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THE FLIP SIDE OF FETAL PROTECTION POLICIES: COMPENSATING CHILDREN INJURED THROUGH PARENTAL EXPOSURE TO REPRODUCTIVE HAZARDS IN THE WORKPLACE

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INTRODUCTION

Fetal protection policies have been used as a mechanism to exclude women from employment opportunities involving the risk of exposure to substances that are potentially harmful to fetuses or reproductive capacity. In March, 1991, the U.S. Supreme Court ruled that such a policy, which barred all fertile women from jobs entailing exposure to lead in a battery manufacturing plant, violated Title VII of the Civil Rights Act by impermissibly discriminating against women.[1] However, this decision did not resolve all of the problems engendered by reproductive hazards in the workplace. A comprehensive application of antidiscrimination law, occupational health law, and tort law is necessary to achieve a workable solution.

Employers have offered two justifications for implementing fetal protection policies. The first is a general concern for the health of fetuses. Indeed, the 7th Circuit Court of Appeals in *Johnson Controls*[2] asserted that an altruistic interest in protecting fetal health played the primary role in the company's institution of its fetal protection policy.[3]

Though laudable, this justification leads to "fetal projection." The fetus has become the locus of social concerns:

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1. UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991).
2. 886 F.2d 871 (7th Cir. 1989).
3. *Id.* at 884, n.25.

various segments of society scramble to speak for the fetus, to assign it rights and interests that coincide with their own, thus projecting their own needs onto the fetus.[4] The fetus is uniquely situated to perform this role as a symbol of social fears and conflicting mores in a rapidly changing society—it cannot speak for itself and it is poised to enter the world, soon to possess a full panoply of rights. When the fetus is assigned a right or an interest, it is important to examine who is assigning that right, what background of beliefs or fears informs that assignment, and what might be gained from it. Then, we are able to critique the logic of the fetal rights movement and understand what motivates fetal protection policies.[5]

The second justification for implementing fetal protection policies is fear of tort liability. Though courts may be reluctant to admit that this concern plays a role,[6] the employment community reflects its alarm in recent occupational health and management literature which focuses on the risks of dispro-

4. An employer's need to avoid potential tort liability and society's fear of social change regarding women's roles are disguised as the fetus' right to be born healthy. Fetal protection policies have arisen only in traditionally male, blue-collar jobs. In contrast, employers do not typically exclude women to protect fetal health in employment sectors traditionally dominated by women, such as secretarial work, where equivalent or greater risks to fetal health may be present. *See* Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, nn.1-2, 1238-39 (1986); *Birth Defects Caused by Parental Exposure to Workplace Hazards: The Interface of Title VII with OSHA and Tort Law*, 12 U. MICH. J.L. REF. 237, 241 (1979) [hereinafter *Birth Defects*]. For abortion foes, the need to protect traditional notions of the role and status of women as childbearers and mothers may be projected onto the fetus and transformed into its right to life. *See* K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 192-215 (1984).

5. *See* Petcheskey, *Foetal Images: The Power of Visual Culture in the Politics of Reproduction*, in REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE (M. Stanworth ed. 1987) (discussing how images of the fetus are used as symbols in various political and moral debates).

6. The 7th Circuit Court in *Johnson Controls* stated: "Although costs from tort judgments are merely a secondary consideration, they are still an important and legitimate additional consideration for an employer when lead safety policies may very well affect the development of the child in its most critical stage in the mother's womb." 886 F.2d at 884, n.25. The court cited Wright v. Olin Corp. for the proposition that even though added costs standing alone might not be sufficient to support a business necessity defense, legitimate social concerns are. 697 F.2d 1172, 1190 n.26 (4th Cir. 1982). The court did not define what "legitimate social concerns" might be; presumably, they meant concern for the health of the fetus as opposed to the cost of compensation for injury. The court must have felt constrained by the *Olin* language to justify the fetal protection policy on grounds other than fear of tort liability.

In contrast, the U.S. Supreme Court denied that tort liability posed a serious threat, calling the possibility "remote at best." UAW v. Johnson Controls, 111 S. Ct. 1196, 1208 (1991). Moreover, the Court held that the possibly increased cost of employing women is not a legitimate basis for discrimination under the bona fide occupational qualification (BFOQ) standard. *Id.* at 1209.

portionate damage assessments.[7] On the other hand, the feminist community and other legal commentators are skeptical about the possibility of unlimited employer liability.[8] In the face of this controversy, the actual risk to employers must be evaluated: is the fear of unlimited tort liability grounded in reality, or is it merely unfounded speculation?

The issue of the injured child's possible remedies is especially important in California because of two developments. First, in 1990, the California Court of Appeal struck down Johnson Controls' fetal protection policy a year before it was prohibited by the U.S. Supreme Court, holding that it violated the California Fair Employment and Housing Act's anti-discrimination provisions.[9] Thus, until a safer workplace is provided, women and men will risk reproductive harm by working at jobs that expose them to potentially harmful levels of toxins.[10]

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7. *See, e.g.*, Paskal, *Dilemma: Save the Fetus or Sue the Employer?*, 39 LAB. L.J. 323 (1988) (arguing that employers face the possibility of huge damage awards for injuries to offspring of workers); Leffert, *Employers Must Consider Legal Aspects of Workplace Hazards*, 58 OCCUPATIONAL HEALTH & SAFETY 24 (1989) (discussing employers' options under the law in response to workplace reproductive hazards); Bond, *Role of Corporate Policy in the Control of Reproductive Hazards of the Workplace*, 28 J. OCCUPATIONAL MED. 193 (1986) (recommending policy statements and implementation strategies to address reproductive hazards); McElveen, *Reproductive Hazards in the Workplace: Some Legal Considerations*, 28 J. OCCUPATIONAL MED. 103 (1986) (noting courts' willingness to expand liability for environmental harms).

8. *See, e.g., Birth Defects, supra* note 4, at 253-56 (arguing that traditional common law principles of employer liability, coupled with problems in showing causation, would make recovery by an injured child extremely difficult).

9. Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517, 267 Cal. Rptr. 158 (1990). In striking down the company's broad exclusion of all fertile women from jobs involving exposure to high levels of lead, the court relied in part on the possibility of equivalent risks to the offspring of both men and women from exposure to lead. *Id.* at 550, 267 Cal. Rptr. at 177. Since non-pregnant fertile women and men were in the "same position," there was no reason to exclude only women. *Id.*

10. *See* 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, 665-68 (1981); Blakeslee, *Research on Birth Defects Turns to Flaws in Sperm*, N.Y. Times, Jan. 1, 1991, at 1, col. 1.

Ideally, employers should provide (and OSHA and state health laws should mandate) workplaces where toxin levels are low enough to protect against reproductive and fetal harms. However, OSHA merely regulates the levels of toxins harmful to adults, even though fetuses and reproductive systems may be injured at considerably lower levels. *See, e.g.*, UAW v. Johnson Controls, Inc., 886 F.2d 871, 876, n.7 (7th Cir. 1989). It is arguable whether OSHA is required to set standards to protect reproductive capacity. *See* Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577, 592, n.90 (1986) (discussing the limits of OSHA in regulating reproductive toxins).

Second, in 1989, the California Court of Appeal addressed the question of remedies for a child injured by parental exposure to workplace reproductive hazards. In *Bell v. Macy's California,*[11] the court held that a child's injuries "derived from" workplace harm to a parent are exclusively compensable through workers' compensation, even though the system currently provides no remedy for such injuries.[12] The impact of this case bars a cause of action against the employer by a child injured in utero.

The controversy over fetal protection policies has so far centered on the relative rights and responsibilities of the worker, the employer, and the state. This article examines reproductive workplace hazards from the injured child's point of view, advocating compensation for injuries resulting from parental exposure. Part I introduces four policy goals that should be implemented in any compensation system in order to produce an appropriate balance of interests. These goals are: an adequate remedy for injury, equal treatment of male and female workers, incentives for workplace safety, and fairness to employers' economic interests. Part II examines current tort and workers' compensation law to see whether or not these goals are accomplished. Finally, Part III proposes a compensation system which adequately serves the four policy goals.

I. POLICY GOALS: DEFINITIONS AND JUSTIFICATION

Any compensation system for workplace reproductive injuries should serve four goals: adequate remedy for injury, incentives to clean up the workplace, equal employment opportunity for men and women, and fairness to employers' economic interests. This section examines how these goals, both individually and in concert, produce an appropriate balance of interests.

A) ADEQUATE REMEDY FOR INJURY: COMPENSATION

Compensation for injury is a traditional aim of tort law.[13] Under the theory of "ethical compensation," justice requires

11. 212 Cal. App. 3d 1442, 261 Cal. Rptr. 447 (1989).

12. *Id.* at 1454-1455, 261 Cal. Rptr. at 455-56.

13. *See* Williams, *The Aims of the Law of Tort,* 4 CURRENT LEGAL PROBS. 137, 151-52 (1951); G. WILLIAMS & B.A. HEPPLE, FOUNDATIONS OF THE LAW OF TORT 28-30 (2d ed. 1984) (arguing that compensation for injury is the most important purpose of tort law); S. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS 35-49 (1989).

that the victim of a wrong should receive compensation.[14] As the injured party cannot absorb the cost of crushing medical expenses, lost wages, etc., compensation shifts the cost of the accident from the individual to society at large through the price system or liability insurance.[15] However, who should bear the risk? Nothing can be undertaken without risk of harm to others; for example, batteries cannot be manufactured without risking reproductive harm to workers. The cost should be borne by the undertaker if the risk eventuates.[16]

In the reproductive hazards context, it is simply not fair to require the injured offspring to bear all of the risk. The employer receives a benefit in the form of labor, the worker receives a benefit in the form of a job and income, and society benefits overall from the generated work product. Therefore, the employer, worker, and society should collectively bear the cost. Consumers can absorb some of the employer's increased costs (e.g., damage payments for injuries or higher insurance premiums) by paying a higher price for the product. Society can absorb some cost by paying taxes to support a compensation insurance system.

In California, the injured offspring bears most or all of the risk. The employer bears no risk because, under *Macy's,* the employer may not be sued.[17] The female worker bears no immediate risk because, under *Johnson Controls*, she is entitled to the job and cannot be the subject of discrimination.[18] Because risk cannot be entirely eliminated, it is fair to compensate injured offspring for bearing the risk that benefits others.

Compensation should include actual damages such as medical costs, lost earnings, and special education expenses, i.e., any cost over and above what an uninjured child would incur. Punitive damages are not included because their function is to punish and deter rather than to compensate for injury.[19] In con-

14. Williams, *supra* note 13, at 141.

15. S. SUGARMAN, *supra* note 13, at 35. Sugarman assumes most people agree that "when people become disabled and face unexpected income losses and medical expenses that leave them in financial straits, there is a collective duty to help them." *Id.* at 36.

16. *See* Williams, *supra* note 13, at 151-52.

17. 212 Cal. App. 3d 1442, 261 Cal. Rptr. 447 (1989).

18. 218 Cal. App. 3d 517; 267 Cal. Rptr. 158 (1990). However, the parent bears the long-range cost of caring for an injured child, and the possibility of parental tort liability remains. *See infra* pp. 701-710.

19. *See infra* text accompanying notes 123-26, discussing the distinction between punitive and compensatory damages. In the rare case of egregious employer wrongdoing, punitive damages should be allowed through a tort suit.

trast, compensation for actual damages puts the child where she would have been economically, though unfortunately not physically, had there been no injury.[20]

B) INCENTIVES FOR CLEANUP: DETERRENCE

Another basic goal of tort law is to prevent harm through deterrence of wrongful or negligent acts.[21] Though there is disagreement about whether tort law actually deters wrongful conduct,[22] Williams suggests that tort law does deter where the harm is preventable; for example, civil sanctions for lack of workplace safety precautions may affect behavior.[23]

Incentives for cleanup are important in the reproductive hazards area because a cleaner, safer workplace can prevent injuries. Surely, a healthy child is preferable because it suffers less than an injured, though compensated, child. Ideally, the workplace should be free from all risks.[24]

A safe workplace, however, cannot be achieved without costs. The cost of achieving a zero risk workplace may be too high: it may drive the employer out of business or to a foreign country with less strict regulations, or it may make the product unaffordable. Thus, fairness to employers requires that incentives for cleanup be balanced against a tolerable level of risk, i.e., one that can be achieved without undue cost. If the cost of injury can be absorbed by the employer or an insurer and be eventually passed on to society without making essential products unaffordable, the risk level is appropriate.

