuit's view will win out is questionable.[53]

51. 581 F.2d 493 (5th Cir. 1978), *cert. granted sub nom.*, Marshall v. American Petroleum Inst., 47 U.S.L.W. 3535 (1979).

In four cases involving interpretations of the noise standard which it decided prior to *American Petroleum Inst.*, the Review Commission ruled that economic feasibility does require weighing the costs incurred against the benefits the controls could be expected to achieve. *See* Continental Can Co., 4 OSHC 1541 (1977); Weyerhauser Co., 5 OSHC 1275 (1977); Castle & Cook Foods, 5 OSHC 1435 (1977); Great Falls Tribune Co., 5 OSHC 1443 (1977). The noise control standard, 29 C.F.R. § 1910.-95(b)(1) (1977), requires that "when employees are subjected to sounds exceeding those listed . . . *feasible* administrative or engineering controls shall be utilized." (emphasis added). The Commission decided in each of the cases that the benefits gained in reducing the decibel levels in the plants did not justify the cost of controls, and therefore, that the controls were not economically feasible. Whether the Commission would employ the same analysis in a proceding to enforce a toxic substance standard, or one where the requirement of feasibility were not written into the regulation itself is unclear.

52. American Petroleum Inst. v. OSHA, 581 F.2d 493, 503 (5th Cir. 1978), *cert. granted sub nom.*, Marshall v. American Petroleum Inst., 47 U.S.L.W. 3535 (1979).

53. The court reached its conclusion by comparing the Act's definition of a standard, 29 U.S.C. § 652(8) (1976), with the requirements of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2051 (1976). In Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831 (5th Cir. 1978), the court had read the CPSA to require that the benefits expected from a safety standard bear a reasonable relationship to its costs. *Id.* at 854. Viewing the purpose of the two statutes as parallel and the requirements as "precisely similar," the court ruled in *American Petroleum Institute* that the OSH Act demands the same substantive assessment of costs and benefits. American Petroleum Inst. v. OSHA, 581 F.2d 493, 502 (1978), *cert. granted sub nom.*, Marshall v. American Petroleum Inst., 47 U.S.L.W. 3535 (1979).

There are a number of problems with the court's ready equation of the two statutes. First, the statutory language is not precisely similar. By its terms, the CPSA requires the Consumer Product Safety Commission (CPSC) to show that a standard is

Although it accords with the Carter administration's position that the cost components of all regulatory schemes should be carefully scrutinized,[54] it takes a rather narrow and misguided view of the purpose of the Act. Following the teachings of the District of Columbia, Second and Third Circuits, feasibility is the principal economic qualification placed on the Secretary's rulemaking authority. Furthermore, the phrase "to the extent feasible" is not treated primarily as a limitation on the Secretary's ability to mandate preventive measures, but rather is a goal toward which the Secretary and industry must strive.

2. Elements of Decisionmaking

In deciding challenges to health standards promulgated under the Act, the courts have developed a rubric for characterizing and reviewing the determinations made by the Secretary in drafting them. The courts have distinguished between factual determinations and policy decisions, giving important recognition to the different functions the Secretary performs in fulfilling the statutory mandate. When making decisions based on factual matters, "sus-

reasonably necessary to eliminate or reduce unreasonable risk. 15 U.S.C. § 2058(c)(2)(A) (1978). Under the OSH Act, the Secretary may begin the standard setting process whenever it would serve the Act's objective of providing a safe and healthful work environment. 29 U.S.C. § 655(b)(I) (1976). Standards may contain any measures which are feasible, *id.* § 655(b)(5) (1976), and which are reasonably necessary or appropriate to accomplish that objective. *Id.* § 652(8) (1976). Second, while the CPSC must present substantial evidence to support its conclusion that any part of a standard is reasonably necessary to eliminate unreasonable risk, Aqua Slide 'N' Dive v. CPSC, 569 F.2d at 838, the OSH Act imposes no such obligations on the Secretary. Third, the equations for calculating costs and benefits under the statutes must differ. In a consumer situation, the burdens and benefits of regulation accrue to the same person, and may be viewed as a balance. In the workplace, the employer must abide by the regulations, but it is the employee who suffers the real risks of the employer's failure to comply. Thus, different factors must be weighed in doing a cost-benefit analysis and in determining the need for regulation. Finally, the purposes the statutes must serve are very different. The CPSA is intended to protect consumers from faulty merchandise in situations where they are unaware of the attendant dangers and thus unable to make their own decisions about whether to assume the risks. *Id.* at 839. By contrast, even if an employee is aware of the risks attendant on working in a certain plant, his or her ability to choose whether to "use" the product—by working there—is far more restricted than the choices available to most consumers.

54. The Office of Management and Budget and the Council of Economic Advisors have been urging regulators to include cost-benefit analyses as a major consideration in drafting standards. *See, e.g.*, Shabecoff, *Regulation by the U.S.: Its Costs vs. Its Benefits*, N.Y. Times, June 14, 1978, at D-6, col. 4.

ceptible to evidentiary development,"[55] the Secretary is constrained by the record developed at informal hearings held on the proposed standard and supplemented by written submissions from interested parties. Such factual determinations must be supported by substantial evidence on the record as a whole.

As noted earlier, however, a solid data base often is not available. Many of the

> questions involved in promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis.[56]

As distinct from factual determinations, the policy choices made by the Secretary must be left standing by a reviewing court unless they are arbitrary and capricious.[57]

The line between fact and policy is hazy at best. Similarly, the distinction between the "arbitrary and capricious" and the "substantial evidence" review tests seems at times to be illusory. The recognition that the Secretary must engage in two different processes in promulgating standards is important, however. As Judge

55. Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1308 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975).

56. IUD v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974).

57. The distinctions between the Secretary's responsibilities in making "adjudicative resolution[s] of disputed facts" and "legislative policy determination[s]," and the resultingly different reviewing tasks demanded of the courts, were first fully articulated by the D.C. Circuit in *IUD v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974). The Industrial Union Department filed suit seeking court review of certain provisions of the OSHA standard promulgated to regulate exposures to asbestos dust. Before addressing the merits of the suit, the court had to discern the standard of review to be applied. The statute prescribes that "determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole," 29 U.S.C. § 655(f) (1976), but the court found the reach of the substantial evidence test limited to those circumstances where the Secretary's determinations rested on facts. Policy choices, by contrast, "are not susceptible to the same type of verification or refutation by reference to the record as are some factual questions. Consequently, the court's approach must necessarily be different no matter how the standards of review are labelled." IUD v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).

This position was subsequently adopted by the Second Circuit in Society of Plastics Indus. v. OSHA, 509 F.2d 1301, 1309 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975). The Third and Fifth Circuits also apply this dual standard of review. *See* AISI v. OSHA, 577 F.2d 825, 831 (3d Cir. 1978); American Petroleum Inst. v. OSHA, 581 F.2d 493, 497 (5th Cir. 1978), *cert. granted sub nom.*, Marshall v. American Petroleum Inst., 47 U.S.L.W. 3535 (1979).

McGowen noted in *IUD v. Hodgson*, "[a]lthough in practice these elements [of policy and factual decisionmaking] may so intertwine as to be virtually inseparable, they are conceptually distinct and can only be regarded as such by a reviewing court."[58] In large part, this assessment is a necessary concession to the unrefined state of knowledge in the area of occupational health hazards. Congress instructed the Secretary to activate the standard-setting procedure whenever he or she determines that promulgation of a rule is necessary to "serve the objectives of this Act."[59] Requiring substantial factual evidence to support all rulemaking decisions would straitjacket the Secretary.

In differentiating factual from policy determinations the courts have taken a pragmatic approach, basing their analysis as much on the nature of the data available as on the nature of the issue involved. Rather than making abstract determinations that certain kinds of issues call for policy determinations, while others are factual questions, the courts have looked to the information available to the Secretary during the rulemaking process. Thus, for example, the record amassed during the rulemaking process for the vinyl chloride standard disclosed an incidence of angiosarcoma among workers exposed to vinyl chloride significantly in excess of that experienced by the general population.[60] In a challenge launched by the Society of Plastics Industries to the newly promulgated standard, the Second Circuit viewed the link between workplace exposures to the substance and onset of disease as a factual matter.[61] Substantial evidence supported the Secretary's characterization of vinyl chloride as a human carcinogen.[62]

In contrast, during hearings on the standard proposed for ethyleneimine (EI), the Secretary was presented with no evidence that exposure to the substance results in high rates of cancer among workers.[63] The record did contain substantial evidence that

58. IUD v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974).

59. 29 U.S.C. § 655(b)(1) (1976).

60. Society of Plastics Indus. v. OSHA, 509 F.2d 1301, 1305-06 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975).

61. The court noted that although "the factual finger points, it does not conclude." *Id.* at 1308. This evidence, bolstered by extrapolation from animal studies, supported the Secretary's determination. *Id.*

62. *Id.* at 1311.

63. Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975).

EI is an animal carcinogen.[64] In setting aside the Synthetic and Organic Chemists Manufacturers Association's pre-enforcement challenge to the standard, the Third Circuit wrote that the Secretary's decision to treat the substance as a human carcinogen, based on an extrapolation from the animal data, was a legal determination "in the nature of a recommendation for prudent legislative action."[65] It was a justifiable policy determination which was neither arbitrary nor capricious.[66]

The Secretary's ability to use experiments with animals as the basis for human health standards, even absent definitive factual verification, is crucial to the ability to protect health. The only alternative is to watch a group of exposed workers, without modifying their environments, to see whether they experience the same elevated disease rates revealed in the animal tests. The policy decision to accept animal data represents a decision not to use the work environment as a laboratory and workers as subjects.

The Secretary has similarly resolved the basic issue of the degree of exposure that may be allowed once a substance is identified as hazardous. There is continuing controversy in the scientific community over whether there can ever be a safe level of exposure to a carcinogen. With the exception of the standards for the "fourteen carcinogens,"[67] however, the Secretary has consistently based standards for carcinogenic substances on the assumption that if no safe level of exposure can be identified, none exists. The specified exposure levels for such carcinogens as asbestos, vinyl chloride and coke oven emissions have been based on the greatest level of protection which the Secretary determines can feasibly be obtained.[68]

These policy determinations have provided the basic framework

64. *Id.* at 1157.

65. *Id.* at 1159.

66. *Id.* at 1160.

67. In 1974, the Secretary set standards for 14 carcinogens, which he treated together in a single proceeding. The standards are codified at 29 C.F.R. §§ 1910.1003-.1016 (1977). EI is among the fourteen carcinogens. *See* text accompanying notes 63-66 *supra*.

68. This policy also underlies the generic standard for carcinogens proposed as a means of grouping substances based on whether they are known to be human or animal carcinogens, and regulating them as groups. This proposal was initiated with the recognition of the inordinate amount of time which has been consumed in enacting each of the toxic substance standards, and the fact that many of the same issues are involved in each procedure. The proposed standards sets out certain principles and criteria for defining and controlling carcinogens, among them the basic policy that no safe level of exposure exists. 42 Fed. Reg. 54,149-54,155 (1977).

for dealing with suspected carcinogens. The first step is to define the nature of the risk by examining available data. When animal studies establish that a toxic substance is a carcinogen, but no studies on workers are available, the animal studies are used to support a presumption that the substance is a human carcinogen. Once the substance is identified as carcinogenic, and absent evidence establishing that a safe level of exposure exists, the carcinogen is treated as unsafe at any level.[69] The technological and economic capabilities of the industry may then be assessed to determine the greatest protection feasible.

A similar approach is warranted when dealing with substances suspected to be threats to the reproductive capacities of workers. If data is available on certain groups of workers, it should be utilized to protect all workers, unless a showing can be made that the hazards posed are somehow unique to a group. Thus, data establishing that a particular toxic substance endangers the reproductive health of women workers must be presumed to be applicable to men, unless or until it can be demonstrated that the nature of the threat posed is unique to women. If a substance is a teratogen, and poses neither mutagenic nor gameotoxic risks, it threatens the reproductive processes of women in a way in which men cannot be affected. Unless a determination can be made that the substance is only teratogenic, protection must be afforded to both.[70]

69. Premising a determination on a lack of information—here, that no safe level exists because none has been proven—would seem to be a policy judgment. However, when the steel industry brought a pre-enforcement challenge to the permissible exposure limit set for coke oven emissions, the Third Circuit treated the Secretary's underlying rationale that no safe level of exposure exists as a factual matter, supported by substantial evidence. Establishing the actual exposure limit, "based on the evidence that coke oven emissions are carcinogenic at any level of exposure . . . was a policy judgment on the basis of the best available evidence as to what the industry could achieve in an effort to best protect its coke oven employees." AISI v. OSHA, 577 F.2d 825, 833 (3d Cir. 1978).

70. In promulgating the standard for exposure to lead, the Secretary took the position that until the precise disease mechanism could be isolated, a standard must protect workers against all of them:

> While the precise mechanism(s) by which lead effects spontaneous abortion, miscarriages and stillbirths in women is unclear, there is no debate that such effects occur. Further research is required to determine whether genetic, teratogenic, fetotoxic or embryotoxic mechanisms are active. Any, or all may be responsible for adverse effects on the fetus. OSHA believes that, whatever the mechanism, a standard must be promulgated which prevents these effects of lead from occurring.

