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## ARTICLES

# Beyond Protection: Relevant Difference and Equality in the Toxic Work Environment

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*This Article examines the Supreme Court's decision in California Federal Savings & Loan Association v. Guerra and its application to the equal treatment/special treatment debate. It focuses on using the California Federal decision as a tool to protect pregnant workers in the toxic work environment. The Article discusses the requirements necessary for state legislation and private employer plans for the toxic work environment to be compatible with California Federal's interpretation of the Pregnancy Discrimination Act.*

### INTRODUCTION

A legal system must attempt to assure fairness. Fairness must have reference to real human predicaments. Abstract universality is a convenient device for some philosophical pursuits, or for any endeavor whose means can stand without ends, but it is particularly unsuited for law. Law is, after all, a social tool. It is only extrinsically important. Its actual value depends upon its success in promoting that which is intrinsically valuable.\*\*

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\*\*Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373,

Pregnant employees who work in environments that jeopardize the health and safety of the fetus are caught in a web of equal treatment. The equal treatment standard makes pregnancy irrelevant in the workplace and does not permit recognition of the duality of the pregnant worker's existence: She is an employee and she is also carrying a fetus. Obviously, the pregnant employee wants to have a healthy baby. However, the equal treatment standard may prevent her from doing so.

The Pregnancy Discrimination Act (PDA),<sup>1</sup> as interpreted under the equal treatment standard, has encouraged female workers to view their pregnancy as incidental to their working experience. This effect prohibits or discourages treatment that facilitates the pregnancy's purpose — the birth of a healthy child. To provide her rights as an employee at the expense of her fetus places the female worker in a dilemma. The equal treatment interpretation of the PDA requires employers to ignore pregnancy to avoid federal liability. This dichotomy is treacherous because it severs the employee's work from her personal life at a cost that neither the worker, the fetus, nor society should bear. Laws purporting to mainstream pregnant workers must make work compatible with the worker's ability to bear a healthy child.

The PDA was Congress' reaction to the Supreme Court's interpretation of Title VII's ban on sex discrimination in *General Electric Company v. Gilbert*.<sup>2</sup> *Gilbert* held that a benefit plan that discriminated on the basis of pregnancy was not discrimination based upon sex.<sup>3</sup> This interpretation of the PDA's legislative history indicates that its explicit purpose was to overturn *Gilbert*.<sup>4</sup> It also reveals concern for eliminating the image of women workers as marginal, uninterested in long-term

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1380 (1987).

<sup>1</sup> The Pregnancy Discrimination Act of 1978 was passed as an amendment to Title VII of the Civil Rights Act of 1964 [hereafter Title VII]. 42 U.S.C. § 2000e(k) (1982).

<sup>2</sup> 429 U.S. 125 (1976).

<sup>3</sup> *Id.* at 145-46.

<sup>4</sup> See, e.g., *Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 6, 11-15 (1977) (statement of Sen. Birch Bayh). As noted in a previous article: "The *Gilbert* decision is so widely referred to in the legislative history that a complete catalogue of its appearance is unmanageable." Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment of Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 79 n.76 (1980). For further discussion of the legislative history on this point see *id.* The major obstacle to the PDA's passage was congressional concern about employer responsibility to pay for abortions. See *Joint Explanatory Statement of the Committee on Conference*, H.R. CONF. REP. NO. 1786, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4765; see also Furnish, *supra*, at 81-82.

employment, and frivolous because of their childbearing capacity.<sup>5</sup>

The PDA did more than overturn *Gilbert*. It stated:

The terms "because of sex" or "on the basis of sex" include, but are not limited to because of or on the basis of pregnancy, child-birth, or related medical conditions; and women affected by pregnancy, child-birth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work, and nothing in § 2000e-2(h) of this title shall be interpreted to present otherwise.<sup>6</sup>

A literal reading of the PDA requires employers to treat pregnant women the same as other workers similarly situated in their ability to perform the job. Shortly after Congress passed the PDA, several articles analyzed the PDA's effect on women who worked in fetally toxic work environments.<sup>7</sup> These early articles highlighted an obvious problem: How to reconcile a statute that forbids employment distinctions based on pregnancy with the possibility that certain work environments cause harm to the fetus. Early commentators differed as to the amount and severity of fetal harm that results from toxic work environments. Also at issue was the impact of toxins on the reproductive systems of men and women, and the wisdom of using Title VII defenses when an employer's exclusion of pregnant or fertile women from work situations was supported by a sufficient showing of fetal harm.<sup>8</sup> Early commentators agreed that the PDA required equal treatment of pregnant women based on their ability to perform the job. They disagreed on whether this was wise.<sup>9</sup>

The dilemma of the pregnant woman in the toxic work environment has not eased since those first articles appeared. As some commentators feared, courts conceded the possibility that existing Title VII defenses

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<sup>5</sup> See, e.g., *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 4-20 (1977) (statement of Wendy Williams); see also Furnish, *supra* note 4, at 81.

<sup>6</sup> 42 U.S.C. § 2000e(k) (1982).

<sup>7</sup> See, e.g., Furnish, *supra* note 4; Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981).

<sup>8</sup> Compare Furnish, *supra* note 4, at 66-74, 90-103, 119-29 with Williams, *supra* note 7, at 655-68, 682-96.

<sup>9</sup> Compare Furnish, *supra* note 4, at 84, 118-19 with Williams, *supra* note 7, at 667-68.

based on potential fetal harm could be used in certain circumstances to exclude pregnant women from toxic work environments.<sup>10</sup> I argued in an earlier article that such mishandling of Title VII defenses to meet a perceived problem was both unacceptable for the development of Title VII jurisprudence and an insufficient response to the problem.<sup>11</sup>

Much has been written since then about how much "special treatment" women should demand in light of their reproductive capacity.<sup>12</sup>

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<sup>10</sup> See *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). Other authors note that the *Hayes* court seemed more sensitive to concerns about misusing Title VII defenses than the *Olin* court. See Note, *Getting Beyond Discrimination: A Regulatory Solution to the Problems of Fetal Hazards in the Workplace*, 95 YALE L.J. 577, 583, 586-91 (1986) [hereafter Note, *Beyond Discrimination*].

<sup>11</sup> Furnish, *supra* note 4, at 100-03, 118-19.

<sup>12</sup> Choosing the proper terms for the concepts is problematic: equal treatment/special treatment, parity/preference, assimilationist/incorporationist. These terms cannot capture the texture and subtlety of the raging debate. This Article assumes that the reader has at least passing familiarity with the elements of the purported dichotomy. In this Article, the terms "equal treatment" and "special treatment" represent a simplistic shorthand for a complex tapestry of ideas. The literature on this subject is vast and rich. See Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) [hereafter Scales, *Feminist Jurisprudence*]; Note, *Employment Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985) [hereafter Note, *Employment*]; Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

Professor Finley's article rejects both the special treatment and the equal treatment approaches, arguing that both are flawed because they accept a male norm as a measure. She argues that one can only be treated the same or differently when compared to a standard. Finley, *supra*, at 1153. The equal treatment advocates use the male norm as the proper measure for equal treatment of women, *i.e.*, treating women as if they were men and ignoring any differences: "Be a man and you will succeed in a man's world." *Id.* at 1155. According to Professor Finley, special treatment advocates do not escape the same trap because "special" has a pejorative cast to it. "Special" means different from (and therefore inferior to?) the male norm. *Id.* at 1157. Professor Finley sees the special treatment and equal treatment advocates locked in an endless and futile debate about relevant sameness and relevant difference, rather than working for meaningful change. *Id.* at 1159; see also MacKinnon, *Difference and Dominance: On Sex Discrimination* in THE MORAL FOUNDATIONS OF CIVIL RIGHTS 144-45, 149, 151 (R. Fullinwider & C. Milles eds. 1986); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1375-76 (1986) [hereafter Scales, *Emergence of Feminist Jurisprudence*]. As Professor Finley eloquently states:

I sense that we will have lost something very fundamentally human in such a world of no "real" differences. My sense of loss stems from a feeling that I as a woman want to be able to revel in the joy and virtually

Some commentators argue that any attempt to accommodate a woman's childbearing capacity encourages limits on women's rights in proportion with their reproductive capacity.<sup>13</sup> Others argue that true equality of opportunity requires recognition of women's childbearing capacity.<sup>14</sup>

The tension between these two positions was inherent but not necessarily stated in the earliest articles on the PDA. Although the differences in ideology transcend the PDA,<sup>15</sup> it has become a focal point for the equal treatment/special treatment debate.

Few *effective* legal vehicles have appeared for crystallizing the jurisprudential debate on the PDA.<sup>16</sup> Even fewer cases deal with the toxic

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mystical specialness of having a baby. What I do not want is to be punished for this wonderful gift at the same time. My feeling that something will be missing in this ideal androgynous world also comes from a fear that it rests on a vision of equality that says we can all be equal if we just strip away all our differences. Life in such a world would be boring, impoverished and unenriching.

Finley, *supra*, at 1139-40. Professor Finley's argument is persuasive, although harsh on special treatment advocates. Unlike equal treatment adherents, special treatment advocates recognize relevant differences. Because society is so conditioned by the male norm and by Title VII's predominantly "neutral" (*i.e.*, male) jurisprudence, perhaps some special treatment advocates are a bit "hangdog" in their assessment of the desirable scope for special treatment. See MacKinnon, *supra*, at 145; Scales, *Emergence of Feminist Jurisprudence*, *supra*, at 1377. In the future we will see less apologizing and more amplifying and affirming by special treatment advocates. As Professor Finley herself notes, these things develop one step at a time. Finley, *supra*, at 1177-79. Professor Finley believes we should concentrate more on responsibility analysis rather than on special treatment. Her article is enriching.

<sup>13</sup> Professor Williams is recognized as the most effective spokesperson for this position. See Williams, *supra* note 12, at 327, 354-63, 371-73.

<sup>14</sup> See, *e.g.*, Kay, *supra* note 12; Scales, *Emergence of Feminist Jurisprudence*, *supra* note 12; Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983) [hereafter Note, *Sexual Equality*].

<sup>15</sup> See *supra* notes 8-11 and accompanying text.

<sup>16</sup> See California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987); Miller-Wohl Co. v. Commissioner of Labor & Indus., 692 P.2d 1243 (Mont. 1984), *vacated and remanded*, 107 S. Ct. 919 (1987); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982). I intentionally omit Newport News Shipbuilding Dry Dock v. EEOC, 462 U.S. 669 (1983) from this list. *Newport News* was the first case in which the Supreme Court addressed the PDA's coverage. However, it did not provide a vehicle in which the equal treatment/special treatment debate received full play. In *Newport News* the Supreme Court held that an employer who covered expenses for childbirth and related medical conditions for spouses and dependents of employees at a lower rate than other medical conditions incurred by spouses and dependents violated Title VII by discriminating on the basis of sex. An employer who singled out pregnancy for lower coverage in spousal benefit programs necessarily discriminated against male employees, since their spouses

work environment issue.<sup>17</sup> Lower courts confronted with the issue have provided unsatisfying results. Unsatisfying from the standpoint of Title VII jurisprudence and unsatisfying, one would suspect, both to the equal treatment adherent and the special treatment advocate. Much of the recent scholarly debate on the PDA and the equal treatment/special treatment ideology focuses on the easier question of how to treat women who are physically disabled by pregnancy or childbirth.<sup>18</sup>

The Supreme Court first dealt with the equal treatment/special treatment issue in *California Federal Savings & Loan Association v. Guerra*.<sup>19</sup> Although *California Federal* does not address toxic work environment issues, this Article demonstrates *California Federal's* usefulness to the debate over the toxic work environment dilemma. Part I

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were at risk of pregnancy while the spouses of women employees were not. While *Newport News* holds some clues for the Court's resolution of the more fundamental interpretative debate over the PDA in its pronouncement that the two clauses of the PDA should be read separately, the issue raised in *Newport News* does not crystallize the equal treatment/special treatment debate.

<sup>17</sup> See, e.g., *Hayes*, 726 F.2d at 1543; *Wright*, 697 F.2d at 1172.