Therefore, the goal is not over-deterrence or elimination of all risk, but to provide incentives for cleanup to achieve a level of tolerable risk.

20. Sugarman notes: "What I want, and what I assume most people want, is basic protection against income losses and for medical expenses that are incurred for whatever reason." S. SUGARMAN, *supra* note 13, at 48. He goes on to argue that although compensation for accident victims is a "proper social concern," tort law is not an effective means of providing it. *Id.* at 49.

21. S. SUGARMAN, *supra* note 13, at 3-4 (first major goal of personal injury law encompasses behavior control, safety, deterrence of unsafe conduct and the prevention of injury); Williams, *supra* note 13, at 144-51 (explaining the deterrent function of tort law).

22. S. SUGARMAN, *supra* note 13, at 3-24; Williams, *supra* note 13, at 149-51. Factors negating deterrence include the existence of insurance, the uncertainty of sanction, and lack of knowledge of the law. *Id.*

23. Williams, *supra* note 13, at 149.

24. Wendy Williams argues the goal should be to make the workplace safe for *all* workers. *See* Williams, *supra* note 10, at 663-65.

C. EQUAL EMPLOYMENT OPPORTUNITIES FOR MEN AND WOMEN: NON-DISCRIMINATION

The "antidiscrimination principle" has been defined by Paul Brest as "the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected."[25] This principle may be extended to classifications and practices based on sex as well as race, although the extension is problematic.[26] The idea that classifications should be based on personal ability, rather than immutable characteristics such as race or sex, seems to be generally accepted in our society.[27]

Classifications based solely on sex are disfavored in order to eradicate role stereotypes and vestiges of the historical subjugation of women. Women and men should be able to share equally in positions of power and decision-making in the larger society, as well as within family units.[28] Equal access to employment opportunities[29] is essential to this goal, not only because it provides personal self-fulfillment and economic power, but also because employment roles are often a channel to power in the political sphere.

In the reproductive hazards context, one could argue that excluding women is justified since women are more likely

25. Brest, *The Supreme Court, 1975 Term—Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

26. Professor Herma Hill Kay discusses the problems of applying the assimilationist model of antidiscrimination, used in race discrimination cases, to sex-based classifications in Kay, *Models of Equality*, 1985 ILL. L. REV. 39, 78-87 (1985). The assimilationist model "implies that the law should treat women and men as if they were interchangeable." *Id.* at 40. Professor Kay suggests that the assimilationist model is inappropriate because it does not account for the fact of sexual reproductive differences. She argues that the better approach is to "accommodate and neutralize the impact of those differences on the lives of women and men." *Id.* at 88.

27. "Equality is a deeply-held yet elusive ideal in American legal and political theory." *Id.* at 41.

28. Professor Kay notes that "the sex antidiscrimination cases ... display a two-way model of access in which power is exchanged between both sex groups." *Id.* at 67. Thus, women seek to share in opportunities traditionally available only to men, while men seek access to spheres traditionally occupied by women. In contrast, race cases display "a one-way model [where] the disadvantaged racial group seeks to wrest power from a privileged and dominant racial group," with no reciprocal attempt by the dominant racial group to gain access to what the disadvantaged group has. *Id.*

29. "Equality of opportunity," as opposed to assimilation, is defined by Professor Kay as "removing barriers which prevent individuals from performing according to their abilities. The notion is that the perceived inequality does not stem from innate difference in ability, but rather from a condition or circumstance that prevents certain uses or developments of that ability." Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 26 (1985).

than men to transmit harm to offspring.[30] Thus, the classification is not so much based on sex but on the increased likelihood of injury.

This argument fails for two reasons. First, the class of women is both overly broad and underinclusive: it includes infertile women who have no risk of transmitting harm and excludes men who may have that risk.[31] Second and more importantly, Congress refuted the argument that pregnancy discrimination is not sex discrimination[32] by enacting the Pregnancy Discrimination Act.[33] Congress explicitly recognized that classifications based on women's reproductive capacity are as impermissible as other sex-based classifications. The question then focuses on remedies: should pregnant women be treated the same as other disabled workers or is special accommodation of women's reproductive function permissible and desirable?[34]

Women's special reproductive function, including a capacity to transmit harm, must be accommodated in order to put them on an equal footing with men in the toxic workplace.[35]

30. *See supra* note 10 & *infra* note 146, discussing the conflicting evidence regarding the relative capacity of women and men to transmit reproductive harm.

31. *See supra* note 10 & *infra* note 146.

32. The Supreme Court twice held that pregnancy discrimination was not sex discrimination in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (pregnancy classification not sex discrimination under Title VII) and in Geduldig v. Aiello, 417 U.S. 484 (1974) (denying that exclusion of pregnancy from a disability plan's coverage was a sex-based classification under the equal protection clause).

33. 42 U.S.C. § 2000e(k) (1981). In response to the *Gilbert* and *Geduldig* decisions, the Pregnancy Discrimination Act (PDA) provides that the term "sex" in Title VII includes pregnancy, childbirth and related medical conditions, and that women affected by these conditions shall be treated the same for employment-related purposes as other persons similar in their ability to work.

34. The feminist community has vigorously debated the efficacy of the question of "equal treatment" and "special treatment" models. *See* Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982) (arguing for equal treatment model); *see generally* Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983). The Supreme Court expressed approval of the special treatment model in California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1986), holding that California's Fair Employment Law, requiring leave for pregnant workers but not for other similarly disabled workers, was not preempted by the language of the PDA providing that "women affected by pregnancy ... shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work." *Guerra*, 479 U.S. at 285 (quoting 42 U.S.C. § 2000e(k) (1981)). The Court noted that the PDA was a floor, not a ceiling, on protection for pregnant women. *Id.* at 285.

35. Professor Herma Hill Kay has made an impressive argument in support of the special treatment model for pregnancy in two articles: *Models of Equality*, *supra* note 26 and *Equality and Difference: The Case of Pregnancy*, *supra* note 29. In

Such accommodation should include paid leave[36] during pregnancy. Leave during the period when the woman is attempting to conceive, or while lactating, may also be necessary. The woman should be guaranteed her own or a substantially similar job when she returns to work, at an equivalent rate of pay. The policies should be legislatively mandated if employers are unwilling to adopt them voluntarily.

Leave policies comport with the basic principle of accommodating reproductive difference. Given women's greater risk of transmitting harm, the policies equalize employment opportunity for women and men. Similarly, compensation policies for injured offspring should reduce any discriminatory impact by providing compensation for harm transmitted through men as well as women.

D) FAIRNESS TO EMPLOYERS' ECONOMIC INTERESTS

Fairness to employers is required for strategic reasons and justice considerations. Employers must be convinced that

Models, she argues that we must find ways to accommodate and neutralize the impact of sexual reproductive differences of the lives of men and women. Kay, *supra* note 26, at 88. In *Equality and Difference*, Kay argues that accommodation of reproductive difference requires an "episodic analysis" that "take[s] account of biological reproductive sex differences and treat[s] them as legally significant only when they are being utilized for reproductive purposes." Kay, *supra* note 29, at 22. She states that for women, the reproductive function is manifest only during pregnancy. *Id.* at 23-24. She notes that female reproductive behavior "occupies approximately nine months, but its cycle is complete following childbirth." *Id.* at 24.

In the reproductive hazards arena, however, her analysis is faulty; workplace toxins can cause harm long before a woman becomes pregnant (and perhaps after birth, during lactation). Thus, women may need special accommodation for a much longer period than just the nine months of pregnancy, including the periods when the woman is attempting to conceive and during lactation.

Men also transmit pre-pregnancy harm. Kay argues that "[m]ale reproductive behavior is quite brief in duration." *Id.* Presumably her definition includes only the act of sexual intercourse. Yet, for men, legally significant reproductive events may occur constantly with exposure to workplace toxins harmful to their reproductive systems. Men are equally deserving of protection of their reproductive function; however, defining the relevant "episode" may be difficult, if not impossible.

36. There is debate over voluntary versus mandatory leave and relevant time periods. *See infra* note 136. Voluntary leave is less paternalistic and less intrusive on women's autonomy; however, employees may be reluctant to request leave due to employer pressure. Mandatory leave is consistent with current OSHA practices requiring employees to temporarily leave workplaces when their own health is in danger. 29 C.F.R. § 1910.1025(k) (1990). But what level of risk triggers the leave? Must there be absolute proof that the substance causes reproductive harm, or is a mere suspicion enough? What level of scientific proof is required? Should the time of the leave (attempting to conceive, pregnancy, lactation) be keyed to the level of known or suspected risk involved? When is leave appropriate for men, if at all?

The answers to these questions require more technical knowledge of the effects of various substances than this author possesses. However, mandatory leave policies are necessary to protect the reproductive function of workers endangered by workplace hazards.

any compensation mechanism is fair in order to gain support and compliance. Moreover, fairness is required in order to retain jobs. At one extreme, laws requiring unduly costly compensation or insurance should not drive employers out of business.[37] Neither should they force employers to move their operations to other countries with less burdensome regulations.

Finally, justice requires fair treatment of all actors. Employers benefit society by providing jobs and essential products. They should not be treated as wrongdoers if they are making good faith efforts to deal with the complex problems of reproductive hazards in the workplace.

In summary, each of the four policy goals is equally important. The first two goals express desired ends (*what* we want); the second two are operational concerns (*how* we want to achieve it). Together, they appropriately balance the interests of the three main parties: worker, child, and employer. The state, as guardian of these interests, should seek to devise compensation solutions that implement the four principles.

II. ARE FEARS OF MASSIVE TORT LIABILITY JUSTIFIED?

The answer to this question requires an understanding of common law principles of employer liability to employees, the statutory intervention of workers' compensation laws, an in-depth analysis of the child's cause of action against the employer, and the possibility of the child's proceeding against the parent.

A) COMMON LAW REMEDIES OF EMPLOYEE AGAINST EMPLOYER

At common law, employers had very limited tort liability to employees:[38] they were liable only for failure to exercise reasonable care. Moreover, the employer's duties were limited to providing a safe workplace and safe equipment, warning against dangers of which the employee was reasonably igno-

37. The Supreme Court in *Johnson Controls* stated: "We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer's business." UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1209 (1991). The court appears to suggest that such "prohibitive" costs could form the basis for a BFOQ defense to a charge of discrimination.

38. The discussion in the following three paragraphs is drawn from W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 568-71 (5th ed. 1984) [hereinafter PROSSER & KEETON] and 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation*, § 1, at 560 (9th ed. 1987) [hereinafter B. WITKIN].

rant, providing a sufficient number of fellow workers, and promulgating and enforcing safety rules.

If one of these duties were breached, three defenses stood as powerful bars to employee recovery: contributory negligence, assumption of the risk, and the fellow-servant rule. As a result, there was no recovery for most industrial accidents.

The assumption of the risk doctrine was particularly onerous for employees. An employee who appreciated the danger of his workplace yet remained at work was presumed to assume the risk; thus, no recovery was possible, even when an employer had clearly violated one of the prescribed duties. American courts ignored the role of economic necessity in the employee's "choice" to remain at work.

In the fetal protection area, assumption of the risk might bar a worker's action for reproductive harms against an employer who had discharged his duty to warn, if the employee understood the danger.[39] However, the doctrine would not bar the *child's* cause of action, since the child did not choose to be at a toxic worksite—the parent's implied waiver would not apply to the child. Thus, the employer could be subject to liability.[40]

B) WORKERS' COMPENSATION LAWS

Workers' compensation laws were enacted in response to the harsh treatment of employees under the rigid common law rules.[41] These statutes abolished the common law defenses and exposed the employer to absolute liability, regardless of negligence by either party. Workers' compensation statutes shift the financial burden of human accident losses in industry from the employee to the employer, who can then pass increased costs on to the consumer.[42] The advantages include

39. Recently, courts have significantly narrowed the doctrine of assumption of the risk. *See infra* note 99.

40. *See infra* pp. 693-698 and accompanying notes for additional considerations of employer liability.

41. The following paragraph is drawn from PROSSER & KEETON, *supra* note 38, at 573-74, and B. WITKIN, *supra* note 38, at 560-61.