Lead Standard: Attachments, *supra* note 18, at 54,395. Arguably, the need to protect

It may be possible to demonstrate that the most potent threat posed by a substance is teratogenesis, and thus, because of the vulnerability of the fetus, the need to protect pregnant or potentially pregnant women is particularly pressing. Alternatively, there may simply be a need to provide additional protection for any worker—male or female—who intends to parent a child. This additional "factual data" should not change the underlying policy considerations shaping the Secretary's rulemaking—*i.e.*, that the health of all workers must be protected to the greatest extent feasible. The fact that some workers may potentially be at a higher risk does not exclude them from consideration as workers, and the need to protect them should not obscure the fact that real threats are posed to other workers as well. Evidence of differential susceptibilities may, however, open up options for different kinds of protective schemes.

3. Control Options Available in Setting Standards

Standards promulgated under the Act to control exposure to toxic substances generally establish exposure limits for the controlled substance or specify technological controls, work practices and protective clothing to minimize worker exposures.[71] In the course of OSHA's rulemaking procedures, the Secretary has developed a hierarchy of control measures, which can be seen in the priorities ascribed to the methods of compliance specified in the standards. The hierarchy seems based on the policies that (a) it is the envi-

women against reproductive hazards other than teratogenesis would create a presumption that men required equivalent protective measures. In promulgating the lead standard, however, the Secretary was able to rely on evidence that lead poses significant hazards to the male reproductive system. *Id.* at 54,388.

71. While most of the toxic substance standards promulgated thus far have either specified an exposure limit or mandated specific work practices and engineering controls, the Secretary's authority to combine elements of both was upheld against the steel industry's challenge to the coke oven emissions standard. In promulgating the standard, the Secretary established an exposure limit for the emissions, then mandated a series of engineering controls and work practices which each coke oven operator must institute to achieve that performance level. The industry contended that the sections of the Act authorizing performance levels and specification of controls were mutually exclusive control procedures. The Third Circuit rebuked the industry's argument that the Secretary lacked authority to institute such a "double-barrelled standard," noting, *inter alia*, that "because the statutory objective is to adequately assure that employees will not suffer material impairment of health while at work, it becomes self-defeating to bar the use of reasonable and effective engineering controls and work practices to achieve such a purpose." AISI v. OSHA, 557 F.2d 825, 837 (3d Cir. 1978).

ronment which must be controlled,[72] and (b) it is the responsibility of the employer to control it.[73] This approach also recognizes that when the best methods of control prove inadequate, less favored measures must also be utilized to insure maximum protection. Accordingly, engineering controls and work practices rank as the primary means of eliminating exposures. Engineering controls are technological modifications to the production processes which "eliminate, contain, dilute or collect . . . emissions at their source."[74] Work practices include ways of handling production and maintenance, and are a necessary adjunct to keep the engineering controls, and the basic production technology, functioning effectively. As such, both control emissions at their source. If these source controls alone fail to keep the amount of the toxic substance emitted into the workplace within the prescribed exposure limit, the employer must then provide the employees with protective equipment (*e.g.*, respirators) which essentially isolate the individual from the hazard. Protective equipment ranks at the bottom of the Secretary's priorities.[75]

The Act grants the Secretary authority to promulgate standards which require measures "reasonably necessary or appropriate to provide safe or healthful employment . . . ."[76] In drafting standards, the Secretary has seemed to read the definition literally: any measures which are reasonably necessary, or are reasonably appropriate may be imposed to serve the objective of providing workers with the greatest degree of protection feasible. In *Ameri-*

72. "[P]rotection of the employee is most effectively attained by elimination or minimization of the hazard at its source, which work practices and engineering controls are both designed to do, and . . . methods which depend upon the vagaries of human behavior are inherently less reliable than well-maintained mechanical methods." Occupational Exposure to Lead, 43 Fed. Reg. 52,952, 52,990 (1978) [hereinafter cited as Lead Standard].

73. The Act places primary responsibility for providing a safe workplace with the employer. Section 5(a) of the Act, 29 U.S.C. § 654(a) (1976), requires the employer to follow prescribed standards and generally to provide a workplace safe from "recognized hazards." As explained in the legislative history, responsibility is placed on employers because they have primary control of the work environment, and should therefore assure that it is safe and healthful. S. REP. NO. 91-1282, 91st Cong., 2d Sess. 9 (1970) [hereinafter cited as S. REP.], *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5186; H.R. REP. NO. 91-1291, 91st Cong., 2d Sess. 21 (1970) [hereinafter cited as H.R. REP.].

74. Lead Standard, *supra* note 72, at 52,989.

75. *Id.*

76. 29 U.S.C. § 652(8) (1976).

can Petroleum Institute v. OSHA,[77] the Fifth Circuit gave the statutory definition a far narrower reading, interpreting it to mean that the benefits of the standards themselves must bear a reasonable relation to the costs which they impose.[78] The other courts of appeals reviewing OSHA standards have not specifically analyzed this section. Their silence might be an indication that they have not viewed it as a limitation on the Secretary's ability to devise methods of assuring protection. Besides the Fifth Circuit's requirement that standards be cost-effective, no court has imposed any restrictions on the kinds of controls which the Secretary may mandate.

The Secretary has thus devised measures of protection to meet the nature of the hazard posed. In promulgating the asbestos standard, for example, OSHA introduced a combined program of routine medical surveillance and shift rotations as a means of protecting employees.[79] When a medical examination reveals that an asbestos worker is exposed to excessive amounts of asbestos fibers, he or she is rotated out of that work area to reduce his or her overall exposure. Shift rotation is listed in the standard under "personal protective equipment." While perhaps a misnomer, it indicates the place such a practice takes in the hierarchy of control measures—at the bottom. Though properly viewed as a last resort, these kinds of measures—protective equipment, medical surveillance, shift rotation—must be employed when source controls prove insufficient. At that point, they are necessary interim measures.[80]

The medical surveillance and shift rotation provisions found in the standard for limiting exposure to asbestos have been expanded into the concept of "medical removal protection" (MRP), a controversial aspect of the recently promulgated standard for lead.[81]

77. 581 F.2d 493 (5th Cir. 1978), *cert. granted sub nom.*, Marshall v. OSHA, 47 U.S.L.W. 3535 (1979).

78. *Id.* at 503.

79. 29 C.F.R. § 1910.1001(d)(2)(iv)(C) (1978). *See also* Standard for Occupational Exposure to Cotton Dust, 29 C.F.R. § 1910.1043(f)(2)(v) (1978).

80. *See, e.g.*, the discussion of the Lead Standard's temporary medical removal provision: "OSHA does not view temporary removal as and [*sic*] alternative means for employers to control employee exposure, but rather as a last-ditch, fall-back mechanism to protect individual workers in circumstances where other protective mechanisms have not sufficed." Lead Standard: Attachments, *supra* note 18, at 54,440.

81. Lead Standard, *supra* note 72, at 53,011, to be codified at 29 C.F.R. § 1910.1025(k).

Under the provisions of the standard, the employer must periodically monitor the level of airborne lead in the workplace.[82] Any worker who has been employed in an area where exposure to lead exceeds a level of thirty micrograms per cubic meter of air (mg/m^3) for more than thirty days a year must be provided with routine medical testing of the level of lead in his or her blood.[83] An employee may also request medical examinations if he or she develops symptoms indicative of lead-related disease, if he or she wants advice regarding his or her reproductive capacity, or if he or she is experiencing difficulty in breathing while using a respirator.[84] The purpose of the medical surveillance is to facilitate early detection of the medical effects associated with exposure to lead. If a medical determination is made that the employee's blood lead level exceeds specified criteria[85] or that continued exposure will otherwise create the risk of sustaining material impairment to health[86] the employer must remove the employee from his or her job, or limit the hours of employment until a medical determination is made that it is safe for the employee to return to regular employment. During the time that the employee is removed from his or her job, or limited in the work hours, the employer must maintain the earnings, seniority, and other employment rights and benefits of the worker as though he or she had not been removed or otherwise limited.[87] Once the period of removal or limitation has ended, the employee must be returned to his or her former job status,[88] *i.e.*, the position the worker would likely be occupying if he or she had never been removed.[89]

The Secretary views temporary medical removal and the medical removal protection benefits as necessary adjuncts to medical sur-

82. *Id.* at 53,007, to be codified at 29 C.F.R. § 1910.1025(d).

83. *Id.* at 53,010, to be codified at 29 C.F.R. § 1910.1025(j)(1)(i). "The action level was set at a point commensurate with the beginning of potential risk to reproductive capacity." Lead Standard: Attachments, *supra* note 18, at 54,423.

84. Lead Standard, *supra* note 72, at 53,010, to be codified at 29 C.F.R. § 1910.1025(j)(3)(i)(D).

85. *Id.* at 53,011, to be codified at 29 C.F.R. § 1910.1025(k)(1)(i).

86. *Id.* at 53,012, to be codified at 29 C.F.R. § 1910.1025(k)(1)(ii).

87. *Id.*, to be codified at 29 C.F.R. § 1910.1025(k)(3). The employer is to provide MPR benefits for up to eighteen months, *id.*, which is "OSHA's best estimate of the rate at which workers will naturally excrete lead once removed from significant exposure." Lead Standard: Attachments, *supra* note 18, at 54,468.

88. Lead Standard, *supra* note 72, at 53,012, to be codified at 29 C.F.R. § 1910.1025(k)(1)(iii).

89. Lead Standard: Attachments, *supra* note 18, at 54,464.

veillance. Temporary removal is required since, due to the variability of worker response to lead, a small percentage of the workforce will not be protected even by complete compliance with the standard. During the time it will take various segments of the industry to bring themselves into compliance with the standard, additional protection will be required.[90] The MRP benefits are crucial to the success of medical surveillance and temporary removals:

> The central purpose of the Act is to prevent illness and injury, not simply to identify it. Furthermore, prevention cannot be achieved when employees must choose between continued exposure to a toxic substance and the employees' means for supporting their families. . . . OSHA's present view is that the medical surveillance provision should afford significant employee protection from serious health hazards without consequential loss for the exposed worker.[91]

While opponents of MRP argue that such a requirement exceeds OSHA's statutory authority, and should be left either to congressional action or collective bargaining,[92] the Secretary sees it as a form of administrative control necessary to fulfill the standard's functions.[93] Indeed, the statutory definition of "standard" leaves ample room for such a measure. Section 3(8) of the Act describes health and safety standards as requiring conditions or the adoption or use of "practices, means, methods, operations, or processes necessary or appropriate to provide safe or healthful employment and places of employment."[94] Broadly construed, "practices" em-

90. *Id.* at 54,440.

91. Proposal for Protected Medical Surveillance in Standard of Occupational Exposures to Lead, 42 Fed. Reg. 46,547-46,548 (1977). In the preamble to the final standard, the Secretary states the reasons for the MRP benefit provisions as twofold:

> First, OSHA views MRP as the most effective device for maximizing meaningful worker participation in the medical surveillance program provided by the standard [by eliminating economic disincentives from participation]. Second, since temporary medical removal is fundamentally a protective, control mechanism, OSHA has determined that the costs of this control mechanism should be borne by employers. MRP is meant to place such costs of worker protection directly on the industry rather than on the shoulders of individual workers unfortunate enough to be at risk of material impairment to health due to occupational exposure to lead.

Lead Standard: Attachments, *supra* note 18, at 54,441.

92. *See, e.g.*, Industry Questions OSHA Authority on Rate Retention; Unions Urge Clause, [1978] 7-24 OSH REP. (BNA) 819.

93. *Id. See also*, Lead Standard: Attachments, *supra* note 18, at 54,442.

94. 29 U.S.C. § 652(8) (1976). Including medical surveillance in a health standard is not only justified under the general language of § 3(8) of the Act, but is specifically authorized by § 5(b)(7), 29 U.S.C. § 654(b)(7) (1976).

braces an MRP scheme. This characterization is particularly appropriate when MRP is viewed as necessary to the success of a medical surveillance program, and if both are thus "reasonably necessary [and] appropriate to provid[ing] . . . healthful employment and places of employment."[95]

Medical surveillance and MRP are particularly important options in dealing with the possibility of varying contacts with and susceptibilities to exposures. Through individual medical tests, a physician can spot those employees who have elevated levels of a substance in their systems or who are otherwise experiencing impaired health. Additionally, if the Secretary were to have a reasonable basis for determining that a particular classification of employees—*e.g.*, women, or pregnant women, or fertile employees—requires a higher level of protection against a particular toxic substance than does the rest of the workforce, protective medical surveillance would provide a mechanism for allowing the employee to stay at his or her job until a medical examination reveals a risk to his or her health, and then to preserve the earned benefits of that job during the time when the conditions there make it necessary to work elsewhere.[96]

As with any measure which does not control the substance at its source, MRP would ideally be an interim measure, utilized only while the industry achieves compliance with the standard through the installation of source controls. It often takes some time to install and, if necessary, to develop the source controls upon which

95. As required by the Fifth Circuit in American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978), *cert. granted sub nom.*, Marshall v. American Petroleum Inst., 47 U.S.L.W. 3535 (1979), "reasonably necessary" may also require an assessment of cost-effectiveness. "OSHA does not accede to the Court's interpretation of the [A]ct but has nonetheless determined that the costs imposed by this lead standard . . . are clearly justified in view of the substantial increase in worker protection this standard would afford." Lead Standard: Attachments, *supra* note 18, at 54,431.

