Are fetal protection policies justified in view of employment discrimination?

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Historically, women have had only limited or no access to high-paying jobs traditionally held by males. Under the (hypocritical?) rationale of concern for healthy mothers and children, some employers have kept women out of certain job categories. The same rationale, however, did not apply when it came to backbreaking jobs in traditional female professions such as nursing. The few women who dared to pioneer in male jobs have experienced discrimination in pay and advancement. Often, the jobs denied to women were paying more and carried better benefits than traditional "female" jobs (Annas, 1991).

During the 1970s, the proportion of women in the workforce increased dramatically (Finneran, 1980). The Department of Labor (1987) published *Workforce 2000* (U.S. Department of Labor, 1997), a report on the changes in the workforce that showed the increased importance of women of all races and minority men to the American economy. (It is estimated that women and minorities will make up 62 percent of the workforce by the year 2005.)

Why should women be encouraged to enter the workforce and to pursue carriers? Should women have the same access to all job categories as men? The answer to these questions lies in the changing demographic composition of America and the dramatic shift from traditional families to different household make-up. Many of the women working today do so not out of choice but of need, even if they happen to be married. Most families cannot subsist by relying on one breadwinner; today, it often takes two incomes to get by. Furthermore, many families consist of a single parent with children, the majority of single parents being women. It is only fair that equal efforts should reap equal rewards, in that a wage gap, restrictions in job access, and hurdles in advancement for working women affect not only the women themselves but family income in general.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on grounds of race, color, religion, sex, or national origin. The only justification under Title VII for discriminating on the basis of religion, sex, or national origin is if the characteristic is a "bona fide occupational qualification (Annas, 1991)." Therefore, women may not be legally excluded from jobs without a proven relation of gender to job performance, or except if the characteristic is a "bona fide occupational qualification" and reasonably necessary to the normal operation of that particular business or enterprise. The federal Pregnancy Discrimination Act of 1978 goes one step further in addressing specific female concerns and prohibits sex discrimination based on pregnancy, childbirth, or related conditions. Discrimination can consist either of disparate treatment or of policies, practices and procedures not justified by business necessity and with disparate (adverse) impact.

Women and men are different

Some of the differences are due to socialization and modeling, but some seem to be innate. The recent run on girls' schools is partly explained by research findings that girls and

boys learn differently (Lewin, 1999); boys have a quicker reaction time, tend to dominate class discussions and prefer specific activities, spending more time in the block area. Even as males and females grow up, they may have different patterns of thinking and behavior. In terms of simplistic generalization, women tend to have a different style of negotiations, slightly different priorities and values, and a focus rather on long term as opposed to quick fix solutions. In the legal profession, women are known to often challenge the "take-no-prisoners" style of their male colleagues (Torry, 1996). Many men acknowledge that some women have a superior ability to "Cut through the fluff" and still maintain fruitful working relationships. Even as these differences carry over to the workplace, in most jobs, sex does not affect the ability to perform the core tasks of the job. Therefore, in the majority of cases, discrimination based on sex is not warranted.

However, there is one aspect of life where gender equality is impossible or at least debatable: women can bear children and men cannot. Every patriarchic society has nurtured deep resentment over the relative power of women stemming from this fact of life. Religion, law and medicine have traditionally teamed up to enforce the patriarchic agenda and to ensure that women will behave as their fathers, husbands, and sons think they should. In this context, control over women's reproductive capacity takes center stage, with regulations concerning birth control, female adultery, the mutilation of female sex organs, and rules of socially acceptable behavior. In past centuries, hundreds of midwives and "wise women" with knowledge of birth control have been burned on the stake (Robbins, 1997). The endless and bitter war going on at the porches of abortion clinics all over the US (and not only the US) is an outgrowth of this agenda. Abortions touch on one issue that is unresolved and therefore remains hotly debated: Who has the ultimate control over the female body and over unborn children? Who is ultimately responsible for the wellbeing of unborn children? Feminists and equal rights activists maintain that the age of (even "benevolent") paternalism is over and that women should have the power to decide these issues. This question may seem of rather ethical and academic nature, but has had some very practical impact on employment court cases in view of workplace hazards.

