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Recent Decisions: Civil Rights — Title VII — Sex Discrimination — Exclusion of Pregnancy-Related Disabilities from Benefit Eligibility under Employer Disability Plan Does Not Constitute Sex Discrimination Violative of Title VII of 1964 Civil Rights Act. General Electric Co. v. Gilbert, ___ U.S. ___, 97 S. Ct. 401 (1976)

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CIVIL RIGHTS — TITLE VII — SEX DISCRIMINATION — EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM BENEFIT ELIGIBILITY UNDER EMPLOYER DISABILITY PLAN DOES NOT CONSTITUTE SEX DISCRIMINATION VIOLATIVE OF TITLE VII OF 1964 CIVIL RIGHTS ACT. *GENERAL ELECTRIC CO. V. GILBERT*, ___ U.S. ___, 97 S. Ct. 401 (1976).

I. INTRODUCTION

A substantial portion of America's private industrial concerns protect their full-time employees against the risk of temporary work absence from nonoccupational disabilities through some form of comprehensive income maintenance plan paying weekly benefits.[1] Approximately sixty percent of these plans single out a particular class of disabilities — those pregnancy-related — for explicit exclusion from coverage.[2] Pregnancy exclusions have catalyzed recent litigation on the issue of whether a private employer's lone exclusion of pregnancy-related disabilities from an otherwise comprehensive nonoccupational disability income maintenance plan is sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[3]

Title VII makes unlawful discrimination by an employer with respect to the hiring, discharge, compensation, terms, conditions, or privileges of employment on the basis of sex.[4] The Equal Employment Opportunity Commission (hereinafter EEOC), charged by Congress with interpreting Title VII,[5] issued a guideline in 1972 requiring employers to treat pregnancy-related disabilities "on the same terms and conditions" as all other temporary disabilities.[6] In 1975, five United States Courts of Appeals held that Title VII was

1. Forty percent of the companies in the United States provide temporary disability income maintenance coverage for their workers. *Arguments Before the Court*, General Electric Co. v. Gilbert, 45 U.S.L.W. 3296 (U.S. Oct. 19, 1976) (argument of G.E.'s attorney).
2. *Id.*
3. 42 U.S.C. § 2000e (1976) (orginally enacted as Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253, *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103).
4. Under Title VII, it is an unlawful employment practice for an employer:
   (1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, *sex*, or national origin.
   42 U.S.C. § 2000e-2(a) (emphasis added).
5. *Id.* § 2000e-12(a).
6. 29 C.F.R. § 1604.10(b) (1975).

violated by the disparate treatment of pregnancy-related disabilities in disability income maintenance plans.[7]

On December 7, 1976, however, the United States Supreme Court led a successful and surprise attack on these decisions. In *General Electric Co. v. Gilbert,*[8] the Supreme Court, by a six-to-three margin,[9] in effect overruled these five courts of appeals' decisions. The *Gilbert* majority held that disparate treatment of pregnancy is not in itself discrimination on the basis of sex under Title VII. For many female workers, December 7, 1976 will live on in infamy.

II. THE *GILBERT* SETTING

The General Electric Company (hereinafter G.E.) is a large industrial corporation operating production plants throughout the United States. As a fringe benefit for its employees, G.E. maintains a comprehensive nonoccupational sickness and accident benefit plan.[10] Under this plan, an employee who incurs a nonjob-related disability which renders him or her unable to work may be eligible for weekly income maintenance payments.[11] If the claim is approved, the employee begins to receive payments on the eighth day of work absence, unless he or she is hospitalized before that time, in which case payments commence immediately. The amount of a weekly payment is equivalent to sixty percent of the worker's regular weekly wage, with a maximum disability payment of $150 per week. If necessary, payments are made through twenty-six weeks of absence.[12]

Coverage is comprehensive; unless a disability is expressly excluded, it is covered.[13] The G.E. plan involves three distinct

7. Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), *cert. granted,* 97 S. Ct. 806 (1977); Hutchinson v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975), *cert. denied,* 97 S. Ct. 731 (1977); General Electric Co. v. Gilbert, 519 F.2d 661 (4th Cir. 1975), *rev'd,* 97 S. Ct. 401 (1976), *reh. denied,* 97 S. Ct. 731 (1977); Communications Workers of America v. A.T.&T. Co., 513 F.2d 1024 (2d Cir. 1975), *vacated,* 97 S. Ct. 724 (1977); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on juris. grounds,* 424 U.S. 737 (1976).

8. 97 S. Ct. 401 (1976).

9. In the majority were the Chief Justice and Justices Rehnquist (author of the opinion), Stewart, White, Blackmun and Powell. Justice Brennan authored a dissent in which Justice Marshall joined. Justice Stevens wrote a separate dissent.

10. This information was brought out originally in the opinion of the district court, Gilbert v. General Electric Co., 375 F. Supp. 367, 370–71 (E.D. Va. 1974). In the sense that G.E. was primarily responsible for benefit payments to its employees, the company was a self-insurer. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

> [A] comprehensive insurance policy is one covering all exposures, as in the case of a comprehensive automobile liability policy; all perils, as in the case of the comprehensive automobile material damage policy; or all hazards, as in the case of the comprehensive general liability policy — each subject to exclusions. Thus, in a comprehensive policy, "If it ain't excluded, it's covered."
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> R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 168–69 (5th ed. 1972).

categories of disability.[14] The unisex category includes those disabilities mutually incurrable by both sexes.[15] Several of these unisex disabilities are incurrable through the voluntary or reckless action of an individual — attempted suicide, alcoholism, drug addiction, and elective cosmetic surgery, to name only a few.[16] The male-dominated category encompasses those disabilities saddled exclusively or predominantly on men, such as hair transplants, prostatectomies, and vasectomies.[17] The female-dominated category comprehends disabilities exclusively or predominantly inflicting women, such as breast cancer, hysterectomies, and salpingectomies.[18] The most notable female disability of all — pregnancy — is, however, expressly excluded from coverage. It is the only exclusion, and a broad one at that. Any disability, whether pregnancy-related or not, which is incurred by a woman while on a maternity leave fails to trigger benefit eligibility.[19]

Two of the *Gilbert* plaintiffs suffered particularly as a result of the refusal of their employer to pay disability benefits for pregnancy. Doris Wiley had an unplanned pregnancy and eventually took a maternity leave. She was legally separated from her husband and had a two-year old daughter to support. Denied disability benefits from G.E., she applied for welfare, but had to wait the usually inconvenient period before commencement of payments. In the meantime, with no other means of support, she ran out of the money necessary to pay her bills. Her utilities were shut off and she and her baby subsisted for the two months of her disability without heat, electric light, cooking, and refrigeration.[20] Emma Furch was hospitalized two days after beginning her maternity leave. Seven days later, she delivered a stillborn baby. Within a week, while recuperating at home, she developed a nonpregnancy-related blood

14. This categorization was suggested by Justice Brennan in his *Gilbert* dissent, 97 S. Ct. at 417–18. The majority seems to implicitly utilize the same tripartite division, *id.* at 408: "But we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities *and yet confined to the members of one . . . sex.*" (emphasis added).
15. *Id.* at 417. A unisex disability incurred by a woman during a maternity leave is not covered, even when unrelated to pregnancy. *See* text accompanying note 21 *infra*.
16. The district court indicated that G.E. had paid disability benefits for employee work absence from sclerosis of the liver, lung cancer, emphysema, injury sustained in auto accident, injury incurred in sport activity, injury incurred in a fight, disability following a program for the cure of alcoholism and drug addiction, injury incurred in an attempted suicide, disability from elective plastic surgery and disability following a program of psychiatric treatment. G.E. pays benefits for these disabilities regardless of the degree of care taken by the employee to avoid them. 375 F. Supp. at 374.
17. 97 S. Ct. at 417 (Brennan, J., dissenting).
18. *Id.* at 417–18 (Brennan, J., dissenting). A salpingectomy involves the removal of one or both of a woman's fallopian tubes, so that she will be unable to become pregnant. STEDMAN'S MEDICAL DICTIONARY 1249 (23d ed. 1976).
19. *See* text accompanying notes 20–21 *infra*.
20. 375 F. Supp. at 381 n.12; Post-trial Brief for Plaintiffs at 13–14.