96. The Secretary has taken the position that lead poses a particular health threat to persons wanting to parent children, and that special provisions must be made to assure their protection. Thus, all employees are to be instructed regarding the health hazards associated with contact with lead, Lead Standard, *supra* note 72, at 53,013, to be codified at 29 C.F.R. § 1910.1025(l)(1)(v); and *upon request*, employees are to be given pregnancy or male fertility tests, *id.* at 53,010, to be codified at 29 C.F.R. § 1910.1025(j)(3)(ii)(F) and medical examinations to advise them as to their capability to bear healthy children, *id.*, to be codified at 29 C.F.R. § 1910.1025(j)(3)(i)(C). If it is determined to be medically necessary, they are to be provided with extra protection or temporarily removed from their jobs, with retained employment benefits. *Id.* at 53,011-13, to be codified at 29 C.F.R. § 1910.1025(k).

the safety of the workplace will primarily depend. In the meantime, industry continues to function, and its employees must be afforded necessary protection as they continue to work.

B. *Employers' Obligations Under the General Duty Clause*

Even when no specific standards have been established, the employer remains under a statutory obligation to provide a safe and healthful work environment. Section 5(a)(1) of the Act, the general duty clause, states that each employer "must furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm."[97] On its face, the clause imposes a responsibility but seems to leave the method of fulfilling it to the judgment of the individual employer. Employers might argue that instituting exclusionary employment practices to assure that women do not suffer reproductive harm from exposure to toxic substances is a response to this statutory obligation. However, even without considering for the moment the particular requirements of Title VII[98] exclusionary practices do not accord with the intent of the general duty clause.

The task of defining the boundaries of the obligations imposed by the general duty clause is complicated by the fact that its possible applications have not been fully explored by Congress or by the courts. The limited judicial interpretation of the section is due primarily to the nature of the issues raised in litigation under the clause. The judicial analysis has been concerned more with the validity of the defenses raised by employers charged with violations[99] than with defining the affirmative obligation of the employer. Additionally, very little attention has been paid to the utility of enforcing the clause to prevent health hazards. Employers are most often issued citations for violating the clause when conditions in their workplaces either have resulted or may potentially result in accidents. The focus of most of the cases has thus been on

97. 29 U.S.C. § 654(a)(1) (1976).

98. 42 U.S.C. § 2000e (1976). For discussion of the requirements of Title VII, *see* § IV *infra*.

99. An employer will be cited for violating the general duty clause when an inspector discovers a hazardous condition for which there is no specific standard in effect. A citation may carry a penalty, assessed according to the seriousness of the violation. 29 U.S.C. § 666 (1976). The employer may contest the validity of the citation before the Occupational Safety and Health Review Commission, *id.* § 659(c), with review available in the court of appeals. *Id.* § 660(a).

safety rather than on health, and the terms of analysis sometimes seem to have limited application in defining the employer's responsibility for averting health hazards.[100] There are a number of principles which have come from these cases, however, which when combined with the general mandate of the Act are useful in devising a framework for evaluating how an employer should proceed to protect his or her workforce.

Both the Senate and House committee reports characterized their versions of the general duty clause[101] as embodying the common law principle that individuals are obligated to refrain from actions which will harm others. "Employers are equally bound by this general and common duty to bring *no* adverse effects to the life and health of their employees throughout the course of their employment."[102] This "duty" involves two principles which were uncontroverted in the debates: the dangers must be "preventable"[103] and the clause reaches employment conditions for which there is no standard in effect.[104] The reports and debates disclose sharp disagreement, however, over how to characterize the hazards guarded against, and where to place the boundaries on the employer's duty.

Neither the Act itself, nor its component parts, was intended to impose strict liability on employers.[105] In *National Realty and Construction Co. v. OSHRC*,[106] the Court of Appeals for the District of Columbia defined the employer's standard of care as lying somewhere between reasonable care and absolute liability:

100. The most effective control of worker exposure will ultimately be through the imposition of well-defined standards. However, because of the limited number of standards presently in effect, employers must be expected to become aware of the health hazards with which their employees come into contact and be required to act on their knowledge.

101. The general duty provision contained in the House bill stated that each employer "shall furnish to each of his employees employment and a place of employment which is safe and healthful." H.R. REP., *supra* note 73, at 3. The Senate version required employers to furnish employment "which is free of recognized hazards so as to provide safe and healthful working conditions." S. REP., *supra* note 73, at 27, [1978] U.S. CODE CONG. & AD. NEW, at 5203.

102. S. REP., *supra* note 73, at 9, [1970] U.S. CODE CONG. & AD. NEWS, at 5186. *See also* H.R. REP., *supra* note 73, at 21.

103. H.R. REP., *supra* note 73, at 22.

104. *Id.*; S. REP., *supra* note 73, at 10, [1970] U.S. CODE CONG. & AD. NEWS, at 5185-86.

105. H.R. REP., *supra* note 73, at 21.

106. 489 F.2d 1257 (D.C. Cir. 1973).

> The duty was to be an achievable one. Congress' language [in the general duty clause] is consonant with its intent only where the "recognized" hazard can be totally eliminated from the workplace. . . . Congress intended to require elimination only of preventable hazards. It follows, we think, that *Congress did not intend unpreventable hazards to be considered "recognized" under the clause*. Though a generic form of hazardous conduct, such as equipment riding, may be "recognized," unpreventable instances of it are not, and thus the possibility of their occurrence at a workplace is not inconsistent with the workplace being "free" of a recognized hazard.[107]

The reasoning articulated in *National Realty* has provided the formula for enforcing the clause. To prove a violation, the Secretary must demonstrate that the hazardous condition detected in the workplace was a preventable one. "Preventability" is premised on several factors:[108] the employer *knows or should know* (a) that a *condition is hazardous, i.e.*, that it is causing or likely to cause death or serious injury, and (b) that the *condition is or foreseeably could be present* in the workplace. Prevention or elimination of the hazard must be feasible.

The employer's knowledge is measured against industry norms. The employer knows that a condition is hazardous if it is "of *common knowledge* or general recognition in the particular industry in which it occurs. . . ."[109] If the industry in general recognizes that a certain activity is hazardous, constructive knowledge is imputed to the employer. The employer's actual knowledge may of course surpass the industry norm, and when this can be demonstrated, a lower level of awareness in the industry as a whole is no defense to a citation.[110]

107. *Id.* at 1266 (emphasis added).

108. In *National Realty*, the court analyzed the component parts of violation of the clause as "(1) the employer failed to render the workplace 'free' of a hazard that was (2) recognized, and (3) causing or likely to cause death or serious harm." *Id.*, at 1265. For an analysis of the clause generally following this rubric, see Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988 (1973) [hereinafter cited as Morey].

As noted by Morey, the elements are neither independent of each other, nor distinct in meaning. *Id.* at 992. The analysis outlined in the text is not intended as a rejection of the court's scheme, but rather as an examination of the underlying principles.

109. OSHA COMPLIANCE OPERATIONS MANUAL, VIII-2 (1978).

110. "Even a cursory examination of the Act's legislative history clearly indicates that the term recognized was chosen by Congress not to exclude actual knowledge, but rather to reach beyond an employer's actual knowledge to include the generally

A hazard is recognized as present if it either can be detected by means of the senses or "is of such wide general recognition as a hazard in the industry that even if it is not detectable by means of the senses there are generally known and accepted tests for its existence which should make its presence known to the employer."[111] Again, recognition is premised on an industry norm. When dealing with toxic substances, recognition means that the substance is so generally regarded in the industry as constituting a hazard that the employer is expected to monitor for its presence, and if necessary, to institute protective measures.

Use of the industry norm to evaluate what an employer is expected both to regard as a hazardous condition and to recognize as present in the work environment presents two problems. The first is where to look for evidence of what the industry in general knows, and the second is how sophisticated an understanding may be imputed to an employer or to the industry generally based on information gathered and preventive steps actually taken.

Various indicators of industry knowledge are available. One utilized by the commission and the courts is industrial safety and hygiene plans voluntarily instituted. In *National Realty*, the court based the norm for preventability on whether "conscientious [safety] experts, familiar with the industry . . . would take it into

recognized knowledge of the industry as well." Brennan v. OSHRC (Vy Lactos Laboratories, Inc.), 494 F.2d 460, 464 (5th Cir. 1974).

111. OSHA COMPLIANCE OPERATIONS MANUAL, VIII-2 (1978). The original bill reported out of the House Committee stated that the employer's duty was to provide "employment and a place of employment which is safe and healthful." H.R. REP., *supra* note 73, at 3. The minority report voiced strong objections to this language, characterizing as "offensive" and "essentially unfair" a requirement to comply with a "vague mandate applied to a highly complex industrial circumstance." *Id.* at 51. Among the clarifications sought was the specification that a hazard be "readily apparent." *Id.* The language adopted in the final version of the Act requires only that the hazard be "recognized." 29 U.S.C. § 654(b)(1) (1976). The floor debates show confusion over whether this language is a rejection of the "readily apparent" standard, or whether the terms are synonymous. *See, e.g.*, comments by Rep. Steiger, 116 CONG. REC. 1189 (1970).

By limiting the employer's obligation to the prevention of injury from readily apparent hazards, Congress would have foreclosed the possibility of using the general duty clause to enforce protection of workers' health, since most toxic substances are not readily apparent. The Secretary and the Commission have specifically rejected the notion that, as presently worded, the clause only includes obvious hazards. This position received the backing of the Eighth Circuit in American Smelting and Refining v. OSHRC, 501 F.2d 504 (8th Cir. 1974). For a discussion of the legislative history and affirmance of the OSHA manual definition, *see id.* at 510-11.

account in prescribing a safety program."[112] The same measure could be used for health hazards. If an industry's own hygiene procedures include precautions to avert contact with a toxic substance, recognition that the substance is potentially hazardous can be imputed to the employer.

A second indicator identified in enforcement proceedings is consensus standards drafted by national industrial health and safety organizations.[113] These standards provided the major source of industrial guidelines prior to enactment of the Act, and, during the first two years following its effective date, became the first set of standards promulgated by the Secretary.[114] In *American Smelting and Refining Co. v. OSHRC*,[115] the Court of Appeals for the Eighth Circuit ruled that, in the absence of an OSHA standard for lead exposure, the employer must adhere to a widely recognized industry standard.[116] The recognition by the consensus standards organization that exposure to lead at a level above a designated threshold limit value ("TLV") was dangerous constituted the court's basis for measuring the employer's obligation under the general duty clause.[117] These organizations continue to serve in an advisory

112. National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1266 (D.C. Cir. 1973).

113. Morey argues that formal or informal industry standards should not be conclusive on the "recognition requirement."

> Rather, it should be open to the employer to demonstrate that the general requirement of a standard masks industry recognition of varying individual circumstances, and that a given condition on his premises would not be considered a hazard by the industry because of special requirements or special compensating safety advantages of his situation.

Morey, *supra* note 108, at 1003. In part, his objection is met by distinguishing between "recognized as a hazard" and "recognized as present." To the extent a situation is embodied in a consensus standard, it is recognized as hazardous. However, the employer may point to mitigating circumstances in his or her workplace which may influence whether the hazard may be fairly considered present. The additional requirement of the clause that avoidance of the hazard be deemed feasible further affects how an industry standard will be applied. *See* text accompanying notes 124-30 *infra*.

114. Section 6(a) of the Act orders the Secretary to promulgate as a standard any existing national consensus standard, "unless he determines that the promulgation of such a standard would not result in improved safety or health." 29 U.S.C. § 655(a) (1976).

115. 501 F.2d 504 (8th Cir. 1974).

116. *Id.* at 514.

117. *Id.* at 514-15. The court accepted as "recognized" both the TLV and the judgment implicit in the standard that measuring the concentrations of lead in the air provided better protection than would monitoring the levels of lead in the blood of

capacity to industry and to the Secretary, and should at minimum be considered as a baseline indicator of industry recognition.

Reliance on safety plans or consensus standards as the basis for enforcing the general duty clause creates a peculiar kind of self-regulation. A condition is recognized as hazardous only to the extent that the industry commits itself to controlling it. This criterion creates a disincentive for structuring strict safety and health plans, since the admission by an employer that a particular hazard must be guarded against may become the basis for imposing a statutory obligation. This method of enforcement also ignores data which are available to employers and which should be regarded as placing them on constructive notice of the hazards in their workplaces. Two such sources of information are test data required under other environmental regulations before toxic substances[118] or pesticides[119] may be manufactured or used, and records of incidents of work-related disease and injury which each employer must maintain under the Act.[120] Both of these should be used as indicators of

exposed workers, the technique utilized by the company and asserted to be equally effective. *Id.*

118. The Toxic Substances Control Act of 1976 (TOSCA), 15 U.S.C. §§ 2601-2629 (1976), authorizes the Administrator of the Environmental Protection Agency (the Administrator) to require pretesting of any toxic substance to be introduced into manufacturing or commerce in order to establish the possible effects it will have on human health and the environment. *Id.* § 2603(a)-(b).

119. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1976), similarly requires that any user or manufacturer applying to register a pesticide must satisfy testing requirements imposed by the Administrator and demonstrate that the pesticide will perform its intended function without posing "unreasonable risks" to people or the environment. *Id.* § 136a(c)(1)-(5). The test data not only satisfy these statutory requirements, but also effectively place the employer using a tested substance on notice of the potential hazards associated with its use. The data thus should provide a basis for imposing the general duty clause's command that the substance be used in a way to keep the work environment free of these hazards.