At the same time in the 1970s that the participation of women in the workforce increased, equally scientific knowledge expanded concerning exposure to hazards in the workplace. Simultaneously, public awareness dramatically increased as to the possible consequences of exposure to some of these hazards for the next generation: miscarriage, stillbirth, and birth defects (Finneran, 1980). However, the Equal Employment Opportunity Commission in collaboration with the US Department of Labor issued Interpretive Guidelines on Employment Discrimination and Reproductive Hazards on February 1, 1980, affirming that: "An employer / contractor whose work environment involves employee exposure to reproductive hazards shall not discriminate on the basis of sex (including pregnancy or childbearing capacity) in hiring, work assignment, or other conditions of employment" (Finneran, 1980). This position, given that it is not based on the precise scientific and medical evidence, can be perceived as an erroneous and indefensible legal standard.

In the workplace, there are two main types of health hazards that can attack the reproductive system. Mutagens cause mutations in the plasma of germ cells and change the genetic material or information encoded in the sperm of male employees and the ova of female workers. The damage results from the union of mutated cells and is then passed on, in

unpredictable ways, to the next generation. Mutagens affect men and women alike, and therefore, both male and female employees must be equally protected against them. OSHA regulates the exposure of employees to toxic materials and other quiet workplace hazards lurking in nasty substances, as well as exposure to physical conditions with mutagenic effect like radiation, etc.

More troubling than mutagens are teratogens. Teratogens attack the developing embryo in the womb at the earliest stages of a pregnancy, when not even the woman herself may know that she is pregnant. The placenta acts like a filter for many harmful substances and for infections. Teratogens harm the fetus by somehow passing through the placenta during the critical first trimester of the pregnancy and by causing developmental malformations. By the time the woman becomes aware of her pregnancy, the damage is already done. Exposure to teratogens can signify that the child may be so severely injured that it will die within the first months of the pregnancy; however, some fetuses will survive and will be born with more or less severe birth defects.

Birth defects accounted for more than 21 percent of all infant deaths in 1991 and are the leading cause of infant mortality in the US ("Surveillance…" 1980). About 5 percent of the 100,000 to 150,000 children born every year with a major birth defect (corresponding to 3 – 4 % of all infants) die before their first birthday. Birth defects contribute substantially to childhood morbidity, mental retardation and long-term disability. The costs for the care of children with birth defects are enormous and estimated to exceed $1.4 billion annually. A birth defect is defined as a structural abnormality present at birth, and the condition ranges from malformations (cleft lips and palates, for example) over deformations (clubfeet) to disruptions (breakdown of normal tissue). Birth defects are classified as major or minor and most of them occur as isolated defects, although 20 – 30 percent of affected infants suffer from multiple defects. This means that the defects occur in different organ systems or body sites, are not related to the same stage in embryo development and do not have a common underlying defect.

Two government agencies (the National Institute of Child Health and Human Development CDC and the National Center for Environmental Health's Centers for Disease Control and Prevention) and private, nonprofit organizations like the March of Dimes collect data about birth defects. A Birth Defects Monitoring Program is conducted by the CDC's Birth Defects Branch. The objective is to make the program nationwide and use it as a screening tool for geographic clusters and general trends. Before 1981, only Nebraska and New Jersey had laws that required reporting birth defects to the state health departments. In the meantime, the number of states participating has increased to about 20, but legislation differs widely among them as to the scope of data they collect (maternal, paternal and infant data) (Lynberg and Edmonds).

The prevention of birth defects is difficult, given that the specific causes of most (75%) are unknown. There are at least 3,000 types of birth defect syndromes, and a total of 161 categories of birth defects are currently analyzed quarterly to determine increases or other unusual trends. The BDMP functions primarily as an early warning system that is useful for correlating the incidence of birth defects with such trends as the temporal and geographic distribution of drugs, chemicals and other possible teratogens. Early intervention and information of families about recurrence risks are also part of the monitoring programs. (One lucky hit in this

context, for example, has been the link between folic acid in nutrition and the occurrence of spina bifida and anencephaly. Randomized clinical trials in the United Kingdom established the correlation and led the FDA to require that enriched cereal grain products must be fortified with folic acid.)