<sup>18</sup> See, e.g., Kay, *supra* note 12; Note, *Pregnancy and Equality: A Precarious Alliance*, 60 S. CAL. L. REV. 1345 (1987). Even those commentators who look at the issue more generally tend to give less thorough and convincing analysis to the toxic work environment problem. One reading the literature occasionally senses that the writers wished it was not a problem that affected women differently than men. See *infra* text accompanying note 69; see, e.g., Finley, *supra* note 12, at 1130-31; Kay, *supra* note 12, at 25 n.135, 29. But see Note, *Beyond Discrimination supra* note 10, at 579-81; cf. Note, *Employment, supra* note 12, at 954 n.113.

This reluctance is paradoxical. Admitting that during pregnancy the fetus is vulnerable through the mother to toxins creates grave difficulties for pure equal treatment adherents and those who view pregnancy as simply irrelevant to achieving equality. However, it is difficult to see what we achieve for working women by pretending no real issue exists or by attempting to minimize it either by claiming lack of scientific certainty or by recognizing no relevant differences between men and pregnant women. We may achieve a comforting formalism in our treatment of the sexes, but at a cost to pregnant employees. "Women as gendered selves are constrained in and by the institution of motherhood, . . . [but] also recognize[] and value the positive aspects of biological motherhood." Z. EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY: CRISIS IN LIBERAL AMERICA* 244-45 (1984). Feminists who purport to embrace or at least understand this concept should be concerned about minimizing the dilemma working women face (or remain ignorant of) when they become pregnant. The way we choose to frame this issue is critical. As Professor Littleton stated: "The underlying pragmatism of feminist jurisprudence develops from the requirements of good feminist methodology and practice. Feminists cannot ignore the concrete experience of women; it is the foundation of both feminist theory and practice. And theory that does not work in practice is bad theory." Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1, 6 (1987).

<sup>19</sup> 107 S. Ct. at 683.

provides a brief review of the *California Federal* opinion and its implications for the toxic work environment issues.<sup>20</sup> Part II analyzes *California Federal's* implications for private employer policies dealing with the toxic work environment issue without state legislation.<sup>21</sup> Part III examines the permissibility of state legislation that addresses the toxic work environment dilemma.<sup>22</sup> It suggests a standard to use in drafting such legislation and the policy justifications for pursuing that course.<sup>23</sup>

### I. *California Federal Savings & Loan v. Guerra*: A KEY TO THE TOXIC WORK ENVIRONMENT DILEMMA

*California Federal* is the first Supreme Court decision that directly addresses the equal treatment/special treatment debate. *California Federal's* application to the toxic work environment dilemma is not contained by its facts. This Article first analyzes the salient aspects of *California Federal* and then demonstrates how those salient aspects assist the analysis of the toxic work environment dilemma.

#### A. *The California Federal Opinion*

*California Federal* addressed a challenge to section 12945(b)(2) of the California Fair Employment and Housing Act, which required an employer to grant a pregnant employee "reasonable" leave. Leave was granted if the employee had a physical disability that did not exceed four months. The employer could deny the leave on the basis of a bona fide occupational qualification.<sup>24</sup>

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<sup>20</sup> See *infra* notes 24-61 and accompanying text.

<sup>21</sup> See *infra* notes 62-97 and accompanying text.

<sup>22</sup> See *infra* notes 98-115 and accompanying text.

<sup>23</sup> See *infra* notes 116-35 and accompanying text.

<sup>24</sup> CAL. GOV'T CODE § 12945(b)(2) (West 1980). The California legislature passed the statute in reaction to the Supreme Court's decision in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), but prior to congressional adoption of the PDA. The Supreme Court summarized the history of § 12945(b)(2) in *California Fed. See California Fed.*, 107 S. Ct. at 686 n.1. Many sections of the California statute no longer apply to employers covered by Title VII. *Id.* Section 12945(b)(2) was saved by express amendment and applies to employers who are subject to Title VII. *Id.* A definitive state interpretation of § 12945(b)(2) required employers to give pregnant women up to four months unpaid leave if necessary to accommodate the pregnancy and the birth of the child. *Id.* at 687. The state interpretation of the statute also required the employer to reinstate the woman to her prior position unless "business necessity" foreclosed that possibility. *Id.* If so, the state required the employer to make a good faith effort to secure a substantially similar job for her. *Id.* This statutory interpretation placed the burden of demonstrating reasonable reinstatement on the employer. It also gave pregnant women

The question in *California Federal* was whether the state could confer this right to leave and reinstatement on pregnant women who were employed subject to Title VII and the PDA. *California Federal* also addressed whether the state could require employers to treat pregnant women differently from other employees when the PDA literally required equal treatment.

The issue in *California Federal* lined up the equal treatment/special treatment advocates. The employer, California Federal, and its amicae argued that the PDA mandated equal treatment for women, and the PDA therefore preempted the California Act.<sup>25</sup> The State and its amicae argued that the consistency of the PDA's purpose with section 12945(b)(2) saved the California statute from preemption.<sup>26</sup>

The Ninth Circuit Court of Appeals held that the PDA provided a federal floor, a minimum standard, below which private employers could not go in their treatment of pregnant women.<sup>27</sup> The PDA was not a ceiling to contain the benefits. Further, it found that the California statute was consistent with the existence of a floor and that the PDA did not preempt it.<sup>28</sup>

The Supreme Court affirmed the Court of Appeals. It found the California statute compatible with the purposes of Title VII.<sup>29</sup> The Court emphasized that the regulatory scheme under Title VII presupposed a large area of state regulation to ensure equal employment.<sup>30</sup> In concluding that Title VII's preemptive scope is "severely limited," the

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statutory rights that no man and no nonpregnant woman had — the right to up to four months leave from a job, if necessary, and a reasonable right to reinstatement.

<sup>25</sup> See Petition for Writ of Certiorari at 11 n.8, 18 n.13, *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683; Brief for Petitioner at 10, *California Fed.*, 107 S. Ct. 683; Brief for the United States supporting Petitioner at 18, *California Fed.*, 107 S. Ct. 683. Some amicae that argued for equal treatment claimed that the statute was preempted unless extended to protect workers disabled by conditions other than pregnancy and urged the Court to extend the benefits and save the statute. See Amicus Brief of the American Civil Liberties Union at 9, *California Fed.*, 107 S. Ct. 683; Amicus Brief of the Equal Employment Advisory Council at 17, *California Fed.*, 107 S. Ct. 683.

<sup>26</sup> Brief for Respondents at 12, 41, *California Fed.*, 107 S. Ct. 683; Amicus Brief of the Coalition for Reproductive Equality at 17-23, *California Fed.*, 107 S. Ct. 683; Amicus Brief of the National Conference of State Legislatures at 11-13, *California Fed.*, 107 S. Ct. 683; Amicus Brief of the State of Connecticut at 15-16, *California Fed.*, 107 S. Ct. 683; Amicus Brief of Equal Rights Advocates at 9, *California Fed.*, 107 S. Ct. 683.

<sup>27</sup> *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d at 390 (9th Cir. 1985).

<sup>28</sup> *Id.* at 396.

<sup>29</sup> *California Fed.*, 107 S. Ct. at 689.

<sup>30</sup> *Id.* at 689-90.



Court relied on the antipreemption provisions of the Civil Rights Act.<sup>31</sup> The Court held that the PDA allowed the states to require more than the federal statute mandated. It allowed them to raise the floor when the state statute's goals were compatible with Title VII's goals as amplified by the PDA's language and its legislative history.<sup>32</sup>

The Court expressly rejected a literal reading of the PDA and the equal treatment interpretation that restricted the congressional purpose behind its passage. The Court cited the PDA's legislative history to bolster its interpretation,<sup>33</sup> but ultimately based the opinion on two separate grounds. First, reading the statute to require equal treatment made literal sense but did not comport with the broader purposes of Title VII.<sup>34</sup> The Court read the PDA's second clause, which mandates an equal treatment standard, as overturning *Gilbert*. It found the second clause did not limit the first clause, which defines sex discrimination to include pregnancy, childbirth, and related medical conditions.<sup>35</sup> Although the PDA did not require special consideration for pregnant women, it did not expressly prohibit "preferential" treatment for them.<sup>36</sup> The PDA's failure to expressly prohibit special treatment allowed the Court to decide whether such "preferential" treatment was compatible with Title VII's purposes as amended by the PDA.

Second, and more critically, the Court recognized that the California statute, like the PDA, was aimed at achieving equal employment opportunity by removing barriers that had historically disadvantaged an identifiable group.<sup>37</sup> The California statute was aimed at rectifying inadequate disability leave policies that disadvantaged pregnant women's employment opportunities.<sup>38</sup> This goal was consistent with the PDA's goal of permitting women the "basic right to participate fully and equally in the workforce, without denying them the fundamental right

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<sup>31</sup> *Id.* at 690. First, it used the antipreemption section of Title VII, 42 U.S.C. § 2000e-7 (1982). Title VII reflected Congressional intent to preserve a large sphere to state regulation. *Id.* at 689-90. Second, it relied on the more general and slightly different antipreemption provision that applies to all titles of the Civil Rights Act of 1964. 42 U.S.C. § 2000h-4 (1982). The term "antipreemption" statute is used here. Justice Scalia used this term in his concurring opinion because the section forbids preemption unless certain conditions are met. See *California Fed.*, 107 S. Ct. at 697 (Scalia, J., concurring).

<sup>32</sup> *California Fed.*, 107 S. Ct. at 693-94.

<sup>33</sup> *Id.* at 692-93.

<sup>34</sup> *Id.* at 691.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 692-93.

<sup>37</sup> *Id.* at 693.

<sup>38</sup> *Id.* at 694.

to full participation in family life.”<sup>39</sup>

After the Court decided that the statutes’ goals were compatible, it noted that the PDA’s legislative history did not suggest Congress intended the PDA to supplant state regulation.<sup>40</sup> The Court carefully phrased its holding by emphasizing the “limited” nature of the “benefits” that the California statute guarantees to women.<sup>41</sup> The opinion emphasized that the statute covers only the period of actual disability and was not based on stereotypic notions inconsistent with Title VII.<sup>42</sup>

Justices Stevens and Scalia each wrote concurring opinions.<sup>43</sup> Justice Stevens forthrightly rejected the proposition that pregnancy must be treated neutrally under the PDA.<sup>44</sup> He relied on *United Steelworkers v. Weber*<sup>45</sup> to find that some preferential treatment is permissible even when Title VII speaks in a neutral voice.<sup>46</sup> Although Justice Stevens did not describe how to separate acceptable preferential treatment from unacceptable preferential treatment, he did emphasize the need for contextual evaluation of the challenged “preference” based on Title VII’s goal of achieving equal employment opportunity.<sup>47</sup>

Justice Powell and Chief Justice Rehnquist joined in Justice White’s dissent.<sup>48</sup> The dissent adopted a literal reading of the PDA’s second clause, which left “no room” for preferential treatment of pregnancy.<sup>49</sup> It rejected the Ninth Circuit’s ceiling/floor analogy as incompatible with the statute’s unambiguous expression of the equal treatment standard.<sup>50</sup> The dissent repeated amicae’s concerns that the majority’s interpretation of the PDA would bring back nineteenth-century female stereotypes rather than allowing women, “like men,” to have jobs and families.<sup>51</sup> In the dissent’s view, the legislative history did not support the majority’s radical departure from the statute’s literal reading.<sup>52</sup> Further, it felt that policy matters should be addressed solely by Con-

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<sup>39</sup> *Id.* at 693-94 (quoting 123 CONG. REC. 29,658 (1977) (remarks of Sen. Williams)).

<sup>40</sup> *Id.* at 693.

<sup>41</sup> *Id.* at 694.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 695 (Stevens, J., concurring), 697 (Scalia, J., concurring).

<sup>44</sup> *Id.* at 695-96 (Stevens, J., concurring).

<sup>45</sup> 465 U.S. 792 (1984).

<sup>46</sup> *California Fed.*, 107 S. Ct. at 696 (Stevens, J., concurring).

<sup>47</sup> *Id.* at 696-97 nn.3-4 (Stevens, J., concurring).

<sup>48</sup> *Id.* at 698 (White, J., dissenting).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 699 (White, J., dissenting).

<sup>51</sup> *Id.* at 699-700 (White, J., dissenting).