42. Theoretically, workers' compensation could encompass injury to a child from parental exposure to workplace toxins. Injured offspring are human accident losses whose cost should be borne by industry. The employer can efficiently pass on the cost of prevention and compensation to society through product price. It is difficult, however, to adapt the workers' compensation remedy scheme to the injured child, since benefits are based in part on inability to earn wages. Therefore, some form of employer-financed no-fault compensation should be adopted to pay for the child's injury. *See infra* p. 710-713.

reduced litigation costs, immediate recovery, and promotion of industrial harmony. The employee need not prove proximate cause, but must still show that the injury was work-related.[43]

Several aspects of workers' compensation law are particularly relevant to the reproductive hazards area.[44] First, the awards are based on the concept of disability, which has two components: medical or physical disability, and inability to earn wages. Thus, payments to the injured worker consist only of medical expenses occasioned by the injury, plus wage-loss payments.

It follows that there is no payment for emotional distress (except psychological care), pain and suffering, or punitive damages as there might be in tort. Therefore, since the costs of an unsafe workplace are less under a workers' compensation system than under a tort system, there is less incentive for the employer to clean up the workplace.

Second, when an injury is "compensable," statutory benefits are the employee's exclusive remedy.[45] The employee may not sue the employer in tort. The remedy is thus an imposed compromise whereby the worker accepts limited compensation (less than possible tort recovery) in exchange for assured compensation.[46]

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43. Not all workers are covered by workers' compensation statutes, e.g., farm laborers are usually exempt. PROSSER & KEETON, *supra* note 38, at 574. This is significant because such workers are often exposed to pesticides and other chemicals which can cause reproductive damage. In addition, some "casual" employees, and those employed by businesses with fewer than a minimum number of employees, may not be covered. *Id.*

44. This paragraph is drawn from 2 A. LARSON, WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH § 57.10, at 10-1 to 10-6 (1990).

45. PROSSER & KEETON, *supra* note 38, at 574; *see e.g.*, CAL. LAB. CODE § 3602(a) (Deering 1991) ("Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer....").

46. PROSSER & KEETON, *supra* note 38, at 574. In California, there are few statutory exceptions to exclusivity: where the injury or death is caused by willful physical assault by the employer (CAL. LAB. CODE § 3602(b)(1) (Deering 1991)); where the injury is aggravated by the employer's fraudulent concealment of the injury and its connection to the employment (CAL. LAB. CODE § 3602(b)(2) (Deering 1991)); or, where the injury is caused by a defective product manufactured by the employer that the employee obtained from a third party (CAL. LAB. CODE § 3602(b)(3) (Deering 1991)). A fourth judicially-created exception is the "dual capacity" doctrine, wherein the employer acts as both employer and defective products manufacturer vis-a-vis the employee. *See* CAL. LAB. CODE § 3602(a) (Deering 1991); B. WITKIN, *supra* note 38, § 28, at 581-82, § 45, at 599-600, § 50, at 607-08. While these exceptions may be relevant in individual reproductive hazards cases, the following analysis assumes that none apply.

Finally, although the injury may be clearly "compensable" under the statute, there may be no compensation without lost earning capacity.[47] Nevertheless, the employee is barred by the exclusivity provision from suing the employer in tort.[48] Thus, work-related injury to sexual or reproductive functions yields no statutory benefits to the employee, yet will not form the basis of a damage suit against the employer.[49]

This is especially relevant in the reproductive hazards arena. A complete overhaul of the workers' compensation system would be necessary to provide benefits for reproductive damage to the employee herself, let alone damage that may occur to her offspring.[50] To date, no legislation has corrected this problem, although reform could include benefits consisting of a lump sum payment regardless of wage loss, as is often provided for loss of a bodily member.[51]

In *Bell v. Macy's California,*[52] a California appellate court recently affirmed workers' compensation as the "exclusive remedy" for all work-related injuries, including damage to offspring.[53] The court's decision rested on the doctrine of "deriva-

47. *See* A. LARSON, *supra* note 44; CAL. LAB. CODE § 4660 (Deering 1991).

48. *See supra* note 45.

49. A. LARSON, *supra* note 44, §§ 65.20-21, at 12-4 to 12-6. In California, an employee was denied compensation for work-related injuries to his genitals, groin and thighs because there was no lost earning capacity. Williams v. State Comp. Ins. Fund, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975). Similarly, the workers' compensation disability schedule barred his wife's suit for loss of consortium because the worker's benefits are in lieu of liability to any person. *Id.* at 123, 123 Cal. Rptr. at 816. The court's denial of a separate tort suit rests on the:

> reciprocal concessions upon employer and employee alike.... [T]he employer assumes liability without fault, receiving relief from some elements of damage available at common law; the employee gains relatively unconditional protection for impairment of his *earning capacity*.... [T]he work-connected injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals....

Id. at 122, 123 Cal. Rptr. at 815 (emphasis added). The court conceded that "a failure of the compensation law to include some element of damage recoverable at common law is a legislative and not a judicial problem." *Id.*

50. Under current rules, the injury to the child, even if a covered *type,* would not entitle the child to benefits, as workers' compensation provides benefits only for the worker herself.

51. *See* A. LARSON, *supra* note 44, § 57.11, at 10-6, § 57.14, at 10-11 to 10-16 (discussing the "schedule principle" of fixed amounts for specific physical impairments).

52. 212 Cal. App. 3d 1442, 261 Cal. Rptr. 447 (1989).

53. *Id.* at 1455, 261 Cal. Rptr. at 456. In *Macy's,* a company medical clinic delayed hospitalizing a seven-month pregnant clerical employee, whose uterus had ruptured while she was at work. As a result of the delay, the baby suffered brain and other

tive injury," which applies exclusivity to a third party's claim for any injuries deriving from a compensable injury to an employee.[54] The court maintained that an employer "should not be held liable in tort for certain collateral consequences of a covered injury." [55] The *Macy's* holding also reflected concern for potential gender discrimination.[56]

The outcome in *Macy's* was arguably unsatisfactory to both women and their offspring, since a child injured by workplace reproductive hazards is left without remedies.[57] The court recognized this and called upon the legislature to address the gap between tort and workers' compensation law.[58]

physical damage, and eventually died two years later. The parents sued the employer for wrongful death, for personal injuries to the employee, and for emotional distress to the husband. In addition, they brought a survivor's action on behalf of the child under the probate code. The trial court granted the employer's motion for summary judgment based on the exclusivity provision of worker's compensation. *Id.* at 1446-47, 261 Cal. Rptr. at 449-50.

54. *Id.* at 1452, 261 Cal. Rptr. at 453-54. The court stated that because the baby's injuries "were the direct result of Macy's work-related negligence towards [the employee], they derived from that treatment and are within the conditions of compensation of the workers' compensation law." *Id.* at 1453, 261 Cal. Rptr. at 454. The court noted that the derivative injury rule bars a relative from recovery for mental distress resulting from witnessing an employee's gruesome injury or death. *Id.* at 1452-53, 261 Cal Rptr. at 453-54 (citing Williams v. Schwartz, 61 Cal. App. 3d 628, 630-32, 131 Cal. Rptr. 200, 201-02 (1976)). Similarly, a spouse has no cause of action against an employer for loss of consortium resulting from a workplace injury. *Id.* (citing Williams v. State Comp. Ins. Fund, 50 Cal. App. 3d 116, 123, 123 Cal. Rptr. 812, 816 (1975)).

The dissent in *Macy's* argued that in some instances, the employee parent would have received no compensable "injury" from which the child's injury could "derive." *Id.* at 1456-57, 261 Cal. Rptr. at 456-57. *See also Birth Defects, supra* note 4, at 239. However, the majority responded by noting the exclusivity provision applied not only to a compensable injury but also to a work-related "condition." *Macy's*, 212 Cal. App. 3d at 1453 n.6, 261 Cal. Rptr. at 454 n.6. Thus, the court wrote the requirement of a compensable injury to the worker out of the rule. The "condition" language could apply to a situation where toxic exposure genetically alters a worker's sex cells. Under the *Williams* line of cases, the worker would receive no "injury," yet the child's injury would derive from the work-related "condition" and be exclusively compensable.

55. *Macy's*, 212 Cal. App. 3d at 1454, 261 Cal. Rptr. at 455.

56. *Id.* at 1454-55, 261 Cal. Rptr. at 455-56. After acknowledging that the derivative injury doctrine "apparently has its roots in the defunct common law notion that a wife's right to sue for injury to her husband was derivative and collateral to the husband's rights," the appellate court noted that allowing the fetus to sue its mother's employer would entail "serious risk" for the employer. *Id.* at 1453-54, 261 Cal. Rptr. at 454-55. The range of potential injuries to unborn children encompasses ordinary slips and falls, as well as more "subtle poisoning" by toxic exposure or genetic radiation damage. *Id.* at 1454, 261 Cal. Rptr. at 455. The court concluded that the employers might respond to potential liability by excluding women from the workplace. *Id.*

57. This decision may have limited precedential value: its shaky doctrinal underpinnings are subject to legislative or judicial attack, the decision is binding only in the First District, and the California Supreme Court's denial of review (*rev. denied* 11/15/89) does not necessarily signal approval, as the Court may be waiting for a conflict to develop among the Districts.

58. *Id.* at 1453 n.5, 1455 n.7, dissent at 1458, 261 Cal. Rptr. at 454 n.5, 455 n.7, dissent at 458.

In other jurisdictions, courts interpreting the exclusivity provision in workers' compensation statutes have reached contrary conclusions.[59] In *Adams v. Denny's Inc.*,[60] the Louisiana Court of Appeal stated that a child's injury resulting from workplace reproductive hazards was not exclusively compensable because the fetus was not a part of the physical structure of the mother's body; thus, its death was not an injury to the worker within the meaning of the statute.[61] This reasoning sharply contrasts with that in *Macy's*, where the court noted that "the fetus *in utero* is inseparable from its mother. Any injury to it can only occur as a result of some condition affecting its mother."[62]

Clearly, the combination of California decisions in *Johnson Controls* and *Macy's* calls for legislative response. The courts have correctly[63] cut off the option of discrimination against

59. Witty v. American Gen. Capital Distrib., 697 S.W.2d 636 (Tex. Ct. App. 1985) (workers' compensation exclusivity does not bar a mother's cause of action for emotional distress suffered as a result of fetal death caused by the employer's negligence. In dicta, the court noted that workers' compensation would not bar a third party victim's action. *Id.* at 641); Woerth v. United States, 714 F.2d 648 (6th Cir. 1983) (exclusivity provision of the Federal Employees Compensation Act did not bar a husband's claim under the Federal Torts Claim Act for medical expenses and lost wages after contracting hepatitis from his wife, who was covered by the FECA. The court rejected any application of a derivative injury rule, noting that the injuries were separate and plaintiff did not seek damages "with respect to" his wife's injuries. *Id.* at 650); Dillon v. S.S. Kresge Co., 35 Mich. App. 603, 192 N.W.2d 661 (1972) (where a child's suit for injuries resulting from fetal exposure to rubella due to employer's negligence was remanded in light of recent Michigan decision allowing suits for prenatal injuries).

60. 464 So. 2d 876 (La. Ct. App. 1985). There, an employee sued for the wrongful death of her fetus resulting from a fall at work due to employer negligence.

61. *Id.* at 877. The court relied on the recent state legislative proclamation that human life begins at the moment of "fertilization and implantation," *id.*, thus reaching a result more favorable to the injured child than in *Macy's* by invoking strong pro-life language. Another difference between the two cases is Louisiana's recognition of an action by parents for the wrongful death of a fetus. Danos v. St. Pierre, 402 So. 2d 633 (La. 1981). In California, there is no recovery for the wrongful death of a stillborn child. Justus v. Atkinson, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

62. Bell v. Macy's California, 212 Cal. App. 3d 1442, 1453 n.6, 261 Cal. Rptr. 447, 454 n.6 (1989). The use of the word "inseparable" is somewhat unfortunate, since the meaning is ambiguous. There are three possible ways to look at the maternal/fetal relationship. First, the fetus is part of the mother's body; however, the concept of viability, i.e., the idea that a fetus can exist outside the womb, contradicts this notion. A more palatable interpretation considers the fetus and mother to have identical (inseparable) interests; yet there are numerous situations where those interests might collide, e.g., drug abuse or abortion. Second, the fetus is entirely separate. Third, the fetus is separate but within the mother's body. Although the mother and fetus may have differing interests at times, the mother takes the interest of her fetus into account in her behavior. Interview with Marjorie M. Shultz, Professor of Law at University of California, Berkeley (Feb. 1991).