The Administrator's approval of a substance for use under TOSCA or grant of registration under FIFRA does not in any way constitute an unqualified concession that use is safe, nor, by extension, an arguable waiver of responsibility under the general duty clause. Under FIFRA, for example, the Administrator registers a pesticide when he or she determines, *inter alia*, that "when used in accordance with widespread and commonly recognized practice" it will not generally cause adverse environmental and health effects. 7 U.S.C. § 136a(c)(5)(D) (1976). Misuse should therefore be grounds for a citation under the general duty clause.

120. *See* 29 U.S.C. §§ 651(b)(12), 657(c), 669(a)(5) (1976). Each employer must monitor employee exposure to toxic substances and must maintain records on work-related deaths, injuries and illnesses. The recordkeeping provisions of the Act are primarily designed to assist the Secretary of Labor in promulgating and enforcing

an employer's knowledge of the hazards present in the workplace.

In using safety plans and consensus standards, the Commission and the courts have accepted them at face value. They have made no inquiries concerning the nature of the risk that a plan or standard was designed to avert. While this approach may provide a

standards, 29 U.S.C. § 657(c) (1976), and the Secretary of Health, Education and Welfare in his or her research responsibilities, 29 U.S.C § 669(a)(5) (1976), by augmenting the inadequate data available on workplace health and safety. See S. REP., *supra* note 73, at 16, [1970] U.S. CODE CONG. & AD. NEWS, at 5192; H.R. REP., *supra* note 73, at 30.

The Secretary has recently proposed regulations to make the logs and summaries of this data available to employees and their representatives to serve another purpose of the Act, that of keeping employees informed about the conditions under which they are working. Notice of Proposed Rule on Retention of Medical Records, 43 Fed. Reg. 31,324 (July 21, 1978).

Requiring an employer to provide this data effectively forces him or her to police the workplace and, at a minimum, to be aware of reported problems. The employer must maintain a log of "recordable occupational injury and illness," 29 C.F.R. § 1904.2(a) (1978), which includes information on the nature of the injury or illness, the employee's occupation and the location of the accident or exposure. The employer must also prepare an annual summary based on the log. 29 C.F.R. § 1904.5(a) (1978). The summary could serve an important function in disclosing to the employer patterns of disease and injury, placing him or her on alert to possible relationships between specific locations or conditions of employment and resultant injury or disease. Potentially, these could be indicators both that conditions constitute hazards which are "causing or likely to cause harm," and that such hazards are present.

As promulgated, however, the recordkeeping requirements fall short of demanding the kind of information which would advance the employer's awareness of work hazards. The employer must report all incidents of "occupational illness and injury," that is, illness and injury already accepted (or "recognized") by the employer as stemming from the work environment. Thus, conclusions about whether conditions present in the workplace constitute hazards are drawn before the employer fills out the form. The possibility that these reports will provide new information about workplace hazards is therefore limited.

The problems could be obviated to some extent by requiring the employer also to record all diseases and deaths reported among workers and retirees. Patterns of disease would then provide indications of new problems. It also would eliminate the highly subjective nature of the present reporting systems. There must also be an extension of the present requirement that the employer retain his records for five years, because of the long latency periods before many diseases become manifest. The Secretary has recently proposed an amendment to the recordkeeping requirements, which would require each employer to preserve the employee exposure or medical records for the duration of each employee's employment plus five years, except where a specific standard prescribes a different retention period. *See* OSHA Proposed Rule on Retention of Medical Records, 43 Fed. Reg. 31,371 (1978), to be codified at 29 C.F.R. § 1910.20(c). *See also* Lead Standard, *supra* note 72, at 53,013, requiring employers to retain employee exposure records and medical surveillance records for 40 years or the duration of employment plus 20 years, whichever is longer. (Provision to be codified at 29 C.F.R. § 1910.1025(n)(2)(iv)).

satisfactory indication of what an employer characterizes as a safety hazard, it does not serve as an adequate index of the scope of an employer's understanding of the health hazards in the workplace. The imposition of precautions to guard against health hazards should raise questions about the underlying rationale, for only then can there be any assessment of whether the precautions adequately "free" the workplace of the recognized risks.

These questions become particularly significant in analyzing whether exclusionary employment practices are an appropriate response to an employer's general duty obligations. An exclusionary employment scheme instituted to preclude women from working in areas which will bring them into contact with certain toxic substances can be characterized as an industrial health plan. As such, it embodies the recognition that a particular toxic substance manufactured or used there constitutes a hazard, and that it is present. Having met the two elements of recognition in the *National Realty* formula,[121] the employer is obligated to act in such a way as to insure that his workplace is "free from recognized hazards."[122]

Taking this "health plan" at face value, the hazard it is designed to avert is that posed to the reproductive capacity of women. But for an employer to be able to assert that excluding women frees the work environment of recognized hazards, the nature of the hazard must be defined with greater particularity. While an employer may claim that exclusionary plans satisfy—or indeed are required by—the general duty clause to protect women, the plan does nothing to protect men. This approach implies that no hazard to men is recognized. The fact that the employer has not specifically acknowledged this as a hazard, however, should not end the employer's duty. Rather, the recognition that a substance threatens women should logically lead to a presumption that the substance may threaten men as well.[123]

As with standards promulgated by the Secretary, there remains the question of what sort of action an employer may take if he or she recognizes that a particular substance is primarily or most potently a teratogen, in which case the assumption that women are peculiarly at risk is warranted. First, in acting on that assertion the targeted group must be limited to women who could potentially

121. *See* text accompanying note 108 *supra*.
122. 29 U.S.C. § 654(b)(1) (1976).
123. *See* text accompanying notes 10-21 *supra*.

become pregnant, for it is only they who are at risk.

Beyond that, the general duty clause itself provides little guidance on the kinds of measures an employer must or may take to free the workplace of hazards. To satisfy *National Realty*'s definition of preventability, the Secretary must demonstrate both that the hazard was or should have been recognized, and that elimination of the hazard was feasible.[124] Feasibility in this context presumably carries the same connotations as in standard setting, *i.e.*, that prevention must be technologically and economically feasible.[125] In addition, in considering whether in specific instances safety hazards could have been averted, the Commission and the courts have repeatedly been presented with the defense that prevention was infeasible because the presence of the hazard was the result of unforeseen employee misconduct. In evaluating this defense, the Commission has focused on whether the employer met his or her responsibility to take reasonable measures to prevent an employee from creating a hazardous situation or to limit the contact an employee could have with an existing hazardous condition.[126] This latter factor, limiting contact with existing hazards, is significant in its use of the general duty clause to protect employees from

124. The court in *National Realty* defined feasibility to mean that measures must be tested and elimination not overly costly. National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1266 (D.C. Cir. 1973).

125. Economic feasibility may not have precisely the same definition for purposes of the general duty clause as it has in standard-setting. *See* text accompanying notes 45-54 *supra*. In setting a standard, the Secretary assesses the impact it will have on the industry as a whole. In a general duty clause situation, the focus is on the economic impact on the individual employer. With the exception of *National Realty*'s statement that the measures not be overly costly, *see* note 124 *supra*, the courts have not defined the limits of the economic burden which an individual employer must bear under the general duty clause.

For a discussion of the possible implications of the cost of complying with the general duty clause for an employer's defense under Title VII, *see* text accompanying notes 213-17 *infra*.

126. To establish a violation of the general duty clause, the Secretary must suggest additional steps the employer could have taken to avert exposure to danger. National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1267 (D.C. Cir. 1973). An employer is responsible for violations resulting from employee misconduct only when "demonstrably feasible measures exist for reducing its incidence." Brennan v. OSHRC & Hanovia Lamp Div., Canrad Precision Indus., 502 F.2d 946 (3d Cir. 1974). Isolated occurrences of employee misconduct, or unpredictable and idiosyncratic behavior are generally not considered preventable. Standard Glass Co., 1 OSHC 1167 (1972). *See also* Briscoe/Arace/Conduit, A Joint Venture, 5 OSHC 1167 (1977) (employer's failure to show that employee's hazardous conduct was a departure from a uniformly and effectively enforced work rule requires rejection of the employer's "isolated occurrence" defense).

exposures to toxic substances. Employers have been cited for violations in situations where chemicals known to be present have accumulated in confined spaces which employees must enter,[127] and in circumstances where chemical reactions have occurred which the employer could reasonably have anticipated.[128] It is generally not the presence of the toxic substance which constitutes the violation, but rather the employer's failure to make sure that the employees working in the vicinity of the hazard are adequately protected. In such cases, accumulations of toxic substances or sudden chemical reactions seem to be regarded as concomitants of production. The employer, however, must provide protective gear and fully instruct his or her employees as to the hazards involved. Thus Commissioner Cleary noted in *Stephan Chemical Co.*,[129]

> While it is undisputed that working with pressure vessels and chemicals is dangerous, this is not the hazard. If it were, respondent's conclusion that the hazard could not be eliminated from the workplace without closing its business might be correct. [However, although the administrative law Judge] did use the word hazardous in describing the job assigned to respondent's employees, he used it as a synonym for the word dangerous, not as a word of art. The Judge defined the hazard as permitting an employee to perform his dangerous task without proper training and supervision.[130]

The employer is thus required to devise means of minimizing the contact employees have with toxic substances. The employer might argue that exclusionary practices serve just this end. By being barred from the workplace, women are prevented from being exposed to the hazardous substance. Since the responsibility for compliance with the Act remains on the employer regardless of whether the employee creates or assumes the risk, the employer may argue that such measures are necessary.

127. *E.g.*, Armor Shield Inc., 5 OSHC 1613 (1977) (hazardous gas in manhole leading to gas storage tank); Advance Specialty Co., Inc., 3 OSHC 2072 (1976) (area around metal stripping vat improperly ventilated); Fry's Tank Service Inc. and Cities Service Oil Co., 4 OSHC 1515 (1976); Aro Inc., 1 OSHC 1453 (1973) (oxygen-deficient atmosphere).

128. *E.g.*, Edgewood Construction Co., 2 OSHC 1485 (1975) (natural gas build up in excavation; actual knowledge of previous build-up requires positive action to detect reappearance); Brennan v. OSHRC (Vy Lactos Laboratories, Inc.), 494 F.2d 460 (8th Cir. 1974) (chemical reaction between acid in slurry and iron sulfide particles which allegedly dropped from ceiling when employee cut ventilation hole).

129. 5 OSHC 1367 (1977).

130. *Id.* at 1368.

This argument totally ignores the basic underpinnings of the Act, however. Although the hierarchy of control measures used in standard setting has not been applied in general duty situations, the premises which support it are equally applicable here. Congress's intent was to protect workers at their jobs. Excluding women deprives them of their status as workers, and conflicts with this statutory principle. No blanket exclusions should be countenanced under the Act—either under the Secretary's standards or the general duty clause—until all alternative means of minimizing workers' contact with the hazardous substance have proven ineffective.

III. CONSTITUTIONAL RESTRAINTS ON STANDARD-SETTING

The most desirable means of protecting the workforce from exposure to toxic substances is to control emissions at their source. Protection is the charge of the Act, and the Secretary must attempt in the first instance to effectuate its purpose in this way. If the work environment cannot at present be made safe for all workers, the Secretary may consider ways of isolating individuals to provide them with additional protection. In considering whether to promulgate standards which incorporate removing women from certain work environments to protect their reproductive capacities, the Secretary must be mindful of constitutional restraints on such governmental enactments. This section discusses the limitations that Fifth Amendment equal protection and due process requirements place on the Secretary's standards.[131]

131. Although the Fifth Amendment contains no equal protection clause, the Supreme Court analyzes equal protection claims brought under the Fifth Amendment in the same way it analyzes those brought under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975), and cases cited therein.

A standard intended to provide women with special protection must be viewed against the peculiar history of protective legislation in this country. The development of a body of law providing women with special protection began as a deliberate strategy to establish support for the principle that the government had a valid interest in protecting the labor force. After the Supreme Court invalidated New York's maximum hours laws for bakers as an unconstitutional interference with the employers' and employees' liberty to contract, Lochner v. N.Y., 198 U.S. 45, 56 (1905), proponents of protective legislation decided to proceed incrementally. They calculated that if they could win acceptance for legislation protecting women, they would ultimately be able to build support for general protective enactments. The strategy seemed to have worked when the Court decided United States v. Darby, 312 U.S. 100 (1941), upholding the Fair Labor Standards Act as a legitimate exercise of the federal government's commerce powers, and sweeping away the prohibitions on both state and federal wage and hour regulations. *Id.* at 125. While *Darby* legitimized regulations reaching both men and women, it did not require equalization of "wom-

The standard for analyzing a governmental program under equal protection varies depending upon the nature of the interest or group adversely affected by it. A health and safety standard which treats women differently than men in order to protect their reproductive capacities can be analyzed in three ways: as an infringement on women's right to work; as a classification based on sex; or as a restriction on women's ability to make decisions with regard to bearing children. Each characterization invokes a different standard of review.

First, an exclusionary plan places restrictions on women's right

en only" provisions then in the law, nor did it signal the end of viewing women's qualifications for employment as requiring special attention. For a more detailed discussion, see A. Hill, Protection of Women Workers and the Courts, (Nov. 3, 1977) (paper presented at Conference on Protective Legislation and Women's Jobs).

