AT THE INTERSECTION OF REPRODUCTIVE FREEDOM AND GENDER EQUALITY: PROBLEMS IN ADDRESSING REPRODUCTIVE HAZARDS IN THE WORKPLACE

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INTRODUCTION

Issues posed by reproductive hazards in the workplace lie at the intersection of gender, labor, and health concerns. Stereotypical assumptions attributing reproduction to women alone have led to policies that exclude women from certain well-paying jobs and leave men exposed to reproductive risks in those same jobs. While those policies are no longer permitted, the need to promote job equity and health continues. Complications posed by this country's gendered employment history are compounded by bias in medical research. Consequently, the search for means to ensure that both women and men in the United States have the opportunity to form families while working in safe, well-paying jobs presents considerable challenges.

Occupational conditions that interfere with healthy procreation by preventing conception, by reducing or deforming sperm or eggs, or by promoting spontaneous abortion and congenital malformations all constitute reproductive hazards in the work-

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place. Such hazards may take the form of exposure to toxins or ergonomic stress.

As explained in more detail below, employment policies that, in the name of "protecting the fetus," exclude women altogether from working in hazardous environments have been held to violate Title VII of the Civil Rights Act of 1964.[1] The decision, *UAW v. Johnson Controls*,[2] has thus made clear that the real question is what policies are most likely to lead to safe and healthy work conditions for women and men who wish to procreate without sacrificing equal opportunity. Now that interference with reproductive functioning has been placed on the National Institute of Occupational Safety and Health (NIOSH) list of the ten leading work-related diseases and injuries,[3] it would seem that the time has come to address such threats — for both men and women. Doing so is not a simple matter, however. There are numerous practical problems in devising and implementing appropriate policies, and there is much research to be done. Moreover, at times, decisions as to how best to address reproductive hazards, at least in the short run, will require choices between the interest in gender equality and in reproductive freedom.

I. THE GENDERED BACKDROP TO TODAY'S PROBLEM

Any effort to understand and address the problem of reproductive hazards in the workplace must begin with the gendered history lying behind it. This history makes plain the primacy of assumptions about the proper roles of women and men, as well as the disingenuousness behind any claimed interest in protecting the fetus. Three points are relevant. First, women were often excluded from lucrative men's jobs involving reproductive risks under so-called fetal protection policies. Second, no such concern or policy was enunciated in situations where women were in traditionally low-paying women's jobs. Finally, reproductive risks experienced by men were simply ignored or denied as long

1. *See, e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

2. *Id.*

3. J.D. Millar, *Summary of "Proposed National Strategies for the Prevention of Leading Work-Related Diseases and Injuries, Part 1,"* 13 AM. J. IND. MED. 223 (1988). In addition to reproductive disorders, the list includes occupational lung disease, musculoskeletal disorders, occupational cancer, severe traumatic injuries, neurotoxic disorders, occupational cardiovascular disease, noise induced hearing loss, skin disorders, and psychological disorders. *Id.*

as possible; when acknowledged, however, they were quickly rectified.[4]

Perhaps the best known facet of reproductive hazards in the workplace is the exclusion of women from certain jobs in the name of "fetal protection." An infamous case involving the American Cyanamid plant in Willow Island, West Virginia is illustrative.[5] Employees at the plant were quite well paid for the area.[6] As late as 1974, however, there were no women at the plant.[7] By 1978, approximately twenty-five women had begun working there, and the company introduced a "fetal protection" policy requiring women employees between the ages of fifteen and fifty to show medical proof of sterilization.[8] As a result, five women obtained sterilizations to keep their jobs.[9] Initial government and union litigation to enforce the federal Occupational Safety and Health Act (OSHA) failed,[10] though the women were able to obtain monetary and injunctive relief.[11]

Fetal protection policies impose two-way damage: a choice between jobs and reproductive capacity for women and conditions that threaten the reproductive capacity of men. Legal challenges by nongovernmental groups and individuals have succeeded in curing only part of the problem, the job exclusion part. As we have seen in the Willow Island story, private efforts to enforce federal safety and health laws are not permitted.[12]

Following the American Cyanamid case, the United Automobile Workers brought a class action under Title VII of the Civil Rights Act of 1964 against Johnson Controls, a manufacturer of, among other things, lead batteries.[13] Plaintiffs' sex discrimination claim focused on the fact that Johnson Controls allowed all qualified men to work at jobs involving actual or potential lead exposure exceeding the OSHA standard, but re-

4. *See generally* Joan E. Bertin, *Reproductive Hazards in the Workplace, in* REPRODUCTIVE LAWS FOR THE 1990s 277 (Sherrill Cohen & Nadine Taub eds., 1989).

