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FETAL HAZARDS, GENDER JUSTICE, AND THE JUSTICES: THE LIMITS OF EQUALITY

DAVID L. KIRP*

I. INTRODUCTION: "THE MOST IMPORTANT SEX-DISCRIMINATION CASE . . ."

In an era bereft of Supreme Court rulings that enlarge the meaning of equality, *International Union, UAW v. Johnson Controls, Inc.*¹ stands as a vivid apparent exception. This 1991 decision outlawed what have generally been called fetal protection policies: corporate rules barring all fertile women from jobs that pose a potential risk to fetuses because they expose workers to high levels of toxic substances such as lead.² Johnson Controls, a car battery manufacturer, argued that the policy was needed to defend the interests of the unborn against the shortsightedness of their mothers. Three federal appeals courts had embraced that position.³ But the Supreme Court Justices saw things differently, unanimously viewing the rule as a violation of the federal Pregnancy Discrimination Act.⁴

Although the Johnson Controls Corporation happens to manufacture automobile batteries,⁵ the implications of the case reach far beyond a handful of women in the declining blue-collar sector of the economy, where jobs are more likely to be lost due to overseas

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1. 111 S. Ct. 1196 (1991).

2. *Id.* at 1207.

3. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 886-87 (7th Cir. 1989) (en banc), *rev'd*, 111 S. Ct. 1196 (1991); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172, 1190 (4th Cir. 1982).

For arguments supporting Johnson Controls' position, see Amici Curiae Brief of the Chamber of Commerce of the United States of America, in Support of Respondent, *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (No. 89-1215); Amici Curiae Brief of the Equal Employment Advisory Council and the National Association of Manufacturers, in Support of Respondent, *Johnson Controls* (No. 89-1215).

4. 42 U.S.C. § 2000e(k) (1988). *Johnson Controls* was decided by a 9-0 vote, with concurring opinions by Justices White and Scalia. *Johnson Controls*, 111 S. Ct. at 1199.

5. *Johnson Controls*, 111 S. Ct. at 1199.

competition than to arguments over fetal vulnerability.⁶ In 1980, an estimated 100,000 jobs were already closed to women⁷ because of alleged fetal hazards—and this was only the beginning. Some estimated that twenty to thirty million jobs were at stake, in fields ranging from housepainting and cabdriving to child care and radiology.⁸ This reality prompted Judge Frank Easterbrook, dissenting in the Seventh Circuit's decision in *Johnson Controls*, to call the case "likely the most important sex-discrimination case in any court since 1964, when Congress enacted Title VII."⁹

In overturning the workplace restrictions, the Supreme Court was speaking out for women's rights—more precisely, for the idea of equal rights that transcend differences in reproductive roles. Marsha Berzon, who argued the plaintiff's case, called the ruling a "victory for women and for safety in the workplace [which] makes it clear that women have the right to make critical work and family decisions for themselves and for their children."¹⁰

When compared with the language of the Seventh Circuit's *en banc* ruling,¹¹ the Supreme Court opinion deserves such hosannas. In ignoring the plainest implications of law, science, and policy, the appellate court's decision displayed an almost religious veneration for the claims of putative fetuses and an indifference, verging on callousness, to the hard choices faced by working women. By contrast, the Supreme Court's judgment stands as a reminder that "fetal protection," as firms like Johnson Controls employ the phrase, is really the language of corporate spin control, artfully designed to evoke support for a practice less idealistic in its moti-

6. For a discussion of the decline of blue-collar employment, see Steve Lohr, *Accepting the Harsh Truth of a Blue-Collar Recession*, N.Y. TIMES, Dec. 25, 1991, § 1, at 1.

7. Wendy W. Williams, *Firing the Woman to Protect the Fetus: the Reconciliation of Fetal Protection With Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641, 647 n.30 (1981).

8. See BUREAU OF NAT'L AFFAIRS, PREGNANCY AND EMPLOYMENT 57-92 (1987). The Centers for Disease Control estimated that some "827,000 U.S. workers are potentially exposed to lead on the job." Centers for Disease Control, *Surveillance for Occupational Lead Exposure—United States, 1987*, 38 MORBIDITY & MORTALITY WKLY. REP. 642, 645 (1989).

9. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 920 (7th Cir. 1989) (*en banc*) (Easterbrook, J., dissenting), *rev'd*, 111 S. Ct. 1196 (1991).