clot in one of her lungs, requiring hospitalization. Because her benefit eligibility had been severed by the maternity leave, no weekly benefits accrued to her for work absence from the blood clot and, of course, none from the miscarriage.[21]

The plaintiffs failed to obtain any change of policy from G.E.,[22] exhausted their administrative remedies,[23] and filed a class action suit against G.E., charging the corporation with an illegal employment practice in violation of Title VII as interpreted by the 1972 EEOC guideline explicitly requiring employers to treat pregnancy-related disabilities like all other temporary disabilities.[24] The United States District Court for the Eastern District of Virginia found that G.E.'s pregnancy exclusion was discriminatory in a "deliberate and intentional"[25] manner and ordered that the plaintiffs receive denied benefits.[26] The Fourth Circuit Court of Appeals affirmed in a two-to-one decision.[27] The Supreme Court of the United States reversed by a six-to-three margin.[28]

A complete analytical understanding of *Gilbert* can best be gained through an item by item examination of the considerations faced and dealt with by the Court in its decision. The G.E. pregnancy exclusion could have been proven illegally discriminatory in three ways — by a showing of (1) per se (facial) discrimination, (2) discriminatory motive, or (3) discriminatory effect.[29] The majority found that discrimination on the basis of sex was not proven under any of these standards. In separate dissenting opinions, Justices Brennan[30] and Stevens argued that sex discrimination was proven by the plaintiffs under all three standards. The Court also had to decide whether or not to defer to the 1972 EEOC pregnancy

21. 97 S. Ct. at 405 n.4, 416 n.4 (Brennan, J., dissenting).
22. The plaintiffs' labor union, the International Union of Electrical, Radio and Machine Workers, AFL-CIO and CLC, sought the deletion of the pregnancy exclusion five times in previous national negotiations with G.E. — in 1955, 1963, 1966, 1969, and 1973. Each time, G.E. refused to delete the exclusion. 375 F. Supp. at 371; *Arguments Before the Court,* General Electric Co. v. Gilbert, 44 U.S.L.W. 3421, 3423 (U.S. Jan. 27, 1976) (argument of Ruth Weyand, for plaintiffs). As was pointed out by the district court, however, " 'The rights assured by Title VII are not rights which can be bargained away — either by a union, by an employer, or by both acting in concert.' " 375 F. Supp. at 382 (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971)). Thus, the fact that the pregnancy exclusion was part of a collectively bargained agreement was not an issue in *Gilbert.*
23. 97 S. Ct. at 404–5.
24. 29 C.F.R. § 1604.10(b) (1975).
25. 375 F. Supp. at 386.
26. *Id.*
27. 519 F.2d 661 (4th Cir. 1975).
28. 97 S. Ct. 401 (1976), *reh. denied,* 97 S. Ct. 731 (1977).
29. *See* Washington v. Davis, 426 U.S. 229, 246–48 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *See also* cases cited by Justice Brennan, 97 S. Ct. at 417 n.7.
30. Justice Marshall joined Justice Brennan's dissent.

guideline,[31] for if it decided to defer, the G.E. pregnancy exclusion would be a "prima facie violation of Title VII."[32] If the Court decided not to defer, an independent examination would be necessary. Since the majority chose not to defer,[33] and made an independent examination of the G.E. plan, this article will concentrate solely upon the *Gilbert* Court's approach to the three modes of evidencing sex discrimination under Title VII.

III. PER SE DISCRIMINATION

On its face, was the G.E. plan's pregnancy exclusion gender-neutral or inextricably sex-based? This was the issue facing the Court at the first stage of its' analysis. The majority in *Gilbert* contended that it was not the sex of female G.E. employees, but rather the physical condition of pregnancy, which was the basis of the pregnancy exclusion.[34] This conclusion in *Gilbert* was presaged

31. "Disabilities caused by or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated . . . under any temporary disability insurance . . . plan . . . on the same terms and conditions as . . . other temporary disabilities." 29 C.F.R. § 1604.10(b) (1975).

32. *Id.* § 1604.10(a).

33. 97 S. Ct. at 411. The Court did not have to defer to the EEOC pregnancy guideline, since administrative guidelines, unlike congressionally authorized regulations, do not possess the independent force of law. *Id.* Normally, however, an EEOC guideline is entitled to considerable persuasive power — " 'great deference.' " *Id.* at 410 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971)).

Three reasons for its decision not to defer to the pregnancy guideline were provided by the *Gilbert* majority. The EEOC pregnancy guideline expressed a position contrary to past EEOC General Counsel Opinion Letters, *see, e.g.,* General Counsel Opinion Letter, CCH EPG ¶ 17,304.43 (1966), and an EEOC case decision expressly approving the letters, EEOC Decision No. 70-360, CCH EEOC DECISIONS ¶ 6084 (Dec. 16, 1969). *Contra,* EEOC Decision No. 71–1474, CCH EEOC DECISIONS ¶ 6221 (Mar. 19, 1971). Moreover, the 1972 guideline was promulgated eight years after Title VII's enactment. 97 S. Ct. at 411. In the majority's opinion, this lack of both consistency and contemporaneity weakened the guideline's persuasiveness as the correct interpretation of the legislative intent behind Title VII. *Id. See generally* Leis, *Current Trends in Pregnancy Benefits — 1972 EEOC Guidelines Interpreted,* 24 DEPAUL L. REV. 127 (1974) (also discussing other faults in the promulgation of the guideline).

Aiming at the heart of the guideline itself, the majority summarized a colloquy between Senators Randolph and Humphrey during Senate debate on the 1964 Civil Rights Act, in which the latter acknowledged, in his role as floor leader, that it was intended in Title VII that "differences in treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation." 110 CONG. REC. 13663–664 (1964), *quoted in* 97 S. Ct. at 412. Senator Humphrey's statement, in conjunction with an interpretive guideline by the Wage and Hour Administrator pursuant to the Equal Pay Act and the Bennett Amendment of Title VII directly contradicting the EEOC guideline, further weakened the EEOC guideline's persuasiveness for the majority. *Id. But see* 97 S. Ct. at 418–19 (Brennan, J., dissenting) and cases cited at note 7 *supra. See generally* Comment, *Waiting for the Other Shoe* — Wetzel *and* Gilbert *in the Supreme Court,* 25 EMORY L.J. 125, 127–43 (1976).

34. 97 S. Ct. at 408.

in the Court's 1974 decision in *Geduldig v. Aiello*,[35] in which a six-to-three majority[36] held that the exclusion of pregnancy-related disabilities from an otherwise comprehensive California social welfare program providing nonoccupational income maintenance benefits was not in violation of the equal protection clause of the fourteenth amendment. A footnote discussion in *Geduldig* was found directly applicable by the *Gilbert* majority:[37]

> The [pregnancy exclusion] does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every . . . classification concerning pregnancy is a sex based classification . . . . [P]regnancy is an objectively identifiable physical condition with unique characteristics. . . .
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> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups — pregnant women and nonpregnant persons.* While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[38]

Applying this rationale from *Geduldig,* the *Gilbert* majority concluded that "an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all."[39]

The majority in *Gilbert,* relying on the *Geduldig* reasoning, bifurcated the class of all women into pregnant women and nonpregnant women.[40] The G.E. plan did not discriminate against

35. 417 U.S. 484 (1974). *Geduldig* was decided after the district court rendered its opinion in *Gilbert.* The *Gilbert* litigation, therefore, first dealt with *Geduldig* on appeal to the Fourth Circuit Court of Appeals, which found *Geduldig* inapplicable and held in favor of the female employees, thereby affirming the district court's opinion. 519 F.2d 661, 666–67 (4th Cir. 1975).