Since the enactment of Title VII in 1964, the courts have consistently invalidated state statutes which establish different work criteria and regulations for women than for men. *See, e.g.*, Weeks v. Southern Bell Tele. and Tele. Co., 408 F.2d 228 (5th Cir. 1967) (California limitations on hours and restrictions on weights women were permitted to lift no defense for employer); Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972) (Arkansas statute requiring overtime pay for women but not men must be extended to cover men); Homemakers, Inc. v. Division of Indus. Welfare, 509 F.2d 20 (9th Cir. 1974) (California statute requiring overtime premium for women only ruled invalid). Reliance on Title VII has allowed the courts to avoid reexamining whether such employment schemes are constitutionally supportable.

In evaluating social welfare programs which treat male and female wage-earners differently, the Supreme Court has looked at the purpose the gender-based distinctions purportedly served in determining whether they are constitutionally supportable. Provisions designed to redress "society's longstanding disparate treatment of women" pass constitutional scrutiny. Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977). *See, e.g.*, Califano v. Webster, 430 U.S. 313, 317 (1977) (Social Security Act computation formulas for old-age benefits which favor women wage-earners upheld as deliberately enacted to redress society's disparate treatment of women); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (military rule allowing women greater number of years tenure without promotion before being mandatorily discharged serves purpose of providing them with fair career advancement opportunities); Kahn v. Shevin, 416 U.S. 351, 355 (1974) (Florida property tax exemption for widows reasonably designed to lessen the impact which spousal loss has on women). Distinctions which were not created for a compensatory purpose, and which penalize women violate due process. *See, e.g.* Califano v. Goldfarb, 430 U.S. 199, 206-07 (1977) (Social Security Act survivors' benefits payable to widows regardless of actual dependency but to widowers only upon showing that deceased wife had provided at least one-half of his support; distinction penalizes female wage-earners by providing less protection for their spouses); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (Social Security Act survivors' benefits available to widows and children of deceased male wage-earners, but only to the children of deceased female wage-earners; distinction unjustly discriminates against female wage-earners).

The constitutional standard for analyzing gender-based distinctions is discussed in text accompanying notes 135-41 *infra*.

to work in certain industries. Like most economic regulations, enactments affecting employment opportunities are treated deferentially by the Supreme Court, subjected only to the test of minimal rationality.[132] By this standard, equal protection is violated "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objectives."[133] As long as some rational basis can be posited which would support the classification, the enactment is presumed to be valid.[134] Under a minimum rationality analysis, an exclusionary plan would probably be supportable as a rational means of safeguarding women, despite the fact that it impinges on their employment rights.

The second way of characterizing a plan which excludes women is as an enactment based on gender. Whether the Court would regard exclusion of women as gender-based discrimination will depend on the nature of the hazard against which the Secretary is guarding. Following the Court's analysis of distinctions based on pregnancy, a classification based solely on women's ability to bear children does not necessarily constitute gender-based discrimination. In *Geduldig v. Aiello*,[135] the Court upheld a California disability benefit plan for state employees which did not extend coverage for pregnancy or pregnancy-related disabilities. The lack of coverage was not sex-based discrimination as such because "while it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[136] Rather, the Court viewed pregnancy as a condition unlike any covered by the plan, and viewed the plan as distinguishing between disabilities, not between men and women.[137] Accordingly, an exclusionary plan designed to protect women from substances which pose unique threats to their health may not be considered explicitly gender-based.[138]

132. Although the Court has traditionally called the "right to work for a living in the common occupations of the community . . . the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure," Truax v. Raich, 239 U.S. 33, 41 (1915), classifications restricting employment opportunities are nonetheless subject only to the minimal requirements of equal protection. Mass. Bd. of Retirement v. Murgia, 427 U.S. 306, 313-14 (1976).

133. McGowan v. Md., 366 U.S. 420, 425 (1961).

134. Mass. Bd. of Retirement v. Murgia, 427 U.S. 306, 314 (1976).

135. 417 U.S. 484 (1973).

136. *Id.* at 496 n.20.

137. *Id.*

138. Even if facially neutral, a classification which has a disproportionate impact

By contrast, if the health threat is not posed peculiarly to women, but rather is shared by all persons with reproductive capacities, a plan which only excludes women does discriminate on the basis of sex. As such, the plan would be subject to an intermediate level of scrutiny. To withstand constitutional challenge, discrimination based on sex "must serve important governmental objectives and must be substantially related to achievement of those objectives."[139] Part of the Secretary's objective under the Act is to preserve the health and functional capacities of the workforce.[140] To justify excluding women as a procedure substantially related to achieving that goal, the Secretary must be able to demonstrate that eliminating women will substantially eliminate the problem. Thus, he or she must show that the risks posed to women are graver than those posed to men.[141]

Finally, an exclusionary plan may be analyzed as interfering with women workers' privacy rights. An exclusionary plan designed to protect women's reproductive capacities would probably bar only fertile women. By limiting the employment options of a group of women in this way, however, such a standard would impose economic hardships which may impact on their decisions about bearing children.[142] The Court has recognized decisions about procre-

on the members of one sex may violate equal protection if it is a "mere pretext for invidious discrimination." *Id.* Proof of invidious purpose requires a showing of intent to discriminate. Washington v. Davis, 426 U.S. 229 (1976) (disproportionate exclusion of black applicants from employment with the District of Columbia police department because of qualifying test held not to violate equal protection absent showing of discriminatory intent).

139. Craig v. Boren, 429 U.S. 190, 204 (1976) (Oklahoma law prohibiting sale of 3.2% beer to males under twenty-one and to females under eighteen constituted gender-based discrimination against males between eighteen and twenty-one).

140. *See also* text accompanying notes 152-54 *infra*.

141. In evaluating legislative enactments under minimum rationality, the Court has sanctioned regulations which address one aspect of a problem at a time, as long as the lines the legislature drew were rationally supportable. Geduldig v. Aiello, 417 U.S. 484, 495 (1974). Similarly, while the Secretary may be justified in dealing with the most pressing health threats first, the intermediate standard of scrutiny compels him or her to address those problems the alleviation of which will substantially fulfill the statutory objective.

142. The reality of this connection was borne out by the experience of women working at the Willow Island, West Virginia plant of the American Cyanamid Company. As reported in the New York Times, four women had themselves sterilized after a plant official implied that "the surgery might help them save their jobs at the chemical plant." *Four Women Assert Jobs Were Linked to Sterilization*, N.Y. Times, Jan. 5, 1979, at 21, col. 1.

ation,[143] contraception,[144] and abortion[145] as fundamental rights subsumed under a general constitutional right to privacy. When a legislative classification interferes with the exercise of a fundamental right, such as the right to privacy, strict scrutiny is invoked.[146] A strict scrutiny analysis requires that the classification be necessary to fulfill a compelling state interest.[147]

The right to personal privacy, although fundamental, is not absolute. As Justice Blackmun explained in *Roe v. Wade*:[148]

> The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate . . . . [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.[149]

Although the state may legislate to protect its interests, any restriction it consequently imposes on the fundamental rights of affected individuals must be carefully tailored.[150] It must fulfill the state's recognized interests, while impinging on the rights of the individual to a minimal extent. In considering abortion, the Court weighed a woman's right to privacy in making decisions about abortion against the state's interests in preserving her health and the health of the potential life. Under Justice Blackmun's scheme, the

143. Skinner v. Okla., 316 U.S. 535 (1942).

144. Eisenstadt v. Baird, 405 U.S. 438 (1972).

145. Roe v. Wade, 410 U.S. 113 (1973).

146. Governmental enactments which discriminate against members of suspect classifications are also subject to strict scrutiny. *E.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (race); Ogama v. Cal., 332 U.S. 633 (1948) (ancestry). In Frontiero v. Richardson, 411 U.S. 677, 682 (1973), a plurality of the Court called sex a suspect classification. This characterization was never adopted by a majority of the Justices, and gender-based discrimination is not subject to strict scrutiny. *See* text accompanying note 139 *supra*.

147. Roe v. Wade, 410 U.S. 113, 155 (1973).

148. *Id.*

149. *Id.* at 153-54.

150. *Id.* at 155.

different interests attach at different stages of pregnancy. Only when the fetus becomes viable do the state's interests supersede those of the woman, allowing it to eliminate her choice and proscribe abortion.[151]

When the Secretary acts to fulfill his or her duties under the OSH Act, the interests of the state and of women workers are ostensibly more closely allied. Both want to preserve the women's reproductive capacities and to safeguard the health of potential offspring. The state's interests here are clearly articulated in the language of the Act. The Secretary is to set standards which assure that "no employee will suffer material impairment of . . . functional capacity,"[152] and the Act is intended to "preserve our human resources."[153] Additionally, the Secretary, proceeding under the authority of the Act, must be concerned with the welfare of people at work.[154] This corresponds to the women's interest in staying at work while being assured of retaining a healthy reproductive capacity. If the Secretary were to approve an exclusionary plan, the state's interest in preserving reproductive health would be advanced to the exclusion of its interest in keeping women in the workplace. At that point, the state's asserted interest would collide with the interests of women workers, for such a plan would essentially require women to choose between their reproductive capacities and their jobs.

For such a provision in an OSHA standard to be valid, it would have to be narrowly drawn to serve the government's interest. The state's interest in protecting the health of potential offspring attaches at that point where exposure to toxic substances endangers their health or well-being. In considering abortion, the question is whether a specific potential life may be terminated. By contrast, the issue with which the Secretary must deal is how generally to safeguard the quality of life and health of the potential offspring of

151. The state's interest in preserving the woman's life and health become compelling at the beginning of the second trimester of pregnancy, when the risk of death due to an abortion outweighs the risk of death due to childbirth. At that point, the state may regulate the abortion procedure "in ways that are reasonably related to maternal health." *Id.* at 163. Once the fetus becomes viable, at the beginning of the third trimester, the state's compelling interest in preserving the potentiality of human life enables it to "regulate and even proscribe abortion, except where it is necessary . . . for the preservation of the life or health of the mother." *Id.* at 164.

152. 29 U.S.C. § 655(b)(5) (1976).

153. 29 U.S.C. § 651(b) (1976).

154. *See* § II. A. 1. *supra.*

exposed workers. Exactly when the state's interest becomes compelling depends on the nature of the hazard.[155] If the substance is a teratogen, the hazard becomes real at conception; if it is a cumulative teratogen, any woman who intends to become pregnant may be at risk. If the substance is a gameotoxin or mutagen, fertile workers of both sexes who want to parent children are potentially at risk. Thus, if the substance is not demonstrated to have only teratogenic properties, removing women from the work environment does not effectively fulfill the protective goal because men are left exposed in the workplace.

The method employed by the Secretary to safeguard the state's interests must not only be narrowly drawn, but must actually be designed to accomplish its purpose. If women are faced with the loss of their livelihood and choose instead to have themselves sterilized, the state is not satisfying its interest in preserving the workers' functional capacities. To assert that this safeguards the next generation redefines the government's purpose and eliminates half of the mandated state's interest.

If the Secretary chooses to institute protective measures which separate individuals—women, men or both—from the hazard rather than relying on methods which control exposures in the workplace, due process requires that individual determinations be made to identify the workers who need this kind of protection. As long as the plan threatens to impinge on an individual's protected rights,[156] the Secretary may not base it on irrebuttable presumptions that all women are at risk and must be excluded, nor that all fertile women or all fertile people are at risk. Whether an individual is at risk due to exposures to toxic substances which lead to reproductive problems depends on whether the person intends to exercise his or her ability to procreate and on the nature of the hazard. Thus a decision to remove an employee from his or her job must be predicated on a determination that the individual is in fact at risk.

155. *See* text accompanying notes 10-17 *supra*.

156. The Court has abandoned reliance on the irrebuttable presumption analysis in cases where the interests asserted invoke only a minimum rationality test under equal protection. *See* Weinberger v. Salfi, 422 U.S. 749, 772 (1975) (duration of relationship requirement in Social Security Act defining widow and child to exclude surviving wives and stepchildren whose relationship to deceased wage earner commenced less than nine months before his death satisfies constitutional requirements). In *Salfi*, the Court distinguished Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) as dealing with protected rights.

The Supreme Court enunciated this principle in *Cleveland Board of Education v. LaFleur*.[157] The Cleveland School Board required all pregnant teachers to begin maternity leave after their fifth month of pregnancy. The Court said that in light of the evidence that a woman's ability to work effectively during pregnancy is very much an individual matter,[158] the irrebuttable presumption of unfitness embodied in the school board's policy violated due process.[159] The Court left open the possibility that there might be a point closer to childbirth when "widespread medical consensus about the 'disabling' effect of pregnancy on a teacher's job" would justify a uniform termination date.[160] It might be equally permissible to establish a criterion under which individuals would be excluded from a workplace because a scientific consensus supports the presumption that remaining there would be disabling. The removal cannot, however, be based on an assumption that certain individuals meet that criterion. Rather, individual assessments must be made.

Making individual assessments introduces an additional privacy problem—the ability of the state to inquire into personal matters.[161] The state may gain access to personal records which otherwise would be protected by the right to keep certain matters private if it needs the information to serve a legitimate state function. However, in securing and using the information, it may not impermissibly intrude on the rights of the individuals.[162] In acting to

157. 414 U.S. 632 (1974).