10. *Supreme Court Prohibits Fetal-Protection Policies*, RECORDER, Mar. 21, 1991, at 1.

11. *Johnson Controls*, 886 F.2d 871.

vation, and less benign in its consequences for the unborn as well as for working men and women, than the words imply.

Yet the Supreme Court's decision looks decidedly less heroic when regarded, not as a set of principles abstracted from the commonplace but rather as a statement about how to make real—and literally toxic—choices. *Johnson Controls* may have invested non-discrimination with all the meaning it can be made to carry,¹² but the opinions of the Justices speak more to the inadequacy of equal rights reasoning than to its potential to address the matter at hand.¹³ As Judge Easterbrook noted in his dissent: "How much risk is too much is a moral or economic or political question, one ill suited to the processes of litigation and not the sort of question Title VII puts to a judge."¹⁴ A less formally constrained conception of justice requires a language that honors claims about the public good deeper than merely the right to be treated no worse—or no better—than someone else because of reproductive capacity.

Since legal rules embody a way of imposing an abstract order on the unruly specificities of lived lives, this account begins with a description of the particulars. Part II tells the stories of the women and men whose lives were remade by the policy on employee exposure to lead. The narrative moves back in time to place protective rules in their historical context, then up the corporate ladder to explain the organizational reasoning behind these rules. Parts III and IV shift from the descriptive and historical to the legal and analytical, examining the differing judicial understandings of how

12. See Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976) ("the antidiscrimination principle can be and has been extended to encompass a variety of other [nonracial] traits, including alienage, illegitimacy, and sex"). See generally Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (discussing major developments in antidiscrimination law from *Brown v. Board of Education*, 347 U.S. 483 (1954), to 1978).

13. Although *Johnson Controls* was a unanimous ruling, the Justices were not in complete agreement, particularly as to the scope of the bona fide occupational qualification (BFOQ) defense. Compare *Johnson Controls*, 111 S. Ct. at 1204-08 (holding that the increased cost of changing operations does not support a BFOQ defense) with *id.* at 1210-14 (White, J., concurring) (arguing that Congress intended to provide a BFOQ defense to employers if changing operations increased expenses) and *id.* at 1216 (Scalia, J., concurring) (arguing that increased operating expenses due to changing operations or potential tort liability are sufficient to support a BFOQ defense).

14. *Johnson Controls*, 886 F.2d at 917 (Easterbrook, J., dissenting).

to comprehend rules on fetal hazards in terms of equal treatment. Part V describes how the application of a less equality-driven approach might enrich the idea of justice in the workplace.

II. THE FACTORY FLOOR AND THE BOARDROOM

A. *On the Line*

In August, 1982, Ginny Green, then fifty years old, had been working for eleven years on the battery assembly line at the Johnson Controls plant in Brattleboro, Vermont.¹⁵ It was grinding labor, lifting heavy stacks of battery plates hundreds of times a day, but the money it brought in, nine dollars an hour with time-and-a-half for overtime, meant she could make a real home for her nine-year-old daughter. Green knew about the risks of contamination from the lead she was constantly exposed to, but she also knew that personal hygiene—what one doctor at Johnson Controls called “good housekeeping”¹⁶—could effectively shield an individual against lead. Besides, fifty years old and divorced, Green did not plan on having more children, so that risk, at least, she could ignore.

Suddenly, however, Ginny Green found herself out of a job, a victim of the company's new rules that applied to any female employee under the age of seventy who could not prove she was sterile. The company demoted her to a job as a respirator sanitizer, a glorified laundress, and she became the butt of fertility jokes in the plant. While her wages remained the same, her income fell because overtime work ended. Green did not style herself as a crusader, but the transfer made her angry. “I felt I was good enough to work on the line for eleven years. Why take me off now, just because of that stupid thing.”¹⁷ Together with several coworkers, she filed a grievance with the union.¹⁸

15. Telephone Interviews with Johnson Controls Employees and Others (Jan. & Feb. 1990) [hereinafter *Worker Interviews*].

16. Telephone Interview with Dr. Benjamin Culver, University of California (Irvine), Medical Consultant to the Johnson Controls Fullerton, California Plant (Dec. 1989) [hereinafter *Culver Interview*]. The Fullerton plant barred women from battery-making jobs at Culver's urging, even when the rest of the company was simply warning women of the risks. *Id.*

17. *Worker Interviews*, *supra* note 15.