<sup>52</sup> *Id.* at 699-701 (White, J., dissenting).

gress and not the judiciary.<sup>53</sup>

B. *California Federal's Utility in Resolving the Toxic Work Environment Dilemma*

*California Federal* addresses only the issues of unpaid disability leave and limited reinstatement rights for pregnant workers presented as a legal option under a state statute. However, those limitations do not prevent applying *California Federal* beyond its facts. *California Federal* is liberating because it recognizes difference without implying inferiority.<sup>54</sup>

The opinion should help to reconcile the pregnant employee's interests in employment and fetal health. The Court's recognition of the nonstereotypic differences based on pregnancy and childbirth eliminates the concern that the PDA's literal reading will thwart all state legislation or employer policies dealing with toxic work environments and pregnancy. The question remains whether state legislation or employer policies in this area can comport with the spirit of the PDA and Title VII.

In *California Federal* the Court was careful not to extend its holding beyond the facts before it. The majority did not refer to other similar work policies such as "volunteer" employer programs that provide longer disability leaves for pregnancy than for other conditions. Nor did it consider the possibility that states might enact statutes that require minimum paid disability leave only for pregnant women and not for other disabled workers. The *California Federal* opinion did not hint at the toxic work environment issue. However, *California Federal's* thrust and tone suggest that employment distinctions are compatible with the PDA if they are based solely on the physical reality of pregnancy and childbirth and if such distinctions actually advantage rather than penalize pregnant women. The Court's willingness to abandon the PDA's literal reading provides an opportunity to recognize the legitimate physical differences between pregnant and nonpregnant persons in the toxic work environment. *California Federal* grants the opportunity, but limits any potential for abuse.

*California Federal* also releases the toxic work environment dilemma from the chains of traditional Title VII defenses which are ill-suited to the toxic work environment problem and to the PDA's literal

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<sup>53</sup> *Id.* at 700 (White, J., dissenting).

<sup>54</sup> Professor Finley argues for the need to recognize uniqueness without creating inferiority to a male norm. See Finley, *supra* note 12, at 1154-61.

language.<sup>55</sup> Some commentators explicitly recognized the impropriety of Title VII defenses in toxic work environments.<sup>56</sup> The strained analysis necessary to justify the application of these defenses in the toxic work environment demonstrates this impropriety.<sup>57</sup> *California Federal* makes reliance on traditional Title VII defenses unnecessary because it recognizes biological differences without penalizing pregnant women.

*California Federal's* reliance on an analysis which assumes that Congress would have prohibited preferential treatment if that was its intent, can be applied to the private employer voluntary plan as well as state regulation on toxic work environments and pregnancy.<sup>58</sup> In this context, Justice Stevens' reliance on *Weber* in his concurring opinion has particular significance.<sup>59</sup> *Weber* approved an employer's self-im-

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<sup>55</sup> The two defenses to Title VII claims that have greatest applicability are: (1) the statutory defense to claims of express discrimination on the basis of sex — the Bona Fide Occupational Qualification (BFOQ) defense; and (2) the court-created defense to claims that neutral employer rules or criteria for employment have an adverse impact on groups protected by Title VII — the defense of business necessity. These are distinct defenses, applicable in distinct cases. Both suggest that the employer must prove a job-related reason for the employment practice in question, although some contend business necessity permits the use of other reasons closely tied to business practice. See Furnish, *supra* note 4, at 94-95, 100-01, 102-03; Note, *Beyond Discrimination*, *supra* note 10, at 586-91; see also Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419, 425-40 (1982); Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869, 917-20; Note, *Employment*, *supra* note 12, at 946, 948-49.

<sup>56</sup> Furnish, *supra* note 4, at 94-95, 100-01, 102-03; Howard, *supra* note 7, at 834-35; Note, *Beyond Discrimination*, *supra* note 10, at 586-91.

<sup>57</sup> See Furnish, *supra* note 4, at 94-95, 100-01. The problems with *Olin* and *Hayes* are discussed in Note, *Beyond Discrimination*, *supra* note 10, at 586-91.

<sup>58</sup> One could argue to the contrary that the Supreme Court's recognition of the validity of state legislative attempts to provide special or preferential treatment for pregnant women in certain limited circumstances does not necessarily sanction private employer attempts to practice special treatment. The role expressly reserved to the states under Title VII bolsters their claims for room to regulate in ambiguous circumstances. Private employers have no such entitlement to judicial favor and their preference programs might not pass scrutiny solely for that reason. *California Fed.* does not address this point, but while the opinion focuses on state regulation, the extension to private employers is natural. One might ask whether the result in *California Fed.* would be different if a private employer had offered a voluntary disability leave regulation rather than a statute imposed on all employers — the answer is no.

<sup>59</sup> *California Fed.*, 107 S. Ct. at 695-97 (Stevens, J., concurring). A footnote in *California Fed.*'s Ninth Circuit opinion cited *United Steelworkers v. Weber*, 443 U.S. 193 (1979) for the proposition that equality does not mean sameness of treatment. *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 n.7 (9th Cir. 1985). The Supreme Court majority opinion in *California Fed.* also relies on *Weber*. *California*

posed affirmative action plan as consistent with Title VII.<sup>60</sup> Justice Stevens' use of *Weber* suggests direct application of *California Federal's* framework to private employer attempts to resolve the toxic work environment dilemma.

The opinion in *California Federal* recognized the validity of a special treatment approach to the actual physical condition of the pregnant employee. *California Federal* permits state legislation that allows the pregnant woman sufficient time to give birth and recuperate so that she can participate meaningfully in the work force when she returns. It permits this even if childbirth is the only temporary disability to which the state grants legislative job protection.

*California Federal* must be extended further to recognize that the worker cannot be separated from the fetus. Her actual physical condition that places the fetus at risk to workplace toxins is obviously different from the physical fact that the worker must give birth. The pregnant employee can expose the fetus to the toxins and still perform her job. This contrasts with the leave policy since the pregnant worker cannot give birth and work at the same moment. The state legislation challenged in *California Federal* dealt only with pregnancy as it related to ability to work. State legislation or employer policies that focus on the pregnant worker in the toxic work environment will not have the ability-to-work focus of the state legislation challenged in *California Federal*. Instead, such legislation will focus on facilitating fetal health and employment opportunities.

The *California Federal* Court recognized relevant difference when that difference interfered with a job function for a finite period. The Court's analysis provides a basis for recognizing relevant difference that does not affect job performance, but that has a lasting effect on the pregnancy's purpose. The theoretical underpinnings of *California Federal* support this extension. Recognizing the pregnant worker's interest in the fetus' health and safety does not mean disregarding the equal treatment advocate's concerns about abuses that occur when women's child-bearing capacity is the focus of policy making. The challenge is to minimize the risks of paternalism while empowering pregnant workers. *California Federal* can be used to achieve this goal.

*California Federal* provides keys to resolving the toxic work environment problem in a manner that does not contort the development of Title VII jurisprudence. The resolution, or a beginning resolution, of the toxic work environment dilemma under Title VII is considerably

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*Fed.*, 107 S. Ct. at 691.

<sup>60</sup> *Weber*, 443 U.S. at 193.

more complicated.<sup>61</sup> This Article applies *California Federal* to private employer attempts to regulate pregnant employees' exposure to a toxic work environment and then analyzes its application to state regulation in that environment.

## II. *California Federal* AND THE LEGALITY OF PRIVATE EMPLOYER RESPONSES TO THE TOXIC WORK ENVIRONMENT DILEMMA

Commentators have focused primary attention on private employer, rather than state regulatory, attempts to deal with the toxic work environment dilemma. As noted earlier, many commentators argued that the equal treatment model foreclosed most private employer attempts to

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<sup>61</sup> See Furnish, *supra* note 4, at 115-19 (arguing for an amendment to Title VII). It appears that inciting Congress to act on the dilemma of the pregnant worker in the toxic work environment is about as easy as getting Mrs. Askew and Mr. Bridger to retrieve a newspaper from Mrs. Askew's roof in T.R. Pearson's, *Off for The Sweet Hereafter* (Simon & Schuster, 1986). In that novel, Mrs. Askew is advised to contact Mr. Bridger to paint the inside of her gutters. Although her intentions were good,

Mrs. Askew discovered she was not plagued with a runoff problem anymore or a stoop puddle either and could not convince herself or feel plagued or troubled or even the slightest bit bothered by the insides of her gutters since that was not anything she could stand on the front lawn and get annoyed over.

*Id.* at 17. She is finally moved to action when the newspaper boy "cocked his wrist from the curbing and launched Mrs. Askew's afternoon *Chronicle* clean up onto the roof where it settled against the toilet vent, and while Mrs. Askew believed herself a touch niggardly for leaving her gutter troughs unpainted she could not begin to abide the sight of a newspaper on the roof of her house." *Id.* Coercing Mr. Bridger to come over was a bit of a problem, "[N]ot that Mr. Bridger was a lazy man or a slackard, he was just what people call steady and earnest, like a glacier is steady and earnest." *Id.* at 5. When he did arrive, "[I]nitially, him and Mrs. Askew stood together on the front lawn and considered the gutter and considered the downspouts and considered the Thursday *Chronicle* next to the toilet vent." *Id.* at 18-19. Finally, Mr. Bridger climbed on the roof. "On several occasions Mr[s]. Askew reminded Mr. Bridger to fetch down the Thursday *Chronicle* from beside the toilet vent and invariably Mr. Bridger would stand up from his squat long enough to rehike his pants and tell her, 'Yes ma'm.'" *Id.* at 21. Despite being diverted by discussions with her neighbors, every once in a while something "jarred Mrs. Askew back to the business at hand and she made a point of reminding Mr. Bridger to fetch down the *Chronicle* from beside the toilet vent, so naturally Mr. Bridger stood up from his squat, rehiked his pants, and told her 'Yes Ma'm.'" *Id.* at 22-23. Eventually, Mr. Bridger climbed off the roof. After discussing the estimate for gutter painting with her neighbors, "Mrs. Askew laid her head back momentarily and said she did wish Mr. Bridger had recollected to fetch down the Thursday *Chronicle* from beside the toilet vent." *Id.* at 24.

distinguish women employees for preferential treatment.<sup>62</sup> Some commentators were displeased with that result.<sup>63</sup> Others believed the result correct, both as a matter of statutory interpretation and policy.<sup>64</sup> These commentators argued in support of their positions that the risks of pregnant women's exposure to toxic work environments were exaggerated, as compared to men's risks of exposure. In their view, toxic work environment concerns were a subterfuge for excluding women from jobs.<sup>65</sup>

This view was reinforced because many employers had excluded women from job categories with potential reproductive hazards prior to Title VII not because of concerns about fetal health but because they were "men's jobs."<sup>66</sup> It was more than coincidental that at the time women were given legal entree to such jobs, they faced exclusion because of their reproductive capacity. More fundamentally, these commentators expressed grave concerns about the negative effect on women's employment opportunities if employers could make work assignment decisions based on women's reproductive capacity.<sup>67</sup> As the PDA's legislative history indicates, the view of woman as "baby maker" is a primary force and justification for employment discrimination against women.<sup>68</sup> It is difficult to admit the possibility that in certain limited circumstances, pregnancy should be relevant to work place decisions (either by the employer or the employee) even when it does not affect job performance. For some, its inconsistency with the equal treatment ideology precludes legal justification. Current legal literature begs the fundamental issue by questioning or dismissing scientific evi-

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<sup>62</sup> See *supra* notes 7-9 and accompanying text.

<sup>63</sup> See Furnish, *supra* note 4, at 119.

<sup>64</sup> See Williams, *supra* note 12, at 369.

<sup>65</sup> See Finley, *supra* note 12, at 1130-31. See generally Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196-97 (1982).

<sup>66</sup> See Howard, *supra* note 7, at 798 n.3; Note, *Beyond Discrimination*, *supra* note 10, at 578-89.

<sup>67</sup> See Williams, *supra* note 7, at 352-70. Professor Williams has had great success in promoting this view. Even though a considerable number of feminist legal analysts rejected her approach to the PDA specifically and women's rights generally, they have not criticized her approach to the toxic work environment question. As a result, the issue has not received the sufficiently open minded attention from many capable voices it needs to reach a responsible resolution. See *supra* note 18. For a recent approach that rejects Professor Williams' analysis see Note, *Beyond Discrimination*, *supra* note 10 (arguing the use of the Toxic Control Substances Act rather than Title VII to deal with reproductive hazards). Cf. Finley, *supra* note 12, at 1130-31.