63. These decisions were correct because they promote equal employment opportunity for women. *See supra* pp. 679-681 (discussing non-discrimination). In

women in *Johnson Controls,* but workers are still exposed to reproductive hazards that are potentially harmful to their offspring.[64] *Macy's* leaves such injured children remediless.[65] Since the policy reason driving the *Macy's* decision (the risk of discrimination against women) was mooted by *Johnson Controls,* the case now rests entirely on the shaky derivative injury rule. Therefore, *Macy's* should be overruled or legislatively abrogated.

Legislation to abrogate the *Macy's* holding was introduced in the California legislature in February, 1990. Assembly Bill No. 489 would have amended the Labor Code to add Section 3606, reading:

> Notwithstanding Section 3602, where the negligence of an employer is the proximate cause of an injury to the unborn child of a pregnant employee, an action at law for damages may be brought against the employer, by or on behalf of that child, as provided in Section 29 of the Civil Code.

The bill passed both houses of the legislature but was vetoed by Governor Wilson on October 13, 1991.[66]

This legislation was a good beginning. It allowed only a cause of action against the employer and not against a parent, although it would probably not bar such a cause of action.[67] However, it is problematic because it deals with fetal injuries occurring in utero; *a fortiori* it only applies to women workers and does not cover preconception harms, such as injuries caused by genetic damage to either parent.[68] This does not serve the basic

addition, eliminating women from the toxic workplace is not the best nor the only way to prevent harm. Making the workplace safer for all workers and providing reasonable leave policies are feasible alternatives with a less discriminatory impact.

64. The federal *Johnson Controls* decision covers discriminatory refusal to hire women as well as discrimination once women are working, such as firing and demotion. The Court stated that "[t]he extra cost of employing members of one sex ... does not provide an affirmative Title VII defense for a discriminatory *refusal to hire* members of that gender." 111 S. Ct. 1196, 1209 (1991) (emphasis added). Discrimination in hiring, however, may be more difficult to detect and prove than other forms of discrimination.

65. Currently, an injured child's only option is to sue the parent. *See infra* pp. 701-710.

66. ASSEMBLY WEEKLY HISTORY (Feb. 6, 1992).

67. *See infra* pp. 701-710 (discussing a child's cause of action against the parent).

68. *See infra* pp. 690-692 (discussing preconception torts).

goal of equal employment opportunity for men and women. Also, since the legislation relies on Civil Code Section 29,[69] it requires the child to be born alive for the cause of action to proceed. There would be no remedy for a stillborn child. This does not serve the goal of adequate remedies for all injuries.

Legislative language should encompass the basic goals of equal employment opportunity, adequate compensation for injury, incentives for a safe workplace, and fairness to employers. Such a statute could read as follows:

> Where the negligence of an employer is the proximate cause of an injury to the unborn or unconceived offspring of an employee, an action at law for damages may be brought against the employer, by or on behalf of that offspring.[70]

This language serves the four policy goals noted above. It allows the child to sue in tort, providing an incentive for employers to clean up the workplace. The child may sue for injuries incurred through *both* parents, reducing employers' incentives to discriminate. The tort remedy should be only one part of a broader compensation scheme to provide adequate compensation.[71] Finally, the safeguards of the tort system, i.e., requiring proof of causation, lack of contributory negligence, etc., should ensure fair treatment of employers.

C) THE CHILD'S CAUSE OF ACTION AGAINST THE EMPLOYER

As discussed above, the exclusivity doctrine in workers' compensation statutes bar most suits against employers for injuries to employees. Most jurisdictions, however, have not established rules for workplace injury to unconceived or unborn offspring. No such suit has yet been successful, perhaps owing to problems in proving causation.[72] However, since employers justify excluding women on the grounds of potential tort liability, and because tort law is currently the sole means of

69. *See infra* note 76.

70. The proffered language is drawn from the defeated California Assembly Bill No. 489. *See supra* text accompanying note 66.

71. *See infra* pp. 710-713.

72. *See Birth Defects, supra* note 4, at 256. *But see* Stelly v. Firestone Tire & Rubber Co., 20 OCCUPATIONAL SAFETY & HEALTH REP. (BNA) 1040 (1990). There, the family of a Firestone chemical plant employee reached a settlement including $6.8 million for the 18-year-old son who was allegedly born mentally retarded due to the father's exposure to mercury on the job.

compensation, it is necessary to evaluate the probability of a child recovering for such harm. This section discusses obstacles to a child's recovery in tort from an employer. For the purposes of discussing California law, it is necessary to hypothesize that the *Macy's* decision has been abrogated; thus, injured children of workers are free to sue the employer.

Some commentators argue that workplace exposure to hazards could lead to massive employer liability to injured offspring.[73] An action against the employer would be based upon negligence theory.[74] The four elements of a negligence suit are duty, breach, injury and causation. The obstacles an injured child faces in proving these elements fit under several doctrinal labels, as noted in the following discussion.

1) Prenatal and Preconception Torts

A threshold question is whether the relevant jurisdiction recognizes a cause of action for either prenatal or preconception injuries. This question is usually framed as whether the defendant owes a duty of care to a plaintiff who was unborn or unconceived at the time of injury. All states now allow a cause of action for prenatal torts.[75] In California, such suits are specifically authorized by an 1872 statute, Civil Code Section 29.[76]

73. *See* Paskal, *supra* note 7, *passim*. It is important to note that Paskal's analysis uses cases from various jurisdictions to prove his thesis. However, tort law is state law; thus, any accurate analysis needs to be jurisdiction-specific.

74. The employer is "strictly liable" to its employees in only two situations: first, an employer who also acts in the role of manufacturer can be strictly liable for providing defective products; or second, where the employer's activity is unusually dangerous and is carried on in an inappropriate location. *See* PROSSER & KEETON, *supra* note 38, § 75 at 537-38 (discussing unusually dangerous activities); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, § 1241-43, at 675-79 (9th ed. 1988) (discussing strict products liability). Though some manufacturing activities and substances could be considered dangerous, it would be difficult to argue that the manufacturing plant was an inappropriate location for their use.

75. Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. 1946) was the first American case to recognize a cause of action for prenatal torts. Since then, all jurisdictions have followed suit, at least for children born alive. PROSSER & KEETON, *supra* note 38, § 55 at 368. The duty and cause of action are recognized in California. 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, § 636 at 728.

76. CAL. CIV. CODE § 29 (Deering 1990) states:

> A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of birth of the minor....

Prior to 1946, the statute was used primarily to protect the rights of future beneficiaries under wills, trusts, and life insurance policies, etc. The statute is problematic in several respects. First, it explicitly states a fetus is a "person," thus fueling the abortion debate. However, courts have interpreted the statute to mean that

As of early 1991, only a few courts had expressly ruled on the question of preconception torts. Of these, all jurisdictions except New York recognized the preconception cause of action.[77] The California Supreme Court has acknowledged the tort in dicta.[78] Recently, a California Court of Appeal expressly recognized the preconception cause of action but limited its application to product manufacturers and medical care providers.[79]

a fetus is a person only for some purposes. *See, e.g.*, Endo Labs., Inc. v. The Hartford Ins. Group, 747 F.2d 1264 (9th Cir. 1984) (fetus later born alive is a person for purposes of liability under insurance policy); Reyna v. City & County of San Francisco, 69 Cal. App. 3d 876, 138 Cal. Rptr. 504 (1977) (fetus is not a person for purposes of wrongful death statute). *But see* Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939) (statute based on recognized fact that viable fetus is a "human being," separate and distinct from the mother, allowing child to maintain malpractice suit against physician for injuries sustained incident to delivery). Secondly, a child must be "conceived" at the time of injury for a cause of action to proceed; thus, the statute does not authorize preconception torts. The California Supreme Court resolved this, however, in Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). The six-year statute of limitations is tolled by the delayed discovery rule. Call v. Kezirian, 135 Cal. App. 3d 189, 185 Cal. Rptr. 103 (1982); Segura v. Brundage, 91 Cal. App. 3d 19, 153 Cal. Rptr. 777 (1979).

77. *See, e.g.*, Monusko v. Postle, 175 Mich. App. 269, 437 N.W.2d 367 (1989) (preconception negligence cause of action exists against physician for failure to test mother for rubella); Bergstreser v. Mitchell, 577 F.2d 22, 28 (8th Cir. 1978) (allowing cause of action under Missouri law to a child born alive for preconception injuries due to negligent Caesarian section on the mother in a prior pregnancy); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (allowing cause of action for injuries to child sustained through negligent transfusion of mother with incompatible blood before conception); Jorgensen v. Meade Johnson Labs., Inc., 483 F.2d 237 (10th Cir. 1973) (allowing cause of action under Oklahoma law for claim that use of defendant's oral contraceptive altered the mother's chromosomal structure to produce deformed children).

These courts have based their conclusions on basic concepts of duty and proximate cause. The *Renslow* court summed up its logic by stating: "We believe that there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother." 67 Ill. 2d at 357, 367 N.E.2d at 1255. In contrast, New York courts have disallowed most preconception torts for various policy reasons: the need to limit liability, to prevent frivolous claims, and to avoid incongruity with statutes of limitations. Some courts claim no duty to the unconceived because there is no duty to protect the potentiality of life. Catherwood v. American Sterilizer Co., 130 Misc. 2d 872, 498 N.Y.S.2d 703 (1986) (no cause of action for preconception strict products liability). *See also* Enright v. Eli Lilly & Co., 77 N.Y.2d 377, 570 N.E.2d 198 (1991) (no strict liability cause of action for injuries to grandchild resulting from grandmother's use of DES); Albala v. City of New York, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981) (no cause of action in New York for preconception negligence).

78. In Turpin v. Sortini, 31 Cal. 3d 220, 230-31, 643 P.2d 954, 960, 182 Cal. Rptr. 337, 343 (1982), the Court stated: "[I]f (plaintiff's) deafness ... resulted from a tort committed upon her mother before conception (citations omitted), it is clear that she would be entitled to recover against the negligent party."

79. In Hegyes v. Unjian Enter., Inc., 234 Cal. App. 3d 1103, 286 Cal. Rptr. 85 (1991), the court held that an automobile driver owes no duty of care to the unconceived child of a woman injured by his negligent driving, since the subsequent injury to the child is not reasonably foreseeable. Under this reasoning, employers could be liable to unconceived children of workers if the injury is foreseeable. *See id.* at 1130-33, 286 Cal. Rptr. at 101-03. However, the court also held that no defendant except a product manufacturer or medical professional owes a duty of care to the unconceived. *Id.* at 1113, 286 Cal. Rptr. at 89. Though the court did not discuss employers as potential defendants, its subsidiary holding may become another barrier to recovery against them in California.

In a jurisdiction which does not recognize preconception torts, a child could not sue an employer for workplace harms mediated through the father, as all harm would necessarily occur prior to conception.[80] This creates an incentive for employers to exclude women from the workplace. In the future, courts should keep this outcome in mind when deciding whether to allow preconception torts.

2) Causation

Proving causation is the second substantial obstacle to an injured child's recovery. A plaintiff in a negligence suit must prove both cause in fact (actual cause) and proximate (legal) cause.

To prove actual cause, the child must show that workplace exposure actually caused the harm. This is difficult in the reproductive hazards context; there is a general lack of scientific knowledge, and toxic exposure has a delayed impact.[81] The available data consist of animal experiments and epidemiological studies showing the likelihood of a substance to cause harm.[82] Mass tort cases have similar causation problems.[83]

The question of proximate or legal cause involves determining whether it is just to hold the defendant responsible in the particular situation.[84] Factors to consider include foreseeability of consequences, concurrent causes, intervening causes, and whether employers may shift the duty to protect to someone else.[85]

All of these factors are relevant in the reproductive hazards arena. Regarding foreseeability, the employer must or should know the risk of reproductive harm. Other concurrent causes of birth defects must be ruled out. The decision of the

80. One possible exception could be where toxic substances on a man's clothing are transmitted through a pregnant woman to the fetus. This situation should be analyzed as a prenatal tort, with the employer a few steps removed from the fetus. A related problem, where a young child encounters toxins through exposure to a parent's clothing, *see* N.Y. Times, *supra* note 10, is beyond the scope of this paper, as it is not a reproductive harm but a direct injury to the child.

81. *Birth Defects, supra* note 4, at 242.

82. Paskal, *supra* note 7, at 333. Paskal notes the sympathy of courts to victims, and fears that courts will apply a presumption of causation in fetal torts litigation. *Id.* at 335.

83. *See* S. SUGARMAN, *supra* note 13, at 41-49 (discussing how causation problems, among others, hindered accomplishment of the compensation goal in Agent Orange, bendectin, asbestos, and IUD litigation).