36. In the majority were the Chief Justice, Justice Stewart (author of the opinion), and Justices White, Blackmun, Powell, and Rehnquist (author of the *Gilbert* majority opinion). The dissent was written by Justice Brennan, with Justices Douglas and Marshall concurring.

37. 97 S. Ct. at 407.

38. Geduldig v. Aiello, 417 U.S. 484, 496–97 n.20 (1974) (emphasis added), *quoted in* 97 S. Ct. at 407.

39. *Id.* at 408. In other words, the pregnancy exclusion was not discriminatory per se.

40. *Id.* at 407. Although *Gilbert* and *Geduldig* explicitly divide potential recipients into pregnant women and nonpregnant persons, the class of nonpregnant persons should be divided further into nonpregnant women and nonpregnant men. Men cannot become pregnant and thus are not included in our analysis of the per se status of the pregnancy exclusion as it relates to those who can become pregnant — women. It does not do violence to the majority's nonpregnant persons category to divide it, therefore, into nonpregnant women *and* men.

the class of all female G.E. employees, but rather, discriminated against the class of pregnant, female G.E. employees. Title VII prohibits discrimination on the basis of sex.[41] Since the ground of G.E.'s discrimination was not womanhood, but pregnancy, the plan did not violate Title VII. For the *Gilbert* majority, then, discrimination against pregnancy is not discrimination on the basis of sex.

The correctness of this approach depends on the validity of the majority's bifurcation of pregnant and nonpregnant women in the context of G.E.'s insurance plan. It was at this point that Justice Stevens, in his dissent, launched his attack upon the majority's reasoning. The G.E. plan, like all insurance plans,[42] protects insureds against the risk of loss from the occurrence of specified events. The word "risk" denotes uncertainty concerning loss in the future.[43] As Justice Stevens accurately explained, "Insurance programs, company policies, and employment contracts all deal with future *risks* rather than historic facts. The classification is between persons who face a risk of pregnancy and those who do not."[44] Thus, the G.E. plan insured employees against temporary loss of income from disabilities incurrable in the future, not against disabilities already incurred. Once a woman becomes pregnant, any discussion of risk becomes superfluous, for the risk no longer exists, the disability does. Because virtually all female G.E. employees were susceptible to the risk of pregnancy, the majority's bifurcation of pregnant and nonpregnant women was invalid. In reality, discrimination against pregnancy is equivalent to discrimination against the risk of pregnancy. As Justice Stevens aptly pointed out, "[I]t is the capacity to become pregnant which primarily differentiates the female from the male."[45] Therefore, discrimination against the risk of pregnancy is equivalent to discrimination against persons on the basis of womanhood — on the basis of sex.

The *Gilbert* majority nevertheless depended upon that chimerical bifurcation. "Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; 'If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind.' "[46] In the future, any income

41. 42 U.S.C. § 2000e–2(a).
42. R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 18 (5th ed. 1972).
43. *Id.* at 19. Mehr and Cammack, in defining "loss," caution that "[l]oss is an *unintentional* decline in, or disappearance of, value arising from a contingency. The adjective 'unintentional' is an essential part of the definition." *Id.* at 23 (emphasis added). The majority in *Gilbert* claimed that one of the legitimate grounds for G.E.'s decision to exclude pregnancy from coverage was the voluntariness of the incurrence of pregnancy in most cases. 97 S. Ct. at 408. Justice Brennan retorted in his dissent that the unintentionality of the incurrance of a disability was not essential to G.E.'s pattern of coverage. *Id.* at 415. *See* text accompanying notes 74–80 *infra*.
44. 97 S. Ct. at 421 n.5 (Stevens, J., dissenting).
45. *Id.* at 421 (Stevens, J., dissenting).
46. Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146, 1157 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975), *vacated on juris. grounds*, 424 U.S. 737 (1976).

maintenance plan exclusion of a physical disability unique to a protected class of persons, whether it be pregnancy or, as Justice Brennan suggests in his dissent, sickle-cell anemia,[47] will not be considered facially discriminatory under Title VII if the *Gilbert* reasoning is followed. Substituting "sickle-cell anemia" for "pregnancy," "blacks" for "women," and "race" for "sex" in the *Geduldig* language quoted above,[48] the majority's argument reveals itself as pure sophistry:

> The sickle-cell anemia exclusion does not exclude anyone from benefit eligibility because of race but merely removes one physical condition — sickle-cell anemia — from the list of compensable disabilities. While it is true that only blacks can get sickle-cell anemia, it does not follow that every classification concerning the disability is a racially based classification. Sickle-cell anemia is an objectively identifiable physical condition with unique characteristics. The lack of identity between the excluded disability and race becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups — sickle-cell anemic blacks and nonsickle-cell anemic persons.* While the first group is exclusively black, the second includes members of all races. The fiscal and actuarial benefits of the plan thus accrue to members of all races.

In other words, under *Gilbert* there is no discrimination on the basis of sex in a pregnancy exclusion and, likewise, there would be no discrimination on the basis of race in a sickle-cell anemia exclusion. In both cases, the discrimination is directed against a physical condition only, not against the class of individuals exclusively subject to that physical condition. In effect, the Supreme Court has

47. 97 S. Ct. at 416 n.5. Sickle-cell anemia is a genetic disease to which, almost exclusively, those of black African descent are susceptible. Although seven to nine percent of the American black population carries the sickle-cell trait, about 0.3 percent suffer from the disease. The disease has been found in rare instances in persons of Mediterranean and Oriental descent. The disease causes normal red blood cells, which are round in shape, to become crescent-shaped or sickle-shaped, indicating the breakdown of blood. The blood hemoglobin, which carries oxygen to the body, becomes abnormal, giving rise to symptoms, such as degenerative bone disease, leg ulcers, arthritis, acute attacks of pain, yellowing or greening of the eyes, and extreme tiredness. Note, *Constitutional and Practical Considerations in Mandatory Sickle Cell Anemia Testing*, 7 U.C.D. L. REV. 509, 519 (1974); STEDMAN'S MEDICAL DICTIONARY 70 (23d ed. 1976). The disease can, at different times and with varying degrees of severity, render an inflicted individual unable to work at most types of employment requiring physical movement. *See* Smith v. Olin Chemical Corp., 535 F.2d 862 (5th Cir. 1976) (black manual laborer fired as a result of his failure to pass Olin's physical examination, which had uncovered degenerative bone disease in Smith's spine, the cause of which Smith and his personal physician claimed was sickle-cell anemia; race discrimination claimed).

48. *See* text accompanying note 38 *supra*.

defined discrimination in such a way as to render logically impossible a finding of sex — or race — discrimination on the face of an income maintenance plan excluding coverage of a disability unique to one sex — or one race.

It is certainly hard to believe that the Court would be willing to apply the *Gilbert* rationale to a sickle-cell anemia exclusion. If it failed to do so, then it would plunge into inconsistency. Three alternatives would be open to the Court: (1) apply the *Gilbert* definition of per se coverage discrimination to a sickle-cell anemia exclusion; (2) reverse *Gilbert;* or (3) apply the *Gilbert* per se analysis, but find discriminatory motive or discriminatory effect.

Considering the definition of per se discrimination in disability benefit programs from *Geduldig v. Aiello,*[49] one may wonder why *Gilbert* is significant. There were three major differences between the factual situations facing the Court in *Gilbert* and in *Geduldig.* While *Gilbert* dealt with a private employer's plan, *Geduldig* concerned a California social welfare program providing the same kind of benefits.[50] Moreover, the insurance plan in *Gilbert* was funded by G.E., but the California program in *Geduldig* was funded through the contributions of public and private employees on a percentage of salary basis.[51] Finally, there was a significant difference between the extent of the pregnancy exclusion in the programs. In *Geduldig,* only normal pregnancies were subject to the exclusion. Disabilities from complications arising from pregnancy and disabilities incurred during a maternity leave which were not pregnancy-related were covered by the California plan.[52] In *Gilbert,* however, any disability which arose during a maternity leave, whether or not pregnancy-related, was excluded.[53] Whereas the *Geduldig* exclusion was a true pregnancy exclusion, the *Gilbert* exclusion was more akin to a maternity leave exclusion.