5. Oil, Chem. and Atomic Workers Int'l Union v. Am. Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984); *see* Bertin, *supra* note 4, at 277.

6. *See American Cyanamid*, 741 F.2d at 444.

7. *Id.*

8. *Id.*

9. *Id.*; *see* Bertin, *supra* note 4, at 278.

10. *American Cyanamid*, 741 F.2d 444; *see* Bertin, *supra* note 4, at 283-84.

11. *See American Cyanamid*, 741 F.2d 444.

12. The federal Occupational Health and Safety Act (OSHA) preempts parallel state laws except with respect to state employment. 29 U.S.C.A. § 653(b)(1) (West 1996).

13. UAW v. Johnson Controls, Inc., 680 F.Supp. 309 (E.D. Wis. 1988).

quired all women to demonstrate they were infertile before being considered for the same work. The Supreme Court agreed that the fetal protection policy amounted to illegal sex discrimination. Writing for a five-justice majority, Justice Blackmun made clear that a company's fear of prenatal injury does not suffice to justify the discrimination against women inherent in a fetal protection policy.[14] Although the Blackmun opinion does contain language suggesting that women have an equal right to safe working conditions, all that *Johnson Controls* actually holds is that women, like men, have the right to be subjected to dangerous conditions in the workplace.

The problems of women in traditionally female jobs shed light on the sincerity of the fetal protection policies. There has been a pattern of ignoring the risks to the fetuses of women employed in jobs which were as dangerous as traditionally male jobs, so long as those jobs were low-paying "women's" jobs. Think, for example, of the reproductive risks practical and registered nurses face from the ergonomic strains and exposure to toxins their work demands. Likewise, hairdressers and dry cleaners are exposed to a variety of dangerous chemicals, while teachers also face numerous risks from infections and ergonomic strains. In this way, fetal protection policies that serve to exclude women from lucrative work are reminiscent of women-only maximum-hour legislation that had the same effect and had analogous exceptions.

Finally, there are the reproductive risks faced by men in the same or equally hazardous jobs. Historically, reproductive risks to men have also tended to be ignored until their existence becomes irrefutable. At that point, solutions to the problem are put into place quite quickly. For example, the low fertility found in the 1970s in men working with the pesticide dibromochloropane (DBCP) led in the 1980s to DBCP being barred from almost all uses.[15] Unlike women, men are regarded as belonging in the workplace and conditions are adjusted accordingly. By contrast, women's reproductive roles are regarded as primary when they threaten men's employment and ignored when they do not. This failure to address risks women experi-

14. A three-justice concurrence did take the position that the exclusion of women would be justified if reasonably necessary to avoid substantial tort liability, however. *Johnson Controls*, 680 F.Supp at 318 (concurring opinion).

15. Bertin, *supra* note 4, at 280.

ence in women's work, however, may simply be another way of saying they belong at home.

II. Compelling Long-Term Solutions?

To what extent are employers under an obligation to introduce the appropriate long-term solution? Employers may be induced to adopt policies dealing with reproductive hazards in their workplaces by federal or state regulatory agencies, negotiations with unions or other employee groups, or because they themselves wish to do it in order to avoid private damage actions or to benefit their enterprise financially. As a regulatory matter, most enterprises are governed by OSHA, a federal statute, and the regulations issued pursuant to it.[16] These regulations are decidedly sparse on this issue. Tort damages might be another way of imposing such an obligation. However, because workers' compensation systems have by now replaced tort liability in every jurisdiction,[17] employees are precluded from bringing tort actions against their employer in most cases.[18] Workers' compensation does not cover birth defects, and compensation for harm to a worker's reproductive health is quite unusual.[19] Tort actions for damages brought by children injured as a result of parental occupational exposure (either preconception or in utero) are possible, but recoveries are rare both in light of the state of medical research and its focus on maternal exposure.[20] In any event, monetary compensation for the inability to procreate is hard to obtain.[21]

III. Are There Appropriate Short-Term Policies?

In the absence of legal compulsions to find long-term solutions, workers' exposure to reproductive risks is likely to continue. Efforts to achieve the adoption of laws and regulations designed to induce more permanent solutions are, of course, well advised. Nevertheless, in the meantime it may be possible

16. *See* Bertin, *supra* note 4, at 282.