18. *Id.*

A few months later, across the country at Johnson Controls' Fullerton, California plant, twenty-eight-year-old Queen Elizabeth Foster, a former bank teller earning five dollars an hour, thought she was starting a more lucrative new career on the battery assembly line.¹⁹ "They showed me through the place and I believed I was capable enough. I've worked on my feet, you know—and I'd be making something like double what I got at the bank."²⁰ But when Foster was sent off for her physical exam, she was told "they didn't want women who could have kids. . . . I went through a really bad trauma."²¹ Eventually, Foster took her complaint to the California Fair Employment and Housing Commission, which sided with her; the company appealed unsuccessfully in state court.²²

Foster was unwilling to abandon the possibility of being a mother in exchange for a job assembling batteries, and for their part, company officials insisted the policy was "in no way intended to support or encourage women of childbearing capability to seek to change this status [through sterilization]."²³ Nonetheless, some women working in toxic settings came to believe that they had no other realistic choice.²⁴ "I thought there was no option for me. That was my only way out, to keep my job, to keep my sanity, to keep my family afloat,"²⁵ said Betty Riggs, twenty-six years old at the time, who had pushed a reluctant company to hire her for a decent-paying job in the lead pigments department of American Cyanamid's Willow Island, West Virginia plant.²⁶ Riggs had one son and wanted more children, yet when the company announced

19. *Id.*

20. *Id.*

21. *Id.*

22. *Johnson Controls, Inc. v. California Fair Employment and Hous. Comm'n*, 267 Cal. Rptr. 158 (Cal. Ct. App. 1990).

23. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 878 (7th Cir. 1989) (en banc), *rev'd*, 111 S. Ct. 1196 (1991).

24. See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 440-53 (discussing *Oil, Chem. and Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984)).

25. *World News Tonight* (ABC television broadcast, Dec. 14, 1989).

26. *Id.*; see also OFFICE OF TECH. ASSESSMENT, U.S. CONG., *REPRODUCTIVE HEALTH HAZARDS IN THE WORKPLACE* 251-61 (1985) (case study of American Cyanamid); FALUDI, *supra* note 24, at 442 (discussing Betty Riggs); Gail Bronson, *Bitter Reaction: Issue of Fetal Damage Stirs Women Workers at Chemical Plants*, *WALL ST. J.*, Feb. 9, 1979, at 1 (discussing attitudes of American Cyanamid employees).

its fetal protection rules, she submitted to surgical sterilization because her marriage was breaking up and she needed the money. "I did what I did because I was more or less the sole supporter for a lot of people who were depending on me. I couldn't let them down. I was up against a brick wall and there was no place to go but forward."²⁷ Yet not long afterward, the company shut down its pigments department, eliminating the jobs that Betty Riggs and four other women had held onto, at the price of being sterilized.²⁸

B. Harmful Effects of Lead Exposure

The toxic properties of lead have been well known since Hippocrates described them in the fourth century B.C.; and lead poisoning is the oldest recognized occupational disease.²⁹ During the eighteenth and nineteenth centuries, workers in the smelting houses of the Industrial Revolution suffered seizures and loss of consciousness. Their limbs twisted or went limp with dropsy and their minds corroded.³⁰

At that time, the levels of lead carried in the workers' blood reached many hundreds of micrograms per deciliter, but the currently permissible levels, established in 1978 by Occupational Safety and Health Administration (OSHA) regulation, are far lower.³¹ Most scientists accept the OSHA standard, fifty micrograms of lead per hundred grams of blood, as being rigorous enough to prevent the familiar signs of lead poisoning:³² fatigue, constipation, hypertension, diminished sexual drive, memory loss, and mood swings.³³ Nevertheless, as researchers have become able to detect the impact of lead at ever-lower concentrations in the blood, proposals for radically lowering permissible blood lead levels have become common; a scientist from the Environmental Defense Fund, whom the UAW called as an expert witness in the *Johnson*

27. FALUDI, *supra* note 24, at 447.

28. *Id.* at 448.