The source of the law applicable to both cases was different. *Geduldig* was decided entirely on the basis of the equal protection clause of the fourteenth amendment.[54] *Gilbert* was ruled by Title VII. A different standard of judicial scrutiny applies to actions brought

49. *Id.*
50. Geduldig v. Aiello, 417 U.S. 484, 487–88 (1974).
51. Under the California program, each employee contributed one percent of his or her salary up to a maximum of $85 per year. *Id.*
52. *Id.* at 491. The California statute was interpreted by the California Court of Appeals as excluding only normal pregnancies. Rentzer v. Unemployment Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973). Eighty percent of all pregnancies are normal. *See* text accompanying note 70 *infra.* There were three specific exclusions other than normal pregnancy — alcoholism, drug addiction, and sexual psychopathy. Geduldig v. Aiello, 417 U.S. 484, 488 (1974).
53. *See* text accompanying notes 20–21 *supra.*
54. U.S. CONST. amend. XIV, § 1.

under each source of law.[55] In *Gilbert*, had discriminatory effect been shown, G.E.'s only available, relevant defense would have been one

55. The Supreme Court has at its disposal three separate standards for equal protection analysis — minimal scrutiny, intermediate scrutiny, and strict scrutiny. These tests are applied only after a classification is found to be discriminatory. The three tests require of the discriminator three different degrees of justification for the discriminatory classification. If the discriminator can justify its classification under the applicable standard, the discrimination is not violative of the Constitution. The standard that applies depends on that which is discriminated against.

The minimal scrutiny test, which is generally applied to state economic, business, and social welfare laws, will uphold a state classification which bears a mere rational relationship to a legitimate state interest and is not motivated invidiously. It is not necessary, under this lower-tier rational basis test, for a state to "choose between attacking every aspect of a problem or not attacking the problem at all." Dandridge v. Williams, 397 U.S. 471, 486–87 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); *cf.* Geduldig v. Aiello, 417 U.S. 484, 494–96 (1974).

The intermediate scrutiny test has been applied by the Supreme Court to most sex discrimination cases. This middle-tier test requires that the sex-based classification bear a fair and substantial relationship to important governmental objectives. Craig v. Boren, 97 S. Ct. 451 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (fifth amendment); Schlesinger v. Ballard, 419 U.S. 498 (1975) (fifth amendment); Kahn v. Shevin, 416 U.S. 351 (1974); Stanley v. Illinois, 405 U.S. 645 (1972); Reed v. Reed, 404 U.S. 71 (1971). Justice Rehnquist, in his dissenting opinion in *Craig v. Boren*, 97 S. Ct. at 467, argued that minimal scrutiny should be applied to cases of discrimination against *men* because they have not been subjected historically to purposeful unequal treatment to their detriment.

Finally, a classification analyzed under the strict scrutiny test will be upheld only where the state can demonstrate a compelling state interest. This test applies to suspect classifications, such as race, alienage, and national origin. A suspect class has been defined by the Supreme Court as one whose members have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the . . . political process." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). *See generally* Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 978–83 (1975).

The same analysis is applied to cases under the fourteenth amendment due process clause when a fundamental right is involved. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion decision during first trimester of pregnancy within fundamental right to privacy of fourteenth amendment; state's interest in maternal health and fetal life becomes compelling at, respectively, the second and the third trimesters). This analysis is also used when a fundamental right is treated in a discriminatory fashion. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (equal protection of fundamental right to interstate travel violated). Finally, the Court has recognized that the fifth amendment due process clause has inherent in it an equal protection guarantee, which can be applied to actions by the federal government. *E.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

Justice Marshall has, in several cases, expressed dissatisfaction "with the Court's rigidified approach to equal protection analysis." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting). He argues, instead, for the use of a sliding scale approach "with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected." *Id.* at 124–25. *See* Vlandis v. Kline, 412 U.S. 441 (1973); Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972); Dandridge v. Williams, 397 U.S. 471, 508–9, 519–21 (1970) (Marshall, J., dissenting).

The standard of scrutiny applicable to a Title VII case, once discriminatory effect has been shown, is, in essence, that of strict scrutiny. The employer's only

of "business necessity,"[56] which would have required G.E. to demonstrate that the pregnancy exclusion was necessary to the safe and efficient operation of the business.[57] In contrast, a mere rationally supportable, legitimate interest in maintaining the California program's self-supportiveness, the same employee contribution rate, and identical coverage was sufficient to sustain the pregnancy exclusion in *Geduldig*.[58]

These distinctions between *Gilbert*-type Title VII cases and the *Geduldig* case were significant enough to lead several lower federal courts to consider *Geduldig* inapposite in Title VII cases.[59] Their view limited *Geduldig*'s reach to state social welfare programs scrutinized under the equal protection clause.[60] To the Supreme Court, however, these differences did not affect the authority of *Geduldig*. It was the opinion of the *Gilbert* majority that the *Geduldig* concept of per se discrimination was equally applicable in

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defenses are that the discriminatory classification is a bona fide occupational qualification (B.F.O.Q.), 42 U.S.C. § 2000e–2(e) (not applicable to race), or one of business necessity, *id.* § 2000–5(g); *see* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971). Both defenses are usually difficult to prove, as is, in equal protection or due process cases, a compelling state interest. Sex, however, is not yet a suspect class under equal protection analysis. In *Frontiero v. Richardson,* 411 U.S. 677 (1973), four members of the Court — the most ever — held sex to be a suspect class. Sex is a suspect class in California. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

56. 42 U.S.C. § 2000e–5(g). The B.F.O.Q. exception would not have been relevant in *Gilbert.* The B.F.O.Q. defense requires a showing that a gender-based classification has a manifest relationship to the primary function of the job in question, a necessity that a particular sex perform the particular job, such as when a female is needed for a female role in a movie. *See generally* Oldham, *Questions of Exclusion and Exception Under Title VII — "Sex-Plus" and the BFOQ,* 23 HAST. L.J. 55, 90 (1971).

57. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact.

Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971) (race discrimination). The business necessity defense is applicable only when the discrimination arises from a policy facially neutral and nondiscriminatory in its intent. *Id.* at 797. "While considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative." *Id.* at 799 n.8.

58. Geduldig v. Aiello, 417 U.S. 484, 496 (1974).

59. *See* cases cited in note 60 *infra.* Although the 1972 amendments to Title VII, *see* note 3 *supra,* extended the Act's coverage to the states, the *Geduldig* majority did not discuss the Act, nor the 1972 EEOC pregnancy guideline. Justice Brennan's dissent in that case discussed both and applied them. Geduldig v. Aiello, 417 U.S. 484, 501–2, 504 n.9 (1974).

60. Satty v. Nashville Gas Co., 522 F.2d 850, 852–54 (6th Cir. 1975), *cert. granted,* 97 S. Ct. 806 (1977); Hutchinson v. Lake Oswego School Dist., 519 F.2d 961, 963–64 (9th Cir. 1975), *cert. denied,* 97 S. Ct. 731 (1977); General Electric Co. v. Gilbert, 519 F.2d 661, 666–67 (4th Cir. 1975), *rev'd,* 97 S. Ct. 401 (1976), *reh. denied,* 97 S.