17. *See generally* Emily Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 Hous. L. Rev. 119, 161-73 (1994).

18. *Id.*

19. Jean Macchiaroli Eggen, *Toxic Reproductive and Genetic Hazards in the Workplace: Challenging the Myths of the Tort and Workers' Compensation Systems*, 60 Fordham L. Rev. 843, 859-74 (1992).

20. *See generally* Mary Sue Henifen et al., *Prenatal Screening*, *in* Reproductive Laws for the 1990s (Sherill Cohen & Nadine Taub eds., 1989).

21. Eggen, *supra* note 19, at 864-66.

through union bargaining or other pressures to induce an employer to adopt a short-term measure to provide immediate relief. Indeed, even when an employer has begun the process of providing long-term relief, the employer may still need and be willing to adopt a policy providing relief in the interim.

Regardless of how the employer is persuaded or compelled to alter its work conditions, it is crucial to select an appropriate means of doing so. Established short-term options to address the risks reproductive hazards pose in particular workplaces include:

(1) *Modifying the job for a particular individual subjected to the hazardous conditions.* An example of individual job modification in the context of ergonomic risks would be a practical nurse's coworkers in a hospital ward taking on some of her heavy-lifting tasks in exchange for her taking on some of their lighter work. Assigning a team of two to do heavy lifting is another solution to the same problem, one that would probably help all the workers.

(2) *Engineering controls which modify the conditions for an entire workforce.* Such controls could reduce reproductive risks via increased ventilation, better shielding and enclosure, and dust reduction.

(3) *Substitution of products used to reduce toxicity.* Given the process under consideration, it may be possible to replace in part or in whole the toxic product threatening workers. A recent example involved clothes manufacturing where it was possible to find a nontoxic hardener to substitute for the toxic product that had been in use.

(4) *Use of safety gear and protective equipment.* For example, masks, respirators and gloves could be used to minimize reproductive risks to workers packaging birth control pills.

(5) *Rotating work assignments.* Again in the context of the birth control pill packaging plant, job rotation whereby workers were rotated in and out of the particular job could be used to reduce exposure.

(6) *Transferring temporarily to another position.* Job transfer can be envisioned in a number of contexts: to prevent a man's exposures to DBCP that jeopardize his ability to produce sperm; to prevent exposure of a man or a woman to solvents that lead to spontaneous abortions; to prevent a woman's exposure to ethylene oxide, a chemical important to sterilization in hospitals, which is associated with children being born with birth defects.

Thus, transfers may involve workers who are contemplating reproduction or women who are already pregnant.

(7) *Temporary leave policies.* Finally, a worker may be placed on temporary leave when none of the other options is feasible or yields satisfactory protection. Thus, for instance, a temporary leave may be the only option available to a pregnant woman working in the chemical laboratory of a small recycling business who is not capable of doing a desk job, the only other work open.

In any particular situation, any option considered must be evaluated in terms of its ability to provide the necessary protection and in terms of its practicality. Practicality involves administrative feasibility as well as cost concerns and turns on many factors, such as the nature and size of the workplace and the demographics (*e.g.*, age and sex) of the employees. Both the protection and practicality issues are of real importance since policies that don't provide protection are not likely to be implemented by employers or taken advantage of by workers, and therefore, hardly serve their purpose.

There are clear disadvantages to many of the options. If job modification can be achieved only for an individual engaged in or contemplating reproduction, it is likely that the burdens or exposures of coworkers will increase. Similarly, job rotation will mean more workers are burdened or exposed even if to a lesser degree. Workers often dislike the discomfort of safety gear and other protective equipment, and there are real questions as to its effectiveness. As already noted, there may not be positions to which workers are able to transfer. Even when such positions do exist, they may entail a loss of pay, benefits, or opportunity for advancement. Such losses are even more likely when temporary leaves are at stake.