29. Centers for Disease Control, *supra* note 8, at 644.

30. ABRAHAM CANTAROW & MAX TRUMPER, LEAD POISONING at vii-viii, 117-54 (1944).

31. See 29 C.F.R. § 1910.1025 (1991).

32. *But see* Centers for Disease Control, *supra* note 8, at 645 ("Although the OSHA Lead Standard has been in effect for [less than] 10 years, the data in this report indicate that overexposures to lead continue in many industries.").

33. CANTAROW & TRUMPER, *supra* note 30, at 117-54.

Controls case, urged a ceiling of twelve micrograms per deciliter.³⁴ Yet such a standard would not only be ruinously expensive, it would also mean shutting down cities such as Los Angeles and New York City, where average blood lead levels are very high because of lead in the air.³⁵

The risks to the offspring of women who carry high lead levels in their blood have also been known for centuries.³⁶ As recently as the turn of this century, some women working in china and pottery factories, palsied by lead, would conceive a child in order to pass the heavy metal out of their own bodies.³⁷ These desperate women needed no scientist to tell them that a fetus absorbs through the placenta some of the lead that a mother carries—and that a fetus so poisoned would be spontaneously aborted or born dead. So fearfully did doctors of the time view the impact of lead on the next generation that lead poisoning was commonly known as race poison.³⁸

Although such horror stories are history, lead still can stunt—and perhaps arrest—children's physical and mental development if absorbed in sufficient amounts.³⁹ More than 200,000

34. See *International Union, UAW v. Johnson Controls, Inc.*, 680 F. Supp. 309, 312 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989) (en banc), *rev'd*, 111 S. Ct. 1196 (1991).

35. See *Amici Curiae Brief of American Civil Liberties Union, in Support of Petitioners, International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (No. 89-1215) [hereinafter *ACLU Amicus Brief*]. "There are no clear thresholds for any of these effects of lead," stated Dr. Ellen Silbergeld, an expert for International Union. Dr. Ellen Silbergeld, *Deposition*, reprinted in *Amici Curiae Brief of the Natural Resources Defense Council, Inc.*, in Support of Petitioners, *Johnson Controls* (No. 89-1215).

Dr. J. Julian Chisolm, Director of the Lead Program at the John F. Kennedy Institute in Baltimore, similarly testified that exposure to lead levels as low as 10 micrograms presented a grave risk of permanent harm. Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, *Johnson Controls* (No. 89-1215) [hereinafter Appendix to Petition]. As the cross-examination brought out, however, Chisolm had previously testified for the lead industries in opposing government efforts to reduce lead levels in gasoline and had argued for higher "action levels" of blood lead levels. *Amici Curiae Brief of American Public Health Association, in Support of Petitioners, Johnson Controls* (No. 89-1215).

36. See OFFICE OF TECH. ASSESSMENT, *supra* note 26, at 69-70 ("Lead has been recognized as a reproductive hazard since the days of ancient Rome.").

37. See CANTAROW & TRUMPER, *supra* note 30, at 84, 143.

38. See *id.* at 18.

39. See AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS* at I-7, IV-3 to IV-19 (1988). The report also notes that,

children aged five or younger have blood lead levels higher than the safe ceiling specified by the Centers for Disease Control.⁴⁰ Lead is typically brought home by parents, who carry it away from work on fingers, hair, and clothing; or else it comes from old paint pried off walls by small hands; or it is simply inhaled in the urban air.⁴¹

More is understood about the effects of direct exposure to lead than about the effects of any other toxic substance.⁴² Yet on the precise issue posed by the Johnson Controls policy—when, if ever, should women be barred from jobs involving otherwise acceptable levels of toxic exposure—surprisingly little is known, about either how lead is transmitted from mother to child or how to reduce the risks of transmission. It is unclear, for instance, whether lead in a mother's blood—not the levels of the Industrial Revolution, but levels to which employees at modern-day factories are sometimes exposed—actually endangers a fetus.⁴³ If a woman becomes pregnant with a blood lead level of forty, as Judge Easterbrook noted in his *Johnson Controls* dissent, the risk attributable to that expo-

nationally, 2,380,600 children between the ages of six months and five years—more than one child in six—are projected to have blood lead levels greater than 15. *Id.* at I-12 tbl. I-2. Among 3,595,000 pregnant women in the study, 3,800 had blood lead levels exceeding 25; 403,200 had blood lead concentrations exceeding 10. *Id.* at I-22.

40. *Id.* at I-7, -13.

