

NOTES

LACK OF INSURANCE COVERAGE FOR PRESCRIPTION CONTRACEPTION BY AN OTHERWISE COMPREHENSIVE PLAN AS A VIOLATION OF TITLE VII AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT—STRETCHING THE STATUTE TOO FAR

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INTRODUCTION

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹ Most women who want two children will spend an average of five years pregnant or trying to get pregnant and more than twenty years trying to prevent pregnancy.² Thus, a woman who wants the U.S. average of two children may have to use contraception for more than two decades.³ There are sixty million women in the United States who are now in their childbearing years, approximately ages fifteen to forty-four.⁴ Of the total number of U.S. women in their childbearing years, forty-two million (or seven out of every ten) are sexually active and do not wish to conceive.⁵

The availability of contraception has changed the lives of women. It is well established that the Constitution protects one’s right to use birth control measures.⁶ However, obstacles to the consistent use of contraceptives remain.

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1. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

2. NARAL Pro-Choice America Foundation, *Insurance Coverage for Contraception Improves the Health of Women and Families*, Apr. 22, 2002, at <http://www.naral.org/facts/insurancecov.cfm>.

3. Roberta Riley, JD, and Carolyn Snape, *What’s the Latest with Insurance for Contraception?*, HEALTH & SEXUALITY, Jan. 2, 2002, at <http://www.arhp.org/healthcareproviders/onlinepublications/healthandsexuality/transdermal/insurance.cfm?ID=235>.

4. *Id.*

5. *Id.*

6. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court held that a Connecticut statute that prohibited dispensing or use of birth control devices to or by married couples was a violation of the U.S. Constitution, finding that the right of privacy to use birth control measures is

One of the major barriers to universal access to contraception is the high cost: approximately \$540 per year for oral contraceptives; \$380 per year for Depo-Provera; and \$400 for an intrauterine device (IUD).⁷ The question remains who should bear this cost.

Many individuals who wish to use these types of contraceptives must pay the related costs themselves. More than two-thirds of adult women obtain their health insurance through employers.⁸ Yet, a sizable percentage of employers' health insurance plans do not cover prescription birth control even though the plans offer comprehensive coverage for other prescription drugs.⁹ Forty-nine percent of all typical large group plans do not routinely cover any contraceptive methods.¹⁰ "Only fifteen percent of large group plans cover all five of the most commonly used reversible prescription methods."¹¹ Health Maintenance Organizations (HMOs) provide better contraceptive coverage than large group plans, but fewer than half (thirty-nine percent) cover all five of the most common reversible prescription methods.¹² Participants in those plans are now arguing to the courts that the failure of employers to provide coverage for prescription contraception is a form of sex discrimination.¹³

Specifically, the federal courts are being asked to decide if the exclusion of prescription contraception from an otherwise comprehensive medical plan constitutes discrimination against women in violation of Title VII of the Civil Rights Act,¹⁴ as amended by the Pregnancy Discrimination Act.¹⁵ As of this writing, only one federal court has decided the issue.¹⁶ That court concluded that

a legitimate one. The Supreme Court found a Massachusetts statute which prohibited the distribution of contraceptive devices to unmarried persons to be a violation of the U.S. Constitution in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). The Court reaffirmed this concept in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

7. Riley & Snape, *supra* note 3.

8. NARAL Pro-Choice America Foundation, *supra* note 2.

9. See Bill Rankin, *Paulding Duo Join Birth Control Coverage Debate; Hoping to Build on Precedent: Two Cases Making Their Way Through Federal Court*, THE ATLANTA JOURNAL - CONSTITUTION, July 24, 2002, at 5D; Center for Reproductive Rights, *Contraceptive Coverage for All: EPICC Act Is Prescription for Women's Equality*, Sept. 2002, at http://www.crlp.org/pub_fac_epicc.html.

10. Center for Reproductive Rights, *supra* note 9.

11. *Id.*

12. NARAL Pro-Choice America Foundation, *supra* note 2.

13. See Cynthia L. Cooper, *Women Fight for Insurance Equity in Court, at Work*, WOMEN'S ENEWS, July 1, 2002, at <http://www.womensenews.org/article.cfm/dyn/aid/957>.

14. 42 U.S.C. § 2000e (1994).

15. *Id.* § 2000e(k).

16. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). In another case,

the exclusion did violate Title VII. Many other plaintiffs are waiting for their day in court.¹⁷

This Note argues that the recent federal district court decision holding that the failure of an otherwise comprehensive medical plan to cover prescription contraception is a violation of Title VII of the Civil Rights Act as amended by the Pregnancy Discrimination Act¹⁸ stretches Title VII too far. While the availability of reliable contraception has undoubtedly had a significant and positive impact on the lives of women in this country,¹⁹ it does not justify such a sweeping interpretation of that statute.

The exclusion of prescription birth control from an otherwise comprehensive health plan does not discriminate against women in violation of Title VII, as amended. First, contraception does not fall within the protection of the Pregnancy Discrimination Act, which prohibits discrimination on the basis of “pregnancy, childbirth, and related medical conditions.” Secondly, the differences between prescription drugs in general and contraceptives make *contraception* the appropriate level of comparison between the coverage offered males and females. The challenged health plans do not cover the prescription contraception for males or females, and are therefore not discriminatory. Third, the exclusion of prescription contraception from coverage disadvantages both males and females. Finally, broadly reading Title VII to prohibit the exclusion of prescription contraception from an otherwise comprehensive health plan opens the door for requiring coverage of an untold variety of procedures and prescriptions when the use of such procedure or prescription applies to only one gender. This presents a genuine threat to the ability of many employers to provide coverage to employees in a time when health costs are already escalating at double-digit rates.²⁰

a federal district court denied the defendant-employer’s motion to dismiss the plaintiff-employees’ claim that its health plan’s exclusion of prescription contraceptives constitutes sex discrimination in violation of Title VII. *Cooley v. Daimler Chrysler Corp.*, 281 F. Supp. 2d 979 (E.D. Mo. 2003).

17. See *EEOC v. United Parcel Serv.*, 141 F. Supp. 2d 1216 (D. Minn. 2001); *Maudlin v. Wal-Mart Stores, Inc.*, No. 1:01-CV-2755-JEC, 2002 U.S. Dist. LEXIS 21024 (N.D. Ga. Aug. 23, 2002); see also Kaiser Daily Reproductive Health Report, *AT&T Employees Sue for Contraceptive Coverage Under Company’s Health Insurance Plan*, Jan. 22, 2003, at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=15626; Rita Rubin, *Battle over Contraceptive Coverage Heats up*, USA TODAY, May 8, 2002, at 8D.

18. *Erickson*, 141 F. Supp. 2d 1266.

19. See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998) (describing the positive impact access to contraception has had on American women).

20. See Milt Freudenheim, *The Healthier Side of Health Care*, N.Y. TIMES, Oct. 23, 2002, at C1 (“Health costs are spiraling into another year of double-digit increases. Patients, employers, and government health programs are feeling the financial pain.”); Bill Brubaker, *Health Insurance Prognosis Is Poor; Survey of Employers Finds Premiums Rising, Coverage Shrinking*, WASH. POST, Sept. 6, 2002, at E01 (“Employers faced another year of double-digit rate increases—12.7 percent this year, the largest since 1990.”); Associated Press, *Costs of Health Benefits Are Seen*

While many would argue that it is a shortsighted policy²¹ on the part of the employer to exclude prescription contraceptives from coverage, this does not transform that failure into a violation of Title VII. Whether policy reasons justify requiring employer-sponsored private insurance plans to provide coverage for prescription contraception is an issue for the legislature, not the courts.²²

Part I of this Note examines Title VII as amended by the Pregnancy Discrimination Act, its development and application by the courts. Part II discusses the facts, holding, and reasoning of *Erickson*, and the Equal Employment Opportunity Commission's "Commission Decision" issued in December 2000, both finding the exclusion of prescription birth control to be a violation of Title VII. Part III focuses on the arguments against interpreting Title VII so expansively. Part IV proposes that, notwithstanding the inapplicability of Title VII to the issue, it makes business sense for employers to include coverage for prescription contraceptives within an otherwise comprehensive health plan.

I. TITLE VII AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT AND RELATED CASE LAW

Title VII of the Civil Rights Act of 1964 declares it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."²³ Although

Rising by 15%, N.Y. TIMES, Oct. 15, 2002, at C7; John M. Broder, *It's No Longer an Issue of Class; Middle-Class Are Among Newly Uninsured*, CHI. TRIB., Dec. 8, 2002, at C5 ("[T]he current slowdown and the rising cost of providing health care to employees produced a double whammy: Fewer companies are now willing to offer their workers health-care coverage, and those that do will ask them to bear a far higher share of the cost."); Gregory Weaver, *Health Care Hikes Steepest in Decade*, INDIANAPOLIS STAR, Nov. 17, 2002, at A1 ("Some are beginning to wonder if the day will come when employers no longer will be able to afford to provide subsidized health coverage for their workers.").

21. See *Improving Women's Health: Why Contraceptive Insurance Coverage Matters?: Hearing Before the Senate Committee on Health, Education, Labor, and Pensions*, 107th Cong. (2001) (statement of Jennifer Erickson).