Title VII cases, notwithstanding that the conduct of a private employer rather than a state was involved.[61]

IV. DISCRIMINATORY MOTIVE

The *Gilbert* majority recognized that its finding of no per se discrimination was only the first step in its analysis of G.E.'s pregnancy exclusion under Title VII standards. If the plaintiffs proved that G.E.'s exclusion of pregnancy was a mere pretext designed to effect an invidious discrimination against women, then a violation of Title VII's ban on discrimination on the basis of sex would be established.[62] The majority chose not to infer that lurking behind G.E.'s pregnancy exclusion was an intent to discriminate against women as such. For G.E., there was "no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities *and yet confined to the members of one . . . sex.*"[63] The majority, claiming to rely upon the findings of the district court,[64] explained that pregnancy was distinguishable from all covered male-female-dominated disabilities in two respects — "it is not a 'disease' at all,"[65] and it "is often a voluntarily undertaken and desired condition."[66] According to the majority's view, the nondisease-voluntariness criteria did not require the exclusion from coverage of any other male-female-dominated disability. The majority inferred that G.E. was guided by these twin criteria, that the company had good reason to believe these criteria valid, and that, therefore, G.E. was motivated only by neutral actuarial considerations in choosing to exclude pregnancy-related disabilities from income maintenance coverage.[67]

Justice Brennan's dissent convincingly refuted the majority's wooden reasoning by reviewing more closely and accurately the findings of the district court.[68] Actually, the district court found that "[p]regnancy, *per se,* is not a disease,"[69] but that labor and delivery

Ct. 731 (1977); Tyler v. Vickery, 517 F.2d 1089, 1097–99 (5th Cir. 1975), *cert. denied,* 426 U.S. 940 (1976); Communications Workers of America v. A.T.&T. Co., 513 F.2d 1024, 1028–31 (2d Cir. 1975), *vacated,* 97 S. Ct. 724 (1977); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199, 203 (3d Cir. 1975), *vacated on juris. grounds,* 424 U.S. 737 (1976).

61. 97 S. Ct. at 408.
62. *Id.* at 407–8 (following Geduldig v. Aiello, 417 U.S. 484, 496–97 n.20 (1974)).
63. *Id.* at 408 (emphasis added).
64. 375 F. Supp. at 376–77.
65. 97 S. Ct. at 408.
66. *Id.*
67. *Id.*
68. *Id.* at 416.
69. 375 F. Supp. at 375–77. Four commonly accepted definitions of disease presented to the district court were:

> (1) . . . a statistical deviation from the average. The difficulty with this definition lies in defining what is "average" or "normal."
> (2) . . . in terms of difficulty in ability to function. The weakness in this

are disabling in a normal, uncomplicated pregnancy.[70] In addition, twenty percent of all pregnancies are complicated either by miscarriage,[71] pregnancy-related diseases[72] or nonpregnancy-related diseases,[73] each of which can be disabling.[74]

The district court found, with regard to G.E.'s contention that pregnancy, unlike other disabilities, was voluntary or planned, that

> [a]t best, . . . with proper care, forbearance, and precaution, pregnancy can to a large extent be avoided. But "voluntariness" in this sense is meaningless. This standard is not applied to informal athletic injuries, most of which could also be avoided by appropriate preparation, forbearance, and circumspect precaution. The most that can be said with certainty is that some pregnancies, perhaps a majority, are voluntary; others are not.[75]

The coverage of the plan designed by G.E. itself was inconsistent with the nondisease-voluntariness criteria. Take, for example, G.E.'s coverage of hair transplants.[76] By far, men predominate over women in needing and seeking transplantation of hair.[77] Baldness is generally not the result of disease, but rather, the objectification of the genetic code. Although, as most bald men would agree, loss of hair is not a voluntarily incurred condition, neither is it disabling. Since baldness is not disabling, it is not the condition to which the voluntariness test should be applied, but that which causes a disability to occur — the hair transplantation itself — is. That procedure is surely voluntary and can be temporarily disabling. The conclusion is inescapable that, if in fact G.E. applied the nondisease-voluntariness criteria, it did so inconsistently.[78]

The majority's limitation of the twin criteria to the male-female-dominated disability categories[79] was novel, as G.E. had not argued

definition is defining "function" in a non-relative social or medical sense.

(3) . . . a condition, which if not corrected, may lead to disability or death. In this connection the medical term "morbidity" is applied, said term meaning a process of deterioration leading to death.

(4) . . . [the lack of] total physical, psychological well-being.

Id.

70. *Id.* at 376–77.
71. Approximately ten percent of pregnancies end in miscarriage, predominantly during the first trimester. In most cases disability lasts for a few days. *Id.*
72. There are two types of pregnancy-related diseases. The first type is caused by weight gain from pregnancy. This weight gain may exaggerate underlying, dormant conditions, such as hypertension and diabetes. The other type is caused by detachment or mislocation of the placenta. Each type can be disabling, but only half of each require hospitalization. *Id.*
73. For example, Emma Furch developed a blood clot in one of her lungs, which was not caused by her pregnancy. *See* text accompanying note 21 *supra.*
74. 375 F. Supp. at 376.
75. *Id.* at 375.
76. A hair transplant is a type of elective plastic surgery.
77. Baldness is a sex-linked and sex-influenced trait. Over ninety-nine percent of genetically caused bald persons are men.
78. *See* 97 S. Ct. at 415–16 (Brennan, J., dissenting).
79. *See* notes 17–18 *supra,* and accompanying text.

that limitation before the district court. The company had argued that the twin criteria applied to all disabilities.[80] Applied to all three disability categories, the twin criteria were surely incompetent to describe the pattern of coverage and exclusion, since the plan covered such disabilities as "sports injuries, attempted suicides, . . . disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery."[81]

The nondisease-voluntariness criteria possess usefulness for the majority beyond the facts of *Gilbert*. Although the majority's concept of per se discrimination would require that a sickle-cell anemia exclusion be held to be racially neutral,[82] the majority could distinguish a sickle-cell anemia exclusion from a pregnancy exclusion and, at the same time, avoid the per se analysis altogether. Faced with a sickle-cell anemia exclusion, the majority could simply point out that, unlike pregnancy, sickle-cell anemia is both a disease and involuntary.[83] In this way, the majority could argue, the sickle-cell anemia exclusion is a mere subterfuge cloaking a discriminatory motive. Thus, by applying an error whose magnitude approaches Brobdingnagian proportions, the majority could shield blacks with Title VII's protective umbrella but leave women out in the rain.

Justice Brennan, relying on past discriminatory employment practices by G.E. with regard to women,[84] went on to show that G.E.'s reliance on the twin criteria of exclusion, if indeed there was such reliance, was not an honest and innocent error. "[C]ontemporary disability programs are not creatures of a social or cultural vacuum devoid of stereotypes and signals concerning the pregnant woman employee."[85] In the 1930's and 1940's, G.E. began for the first time to include women in its benefit programs.[86] Prior to the Equal Pay Act,[87] G.E. took "pregnancy and other factors into account in order to scale a woman's wages at ⅔ the level of men's."[88] Probably as a tactical move, G.E. dropped its forced maternity leave policy at about the same time the *Gilbert* plaintiffs filed suit against the company.[89] This policy had required pregnant women to leave work at a point midway into their pregnancy, without pay or income maintenance payments, even when they were quite capable of carrying a normal workload.[90] Justice Brennan concluded that G.E. had not "actually conceptualized or developed [its] comprehensive

80. 375 F. Supp. at 378.
81. 97 S. Ct. at 416 (Brennan, J., dissenting).
82. *See* note 48 *supra*, and accompanying text.
83. *See* note 47 *supra*.
84. 97 S. Ct. at 415 n.1.
85. *Id.* at 420.
86. *Id.* at 415 n.1.
87. 29 U.S.C. § 206 (1976).
88. 97 S. Ct. at 415 n.1.
89. *Id.*
90. *Id.*

insurance programs disability-by-disability in a strictly sex-neutral fashion."[91] Rather, G.E.'s pattern of coverage and exclusion betrayed "a sex-conscious process expressive of the secondary status of women in the company's labor force."[92]

V. DISCRIMINATORY EFFECT

The majority opinion and the dissenting opinions of Justices Brennan and Stevens agreed that a violation of Title VII could be established by demonstrating that G.E.'s pregnancy exclusion had a discriminatory effect upon G.E.'s female employees.[93] There were two interrelated levels of effect analysis open for consideration by the justices. One level dealt with the plan's coverage itself and the other was concerned with the relationship between that coverage and the employment opportunities of female employees at G.E. and in the American work force in general.