It is helpful to compare procedures that are applied to all workers with procedures applied to the individual or individuals explicitly concerned about their reproductive status. Depending, of course, on the effectiveness of each option, with the possible exception of job rotation, there would seem to be an advantage to policies or procedures that affect all workers at once.

Leaves are more complex. On the one hand, a worker transferred to another job is removed totally from the threat. On the other hand, women often do not know right away that they have become pregnant and thus may still be on the job during their most vulnerable periods. It is highly unlikely that such a person

will be able to obtain another position that affords equal pay, benefits, and opportunity for advancement. Moreover, given the extreme bias in medical research, reflecting the assumption that only women are involved in bearing children (and because of this involvement, they are marginal workers at best), far more data is available showing women's vulnerability to reproductive hazards. As a result, men are likely to be denied the benefits of leave policies, and women who can afford to take advantage of them are likely to remain second class members of the workforce. It would seem, then, that such policies require a choice between gender equality and reproductive freedom. Hopefully, researchers will abandon this sexist assumption and perform the research necessary to protect men and women in the near future.

Procedures and policies that focus on individuals also have consequences for others. In cases of job modification for individuals, for example, coworkers are required to assume more than their share of burdensome, health-threatening tasks. When temporary workers — or no one — replaces workers who have taken temporary transfers or leaves, the burden on a department or office's regular workers naturally increases. These workers quite probably have health problems of their own. To allow a pregnant woman a leave that is denied a woman with varicose veins or a man with a history of heart trouble is to privilege reproductive issues. Indeed, it may even be said to privilege childbearing over other reproductive choices, for a worker who has chosen not to bear children will necessarily assume a greater workload and often face greater risks to make the opposite choice of a coworker safer.

IV. Reaching for Long-Term Solutions

By definition, long-term solutions to chemical hazards in the workplace will have to take the form of removing the hazard either by product substitution or complete elimination of exposure pathways. Where risks stem from ergonomic considerations, long-term solutions must depend on redesigning the tasks to be done or providing adequate aids.

While legislation compelling complete elimination of workplace reproductive hazards may be unrealistic at a time when Congress is reluctant to impose regulations and to finance the agencies that will be administering them, it is probably not a bad idea to think through what form such legislation should take should it become feasible. Other countries have been far more

willing to address the problem. Therefore, existing international models serve as one possible source of guidance.

Finland provides a particularly ambitious model. Finnish legislation comes in two parts. First, as part of the law on occupational safety, employers must ensure that work conditions are not likely to cause genetic damage to the worker or harm to the offspring or to the pregnancy.[22] Included in the provisions are suggestions as to how the working environment may be improved and a list of agents to be avoided. This portion of the scheme pertains to both male and female workers.[23] The second portion of this scheme, which pertains to maternity leave, obviously applies only to women.[24] Under this legislation, if a pregnant woman is exposed to one of the agents on a list maintained by the Labor Ministry, the employer must first attempt to correct the problem; if that is not possible, the employer must attempt to transfer the worker to a reproductively safe job; if that is not possible, the worker is entitled to a special maternity leave. In some countries with similar legislation, this special leave is paid for by the national health insurance fund; in others it is paid for by the employer itself.[25] The expenses involved, at least where the employer is directly responsible for the costs of the leave, can clearly serve as an incentive to clean up.[26]

For the United States, such legislation does, indeed, appear ambitious. However, thinking about this model should help us formulate our wish list. Is this model something to be sought after? The legislation seems fairly clearly directed at protecting society's interest in healthy children, rather than the individual's interest in procreating. Moreover, there seems to be no job equity protection for pregnant women who have been transferred to other work or are on leave. Should people's ability to

22. Act on Occupational Safety 27/87 § 9(2) (1987) (Fin.).

23. *Id.*

24. Decree of the Gov't. on the Prevention of Occupational Health Hazards to the Genotype, Fetus and Reproduction No. 1043/91 (1991) (Fin.); Decree of the Ministry of Labor on Agents Hazardous to the Genotype, Fetus and Reproduction No. 1044/91 (1991) (Fin.).

25. *Id. See generally* Erityisäitiysloma: Lait ja asetukset 9, 1991. Työterveyslaitos, Helsinki 1991 (Special Maternity Leave: Laws and Statutes 9, 1991. Finnish Inst. of Occupational Health, Helsinki 1991).