41. *Id.* at I-6. See generally David Bellinger et al., *Longitudinal Analyses of Prenatal and Postnatal Lead Exposure and Early Cognitive Development*, 316 NEW ENG. J. MED. 1037 (1987) (studying blood lead levels and mental and psychomotor development of 249 children living near Boston, from birth to two years of age); Anthony J. McMichael et al., *Port Pirie Cohort Study: Environmental Exposure to Lead and Children's Abilities at the Age of Four Years*, 319 NEW ENG. J. MED. 468 (1988) (comparing blood lead level and cognitive ability test scores of 537 children living near a lead smelter, from birth to four years of age).

42. Jeannette M. Valentine & Alonzo L. Plough, *Protecting the Reproductive Health of Workers: Problems in Science and Public Policy*, 8 J. HEALTH POL. POL'Y & L. 144, 154 (1983). "What is known about reproductive health hazards is far outweighed by what is unknown." OFFICE OF TECH. ASSESSMENT, *supra* note 26, at 3.

43. Scientists have not examined the data on birth defects for children of lead-exposed workers since the British studies almost a century ago. Testimony of Dr. Jay Noren, Johnson Controls, Inc. v. California Fair Employment and Hous. Comm'n, 267 Cal. Rptr. 158 (Cal. Ct. App. 1990), reprinted in Amici Curiae Brief of Equal Rights Advocates, in Support of Petitioners, International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (No. 89-1215). But see Bellinger et al., *supra* note 41, at 1037 ("It appears that the fetus may be adversely affected at blood lead concentrations well below 25 mcg per deciliter, the level currently defined by the Centers for Disease Control as the highest acceptable level for young children.").

sure of her having a learning-disabled child might be one in two—or it might be one in 2,000 or one in 2,000,000.⁴⁴ Thus, the *Johnson Controls* standard of thirty is a guess about fetal safety, not firmly anchored to science.

Businesses that rely on lead and other toxic substances in manufacturing could have collected useful data—instead these enterprises made policy by hunch and anecdote. Among the 50,000 workers and their families whom Dr. Charles Fishburn, medical consultant to Johnson Controls, estimated that he had treated, he recalled encountering just one “damaged child” of a high-lead mother—a hyperactive youngster—and Fishburn could not be sure that the harm was caused during gestation.⁴⁵ During the 1970s, American Cyanamid barred fertile women from jobs that might expose them to any of twenty-nine chemicals, despite a dearth of evidence about the consequences of exposure to any of these chemicals other than lead.⁴⁶ When OSHA challenged the policy, the firm narrowed the scope of its workplace exclusions.⁴⁷

Like other companies that use highly toxic materials in manufacturing, Johnson Controls could have taken steps in order to reduce the possibility of fetal damage far less draconian than its exclusionary rule. Although the firm had done a great deal to make the plant less toxic, in response to OSHA requirements, it could have lowered the levels of airborne lead in its plants still further, albeit at considerable cost.⁴⁸

More realistically, the corporation could have limited the reach of its policy. Its rule barred all women between the ages of seventeen and seventy from line jobs where lead levels can run high,

44. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 916 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting), *rev'd*, 111 S. Ct. 1196 (1991). Easterbrook was working in the Solicitor General's Office at the time OSHA developed its rules on exposure to lead, and he defended the agency against industry attack. See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980).

45. *Johnson Controls*, 886 F.2d at 877.

46. See *Oil, Chem. and Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984).

47. FALUDI, *supra* note 24, at 444-49.

48. The company reported that it had invested \$15 million on environmental engineering controls for its battery division in order to lower lead levels. Testimony of Dr. Jean Beaudoin, Johnson Controls Health and Safety Manager, *cited in* Appendix to Petition, *supra* note 35.

unless they could prove their sterility.⁴⁹ But not all women are equally likely to conceive: among blue-collar women over thirty, the birth rate is less than two percent; and among all women aged forty-five to forty-nine, just one in 5,000 has a child in any given year.⁵⁰ The company's policy kept fertile women from any job from which they might eventually be promoted into battery making. This effectively denied women ninety-five percent of the jobs at Johnson Controls, even though barely a third of those jobs actually had workers with unacceptable lead levels.⁵¹ It revealed a corporate concern for efficient management, not health risks.