158. *Id.* at 645.

159. *Id.* at 648. Although the lower court had ruled that the policy violated equal protection by treating pregnant women differently than men, LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), Justice Stewart did not address the equal protection argument in his opinion for the Court. Instead, his decision rested entirely on "irrebuttable presumptions" as a violation of due process. The irrebuttable presumption that any women who was five months pregnant was unable to teach "unduly penalize[d] a female teacher for deciding to bear a child." Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648 (1974). The decision implied a sensitivity to the economic consequences of maternity leave which the Court failed to pursue in its Title VII cases. *See* text accompanying notes 171-80 *infra*.

160. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 n.13 (1974).

161. The Court has characterized the right to privacy as protecting at least two different interests. "One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1976). The workers' interests in making decisions regarding childbearing is subsumed under the latter, and their interests in keeping decisions and activities in that area private is protected by the former.

162. In Whalen v. Roe, 429 U.S. 589 (1976), the Supreme Court upheld a New

fulfill the state's interest in safeguarding employees' health and functional capacities, the Secretary could promulgate a standard requiring disclosure of medical records to employers.[163] The employers would use the data to identify those employees who are actually at risk. This would accord with the due process requirement that individual assessments be made. The problem with requiring disclosure of the medical information is that it may imper-

York law which required copies of all prescriptions for "schedule II" drugs, including the name and address of the patient, to be submitted to a central computer bank with the state health department. The statute was enacted to curb unlawful diversion of dangerous drugs by preventing use of stolen, revised or expired prescriptions. Justice Stevens held that the enactment served a legitimate state purpose, and that the system did not, on its face, pose a sufficiently grievous threat to individual confidentiality to establish a constitutional violation. *Id.* at 602. He closed, however, with a caveat that if improperly administered such a system could result in a constitutional violation. *Id.* at 605-06. Similarly, in Planned Parenthood v. Danforth, 428 U.S. 52 (1975), the Court dismissed a charge that a state law requiring maintenance of abortion records was unconstitutional. The recordkeeping requirements aided the state's interest in preserving maternal health and could provide useful data for making medical decisions. Furthermore, the statute provided safeguards which properly respected the patient's rights to confidentiality and privacy. *Id.* at 80-81. *See also* E.I. du Pont de Nemours & Co. v. Finklea, 442 F. Supp. 821 (D.C. W. Va. 1977), where the district court resolved a similar question involving release of medical records to the National Institute for Occupational Safety and Health. For order delineating the procedural safeguards by which NIOSH must abide in utilizing the information in order to assure confidentiality, *see* E.I. du Pont de Nemours & Co. v. Finklea, 6 OSHC 1167, 1170-71 (D.C. W. Va. 1977).

Preserving the individual's rights is as important as fulfilling the state's objectives. Accordingly, the District Court for the Northern District of Illinois found the recordkeeping requirements of the Illinois Abortion Act constitutionally infirm to the extent that they allow public disclosure of the records of abortions performed after midterm in pregnancy. Wynn v. Scott, 449 F. Supp. 1302, 1328 (N.D. Ill. 1978), *appeal dismissed for lack of jurisdiction*, 99 S. Ct. 49 (1978). The court ruled that the possibility of disclosure imposed on women's privacy rights in two ways: disclosure of such highly personal information could be stigmatizing, and the chance of disclosure could indirectly affect a woman's independence in deciding whether to have an abortion. "A woman might choose not to have an otherwise necessary abortion if she knew her decision could become virtually a matter of public record." *Id.*

163. Part of the challenge launched by the Industrial Union Department (IUD) to OSHA's asbestos standard concerned such a provision. In IUD v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), the IUD argued that confidentiality is necessary to avert the possibility that, in hiring and discharging, the employer would discriminate against employees with symptoms of asbestos-related diseases or prior histories of exposures to asbestos dust. Without addressing any constitutional issues, the court supported the Secretary in his determination that the salutory purpose of the standard—reassignment of employees unable to use respirators to safer jobs *without loss of seniority or wages*—could not be fulfilled if the employers were denied access to the records. *Id.* at 485.

missibly interfere with the employees' privacy rights and ultimately subvert the protective scheme. Even if it were possible to assure that the records made available to the employer would be kept strictly confidential and that the information would be used only for the prescribed purpose, the possible consequence of utilizing the information may be to restrict the workers' ability to make decisions about safeguarding their own health. If an employee were aware that the result of a medical examination might lead to removal from the job, there would be a strong disincentive to submit to the exam to begin with. Thus, the rationale behind making the examination results available to employers would be undermined.

Making periodic medical examinations mandatory would not avert this problem. If the standard required medical tests for all employees, it would constitute an impermissibly broad intrusion on their "right to be left alone,"[164] for there is no legitimate interest in monitoring the reproductive abilities of individuals who are not potentially at risk. The same would be true of monitoring all fertile employees, for not everyone chooses to exercise that capacity, and, depending on the hazard, not all fertile people risk having their functional capacity impaired at all times. The Secretary would therefore have to establish rational criteria for identifying those employees who must submit to medical examinations. Once the people who meet those criteria are left to identify themselves, they are confronted with the same dilemma as if the examinations were optional: identifying themselves as potentially at risk and facing possible discharge or demotion, or refusing to come forward and foreclosing the opportunity to safeguard their functional capacities.

Reducing the exposure for the entire workforce is the optimal method of providing protection against health hazards and fulfilling the mandate of the Act. If this proves inadequate to protect workers who will later bear children, the Act requires the Secretary to take further precautions. One such precaution might be to remove workers from the hazard. In considering whether employment regulations impact on individuals in ways which violate equal protection, the Court generally treats them deferentially. Therefore, it might not be overly concerned with removal provisions per se.

164. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), quoted in Whalen v. Roe, 429 U.S. 589, 599 n.25 (1976), as the basis for the right to avoid disclosure of personal matters. *See* note 161 *supra*.

When such provisions make gender-based distinctions, or restrict workers' abilities to make choices about childbearing, heightened standards of review are invoked. Under the strict scrutiny analysis, any protective plan which restricts an individual's ability to make personal choices about childbearing must be narrowly constructed to achieve the state's purpose. Additionally, the requirements of due process mean that individual assessments must be made concerning whether a particular worker's employment must be restricted to accomplish the protective purpose. The Secretary's purpose in setting standards can be effectively fulfilled only by eliminating some of the economic disincentives which serve to defeat the rationale underlying removal provisions. As long as protection means a significant reduction in income, workers will be faced with a choice between work and maintenance of healthy reproductive capacities.

IV. TITLE VII

Title VII of the Civil Rights Act of 1964[165] prohibits employment discrimination based on race, religion, sex or national origin. By its terms, the statute prohibits discrimination in both employment opportunities and conditions of employment. It is unlawful for any employer:

> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunites or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.[166]

In enacting the statute, Congress intended to remove all "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[167] With respect to sex discrimination, the basic tenet of Title VII is that an employer may not make distinctions between employees or applicants for employment

165. 42 U.S.C. § 2000e (1976).
166. *Id.* § 2000e-2(a)(1)-(2).
167. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

based on generalizations about males or females.[168] Rather, the employer must focus on the individual. The statute "precludes treatment of individuals as simply components of a . . . sexual . . . class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[169]

This section examines the restrictions Title VII places on employers attempting to bar women from the workplace in order to protect their reproductive health. To establish a violation, an excluded applicant or employee must show that the exclusionary employment plan discriminates on the basis of sex or has a disproportionate impact on women. As the result of Supreme Court decisions dealing with employers' pregnancy policies, Congress amended Title VII to include distinctions based on pregnancy, childbirth and related medical conditions within the definition of sex-based discrimination. Thus, a woman excluded from a job because she is capable of bearing children can now easily show that the plan constitutes a prima facie violation of Title VII. Once the plaintiff establishes that the plan is explicitly based on sex, the employer may raise the defense that sex is a bona fide occupational qualification (BFOQ) reasonably necessary to normal business operations.[170]

168. EEOC Guidelines on Discrimination Because of Sex [hereinafter cited as EEOC Guidelines], 29 C.F.R. § 1604.2(a)(1)(ii) (1977), *cited with approval in* Dothard v. Rawlinson, 433 U.S. 321, 333 n.17 (1977).

169. City of Los Angeles v. Manhart, 435 U.S. 702, 708 (1978).

170. The bona fide occupational qualification (BFOQ) is a statutory defense to discriminatory employment practices that are explicitly based on sex. The courts have also developed a separate defense of business necessity. Originally used in cases alleging racial discrimination, for which there is no statutory defense, business necessity is a defense for employment practices which are neutral on their face but discriminatory in operation. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Despite the fact that the BFOQ and business necessity defenses derive from different sources and are intended to apply to different situations, the courts do not always rigorously distinguish between them. *See, e.g.*, note 204 *infra*. The tendency of the courts to read the defenses interchangeably threatens to broaden the application of the BFOQ defense. R. GINSBURG & H. KAY, 1978 SUPPLEMENT TO DAVISON, GINSBURG AND KAY'S TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 210 (1978). This result contradicts the policy espoused by the courts that the BFOQ is an extremely narrow defense to discrimination based on sex. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977), *citing with approval* EEOC Guideline, 29 C.F.R. § 1604.2(a) (1976).

The discussion in the text adheres to the analysis that a BFOQ may justify discrimination explicitly based on sex, while business necessity defends practices which have discriminatory impacts. The amendment to Title VII now makes clear

Section A discusses the basis for establishing that this sort of discrimination is gender-based, and section B addresses the employer's ability to use the BFOQ defense.

A. *Gender-Based Discrimination*

The Supreme Court, in interpreting Title VII, has held that distinctions based on pregnancy are not sex-based. In *General Electric Co. v. Gilbert*,[171] the plaintiff challenged General Electric's disability benefits plan on the ground that it excluded pregnancy and pregnancy-related conditions from its coverage. According to the Court, the distinctions the plan drew were not gender-based because they were based on the nature of the disability, not the sex of the employee.[172] Nor did the plan have a disproportionate impact on women because there was no proof that its fiscal and actuarial benefits were worth more to men than to women.[173] The Court therefore held that General Electric's disability plan did not violate Title VII.[174]

The Court further developed its definition of prohibited sex discrimination in *Nashville Gas Co. v. Satty*.[175] Nashville Gas required its pregnant employees to take leaves of absence[176] during

that employment policies based on childbearing capacity are sex-based. *See* § IV. A. *infra*. Therefore, an exclusionary employment plan which discriminates on the basis of childbearing capacity constitutes a prima facie case of sex discrimination. Once an excluded employee establishes her prima facie case of discrimination, the employer's only defense is that sex is a BFOQ. *See* § IV. B. *infra*. The business necessity defense is not available in this context.

171. 429 U.S. 125 (1976).

172. *Id.* at 135. The Court fully adopted the reasoning it had employed in Geduldig v. Aiello, 417 U.S. 484 (1974), in holding that distinctions based on pregnancy were not gender-based. In so doing, it rejected the conclusions of the six circuit courts that had considered the question. *See* Satty v. Nashville Gas Co., 522 F.2d 850, 853-54 (6th Cir. 1975); Hutchinson v. Lake Oswego School Dist., 519 F.2d 961, 964 (9th Cir. 1975); Gilbert v. General Elec. Co., 519 F.2d 661, 665 (4th Cir. 1975); Tyler v. Vickery, 517 F.2d 1089, 1095 (5th Cir. 1975); Communication Workers v. A.T.&T., 513 F.2d 1024, 1030 (2d Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *judgment vacated on other grounds*, 424 U.S. 737 (1976).

173. General Electric Co. v. Gilbert, 429 U.S. 125, 138 (1976).

174. *Id.* at 145-46.

175. 434 U.S. 136 (1977).

176. *Id.* at 138. The forced leave provision was not itself before the Court. The district court had ruled that since the commencement of pregnancy leave was individually determined for each employee and was based on several factors, the leave provision was neither arbitrary nor irrational. Satty v. Nashville Gas Co., 384 F. Supp. 765, 771-72 (M.D. Tenn. 1974).

which they received no sick pay[177] and lost all seniority rights accrued before the leave commenced.[178] While holding that the sick pay policy was legally indistinguishable from General Electric's disability plan and therefore not discriminatory,[179] the Court ruled that the seniority plan did have an unlawful impact on women.[180] Justice Rehnquist, writing for the Court, stated that the impact of denying women benefits was not sex discrimination, while the impact of imposing burdens on them was. Sick pay, though earned and available for all other medical absences, was a benefit, and did not have to be extended to pregnant women. Stripping women of their accrued seniority, however, was a burden which "men need not suffer," and violated the statute because it had a disproportionate impact on their employment opportunities.[181]

In Congress's view, the fine lines the Supreme Court was drawing threatened to "erode our national policy of nondiscrimination in employment."[182] In 1978, Congress amended Title VII to make clear that distinctions based on pregnancy constitute sex discrimination.[183] The purpose of the amendment was not to extend coverage of Title VII, but to reassert the statute's original intent by eliminating the ambiguities imposed by the Supreme Court. The amendment states that:

> The terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same

177. The employer compensated employees for limited periods of sick leave due to non-job related illnesses or disabilities, but no compensation was provided for pregnancy-related absences. Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977). The amount of sick leave available to employees was tied to their seniority. Satty v. Nashville Gas Co., 384 F. Supp. 765, 768 (M.D. Tenn. 1974).