The majority concentrated solely on the plan's coverage itself. It's approach was thus strikingly similar to that upon which it relied in its analysis of per se discrimination, where the majority held that the G.E. pregnancy exclusion was not facially discriminatory.[94] There was no discriminatory effect against females in G.E.'s pregnancy exclusion, the majority argued, because the plan provided equality of coverage in its aggregate risk protection, in the sense that there was an "evenhanded *inclusion* of risks."[95] Pregnancy, according to the majority, was "an *additional* risk, unique to women."[96] In other words,

> "'[t]here is no risk from which men are protected and women are not . . . [and] no risk from which women are protected and men are not.'"[97]

Pregnancy was a risk which, if covered, would have protected women but not men, and it was therefore an additional risk.

The majority erred, as far as the dissenters were concerned. True, there was an evenhanded inclusion of risks, but only in the unisex disability category — those disabilities that "mutually inflict both sexes."[98] Pregnancy was an additional risk unique to women only in the sense that it was a disability in the female-dominated disability category. In the same sense were male-dominated disabilities additional risks unique to men. Outside of the unisex category, there were risks from which men were protected and

91. *Id.* at 420.
92. *Id.* at 416.
93. *Id.* at 417.
94. *See* text accompanying notes 39–41 *supra.*
95. 97 S. Ct. at 410.
96. *Id.*
97. *Id.* at 409 (quoting Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974)).
98. *See* text accompanying notes 15–16 *supra.*

women were not, and visa versa. For example, as Justice Stevens explained, "[I]f the word 'risk' is used narrowly, men are protected against the risks associated with a prostate operation whereas women are not."[99] Likewise, women are protected against the risks associated with breast cancer whereas men are not.

In what sense was the fact that pregnancy was a female-dominant "additional" risk distinguishable from the fact that a hair transplant was a male-dominant "additional" risk? If there was a legally cognizable difference, then the majority might have been correct in concluding that G.E.'s plan provided equal coverage. It has been shown that the majority's bifurcation of pregnant and nonpregnant women with respect to coverage was invalid when used to explain lack of per se discrimination.[100] It was also demonstrated that the majority's nondisease-voluntariness criteria were incompetent to explain lack of discriminatory motive.[101] Was their isolation of pregnancy as an additional risk strike three? The resolution of this question lies in the ascertainment of the meaning of equality of coverage, for the G.E. plan, with the pregnancy exclusion, was said to provide equal coverage between men and women in such a way that pregnancy-related disabilities, if covered, would have rendered the plan's coverage unequal.

Actually, there were two different conceptions of equality involved in the *Gilbert* decision, one upon which the majority implicitly relied, the other upon which Justices Brennan and Stevens, in their separate dissents, explicitly relied. The majority's conception of equality necessitated, in a logical sense, the pregnancy exclusion.[102] In stark contrast, the conception of equality adopted by Justices Brennan and Stevens logically necessitated the inclusion of pregnancy-related disabilities. The *Gilbert* effect analysis, on the coverage level, reduced to a game of definitions once again.[103]

99. 97 S. Ct. at 421 n.5 (Stevens, J., dissenting). Justice Brennan, in his dissent, attempted in yet another manner to expose the dearth of logic in the majority's analysis:

> Had General Electric assembled a catalogue of all ailments that befall humanity, and then systematically proceeded to exclude from coverage *every* disability that . . . predominantly inflicts women, the Court could still reason . . . that the plan operates equally: Women, like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payment for pregnancies, breast cancer, and all the other excluded female-dominated disabilities.

Id. at 416 n.5 (Brennan, J., dissenting).

100. *See* text accompanying notes 42–45 *supra.*

101. *See* text accompanying notes 67–80 *supra.*

102. The pregnancy exclusion was necessitated in a logical sense because the entire analysis was definitional. Definitional analysis alone does not incorporate the teachings of experience. Experience, that is, the social impact of the pregnancy exclusion on women in the work force, is more attuned to the intended meaning of discriminatory *effect. See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (testing for employment, although facially neutral, had the effect of excluding blacks; discriminatory effect found under Title VII).

103. A definitional game was also at work in the majority's analysis of per se discrimination, where the majority defined a distinction between pregnant

Under the majority's conception of equality, there is equality of coverage if, outside of the unisex disability category, biologically functionally analogous disabilities are covered.[104] Thus, when each male-dominated disability covered is matched with a functionally analogous female-dominated counterpart which is covered, the resulting coverage is equal. For example, the G.E. plan covered vasectomies and salpingectomies,[105] prostate cancer and cervical cancer. The plan did not cover pregnancy-related disabilities because there was no functionally analogous male-dominated disability to match. There was therefore no requirement that pregnancy-related disabilities be included just because women possessed a heavier burden in " 'the scheme of human existence.' "[106] Need, therefore, was not the criterion for equality; quid pro quo served as the maxim of equality. Equality between the sexes logically necessitated the pregnancy exclusion, for pregnancy inclusion would tip previously balanced coverage in favor of women, rendering the plan unequal. Pregnancy, in this sense, was an additional risk.

Under the conception of coverage equality envisioned by Justices Brennan and Stevens, if all of the disability risks associated with one sex are covered, all of the disability risks associated with the other sex must be covered. If all potential male-dominated disability risks are protected, then all female-dominated disability risks should be protected. Equality of coverage proceeds from the maxim, *To each, according to need.*[107] Justice Stevens had this idea in view when he observed, "If the word ['risk'] is used . . . to describe the risk of uncompensated employment caused by physical disability, men receive total protection . . . against that risk whereas women receive only partial protection."[108] Coverage must be equally

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women and nonpregnant women as to future risk of pregnancy. *See* notes 40–45 *supra.* That very same game established a foothold in the majority's defining "disease" in such a restrictive manner as to exclude pregnancy from the definition and, thus, from any possible legal requirement of coverage in G.E.'s plan. *See* notes 62–66 *supra.*

104. The functional analogy approach is rather artificial. For example, what in the female is functionally analogous to disability from hair transplantation in the male — female hormones to diminish hair? One way to avoid this type of problem is to supplement the functional analogy approach with a trade-off approach. There could be certain trade-off disabilities where a male-dominated disability has no functional counterpart in a female-dominated disability and visa versa. The trade-off criteria should involve a consideration of the relative seriousness of both disabilities and the average work absences occasioned thereby.

105. Both are sterilizing procedures.

106. 97 S. Ct. at 409–410 n.17.

107. The British philosopher and social scientist, R. H. Tawney, argued that "the more anxiously a society endeavours to secure equality of consideration for all its members, the greater will be the differentiation of treatment which, when once the common human needs have been met, it accords to the special needs of different groups and individuals among them." R.H. TAWNEY, EQUALITY 39 (1952); *see generally* BHAGAVAD GITA (Hindu religious text); K. MARX & F. ENGELS, DAS KAPITAL; PLATO, REPUBLIC.

108. 97 S. Ct. at 421 n.5 (Stevens, J., dissenting).

appropriate to the needs of men and women in order to be equal between them. Therefore, equality between the sexes logically necessitated the inclusion of pregnancy-related disabilities.