Identifying teratogens is like searching a haystack for the famous pin. A national monitoring program can help to recognize a birth defect epidemic resulting from the introduction of a new teratogen or increased exposure to old ones in a timely manner. As most teratogens are associated with a spectrum of birth defect combinations, the data collection and analysis need to be comprehensive and sophisticated. Several human teratogens have been identified up to date, spanning a wide field from ultrasound, pesticides, lead (as in paint), severe exposure to carbon monoxide (as of leaking furnaces) and all the way to congenital rubella. Exposure to any of these factors during the critical first trimester of a pregnancy can lead to fetal death or serious toxic effects, such as anatomical malfunctions and changes in psychomotor and mental development (Norman and Hamilton). Some teratogens even accumulate over the time of exposure, remain in the body, and may affect fetuses long after the exposure has ceased.

In the 1980s and early 1990s, the complexity of the issue led some employers to adopt fetal protection policies. The policies aimed at excluding all potential embryo carriers from jobs where there was a possible exposure to teratogens. The result was that many jobs that were better paying and provided more extensive benefits were thus denied to any women of childbearing age not provably sterile. Without a very persuasive scientific justification for the differential treatment, employers exposed themselves to the allegation of disparate treatment and violation of Title VII. The questions raised in court dealt with gender equality, fetal rights and employer responsibility for occupational health and safety.

A landmark case against fetal protection policies was International Union, United AutoWorkers v. Johnson Controls, Inc. (U.S. Sup CT., 55 FE PCases 365) (Annas, 1991; Finneran, 1980). Since 1977, Johnson Controls had advised women not to take jobs involving exposure to lead, and upon consulting medical experts, the company changed to excluding women from these jobs in 1982. In 1984, a class-action suit challenged the policy, and it went all the way to the Supreme Court. In March 1991, the Court held that these policies constitute disparate treatment on the basis of sex and are therefore illegal. The welfare of fetuses not yet conceived was perceived as neither at the core of the employee's job nor as the essence of the business of Johnson Controls, but in direct conflict with the Pregnancy Discrimination Act. The ruling in the case applies to all employers engaged in interstate commerce, as well as hospitals and clinics. Some heralded the decision as a victory for women and worker's rights, but at the same time it was highly controversial because it pitted the job rights of the pregnant worker against the health of the fetus. It ignored the fact that the risks are due to intra utero exposure and therefore reinforced the popular misconception that workplace toxins pose the same reproductive risks to men as to women. This is only correct considering the fetuses. The real issue is that no fetuses are at risk if a man is exposed to teratogens in the workplace, but there might be if a woman is.

The ruling contained several ambiguities (Samuels, 1996). The majority under Justice Blackmun hinted that a fetal protection policy might constitute a bona fide occupational

qualification if the potential tort liability threatened the solvency of the business. The two concurrent opinions provided further loopholes. Justice Byron White wrote that fetal protection policy might be permissible if it "was reasonably necessary to avoid substantial tort liability" but at the same time warned that the case might be used to undercut certain privacy rights. Justice Scalia contended that a fetal protection policy might be justified under a cost-based defense. Altogether, the ruling provided little guidance for lower courts, and some of them have adopted contradictory views and interpretations of some of the central tenets of the case in subsequent years.

The Johnson Controls case has been cited in the ongoing debate between advocates of "equal" versus "special" (preferential) treatment of pregnant women in the workplace (Annas, 1991; Finneran, 1980). The advocates of "special" treatment contend that pregnancy is unique and that employers must accommodate needs of pregnant women. Fetal protection policies bar women because they are "special" in the sense that they can become pregnant and carry a fetus. The ruling in the Johnson Controls case seems to suggest that the Supreme Court leans towards the "equal" position.

In California Federal Savings and Loan Association v. Guerra (4799.U.S.272 US Supreme Court, 1987), the Court ruled, however, that although the PDA does not require employers to give special treatment, it does not prohibit preferential treatment. Female rights advocates contend that some courts still place women's procreative role above all other roles, see them as primarily biologic instead of economic actors, and seem to permit discrimination when necessary to protect this role. In Hargett v. Delta Automotive (799 FSupp 326), for example, the court continued to see "fertile" women as a distinct class of people and ruled that the distinctiveness justified differential treatment.