84. *See* PROSSER & KEETON, *supra* note 38, § 42, at 272-80; 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, §§ 965-72, at 354-63 (9th ed. 1988).

85. PROSSER & KEETON, *supra* note 38, § 42, at 279.

parent, duly warned, to work in the face of known danger might be considered an intervening cause.[86] If the state regulates workplace toxins, the employer's compliance with such regulations may shift any duty to protect to the state.[87] Ultimately, if a court decides that the connection between the employer and the injury is too tenuous, or if there is a policy basis that justifies exonerating the employer, proximate cause could be the legal label which releases the employer from liability.

3) Common Law Duties and Defenses

Common law rules regarding employer liability to employees apply when an injury is not compensable through workers' compensation.[88] Then, the employer is subject to the common law duties and defenses.

a) Duty to Provide a Safe Workplace—Compliance With Applicable Regulations

The employer's duty to provide a safe workplace and safe equipment is implicated in the reproductive hazards context. Compliance with applicable safety statutes and regulations may discharge this duty. In California, violation of a statute or regulation will be considered negligence per se where the violation proximately caused the plaintiff's injury.[89] Thus, a finding that an employer violated safety regulations would contribute to a finding of negligence. An employer's compliance with applicable regulations would not necessarily bar suit if it were found that the employer should have exercised a higher standard of care than the regulations required.[90] However, in the trier of fact's eyes, evidence of compliance would likely weigh heavily in the employer's favor.

Currently, applicable federal occupational health regulations (OSHA standards) do not take reproductive harms into

86. *See infra* pp. 695-697 (discussing parental consent as barrier to liability).

87. *But see infra* pp. 693-694 (discussing compliance with applicable regulations).

88. *See supra* pp. 682-683 (discussing common law rules).

89. 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, §§ 818-21, at 170-175 (9th ed. 1988). This general principle does not appear to have been tested in the reproductive hazards arena. *Compare* Security Nat'l Bank v. Chloride, Inc., 602 F. Supp. 294 (Kan. 1985) (violation of OSHA lead standard not necessarily negligence per se under Kansas law).

90. *See* National Solid Wastes Mgmt. Ass'n v. Killian, 918 F.2d 671, 680 n.9 (7th Cir. 1990) (compliance with OSHA standards not a defense to tort or criminal liability).

account. The standards are set at levels which will not harm adults,[91] even though fetuses and reproductive systems can be damaged at lower levels. Because current regulations do not protect offspring, compliance with such regulations should not bar suit by an injured child against the employer.

A judge or jury should hold the employer to the standard of keeping the workplace safe enough to protect offspring as well as adults. Two reasons justify holding the employer to the higher standard: first, it will encourage the employer to develop technology to make a safer workplace; second, even if the employer's behavior does not change, the injury should be compensated.[92]

b) Employer's Knowledge of Risks

Where an employer does not know of the risk of harm and has no reason to know, there is no liability. However, where the employer does not know about the risk of harm, but should know, liability may follow.

The employer[93] should not be held to a standard of knowing every risk of harm in the workplace.[94] Rather, she should be held to know the general health risks that the workplace presents to employees. The standard should equal that knowledge generally available in the relevant business and scientific community.[95] The employer should have a duty to investigate additional risks if his process or materials are unique.[96]

Likewise, the employer should not be held to know whether individual workers are pregnant or planning to conceive. The

91. *See supra* note 10.

92. *See supra* pp. 676-678. For a discussion of the split between the regulatory and compensatory aspects of damages, *see infra* pp. 700-701.

93. The employer may often be a corporation or other business enterprise. In this context, "the employer" is the individuals comprising the organization. Knowledge of agents of the organization (management level employees) should be imputed to the organization itself under principles of agency law and respondeat superior liability.

94. "Knowledge" has been defined as "the belief in the existence of a fact, which coincides with the truth ... the actor must give to his surroundings the attention which a standard reasonable person would consider necessary under the circumstances, and ... must use such senses as he has to discover what is readily apparent." PROSSER & KEETON, *supra* note 38, § 32, at 182.

95. Persons with knowledge above that of the ordinary person, such as professionals, will be held to that standard of knowledge. PROSSER & KEETON, *supra* note 38, § 32, at 185.

96. *See* PROSSER & KEETON, *supra* note 38, § 32, at 185 (regarding the duty to investigate in special relationships).

employer must warn *all* workers, regardless of particular risk, to avoid discrimination and to maximize employee protection.

c) Employer's Duty to Warn—Parental Consent as Barrier to Liability

The employer's duty to warn employees of dangerous workplace conditions[97] is somewhat analogous to a physician's duty to provide informed consent to a patient. Where the physician discharges the duty, and the patient chooses or refuses treatment, the physician is not liable for the consequences of that decision.[98] In the employment context, if the employer violates her duty and does not warn, liability to the child is more likely. However, where the employer discharges the duty through appropriate warnings and the employee/parent nevertheless chooses to work, that consent may cut off the employer's liability to the child.

In the case of injury to a fully informed employee who chooses to work, the doctrine of "assumption of the risk" might preclude liability.[99] Although the employee cannot waive the child's right to sue, parental consent might cut off the employer's liability.[100]

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97. In addition to the common law duty to warn, the employer must also comply with applicable federal and local occupational health law warning requirements, such as those prescribed by OSHA, CAL OSHA, and Prop. 65.

98. For a discussion of informed consent law in California, *see* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, §§ 352-62, at 439-49 (9th ed. 1988). Consent of parent or guardian is ordinarily necessary to authorize an operation on a child. *Id.* § 353 at 440.

99. The doctrine of "assumption of the risk" has undergone much change recently. As of early 1991, the employee was required to know the particular risk was present and must have understood its nature. Moreover, she was required to assume the risk voluntarily. PROSSER & KEETON, *supra* note 38, § 68, at 486-92. In the workplace reproductive hazards context, the first requirement would be met if the employer discharged his duty to warn *and the employee understood.* Under the second requirement, however, the worker's consent might be considered involuntary due to economic pressure or employer coercion.

Many courts have abolished "assumption of the risk" entirely in the employer/employee context. In other jurisdictions, the defense has been merged into the comparative negligence doctrine. PROSSER & KEETON, *supra* note 38, § 68, at 491-98. California falls partially into the latter category. "Unreasonable" assumption of the risk is incorporated into comparative negligence, but "reasonable" assumption has survived it. "Reasonable" assumption has been applied in the employment context, where employees such as firefighters and stuntpeople are held to "reasonably" assume the risk of their occupations if they know of the particular risk. 6 B. WITKIN, *supra* note 38, *Torts*, §§ 1089-90, at 492-94. It is unclear whether manufacturing workers exposed to toxins would fall into the "reasonable" category.

100. Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986); United States v. University Hosp. of State Univ. of N.Y. at Stonybrook, 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd* 729 F.2d 144 (2d Cir. 1984); American Academy of Pediatrics v. Heckler, 561 F. Supp. 395 (D.C. 1983).

Support for this proposition can be found in the "Baby Doe" cases.[101] There, the U.S. Supreme Court and other Federal Courts struck down regulations of the U.S. Department of Health and Human Services which would have required hospitals to provide treatment to handicapped infants, even where the parents did not consent to such treatment. The cases may stand for the idea that a parent's choice to deny consent cuts off the hospital's liability; thus, the hospital had no duty to treat where the parent had not consented.

Similarly, in the employment context, where a parent affirmatively chooses to work in a hazardous workplace, impliedly consenting to the exposure of her reproductive system to hazards, the employer may have no duty to protect the employee's offspring from harm.

However, the two situations are not exactly analogous. First, the regulations at issue in the Baby Doe cases were promulgated pursuant to *antidiscrimination* statutes. The purpose of the statutes was to ensure that disabled infants were treated the same as other infants.[102] The regulations were held invalid because the hospitals had not discriminated against disabled infants in refusing to provide unauthorized care.[103] If the statutes had been intended to *save* disabled babies, the cases might have been decided differently. In the reproductive hazards context, then, parental consent might not cut off employer liability if the purpose of recognizing liability is to protect the health of the employee's offspring.

Second, courts might find that employers still have a duty to protect an employee's offspring from workplace hazards if they feel that it is reasonable. In the "Baby Doe" cases, doctors sided with parents in determining that the best treatment was to allow the severely handicapped infants to die.[104] The rule disallowing liability due to lack of parental consent was

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101. *See supra* note 100.

102. Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986), citing 29 U.S.C. § 794 (1983).

103. United States v. University Hosp. of State Univ. of N.Y. at Stonybrook, 575 F. Supp. 607, 614 (E.D.N.Y. 1983), *aff'd* 729 F.2d 144, 156-57 (2d Cir. 1984); Bowen v. American Hosp. Ass'n, 476 U.S. 610, 630-33 (1986).

104. In United States v. University Hosp. of State Univ. of N.Y. at Stonybrook, 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd* 729 F.2d 144 (2d Cir. 1984), the parents refused treatment after consulting several physicians. The Appellate Division concluded that the parents' decision was reasonable, based on responsible medical authority. 729 F.2d at 146-47.

arguably justified by medical expertise. In contrast, where medical testimony favors an employer duty and subsequent liability, such a duty might be found.

Finally, policy considerations may favor employer liability when parental choice, though informed, was nevertheless not entirely voluntary. The employee and employer are not in equal bargaining positions. The employer is usually superior in both power and knowledge, especially in large manufacturing operations. The employer is in a position to coerce the employee to remain in the workplace through express or implied threats; after all, the employer has a stake in keeping employees in whom he has invested money to recruit, hire and train.[105] Moreover, economic duress may affect the employee's choice if she feels she must work to provide income and health benefits to herself and her family. Policy considerations of this sort may justify employer liability even where the worker purportedly "consented."

Whether parental choice would cut off the employer's liability can also be analyzed under "intervening cause" doctrine. A parent's negligent supervision of a child can insulate a defective product manufacturer from liability for the child's injuries.[106] In more general terms, where a third person (parent) is notified of the danger in advance, but chooses to disregard the notice and inflicts the danger on plaintiff (child), the responsibility shifts to the parent.[107]

4) Vicarious Liability

An employer could possibly be vicariously liable for the negligence of the employee in choosing to work in a hazardous workplace. The California Court of Appeal has held, however, that there was no vicarious liability on an employer's part

105. This situation is most likely in jobs requiring a high degree of skill with substantial training costs, or where workers are not protected by a union or other labor organization and are thus more vulnerable to employer coercion.

106. The discussion of intervening cause is drawn from PROSSER & KEETON, *supra* note 38, § 44, at 318-19.

107. In cases of extreme danger or certain special relationships, public policy may require that responsibility remain with the defendant even in the face of third party intervention. Such a special relationship was found between a rental car company and driver of a defective rental car in Ferraro v. Taylor, 197 Minn. 5, 9, 265 N.W. 829, 831 (1936). This public policy exception could conceivably apply to the special relationship between employer and employee. *See* PROSSER & KEETON, *supra* note 38, § 44, at 318-19 (discussing the public policy exception).

where an employee's negligence was the sole cause of his child's death.[108] In another case, the court denied an action against the employer under respondeat superior for the tort of the employee/parent within the scope of employment. The court reasoned that the employer would have an indemnity right against the negligent employee/parent, allowing the child to sue the parent indirectly.[109]

5) *Federal Preemption of State Tort Claims*

The Supreme Court's recent decision in *Johnson Controls*[110] raises the question whether compliance with Title VII would preempt a child's cause of action against the employer.[111] Preemption questions arise when state law conflicts with federal law; the state law may be held invalid under the supremacy clause of the Constitution.[112]

State laws may be preempted in several ways.[113] First, Congress may expressly state that federal law preempts state law. Absent such express language, preemption may be implied by either Congress' intention to occupy a field or where federal

108. Premo v. Grigg, 237 Cal. App. 2d 192, 46 Cal. Rptr. 683 (1965).

109. Myers v. Tranquility Irrigation Dist., 26 Cal. App. 2d 385, 389-90 (1938). As this case was decided before the abrogation of parental immunity, the outcome might be different because children are now able to sue their parents in tort. *See infra* pp. 701-710.

110. 111 S. Ct. 1196 (1991).