26. Interview with Dr. Kitty Strand, Dep't. of Preventive Medicine, U. Oslo (June 26, 1994) (concerning incident in Denmark in which statutory requirement of compensation for threatened workers induced employer to eliminate reproductive risk).

reproduce also be protected? Should we worry about the gender consequences of a protective scheme?

The more modest legislative model from Quebec, Canada is concededly more of an interim measure; it does not attempt to achieve permanent solutions. Pursuant to Quebec's legislation, women interested in conceiving, as well as pregnant or breast-feeding women, must be provided alternative employment or allowed to receive some compensation.[27] Is it an approach we should follow? It does have broader coverage. But here, too, gender equality concerns arise in the absence of wage, benefits, seniority, and similar guarantees.

Does legislation like that from Quebec or Finland actually provide protection to workers unable to afford the wage cuts alternative jobs or compensation might entail? While this question is impossible to answer without knowing more about a particular country's economic conditions and systems of benefits, it does suggest some of the dangers that inhere in "protective legislation." Yet, the inevitability of those dangers have traditionally been broadcast in opposition to essentially every effort to secure protections for workers.

Whatever our views of the Finnish and Canadian models, it would seem clear that regulation by some body setting the maximum levels of exposure for different agents is fairly crucial in pressuring employers to clean up their workplaces, so long as the employers also perceive there is some chance of enforcement. Given the present inability to anticipate an individual's threshold or to know an individual's exposure with any real accuracy, these standards will inevitably have to be expressed in general form. Should these general standards be set only in reference to reproductive risks? Doing so assumes that reproductive functions (most often the fetus itself) are the most vulnerable. Yet this is not always the case. Lead, for example, a well known reproductive toxin, affects many other parts of the body[28] at exposure levels at least equal to those associated with fetal damage. Similarly, vinyl chloride, again known for its reproductive harms, is also a serious carcinogen.[29] Indeed, some experts say that reviewing the scientific literature on the reproductive and other health effects of occupational exposures shows that the assump-

27. R.S.Q. Ch.S-2.1 §§ 40-48 (1993) (Can.).

28. Phillip Raworth, *Regional Harmonization of Occupational Health Rules: The European Example*, 21 AM. J.L. & MED. 7, 39 (1995).

29. *Id.*

tion of heightened or unique fetal risk, while sometimes ultimately validated, often relies more on stereotypes than facts.[30] Adverse health effects of toxic chemicals and other risks are rarely confined to the fetus in utero. An assumption of increased fetal risk must be justified. Assumptions concerning reproductive vulnerability and particularly fetal vulnerability are closely linked to the biased assumption that women don't really belong in the workplace. Ignoring lower standards of vulnerability to other types of health risks suggests once again that in protecting reproductive freedom and not other health issues, we mean only to protect decisions to procreate. Both protection for reproductive choices of both sorts and practical needs to minimize resentment from coworkers call for clean-up standards based on the lowest type of vulnerability. When long-term clean-up occurs, all will benefit. Some short-term solutions, such as engineering controls, use of protective gear and job rotation, will likewise benefit all the workers while other short-term solutions, such as temporary transfers and leaves, will benefit only the most vulnerable.

A general question underlying all sorts of protective legislation is whether they interfere unduly with choice. Early in this century, the courts repeatedly struck down protective labor legislation on these grounds. The United States Supreme Court's 1905 decision in *Lochner v. New York* struck down a state law limiting working hours to sixty per week or ten per day on the ground that it interfered with the workers' freedom of contract.[31] The subsequent New Deal turnabout that resulted in the sustaining of many forms of protective legislation was thought to put an end to this sort of argument.[32] However, the new conservatism that came back to power with the 1994 Congressional elections seems to have revived the debate. With jobs difficult to find, many argue that workers are entitled to decide whether they will assume risks in order to be employed. In this context, assuming a risk might mean, for a proponent of freedom of contract, that a worker would choose to work in an environment which posed hazards to his or her reproductive health.

Others counter that equality of bargaining power is a complete illusion and that without protective legislation, workers will sacrifice their health and well-being all too often. However, it

30. *See, e.g.*, Bertin, *supra* note 4, at 279-80.