22. Various legislative bodies are indeed addressing this issue. Twenty states have already passed legislation mandating coverage of prescription contraception by insurance plans that cover prescriptions in general. Those states are Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Missouri, New York, Nevada, New Hampshire, New Mexico, North Carolina, Rhode Island, Texas, Vermont, and Washington. NARAL Pro-Choice America Foundation, *Insurance Coverage for Contraception: State Laws and Regulations*, Jan. 2003, at http://www.naral.org/facts/cont_cov_chart.cfm. A similar act at the federal level, the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), was first introduced in the U.S. Congress in 1997, but has yet to be passed. See Center for Reproductive Rights, *supra* note 9.

23. 42 U.S.C. § 2000e-2(a)(1) (1994).

largely focused on race at the time of its enactment,²⁴ the purpose of Title VII is clearly to eliminate discrimination in the workplace on the basis of any of the listed factors.

In 1976, the Supreme Court decided *General Electric Company v. Gilbert*.²⁵ In that case, the defendant-employer provided disability benefits to its employees who became unable to work due to a nonoccupational sickness or accident. The plan, however, excluded pregnancy-related disabilities from coverage. Employees who had been denied the disability benefit for their pregnancy-related absences brought the action arguing that the exclusion of pregnancy-related disabilities from the benefit plan was a violation of Title VII of the Civil Rights Act of 1964.²⁶ The Court held in favor of the defendant, finding that an otherwise comprehensive short-term disability policy that excluded pregnancy-related disabilities from coverage did not discriminate on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.²⁷

According to the Court, it is only when there is such sex-based discrimination that a violation of Title VII exists. In this case, the employer merely excluded certain physical conditions from coverage but continued to cover the same categories of conditions for both men and women.²⁸ The Supreme Court held that “pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.”²⁹

In response to the Supreme Court’s *Gilbert* decision, Congress amended Title VII by passing the Pregnancy Discrimination Act (PDA).³⁰ Through its passage, Congress amended the definitional section of Title VII providing that, for purposes of Title VII, discrimination on the “basis of sex” includes, but is not limited to

because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.³¹

24. See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001).

25. 429 U.S. 125 (1976).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 139.

30. See *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1400 (N.D. Ill. 1994) (“The PDA was enacted in large part in response to the Supreme Court’s decision in *General Electric Co. v. Gilbert*.”).

31. 42 U.S.C. § 2000e(k) (1994).

Congress made clear its dissatisfaction with the Court's decision in *Gilbert*³² and confirmed its intent to ensure women affected by pregnancy or related conditions are treated in the same manner as others with similar abilities and limitations.³³

Another significant case decided by the Court after *Gilbert*, but prior to the enactment of the PDA in 1978, is *City of Los Angeles, Department of Water & Power v. Manhart*.³⁴ Based on studies that showed females generally live longer than males, the Department of Water and Power withheld larger pension fund contributions from its female employees than its male employees. The pension plan at issue was entirely funded by the contributions of the employees and the Department and the earnings thereon.³⁵ Because its female employees, as a class, would live to draw more monthly retirement benefit payments from the fund, the Department demanded greater contributions from the female employees. The respondents initiated the action alleging the contribution differential violated Title VII of the Civil Rights Act of 1964.³⁶

In finding the Department's pension funding scheme violated Title VII, the Court distinguished that plan from the benefit plan it had found lawful in *Gilbert*. The Court found that "each of the two groups of employees involved in this case is composed entirely and exclusively of members of the same sex. On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability."³⁷

The Court emphasized that the focus of Title VII was to ensure fairness for the individual, not fairness to classes based on generalizations. There was no guarantee that any individual female employee would actually realize the return on her excess contribution through the receipt of excess monthly payments.³⁸ Thus, the differential was unlawful.

The Supreme Court had the opportunity to interpret Title VII as amended by the PDA in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.³⁹ In that case, the employer-defendant's medical plan provided less comprehensive benefits to the spouses of male employees than to female employees for pregnancy-related conditions. The Court held that this disparity violated Title VII. "Health insurance and other fringe benefits are 'compensation, terms, conditions, or

32. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983) ("In 1978 Congress decided to overrule our decision in *General Electric Co. v. Gilbert* by amending Title VII of the Civil Rights Act of 1964.").

33. See *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 646 (8th Cir. 1987) ("A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment." (quoting S. Rep. No. 95-331 at 3, reprinted in *Legislative History* at 40)).

34. 435 U.S. 702 (1978).

35. *Id.* at 705.

36. *Id.* at 706.

37. *Id.* at 715.

38. *Id.* at 708.

39. 462 U.S. 669 (1983).

privileges of employment.’ Male as well as female employees are protected against discrimination.’⁴⁰ The Court reasoned that

[t]he Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.⁴¹

The Court further examined Title VII as amended by the PDA in *International Union v. Johnson Controls, Inc.*⁴² In that case, the employer-defendant’s fetal protection policy excluded women who were pregnant or who were capable of bearing children from jobs involving lead exposure. The Court found that “[t]he bias in Johnson Controls’ policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.”⁴³

The Court denounced the employer’s policy, stating, “Johnson Controls’ policy classifies on the basis of gender and childbearing capacity, rather than fertility alone Johnson Controls’ policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.”⁴⁴ The Court recognized the difference between childbearing and fertility. Johnson Controls’ policy classified employees based on their potential for pregnancy, a uniquely female characteristic, as opposed to fertility. Thus, the Court found explicit sex discrimination and a violation of the PDA.

II. TRIBUNALS FINDING THE EXCLUSION OF PRESCRIPTION CONTRACEPTION IS A VIOLATION OF TITLE VII

Prescription contraception has been available and popular for years. Despite this fact, only recently has the legal argument been advanced that the failure of an otherwise comprehensive insurance plan to cover the expense of prescription contraception is discriminatory in violation of Title VII.⁴⁵ This section will examine the facts and the reasoning of two recent decisions that endorse that proposition.

A. *The Erickson Decision*

Jennifer Erickson, a twenty-six year old pharmacist, believed it was unfair that her employer’s medical plan did not cover her oral contraceptives. She

40. *Id.* at 682.

41. *Id.* at 684.

42. 499 U.S. 187 (1991).

43. *Id.* at 197.

44. *Id.* at 198.

45. See Planned Parenthood Federation of America, *Some States Now Requiring Contraceptive Coverage*, Dec. 21, 2002, at <http://www.covermypills.com/latest/index.asp?id=47>.

found herself paying the entire expense, in excess of \$300 annually, out of pocket.⁴⁶ Although her employer's plan did not cover her birth control pills, it did cover other prescription drugs, including a number of preventive drugs and devices.⁴⁷ Erickson, with help from Planned Parenthood, took her employer to court, arguing its health plan violated Title VII, as amended by the PDA, because it excluded prescription contraceptives. The question before the court was whether the selective exclusion of prescription contraceptives from defendant's generally comprehensive prescription plan constituted discrimination on the basis of sex in violation of Title VII of the Civil Rights Act, as amended by the PDA.⁴⁸

Bartell, the employer, made many arguments in defense of its health plan. Specifically the employer argued that:

Opting not to provide coverage for prescription contraceptive devices is not a violation of Title VII because: (1) treating contraceptives differently from other prescription drugs is reasonable in that contraceptives are voluntary, preventative, do not treat or prevent an illness or disease, and are not truly a "healthcare" issue; (2) control of one's fertility is not "pregnancy, childbirth, or related medical conditions" as those terms are used in the PDA; (3) employers must be permitted to control the costs of employment benefits by limiting the scope of coverage; (4) the exclusion of all "family planning" drugs and devices is facially neutral; (5) in the thirty-seven years Title VII has been on the books, no court has found that excluding contraceptives constitutes sex discrimination; and (6) this issue should be determined by the legislature, rather than the courts.⁴⁹

The court was not persuaded by any of these arguments. In holding that the exclusion was unlawful, the court reasoned that Congress had embraced the dissenting opinion in *Gilbert* when it enacted the Pregnancy Discrimination Act. "The intent of Congress in enacting the PDA, even if not the exact language used in the amendment, shows that mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women."⁵⁰

The *Erickson* court also relied upon the Supreme Court's decision in *Johnson Controls* in which the Court held that classifying employees on the basis of their capacity to become pregnant is sex-based discrimination. The *Erickson* court described the *Johnson Controls* decision as follows: "the court focused on the fact that disparate treatment based on unique, sex-based characteristics, such as the capacity to bear children, is sex discrimination prohibited by Title VII."⁵¹

46. Ellen Goodman, *Benefits Must Cover Contraception*, at www.personalmd.com/news/n0728103836.shtml (last accessed Nov. 10, 2002).

47. *Erickson*, 141 F. Supp. 2d at 1268.

48. *Id.* at 1268.

49. *Id.* at 1272.

50. *Id.* at 1271.