111. The majority held that Johnson Control's fetal protection policy violated Title VII and the company failed to establish a bona fide occupational qualification (BFOQ), the only defense available to a facially discriminatory policy. *Id.* at 1207. The majority construed the BFOQ narrowly to include only "job-related skills and aptitudes ... qualifications that affect an employee's ability to do the job." *Id.* at 1204-05. Noting that the preemption issue was not before the Court, the majority minimized the possibility of employer liability by arguing that compliance with Title VII might preempt the child's cause of action. *Id.* at 1208-09. In contrast, the concurrence argued that the BFOQ is broad enough to encompass concerns about increased costs in hiring women due to the possibility of substantial tort liability, *id.* at 1210-14, intimating that compliance with Title VII would probably not preclude that liability. *Id.* at 1211. Neither the majority nor the concurring opinions analyzed the preemption issue in depth.

112. Whether federal law preempts state law is largely a matter of federal statutory construction. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d Ed. 1988). *See also* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1986) ("In determining whether a state statute is preempted by federal law...our sole task is to ascertain the intent of Congress."). Courts are traditionally reluctant to find preemption in ambiguous cases. L. TRIBE, *supra*, at 479. *See also* Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986) (overriding presumption that Congress did not intend to displace state law).

113. The following paragraph summarizing preemption law is drawn from Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986).

law actually conflicts with state law, i.e., it is physically impossible to comply with both laws or state law frustrates the purposes of the federal law.

Title VII does not have express preemption language; in fact, it contains an express *anti*-preemption provision.[114] Read literally, Title VII would preempt only those state laws that require or permit employers to exclude women from jobs in toxic workplaces. Thus, an action based on the claim that an employer violated a duty to refuse to hire (or to exclude) an employee from a toxic workplace would be preempted.[115]

It would be difficult to establish implied preemption by Title VII in the reproductive hazards arena. In order to determine that Congress intended to occupy a field, there must be evidence of intent to exert exclusive control.[116] The scheme must be so pervasive or the federal interest so dominant as to eradicate state claims.[117] Here, Congress clearly did not intend to occupy the entire field of reproductive hazards through the mechanism of Title VII, as Title VII does not regulate workplace safety.[118]

Implied preemption by actual conflict could be implicated in the reproductive hazards arena. In determining actual conflict between state and federal law, the court examines the purposes of the federal law and how state law will affect those purposes.[119] Here, the purpose of Title VII is to remove

114. Sec. 2000e-7 of Title VII reads:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7 (1981).

115. Notwithstanding Title VII's mandate against discrimination, however, the other elements of the employer's duty to employees remain intact. Therefore, a tort claim based on employer negligence in providing a safe workplace would not be expressly preempted by compliance with Title VII. *See also* Bernstein v. Aetna Life & Casualty, 843 F.2d 359, 365 (9th Cir. 1988) ("It is well established that Title VII does not preempt state common law remedies.")

116. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 186 (3d Cir. 1986).

117. *Id.* When purely private rights of action are at issue, determining the scope of an occupied field requires a restrained view. *Id.*

118. Whether compliance with both Title VII and OSHA would preclude a state tort claim is uncertain. Normally, compliance with OSHA will not preempt state tort liability. National Solid Wastes Mgmt. Ass'n v. Killian, 918 F.2d 671, 680 n.9 (7th Cir. 1990). The OSH Act contains a broad savings clause similar to the one in Title VII. 29 U.S.C. § 653(b)(4) (1988).

119. Cipollone v. Liggett Group, Inc., 789 F.2d 181,187 (3d Cir. 1986).

discrimination in the workplace.[120] Allowing state tort claims would not make it physically impossible for the employer to comply with both state and federal law.[121] Moreover, state tort laws allowing injured children to recover would not hinder Title VII's purpose. The Supreme Court has decided that employers may not discriminate against women who choose to work in potentially hazardous jobs and any extra cost of employing women is not an excuse for discrimination.[122]

In the preemption area, there is a split of authority regarding the effect of state law tort actions. Some courts have distinguished between the compensatory and regulatory aspects of damages,[123] reasoning that it is not inconsistent to allow tort recovery because a damage award does not require a defendant to alter behavior,[124] only to pay for resulting injury. On the other hand, the court in *Cipollone v. Liggett Group, Inc.*[125] rejected this approach, refusing to separate regulatory from compensatory aspects of a damages award.[126] Certiorari has been granted in a related case to resolve this conflict in the approach to preemption.[127]

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120. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

121. The employer can obey Congressional mandate by employing women in hazardous jobs, while compensating for resulting injuries. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 139, 141-43 (1963) (no preemption where no impossibility of dual compliance).

122. UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). Nonetheless, the Court seemed concerned about this issue: "If state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII." *Id.* at 1209. In light of the Court's holding, however, employers *may not* exclude women to protect fetal health. State tort law cannot "prevent" employers from hiring women without the employer violating Title VII.

123. *See, e.g.*, Silkwood v. Kerr McGee, 464 U.S. 238 (1984) (compensatory and punitive damages for injuries suffered from radiation contamination not in conflict with exclusive federal safety regulation. *Id.* at 256. The dissent emphasized that punitive damages regulate safety by punishing and deterring, while compensatory damages compensate. The absence of a federal compensation scheme bolsters the contention that Congress intended to leave state compensation mechanisms intact. *Id.* at 260-64); Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. 1984) (no preemption of tort remedy absent a clear and manifest Congressional purpose to do so. *Id.* at 1542-43).

124. *See Ferebee*, 736 F.2d at 1541-42.

125. 789 F.2d 181 (3d Cir. 1986) (federal cigarette labeling law preempts state law damage claims challenging the adequacy of warnings, advertising and promotion regulations).

126. *Id.* at 187. The court found that the duties imposed by the state law effectively imposed a requirement to label cigarettes differently, which conflicted with the preemption provision of the Act. *Id.* at 187.

127. Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (Mar. 25, 1991) (No. 90-1038).

Whichever rationale the Supreme Court adopts, a child's cause of action against an employer should not be preempted by compliance with Title VII. First, employers are able to comply with both Title VII and state tort law by compensating injured offspring.[128] Tort liability would be an added incentive to change negligent behavior, an effect that is consistent with the purposes of both Title VII and OSHA. Second, since neither federal law provides a compensation scheme for injured offspring, it is reasonable to infer that Congress intended state tort compensatory mechanisms to apply. Finally, compliance with Title VII would have no effect on compensating injuries mediated through paternal exposure. It would be inconsistent and discriminatory to forestall compensating children injured through maternal exposure because employers have complied with Title VII's mandate not to exclude women.

6) Summary: Liability "Remote"

Fear of unlimited tort liability is unfounded, as there will be many barriers to finding an employer liable to a child injured through workplace reproductive hazards. Liability mechanisms under tort law will protect employers from unlimited responsibility. Nonetheless, when employers are negligent, causes of action by injured offspring should be allowed in order to provide one form of necessary compensation.[129]

D. THE CHILD'S CAUSE OF ACTION AGAINST THE PARENT

If parental choice to continue work in a known hazardous workplace cuts off employer liability to the child, the parent

128. At a minimum, traditional compensatory damages, including medical costs, lost wages, and special education expenses should be available to an injured child.

129. The Supreme Court concluded in *Johnson Controls*:

> Without negligence, it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans sex-specific fetal protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.

111 S. Ct. 1196, 1208 (1991). Where an employer makes a good faith effort to protect employees and their offspring by investigating and knowing the risks, complying with applicable regulations, and adequately warning employees of those risks, then the employer should not be held liable for resulting harm. The injured child is uncompensated, however, which points out the main difficulty of the tort system: compensation depends on a finding of fault. *See* S. SUGARMAN, *supra* note 13, at 36-37. A no-fault compensation scheme, as described in Part III of this article, would remedy this inequity. *See infra* pp. 710-713.

could be held accountable.[130] Current law may allow a child's cause of action against the parent for negligent reproductive exposure to workplace hazards; whether one should be allowed is problematic. This section examines the implications of allowing such a suit and the probability of its success.

1) Parental Immunity and the "Reasonableness" Standard

A threshold question is whether there is parental immunity from tort liability in the relevant jurisdiction.[131] In California, the state Supreme Court abrogated the parental immunity doctrine in *Gibson v. Gibson,*[132] finding that the policy bases no longer justified the rule.[133] The court rejected a blanket exception to liability where parents would have immunity if the alleged

130. Lending credence to this proposition, the Supreme Court stated in unusually strong language: "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1207 (1991). The Court continued, "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make." *Id.* at 1210.

If women have the complete prerogative to make such decisions, the Court implies that she should bear liability for that choice. However, the Court failed to recognize the role of federal and state regulations which could mandate removal or leave mechanisms to protect reproductive and fetal health. Compliance with such provisions could preclude liability, except where voluntary leave was not taken. *See infra* note 136.

131. For an historical overview of the parental immunity doctrine and its abrogation, *see* Santello, *Maternal Tort Liability for Prenatal Injuries*, 22 SUFFOLK U.L. REV. 747, 757-62 (1988).

132. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

133. Id. at 919-920, 479 P.2d at 651-52, 92 Cal. Rptr. at 291-92. The doctrine rested on the possibility of disruption of family harmony, fraud or collusion between family adversaries, as well as a threat to parental authority and discipline. 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, §§ 30-31, at 90-93. The *Gibson* court reasoned that the presence of insurance alleviated intra-family discord. Gibson v. Gibson, 3 Cal. 3d 914, 922, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293. Renter's or homeowner's policies often include a personal liability policy that could presumably cover the fetal or preconception injury. Actual coverage would depend on the language of the individual policy and local law.

In the workplace reproductive arena, this rationale may be questionable. Some insurance policies exclude coverage for members of the insured's family. *See* Annotation, *Validity, Under Insurance Statutes, Of Coverage Exclusion For Injury To Or Death Of Insured's Family Or Household Members*, 52 A.L.R.4TH 18 (1987) (describing auto insurance policies). Although insurance policies may cover conceived yet unborn persons, unconceived persons may be excluded even though the injuring harm was damage to a reproductive system. *See* Annotation, *Unborn Child as Insured or Injured Person Within Meaning of Insurance Policy*, 15 A.L.R.4TH 548 (1982). Most courts require the child to be born alive for coverage to apply. Others impose an additional requirement of viability. *Id.*

negligent act involved an exercise of parental authority or ordinary parental discretion in providing care.[134] Instead, the court adopted a standard for parental negligence based on reasonableness "viewed in light of the parental role. [T]he proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?"[135]

Regarding reproductive hazards, the issue of liability would turn on whether a parent's choice to work in a hazardous workplace was reasonable in light of the circumstances. The standard allows the court flexibility in balancing factors that influence the parent's decision to work against the impact on the family from a decision not to work, such as loss of wages and health care benefits. A court might conclude that the parent's choice was reasonable where the risks to reproductive health were minimal or indeterminable, compared to the immediate detriment to the family. Any judgment of reasonableness would include an assessment of available alternatives.[136]

California had allowed two major exceptions to parental immunity: if the child were emancipated or if the parental act was willful or malicious. 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, § 30, at 90-91. Elsewhere, the doctrine is subject to numerous exceptions; some jurisdictions allow suits where the injury occurred due to parental negligence while engaged in a vocational, business or employment activity not connected with parental duties. *See* Annotation, *Liability of Parent For Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R.4TH 1066, 1102-07 (1981). This "business capacity" exception could arguably allow a tort suit against a parent for the decision to work in a hazardous workplace, although the exception could be limited to decisions made in the course of business and exclude initial worksite decisions.

134. *Gibson*, 3 Cal. 3d at 920-21, 479 P.2d at 652-53, 92 Cal. Rptr. at 292-93. Other jurisdictions have adopted this exception. *See* Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963); Annotation, *Liability of Parent For Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R.4TH 1066, 1132-34 (1981). Where this exception applies, the question in the reproductive hazards arena is whether parental choice to work in a hazardous workplace was an exercise of ordinary parental discretion in providing care. If so, no suit will follow. It is difficult to predict judicial outcomes, however, as the rule provides many loopholes; for example, the parental decision could be considered extraordinary or the decision could be considered outside the scope of "care," defined in as "food, clothing, housing, medical and dental services, and other care." *Goller*, 20 Wis. 2d at 413, 122 N.W.2d at 198.

135. *Gibson*, 3 Cal. 3d at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293 (emphasis in original). In the context of maternal tort liability, Santello suggests a similar rule: a pregnant woman should be held to the standard of care of a reasonably prudent expectant mother conducting herself under similar circumstances, with ordinary community knowledge. Santello, *supra* note 131, at 775.