<sup>68</sup> See *supra* note 5.

dence which suggests that toxic substances affect fetuses at exposure levels that have not been demonstrated to harm the reproductive systems of adult men and women.<sup>69</sup> Some commentators imply that employers are not interested in avoiding fetal harm, that protection policies are pretexts for discrimination or unconscious propagation of stereotypes girded by societal preconceptions about women's proper role.<sup>70</sup>

Prior to *California Federal* several courts dealt with challenges to employer "fetal protection" policies under the PDA.<sup>71</sup> These decisions presupposed the utility of conventional Title VII analysis,<sup>72</sup> yet they admitted the possibility that traditional Title VII defenses could shield such policies in certain limited circumstances.<sup>73</sup> As other commentators have noted, the opinions are not satisfactory in their treatment of Title VII defenses.<sup>74</sup> Sometimes the court demonstrated confusion about which defense was applicable, and the differences between them.<sup>75</sup> The courts had to distort or extend the Title VII defenses to meet the possibility that some work environments were more toxic to fetuses than to adults. In such cases, employers could take steps to exclude pregnant

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<sup>69</sup> See, e.g., *supra* note 18; Williams, *supra* note 7, at 355-65, 367; Note, *Pink Collar Blues: Potential Hazards of Video Display Terminal Radiation*, 57 S. CAL. L. REV. 139, 154-55 (1983). The ability of the male reproductive system to cleanse itself of some harmful toxins is also minimized because the male reproductive system continually produces sperm, while women are born with all the genetic material for reproduction that they will ever have. Women do not create more germ cells; men constantly make new sperm. Obviously, toxins that effect the ability to produce genetically healthy sperm have a long-term effect on men. For women, germ cells are not produced after birth, they are merely released from the ovaries with the accumulated effect of toxins to which the woman was exposed during her lifetime.

<sup>70</sup> See Finley, *supra* note 12, at 1130-31; Williams, *supra* note 7, at 355-65, 367.

<sup>71</sup> See *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). Describing the challenged employer behavior as a fetal protection policy in all these cases is a glorification. Only in *Olin* did the employer appear to operate under a designated policy. In *Hayes*, the challenged decision seemed to be a spur of the moment reaction to pregnancy rather than an implementation of a preplanned policy.

<sup>72</sup> *Hayes*, 725 F.2d at 1547-49, 1552; *Olin*, 697 F.2d at 1184-88.

<sup>73</sup> *Hayes*, 725 F.2d at 1550, 1551, 1552-53 n.15; *Olin*, 697 F.2d at 1190-92.

<sup>74</sup> See Note, *Beyond Discrimination*, *supra* note 10, at 582-90. *Olin* is particularly tortured in its attempt to fit conventional Title VII doctrine to the toxic work environment. The court seemed aware of this, but did not address the issue clearly. See *Olin*, 697 F.2d at 1185 n.21, 1188-91. This reaction to the dilemma was entirely predictable, although unfortunate. See *Furnish*, *supra* note 4, at 101-02. Fortunately, *California Fed.* provides an overriding approach to the doctrinal problem so painfully evident in *Olin* and, to a lesser extent, in *Hayes*.

<sup>75</sup> *Hayes*, 726 F.2d at 1548; *Olin*, 697 F.2d at 1185 n.21, 1186.



women or treat them differently than other workers.<sup>76</sup> Therefore, even absent *California Federal*, employer policies that treat women differently, based on their pregnancy and not on their ability to perform the job, could meet with judicial approval. However, this was accomplished at a cost to the integrity of Title VII defenses. It also was accomplished by pitting pregnant women against their employers.

The opinions do not consider the possibility that the toxic work environment dilemma is a real issue for pregnant women. Nor do they consider that the legal system should encourage the employer to consider that issue when establishing personnel policies.<sup>77</sup> Judicial avoidance of this issue is a direct result of the equal treatment ideology. It assumes that any deviation from equal treatment is incompatible with the working woman's best interests. *California Federal* rejects that assumption and accepts the proposition that real differences can result in special treatment if those differences have limited job possibilities and if the forms chosen to recognize the differences are in keeping with Title VII's goal of advancing employment opportunity.

The initial issue is whether any employer fetal protection policy can meet *California Federal's* standard. As this Article demonstrates, fetal protection policies are justifiable under the *California Federal* standard for interpreting the PDA. The critical problem with private employer plans and state regulation is designing a policy within *California Federal's* limits.

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<sup>76</sup> *Hayes*, 726 F.2d at 1552 n.15, 1153. The court states that the business necessity defense (which it incorrectly applied instead of the BFOQ) is available because "fetal protection" is "a legitimate area of employer concern to which the business necessity defense extends." *Id.* at 1552 n.14.

<sup>77</sup> There is some indication that unions and even employers are becoming more receptive to solving the dilemma. For example, "generally, union contracts make provisions for the removal of pregnant workers from hazards that may harm either the worker or the fetus." 123 D.L.R. C-3 (June 29, 1987). However, they do not differentiate between hazards to women and men. *Id.* For example, based on its finding of a miscarriage rate twice the national average, Digital Equipment Corporation (DEC) offers confidential pregnancy tests at its semiconductor facility. Although DEC does not require temporary transfers of pregnant workers from the toxic environment, it "strongly encourage[s]" them. "To accommodate pregnant workers, the company provides comparable work at equal pay until they are ready for maternity leave." *Id.* at C-4.

A. *Fetal Protection Policies of Private Employers Are Consistent with the PDA as Interpreted by California Federal*

*California Federal* rejects the PDA's literal language and the equal treatment analysis in favor of allowing special or preferential treatment of pregnant women in certain circumstances.<sup>78</sup> As established earlier, *California Federal's* interpretation of the PDA applies to private employers.<sup>79</sup> To demonstrate the consistency of *California Federal's* interpretation of the PDA with fetal protection policies, one must show: (1) that a protection policy is based on an actual physical difference that affects women and not men, rather than on a stereotype or archaic notions "about pregnancy and the abilities of pregnant workers;"<sup>80</sup> and (2) that an employer plan is consistent with Title VII's overall purpose of achieving equal employment opportunities as the PDA elaborates.<sup>81</sup>

1. Fetal Protection Policies Can Be Based on Actual Physical Differences

A large body of scientific evidence suggests that certain workplace toxins are more dangerous to the fetus than to adults.<sup>82</sup> As other articles

<sup>78</sup> See *California Fed.*, 107 S. Ct. at 693.

<sup>79</sup> See *supra* notes 58-60 and accompanying text.

<sup>80</sup> *California Fed.*, 107 S. Ct. at 694.

<sup>81</sup> *Id.*

<sup>82</sup> This evidence is summarized in Furnish, *supra* note 4, at 119-24. That article explains in detail the differences between toxic effects on fetuses, on the genetic material prior to conception, and on adult reproductive systems. More recently, similar points were made in Note, *Beyond Discrimination*, *supra* note 10, at 579-81. In mid-1987 *The Daily Labor Report* ran a short series of articles on reproductive hazards. One report stated:

Women exposed to toxic substances in the workplace *after* conception may suffer spontaneous abortions or still births, or give birth to a child with birth defects, low birth weight, and developmental or behavioral disabilities, NIOSH cautions. In addition, the research institute believes that the fetus may be exposed to occupational carcinogens transmitted through the mother's placenta.

122 D.L.R. C-2 (June 26, 1987). This does not imply that toxins cannot affect the fetus *prior* to conception via male or female germ cells. It does mean fetal harm can occur after conception through maternal exposure to toxins while the mother is at work. A recent lay summary of the toxic risks to the fetus appears in PREGNANCY AND EMPLOYMENT: THE COMPLETE HANDBOOK ON DISCRIMINATION, MATERNITY LEAVE, AND HEALTH AND SAFETY 60-68, 75-87 (BNA 1987) [hereafter PREGNANCY AND EMPLOYMENT]. There is sufficient evidence of risk to fetal health after conception through the pregnant worker's exposure to workplace toxins to warrant special treatment of the pregnant worker. *Id.*

have noted, it is often difficult or impossible to predict with certainty that toxins will cause fetal harm in a particular case.<sup>83</sup> However, the evidence is strong enough to suggest that a pregnant woman can risk the fetus' health if she is exposed to identifiable workplace toxins while pregnant. This risk is different from the risk of harm to the adult reproductive system, as the reproductive system may not actually be used to produce children. It is not that such risks are unworthy of attention, but they are different. Only the pregnant woman clearly runs the risk that toxins will affect her fetus' health.

Granting pregnant workers preferential treatment in these circumstances is not based on archaic stereotypes, but on the best scientific evidence available. It provides an "episodic" preference.<sup>84</sup> Pregnancy is not a permanent condition, nor is it a continuing condition for most working women. Its episodic nature suggests the theoretical ability to design fetal protection policies that do not rest on stereotypic notions about pregnancy and do not create or perpetuate new stereotypes.

The issue becomes more difficult when the focus is placed on the legitimacy of fetal protection plans that give preference to women of childbearing potential, rather than pregnant women. Such a plan might appear to rest on a dangerous stereotyping of women as baby makers always poised on pregnancy. The PDA's legislative history expressly rejected this stereotype as a basis for employment policies.<sup>85</sup>

This is especially true when the same workplace toxins pose similar reproductive risks to both men and women. Under those circumstances, distinguishing women for preferential treatment based on their capacity to become pregnant is a preference based on a stereotype. However, if the preference is based on the fact that fetal harm may occur in the early stages of pregnancy, in some cases before the woman knows she is pregnant, granting a preference to women who were at risk of pregnancy could theoretically be nonstereotypic. In this case, the policy's validity critically hinges on its design.

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<sup>83</sup> See Furnish, *supra* note 4, at 119-20; see also Note, *Beyond Discrimination*, *supra* note 10, at 579, 582; 122 D.L.R. C-2 (June 26, 1987) (stating that: "'What is known about reproductive health hazards is far outweighed by what is unknown' . . . there are 'no reliable estimates as yet of the basic measures of reproductive risk in the workplace.'").

<sup>84</sup> See Kay, *supra* note 12, at 21-30. Professor Kay develops the episodic category for pregnancy and applies it under Title VII and in the constitutional context. She also uses the episodic category to amplify the equal treatment/special treatment debate. *Id.* at 32-37.

<sup>85</sup> See Furnish, *supra* note 4, at 78.

## 2. Fetal Protection Plans Can Be Consistent with the Goals of Title VII and the PDA

As *California Federal* held, the PDA extends Title VII's goals to pregnancy. These goals include achieving equality of employment opportunities and removing "barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."<sup>86</sup> Measuring the compatibility of the theory of fetal protection policies against this standard suggests that they are consistent. In a literal sense, pregnancy and the possibility of exposure to workplace toxins have worked to the employment disadvantage of pregnant women and of women generally. Fetal protection plans that grant pregnant women preferential treatment, when a cognizable risk of fetal harm from the work environment exists, can ensure that pregnancy does not result in job loss.

More importantly, these preferences can assist the PDA's underlying goal — to ensure that "women, as well as men, can have families without losing their jobs."<sup>87</sup> For many women, risking harm to their future child or facing negative economic or professional consequences causes a real dilemma. The PDA should allow preferential treatment for these women since it is completely consistent with the PDA's goal of placing and keeping women in the work force's mainstream and not penalizing them for pregnancy. In fact, one can argue persuasively that failure to grant such a preference results in a penalty. Unless women are given an opportunity to be pregnant without risking fetal health to workplace toxins they are, in fact, penalized by pregnancy.

While this analysis has greatest applicability in the area of state regulation,<sup>88</sup> it also has application to private employer fetal protection policies. Viewed as a preference rather than a penalty, these plans are theoretically consistent with the PDA as interpreted by *California Federal*.

### B. Standards for Private Employer Fetal Protection Policies Consistent with the PDA After *California Federal*

Any employer fetal protection policy must be designed carefully to be compatible with the PDA as interpreted by *California Federal*. The protection policy must be based on physical differences unique to preg-

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<sup>86</sup> *California Fed.*, 107 S. Ct. at 693 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

<sup>87</sup> *Id.* at 694.

<sup>88</sup> See *infra* notes 116-33 and accompanying text.

nancy and it must assist women in overcoming workplace disadvantages. It must prefer pregnancy over nonpregnancy rather than penalize pregnancy either directly or indirectly.