51. *Id.*

Thus, the *Erickson* court concluded that “the PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant”⁵² and that prescription contraception falls within its reach. In reaching its decision to grant summary judgment for the plaintiff on her disparate treatment claim,⁵³ the court emphasized policy considerations and the negative consequences of unplanned pregnancies.⁵⁴

B. EEOC Commission Decision

In December 2000, the Equal Employment Opportunity Commission issued a Commission Decision finding discrimination where prescription contraceptive drugs were excluded from coverage by a health plan that covered other preventive drugs.⁵⁵ The Commission reasoned that the Supreme Court made clear, through its decision in *Johnson Controls*, that the “PDA’s prohibitions cover a woman’s potential for pregnancy, as well as pregnancy itself.”⁵⁶ The Commission then made the leap from the Supreme Court’s inclusion of classifications based on one’s potential for pregnancy within the protection of the PDA to the inclusion of prescription contraception within the PDA, in part because it is one means of controlling a person’s ability to become pregnant.

The Commission’s decision also relied on the language in the PDA that specifically excludes abortion, in most cases, from the requirement that employers cover pregnancy and related conditions on the same basis as other medical conditions.⁵⁷ The Commission concluded that, because Congress took pains to specifically exclude abortion and did not include any such exclusion for contraception, it must have intended for the PDA to apply to contraception. According to the Commission, because the employers excluded the cost of prescription contraceptive drugs—available only to women—from their employee health plan while covering a number of other preventive drugs,

52. *Id.*

53. *Id.* The defendant-employer initially appealed the ruling. That appeal was dismissed, however, after the court approved a settlement on March 4, 2003. The agreement requires the employer to continue providing coverage for prescription contraceptive drugs and related clinical services, as was required by the district court’s decision. Further, the employer must provide this coverage to those class members currently employed with no co-payment through 2006. Finally, the defendant-employer will pay \$100 to those class members no longer employed by the defendant. Planned Parenthood Federation of America, *Planned Parenthood Negotiates Victory for Fairness for Women in Landmark Erickson v. Bartell Contraceptive Coverage Case*, Mar. 4, 2003, at http://www.plannedparenthood.org/about/pr/030304_Erickson.html.

54. *Id.* at 1273 (“Unintended pregnancies, the condition which prescription contraceptives are designed to prevent, are shockingly common in the United States and carry enormous costs and health consequences for the mother, the child, and society as a whole.”).

55. U.S. Equal Employment Opportunity Commission, Commission Decision, at www.eeoc.gov/docs/decision-contraception.html (last modified Dec. 14, 2000).

56. *Id.*

57. *Id.*

devices, and services, the plans violated the PDA's prohibition against discrimination on the basis of pregnancy.⁵⁸

III. TITLE VII AS AMENDED BY THE PDA SHOULD NOT BE INTERPRETED SO BROADLY

A. Prescription Contraception Is Not Within the Scope of the PDA

The PDA amended Title VII by adding the following language to Section 701:

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.⁵⁹

With the passage of the PDA Congress clarified what constitutes sex-based discrimination under Title VII.

Rather than introducing new substantive provisions protecting the rights of pregnant women, the PDA brought discrimination on the basis of pregnancy within the existing statutory framework prohibiting sex-based discrimination. Section 703 of Title VII, which provides the substantive rule regarding sex-based employment discrimination, applies with equal force to employment discrimination on the basis of pregnancy.⁶⁰

Clearly, discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. What is far from clear is whether Congress intended for contraception to fall within the PDA's realm of pregnancy, childbirth, or related medical conditions.

Examining the plain language of the amended statute, the answer to that question should be no. The Eighth Circuit Court of Appeals applied the *ejusdem*

58. See U.S. Equal Employment Opportunity Commission, *EEOC Issues Decision on Two Charges Challenging the Denial of Health Insurance Coverage for Prescription Contraceptives*, at www.eeoc.gov/press/12-13-00.html (last modified Dec. 13, 2000).

59. 42 U.S.C. § 2000e(k).

60. *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1312 (11th Cir. 1994).

generis rule of statutory construction in interpreting the language of the PDA⁶¹ in *Krauel v. Iowa Methodist Medical Center*.⁶² In analyzing and rejecting the plaintiff's claim that infertility was included within the Pregnancy Discrimination Act, the *Krauel* court concluded that "[r]elated medical conditions,' a general phrase, thus should be understood as referring to conditions related to 'pregnancy' and 'childbirth,' specific terms."⁶³ The *Krauel* court found that "[t]he plain language of the PDA does not suggest that related medical conditions should be extended to apply outside the context of pregnancy and childbirth. Pregnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception."⁶⁴

Like infertility, contraception is readily distinguishable from "pregnancy," "childbirth," and "related medical conditions." Contraception is defined as "the deliberate prevention of conception."⁶⁵ Contraception, when used successfully, precludes pregnancy, just as infertility prevents pregnancy. It, too, is strikingly different than pregnancy and childbirth which occur after conception.⁶⁶ Given the absence of clear congressional intent to include it, the plain language of the Pregnancy Discrimination Act does not encompass prescription contraception.⁶⁷

Furthermore, "pregnancy" and "childbirth" are gender specific conditions. However, both fertile men and fertile women may choose to deliberately prevent conception. And contraception, in its various forms, may be used by a male or a female. These characteristics differentiate contraception from actual pregnancy and child bearing and support a finding that contraception does not fall within the Pregnancy Discrimination Act.

In deciding that the Pregnancy Discrimination Act applies to prescription contraception, the EEOC relied, in part, upon the specific exclusion of abortion from the Act's requirements.⁶⁸ The EEOC reasoned that, if Congress wanted to specifically exclude contraception from the PDA, Congress would have specifically so stated, as it did for abortion.⁶⁹ However, this reasoning is flawed because abortion is significantly more like "pregnancy, childbirth, and related

61. *Laporta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 770 (W.D. Mich. 2001).

62. 95 F.3d 674 (8th Cir. 1996).

63. *Id.* at 679.

64. *Id.*

65. WEBSTER'S NINTH NEW DICTIONARY 284 (9th ed. 1983).

66. *See Alexander v. Am. Airlines, Inc.*, 2002 U.S. Dist. LEXIS 7089, at *11 (N.D. Tex. Apr. 22, 2002) ("By no stretch of the imagination does the prohibition against discrimination based on 'pregnancy, childbirth, or related medical condition,' require the provision of contraceptives as part of the treatment for infertility.").

67. *But see Erickson*, 141 F. Supp. at 1270. The court acknowledged that "the amendment makes no reference whatsoever to prescription contraceptives," but the court decides that Congress embraced the dissenting opinion in *Gilbert* and thus requires employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same. *Id.*

68. U.S. Equal Employment Opportunity Commission, *supra* note 55.

69. *Id.*

medical conditions” than contraception. One must be pregnant before one can have an abortion. Abortion is performed on women who are actually pregnant. The two—pregnancy and abortion—are manifestly intertwined. Abortion, by its very nature, is linked to childbearing capacity which is uniquely female. It is those uniquely female biological traits that Congress sought to clearly bring within the ambit of Title VII with the passage of the Pregnancy Discrimination Act.

Contraception is different. The entire purpose of contraceptive use is to prevent pregnancy from ever occurring. It is designed to interfere with fertility and reproductive capacity. Contraception and pregnancy only become joined if the contraception fails. Because of these fundamental differences between abortion and contraception, the fact that Congress specifically excluded abortion from coverage of the PDA does not suggest congressional intent to include contraception.

Additional evidence exists to support the conclusion that Congress did not intend the inclusion of contraception within the Pregnancy Discrimination Act. On multiple occasions, Congress has considered passing the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC). Originally introduced in 1997, the EPICC would mandate prescription contraception coverage by health insurance plans that cover other prescription drugs.⁷⁰ Clearly, Congress is aware that such coverage is lacking and that there is a need to consider such legislation. Congress knows that many insurers fail to provide contraceptive coverage, finding that “the vast majority of private insurers cover prescription drugs, but many exclude coverage for prescription contraceptives.”⁷¹ Thus, it is unlikely Congress assumes they have already secured contraceptive coverage, at least for all women who work for Title VII covered employers, through the passage of the Pregnancy Discrimination Act. Therefore it seems highly improbable that there would be another *Gilbert*-type congressional response to a federal court deciding that the lack of contraception coverage does not give rise to a Title VII violation. Congressional behavior indicates it does not believe prescription contraception coverage is mandated by Title VII as amended by the Pregnancy Discrimination Act.⁷²

Additional reasoning in support of the judiciary finding that prescription contraception does not fall within the ambit of the Pregnancy Discrimination Act

70. Kaiser Daily Reproductive Health Report, *Contraceptive Coverage Debate Gaining Momentum in States, Remains Stalled at Federal Level*, Dec. 16, 2002, at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=15108.