Risk-limiting measures short of banishment from the workplace were available, even for women who actually became pregnant. Many experts believe that lead crosses the placenta from mother to fetus in the last months of gestation.⁵² Because blood lead levels decline sharply in a matter of months, offering women the option of regular pregnancy tests and transferring women workers from the assembly line as soon as they become pregnant would substantially reduce the potential harm that a mother's exposure could cause the fetus.⁵³

Moreover, Johnson Controls could have delivered clearer information on the risks of exposure and on how an individual worker could reduce those risks. Informing women that it was dangerous to become pregnant while working in a lead-tainted environment was company policy between 1977 and 1982, when the fetal hazards rule went into effect.⁵⁴ Exposure while pregnant is as risky as smoking, ran the message,⁵⁵ but this was a weak scare at a time when the dangers of smoking while pregnant were not widely ap-

49. *Johnson Controls*, 886 F.2d at 907 (Posner, J., dissenting).

50. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986, at 57 (1985) (listing 1983 rates); Jeanne M. Stellman & Mary S. Henifin, *No Fertile Women Need Apply, in BIOLOGICAL WOMAN—THE CONVENIENT MYTH* 117, 120 (Ruth Hubbard et al. eds., 1982).

51. *Johnson Controls*, 886 F.2d at 919 (Easterbrook, J., dissenting).

52. *Id.* at 877.

53. *Id.* at 915 n.10 (Easterbrook, J., dissenting) (quoting Dr. J. Julian Chisolm); see *supra* note 35.

54. *Johnson Controls*, 886 F.2d at 876.

55. *Id.* at 907 (Posner, J., dissenting).

preciated.⁵⁶ Just eight employees, out of some 275 female workers, became pregnant with blood lead levels in excess of thirty micrograms per deciliter; although one of the infants had elevated lead levels, no birth defects were reported.⁵⁷ Although this record is hardly evidence of a failed policy, the company nonetheless treated its efforts as a failure.

Differentiating among workers according to their individual levels of lead concentration was yet another possible company strategy that went untried. Although a particular person's blood lead levels might exceed Johnson Controls' trigger for exclusion, most workers doing the same job will have lower lead levels—indeed, at any given work station, these concentrations may range from less than ten to more than forty.⁵⁸ Such differences are primarily related to employees' personal hygiene and their willingness to use an ungainly but effective respirator, which OSHA requires employers to offer all workers in high-lead areas.⁵⁹ By taking these variations into account—treating female workers as individuals, rather than defining them as walking wombs—companies could have avoided holding all women on the plant floor to the standard of the least health conscious.

C. *The Risk Pool*

Although each of these policy alternatives represents a way to reduce risk, the company's rule implies that zero risk—more precisely, zero risk of fetal harm attributable to on-the-job exposure to lead—represented the only acceptable risk level. Supporters of the fetal vulnerability rule have situated themselves on moral high

56. See Marjorie Williams, *Feminism's Unaddressed Issue: Health Risks to Women Who Smoke*, WASH. POST, Nov. 14, 1991, at A16.

57. International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1199-200 (1991). In oral argument, Stanley Jaspan, Johnson Controls' counsel, specified that the company had 275 women workers in 1984; remarkably, data on the number of women workers during the period when the warning was in effect were unavailable. Tr. of Oral Argument at 24, International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (No. 89-1215) [hereinafter Tr. of Oral Argument].

58. Telephone Interview with Joan Bertin, Women's Rights Project, ACLU (Feb. 1990) [hereinafter Bertin Interview]; Telephone Interview with James Cox, Plant Manager of Johnson Controls' Fullerton, California plant (Feb. 1990) [hereinafter Cox Interview]; Culver Interview, *supra* note 16.

59. See 29 C.F.R. § 1916.1025 (1991).

ground as the defenders of future generations. Employers are "ethically compelled to contribute to protecting their employees' offspring,"⁶⁰ the United States Catholic Conference asserted. Johnson Controls maintained that even one child born developmentally disabled would be a very grave injustice and a moral risk that they could not countenance.⁶¹

Although one might imagine from these posturings that the women who work at companies like Johnson Controls have the capacity to exercise judgment little better than a rabbit's, that is, of course, light years removed from reality. These women have an intimate appreciation of the risks. But they also know a different and more complex truth: *there can be no freedom from all risk, only an individual calculation of net risk*. For them, life is lived in the risk pool. They have chosen to work around lead or some other toxic substance, not out of selfishness or a misguided sense of liberation, as their corporate and clerical critics charge, but because they had already had their children, or because they were not intending to become mothers, or because they planned to stop assembling batteries before becoming pregnant, or because they believed the OSHA standard delivered reasonable assurance that having a child was safe even for a woman working on the line.⁶²