Employer fetal protection policies demand careful scrutiny to assess whether they are designed or implemented to penalize pregnancy rather than prefer it. This is particularly important since employers have consistently discarded pregnant workers and used potential pregnancy as an excuse to downgrade women workers generally. As *California Federal* notes, one must read the PDA in light of the historical and social context in which it was passed.<sup>89</sup> That context included congressional recognition of the pervasive and blatant discrimination against pregnant women throughout all areas of the American economy and the subtle and unsubtle ways in which childbearing capacity and childrearing responsibilities excluded women from meaningful participation in the employment market. The PDA was meant to change that. Fetal protection policies can be compatible with the PDA's mandate, but they must be closely scrutinized to detect conscious or unconscious discrimination.

Several areas of the fetal protection policy should be considered to determine its compatibility with the PDA. First, the scientific basis for the program must survive careful examination. The employer policy must be based on the best available scientific evidence.<sup>90</sup> A firm scientific basis for fetal protection policies helps ensure that they meet *California Federal's* required relationship between preferential treatment and physical fact — not stereotypes or assumptions.<sup>91</sup> The employer cannot create a new set of stereotypic assumptions based on speculation about acceptable work for pregnant women.

The need for adequate scientific bases should not be carried to such an extreme that few fetal protection policies are permissible. The inability to know the effects of some toxins to a scientific certainty should not overturn legitimate attempts to provide preference to pregnant women. The preference should not be struck simply because toxic exposure creates reproductive risks to the nonpregnant employee. As noted earlier, toxic exposure to the developing fetus is different in kind. Therefore, pregnancy is entitled to preferential treatment under the PDA and *California Federal*.

Second, the policy must provide preferential treatment to pregnant

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<sup>89</sup> *California Fed.*, 107 S. Ct. at 694.

<sup>90</sup> This requirement is also consistent with *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1553 (11th Cir. 1984) and *Wright v. Olin Corp.*, 697 F.2d 1172, 1191 (4th Cir. 1982).

<sup>91</sup> See *California Fed.*, 107 S. Ct. at 694.

employees, not penalize them for the pregnancy. The policy must be designed to protect the pregnant worker's earnings, job, seniority, and future advancement. To the extent possible, the policy must provide for work that allows the pregnant woman to utilize identical or comparable skills. It must provide for the same wage and benefit package, and it must protect the pregnant woman's original job without a loss of seniority. A less inclusive approach would resemble a penalty system, which would make the policy inconsistent with the PDA.

Third, the policy must be flexible in its exclusions. A blanket exclusion is suspect. For example, the policy should exclude the pregnant employee from her job only during the time when the fetus is vulnerable. In many cases it is not feasible to exclude the pregnant woman only for a portion of the pregnancy, either because of lack of knowledge of when the fetus is affected, or because fetal harm occurs over the course of the entire pregnancy. In such cases, a more general exclusion during pregnancy may have merit. The plan should also permit flexibility in job tasks so that the pregnant employee can continue with those tasks that do not involve toxic risks to the fetus. This will help ensure that the pregnancy is not an excuse for the employer to shuttle the employee into the background and isolate her from her normal work environment more than the toxic risk necessitates.

Fourth, the employer must present information about the policy in an appropriate context. Another factor for assessing the validity of fetal protection policies is how the employer informs employees of a policy's implementation. If the employer presents the policy as part of a general health and safety program and the employer makes a serious attempt to educate workers to minimize workplace hazards, the plan has greater credibility as a preference for pregnancy, rather than a penalty. If a protection policy is the only work place medical condition on which the employer focuses, it suggests that the policy is not intended to assist women in achieving equality of opportunity. If the plan is voluntary, the employee must be fully and clearly informed of the risks. Such information must include the type of harm to the fetus, and the potential for harm to occur.

Fifth, the policy should not have a single target. The employer should attempt to evaluate the risks to exposed fetuses in all job categories. The policy should not apply solely to traditionally male positions while ignoring risks in traditionally female positions. For example, a policy that applies to workers in a chemical production division, but ignores the potential for fetal harm in video display terminal operator jobs, does not reduce the risk of fetal harm to all pregnant workers. It also perpetuates a man's work/woman's work dichotomy.

A sixth, and much more difficult issue is whether the program can be mandatory. The California statute challenged in *California Federal* did not require pregnant women to use the disability leave program.<sup>92</sup> It is not clear whether mandatory policies are consistent with *California Federal's* interpretation of the PDA or how important the "voluntary" nature of the disability leave program was in *California Federal*. Although some pregnant women may not need or want disability leave, most women aware of their rights would probably exercise them unless they were penalized for so doing. The voluntary nature of the statute in *California Federal* was relevant to the question of whether the statute perpetuated stereotypes about pregnancy and childbirth and their relation to job performance. Since the statute allowed the woman to choose to take leave and did not impose any minimum requirement for those women who took leaves (as opposed to maximum permissible leaves), the statute's design permitted individual action rather than impressing a group norm on individuals.<sup>93</sup>

If the voluntariness of the statute analyzed in *California Federal* is relevant to its legality, it seems likely to rest on the latter analysis. A voluntary policy undercuts the concern that the statute perpetuates stereotypes. Therefore, the voluntary nature of the statutory leave, by itself, is not critical to its legality. It is what the voluntary policy represents in contrast to a state imposed mandatory minimum leave that will impact the statute's validity.

In some circumstances, mandatory preference for pregnant women may not imply stereotyped assumptions. Arguably, toxic work environment policies that require removal of pregnant women during the period that the fetus is at risk are not based on stereotypes. However, one could assert that mandatory removal, even with these job protections, creates an impression that the pregnant employee cannot be trusted to make decisions about risks to her fetus. It also suggests that if a conflict exists, the fetus' rights are superior to the mother's rights.<sup>94</sup>

However, voluntary programs may create subtle pressures on the pregnant employee to avoid any preference. Some health monitoring programs have indicated that many workers value their job security

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<sup>92</sup> *Id.* at 686-87.

<sup>93</sup> Amicus Brief, Coalition for Reproductive Freedom, at 120, *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987).

<sup>94</sup> This impression has potentially dangerous implications for the rights of pregnant women generally, not just in the work place. See Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 605-11 (1986).

over their own health.<sup>95</sup> If the fetal protection policy is voluntary, many pregnant women will not take advantage of it for fear that claiming the preference will jeopardize their future job security.<sup>96</sup> This result is likely considering the history of job discrimination against pregnant women. Lifetime indoctrination by a social history that penalizes pregnancy in employment may cause some women to become suspicious of voluntary protection policies. If the policy is structured to be consistent with the PDA after *California Federal*, it should gain the confidence and acceptance of employees. However, one can argue that a properly structured mandatory policy is consistent with the PDA, and that a voluntary plan — to demonstrate that it is a preferential program rather than a program viewed as a penalty — must have a high level of voluntary participation to meet with judicial approval. On balance, the

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<sup>95</sup> See Furnish, *supra* note 4, at 73-74. For an analysis of risk-taking behavior generally see, M. DOUGLAS, RISK ACCEPTABILITY ACCORDING TO THE SOCIAL SCIENCES (1985).

The best established results of risk research show that individuals have a strong but unjustified sense of subjective immunity. In very familiar activities there is a tendency to minimize the probability of bad outcomes. Apparently, people underestimate risks of events that are rarely expected to happen. Our first question about perception of risk is why so many, in their layman's role, judge everyday hazards to be safe and think themselves able to cope when the event shows they cannot.

Most common everyday dangers tend to be ignored. On the other end of the scale of probabilities, the most infrequent, low-probability dangers also tend to be played down. Putting these tendencies together, the individual seems to cut off his perceptions of highly probable risks so that his immediate world seems to be safer than it is and, as he also cuts off his interest in low-probability events, distant dangers also fade. For a species well adapted to survive, neglecting low-frequency events seems an eminently reasonable strategy. To attend equally to all the low probabilities of disaster would diffuse attention and even produce a dangerous lack of focus. From the point of view of species survival, the sense of subjective immunity is also adaptive if it allows humans to keep cool in the midst of dangers, to dare to experiment, not to be thrown off balance by evidence of failures. Here is surely one of the interesting differences between human and animal psychology. Perhaps some of the problems about the evolution of social behavior could be broken down into testable propositions about the social sources of confidence and the felicitous effects for the human race of over-confidence.

Put to the test formally humans do not seem to be good at rational thinking. They also have weak and erratic memory.

*Id.* at 29-30.

<sup>96</sup> Furnish, *supra* note 4, at 73-74; see, e.g., *infra* note 132.



voluntary plan is more desirable but mandatory plans are not invalid.<sup>97</sup>

While voluntary employer plans that meet these standards are legitimate under the PDA, stronger legal and policy arguments support state legislation that establishes preferences for pregnant women in toxic work environments.

### III. *California Federal* AND STATE LEGISLATION TO RESOLVE THE TOXIC WORK ENVIRONMENT DILEMMA

The state has a significant interest in the health of its citizens. It also has an interest in ensuring fetal health and promoting equal employment opportunity for all women, including those who bear children. Even prior to *California Federal* some commentators argued the state's interest was sufficiently significant and compatible with the PDA's purpose to support carefully drafted state legislation to prefer pregnant women in the toxic work environment.<sup>98</sup> *California Federal* reinforces

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<sup>97</sup> It might also be possible to have a plan that is part voluntary and part mandatory. When fetal risk is high and relatively certain, a mandatory plan could be justified. When the risk is either not certain or unpredictable, and/or not as profound in its actual effect on the fetus, the plan could be voluntary in connection with a clear educational program for all affected workers.

<sup>98</sup> See Furnish, *supra* note 4, at 103-12; cf. Finley, *The Exclusion of Fertile Women from the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate Neutral Response to an Emerging Social Problem*, in *Proceedings of the N.Y.U. 38th Annual National Conf. on Labor* 16-1, 16-44-45.

At least two states have statutory provisions that attempt to address the dilemma of the pregnant employee in the toxic work environment. The same California Fair Housing and Employment Code statute containing the maternity leave provision challenged in *California Fed.* states:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification . . . [f]or any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such transfer can be reasonably accommodated, provided, however, that no employer shall be required by this section to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

CAL. GOV'T CODE § 12945(c)(2) (West 1980).

Unlike the challenged maternity leave section, this part of the statute does not apply to employers who are covered by Title VII. See *supra* note 24 and accompanying text.

The Connecticut Human Rights and Opportunities Law also has a provision that addresses this issue:

It shall be a discriminatory practice in violation of this section . . . [f]or an employer, by himself or his agent . . . (E) to fail or refuse to make a

that view and also gives guidance for the proper scope of state legislation.

A. *State Legislation Is Consistent with California Federal's Interpretation of the PDA*

*California Federal* noted that Title VII's antipreemption clauses "severely limited" Title VII's preemptive effect.<sup>99</sup> *California Federal* also focused on the states' role in Title VII enforcement, noting the importance to Congress of state laws that helped achieve Title VII's goal of equal employment.<sup>100</sup>

*California Federal's* rejection of a literal reading of the PDA and its acceptance of preferential treatment for pregnant women in certain circumstances strongly suggests that state legislation that prefers women in the toxic work environment can be consistent with Title VII.<sup>101</sup> *Cali-*

reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available in any case in which any employee gives written notice of her pregnancy to her employer and the employer or pregnant employee reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or fetus; (F) to fail or refuse to inform the pregnant employee that a transfer pursuant to subparagraph (E) of this subdivision may be appealed under the provisions of this chapter; or (G) to fail or refuse to inform his employees, by any reasonable means, that they must give written notice of their pregnancy in order to be eligible for transfer to a temporary position[.]

CONN. GEN. STAT. § 46(a)-60(a)(7)(E)-(G) (1986).

Both of these statutes are substantially flawed. They do not sufficiently and stringently define the preference that should be accorded the pregnant employee in the toxic environment. As noted in the text, to make the statutory scheme a preferential one rather than one that penalizes women, the command to prefer must be clear and the employers' excuses must be limited to situations in which responsible accommodation will destroy the business. Exceptions should not be made simply because they will cause inconvenience to the employer. Although these statutes may have been conceived with the best intentions, they need thoughtful revision to become consistent with the PDA and useful to the relevant population. See Furnish, *supra* note 4, at 103-04, 103 n.181 for an earlier and more detailed critique of the Connecticut statute.

<sup>99</sup> *California Fed.*, 107 S. Ct. at 690.