Under federal law, the employer's only appropriate criterion (as under the ADA) is whether the pregnancy affects the women's ability to perform the major functions of her job. A woman may be put on leave or alternative duties if her pregnancy makes her physically unable to fulfill her regular duties, or if the work might endanger her own health or public safety. (An example might be female employees of a telephone company who, due to reduced agility and the shift in the center of gravity, can no longer safely climb telephone poles).

Johnson Controls was sued under Title VII and not under OSHA or the Toxic Substances Control Act. Accordingly, the Supreme Court decision failed to address the larger issue of workplace health and safety and the employer's responsibility for providing a safe workplace. Instead of improving the overall conditions for all employees (male and female alike), the ruling left women in the same position as men to "choose" employment in dirty, hazardous workplaces. In that sense, the Johnson Controls ruling amounts to a step backward for all employees.

Other issues the Supreme Court did not resolve are the ability of employers to control their costs by limiting tort liability. In the ruling, the Court concluded that liability for the employer seemed "remote at best", if the employer followed OSHA guidelines and fully informed its workers of the risks involved, given that the child would have to prove negligence (Annas, 1991). The main concurring opinion of Justice Byron White, however, hinted that even

in the absence of negligence, employers might be held strictly liable under certain circumstances. The confusion, therefore, is complete.

Under the traditional view, mothers and fetus were inseparable. Only the mother could receive compensation for workplace injuries and was covered under the worker's compensation system. The Workers' Compensation Appeals Board exclusively decided injuries within the course and scope of employment. Major exceptions to this exclusive remedy doctrine were cases dealing with intentional torts, injuries sustained from operating a power press and damages that occur as a result of "fraudulent concealment" of a known toxin. All other lawsuits were barred under workers' compensation laws, which is a no fault system.

Recently, the view of courts shifted. The ruling in the Johnson Controls case did not address the issue of fetal rights. However, under current law, fetuses are treated as third parties ("Worker's Compensation…" 1999). In 1997, the California Supreme Court decided accordingly that children may sue their mother's employer for fetal injuries sustained in utero that are due to unsafe work conditions during pregnancy (Mikaylam v. Michael's Stores 97 Daily Journal D.A.R. 13501). As the employer would have been liable to any third party customers, employers may now be liable in civil court when pregnant workers are exposed to conditions that hurt their fetus. The Court reasoned that the "Compensation Bargain" underlying the workers' compensation system does not include third party injuries. The mother cannot sign a waiver for her fetus, as the compensation belongs to the baby, the third party, and not to the mother. As there is no cap on damages to third parties, this has serious implications for any employer. Injuring a fetus can be catastrophically expensive.

In Texas, parents of children born alive with birth defect caused by prenatal injuries have cause of action under the wrongful death statute if the child dies as a result of the birth defects (Finneran, 1980). Texas courts have not decided yet whether to declare a fetus a person within the meaning of the wrongful death statute, which would mean that parents of stillborn children could also sue. Surviving children with birth defects would be able to sue for personal injuries, pain and suffering, loss of earning capacity and any other damages. As the damages question is largely left to the discretion of the jury, and in view of the "deep pocket syndrome", many employers are very concerned about potentially large tort recoveries.

Can the employer decide what is best for the fetus and ban the mother from unsafe workplaces to protect the company from litigation? The answer is no, according to UAW v. Johnson Controls, Inc. The Supreme Court, in the Johnson Controls case, found that "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents" (International Union v. Johnson Controls, 111 S.CT. 1196 , 1991).

Employers also cannot automatically reassign pregnant employees to areas without exposure to work hazards (EEOC v. Sundstrand Corp., D.C. N. IL, No. 92-C-20287, 1995) or be placed on involuntary medical leave without their doctor's agreement (Deneen V. Northwest Airlines, Inc., 8th Cir, WL 1829, 1998). Companies can only inform employees of the risks involved in each position and must leave the decision to the pregnant employee whether or not to continue working ("Discrimination…" 1999).