The *Gilbert* majority, had they explicitly adopted the quid pro quo conception of equality, could not find justification for their effect analysis merely by stating that six out of nine justices believed in the appropriateness of that conception, as if a mere definitional analysis would suffice. The inquiry should have revolved around the reasons why one definition of equality, rather than the other, was more appropriate to the purposes of Title VII's ban on sex discrimination. This inquiry was attempted by Justice Brennan in his dissent. Justice Brennan arrived at the same conception of coverage equality as did Justice Stevens, but by a route more sociological than definitional. He argued that, because discrimination "is a social phenomenon encased in a social context,"[109] its meaning should be derived from "the desired end-products of [Title VII]."[110] The ultimate objective of Title VII was " 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women].' "[111] Equal treatment in wages, seniority, pension benefits, and disability benefits was among the means conceived by Congress to achieve equal employment opportunity for women.[112] Justice Brennan encapsulated the intimate relationship between income maintenance plan coverage and the equal employment opportunities of women: "[P]regnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force."[113]

Both governmental and private reports depict the increasing need of women in today's labor market for income protection from pregnancy-related disabilities.[114] With the passage of time there has been an ever-increasing proportion of women in the full-time work force.[115] Two-thirds of all working women work out of necessity,

109. *Id.* at 419 (Brennan, J., dissenting).
110. *Id.*
111. *Id.* at 420 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).
112. This is clear from the wording of Title VII itself. *See* 42 U.S.C. § 2000e–2(a).
113. 97 S. Ct. at 419.
114. Weyand, *Baring the Cost of Bearing,* 11 TRIAL 86 (May-June 1975) (attorney for Gilbert, *et al.*); Binder, *Pregnancy, Maternity Leave and Title VII,* 1 OHIO No. U. L. REV. 31 (1973); Johnston, *Sex Discrimination and the Supreme Court — 1971–1974,* 49 N.Y.U.L. REV. 617, 682–83 (1974); Koontz, *Childbirth and Childrearing Leave: Job-Related Benefits,* 17 N.Y.L.F. 480 (1971); Comment, Geduldig v. Aiello: *Pregnancy Classifications and the Definition of Sex Discrimination,* 75 COLUM. L. REV. 441, 456–61 (1975); Comment, *Waiting for the Other Shoe —* Wetzel *and* Gilbert *in the Supreme Court,* 25 EMORY L.J. 125, 151–59 (1976); *cf.* Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964,* 1968 DUKE L.J. 671, 720–22.
115. There are approximately 35 million women in the labor force. Weyand, *Baring the Cost of Bearing,* 11 TRIAL 86, 87 (May-June 1975).

either because they head their households or because they must share household expenses with husbands who are unable alone to provide adequate support.[116] In addition, one-half of the states, including Maryland, do not pay unemployment or disability insurance for periods of disability caused by pregnancy.[117] Thus, as one commentator aptly described:

> If [female employees] are physically unable to work because of . . . pregnancy, they are disqualified for regular unemployment benefits because their disability renders them not "able and available" for work. In addition, under the employment disability laws, illness due to pregnancy is not covered, so the unemployed pregnant woman is denied benefits from either form of compensation.[118]

The *Gilbert* majority observed that a woman seeking to purchase private disability insurance from an insurance company "would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities."[119] Finally, unpaid absence from work caused by pregnancy disadvantages a woman's seniority and pension status, disrupting her promotion and pay raise achievement, and thereby tends to perpetuate a labor market in which full-time female employees earn wages approximately sixty percent that of male employees.[120]

In order to attain Title VII's goal of sexual parity in employment opportunities, Justice Brennan argued, the Court should give "due consideration to the uniqueness of 'disadvantaged' individuals."[121] Women have certainly been treated in the employment arena to their competitive disadvantage. Their uniqueness, like male uniqueness, includes, in the sphere of disability income plans, unique needs. Most women possess the need for pregnancy risk coverage. In the opinion of Justices Brennan and Stevens, a plan not covering the most significant female disability need — pregnancy — which, at the same time, protects all possible male disability needs discriminates against women. Coverage in such a case is not equally appropriate to the needs of men and women, and thus tends to place women at a

116. Comment, 25 EMORY L.J. 125, note 113 *supra*, at 151.
117. This is the state of the law in Maryland. MD. ANN. CODE art. 95A, §§ 4(c), 6(f) (Supp. 1976). Section 6(f) disqualifies any individual for benefits for, among other things:
> . . . any period of disability as a result of pregnancy during which period she is physically unable to continue her employment. However, she shall be eligible for benefits during pregnancy providing that she is physically able to continue her employment, as properly certified by her physician, and is otherwise eligible under the benefit of eligibility conditions set out in § 4(c).
118. Walker, *Sex Discrimination in Government Benefit Programs*, 23 HAST. L.J. 277, 285 (1971).
119. 97 S. Ct. at 409–10 n.17.
120. Geduldig v. Aiello, 417 U.S. 484, 501 n.5 (1974) (Brennan, J., dissenting).
121. 97 S. Ct. at 419 (Brennan, J., dissenting).

competitive disadvantage in the labor market. In order to provide equal coverage and avoid the invidious effects of opportunity deprivation, G.E.'s plan would have to treat pregnancy-related disabilities "on the same terms and conditions as . . . other temporary disabilities."[122]

Justice Brennan found precedential support for his sociological-legal analysis in a similar approach taken in the Court's unanimous 1974 opinion in *Lau v. Nichols,*[123] which involved another section of the Civil Rights Act of 1964.[124] In the San Francisco public school system, Chinese-American students lagged far behind natural English-speaking students in English language fluency. Contributing to this differential was inadequate supplemental instruction in English for the former. Although public funds were applied equally to all students, the Court noted that "the Chinese-speaking [students] *receive fewer benefits* than the English-speaking [students] from [San Francisco's] school system which denies them a meaningful opportunity to participate in the educational program."[125] Although there was no discriminatory motive behind this inadequate supplemental instruction, there was a discriminatory impact upon Chinese-American students. The Court required affirmative action English language instruction for Chinese-speaking students of an intensity over and above that provided for the English-speaking majority. The Court's order required, in actual practice, the allocation of more money per Chinese-speaking student than per natural English-speaking student. By requiring instruction equally appropriate to the needs of both groups, an equal educational opportunity was to that extent insured.[126]

Although the *Gilbert* majority did not explicitly go beyond their definitional effect analysis, it is highly probable that their decision turned primarily upon an unwillingness to impose upon employers the potentially high costs of pregnancy disability benefits.[127] Although it is technically proper in a Title VII case to consider employer costs only after discriminatory effect has been proven, in which case an employer's only relevant defense is business necessity,[128] the *Gilbert* majority dealt with employer costs in the

122. This language is used in the EEOC's pregnancy guideline, 29 C.F.R. § 1604.10(b).
123. 414 U.S. 563 (1974).
124. *Lau* involved section 601 of the 1964 Civil Rights Act, which bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1976).
125. Lau v. Nichols, 414 U.S. 563, 568 (1974) (emphasis added).
126. *Id.*
127. *Cf.* Geduldig v. Aiello, 417 U.S. 484, 492–96 (1974). Comment, 75 COLUM. L. REV. 441, note 113 *supra,* at 476–81; Comment, 25 EMORY L.J. 125, note 113 *supra,* at 151–59.
128. *See* note 57 *supra,* and accompanying text.

beginning of its opinion[129] and spent over one-half of its time during Argument[130] and Reargument[131] on that topic.

G.E. argued that the goal of its plan was the "'appropriate allocation of the benefit dollar.'"[132] It seemed appropriate, the company explained, to do what was best for the largest number of employees.[133] With limited income maintenance funds with which to protect employees, G.E. had to balance the advantages and disadvantages of increasing the burden on the benefit resources which would result from the inclusion of pregnancy-related disabilities. G.E. found that most of its employees were married and had families and that most of these families were supported financially by men rather than women. The company concluded that most female employees were primarily supported by husbands and that women denied pregnancy disability benefits would not suffer significantly because their husbands would support them during the disability period.[134]

G.E. argued that the cost of providing pregnancy disability benefits would be prohibitive. The *Gilbert* majority relied upon statistics that had been used in the district court which indicated that female G.E. employees as a class received a 170 percent higher proportion of disability benefits than the class of male G.E. employees.[135] G.E. estimated that the inclusion of pregnancy benefits would increase this disparity to 210-230 percent for six weeks of coverage and 300-330 percent for the average thirteen weeks of pregnancy absence which G.E. had experienced.[136] Because G.E.'s contributions per female employee were at least that contributed per male employee, the company argued that the Equal Pay Act,[137] a section of which is incorporated into the Bennett Amendment of Title VII,[138] and the legislative intent of which has been interpreted by the Wage and Hour Administrator to permit either equal employer contributions or equal employee benefits between men and