71. Equity in Prescription Insurance and Contraceptive Coverage Act of 1997, H.R. 2174, 105th Cong. § 2 (1997).

72. Interestingly, federal employees have only enjoyed coverage of prescription contraceptives for approximately the past five years, long after the enactment of the PDA. Continued coverage of prescription contraceptives was in jeopardy in 2001 when President Bush omitted the provision that would provide continued insurance coverage for federal employees. Judy Mann, *Still Struggling to Secure Access to Contraception*, WASH. POST, June 20, 2001, at C12.

can be found in *EEOC v. Staten Island Savings Bank*.⁷³ In that case, a charge of disability discrimination in violation of the Americans with Disabilities Act (ADA) was made against an employer whose disability plan provided a lesser benefit for those suffering from a mental disability than for those suffering from a physical disability. In finding for the defendant, the court reasoned:

The ADA, unclear on its face, does not specifically condemn the historic and nearly universal practice inherent in the insurance industry of providing different benefits for different disabilities. The interpretation of Title I urged upon us by the EEOC would require far-reaching changes in the way the insurance industry does business. Of course, Congress could require those modifications to be made, but we are reluctant to infer such a mandate for radical change absent a clearer legislative command. We agree with [other circuits] that “had Congress intended to control which coverages had to be offered by employers, it would have spoken more plainly because of the well-established marketing process to the contrary.”⁷⁴

This reasoning can be easily applied to the issue of prescription contraception.⁷⁵ Congress is aware that coverage of prescription contraceptives is lacking and, like the insurance industry’s practice of providing a lesser benefit for mental disabilities than physical, if it had intended the Pregnancy Discrimination Act to eliminate that practice, it would have “spoken more plainly.”⁷⁶ Congress’s failure to specifically reference contraception in the text of the PDA prevents a finding of congressional intent to require otherwise comprehensive health plans to cover prescription contraception because Congress was well aware that the coverage was lacking. In the light of such knowledge, if Congress had intended for contraception to be included within the coverage of the PDA, it would have stated so explicitly.

The *Erickson* court also relied on the Supreme Court’s opinion in *Johnson Controls*, in which the Court did not limit the application of the PDA to women who were actually pregnant, in reaching its conclusion that contraception is within the meaning of the PDA.⁷⁷ The fetal protection policy at issue in *Johnson Controls* differentiated between fertile males and fertile females. In that case, the Court recognized that both males and females may be fertile and have an interest in the protection of the health of their potential children.⁷⁸ Yet, it was only women who were prohibited from certain jobs when that potential to reproduce

73. 207 F.3d 144 (2d Cir. 2000).

74. *Id.* at 149 (citations omitted).

75. Some federal courts have found that the ADA prohibits discrimination between the disabled and the non-disabled, but not between the mentally and the physically ill. *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000); *Parker v. Metro Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997).

76. *Staten Island Sav. Bank*, 207 F.3d at 149.

77. *Erickson*, 141 F. Supp. 2d at 1271.

78. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991).

existed. It seemed to be the biological difference between men and women—the fact that the woman is the one who bears the child—on which the employer based its distinction.

Unlike the state of pregnancy or the possibility of being pregnant, which was the unlawful classification made by the fetal protection policy at issue in *Johnson Controls*, the desire to engage in sexual activity while avoiding conception is not unique to females. Although prescription contraceptives are currently only available for females,⁷⁹ contraception is not solely a “female” issue. A female acting alone has no need for contraception. Prescription birth control, only one of various conception prevention methods, is a sub-category of contraception. The fact that, due to the current limitations of medical science, there are currently no prescription contraceptives available for males does not change the nature of contraception.

In *Armstrong v. Flowers Hospital*⁸⁰ the court described *Johnson Controls*: “[i]n that case, the employer had denied women who were capable of becoming pregnant the opportunity to work in certain jobs.”⁸¹ It takes two to conceive—which is different than the actual physical state of being pregnant which is obviously a female-only, sex-based characteristic. Reproductive capacity—fertility, to use the term from *Johnson Controls*—is common to both males and females. Furthermore, there are many methods of contraception available to both women and men. In fact, thirty-eight percent of married modern contraceptive users depend on male methods of contraception.⁸² Varied methods of contraception available include, but are not limited to, irreversible surgical procedures, prescription contraceptive drugs and devices, condoms, spermicides, and non-medical methods such as withdrawal and fertility awareness. Simply because one category of the varied options is currently available only for females does not make the exclusion of that category from coverage by an employer’s health plan a violation of Title VII.

The desire to engage in sexual activity without conceiving drives individuals to use contraception. There is nothing inherently gender-related about this desire to prevent conception. The court, in *Piantanida v. Wyman Center, Inc.*,⁸³ had the opportunity to distinguish between sex-based characteristics, discrimination based on which would be unlawful in the employment context, and non-sex-based characteristics, discrimination based on which would not violate Title VII. In that case, the plaintiff, an administrative assistant, was counseled on the deficiencies in her work performance prior to the commencement of her

79. For suggestions on how to jumpstart research and development of contraceptives see William M. Brown, *Deja Vu All over Again: The Exodus from Contraceptive Research and How to Reverse It*, 40 BRANDEIS L.J. 1 (2001).

80. 33 F.3d 1308, 1314 (11th Cir. 1994).

81. *Id.* at 1315.

82. Janet Larsen, Earth Policy Institute, *Sterilization Is World's Most Popular Contraceptive Method*, Oct. 15, 2002, at <http://www.earth-policy.org/Updates/Update18.htm> (the thirty-eight percent is split between condoms and vasectomy).

83. 116 F.3d 340 (8th Cir. 1997).

maternity leave. During the course of the plaintiff's leave of absence, the employer learned of a significant backlog in her work.⁸⁴ Thus, upon her return to work after her leave, the plaintiff was transferred to a lower level position and her salary was reduced accordingly. The plaintiff-employee quit and filed suit, alleging she was forced to resign in violation of Title VII's prohibition against sex discrimination.⁸⁵ The plaintiff's allegation of discrimination was largely based on the employer's statement "that she was being given a position for a new mom to handle."⁸⁶

The court dismissed her action. The court found there was nothing inherently sex-related about becoming a parent—both men and women become parents. The *Piantanida* court reasoned

an individual's choice to care for a child is not a "medical condition" related to childbirth or pregnancy . . . [a]n employer's discrimination against an employee who has accepted this parental role—reprehensible as this discrimination might be—is therefore not based on the gender-specific biological functions of pregnancy and child-bearing, but rather is based on a gender-neutral status potentially possessible by all employees, including men and women who will never be pregnant.⁸⁷

Similarly, the individual's choice to use contraception is not a "medical condition" related to childbirth or pregnancy. The choice to use contraceptives is gender-neutral. The fact that one sub-category of contraception—prescription contraception—is currently only available to females does not transform one's choice to use that particular category of contraception into a gender-specific biological function like pregnancy and child-bearing. The choice to use prescription birth control is not a gender-based characteristic, which is the type of characteristic Congress sought to eradicate as a basis of discriminatory treatment with the passage of Title VII and the Pregnancy Discrimination Act.

Another federal court had the opportunity to examine the meaning of the PDA in *Pacourek v. Inland Steel Co.*⁸⁸ That court found that

[t]he basic theory of the PDA may be simply stated: Only women can become pregnant; stereotypes based on pregnancy and related medical conditions have been a barrier to women's economic advancement; and classifications based on pregnancy related medical conditions are never gender-neutral. Discrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is therefore illegal discrimination. It makes sense to conclude that the PDA was intended to cover a woman's intention or potential to become pregnant, because all that conclusion means is that discrimination against

84. *Id.*

85. *Id.* at 341.

86. *Id.*

87. *Id.* at 342.

88. 858 F. Supp. 1393 (N.D. Ill. 1994).

persons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law.⁸⁹

The focus is on the physical state of being pregnant, or the potential to be pregnant, which are uniquely female biological traits. However, again, both men and women may want to engage in sexual relations without conceiving. The fact that FDA-approved prescription contraceptives, which are but a few of the contraception options that are currently available only for women does not turn the desire to not conceive a child into a sex-based characteristic. Reproductive capacity is not uniquely female and the PDA should not be read to introduce “a completely new classification of prohibited discrimination based solely on reproductive capacity.”⁹⁰

Interpreting the PDA to not encompass contraception is consistent with *Johnson Controls*. In *Johnson Controls*, the Court recognized the distinction between fertility, which is not unique to women, and childbearing capacity, which is unique to women. Examining the defendant’s fetal protection policy, the Court concluded that “[f]ertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.”⁹¹ The distinction made by the employer in its policy, which was held to violate Title VII as amended by the PDA, was childbearing capacity, not fertility or reproductive capacity. The Court suggested a policy based on the fertility of both men and women would pass muster.⁹² The use of birth control is necessitated by the fertility of the man and the woman. An individual’s decision to use birth control results from the reproductive capacity of two people and is not specific to *childbearing* capacity. Hence, to find contraception outside of the PDA is consistent with *Johnson Controls*.

B. Exclusion Is Not Discriminatory

The exclusion of prescription contraception from a prescription insurance plan is not discriminatory. Simply because one sub-category of contraception is available only for women does not make the exclusion of contraception from an otherwise comprehensive plan discriminatory. The use of prescription contraception for birth control is voluntary and not medically necessary.⁹³ Prescription birth control prevents not a disease, but a normal function of the human body. This distinction differentiates prescription contraception from prescription drugs in general and is a valid, non-discriminatory reason for its exclusion. Furthermore, males and females are arguably equally burdened by such an exclusion.

89. *Id.* at 1401.

90. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003).

91. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991).

92. *Id.*

93. Some women may be prescribed birth control for reasons other than contraception. This Note is limited to the issue of the use of prescription birth control for contraceptive purposes.