136. Here, the intersection of tort law and occupational health law becomes critical. Currently, OSHA compels mandatory removal with guaranteed pay rate and job retention for workers with dangerous blood levels of certain toxins. 29 C.F.R. 1910.1025(k) (1990). In mandatory removal schemes, the employee has no decision to make; thus, she cannot be held liable. Another option would be voluntary leave on the employee's part which must be granted; that is, an employee exposed to reproductive hazards could ask for a transfer or removal with rate retention during

Allowing a cause of action against a parent to proceed under the "reasonableness" standard of *Gibson* may yield unsatisfactory results for the injured offspring, who may be left without a remedy. This familiar dilemma once again illustrates limitations in our tort system, which relies on a finding of fault. To fulfill the goal of compensation for injury, a no-fault system of compensation for injury from reproductive hazards should be adopted.[137]

2) *Consequences of Parental Liability*

Recognizing parental liability for workplace reproductive harm has both positive and negative implications. Allowing parental liability undercuts an employer's Title VII business necessity defense of fetal protection policies.[138] If there is less likelihood of employer liability, there is less incentive to discriminate.[139] Furthermore, if parental choice cuts off the employer's liability, the employer may have no corresponding duty to protect the fetus.

On the other hand, recognizing parental liability may restrict autonomy and privacy.[140] Allowing a cause of action

pregnancy or the conception period, and the employer would be obligated to accommodate her. Under such a voluntary scheme, in a jurisdiction allowing tort suits against parents for prenatal or preconception injury, a parent could theoretically be liable for a decision not to take a leave in the face of known risks.

137. *See infra* pp. 710-713.

138. However, *Johnson Controls* has mooted this consideration. As the Court stated, "The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender.... [T]he incremental cost of hiring women cannot justify discriminating against them." UAW v. Johnson Controls, 111 S. Ct. 1196, 1209 (1991).

139. Where parental responsibility is recognized, the employer can seek indemnity from the parent for any contributory negligence.

140. Such recognition would bolster the idea that women's autonomy should be limited during pregnancy for the welfare of the fetus, *see* Robertson, *infra* note 169, at 437-43, thus lending support to controversial tactics, such as prosecuting women for drug or alcohol abuse during pregnancy or incarcerating women to protect fetal health. *See* Johnsen, *A New Threat to Pregnant Women's Autonomy*, 17 HASTINGS CENTER REP. 4, 33 (1987). Recognition of fetal rights also undercuts women's rights to terminate a pregnancy, although the abortion decision may be distinguished from other contexts. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599, 611-12 (1986).

For judicial decisions dealing with the privacy/autonomy aspect of parental liability for negligence resulting in prenatal injuries, *see* Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988) (child's cause of action for unintentional infliction of prenatal injuries denied. *Id.* at 280, 531 N.E.2d at 361. The court considered the effect of recognizing a fetal right to be born health and the corresponding duty to provide the best possible prenatal environment on women's privacy and autonomy. *Id.* at 277-80, 531 N.E.2d at 359-61); Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980) (child's cause of action allowed to proceed against a mother who negligently took a drug during pregnancy, causing tooth discoloration. *Id.* at 402, 301 N.W.2d at 871).

against parents, most likely women, reinforces the idea that a woman's primary function and duty is that of childbearer and mother, which devalues women's participation in the marketplace.[141] Moreover, recognizing the cause of action fosters an adversarial view of divided interests between women and offspring, when in reality, their interests are often congruent.[142]

For these policy reasons, parental immunity from tort liability for the decision to work in a hazardous workplace could be imposed.[143] Carving out an exception for these decisions, however, may reinforce the idea that reproduction is "special" and untouchable.[144] Moreover, a blanket rule relieving women from liability, like a blanket rule making certain decisions unenforceable,[145] detracts from women's ability to choose, plan and decide.[146]

141. Some discriminatory fetal protection policies operate similarly. *See* Becker, *supra* note 4, at 1231-34.

142. Johnsen, *A New Threat to Pregnant Women's Autonomy*, 17 HASTINGS CENTER REP. 4, 35-37 (1987). In the reproductive hazards arena, a court might see the woman's interest in hazardous work and the fetal interest in health as entirely at odds. In reality, however, their interests are congruent in at least one important respect: if the woman maintains her job, she maintains income and health care benefits to provide proper nutrition, shelter and prenatal care to her offspring.

143. The rule could be modeled after CAL. CIV. CODE § 43.6(a) (Deering 1990), which states: "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive." This statute was enacted in response to Curlender v. Bio-Science Labs., which implied in dicta that a child could sue his parent for "wrongful life." 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (1980). Similar language could be used to bar a cause of action by a child against a parent for choosing to work in a hazardous workplace. However, the policy bases of the two statutes would be quite different. Section 43.6 appears to respond to pro-life concerns that a parent should not be encouraged to abort out of fear that the child might sue for failure to do so. A rule barring suit for the choice to work would recognize that a parent should not be punished for choosing to work out of necessity in the face of hazards. In the employment arena, freedom of contract is only an ideal; in reality, workers face economic and other coercions, forcing choices that are potentially dangerous to offspring.

144. For a discussion of the equal treatment/special treatment debate among feminist scholars, *see, e.g.*, Krieger & Cooney, *supra* note 34. *See also* Shultz, *infra* note 145.

145. In the surrogacy arena, a New Jersey court has held that a surrogate mother's contract to give up the baby she had carried for another couple in exchange for payment is unenforceable. *In re* Baby M., 109 N.J. 396, 537 A.2d 1227 (1988). This rule may undercut women's ability to contract, reducing their ability to participate in the traditionally male sphere of the marketplace. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender-Neutrality,* 1990 WIS. L. REV. 297, 379-80 (1990). The rule also reinforces stereotypic views of women as unreliable decision-makers. *Id.* at 381-84.

146. Arguably, most workplace reproductive harms are mediated through women, although there is considerable controversy on this point. Some feminist commentators argue that harm to offspring may occur equally through men and women. *See* Williams, *supra* note 10, at 655-63. Others suggest that the facts are more complex.

The disadvantages of recognizing parental liability thus outweigh the advantages, but a statutory bar to liability may be undesirable. Case by case determination using a reasonableness standard and considering privacy and autonomy factors[147] can protect parents from unlimited liability.

3) Constitutional Bars to Tort Suit Against Parent

Assuming state tort law would allow a child's suit to proceed against a parent for workplace reproductive injury, the parent's constitutional rights to parental autonomy and to privacy, grounded in the fourteenth amendment's due process clause, could bar such a suit.[148]

a) Parental Autonomy

Parents have a liberty interest under the due process clause in directing the upbringing and education of their children.[149] A

See, e.g., Birth Defects, supra note 4, at 240 (teratogenic agents, which act directly on an embryo after conception, affect only women); Buss, *supra* note 10, at 579 ("[S]ome toxins may pose a greater threat to reproductive health through maternal exposure than through paternal exposure."). Adverse reproductive effects through male exposure to toxins continue to be documented. *See* Blakeslee, *supra* note 10 (fathers who work with lead have an almost fourfold increased risk of producing children with Wilm's tumor, a kidney cancer); Himmelstein, *Reproductive Hazards in the Workplace: What the Practitioner Needs to Know About Chemical Exposures,* 71 OBSTETRICS & GYNECOLOGY 921, 922-24, 934 (1988) (noting linkage of lead exposed men to pregnancy loss, genetic damage and infertility); Cunningham, *Chronic Occupational Lead Exposure: The Potential Effect on Sexual Function and Reproductive Ability in Male Workers,* 34 AAOHN J. 277, 278-79 (1986) (discussing adverse effects of lead on male reproductive function).

147. *See* Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

148. Though constitutional claims are most often asserted to bar criminal prosecutions, *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (constitutional right of privacy prohibits state from criminalizing first trimester abortion), the Constitution may also provide a defense to a tort suit. *See e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (first amendment right to freedom of the press precludes a tort suit for defamation under certain circumstances); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (first and fourteenth amendments bar suit for intentional infliction of emotional harm). State statutory or common law must first recognize the tort before a constitutional claim can be raised.

149. Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). *Pierce* and two other cases provide the impetus for the following textual discussion. In *Pierce*, the Court invalidated an Oregon statute requiring parents to send their children to public schools. *Id.* at 536. In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court upheld a statute prohibiting parents from allowing their children to sell merchandise on the streets. *Id.* at 171. The statute was challenged as a violation of first amendment rights of Jehovah's Witnesses to freely practice religion. *Id.* at 167. Finally, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court held that the first amendment's right to free exercise of religion and the fourteenth amendment's right to parental control of children prohibited a state from compelling Amish parents to send their children to formal high school until age sixteen. *Id.* at 234. The holdings in *Prince* and *Yoder* were recently reaffirmed in Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872 (1990).

child is not merely a "creature of the state"[150] since there is a private realm of family life which the state may not enter.[151] However, there are limits to parental autonomy interests,[152] for the Government has an interest in and duty to protect children.[153] Society depends on healthy young people; thus, a parent is not free to expose a child to communicable disease, ill health or death.[154]

Limitations on parental liberty interests focus on those decisions which could affect the child's health or burden society.[155] Both factors are implicated in the reproductive hazards arena. A parent's choice to work in a hazardous workplace could jeopardize the health of future offspring.[156] Caring for children injured by toxic exposure imposes significant social burdens. Even with an adequate system of compensation, either tort or no-fault, society pays through higher product cost.

Since the potential harm to the child's health and costs to society may outweigh parental liberty interests, a due process parental autonomy claim should not bar a tort suit by an injured child against a parent. This conclusion is supported by California case law upholding medical treatment of children over the religious objections of parents.[157]

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150. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

151. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

152. *Id.;* Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972).

153. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

154. *Id.* at 166-168.

155. Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972). The Court has noted that where parental interest is purely secular, such as in the interest in working or in a particular job, that interest would be *less* weighty than a religious interest when balanced against the state's interests. *See id.* at 215-16; Prince v. Massachusetts, 321 U.S. 158, 165 (1944). *See also* cases discussed *infra* note 157 and accompanying text.

156. There is no absolute constitutional right to work in a particular job. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-13, at 1375-78 (2d ed. 1988), and cases cited therein. In some cases there is a limited right to practice one's profession, arising out of rights to economic liberty and personhood. *Id.* That may not be implicated in the hazardous workplace area, where the jobs are usually blue-collar production or manufacturing jobs.

157. Through criminal prosecutions or civil dependency hearings, states may intervene to protect the welfare of children. In *In re* Philip B., 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979), parental refusal to allow heart surgery was upheld under the due process right of parental autonomy. *Id.* at 801, 156 Cal. Rptr. at 50. The state's dependency petition was dismissed because the state failed to justify intervention where surgery presented a substantial risk of further harm to the child. *Id.* at 801-803, 156 Cal. Rptr. at 50-52. However, four years later, the court affirmed an order of change of guardianship and authorized a heart catheterization. Guardianship of Philip B., 139 Cal. App. 3d 407, 430, 188 Cal. Rptr. 781, 796 (1983). In another case involving a child afflicted with eye cancer, the court affirmed an adjudication declaring him a dependent ward of the court to ensure periodic medical review. *In re*

b) Privacy

A second constitutional defense to a tort suit brought by a child against the parent could be based on the right to privacy.[158] This right prohibits state intervention in an adult decision to use contraceptives[159] or to abort a pre-viable fetus.[160] The right to privacy encompasses notions of bodily integrity[161] and the right to control one's destiny.[162] Freedom from bodily intrusion is an important element of this liberty.[163]

Although the scope of procreative liberty delineated by privacy case law includes the right to use contraceptives and to abortion, the right to prevent life does not determine what prenatal and preconception regulation is permissible. An unlimited right to knowingly expose her fetus to workplace toxins does not necessarily follow from a woman's right to terminate a pregnancy. Should she choose to carry her child to term, the child may suffer injury as a consequence of toxic

Eric B., 189 Cal. App. 3d 996,1009, 235 Cal. Rptr. 22, 29 (1987). The court noted a "substantial likelihood of harm" would justify intervention; the state could legitimately act to prevent the *possibility* of harm. *Id.* at 1002-04, 235 Cal. Rptr. at 24-26. Finally, in Walker v. Superior Court, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), the court allowed criminal prosecution of a parent for involuntary manslaughter and felony child endangerment. The parent had refused medical treatment of her child's meningitis because of religious beliefs. *Id.* at 119, 763 P.2d at 854, 253 Cal. Rptr. at 4. The court noted that even religious liberties must yield when a child's health is endangered. *Id.* at 133, 763 P.2d at 866, 253 Cal. Rptr. at 15.