129. 97 S. Ct. at 405–6.
130. 44 U.S.L.W. 3423 (U.S. Jan. 27, 1976).
131. 45 U.S.L.W. 3296 (U.S. Oct. 19, 1976).
132. *Id.* at 3297.
133. *Id.*
134. *Id.*
135. 97 S. Ct. at 405 n.9, 406 n.10.
136. This information was included in the district court's opinion, 375 F. Supp. at 378. *But see* 45 U.S.L.W. at 3296, where G.E.'s attorney stated that the 300–330 percent estimate was for a full, twenty-six week disability period.
137. 29 U.S.C. § 206 (1976). The Equal Pay Act permits pay differentials between men and women only when justified by (1) a seniority system, (2) a merit system, (3) a system in which earnings are work quantity or work quality dependent, or (4) *a system based upon a factor other than sex. Id.* § 206(d).
138. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate *upon the basis of sex* in determining the wages or compensation paid to or to be paid to employees of such employer if such differentiation is authorized by section 206(d) of [the Equal Pay Act].
42 U.S.C. § 2000e-2(h) (emphasis added).

women,[139] permitted the pregnancy exclusion. The *Gilbert* majority accepted this argument only in so far as it dampened the persuasive power of the EEOC's 1972 pregnancy guideline: "[G.E.'s] exclusion of benefits for pregnancy disability would be declared an unlawful employment practice under [that section of Title VII to which the EEOC pregnancy guideline applies], but would be declared not to be an unlawful employment practice under [that section of Title VII to which the Wage and Hour Administrator's guideline applies]."[140]

Moreover, G.E. complained that forty percent of the females who left G.E. due to pregnancy did not return to work at all, as contrasted with a ninety percent return rate for other disabilities.[141] The company argued that the inclusion of pregnancy as a covered disability would constitute a form of severence pay for those women who do not return, a type of compensation which G.E. does not pay to anyone for any reason.[142] Finally, if the corporation attempted to cover pregnancy and, at the same time, keep costs at or near their present level by reducing the amount of other benefits, limiting the number of weeks for which other benefits are paid, or deleting coverage of respiratory ailments caused by smoking, it would surely meet swift and powerful resistance from the employees' labor union, for " '[i]n the real world out there you just don't take it away.' "[143] In short, the majority in *Gilbert* seemed to hold, on a nondefinitional plane, that, *all cost factors considered,* there was no discriminatory effect upon female employees from G.E.'s pregnancy exclusion.

The separate dissenting opinions of Justices Brennan and Stevens did not discuss G.E.'s costs.[144] Justices Brennan, Marshall and Stevens would probably concur, however, in the following statement of one commentator:

> On the one hand, it might be assumed that [Title VII's] purpose was merely to insure that henceforth sex discrimination in employment would be rational and reasonable. Such an interpretation, however, supposes that Congress, lacking confidence in the free play of the market, desired only to deal with irrational and purposeless discrimination,

139. 29 C.F.R. § 800.116(d) (1975), *quoted in* 97 S. Ct. at 412.
140. *Id.*
141. 44 U.S.L.W. at 3423. This figure was also included in the district court's opinion, 375 F. Supp. at 378. *But see* Comment, 25 EMORY L.J. 125, note 113 *supra*, at 157:
> Indications are that the likelihood of return after delivery will be greater in the future as barriers to women's full participation in the work force continue to be eliminated. Increased job security for women should foster a feeling of continuity with and loyalty to their employment. The provision of maternity coverage should operate to promote the employer's interest in maintaining an experienced work force.

142. 375 F. Supp. at 379; 44 U.S.L.W. at 3423.
143. 45 U.S.L.W. at 3299 (argument of G.E.'s attorney).
144. Justice Brennan's dissent did point out that the federal government, as an employer, follows a pregnancy-inclusive rule. 97 S. Ct. at 419.

> and that the primary objective of the ban was to proscribe employment practices based upon the irrational prejudices of employers. The alternative . . . [is that] Congress, in an attempt to provide greater female employment opportunity, outlawed certain forms of *profitable,* and hence *reasonable,* sex discrimination.[145]

VI. CONCLUSION

Whether or not one agrees with the *Gilbert* decision, the fact remains that it stands as authoritative federal law with regard to Title VII. It is now the task of Congress and the state legislatures to relegate *Gilbert* to the realm of mere history, a status akin to that which cases such as *Dred Scott*[146] and *Plessy*[147] possess. An attempt to do just that is presently underway in Congress[148] and in the states, including Maryland, which recently enacted legislation requiring employers and insurance companies to treat pregnancy-related disabilities like other temporary disabilities in employer plans and insurance contracts.[149]

Equality of opportunity is a precious value in the United States. It is a value hailed in America as far back in our history as the founding of the Republic itself.[150] Philosophers, from Plato[151] to John Rawls,[152] have considered it essential to a strong nation. Its achievement, however, has always entailed economic costs. Consider the American quest to insure blacks an equal opportunity in education and employment. America receives in return for those

145. Comment, 1968 DUKE L.J. 671, note 113 *supra,* at 723.

146. Dred Scott v. Sanford, 60 U.S. 393 (1857) (holding that black slaves were not included under the word "citizens" in the Constitution; runaway slave was property of his owner).

147. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding Louisiana statute requiring equal but separate accommodations for whites and blacks in railroad passenger cars).

148. *See* S. 995, 95th Cong., 1st Sess. § 701 (1977). This bill attempts to amend § 701 of Title VII.

149. The new legislation amends MD. ANN. CODE art. 49B, § 19A (minimum six weeks coverage by employers) and MD. ANN. CODE art. 48A, §§ 470K, 477N (insurance).

150. There is a natural aristocracy among men. The grounds of this are virtue and talents. . . . There is, also, an artificial aristocracy, founded on wealth and birth without either virtue or talents: for with these it would belong to the first class. The natural aristocracy I consider as the most precious gift of nature for the instruction, the trusts, and government of society.

1 THE JEFFERSONIAN CYCLOPEDIA 48 (J. Foley, ed. 1967).

151. PLATO, REPUBLIC 144–55 (F.M. Cornford, 3d ed. 1972). Although Plato considered women the weaker of the two sexes, *id.* at 153, he added, speaking through Socrates, that "there is no occupation concerned with the management of social affairs which belongs either to woman or to man, as such. Natural gifts are to be found here and there in both creatures alike; and every occupation is open to both, so far as their natures are concerned." *Id.*

152. "[T]hose with similar abilities and skills should have similar life chances. . . . In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed." J. RAWLS, A THEORY OF JUSTICE 73 (1971).

costs something of great value — social unity[153] and the addition of the multifarious talents of those who otherwise might never contribute to society and to themselves.

Considering this treasured value's expression in philosophy, political science, and Title VII, is it justifiable that a biological function — childbearing — a function activated equally by men and women and unavoidable if the human race is to survive, be made a major basis for the perpetuation of sexual inequality in the United States? Are the qualifications for attaining the American dream — that women forego childbearing while employed — fair and just? Not giving due consideration to the special needs of women in *Gilbert* was, in actuality, giving due consideration only to the special needs of the dominant sex — men — thus solidifying the present state of inequality. The move toward sexual equality requires some conformity by women to the rigorous requirements of the male-dominated working world. At the same time, the male-dominated economy must incorporate some of the special needs of women in order to insure that women will have an equal chance, assuming equivalent talent and motivation, to find success in the American life-world. The realization of that goal is necessary if women are to take their rightful, equal place with men in a society of persons, for "[t]he pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."[154]

Donn Weinberg

153. Social unity is more discernable a result in the long run rather than in the short run, as the daily heated disputes over busing to achieve racial integration demonstrate the short run resistence to change in social arrangements.

154. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20, 485 P.2d 529, 541, 95 Cal. Rptr. 329, 341 (1971).