Discrimination is the differential treatment of persons “when no reasonable distinction can be found between those favored and those not favored.”⁹⁴ Yet there is no true point of comparison for a court to conclude that there is unlawful differential treatment based on the failure of an otherwise comprehensive medical plan to cover prescription contraception. “If the underlying category is contraception, then the exclusion of prescription drugs for birth control is discriminatory only if the contraceptives that men use are covered.”⁹⁵ The plans under attack do not cover prescription contraception for men or women so there is no discrimination. Due to the limitations of medicine, there are not yet any FDA-approved prescription contraceptives available for males.⁹⁶ Surgical sterilization, the most popular form of birth control⁹⁷ and a type of contraception that is available for both men and women, is often covered by insurance plans for both men and women.⁹⁸ Many contraceptive choices do not require professional medical consultation or treatment of any kind and generally fall outside the ambit of insurance coverage altogether.⁹⁹

Plaintiffs urge the point of comparison is prescription drugs generally: the fact that a medical plan does provide coverage for prescription drugs yet fails to cover prescription contraception gives rise to a violation of Title VII. But can prescription contraception fairly be compared to other prescription drugs? The *Erickson* court noted that the insurance plan at issue covered preventive drugs such as blood pressure and cholesterol-lowering drugs, and drugs to prevent

94. BLACK'S LAW DICTIONARY 479 (7th ed. 1999).

95. Peter Neurath, *Contraception Controversy Swirls Around Definition*, PUGET SOUND BUS. J., Aug. 3, 2001, at <http://seattle.bizjournals.com/seattle/stories/2001/08/06/focus9.html>.

96. The availability of a male prescription contraceptive method would resolve the issue by providing a clear choice for comparing the comprehensiveness of coverage between females and males. When asked if male contraceptives were in development, Andrea Tone, the author of a book on the history of contraception, responded in the affirmative. Offering very little detail, she indicated clinical trials were being conducted with male hormonal contraceptive methods. Laura Fording, *A Crash Course on Contraception*, NEWSWEEK, June 22, 2001. Nonetheless, reports predict “it will take at least five years and . . . many studies before a male birth control drug hits the market.” Amanda Ripley, *At Last, the Pill for Men*, TIME, Oct. 20, 2003. See also Dr. Sheldon Segal, *Contraceptive Update*, 23 N.Y.U. REV. L. & SOC. CHANGE 457 (1997) (describing the various developments in contraceptive research, including prescription methods for males).

97. Patricia Guthrie, *Healthy Living: More Choices; New Birth Control Options Include an Alternative to Sterilization*, ATLANTA J. & CONST., Nov. 12, 2002, at 1E.

98. See Eileen L. McDonagh, *My Body, My Consent, Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057 n.69 (1999) (“Voluntary sterilization is the most effective and popular method of birth control.”).

99. There has been support for making the birth control pill available over-the-counter as well. See Cheryl terHorst, *Some Seek Broader Horizons for “Morning-After Pill,”* CHI. TRIB., Oct. 11, 2000, at 1C (“The Food and Drug Administration held hearings this summer about the possibility of making various prescription medications available over the counter, including the birth control pill.”).

blood clotting and breast cancer.¹⁰⁰ Should the fact that an employer's health plan covers prescription drugs to prevent blood clotting compel coverage of birth control pills in order to be lawful? While there is no doubt that unintended pregnancies are a serious problem, there are differences between pregnancy and the diseases and illnesses those other prescription drugs are designed to prevent.¹⁰¹ Furthermore, there are effective methods of non-prescription drug contraception available for both males and females.

Some point to Viagra® as the appropriate comparison.¹⁰² The argument is that plans that cover male-only drugs such as Viagra®, yet fail to cover female-only drugs like prescription contraceptives, are discriminating against women.¹⁰³ However, plaintiffs are proceeding with discrimination cases against employers whose plans also exclude treatments and services for impotence from coverage.¹⁰⁴

Contraception is voluntary and not medically necessary,¹⁰⁵ which differentiates it from other covered prescriptions. Therefore, it is submitted that the proper level of categorization for comparison between the coverage afforded males and females under the health plans is contraceptives, not prescriptions in general. It is logical to evaluate a health plan's equity and lawfulness, not based on the general category of *prescription* coverage, but on the category of *contraception* coverage. Therefore, the exclusion is not discriminatory unless prescription contraceptives for males are covered. Using this level of analysis, the plans are not discriminatory because they do not cover prescription contraceptives for males or females.

In the face of ever-increasing health care costs¹⁰⁶ employers cannot begin to cover everything.¹⁰⁷ Cost is not a defense to otherwise discriminatory

100. *Erickson*, 141 F. Supp. 2d at 1268.

101. *But see id.* at 1272. The employer's argument that contraception was distinguishable from other prescription drugs did not convince that court that any such difference was relevant.

102. *See* Kim H. Finley, *Life, Liberty, and the Pursuit of Viagra? Demand for "Lifestyle" Drugs Raises Legal and Public Policy Issues*, 28 CAP. U. L. REV. 837 (2000).

103. However, Viagra® can also arguably be distinguished from prescription contraception as it does treat the medical problem of erectile dysfunction.

104. *See* *Mauldin v. Wal-Mart Stores, Inc.*, 2002 U.S. Dist. LEXIS 21024 (N.D. Ga. Apr. 23, 2002). The Plan of defendant-employer Wal-Mart excludes from coverage "charges for, or relating to, any treatment or service for abortions, sexual dysfunction, impotence, infertility, birth control (birth control pills/injectives are not covered for any reason), sterilization or reversal of sterilization procedures, artificial insemination, in-vitro fertilizations or embryo transfers, and any complications arising therefrom." *Id.* at *3 n.1.

105. This Note does not address the applicability of Title VII to the exclusion of prescription birth control when prescribed for reasons other than birth control.

106. *See* Associated Press, *Costs of Health Benefits Are Seen Rising by 15%*, N.Y. TIMES, Oct. 15, 2002, at C7; Beth Kobliner, *Personal Business Health Plans Are Offering Fewer Choices and Higher Costs*, N.Y. TIMES, Oct. 6, 2002, at 37; Delia M. Rios, *No Longer an Entitlement: Health Care, Long Seen as a Routine Benefit, Is Under Fire as Employers Seek Relief from Endlessly Rising Insurance Premiums*, CHI. TRIB., Feb. 2, 2003, at C5.

107. When did we begin to expect our employers to cover *all* of our medical expenses anyway?

actions,¹⁰⁸ but the exclusion of a voluntary prescription drug that does not prevent illness is not discriminatory, even when that prescription is currently available only for one gender. Additionally, the over-the-counter options available effectively serve the same purpose. For example, with perfect use of the male condom, two out of one hundred women will experience pregnancy during their first year of use.¹⁰⁹ Furthermore, for those using the health of women as an argument in favor of finding the exclusion of prescription contraception within the scope of Title VII,¹¹⁰ note that condoms are the form of birth control that offers the highest level of protection from sexually transmitted diseases.¹¹¹ According to the Centers for Disease Control and Prevention, male latex condoms

when used consistently and correctly, are highly effective in preventing transmission of HIV, the virus that causes AIDS. In addition, correct and consistent use of latex condoms can reduce the risk of other sexually transmitted diseases (STDs), including discharge and genital ulcer diseases. While the effect of condoms in preventing human papillomavirus (HPV) infection is unknown, condom use has been associated with a lower rate of cervical cancer, an HPV-associated disease.¹¹²

The exclusion of prescription contraception from coverage burdens both males and females. In fact, both males and females have initiated legal action challenging plans that exclude prescription contraception.¹¹³ This phenomenon may be traced to the Supreme Court's decision in *Newport News*.¹¹⁴ In that case, the Court made clear that the coverage offered to the dependents of employees must be taken into consideration in evaluating claims of discrimination,

See Rios, supra note 106 (providing a brief history of how "health-care benefits [came] to be considered a right.").

108. *See City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716, 717 (1978) ("That [cost] argument might prevail if Title VII contained a cost-justification defense . . . [b]ut neither Congress nor the courts have recognized such a defense under Title VII.").

109. Planned Parenthood Federation of America, *Birth Control*, at <http://www.plannedparenthood.org/bc/condom.htm#Benefits> (last accessed Nov. 12, 2003). However, the effectiveness rate of hormonal methods of birth control, the category that includes the birth control pill and other prescription contraception methods, is higher. With perfect use of the pill, less than one woman out of one hundred will experience pregnancy during her first year of use. *See Engender Health, Contraceptive Method Effectiveness*, at <http://www.engenderhealth.org/wh/fp/ceff.html> (last accessed Nov. 12, 2003).

110. *See Law, supra* note 19.

111. Planned Parenthood Federation of America, *supra* note 109 (The latex condom offers better protection against sexually transmitted infections (STI) than any other birth control method.).

112. Centers for Disease Control and Prevention, *Male Latex Condoms and Sexually Transmitted Disease*, at <http://www.cdc.gov/nchstp/od/latex.htm> (last accessed Nov. 12, 2003).

113. *EEOC v. United Parcel Serv., Inc.*, 141 F. Supp. 2d 1216 (D. Minn. 2001).

114. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

reasoning that “since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.”¹¹⁵

The male plaintiff in *EEOC v. United Parcel Service, Inc.* challenged the lawfulness of his employer’s plan because the plan failed to provide prescription coverage for his wife’s oral contraceptive.¹¹⁶ In that instance, the contraceptive was prescribed for the treatment of his wife’s hormonal disorder.¹¹⁷ The employer-defendant’s motion to dismiss was denied.¹¹⁸ Thus, the exclusion of prescription contraception may expose the employer to liability to both female and male employees on the basis of sex discrimination. This illustrates the fact that the exclusion disadvantages both genders. Under this sweeping interpretation of Title VII, both a male and a female could be burdened by the same health plan and both have an actionable sex discrimination claim.¹¹⁹ Under some circumstances, this may be reasonable to effectuate the purposes of Title VII as amended by the Pregnancy Discrimination Act. However, unlike longer expected life spans¹²⁰ and actual pregnancy, the desire to engage in sexual activity yet prevent conception is prevalent among both males and females—it is not a female characteristic. Thus, exclusion of prescription contraception from a health plan burdens both genders. Couples who choose prescription contraception as their birth control method will have to cover the expense out of pocket.

The area of insurance coverage for fertility treatments gives rise to analogous issues and the analysis of the federal courts on that subject is instructive. The court in *Saks v. Franklin Covey Co.*¹²¹ confronted the issue of the lawfulness of an employer’s insurance plan that, while providing coverage for a variety of infertility procedures, specifically excluded “surgical impregnation procedures, including artificial insemination, in-vitro fertilization or embryo and fetal implants.”¹²²

The plaintiff argued that the failure of the plan to cover surgical impregnation procedures was a violation of Title VII because surgical

115. *Id.* at 684.

116. 141 F. Supp. 2d at 1216.

117. *Id.*

118. *Id.*

119. The implication of *Newport News* is indeed that a discriminatory plan may be actionable by both genders. However, the plan at issue in *Newport News* afforded less comprehensive protection to married male employees than the protection it afforded to married female employees. Specifically, the plan provided female employees more extensive pregnancy-related benefits than those provided to the spouses of male employees. *Newport News*, 462 U.S. at 669.

120. The classification of employees based on their average life spans as a class which resulted in requiring females to make larger contributions to a pension fund was adjudged unlawful in *Manhart*. 435 U.S. 702, 706 (1978).

121. 316 F.3d 337 (2d Cir. 2003).

122. *Id.* at 341.

impregnation procedures are performed only on women. While acknowledging that the exclusion of procedures performed exclusively on women may, in certain circumstances, constitute discrimination, the court found that the exclusion in this plan was not contrary to Title VII.¹²³ The *Saks* court reached the conclusion that the failure of an employer's otherwise comprehensive plan to cover procedures that are performed exclusively on one gender was not discriminatory in this case because the exclusion equally disadvantaged both male and female employees.¹²⁴ The court reasoned that "[a]lthough the surgical procedures are performed only on women, the need for the procedures may be traced to male, female, or couple infertility with equal frequency."¹²⁵ Thus, the plan did not violate Title VII.

The same reasoning can be applied to the coverage of prescription contraception. Although the sub-category of contraception at issue here—prescription contraception—is available only for women, the need for contraception can be traced to male and female fertility with equal frequency.¹²⁶ The intended function of surgical impregnation and prescription birth control both relate to the reproductive capacity of women—one to produce pregnancy and one to prevent pregnancy. The role of the male is essential and obvious in both situations; without him, there is no possibility of pregnancy. The exclusion of prescription contraception equally disadvantages males and females.

Acknowledging the decision of the EEOC, which found the exclusion of birth control from an otherwise comprehensive healthcare plan to be a violation of Title VII, the *Saks* court made a cursory distinction between the exclusion of oral contraceptives and the exclusion of surgical impregnation.¹²⁷ The court stated that the exclusion of oral contraceptives disadvantaged women only and distinguished the issue before it stating, "the exclusion of surgical impregnation techniques limits the coverage available to infertile men and infertile women and thus does not violate Title VII."¹²⁸ This perfunctory reasoning is unconvincing, especially in light of the persuasive reasoning the court employed in holding the exclusion of surgical impregnation by the defendant's health plan to be lawful.¹²⁹ The exclusion of oral contraceptives from a health plan limits the coverage available to fertile men and fertile women just like the exclusions faced by infertile men and infertile women covered by the health plan at issue in *Saks*.

123. *Id.* at 347.

124. *Id.* at 346.

125. *Id.* at 347.

126. The *Saks* court found that "[i]nfertility is a medical condition that afflicts men and women with equal frequency." *Id.* at 346. From this I draw the conclusion that men and women must therefore be fertile with equal frequency.

127. *Id.* at 337.

128. *Id.* at 348.

129. *But see* Joanna Grossman, *If Employers Don't Provide Insurance Covering Infertility, Are They Guilty of Sex Discrimination?*, Jan. 28, 2003, at <http://writ.corporate.findlaw.com/grossman/20030128.html> (presenting the argument that the *Saks* court reached the wrong result on the issue of whether the exclusion constituted sex discrimination).

The fact that one contraceptive technique, prescription birth control, is only currently available for women parallels the fact that surgical impregnation is available only for women.¹³⁰ That fact does not transform the exclusion of either prescription contraception or surgical impregnation into a violation of Title VII because both sexes are burdened by the exclusion.

The Eighth Circuit also had the opportunity to address the question of whether a medical benefit plan violated Title VII due to its exclusion of infertility treatments in *Krauel v. Iowa Methodist Medical Center*.¹³¹ The plaintiff had received treatment for her infertility, including artificial insemination and gamete intrafallopian tube transfer (GIFT). The plaintiff successfully conceived through one of the three GIFT treatments.¹³² While her employer's health plan covered the plaintiff's pregnancy and delivery expenses, the plan denied her request for coverage of her infertility treatments. She initiated legal action alleging violations of Title VII, the PDA, and the Americans with Disabilities Act.¹³³ The court affirmed the district court's holding of summary judgment in favor of the defendant on all of the claims. The court reasoned that "[p]otential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant. In this case, because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral, *Johnson Controls* is inapposite."¹³⁴

This reasoning of the *Krauel* court offers additional support for the conclusion that exclusion of contraception from an otherwise comprehensive health plan is not a violation of Title VII as amended by the Pregnancy Discrimination Act. That court also emphasized the distinction between actual pregnancy and infertility.¹³⁵ The distinction between fertility and pregnancy, or potential pregnancy, is equally as valid and determinative.

All employees who select prescription contraceptives as their contraception of choice - as opposed to the over the counter, surgical or other contraceptive options - have to foot the bill.¹³⁶ This includes female employees and male employees whose spouses opt for prescription birth control. Thus, like the exclusions at issue in the *Krauel* case, the exclusion of prescription birth control is gender neutral and does not constitute a violation of Title VII.

130. Furthermore, one can envision the creation of prescription birth control for men well before one can envision the surgical impregnation of a male. Surgical impregnation is arguably more sex-linked than prescription birth control.

131. 95 F.3d 674 (8th Cir. 1996).

132. *Id.* at 676.

133. *Id.* at 675.

134. *Id.* at 680.

135. *Id.* at 679.

136. See Sharona Hoffman, *AIDS Caps, Contraceptive Coverage, and the Law: An Analysis of the Federal Anti-Discrimination Statutes' Applicability to Health Insurance*, 23 CARDOZO L. REV. 1315, 1351 (examining the decision of the *Erickson* court, the article states "Furthermore, at least arguably, the denial of coverage affects men and women equally, since the woman and her partner must choose an alternate form of birth control or perhaps pay for the pill out of pocket.").

Employers should be able to make non-discriminatory exclusions from their health plans, and the exclusion of prescription birth control is such a non-discriminatory exclusion. While advocates of coverage argue that employers cover other preventive treatments, they fail to acknowledge that, unlike contraception that prevents pregnancy, those other preventive treatments prevent disease. As one opponent of mandated coverage stated, "Pregnancy is not a disease and interventions to stop the healthy functioning of healthy women's reproductive systems are not basic health care."¹³⁷ Title VII, as amended by the PDA, does not require the employer to provide preferential treatment to any individuals. Instead, "[t]itle VII requires employers to treat employees who are members of protected classes the same as other similarly situated employees, but it does not create substantive rights to preferential treatment."¹³⁸

The fact that prescription birth control is available only for women does not compel employers to provide coverage or risk violation of Title VII. The statute does not require preferential treatment. The purpose of birth control is related to reproductive capacity, not childbearing capacity. Thus, it is not a uniquely female concern, but instead an important issue for both males and females.

C. *A Dangerously Slippery Slope*

There are strong policy reasons for advocating the coverage of prescription birth control¹³⁹ by otherwise comprehensive health plans. These reasons will be explored in Part IV. However, these reasons do not justify a sweeping interpretation of Title VII to compel that coverage. The judiciary is not the appropriate mechanism for mandating coverage. If governmental intervention is deemed necessary and prudent to secure coverage for prescription contraceptives, it should initiate from the legislature.

State legislatures are actively considering the issue. More than sixty contraceptive coverage bills were introduced in 2002 in at least nineteen states.¹⁴⁰ And while state bills have repeatedly stalled, Congress has also considered legislation at the federal level that requires insurers to provide increased coverage of contraceptives.¹⁴¹ Clearly, legislators throughout the nation are aware of the gap in coverage and are intervening to mandate contraceptive coverage as they, and the voters who elect them, deem appropriate.