158. This right to privacy is embodied in the first, fourth, ninth, and fourteenth amendments to the Constitution. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

159. *Id.;* Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

160. Roe v. Wade. 410 U.S. 113 (1973); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

161. L. TRIBE, *supra* note 112, §§ 15-9 to 15-10, at 1329-62.

162. L. TRIBE, *supra* note 112, § 15-10, at 1352 (the decision to abort implicates autonomy and control of one's reproductive destiny); Rubenfeld, *The Right of Privacy,* 102 HARV. L. REV. 737 (1989) (laws restricting abortion implicate the right to privacy because they dictate the course of a person's life).

163. The principle of bodily autonomy was first acknowledged in Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891), where the Court refused to compel a personal injury plaintiff to submit to a physical examination. However, courts have allowed significant bodily intrusions over women's objections in order to protect fetal health, e.g., court-ordered caesarians were upheld in Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981) and in *In re* A.C., 533 A.2d 611, 539 A.2d 203 (D.C. 1987), *vacated and remanded*, 573 A.2d 1235 (D.C. 1990). Similarly, blood transfusions have been ordered over women's religious objections. *See generally* Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Intervention,* 316 NEW ENG. J. MED. 1192, 1193 (1987); Nelson & Milliken, *Compelled Medical Treatment of Pregnant Women: Life, Liberty and Law in Conflict,* 259 J. AM. MED. A. 1060 (1988).

exposure.[164] In this context, the right to be born healthy is implicated.[165]

However, arguing that an injured child should be compensated is not advocating a right to be born healthy. There is a crucial distinction between compensation and deterrence: compensatory damages compensate for injury already incurred, whereas deterrence focuses on regulating behavior and avoiding potential harm.[166] Requiring payment of damages, which *may* change future behavior, is not equivalent to restricting current behavior.[167]

This distinction forms the crux of the argument against criminal sanctions for behavior during pregnancy,[168] for such sanctions are a direct intrusion on bodily integrity while compensatory damages are not. Some commentators suggest that once a woman foregoes abortion and chooses to carry her child to term, she subjects herself to legal limitations imposed to protect fetal health.[169] Nevertheless, a choice to continue pregnancy does not waive all fundamental rights to bodily integrity and autonomy.[170]

164. Courts and commentators alike recognize that different considerations outside the realm of abortion come into play with a child's birth. In Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 643 (1982), the court noted this fundamental difference in a wrongful life claim that the child would have been better off not being born. *Id.* at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346. Comparing non-existence and impaired existence is difficult if not impossible. *Id.* at 229-39, 643 P.2d at 959-66, 182 Cal. Rptr. at 342-49. *See also* Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection,* 95 YALE L.J. 599, 612 (1986) (arguing that recognizing fetal rights yields two distinct consequences: in proscribing abortion, the state imposes a duty to bear unwanted children, but in the non-abortion context, the state compels women who choose to bear children to conform to judicially defined norms of behavior).

165. Courts have invoked the child's "legal right to begin life with a sound mind and body." *In re* Baby X, 97 Mich. App. 111, 115, 293 N.W.2d 736, 739 (1980) (citing Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971)).

166. An analogous distinction is found in first amendment law: prior restraint, the more intrusive approach, is rarely allowed, whereas after-the-fact fines and penalties are more readily tolerated. *See also* Hazard, *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984) (discussing the distinction between prevention and rectification) ("Preventive action by definition shapes the future ... whereas rectification deals with the past and mitigates but does not undo the course of events." *Id.* at 291).

167. *See supra* notes 123-27 and accompanying text discussing preemption cases.

168. Such sanctions include prosecution for drug abuse, incarceration to prevent drug usage, or forced surgical procedures. *See Developments in the Law: Medical Technology and the Law,* 103 HARV. L. REV. 1519, 1556-82 (1990).

169. *See, e.g.,* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth,* 69 VA. L. REV. 405, 437-43 (1983) (suggesting state sanctions for knowing exposure to teratogenic substances or workplaces that could harm fetal health).

170. There are many reasons for carrying a pregnancy to term, including financial, social, religious and family pressures.

Thus, protecting the interests of potential offspring against the parent's own liberty interests poses a dilemma, for the only way to prevent all harm is to severely restrict parental liberty and choice.[171] Nevertheless, reasonable regulation of worker/parent behavior to protect offspring[172] can coexist with constitutionally protected procreative liberty.[173]

III. PROVIDING COMPENSATION - A PROPOSAL

Currently, in California, a child injured through parental exposure to workplace reproductive hazards has no remedy outside a parental tort suit. Although this dilemma could be partly alleviated by legislation allowing suit against a negligent employer,[174] there are numerous obstacles to recovery.[175] A no-fault system of compensation could provide a guaranteed remedy.[176]

A no-fault system would be ideal, not only because employers may be unable to eliminate all toxins from certain workplaces, but because it serves the four compensation

171. The question of tolerable level of risk is again implicated: in order to accommodate parental liberty, some risk is inevitable. However, in lieu of the parent bearing the entire cost through severely restricted choice or tort liability, increased workplace safety and compensation costs should be spread over society as a whole through higher product cost.

172. The abortion context is distinguished, as there is no third party involvement with a pre-viable fetus. Roe v. Wade, 410 U.S. 113, 156-58 (1973).

173. It is difficult to properly balance the corresponding interests of parent and fetus. Indisputably, bodily integrity is fundamentally protected; thus, it seems very intrusive to restrict adult liberty to protect sex cells from harm. However, when a woman is pregnant, there are two interests at stake. The desire to protect the fetal interest by restricting exposure to toxic workplaces seems less troublesome. But this restriction would apply only to women and the differential treatment is discriminatory. Perhaps this conflict can be solved by accommodating reproductive functions through paid leaves from toxic workplaces. *See supra* pp. 679-681.

174. This legislation must abrogate Bell v. Macy's California, 212 Cal. App. 3d 1442, 261 Cal. Rptr. 447 (1989). *See supra* pp. 685-689.

175. *See supra* pp. 689-701.

176. Two model no-fault systems are the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-1 to 300aa-34 (1991) and the Virginia Birth-Related Neurological Injury Compensation Act, VA. CODE ANN. §§ 38.2-5000 to 38.2-5021 (1990 & Supp. 1991). Both Acts are described in detail in S. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS 106-10 (1989). The summaries that follow are based on Prof. Sugarman's descriptions.

The Vaccine Program was enacted to compensate the small percentage of children who suffer from documented side-effects of mandatory vaccines, such as anti-pertussis. Compensation is paid on a showing that the victim was vaccinated and then suffered one of the statutorily recognized side-effects. Compensation includes otherwise uncovered medical expenses, incidental expenses, lost earnings (set at state average wage), and pain and suffering damages up to $250,000. This is an elective scheme, funded by an excise tax of a few dollars per vaccine dose.

policy goals. The system could provide guaranteed compensation for injured offspring. It could remove incentives for discrimination since all employees could be covered under the same premium cost. As a no-fault system need not bar tort suits for egregious employer behavior, there are clean-up incentives to reduce injury and keep premium cost low. Finally, the system is fair to employers: it avoids litigation cost and delay, and eliminates punitive damages absent blatant wrongdoing.

A no-fault system of compensation[177] should require a showing of parental exposure to a known reproductive hazard and a resulting injury linked to that hazard.[178] The plan should provide medical and incidental expenses, as well as lost earnings; optimally, pain and suffering damages should be allowed. A no-fault system could be funded publicly through an employer tax or privately through commercial insurance companies; in either case, employers would pay a specified dollar amount for each potentially exposed employee. Although employers should be required to participate in the plan,[179] employees could elect plan benefits, i.e., guaranteed compensation.[180] Hence, tort suits against the employer would be precluded, except where there was gross negligence or intentional injury.[181]

A no-fault system of compensation in the reproductive hazards area is not without problems. First, the causal link

The Virginia Act compensates eligible children who were neurologically injured during delivery. No showing of negligence is required. The plan pays reasonable compensation for net economic loss, and is funded by hospital and physician assessments. It is the exclusive remedy for patients of participating physicians. If a physician does not elect to participate in the plan, then patients can sue in tort.

177. The following system applicable to workplace reproductive injury is drawn from the elements of the two model Acts. *See supra* note 176.

178. Injuries linked to reproductive hazards should be statutorily described, as are recognized side-effects in the Vaccine Act. *See* National Vaccine Injury Compensation Program, *supra* note 176.

179 Participation should be mandatory for employers to ensure one form of compensation.

180. Since tort recovery is generally uncertain, the prospect of guaranteed compensation enhances participation in a no-fault system. *See* S. SUGARMAN, *supra* note 176, at 108. Nevertheless, employee election discriminates against children whose parents opt out of the plan and lose guaranteed compensation. Another problem with electivity concerns employer coercion to opt out of the plan.

181. The threat of substantial liability for egregious conduct provides an incentive for workplace safety. Here, the system differs from workers' compensation, where possible tort recovery is forfeited for guaranteed remedy. PROSSER & KEETON, *supra* note 38, at 574. In the reproductive hazards area, tort compensation should be retained, not only to provide clean-up incentives, but because the injured offspring did not forfeit anything (at the time the injury occurred) in exchange for no-fault benefits.

between a parent's exposure to a workplace hazard and a child's injury may be tenuous and difficult to prove.[182] However, this problem could be resolved by establishing a rebuttable presumption that an injury resulted from exposure to a workplace toxin; then, the burden would shift to the employer to prove that exposure did not cause the injury.[183]

Second, it may seem unfair to compensate children injured through workplace reproductive hazards while other children with birth defects are left without a remedy.[184] Indeed, socialized health insurance, whereby health care is accessible at a reasonable cost, would be ideal. However, until such a system is adopted, a no-fault scheme aimed particularly at the workplace hazards problem is the best temporary solution.[185]

CONCLUSION

Currently, California law provides no acceptable remedy for a child injured through parental exposure to workplace repro-

182. Any number of toxins may cause any number or type of birth defects; proving causation could be extremely difficult. *See Birth Defects, supra* note 4, at 256, n.97 (general environmental factors can produce birth defects similar to those caused by workplace hazards). In contrast, the side-effects caused by anti-pertussis vaccine are well-established, S. SUGARMAN, *supra* note 176, at 107, and it is fairly easy to ascertain the connection between delivery complications and resulting brain damage. Difficulties in proving causation may be the reason no suit against an employer has ever resulted in recovery for the child. *See, e.g.*, Security Nat'l Bank v. Chloride, Inc., 602 F. Supp. 294, 295 (Kan. 1985) (damages denied for injuries allegedly suffered from lead exposure in the workplace). *But see* settlement in Stelly v. Firestone Tire & Rubber Co., 20 OCCUPATIONAL SAFETY HEALTH REP. (BNA) 1040 (Nov. 21, 1990).

183. Although this may be a difficult burden of proof to meet, it is justified: the employer usually possesses superior information, plus there is an added incentive to fund further research into toxic exposure. Moreover, the employer's insurance company would be paying the benefits—any risk of higher premiums is outweighed by avoiding huge settlements. Practically speaking, if more claims are awarded than the system can support, the legislature could narrow the types of covered injuries.

184. As Sugarman points out, "There are, after all, enormous numbers of children, who are born with birth defects or contract serious diseases, and who ... are as deserving as vaccine-damaged children. But there is little prospect of reaching their compensation needs through plans that depend on identifying enterprises that have somehow caused their condition.... [M]any disabled children will simply have no access to either tort recovery or a special compensation fund. What is required instead are new ways of thinking about disabled children in general." S. SUGARMAN, *supra* note 176, at 108-09.

185. Discrimination in favor of children injured through workplace reproductive hazards over other children with birth defects is acceptable at this point in time for two reasons. First, compensating these children is a step *toward* "new ways of thinking about disabled children in general." *Id.* It is a step toward society's recognition and compensation of those children who bear the risk. Many defects are caused by substances useful to society; where injury occurs, society should bear the cost of compensation. Second, a no-fault plan, as an extension of an employee benefit plan, can be part of the comprehensive compensation system Professor Sugarman proposes. *Id.* at 125-65.

ductive hazards. Given California's recognition of prenatal and preconception causes of action, however, the question is not whether such injury should be redressed, but who should redress it. Employees, who create the risk of injury and arguably benefit the most from it, should bear the bulk of the cost of compensation through a system coupling tort recovery with a no-fault remedy. Such a system can be consistent with procreative liberty, while encompassing the four policy principles of compensation for injury, non-discrimination, incentives for workplace safety, and fairness to employers.