<sup>100</sup> *Id.*

<sup>101</sup> During the same term in which *California Fed.* was decided, the Supreme Court held that a Missouri law denying unemployment compensation to any person who leaves a job for a reason not "causally connected to their work or employer," including pregnancy, was not inconsistent with the 1976 amendment to the Federal Unemployment Tax Act [FUTA]. *Wimberly v. Labor & Indus. Relations Comm'n*, 107 S. Ct. 821 (1987). The amendment prohibited the Department of Labor from approving state unemployment compensation laws that "denied compensation under such State law

*California Federal's* potential impact on state legislation that addresses this dilemma is even greater than its potential impact on fetal protection plans devised by private employers.<sup>102</sup> *California Federal* cuts through much of the tortured analysis used to support the legislation or the employer plan, and opens a vista for state action. It simply states that the bell jar, which most analysts thought was the universe consistent with the PDA, has windows and doors.<sup>103</sup>

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solely on the basis of pregnancy or termination of pregnancy[.]” 26 U.S.C. § 3304(a)(12) (1982). The Court held that the amendment was intended solely to prevent states from singling out pregnant women for hostile treatment, and did not apply when the unfavorable treatment was a side effect of nondiscriminatory treatment of a larger class, *i.e.*, those who left work for reasons not directly related to work. *Wimberly*, 107 S. Ct. at 825. The Court rejected the contention that either the disparate impact of these rules on pregnant women brought them into conflict with the FUTA amendment, or that the amendment required preferential treatment for pregnant women. *Id.* at 826.

Leaving aside the merits of the analysis in the case, the opinion is consistent with *California Fed.* in its acceptance of state decisions of how much preferential treatment it wishes to accord pregnant women. Nothing in *Wimberly* forecloses states from preferring women forced to leave their employment because of pregnancy or childbirth and who are then unable to return to work. One must hope that states will be more sensitive to the unique situation of the pregnant worker both by ensuring that all employers must provide adequate maternity leave for employees and by recognizing that to achieve equal opportunity and maintain an economic health, states need to prefer women who are temporarily unable to work because of pregnancy or childbirth in the unemployment compensation scheme. It is unfortunate that the Supreme Court was unwilling to show the way in *Wimberly*.

<sup>102</sup> See *supra* notes 57-97 and accompanying text.

<sup>103</sup> While writing this Article, I described the jurisprudential developments under the PDA to my husband over lunch. Ever apt with a literary reference, he pointed out that it sounded a lot like the case-knife sequence of *The Adventures of Huckleberry Finn* that Roscoe Pound used in *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). The chapters illustrate what the courts accomplished.

The context of the excerpts are attempts by Tom and Huck to rescue Jim. On its face, the rescue should be easy and straightforward, but Tom is wed to the “right” way to do things, even if that means complicating them beyond accomplishment.

Tom says . . . “Blame it, this whole thing is just as easy and awkward as it can be. And so it makes it so rotten difficult to get up a difficult plan. There ain’t no watchman to be drugged—now there ought to be a watchman. There ain’t even a dog to give a sleeping-mixture to. And there’s Jim chained by one leg, with a ten-foot chain, to the leg of his bed: why, all you got to do is to lift up the bedstead and slip off the chain. . . . Jim could a got out of that window hole before this, only there wouldn’t be no use trying to travel with a ten-foot chain on his leg. Why, drat it, Huck, it’s the stupidest arrangement I ever see. You got to invent all the difficulties. Well, we can’t help it, we got to do the best we can with the materials we’ve got. Anyhow, there’s one thing—there’s more honor in getting him out through a lot of difficulties and dangers, where there warn’t one of

*California Federal* addressed a limited statutory preference. The

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them furnished to you by the people who it was their duty to furnish them, and you had to contrive them all out of your own head. . . . Now, whilst I think of it, we got to hunt up something to make a saw out of, the first chance we get.”

“What do we want of a saw?”

“What do we want of it? Hain’t we got to saw the leg of Jim’s bed off, so as to get the chain loose?”

“Why, you just said a body could lift up the bedstead and slip the chain off.”

Tom explains to him how unheroic such an approach is, citing to past adventures as “the best authorities” for additional complications. The boys then proceed with their plans. Tom focuses on digging. Huck points out that there are picks and shovels in the place where Jim is prisoner. Tom rejects them as not in keeping with a hero’s escape.

“Well, then,” I says, “if we don’t want the picks and shovels, what do we want?”

“A couple of case-knives.”

“To dig the foundations out from under that cabin with?”

“Yes.”

“Confound it, it’s foolish, Tom.”

“It don’t make no difference how foolish it is, it’s the right way—and it’s the regular way. And there ain’t no other way, that ever I heard of, and I’ve read all the books that gives any information about these things. They always dig out with a case-knife—and not through dirt, mind you; generly it’s through solid rock. And it takes them weeks and weeks and weeks, and for ever and ever. . . .

Tom wishes it would take years to dig Jim out, but they do not have much time, so he suggests they “let on” it took them 37 years.

“Now, there’s sense in that,” I says. “Letting on don’t cost nothing; letting on ain’t no trouble; and if it’s any object, I don’t mind letting on we was at it a hundred fifty year. It wouldn’t strain me none, after I got my hand in. So I’ll mosey along now, and smouch a couple of case-knives.”

The boys finally begin to execute the escape.

“So we dug and dug, with the case-knives, till most midnight; and then he was dog-tired, and our hands was blistered, and yet you couldn’t see we’d done anything, hardly. At last I says: “This ain’t no thirty-seven year job, this is a thirty-eight year job, Tom Sawyer.”

He never said nothing. But he sighed, and pretty soon he stopped digging, and then for a good little while I knowed he was thinking. Then he says:

“It ain’t no use, Huck, it ain’t agoing to work. If we was prisoners it would, because then we’s have as many years as we wanted, and no hurry; and we wouldn’t get but a few minutes to dig, every day, while they was changing watches, and so our hands wouldn’t get blistered, and we could keep it up right along, year in and year out, and do it right, and the way it ought to be done.

But we can’t fool along, we got to rush; we ain’t got no time to spare. If we was to put it another night this way, we’d have to knock off for a week

California statute only required employers to offer nonpaid voluntary leaves of less than four months.<sup>104</sup> The Court emphasized the “limited nature” of the statute’s preference.<sup>105</sup> However, as noted earlier, the Court’s rationale in *California Federal* has much greater application.<sup>106</sup> The Court validated the California provision because it did not discriminate against pregnancy. Physical disability was the premise for the statute’s leave policy. Therefore, it did not rely on “stereotypic notions” inconsistent with Title VII.<sup>107</sup> Further, the California statute and the PDA had the same goal, achieving “equality of employment opportunity and remov[ing] barriers that have operated in the past to disfavor an identifiable group.”<sup>108</sup> Any state legislation dealing with employment of pregnant women must meet these standards.

to let our hands get well—couldn’t touch a case-knife with them sooner.”

“Well, then, what are we going to do, Tom?”

“I’ll tell you. It ain’t right, and it ain’t moral, and I wouldn’t like it to get out—but there ain’t only just the one way; we got to dig him out with the picks, and let on it’s case-knives.”

“Now you’re talking!” I says; “your head gets leveler and leveler all the time, Tom Sawyer,” I says. “Picks is the thing, moral or no moral; and as for me, I don’t care shucks for the morality of it, nohow. . . .”

Gradually, Huck realizes that nomenclature supersedes reality.

“Well,” he (Tom) says, “there’s excuse for picks and letting-on in a case like this; if it warn’t so, I wouldn’t approve of it, nor I wouldn’t stand by and see the rules broke—because right is right, and wrong is wrong, and a body ain’t got no business doing wrong when he ain’t ignorant and knows better. It might answer for you to dig Jim out with a pick without any letting-on, because you don’t know no better; but it wouldn’t for me, because I do know better. Gimme a case-knife.”

He had his own by him, but I handed him mine. He flung it down, and says:

“Gimme a case-knife.”

I didn’t know just what to do—but then I thought. I scratched around amongst the old tools, and got a pick-ax and give it to him, and he took it and went to work, and never said a word.

He was always just that particular. Full of principle.

M. TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN*, 310-19 (Coventry 1982).

<sup>104</sup> CAL. GOV’T CODE § 12945(b)(2) (West 1980).

<sup>105</sup> *California Fed.*, 107 S. Ct. at 694.

<sup>106</sup> *See supra* notes 54-61 and accompanying text.

<sup>107</sup> *California Fed.*, 107 S. Ct. at 694-95.

<sup>108</sup> *Id.* at 693.

1. State Legislation that Recognizes the Pregnant Worker in the Toxic Work Environment Dilemma Is Not Legislation Based on Stereotypes

To be compatible with the interpretation of the PDA in *California Federal*, state legislation must not be premised on stereotypes. This factor was important in sustaining the California statute in *California Federal*.<sup>109</sup> The critical question is how to determine whether the statute is based on stereotypes.

*California Federal* emphasized that the statutory provision that required employers to provide unpaid leave for childbirth was based on actual physical disability.<sup>110</sup> The statute made no presumption about women's needs in general. It simply provided for leave if physically necessary, it did not require any woman to take leave. Therefore, it was "unlike protective labor legislation prevalent earlier in this century" because it was not based on stereotypes or presumptions about women's needs.<sup>111</sup> If *California Federal* is interpreted to mean that any preference based on something other than physical ability to work is a stereotype, the opinion has limited utility beyond its facts. It would allow state legislation that requires employers to offer paid disability leave on a preferential basis for pregnant employees while they are unable to work, but it would not apply to the toxic work environment dilemma. As demonstrated in the private employer context, *California Federal* supports a wider application.<sup>112</sup> Certainly statutes based on actual individual physical disability are not based on stereotypes. However, non-stereotyped foundations for preferential legislation are not limited to physical disability. Biological differences not based on stereotyped assumptions about the "proper role" for women should also have a place in the state legislative scheme. This interpretation of *California Federal* expands its usefulness and is consistent with the opinion's overall rationale. It furthers the goal of equal employment by removing barriers that hamper a pregnant woman's job opportunities. Using physical disability to assess the California statute's validity was a good indication of the statute's nonstereotypic basis. It is not the only valid non-stereotypic basis for state legislation.

The analytic focus then shifts to whether potential for fetal harm through a pregnant mother's exposure to a toxic work environment is a

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<sup>109</sup> *Id.* at 694.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See *supra* notes 54-61, 78-87 and accompanying text.

“stereotypic notion” that is a prohibited basis for state legislation. As noted earlier, fetal vulnerability to toxins via the mother is a physical fact, not a stereotype.<sup>113</sup> While the extent of scientific knowledge is not perfect, the vulnerability is clear. As other commentators have noted, as more information is discovered, it is more likely that fetal vulnerability to toxins will become evident.<sup>114</sup> This does not mean that the fetus cannot be affected by toxins to which the father is exposed during the mother’s pregnancy. It does not mean that we as a society should not be concerned about such exposure, or that we should not try to create toxin-free workplaces. It does mean that legislation based on a toxic work environment’s risk to a fetus through the mother’s exposure during pregnancy is not necessarily legislation based on stereotypes.

## 2. State Legislation that Recognizes the Dilemma of the Pregnant Worker in the Toxic Work Environment Can Be Consistent with the Goals of Title VII As Amended by the PDA

As *California Federal* reminds us, Title VII’s goal is to achieve equal employment opportunity. This does not mean equal treatment. It permits preferential treatment consistent with the equal opportunity objective. State legislation that addresses the pregnant woman in the toxic work environment can be consistent with that goal. As the Court emphasized when it rejected the literal equal treatment analysis of the PDA, the statute must be read against an historical background.<sup>115</sup> If state legislation removes barriers for the employment of pregnant women, if it permits women to bear healthy children without sacrificing women’s jobs, if it gives them more than the PDA demands rather than less, the legislation is compatible with Title VII. Such state legislation must encourage employers to accept pregnancy as a normal occurrence in the working woman’s life and accommodate and prefer it when toxic work environment exposure risks fetal harm. A woman should not have to choose between risking her fetus’ health and her employment. State legislation that prohibits employers from forcing this choice on pregnant employees removes a substantial barrier from the employment opportunities of a group, pregnant women, which has been

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<sup>113</sup> See *supra* notes 82-83 and accompanying text.