137. Rankin, *supra* note 9 (quoting Gail Quinn, the executive director of the U.S. Conference of Catholic Bishops).

138. Lang v. Star-Herald, 107 F.3d 1308, 1312 (8th Cir. 1997).

139. See *infra* Part IV.

140. Kaiser Daily Reproductive Health Report, *supra* note 70.

141. The Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC) was introduced in 1997, 1999, and 2001. The EPICC Act would prohibit "health insurance plans that provide prescription drugs, devices, and outpatient services from excluding coverage of FDA-approved prescription contraceptive drugs and devices . . . and related outpatient contraceptive services." Center for Reproductive Rights, *Contraceptive Coverage for All: EPICC Act Is Prescription for Women's Equality*, Sept. 2002, at http://www.crlp.org/pub_fac_epicc.html.

For the courts to stretch Title VII to effectuate what they may believe is sound policy will result in ramifications far beyond the popular and sympathetic issue of contraception.¹⁴² While it certainly may seem “right” for an employer to provide coverage for prescription contraception as part of an otherwise comprehensive health plan, for the courts to interpret Title VII in a manner to compel employers to provide the coverage has consequences beyond the issue of contraception.

Granted, employers arguing that the cost of covering contraception, when contraception alone is considered, will bankrupt them may not be overly convincing. One may reason that the cost of pregnancy would surely cost the employer far more than the cost of covering contraception.¹⁴³ When one considers only the additional cost associated with the inclusion of prescription contraceptives within an otherwise comprehensive plan, the cost defense indeed may be mildly persuasive at best. However, it seems unlikely in today’s litigious society that the lawsuits will stop with the issue of contraception after the theory is proven successful. Once the courts endorse such a sweeping interpretation of the statute, where will the courts be able to draw the line? Successful claims will open the flood gates for claims based on similar theories; exclusion of treatments for infertility,¹⁴⁴ impotence, and other risks that exclusively or disproportionately impact a particular gender may be deemed discriminatory in violation of Title VII. If this happens, the threat to the continued viability of many employers’ health plans is very real.¹⁴⁵

Men could make a like case against employers whose plans exclude prescriptions for erectile dysfunction.¹⁴⁶ The benefit plan of the defendant-

142. See generally Planned Parenthood Federation of America, *Cover My Pills; Fair Access to Contraception*, at <http://www.covermypills.com/facts/factsheet.asp> (last accessed Mar. 2, 2003) (stating that contraceptive coverage is popular among health care consumers).

143. Geraldine Sealey, *Who Pays for the Pill?*, at <http://abcnews.go.com/sections/us/DailyNews/birthcontrol020619.html> (quoting the executive director of Planned Parenthood “[Covering contraception] saves so much on the other end. Over the long term, contraception coverage seems to save money.”) (last accessed Mar. 4, 2003).

144. Some courts have already held that the exclusion of infertility treatments is not a violation of Title VII. *E.g.*, *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996). However, if the reasoning of the *Erickson* court is embraced it seems infertility treatments, such as surgical impregnation, may be difficult to distinguish from prescription birth control. The *Saks* court made a somewhat superficial distinction between infertility treatments performed only on women and prescription birth control. See *supra* notes 121-28 and accompanying text. The *Erickson* court also acknowledges the issue of infertility treatment coverage stating that “The Court need not determine whether the exclusion of infertility drugs discriminates against women and simply notes that at least two courts have found that such an exclusion is not discriminatory.” *Erickson*, 141 F. Supp. 2d at 1275 n.14.

145. See, Editorial, *We All Stand to Lose*, INDIANAPOLIS STAR, July 21, 2000, at 22A. See also Sealey, *supra* note 143.

146. See Neurath, *supra* note 95 (questioning whether insurers would violate the regulation if it failed to cover prescription drug benefits for use by men only). Note a California appeals court

employer in *Erickson* actually did exclude coverage for Viagra®, a popular drug used to treat erectile dysfunction. Although relegated by the court to a footnote, the *Erickson* court did acknowledge the possibility of male employees having a viable cause of action against Bartell for sex discrimination in violation of Title VII because of this exclusion. The court stated, “Assuming Bartell is correct and its prescription benefit plan does not cover Viagra[®] even when prescribed for the medical condition of impotency, such an exclusion may later be determined to violate male employees’ rights under Title VII. This issue is not before the Court.”¹⁴⁷

Similarly, the Wal-Mart health plan, which is currently the subject of judicial scrutiny,¹⁴⁸ also contains exclusions - in addition to the exclusion of prescription birth control - which may expose it to additional litigation. Wal-Mart’s plan also excludes coverage for drugs used as treatment for infertility and impotence.¹⁴⁹ A lawyer with the National Women’s Law Center, which is supporting the plaintiffs’ case against the giant retailer, argues that the plan at issue does provide coverage for blood pressure and cholesterol medication. “If you’re covering other prescription drugs and not covering contraceptive prescriptions, then you’re discriminating on the basis of gender.”¹⁵⁰ If courts accept this logic, how can Wal-Mart continue to exclude impotence drugs? Impotence, or erectile dysfunction, drugs are prescribed exclusively for males. Males are just as entitled to protection under Title VII’s prohibition of gender-based discrimination as females.¹⁵¹ Thus, under this approach, an employer that provides coverage for other prescription drugs, yet excludes drugs for the treatment of impotence coverage, is discriminating on the basis of gender. The exclusion of infertility treatments available only to females, or those infertility treatments available only for males, would also be in violation of federal law if courts look only at the gender of the person prescribed the drug or receiving the treatment. For the courts that adopt the reasoning of the EEOC and *Erickson*, it will be a challenge to identify well-reasoned distinctions to reach a different conclusion.

The possibilities are especially alarming because of the startling rates at which health care costs are already rising. The increased costs are the subject of

recently affirmed the decision that an HMO could not be forced to cover erectile dysfunction drugs. This ruling may be at odds with the reasoning employed by the *Erickson* court and the EEOC. Lisa Rapaport, *Ruling May Limit HMO Coverage of “Lifestyle Drugs,”* SAN DIEGO UNION-TRIB., June 28, 2002, at A4 (describing the ruling of a California Court of Appeals allowing Health Maintenance Organizations to limit coverage for sexual dysfunction drugs, including Viagra®).

147. *Erickson*, 141 F. Supp. 2d at 1275 n.12.

148. *Maudlin v. Wal-Mart Stores, Inc.*, 2002 U.S. Dist. LEXIS 21024 (N.D. Ga. Apr. 23, 2002).

149. Rankin, *supra* note 9.

150. *Id.*

151. *See Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 454 (7th Cir. 1999) (“[I]t is well settled law that the protections of Title VII are not limited to members of historically discriminated-against groups.”); *see also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

headlines across the country.¹⁵² Escalating costs already pose a very real threat to the viability of existing plans. In 2002, the number of small employers, defined as those employing three to 199 workers, offering health coverage dropped to sixty-one percent from sixty-seven percent in 2000.

Even goliath corporations such as General Electric (GE) are feeling the pressure. Fourteen thousand GE workers went on strike in mid-January 2003 in response to GE's decision to increase insurance co-payments.¹⁵³ Related to that issue, Jeffrey Immelt, chairman of General Electric, commented that increased health care costs for 2003 would eat away all of GE Consumer Products' profits if the company continued to bear the brunt of the increases.¹⁵⁴ Responding to questions about the future of GE's Consumer Products Division, located in Louisville, Immelt commented that GE would remain in Louisville provided that he believed it was profitable to do so.¹⁵⁵

The threat of finding health plans discriminatory based on the exclusion of drugs or treatments is far from confined to the issue of contraception. Employers' arguments that the increased cost associated with requiring additional coverage will compromise their ability to provide affordable coverage may not seem compelling¹⁵⁶ to those who artificially limit it to the issue of contraception. However, the true assessment of the argument's strength must be made based on the much broader ramifications that may result. The risk of employers significantly increasing the employees' cost or dropping employee health coverage completely seems much more tangible when one considers the whole picture. Health care costs are dramatically increasing as it is.¹⁵⁷ Employer arguments that mandating benefits increases the cost of providing coverage so much that it may force employers to drop coverage should not be readily dismissed.

D. If It Is to Be, Limit Relief

If the interpretation of Title VII as amended by the PDA adopted by the *Erickson* court and the EEOC gains widespread acceptance, it should be applied prospectively. The conclusion that the failure to cover prescription contraception violates the federal statute is a new and unforeseeable expansion of the law.

As recently as 1972, only six years before the 1978 passage of the PDA,

152. See *supra* note 20.

153. Rios, *supra* note 106.

154. Mark Yost, *GE Remains Committed to Louisville*, THE COURIER-JOURNAL, Jan. 28, 2003, at 1F.

155. *Id.*

156. *But see* Sealey, *supra* note 143 ("Forcing employers and insurers to cover birth control will only exacerbate high health insurance costs.").

157. See *supra* note 20; see also Darrin Schlegel, *Strategies Evolving to Tame Plan Costs*, HOUSTON CHRON., Jan. 26, 2003, at B1 (quoting a health management expert, "Employers simply can not afford to continue to absorb these rate hikes.").

some state statutes criminalized the distribution of contraceptive devices.¹⁵⁸ In 1972, the Supreme Court decided *Eisenstadt v Baird*. In that case, a Massachusetts statute prohibiting the distribution of contraceptive devices to unmarried persons was found to be unconstitutional.¹⁵⁹ Given this historical background, is it reasonable to assume that employers should have known that the PDA encompassed contraception? The leap from striking down statutes that prohibit the distribution of contraception to compelling employers to provide insurance coverage for it is a tremendous one. There is no reason for employers to believe their otherwise comprehensive health care plan is unlawful because it does not provide for contraceptive coverage. Because employers reasonably believed the exclusion was lawful, any relief granted based on a decision to the contrary should be limited to prospective relief.