Most of the women at Johnson Controls would not describe themselves as feminists. "They are the most traditional women you would want to meet,"⁶³ says the ACLU's Joan Bertin, who, since the days of the *American Cyanamid* litigation, has witnessed how they calibrate their lives.⁶⁴ They are "traditional in their politics, their sense of men's and women's roles. But their jobs also offered them a sense of independence and self-confidence that was missing in other parts of their lives."⁶⁵

Compared to the realistic alternatives—filing forms in an office, dishing up hamburgers at McDonald's, or collecting welfare checks—jobs in the battery plant brought double and triple the

60. Amici Curiae Brief of the United States Catholic Conference, in Support of Respondent at 13, *Johnson Controls* (No. 89-1215).

61. See Appendix to Petition, *supra* note 35.

62. See *supra* text accompanying notes 15-28.

63. Bertin Interview, *supra* note 58.

64. *Id.*

65. *Id.*

hourly wages, delivered better health care benefits, and caused less stress. "What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored?" asked Judge Cudahy in his dissent in *Johnson Controls*.⁶⁶ "Whose fetus is at greater risk? Whose decision is this to make?"⁶⁷

Johnson Controls' officials regarded such concerns as entirely irrelevant. "If there is a greater risk, that's not our concern,"⁶⁸ responded the company's lawyer, Stanley Jaspan, to questioning during the appellate argument about these workers' prospects elsewhere. However, for the body in question, the fetus, it is surely the fact of risk, not its source, that matters.

D. *The Narrow Laws of the Corporate Policy Makers*

These very different perspectives on the character of risk went unheard by the people who shaped corporate policy at Johnson Controls. All the audible voices—the foremen, doctors, and lawyers—were urging the exclusion of women from the shop floor, even as they offhandedly dismissed the very real possibility that men as well as women might be vectors of toxic transmission to the fetus.⁶⁹

During the 1970s, businesses like Johnson Controls came under pressure from the federal government to hire women for their historically all-male line jobs.⁷⁰ Changing policies, however, did not necessarily alter attitudes, and many workers remained unhappy to see women taking these "men's work" jobs. At American Cyanamid, which as late as 1973 had no women working on its production lines, new female employees encountered a stencilled message, "Shoot a Woman, Save a Job,"⁷¹ and supervisors reportedly said

66. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 902 (7th Cir. 1989) (en banc) (Cudahy, J., dissenting), *rev'd*, 111 S. Ct. 1196 (1991).

67. *Id.*

68. *Id.* at 918 (Easterbrook, J., dissenting).

69. Bertin Interview, *supra* note 58; Cox Interview, *supra* note 58.

70. See FALUDI, *supra* note 24, at 438; see also Bertin Interview, *supra* note 58; Interview with Marsha Berzon, plaintiff's counsel in *Johnson Controls* (Jan. 1990) [hereinafter Berzon Interview].

71. FALUDI, *supra* note 24, at 443.

that, "one way or another,"⁷² the company would get rid of the women it had been pushed into hiring. Reliance on fetal protection offered these foremen an easy, sanitized escape hatch.

Company doctors looked at the issue from a very different perspective. They had learned in medical school about fetal hazards stemming from maternal exposure to lead.⁷³ Although some of these physicians had earlier argued that OSHA's maximum permissible levels of workers' exposure to lead were unnecessarily stringent,⁷⁴ they believed that fetuses were somehow different. Protecting women from potential toxic exposure was surely medically prudent. To do otherwise, some thought, was to court a medical malpractice suit.⁷⁵

The concerns of the company lawyers, who contended that multi-million dollar lawsuits were likely to be filed on behalf of damaged fetuses, carried the greatest weight inside the corporate precincts.⁷⁶ If this practical worry did not launch the search for moral qualms, it certainly bolstered them. Such tort liability was theoretically conceivable because the workmen's compensation system, which bars employees from suing on their own behalf,⁷⁷ does not foreclose litigation on behalf of fetuses. In fact, however, the corporation's legal risk was more theoretical than real. Very few plaintiffs actually have brought such cases; the single case involving a female employee resulted in a judgment for the company, even though the company had violated OSHA standards.⁷⁸ The difficulty of demonstrating a causal link between exposure to a toxic substance and some later harm, as shown by the protracted

72. Bertin Interview, *supra* note 58.

73. Culver Interview, *supra* note 16.

74. For a discussion of OSHA's standards and the reaction to them by Johnson Controls, see generally Brief for Respondent, *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (No. 89-1215) [hereinafter Brief for Respondent].