<sup>114</sup> See Note, *Beyond Discrimination*, *supra* note 10, at 582; see also 122 D.L.R. C-1, C-4 (June 29, 1987), which states that: “Another problem, according to one chemical union official, is that until recently the only studies on potential reproductive hazards have been on men. It is unclear at this point . . . how substances that may be hazardous to men effect women.”

<sup>115</sup> *California Fed.*, 107 S. Ct. at 694.

traditionally and continually disfavored in the employment market.

*B. Designing a State Statute Consistent With Title VII After California Federal*

State legislation must be carefully drafted to deal with physical realities, not with stereotyped notions of the suitability of certain jobs for pregnant women. It must also create a real preference, not a penalty. State legislation must be drafted to force employers to recognize that pregnancy is an episodic occurrence for any particular woman, that it is a normal biological function for most women during their working lives. It must force employers to confront and accommodate this reality. If it does so, it works to accomplish the PDA's purpose. It permits women to be pregnant without sacrificing their employment potential.

To meet these standards, state legislation must be clearly drafted from the pregnant employee's perspective, not from the employer's perspective. It must provide a preference for pregnant employees in the toxic work environment, not a state-created excuse for employers to penalize pregnant women. The statute must show sensitivity to prior use of pregnancy as an excuse for not hiring women and achieve the PDA's goal of changing that practice.

Any statutory response must avoid the problems posed by the old state protective statutes that placed women on pedestals because of stereotypic assumptions and effectively barred them from many jobs.<sup>116</sup> *California Federal* makes clear that such state legislation, like the paternalistic protective legislation of yesterday, cannot survive.<sup>117</sup> State legislative attempts to handle the toxic work environment dilemma

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<sup>116</sup> See, e.g., WOMEN'S WORK, MEN'S WORK 44-47 (B. Reskin & H. Hartmann eds. 1986).

<sup>117</sup> *California Fed.*, 107 S. Ct. at 694. A major flaw in paternalistic protective legislation was that it either directly or indirectly denied women employment. See, e.g., WOMEN'S WORK, MEN'S WORK, *supra* note 116, at 44-47. For example, protective laws directly denied them employment by expressly excluding them from certain job categories, *id.* at 45, or by prohibiting them from lifting weights in excess of a designated amount. *Id.* The laws indirectly excluded women by requiring employers to provide women with longer breaks, shorter work hours, and forbidding night employment. *Id.* Paternalistic protective laws had the substantial effect of creating men's work and women's work. *Id.* at 44-47. Because the laws operated to exclude women, we as a society accepted the idea that they should be excluded. Others have detailed the dramatic effect of such laws on women's job opportunities. See generally J. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION (1978). Long after Title VII's passage, the stigma lingers. Cf. WOMEN'S WORK, MEN'S WORK, *supra* note 116, at 44-47.



must avoid the paternalistic trap. This Article does not propose a return to such a damaging pattern of state action. Recognizing the danger inherent in any legislation that singles out pregnant women for preferential treatment does not mean that new legislation will re-create the past history of insensitivity.<sup>118</sup> While one must be wary of these classifications, it is sufficient to demonstrate that the design for legislation is consistent with the PDA and *California Federal*.

Careful analysis suggests that the lynch pin for state legislation is a duty of responsible accommodation. This Article first describes the source for this standard and its advantages in the toxic work environment and then delineates its contours.

### 1. The Concept of the Duty of Responsible Accommodation

The term "duty of responsible accommodation" echoes from the religious accommodation provision in Title VII. That provision requires employers to reasonably accommodate employees' religious beliefs or practices unless it results in "undue hardship" to the employer's business.<sup>119</sup> The greatest danger in using the term "accommodation" to de-

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<sup>118</sup> As others have eloquently noted, such legislation is not a luxury in our political-economic system:

We are not free to deny the need for protection given our present patriarchal society. By protecting women from forms of abuse, society in fact gives women a certain freedom. . . . By arguing for particular forms of protection, given specific historical relations—such as . . . pregnancy disability payments, or protective labor laws—one formulates the beginnings of a sexual equality that recognizes difference between men and women as it presently exists. . . . But we must move beyond the ideology of protection while recognizing the actual need for protection in order to really free women. The purpose of the law and social relations of society matter: is the purpose to curtail and constrain women within the relations of capitalist patriarchal society or to expand sexual equality?

The concern with protection is always problematic for feminism because it operates within the constraints of patriarchal privilege. . . . It is therefore important that as we argue for the protection of women . . . we do not reproduce the patriarchal motive in protection legislation. Rather, we must move beyond this position and imagine the possibilities of a sexual equality that no longer is limited to protection and instead explores the potential for freedom.

Z. EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY* 247-48 (1984).

The legislation's purpose as suggested in the text is not paternalistic; it is to empower women both to bear healthy children and to work. Its purpose is to expand rather than contract the options available for women. *Cf.* Finley, *supra* note 12, at 1174-75.

<sup>119</sup> Title VII forbids discrimination based upon religion. 42 U.S.C. §§ 2000e-

scribe the employer's duty to the pregnant employee is the possibility that the state will adopt not only the federal language, but also be bound to the pathetically hollow interpretation of the entitlement it provides in the federal system. As a result of Supreme Court mishandling, the employee asking for reasonable accommodation for his religious beliefs or practices is entitled to little remedy under Title VII.<sup>120</sup> The possibility that the term "accommodation" might mean as little in state legislation that deals with the toxic work environment dilemma as it does under the Title VII protection for religious discrimination can be diminished or eliminated by two means.

First, careful drafting can define or illustrate the term "accommodation" to make clear that accommodation in the state statute has more

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2(a)(1)-(2) (1982). It defines religion to include all aspects of religious observance, practice, and belief, unless an employer demonstrates that it is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. *Id.* § 2000e-(e).

<sup>120</sup> The case that destroys the term is *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). The Court held that anything more than a "de minimis cost" to the employer as a result of the reasonable accommodation created an undue hardship that excused the employer from the statutory duty. *Id.* at 84. Justice Marshall stated in dissent: "Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. . . . [I]f an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with 'sound and fury,' ultimately 'signif[y] nothing.'" *Id.* at 86-87 (Marshall, J., dissenting); see also *Ansonia Bd. of Educ. v. Philbrook*, 107 S. Ct. 307 (1986).

Others have argued that any "accommodation" connotes a favor that employers will not willingly give, and courts will not insist that employers give it: "Special 'favors' for such workers are viewed as an imposition unconnected to the employer's business needs and interests." *Williams*, *supra* note 12, at 367. An illustration of state adoption of the watered-down federal standard occurred recently in a Minnesota case. The Minnesota statute that requires employers to make reasonable accommodation to women disabled by pregnancy unless it results in undue hardship was recently interpreted by the Minnesota Court of Appeals as permitting an employer to place a beautician on leave rather than allow her to avoid giving permanents because "[she] could not perform an essential part of her job [apparently defined as giving permanents] with reasonable accommodation." *Khalifa v. G.X. Corp.*, 408 N.W.2d 221, 224 (Minn. Ct. App. 1987). This standard of "accommodation" is unacceptable.

The term "accommodation" can be rejuvenated and we should not allow employers who are not interested in granting "favors" to control statutory standards. Part of the task of the statutory standard is educative. If "accommodation" is defined and implemented to have substance, it will not be equated with giving special favors 10 years from now. Throwing up one's hands and saying "thus it is, it will not change" is an unacceptable response to a real problem. There is nothing intrinsically inadequate about the word "accommodation." Our task is to remove the detritus from it and implement a resolution of the toxic work environment dilemma.

meaning than in the federal statute. For example, legislation that expressly requires employers to prefer pregnant women over other employees by accommodating them when the work environment poses potential hazards for the fetus sets the correct statutory tone. It makes explicit the need to accommodate by preferring, not by penalizing. Several drafting techniques can eliminate the possibility that accommodating may mean granting the employee a favor only when it is convenient and virtually cost free to the employer. For example, legislation that eliminates this possibility defines accommodation to include provisions for job security, comparable benefits, and the right to employment using comparable skills during the period that the employee is removed from the toxic environment. Close attention to statutory language can defeat any possibility of deflecting the term "accommodation."

Second, eliminating the "undue hardship" limitation on the duty and substituting "responsible" for "reasonable" also strengthens the statutory imperative and distinguishes it from the federal terminology. Substituting "responsible" for "reasonable" is prompted in part by Professor Finley's recent article on transcending equality theory.<sup>121</sup> Professor Finley argues that we not only need rights, which suggest in her words "fending off" others,<sup>122</sup> but responsibilities that emphasize our interconnection with others and a recognition of the interconnectedness of the work and home spheres of our lives.<sup>123</sup> She aptly describes the tension

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<sup>121</sup> See Finley, *supra* note 12, at 1167-80.

<sup>122</sup> *Id.* at 1171.

<sup>123</sup> Professor Finley writes that:

It may not be sufficient to think only about expanding "rights," because the word "rights" too often connotes fending off, or retreating into a protected private zone. While individual protections from interference by others and the state are important for maintaining a democratic society, the need for freedom from interference with autonomy hardly describes the full range of human needs. The values of community and interconnection are deserving of recognition by the legal system. Accordingly, the notion of rights should be supplemented by conceptions of responsibility. I choose the term responsibility because the fact of interconnection between people and between various aspects of our lives such as work and home give each of us a measure of "responsibility" for how our actions, or failures to act, affect others. Responsibility means not simply honoring obligations, but responsiveness to the perspectives and needs of others. According to this view of responsibility, autonomy is not limited to determining one's actions through separation from others, but includes determining actions by considering others. For example, pregnancy and parenting policies, or lack of them, have hurt men as well as women. So, motivated by the link between self-interest and inevitable human interactions, employers and workers of both sexes should be concerned to break down the work-family

between encouraging the correct level of interconnectedness without forcing it, thereby interfering with the rights of individuals to “fend off” others.<sup>124</sup> In a context other than the pregnant worker in the toxic work environment, she argues that state statutes, such as the California pregnancy disability leave statute, “have taken a major step in the direction of incorporating the perspectives of responsibilities into their law.”<sup>125</sup>

Substituting “responsible accommodation” for “reasonable accommodation” does not suggest that state legislatures adopt Professor Finley’s thesis. Nor does it suggest that mere use of the term “responsible” rather than “reasonable” can incorporate the spirit that her thesis implies. It does suggest a standard at once more exacting and more sensitizing than “reasonable” with its centuries of male-normed content.<sup>126</sup> “Responsible” in this legislation implies a relationship between the employer and the pregnant employee, between the state’s interest and the work environment, and among all employees, including those who are pregnant.

## 2. The Contours of the Duty of Responsible Accommodation

The duty of responsible accommodation in the toxic work environment must explicitly require preference for pregnant women. An employer who does not grant preferential treatment to pregnant women in fetally hazardous work environments does not meet the duty of responsible accommodation. A valid statute should incorporate most of the requirements detailed for valid private employer plans.<sup>127</sup> It should: (1) require a significant scientific basis for concern about fetal harm in the particular work environment; (2) limit the pregnant woman’s isolation from her skill base during the pregnancy; (3) require flexible job descriptions for the pregnant worker; and (4) assure job security, senior-

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dichotomy.

The idea of separate spheres of private life and work life loses its apparent validity when we approach problems from the point of view of responsibilities and interconnectedness. Moreover, when we think in terms of our responsibilities to and interconnectedness with each other, classifying someone as the same or different seems less important. Alike or not, that other person’s existence nonetheless touches ours.

*Id.* at 1171-72 (footnotes omitted).

<sup>124</sup> *Id.* at 1177-79.

<sup>125</sup> *Id.* at 1174.

<sup>126</sup> See MacKinnon, *supra* note 12, at 146-48; Scales, *Emergence of Feminist Jurisprudence*, *supra* note 12, at 1376-88.

<sup>127</sup> See *supra* notes 89-97 and accompanying text.

ity, benefits, and salary. The statute should also require employers to present information about fetal toxicity and the statutory preference to employees and design programs which ensure that a hidden penalty for pregnancies which result in an employee's removal from the toxic environment does not exist.