The Pregnancy Discrimination Act itself had a postponed effective date as to existing fringe benefit and insurance programs. When enacted, the Pregnancy Discrimination Act of 1978 read in part, "The provisions of the amendment made by the first section of this Act shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act."¹⁶⁰ If the PDA is suddenly interpreted to encompass the coverage of prescription contraceptives twenty-five years after its passage, employers should be compelled only to provide prospective relief.

Such limitations on relief for Title VII violations are not without precedent. In *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*,¹⁶¹ the Supreme Court acknowledged that the defendant employer reasonably assumed its pension plan was lawful. Thus, the Court's decision that the plan violated Title VII was applied prospectively, with the benefits derived from contributions made prior to the decision being calculated as provided by the existing terms of the existing plans. The Court recognized that retroactive application would have a devastating result financially on employers.

The expense associated with the retroactive application of the reasoning adopted by the *Erickson* court may be similarly unjustifiably injurious to employers. According to the attorney representing the plaintiff suing her employer, CVS, because its prescription plan does not cover contraceptives, "CVS could be required to pay as much as \$38 million in back damages."¹⁶²

158. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The Massachusetts statute at issue in *Eisenstadt* made it a crime to sell, lend, or give away any contraceptive drug, medicine, instrument, or article, except that physicians were permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists were permitted to fill prescriptions for contraceptive drugs or articles for married persons.

159. *Id.*

160. 42 U.S.C. § 2000e(k) (1994).

161. 463 U.S. 1073 (1983) (holding that the employer's retirement plan that paid lower monthly retirement benefits to women on average live longer than men discriminated on the basis of sex in violation of Title VII).

162. Cynthia L. Cooper, *Women Fight for Insurance Equity in Court, at Work*, WOMEN'S

Similarly, the plaintiffs challenging Wal-Mart's health plan are seeking reimbursement for all employees who paid for their own prescription contraceptives during the past two years.¹⁶³ Such a result seems inappropriate where the employer reasonably believed its plan was lawful.¹⁶⁴

IV. PROVIDING THE COVERAGE MAKES SENSE

Whether Title VII is inapposite to an employer's exclusion of prescription contraception from its otherwise comprehensive plan or not, it makes sense for employers to provide the coverage as part of an otherwise comprehensive health plan. For many employers, the decision has already been made for them. Many states have already mandated coverage through legislation.¹⁶⁵ Twenty states currently require employer health care plans to cover prescription contraception on the same level as they cover other prescription drugs.¹⁶⁶ Even absent legislative or judicial mandates, providing coverage is a wise decision.

About half the pregnancies in this country are unintended.¹⁶⁷ For over three million women, or nearly sixty percent of all women who become pregnant each year in the United States, pregnancy is an unplanned occurrence in their lives.¹⁶⁸

Women faced with unplanned pregnancies are more likely to ignore the early signs of pregnancy and less likely to receive adequate prenatal care; their infants, therefore, run an increased risk of low birth weight and infant mortality. For some families, the emotional and economic stress of an unplanned child is overwhelming. Children who are unplanned are more likely to be abused, and children born unwanted face increased risks of poor health, poverty, and neglect.¹⁶⁹

Increasing the availability and affordability of contraceptives can help reduce this

ENEWS, Oct. 20, 2002, at <http://www.womensenews.org/article.cfm?aid=957>.

163. Julie Appleby, *Worker Sues Wal-Mart for Cost of Contraceptives*, USA TODAY, Oct. 17, 2001, at 2B.

164. Furthermore, calculating what that amount should be presents complications. Wal-Mart may have increased premiums, co-pays, or deductibles in order to share some of the additional cost with enrolled employees.

165. See *supra* note 22. For an examination of the constitutionality of these state mandates under the Federal Constitution's Free Exercise Clause see Inimai M. Chettiar, *Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?*, 69 U. CHI. L. REV. 1867 (2002).

166. Rita Rubin, *Battle Over Contraceptive Coverage Heats Up*, USA TODAY, May 8, 2002, at 8D.

167. Cheryl terHorst, *Law Group Takes Aim at Insurers' Snub of the Pill*, CHI. TRIB., Nov. 6, 2002, at C3.

168. Equity in Prescription Insurance and Contraceptive Coverage Act of 1997, H.R. 2174, 105th Cong. § 2 (1997).

169. NARAL Pro-Choice Foundation, *Contraception*, at <http://www.naral.org/issues/contraception.html>, (last accessed Mar. 4, 2003).

nation's high rate of unplanned pregnancies.¹⁷⁰ Although the number of women who are covered by private health insurance and become pregnant because their pills are not covered by their health insurance may not comprise a significant portion of those unintended pregnancies,¹⁷¹ providing the coverage is a step in the right direction. Some question the number of unintended pregnancies that can truly be linked to a private health insurer's failure to cover prescription contraception; more precisely, the number of women covered by a private health insurance plan who unintentionally become pregnant due to that plan's lack of coverage for prescription contraception must be insignificant. Nevertheless, providing the coverage is surely a step in the right direction.

The United States has alarmingly high infant mortality and low birth-weight rates, which are both associated with unintended conception.¹⁷² Women who experience unintended pregnancies are less likely than other women to receive adequate prenatal care, resulting in greater risks to their health and poorer birth outcomes.¹⁷³

The additional expense to employers would be negligible. Providing full contraceptive coverage in employment-based health care plans would cost employers only \$21.40 per employee per year. For employers with plans that currently provide no contraceptive coverage, the average cost of adding it—if employers contributed 80 percent of the cost—would be \$17.12 per year.¹⁷⁴

Finally, Americans support the idea of a nationwide contraceptive coverage mandate. A 1998 survey of one thousand U.S. adults revealed nearly eight out of ten support mandatory contraceptive coverage, even if it meant their monthly health insurance costs would rise.¹⁷⁵ Seventy-three percent of privately insured adults support full contraceptive coverage in their health insurance plans, even if it would increase their costs by five dollars per month, according to a

170. *Id.* See Irving Harris, *A Clue to Chicago's High Murder Rate You May Not Suspect*, CHI. TRIB., Apr. 16, 2002, at N19 (providing a brief exploration of the link between reduction in unplanned births and the reduction in crime rates). Others question whether the availability of birth control will reduce the number of unplanned pregnancies. See RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 138 (3d ed. 1986).

The ready availability of contraceptive methods may not significantly reduce the number of unwanted children that are born. Contraception reduces the expected costs of sex and hence increases the incidence of sex; the fraction of unwanted births is thus smaller but the number of sexual encounters, by which the fraction must be multiplied to yield the number of unwanted births, is larger.

Id.

171. See Ira Carnahan, *Who Pays for the Pill?; the Bogus Crusade Against Sex Discrimination in Health Insurance*, WKLY. STANDARD, Oct. 2, 2000, at 20.

172. Planned Parenthood Federation of America, *supra* note 142.

173. *Id.*

174. Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage for Contraception*, 1 THE GUTTMACHER REPORT (Aug. 1998), at <http://www.agi-usa.org/pubs/journals/gr010405.html> (last accessed Mar. 1, 2003).

175. NARAL Pro-Choice America Foundation, *supra* note 2.

nationwide poll conducted by the Kaiser Family Foundation.¹⁷⁶

CONCLUSION

Access to safe, effective contraception has undoubtedly changed the lives of both women and men. Yet unintended pregnancy remains a problem in this country. One barrier to consistent use of contraception is its cost. Many believe that insurers should bear that cost when coverage for other prescription drugs and devices is provided. Because prescription contraception is currently only available for females, some argue that the exclusion of prescription contraception from coverage is discriminatory in violation of Title VII, as amended by the Pregnancy Discrimination Act. However, the appropriate level of comparison to assess parity between the coverage afforded males and females should be contraception, not prescriptions in general. Because those insurers do not provide coverage for prescription male contraception, the exclusion is not discriminatory. Through the passage of Title VII and the PDA, Congress sought to eradicate discrimination on the basis of sex and inherent, sex-based characteristics. The fact that prescription contraception is currently available only for females does not transform it or its coverage by private insurance plans into such an inherent, sex-based characteristic. Furthermore, contraception is used to prevent conception, which is traced to the fertility of both a man and a woman. Thus, the exclusion of prescription contraception, which is but one category of effective contraception, burdens both males and female. There are strong policy reasons for employers to provide the coverage within their otherwise comprehensive health plans. However, if the gap in coverage persists and popular sentiment demands coverage, it is the role of the legislature to mandate the coverage. Legislative action to compel coverage can be limited to the specific issue of contraception. However, courts interpreting Title VII to require coverage may open the flood gates to charges of discrimination based on the exclusion of other categories of drugs. This would present a real threat to the continued viability of employer health plans, which are already facing dramatic cost increases.

176. Planned Parenthood Federation of America, *supra* note 142.