178. The seniority policy provided that employees retained accumulated seniority and continued to accrue seniority during leaves of absence necessitated by any disease or disability other than pregnancy. An employee who took a leave of absence for any non-medical reason, or because of pregnancy, was divested of accumulated seniority. Nashville Gas Co. v. Satty, 434 U.S. 136, 140 (1977).

179. *Id.* at 143.

180. *Id.* at 141.

181. *Id.* at 142.

182. HOUSE COMM. ON EDUCATION AND LABOR, PROHIBITION OF SEX DISCRIMINATION BASED ON PREGNANCY, H.R. REP. NO. 95-948, 95th Cong., 2d Sess. 3 (1978) [hereinafter cited as H.R. REP., DISCRIMINATION BASED ON PREGNANCY], *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 6515, 6517.

183. *Id.* at 3-4, [1978] U.S. CODE CONG. & AD. NEWS at 6517-18.

> for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .[184]

The report of the House Committee on Labor and Education explains that the phrase "women affected by pregnancy, childbirth and related medical conditions" means that the protections of Title VII extend to the whole range of matters concerning the childbearing process.[185] Maintaining the ability to bear children is an integral part of the childbearing process, and should be viewed as included in the term "related medical conditions." Although it could be argued that the amendment's coverage is limited to temporary medical conditions connected with pregnancy, the reasons set forth in the legislative history for including these conditions within the definition of sex discrimination apply equally to childbearing capacity. Thus, even if not literally included in the term "related medical conditions," distinctions based on childbearing capacity do constitute discrimination based on sex.

Congress intended the amendment to make clear that distinctions based on characteristics unique to one sex are, by definition, distinctions based on sex. In *Gilbert*, the Court had characterized the employer's plan as condition-related, rather than gender-re-

184. Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (to be codified at 42 U.S.C. § 2000e-2(k)).

The statutory language of the amendment presents a potential problem for the plaintiff challenging an employment plan. The amendment states that "women affected by pregnancy, childbirth or related medical conditions *shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .*" *Id.* (emphasis added). Because this directive is included in the definition of discrimination, an employer might argue that the plaintiff's prima facie case now involves a demonstration that persons similar in their ability to work are being treated differently.

The argument that Congress has added an element to the plaintiff's prima facie case has no merit. Congress intended to remedy a confused situation created by the Supreme Court's decisions, not to erect further obstacles for women seeking employment opportunities. As noted in the House Report, the bill "merely reestablish[es] the law as it was understood prior to Gilbert." H.R. REP., DISCRIMINATION BASED ON PREGNANCY, *supra* note 182, at 8, [1978] U.S. CODE CONG. & AD. NEWS at 6522. Part of the way the law has been understood is that to establish a prima facie case, the plaintiff need only demonstrate that an employment practice explicitly differentiates on the basis of sex. Since the bill makes "distinctions based on pregnancy . . . per se violations of Title VII," *id.* at 3, [1978] U.S. CODE CONG. & AD. NEWS at 6517, nothing has been added to the plaintiff's case.

185. H.R. REP., DISCRIMINATION BASED ON PREGNANCY, *supra* note 182, at 5, [1978] U.S. CODE CONG. & AD. NEWS at 6519.

lated.[186] Justice Stevens dissented from this analysis, noting that since "it is the capacity to become pregnant which primarily differentiates the female from the male," distinctions based on that fundamental difference are facially discriminatory.[187] Justice Brennan also dissented, noting that "it offends commonsense to suggest . . . that a classification revolving around pregnancy is not, at the minimum strongly 'sex-related.' "[188] In discussing the rationale for the amendment, the House and Senate Committe Reports cite both of these statements with approval.[189] The Senate Report adds that the amendment was introduced to show clearly that the definition of sex discrimination under Title VII reflects the "commonsense" view.[190] Discrimination based on childbearing capacity, the "capacity . . . which primarily differentiates the female from the male," must therefore be regarded as discrimination based on sex.

Congress saw the amendment as particularly important because of the effects which policies regarding pregnancy have had on women's employment opportunities. Congress found that women have traditionally been confined to marginal jobs because of employers' assumptions that they will become pregnant and leave the workforce.[191] As noted in the House Report, "[u]ntil a woman passes the childbearing age, she is viewed by employers as potentially pregnant."[192] In addition, discriminatory treatment of working women who actually become pregnant places severe impediments on their individual careers. Congress felt that the "elimination of discrimination based on pregnancy in these employment practices . . . [would] go a long way toward providing equal employment opportunities for women."[193]

The elimination of distinctions based on childbearing capacity is

186. General Electric Co. v. Gilbert, 429 U.S. 125, 135 (1976).

187. *Id.* at 162 (Stevens, J., dissenting).

188. *Id.* at 149 (Brennan, J., dissenting).

189. H.R. REP., DISCRIMINATION BASED ON PREGNANCY, *supra* note 182, at 2, [1978] U.S. CODE CONG. & AD. NEWS at 6516; SENATE COMM. ON HUMAN RESOURCES, AMENDING TITLE VII, CIVIL RIGHTS ACT OF 1964, S. REP. NO. 95-331, 95th Cong., 1st Sess. 2 (1977) [hereinafter cited as S. REP., AMENDING TITLE VII].

190. S. REP., AMENDING TITLE VII, *supra* note 189, at 3.

191. H.R. REP., DISCRIMINATION BASED ON PREGNANCY, *supra* note 182, at 3, [1978] U.S. CODE CONG. & AD. NEWS at 6517; S. REP., AMENDING TITLE VII, *supra* note 189, at 3.

192. H.R. REP., DISCRIMINATION BASED ON PREGNANCY, *supra* note 182, at 6-7 [1978] U.S. CODE CONG. & AD. NEWS at 6520-21.

193. *Id.* at 7, [1978] U.S. CODE CONG. & AD. NEWS at 6521.

basic to Congress's goal of providing equal employment opportunities. Similar assumptions about women being potentially pregnant underlie exclusionary employment practices, and block women's access to higher paying jobs. Moreover, the impact of policies excluding women with childbearing capacities is potentially more restrictive and more far-reaching than the impact of employment policies which penalize pregnant women. The number of women capable of bearing children is greater than the number who will actually become pregnant. In addition, while pregnancy is a temporary state, being capable of bearing children is an on-going physical condition which exists throughout much of a woman's working life. Distinctions based on childbearing capacity should thus be subject to the same scrutiny as pregnancy-based distinctions, *i.e.*, "the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute."[194]

B. *Bona Fide Occupational Qualification*

Once an excluded applicant or employee establishes that the employer's exclusionary employment plan constitutes explicit sex-based discrimination, Title VII provides the employer with the defense that sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[195] The defense is a narrow one.[196] The employer defend-

194. *Id.* at 4, [1978] U.S. CODE CONG. & AD. NEWS at 6518.

195. 42 U.S.C. § 2000e-2(e) (1976). The BFOQ defense applies only to discrimination in conditions of hiring and employment, prohibited by *id.* § 2000e-2(a)(2). *See* text quoted at note 165 *supra*. The statute provides a defense to 42 U.S.C. § 2000e-2(a)(1), *see* text quoted at note 165 *supra*, when "different standards of compensation, or different terms, conditions, or privileges of employment [are applied] pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate." 42 U.S.C. § 2000e-2(h). Accordingly, while the BFOQ may be raised as a defense to policies totally excluding women from the workplace, other issues which might arise in this context (*e.g.*, transfer to safer positions but at lower pay, and/or with loss of seniority, or loss of accrued benefits during forced leave) technically fall outside of the BFOQ defense. Like policies which are neutral on their face but have a discriminatory impact, differences in the terms and conditions of employment which are not pursuant to a bona fide seniority system could be defended as "business necessity." *Employment Rights in Toxic Workplace*, *supra* note 16, at 1127-28 n.61. *See* note 170 *supra*.

To prove that a discriminatory practice is a business necessity, the employer must demonstrate that "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)

ing an exclusionary employment plan must demonstrate that the plan is necessary to preserve the essence of the business operation.[197] The employer may not use the possibility of harm to women's health to support a contention that hiring them would undermine the business.[198] Although it would be difficult, it might be possible for the employer to show that hiring women would impose economic burdens, such as the costs involved in complying with the OSH Act, severe enough to threaten the essence of business operations.[199] If the employer succeeds in making such a showing, he or she must also demonstrate that the characteristic on which the plan is based is shared by all or substantially all women with childbearing capacities and that the characteristic is unique to those women.[200]

(employer's departmental seniority system found to continue discriminatory impact on Negroes hired when employer practiced overt discrimination). As articulated in *Robinson v. Lorillard*, proof of business necessity consists of three parts: (1) the asserted business purpose must be sufficiently compelling to override its discriminatory impact; (2) the challenged practice must effectively carry out the purpose which it purportedly serves; and (3) there is no acceptable alternative policy or practice which would accomplish the employer's purpose with a less discriminatory impact. *Id.*

196. EEOC Guideline, 29 C.F.R. § 1604.2(a) (1977). The Supreme Court endorsed this guideline in Dothard v. Rawlinson, 433 U.S. 321, 334 n.19 (1977).

197. Diaz v. Pan American Airways, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

198. *See* text accompanying notes 201-12 *infra*.

199. *See* text accompanying notes 213-17 *infra*.

200. Although the courts agree that the defense is a narrow one, they have not settled on a single statement of what constitutes a BFOQ. Instead, they cite three different formulations. The first, articulated in Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969), is that the employer must show that he or she had "resonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Id.* at 235. The second formulation of the BFOQ is that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." Diaz v. Pan American Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (emphasis in original). The third formulation requires that "sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex . . . be the basis for the application of the BFOQ exception." Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (9th Cir. 1971).

The courts use these tests interchangeably and, at times, concurrently. In Dothard v. Rawlinson, 433 U.S. 321 (1977), for example, the Supreme Court cited *Weeks* and *Diaz* with approval, *id.* at 333. However, the Court's holding that women's unique sexual characteristics would interfere with their ability to perform tasks essential to the job was actually a combination of *Rosenfeld* (unique characteristics) and *Weeks*

1. Employing Women Would Undermine the Essence of the Business Operations.

The most common rationale given to support the argument that hiring women would undermine the essence of the business is that women would be unable to perform the necessary functions in a safe and efficient manner. The issue is not the safety of the individual workers; rather, it is whether they can do the job without threatening the safety of the business. In *Dothard v. Rawlinson*,[201] for example, the plaintiff challenged Alabama's refusal to hire women as guards in the state's maximum security prison. The Supreme Court found that the possibility that inmates would assault a woman guard was great enough to undermine her ability to insure prison security.[202] The Court carefully stated that its decision rested on the risk posed to prison security, and not on considerations of the safety of women employees:

> In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself. More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a "contact" position in the maximum-security male prison.
>
> . . . .

(essence of the business). *See* text accompanying notes 201-03, 223-25 *infra*. The analysis used in the text is a synthesis of the elements most commonly used by the courts.

One distinction must be drawn between the formulations the courts have enunciated and that employed here. Because it is discrimination against women with childbearing capacities which is the basis for establishing the prima facie case of gender-based discrimination in this context, *see* § IV. A. *supra*, the employer's BFOQ defense must specifically justify excluding women with childbearing capacities. Therefore, where the courts have defined the BFOQ to mean that being female disqualifies an individual from holding a particular job, for purposes of this discussion, it is being capable of bearing children which is the disqualifying factor.

For a general discussion of the proof required by each of the courts' BFOQ formulations, see Sirota, *Sex Discrimination: Title VII and the BFOQ*, 55 TEXAS L. REV. 1025, 1042-47 (1977) [hereinafter cited as Sirota].

201. 433 U.S. 321 (1977).

202. *Id.* at 335. As Justice Marshall noted in his dissent, the Alabama prison system is under court order to meet specified constitutional standards. *Id.* at 342 (Marshall, J., dissenting). The majority confined its holding that being a male was a BFOQ for the job to the particular fact situation, stating that a "woman's relative ability to maintain order in a male, maximum security unclassified penitentiary *of the type Alabama now runs* could be directly reduced by her womanhood." *Id.* at 335 (emphasis added).

> . . . [T]he use of women as guards in "contact" positions under the existing conditions in Alabama maximum-security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard.[203]

The same focus on safety of the business rather than safety of the employee is seen in a series of suits brought by pregnant stewardesses challenging airline policies which prevented them from flying.[204] The defendant airlines justified their policies on the ground that pregnancy would interfere with a stewardess's ability to perform her major responsibility, the safe transport of passengers. While the courts in two of these cases[205] noted the potentially adverse effects that flying could have on the health of a pregnant woman, neither rested its decision on that consideration. In *In re National Airlines*,[206] for example, the airline raised the possibility of harm to passengers, to the mother, and to the fetus as bases for its BFOQ defense. The District Court for Florida found that during the last trimester of pregnancy most women would be unable to

203. *Id.* at 335-36.