Responsibility, in its sense of concern for others, should be the guide. It requires a reshaping of most attitudes that have developed around the issue of toxic work environments and employing women. The statute must show the way to a cooperative scheme in which the employer and all employees see the overall benefits that the accommodation accomplishes. At the level of employer self-interest, the statute helps decrease the potential threat of tort suits on behalf of children born with defects after prenatal exposure to toxic work environments. More importantly, it enforces a notion of the connection between the work life and home sphere and the employer's part in working to achieve compatibility between the two. Employers will not be able to avoid the toxic work environment problem by avoiding pregnant women. It will cost something to accommodate pregnant women, and that cost may provide incentives that lead to safer work environments for all employees.<sup>128</sup> This design should also work to encourage pregnant women to stay in the work force while avoiding workplace risks to fetal health. As noted earlier, workers do not take risks to their health and safety seriously. Providing a statutory scheme that encourages preferences during pregnancy reinforces the compatibility of work and childbearing.

Three major issues cloud the use of the state statutory approach to the fetally toxic work environment. First, should the statute provide for any exceptions from the employer's duty of responsible accommodation. Second, should the statute mandate the accommodation or make it voluntary and dependent on employee requests. Finally, how should the statute respond to the problem of women who are not pregnant, but wish to become pregnant, working in an environment that may cause fetal harm very early in the pregnancy.

*a. The Need to Limit Any Exceptions to the Employer's Duty of Responsible Accommodation — The Impossibility Defense*

The history of employment discrimination against pregnant women strongly argues for either no exceptions to the employer's responsibility to accommodate pregnancy in the toxic work environment or for an

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<sup>128</sup> On placing the cost for such accommodation on employers, *cf.* Finley, *supra* note 12, at 1143-48.

extremely limited statutory exception to the duty. Until employers are educated to their responsibility in this area and until they accept it as a normal business cost, the risk is too great that any statutory crack will widen until the exceptions are more plentiful than the rule. By definition, responsible accommodation results in increased costs to the employer. Therefore, increased costs cannot excuse responsible accommodation. Nor can inconvenience to the employer or other employees overcome the duty. Rather than pitting the pregnant woman receiving preferential treatment against the rest of the workforce, employers must have an incentive to demonstrate to their employees that the principle of responsible accommodation benefits the pregnant employee and all employees not only as workers, but as mothers, fathers, and children.<sup>129</sup> The societal benefits to humanizing and valuing pregnancy in the workplace should not be avoided by conventional employer excuses. Because it will require a radical restructuring of employer attitudes towards pregnant workers and a parallel shift in employee willingness to assist in accommodation, the only exception to the duty of responsible accommodation, if one is to exist, is impossibility.

Establishing impossibility means proving a literal inability to accommodate the pregnant employee and sustain the business by a preponderance of the evidence. For any major employer, this will not be a usable defense. For a very small employer it may provide an escape in limited circumstances. Defining impossibility as inability to sustain the business has the advantage of forcing employers to seek responsible accommodation rather than providing incentives for avoiding it, either by firing pregnant women or trying to have them settle for less than responsible accommodation to their pregnancies.

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<sup>129</sup> A recent BNA report summarizes reactions to any accommodations made to pregnant workers and to working mothers. Resentment is apparently high. PREGNANCY AND EMPLOYMENT, *supra* note 82, at 118-21. Any solution to the toxic work environment problem must work to diminish this by creating an awareness of the benefits to all workers in providing a work environment for the pregnant worker that facilitates the birth of a healthy child. *Cf.* Finley, *supra* note 12, at 1180 n.244.

I was struck by the fact that this BNA report was issued in a glossy pastel pink cover, rather than the usual institutional drabs. That very choice of little-girl pink reflects and reinforces society's tendency to see "pregnancy" issues as part of the "woman problem" rather than a biological fact for women that has broad implications for all members of society. We have all been children. Most of us will be either fathers or mothers. Even if we are never parents we bear a societal cost for children who suffer the effects of workplace toxins. *See* Furnish, *supra* note 4, at 106-08. The health of children is not a women's issue. It is one for all members of society. We need to work to educate ourselves on this point. Allowing workplace "resentments" to control is a poor premise for action.

*b. Confronting the Issue of Statutory Tone - The Voluntary or Mandatory Question*

It is difficult to analyze whether state legislation can or should take a mandatory rather than a voluntary approach to responsible accommodation of the pregnant worker in the toxic work environment. Much of the tension described with respect to private employer programs is directly applicable to the statutory problem.<sup>130</sup> In addition, the long and unhappy history of "protective" legislation for women fogs the statutory horizon. A voluntary program in which the woman decides whether to use the preference parallels the statutory scheme at issue in *California Federal*. As noted in the context of private employer policies, voluntary programs reinforce the notion that the pregnant employee will do what is best for her and her fetus. It reduces the use of stereotypes in establishing the statutory scheme. A voluntary statute presumes nothing about any individual pregnant employee working in a toxic environment. It simply gives those individuals a choice and allows them to exercise it as each sees fit. The imperative to preserve the pregnant woman's autonomy is powerful.

Although the mandatory approach is not problem free from the autonomy standpoint, it deserves careful consideration. The advantages of mandatory policies imposed by employers without legislative demand have relevance to assessing the proper tone for legislative action in the toxic work environment.<sup>131</sup> Pregnant women may be even more reluctant to take advantage of a statutory "right" to responsible accommodation than a policy unilaterally instituted by their employer.<sup>132</sup> There are several reasons for this. First, if the employer offers the alternative as part of its overall personnel policy, the employee may correctly believe that since the employer chose to offer the plan, it will not resent its utilization. It is more difficult for the employee to implement a statute than a provision in the personnel manual. In addition, employees are more likely to know of the existence of an employer policy than a state

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<sup>130</sup> See *supra* notes 92-97 and accompanying text.

<sup>131</sup> *Id.*

<sup>132</sup> David LeGrande, Director of Safety and Health for the Communications Workers of America stated in the Daily Labor Report: "Most folks have no idea they have any rights to protection or once harmed any rights to . . . redress. . . . Moreover, once that realization is made most people wouldn't know how to go about it." 122 D.L.R. C-5 (June 26, 1987). Mr. LeGrande is also depicted as "doubt[ing] that the realization by workers that hazards exist will have a significant impact. Workers, he says, are hesitant to bring health and safety problems to the attention of management for fear of retaliation." 122 D.L.R. C-1, C-5 (June 26, 1987).

law. If the policy is part of the company's manual, explained during orientation, and listed as part of the company's health and benefit package, it has a reality to the employee that state legislation does not have.

The voluntary/mandatory debate's effect can be meliorated and a solution reached by requiring employers to develop responsible accommodation policies and distribute them to employees. These policies must meet the standards described earlier in this Article.<sup>133</sup> The employer must also alert employees to their statutory rights to take advantage of the policy. This combination of a statutory right articulated in a concrete personnel policy might work sufficiently to overcome employee reluctance to take advantage of the preference. Just as when an employer policy is instituted without statutory mandate, the statutorily directed policy must show enough voluntary use by employees to demonstrate that they view it as a preference and not a penalty. Another alternative is to provide a dual statutory system in which the employee has the right to invoke the employer's duty of responsible accommodation. The employer must create and utilize a policy that shapes preferences for pregnant employees so that employees are aware of the statutory provisions and the employers' commitment to them. This policy must also provide for the possibility that employers may require pregnant employees to accept temporary preferential treatment in limited circumstances. As long as the statutory standard for preferential treatment is stringent, the potential for employer abuse is somewhat limited.

The voluntary legislative scheme is most desirable because it leaves the option to take leave with the pregnant employee. However, the option must actually be available. Given the status of pregnant employees, it is somewhat difficult to believe that they will rush to insist on their rights to preferences. I am torn between wanting to ensure the autonomy of the worker and the fear that autonomy of the worker is a myth for pregnant workers. Giving workers a right that they may or may not exercise may mean no right at all.

I believe that a statute which is written simply to impose a duty of responsible accommodation and defines the concept of responsible accommodation to ensure that it strictly limits the ability of any employer to avoid the duty may suffice. For example, the statute could provide: "*Every employer has the duty of responsible accommodation of pregnant employees in work environments which are hazardous to the health and safety of the fetus.*" The statute could then define the concept of responsible accommodation as delineated earlier in this Article:

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<sup>133</sup> See *supra* notes 119-29 and accompanying text.



The duty of responsible accommodation requires the employer to prefer the pregnant woman in such work environments. Responsible accommodation includes but is not limited to providing flexibility in job tasks, providing comparable but not hazardous employment, retaining salary, benefit packages, seniority, job security for the pregnant employee during the time in which fetal health and safety may be at risk. Employers are required to construct, publish and affirm employment policies implementing this statute.

*c. Responsible Accommodation and the Non-Pregnant Employee*

Preferential treatment for pregnant employees to avoid workplace toxins requires consideration of when the preference should take effect. While this statement may seem circular — either the employee is pregnant or not — some workplace toxins may cause fetal harm at the earliest stages of pregnancy, in some cases before the woman knows she is pregnant. Any statute that attempts to facilitate women's employment opportunities compatibly with their ability to bear healthy children should take this fact into account. This may mean permitting women who wish to become pregnant to receive the statutory preference of responsible accommodation before they are pregnant. It does not mean that employers can exclude all women of childbearing capacity from certain jobs. In fact, imposing responsible accommodation on employers before they can exclude any worker from the toxic work environment because of a concern about reproductive harm will further limit the possibility that employers will use childbearing potential for stereotypical employment discrimination. The statutory provision could read: "*Any employment decision based upon employer or employee concerns for reproductive harm to the employee must be made in accordance with the duty of responsible accommodation as defined by this statute.*"

Any statute that singled out women for preferential treatment because of general risks to their reproductive systems not connected to actual pregnancy would be void unless such treatment is accorded men who face similar reproductive risks.

*C. Policy Justifications for Implementing State Legislation*

This Article has demonstrated that carefully drafted state legislation requiring preferential treatment of pregnant employees is compatible with Title VII as amended by the PDA. Validity under Title VII does not necessarily imply advisability. While this Article has presented the justifications for such legislation, it is important to both reiterate and expand them.

The single most important reason for such legislation today, as it was ten years ago, is the dilemma that pregnant employees face in the toxic work environment. Legislation must address the question of how to take advantage of the PDA's promise that pregnancy shall not hinder equal opportunity without risking harm to the fetus. States should act to allow pregnant employees an escape from this dilemma. As I noted years ago, the PDA offers nothing to pregnant employees if they achieve employment opportunities at the cost of the desired outcome of the pregnancy — a healthy child.<sup>134</sup> The pregnant woman's interest is obvious. The law should facilitate this outcome, not thwart it; otherwise, promises of equal employment for all women are tokens in a shell game.

States have an opportunity to facilitate the PDA's goal of keeping women in the workforce whether or not they are pregnant. Any state legislation that mandates appropriate preferential treatment sends a message to employers and employees that needs to be heard. The statute can have a substantial educative effect.<sup>135</sup> It can empower pregnant women, it can give them options that benefit not just a particular woman, or pregnant employees generally, but all employees, the employer, and society. The benefit comes by helping assure that children are born healthy without risking intrusion in the mother's autonomy; by reshaping our views about pregnancy and highlighting the connection between work and home; and by working to assure that pregnant employees and their families are not sacrificed to some disembodied notion of equality. It gives powerful state recognition to a woman's right to both work and bear healthy children if she chooses to have children. Title VII must allow at least this.

### CONCLUSION

The PDA can support preferential treatment of pregnant women. The Supreme Court's recent decision in *California Federal* rejected a restrictive equal treatment interpretation of the statute, liberating it from the constraint of ignoring pregnancy in the workplace. The decision facilitates re-evaluation of society's responses to the dilemma of the pregnant employee in the toxic work environment. Such employees place their offspring at special risk. After *California Federal*, true

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<sup>134</sup> Furnish, *supra* note 4, at 84.

<sup>135</sup> As Professor Scales has said: "Law needs some theory of differentiation. Feminism, as a theory of differentiation, is particularly well suited to it. Feminism brings law back to its purpose — to decide the moral crux of the matter in real human situations." Scales, *Emergence of Feminist Jurisprudence*, *supra* note 12, at 1387.

preferential treatment to accommodate the pregnant employee in such environments by employers acting unilaterally can be consistent with the PDA. More importantly, there is an opportunity for state legislation that requires employers to prefer pregnant employees by providing responsible accommodation to avoid exposure to work place hazards that risk the fetus' health. This legislation has two primary effects: it significantly increases meaningful employment opportunities for pregnant workers while working to reshape the work-home dichotomy that has oppressed employees and harmed employers; and it simultaneously facilitates the state's interest in the health of its citizens.