31. Lochner v. New York, 198 U.S. 45 (1905). *But see* Muller v. Oregon, 208 U.S. 412 (1908).

32. United States v. Darby, 312 U.S. 100 (1941).

does not seem necessary to resolve such disputes for all issues for all time to recognize the need and validity of protective legislation in the area of occupational reproductive hazards. Protective legislation in this area seeks to ensure the fundamental right of reproductive freedom, an interest that is at least as compelling as freedom of contract.

Employers who are prohibited by Title VII and other fair employment laws from excluding women from hazardous work in the name of fetal protection may seek to limit their liability for defective offspring by requiring employees to agree that any such offspring will not sue the employer. This type of solution is consistent with a freedom of contract model. Workers seeking employment are rarely able to choose among jobs. Thus, they are under great pressure to sign "waivers" of this sort. A typical waiver might read:

> The law requires that you be given the option of choosing whether or not to accept a job for which you are otherwise qualified, even if it may involve significant lead exposure and risk to your future children. The Company strongly and emphatically recommends that you not accept placement in a job where the blood lead level may exceed 10 mg /100 mL.[33]

The worker would then be asked to sign a statement stating:

> I understand and accept responsibility for these risks which have been explained to me by the nurse and examining physician for this plant. I have been encouraged to discuss these risks with my family and personal physician before accepting any such position.[34]

Although conditioning employment on signing a waiver is not unusual, it is highly questionable that such waivers would actually be enforced so as to preclude a suit by a later-born child damaged by a parent's exposure during work. First of all, parents and prospective parents may well be prohibited from waiving rights that are not their own in this situation. But even if the third-party nature of the claims is not a problem, the coercion and duress inherent in these situations casts considerable doubt on the validity of any waiver.

The fact that waivers may not ultimately be enforced does not keep them from having an effect. Given the disparity of bargaining power and workers' general ignorance about the legal

33. Carin-Ann Claus et al., *Litigating Reproductive and Developmental Health in the Aftermath of UAW versus Johnson Controls*, 101 ENVTL. HEALTH PERSP. 214 (2d ed. Supp. 1993).

34. *Id.*

niceties of contract law, it is all too likely that a prospective employee will sign a waiver in order to get a job. Once in place, the waiver signals the employers' unwillingness to remove hazards despite the employers' awareness of their presence and is thus a serious source of stress for workers contemplating or achieving parenthood. Additionally, employees, having signed such waivers, are likely to believe that their employers do not have any further legal responsibility to eliminate the hazards. Thus, they are not likely to report unhealthy working conditions to their employers, their union representatives, or governmental authorities. Furthermore, they are likely to be deterred from asserting their and their children's legal rights in court at a later date.

CONCLUSION

Regardless of the outcome of the policy debate surrounding protective legislation, certain solutions seem free from controversy. One obvious immediate need is for more medical research. Findings to date have concentrated on the effects of maternal exposures, with spontaneous abortions and congenital malformations as outcome measures. While the scientific literature shows some likelihood of male-mediated effects on offspring, much more needs to be known about such harms. Information of this sort will not only make it more likely that men are able to exercise and enjoy their reproductive capacity, but also that women are not marginalized as workers through their protection. Similarly, there is a clear need for more research into the effects of exposures on fertility of both men and women. Reproductive freedom means acknowledging and ultimately rectifying all the negative impacts on reproductive functioning.

Other important interim actions have to do with disseminating information and generating consideration of the options. With information, employers and workers are likely to recognize their common interests in change, and those with interests in combatting such hazards need to know there are ways to address their concerns. Be it a matter of more economical processes, a more experienced and loyal workforce, the ability to bear children, or enjoying healthier children, the benefits of combatting occupational reproductive hazards abound.

Reproductive hazards in the workplace clearly show the close relationship between equality and reproductive freedom. Specifically, the gendered occupational history in the United

States has meant that women have been excluded from decent-paying jobs, while employers have often been relieved from the obligation to provide reproductively healthy work conditions. The question remains: Which policies should be implemented in order to maximize equality and reproductive freedom? In answering this question, it is also necessary to determine what policies are best designed to guarantee true reproductive freedom by affording the same benefits of safe and healthy conditions to workers who will not be engaged in procreation. We ought to be trying to answer both of these questions.