204. *See* Condit v. United Airlines, Inc., 558 F.2d 1177 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (mandatory grounding of pregnant stewardesses found essential to safe operation of aircraft; upheld as BFOQ); EEOC v. Delta Airlines, 441 F. Supp. 626 (S.D. Tex. 1977) (unpaid mandatory maternity leave upheld as BFOQ; grounding necessary to safety of passengers); MacLennan v. American Airlines, Inc., 440 F. Supp. 466 (E.D. Va. 1977) (leave policy which commenced as soon as stewardesses discovered they were pregnant not justified; mandatory leave justified after 26th week); Harriss v. Pan American Airlines, Inc. 437 F. Supp. 413 (N.D. Cal. 1977), *motion to vacate denied*, 441 F. Supp. 881 (1977) (unpaid automatic maternity leave justified as both BFOQ and business necessity); In re National Airlines, Inc., 434 F. Supp. 249 (S.D. Fla. 1977) (no mandatory grounding justified during first trimester; individual testing required during second trimester; BFOQ supports mandatory grounding during last trimester).

These cases provide an example of the confusion in the courts over how to apply defenses to Title VII. Each of these cases was decided after the Supreme Court ruled that distinctions based on pregnancy were not gender-based. General Electric Co. v. Gilbert, 429 U.S. 125 (1976); *see* text accompanying notes 171-74 *supra*. The findings of discrimination were therefore based on the discriminatory impact which the maternity leave policies had on women. While a finding of discriminatory impact should lead to an analysis of a business necessity defense (*see* note 170 *supra*), each court applied the BFOQ defense. In addition, the court in MacLennan tested the policy against both the BFOQ and business necessity defenses, and the Harriss court called the employer's defense "BFOQ/business necessity."

205. Harriss v. Pan American Airways, Inc., 437 F. Supp. 413 (N.D. Cal. 1977), *motion to vacate denied*, 441 F. Supp. 881 (1977); In re National Airlines, Inc., 434 F. Supp. 249 (S.D. Fla. 1977).

206. 434 F. Supp. 249 (S.D. Fla. 1977).

perform the duties required to assure safe transport of passengers. The threat of harm to the business therefore supported a BFOQ for the final period of pregnancy.[207] However, the court found no evidence to support the asserted harm to the stewardesses themselves,[208] and ruled that the possibility that flying might be harmful to the fetus was a question which must be left to the mother.[209]

According to *Dothard* and the stewardesses cases, a hazard posed to a woman's health only constitutes the basis for a BFOQ when it interferes with her ability to handle her job.[210] This reading is consistent with the purpose of Title VII, which was intended to wipe out protective policies that disregard the capabilities of individual women and instead treat them as a class in need of special favor. As the Court of Appeals for the Fifth Circuit wrote in *Weeks v. Southern Bell Telephone and Telegraph Co.*:[211]

> Men have always had the right to decide whether the incremental increase in remuneration for strenuous, obnoxious, boring or unromantic tasks was worth the candle. The promise of Title VII is that women are now on an equal footing. We cannot conclude

207. *Id.* at 263.

208. *Id.* at 259.

209. *Id.*

210. In two cases where women working with radiation were forced to resign when they became pregnant, the EEOC accepted the safety of the employee as the basis for a defense. *See* EEOC Decision No. 75-072, 10 FEP Cases 287 (1974) (pregnant employee forced to resign and denied temporary leave and maternity benefits; EEOC found probable cause for violation of Title VII); EEOC Decision No. 75-055, 10 FEP Cases 814 (1974) (employee required to choose between maternity leave without pay and resignation; EEOC found probable cause for violation of Title VII). The findings of discrimination in these cases were based on disproportionate impact rather than explicit sex-based distinctions, and therefore the defense asserted was business necessity rather than BFOQ. In each case the Commission noted the defense, then moved to the next step in the analysis of business necessity: whether there is a less burdensome alternative which would effectively accomplish the employer's purpose. *See* note 195 *supra*.

Because BFOQ is narrower than the judicially created business necessity defense, it must be applied with at least the same stringency. The statutory language requires that the BFOQ be "reasonably necessary" to normal business operations. To serve the statutory objective of eliminating sex discrimination, "reasonably necessary" should be read to require that there be no less burdensome alternatives available which would serve the employer's purpose without the same discriminatory effect. Thus, if a court were to accept the safety of employees as the basis for a BFOQ, it should require a showing that exclusion is the only viable alternative. It should then make sure that the employer satifies the other two requirements for a BFOQ. *See* text accompanying notes 218-25 *infra*.

211. 408 F.2d 228 (5th Cir. 1969).

that by including the bfoq exception Congress intended to renege on that promise.[212]

The employer might also argue that the economic burden of complying with the OSH Act and assuring women safe work would undermine the essence of the business. In considering whether the cost of providing benefits[213] or separate facilities[214] for women justifies discriminatory treatment, the courts and the EEOC have ruled that the difference in costs to accommodate women and men does not support a BFOQ defense.[215] The courts have not yet reached the issue of whether costs which might cause the business to fail would justify discriminatory practices. If an employer could make a credible showing that the cost of complying with the OSH Act's general duty clause would actually threaten the economic viability of the business, he or she might be able to defend exclusionary plans as necessary to normal business operations. The demonstration would be a difficult one to make. To use the Act as the basis for a defense, the employer would have to adhere to the policies embodied in it. Exclusionary employment plans should

212. *Id.* at 236.

213. *See, e.g.*, City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (violation of Title VII for employer to require women to make larger contributions to pension fund, despite the fact that women as a class live longer than men and therefore the cost of providing them with pension benefits would be greater).

214. *See, e.g.*, Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382 (D.D.C. 1974), *order modified*, 392 F. Supp. 1076 (D.D.C. 1975) (sex discrimination for employer to fail to provide women flight attendants with single occupancy layover accommodations, as it did for men); EEOC Decision No. 72-1292, 4 FEP Cases 845 (1975) (manufacturer who provides free housing to male employees must provide like accommodations for female employees). *See also* EEOC Guidelines, 29 C.F.R. § 1604.2(a)(5) (1977), calling it unlawful discrimination for an employer to refuse to hire women in order to avoid state laws requiring provision of separate restrooms for employees of each sex. *Compare* Long v. California State Personnel Bd., 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1974), where the court stated that Title VII does not require an employer "to alter substantially his facility and procedure to suit the sex of the person involved." *Id.* at 1015, 116 Cal. Rptr. at 572. The California court's view is contrary to EEOC policy. Sirota, *supra* note 200, at 1054 n.175.

215. *See, e.g.*, City of Los Angeles v. Manhart, 435 U.S. 702, 716-17 (1978). In considering a pension plan which exacted higher monthly contributions from women than from men based on the difference in average life expectancies, the Court rejected an argument that the contribution difference was justified by a like difference in the cost of providing benefits. *See id.* for a discussion of the relevant legislative history.

The EEOC has also taken the position that "since remedying inequality normally costs money" the BFOQ defense does not include considerations of business expense. EEOC Decision No. 72-1292, 4 FEP Cases 845 (1972).

only be permitted, if at all, as a last recourse after other measures have proven ineffective.[216] Only after the employer demonstrates a good faith attempt to comply with the Act may he or she argue that there is no combination of controls which would create a safe workplace without imposing crippling costs. The employer would then have to convince the court that the necessary costs incurred to protect women would threaten the essence of the business by causing it to fail, and that a cost consideration of this magnitude constitutes a valid defense.[217]

2. Qualification Is Shared By All or Substantially All Women.

If the employer succeeds in proving that the cost of protecting women would undermine the essence of business operations, he or she must then demonstrate a reasonable basis for believing that the plan protects a characteristic shared by all or substantially all women with childbearing capacities. In *Weeks v. Southern Bell Telephone and Telegraph Co.*,[218] Southern Bell had refused to hire women for a job that entailed lifting as much as thirty pounds at a time. The Court of Appeals for the Fifth Circuit looked to an EEOC guideline[219] which states that it is unlawful to refuse to hire individuals based on stereotyped characterizations about the sexes. The court interpreted the guideline to mean that the BFOQ defense must rest on a showing that all or substantially all women are unable to perform, rather than on generalized assumptions about their abilities.[220] It ruled that the company had not proven the validity of its assumption that women could not perform.[221]

Similarly, exclusionary plans may not rest on an assumption that

216. *See* § II. B. *supra*. To use the obligations of the general duty clause to justify exclusionary practices, the employer must also be able to show that as a result of excluding women the workplace is safe. If the men left behind might be threatened by the same health risks, the justification for excluding women collapses.

217. As one commentator has noted, a major problem with accepting "business failure avoidance" as the basis for a BFOQ is that it would allow the financial condition of a business to dictate whether an employer must comply with the law. Financially successful businesses would be prohibited from discriminating, while marginal ones would be permitted to do so. Sirota, *supra* note 200, at 1052 n.164.

218. 408 F.2d 228 (5th Cir. 1969).

219. 29 C.F.R. § 1601.1(a)(1)(ii), now codified at 29 C.F.R. § 1604.2(a)(1)(ii) (1977).

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

221. *Id.*

all or substantially all women with childbearing capacities share a risk which requires special protection. Rather, the employer must demonstrate a reasonable basis for believing this to be true. Such a demonstration would be difficult because whether fertile women are at risk at any time depends on the nature of the hazard and the personal choices of the individual women. For example, while a teratogen may harm a pregnant woman, it will pose no threat to the childbearing capacities of a woman who chooses not to become pregnant while in contact with the substance.[222]

3. Risks Are Unique to Women.

Finally, the employer must demonstrate that special protection is required because women with childbearing capacities are uniquely threatened by substances in the workplace. In construing the defense, the courts look to whether there is something intrinsic to the members of one sex which qualifies them for holding the job. In *Dothard v. Rawlinson*,[223] for example, the Supreme Court held that being a man was a valid BFOQ for being a guard in the maximum security prison. In the majority opinion, Justice Stewart noted that the prison housed inmates convicted of sex crimes, and that these inmates, as well as others deprived of a normal heterosexual environment, were likely to assault any woman present in the prison.[224] On this basis, he found that a woman's very womanhood would undermine her ability to provide the security that is the essence of a prison guard's responsibilities.[225]

The characteristic which disqualified women from the job in *Dothard* was one directly linked to their sex. In defending an exclusionary employment plan using a BFOQ defense, the employer must be able to demonstrate that there is some characteristic peculiar to women which places them at risk. Because most toxic substances threaten the reproductive health of both men and women, the employer may not assume that only women are at risk. Proving that the hazards are unique to women requires a showing that the reproductive health of men is unimpaired by contact with the substances in the workplace.

222. *See* text accompanying notes 15-16 *supra*.
223. 433 U.S. 321 (1977).
224. *Id.* at 335.
225. *Id.* at 336.

V. CONCLUSION

Employers faced with the possibility that workplace hazards may endanger the reproductive health of their employees have tended to see themselves caught between their responsibilities to provide women with equal employment opportunities and to make sure their employees do not face illness and disease because of their jobs. The statutory principles—equal employment and safe work—are not at odds. Congress enacted Title VII to enable individuals to enter the labor force based on their own abilities to perform. Like the constitutional promise of equal protection, Title VII supports the rights of women to become full participants in the economy. In enacting the Occupational Safety and Health Act, Congress moved to guarantee a safe industrial environment. No distinctions were drawn in the Act concerning who would be afforded protection. Rather, the Act promises a workplace safe for all workers. Title VII places women in industry; the Act must assure that it is safe for them to be there.

The promise of the Act has yet to be fulfilled. Real health threats do exist in the workplace, threats from which both women and men must be protected. The question is how the Secretary of Labor and individual employers should proceed to safeguard the workforce, absent firm data specifying the nature of the health threats posed by toxic substances. The Secretary has consistently drafted health standards based on the data which are available, and has aimed at affording workers the highest degree of protection feasible. Only twenty-five health standards have been promulgated to date, however, so reliance on enforcement of standards will not assure a hazard-free work environment. The general duty clause is the other tool available to the Secretary to enforce the employers' obligations under the Act. The philosophy embraced by the Secretary in setting standards has not been used in enforcing the general duty clause, and the clause remains virtually untried as a means of compelling thoughtful protection against health hazards.

The tendency of individual employers acting on their own has been to remove women when they identify toxic substances in their workplaces as threats to reproductive health, and when the number of women in the industry is small enough that their removal will not interfere with business operations. This solution is only a partial one. While removing women protects their reproductive health, it creates employment discrimination problems for

them (contrary to Title VII), and leaves men working in an environment which may pose grave threats to their health as well (contrary to the Act).

Many threats to female reproductive health are also threats to males. In the absence of hard data, the employer and the Secretary must presume that these threats are similar, and proceed from that assumption in designing means of safeguarding the workplace. Even if data substantiate the view that women are peculiarly at risk, removing them is not necessarily justified. The employer must be able to show that no other alternative exists.

The most effective way of safeguarding the workforce, and the way which most accords with the statutory schemes, is to clean up the workplace by controlling emissions at their source. Until this can be successfully done, it will be necessary to provide workers with additional protection. Both the Act and Title VII support the principle that people should be able to continue to function in the workplace. When individuals are identified as being particularly at risk and needing special protection, this principle must not be lost. As long as protective removal from a hazard results in lower pay and limited employment possibilities for people who are at risk, those workers are being penalized rather than protected. This sort of "blaming the victim" deals only with the more obvious symptoms, and not with the root of the problem. The Act, the Constitution and Title VII demand that the threats which toxic substances pose to reproductive health be viewed, in the first instance, as a problem in industry, and not a problem with women. It is only from this perspective that the real nature of the problem can be discovered, and protective, rather than discriminatory, solutions be devised.

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