The role of the company is to warn employees of potential risk and to provide alternative employment opportunities to the women if she becomes pregnant. The risk assessment must be based on scientific evidence. If the woman makes an informed choice to expose her fetus to workplace toxins, the employer cannot interfere. According to six out of nine Supreme Court Justices, state tort liability is preempted so long as the employer follows federal law, informs workers of the risks, and is not negligent (Annas, 1991). However, as mentioned above, subsequent court rulings have been contradictory.

Opponents of fetal protection policies argue that it is useless and unfair to worry future mothers with accounts of minimal risk factors from workplace teratogens. Instead, they should be made aware and conscious of the scientifically proven and established risk for fetal health resulting from smoking, alcohol and drug consumption. Women's rights advocates claim that it is entirely the future mother's choice to determine how she will treat the fetus and whether she will give birth at all. They usually fail to mention that rights are tied to responsibilities. Logically, if a woman can decide to have an abortion, which by some is regarded as the worst thing she can do to the fetus, why should there be any other restrictions on conditions she may inflict on it? To my mind, the difference is that an unborn child will not be a burden to any one, except to its mother's conscience. On the other hand, a child born with birth defects can pose a strain exceeding any family's budget and the burden will ultimately have to be shouldered by society as a whole. Can a future mother assume a responsibility surpassing her realm of influence (because the child may survive her) and her family's means? I think that this constitutes negligence at worst and arrogant stupidity at best.

As the parties at risk by teratogens are fetuses of both male and female sex, the charges of sexual discrimination are debatable, even when only pregnant women are directly affected. The issue might be perceived rather as a neutral health issue than a sex-based decision.

Interestingly, some states seem to contend that somebody has to protect the unborn children against the uncurbed exercise of individual rights by their own mothers (The New York Times, 1998). South Carolina's Supreme Court ruled that a viable fetus is legally a child and that the future mother who exposes it to detrimental influences can be prosecuted for child abuse. Accordingly, the court, in a very controversial ruling, sentenced Malissa Ann Crawley, who had been smoking cocaine while being pregnant, to five years in prison. On July 1, 1998, South Dakota, as another example, became the first state to allow judges to order pregnant women who drink into alcoholism treatment ("Pregnant Drinkers…" 1998). The Governor or Wisconsin was also expected to sign a bill that would permit the state to take pregnant women abusing drugs or alcohol into custody ("In America…" 1998). South Dakota and Wisconsin seem to be aware of the fact that it is cheaper to treat mothers with addiction problems than to imprison them. Still, these are extreme measures. Some contend that in order to prevent misery and hardship resulting from avoidable birth defects, the end justifies the means. If pregnant women cannot be expected to voluntarily watch out for the best of their babies, the consensus in South Dakota, Wisconsin and South Carolina seems to be that they should be nudged by legal measures.

The party at risk, the fetus, cannot consent to being exposed to potentially harmful substances, be it in the workplace or elsewhere. As a whole, it is still up to the mother to make the decision. There is nothing wrong with this as long as the choice is real and is an informed

choice. Opponents of fetal protection policies argue that the policies tend to suffer from over-inclusiveness, as they also affect women planning to delay or avoid childbearing (this does not take into consideration that some teratogens accumulate, as said above). In an age when many participants in the workplace lack elementary math and reading skills, do we really expect these employees to make informed choices about their pregnancies? Unwanted pregnancies happen all the time, and even planned pregnancies are unpredictable. Will a pregnant single mother of two really switch to a less paying job in order not to hurt the next baby? She might under some circumstances, but the odds are against it. More probably, she will hope for the best and try not to think about birth defects unless she has to, that is when she is confronted with the fait accompli. I think it is highly immoral and hypocritical of a society to present a pro forma choice to people who do not really have alternatives, and then to push the burden of guilt on them in addition.

The embryo is the most vulnerable workplace participant. According to John Rawls' theory of justice (Rawls, 1971), every law must protect the least favored members of society. If a society is to be judged by these standards, then it will have to defend unborn children from workplace hazards in case their mothers are not in the position to make the right choice. For the sake of the next generation's welfare and society's welfare as a whole, some individual pseudo rights aimed at short-term material gain may be worth sacrificing. The real issue in fetal protection is that, in the long run, society should aim at eliminating workplace hazards altogether; in the meantime, women of childbearing age who are not proven sterile should not be working in jobs where they are exposed to identified teratogens.

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