75. Culver Interview, *supra* note 16.

76. Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1243-47 (1986).

77. See ELMER H. BLAIR, *REFERENCE GUIDE TO WORKMEN'S COMPENSATION* 2-1 to 2-2 (1968).

78. *Security Nat'l Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D. Kan. 1985). Notably, potential liability for fetal damage is not limited to women. See Becker, *supra* note 76, at 1245 n.120 (discussing complaints involving male exposure to the chemical dibromochloropropane).

Agent Orange litigation,⁷⁹ may explain this paucity of litigation. Moreover, as a matter of familiar tort principle, it seems unlikely that a corporation that followed OSHA standards and fully informed its workers of the possible risks could be found liable.

Yet the economics of the bottom line, coupled with talk about high principle, made the company's decision look easy. By keeping women off the shop floor, Johnson Controls suffered no competitive disadvantage, since firms such as Dow, DuPont, Goodrich, and General Motors were doing exactly the same thing.⁸⁰ With no one in these rarified corporate environs to describe the realities of the risk pool, and no one to argue from the workers' viewpoint, discrimination came to seem entirely rational—even genuinely humane. Aside from the expenses of defending “nuisance” suits, such as the UAW's case, the costs of the company's policy appeared to fall entirely on the other side of the ledger.

E. Unnoticed Risks

Sounding morally and medically superior is easy when, as at Johnson Controls, women are marginal workers. As the UAW pointed out in its Supreme Court brief: “In male-dominated industries, there is, from the employer's point of view, little disadvantage to excluding fertile female workers, since male workers are readily available to fill the positions.”⁸¹ Expressions of corporate concern for the plight of fetuses, however, have been highly selective. Businesses that depend heavily on women workers have been much less scrupulous about the dangers they impose on the unborn;⁸² and firms like Johnson Controls, which rely mostly on male workers, have too quickly discounted the possibility that men's, as well as women's, exposure to high lead levels might put the fetus at risk.

Although laundries and dry cleaners use carbon disulfide and benzene, dental offices are often contaminated with mercury, and

79. See PETER H. SHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

80. See Ronald Bayer, *Reproductive Hazards in the Workplace: Bearing the Burden of Fetal Risk*, 60 MILBANK MEMORIAL FUND Q. 633, 635-36 (1982).

81. Brief for Petitioners at 36-37, *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (No. 89-1215).

82. See *id.* at 37.

laboratories frequently expose workers to benzene and other potentially dangerous toxics, employers in these "women's work" enterprises have not introduced Johnson Controls-type rules.⁸³ Cytomegalovirus (CMV) is perhaps the clearest example of a substance, harmless to men, which cannot be transmitted through sperm to a fetus, but which poses a severe risk to the fetus if the mother is exposed during pregnancy.⁸⁴ Young children pass the virus to pregnant women who then pass it to their fetuses, where it can wreak awful neurological damage. Unlike dibromochloropropane (DBCP), which companies stopped using once it became apparent that the pesticide caused male sterility,⁸⁵ CMV cannot be eliminated.⁸⁶ Yet while the risk of contracting CMV is greatest among women who work in day care centers,⁸⁷ no one has proposed a fetal hazards policy for day care—there is no one else to fill these jobs.

Johnson Controls' policy on toxic risk also shaped the lives of some of the men who worked for the company. In 1984, Donald Penney and his wife Anna May, who worked at Johnson Controls' Wilmington, Delaware plant, decided to start a family.⁸⁸ The Penneys had read about how fathers as well as mothers conceivably could inflict lead poisoning upon the fetus. Anna May was safe because she had a job in a low-lead part of the plant, but Donald, a mechanic, often worked in the high-lead sections. He asked for a three month unpaid leave of absence to be reasonably sure he would father a healthy child. Although leaves were commonplace in the factory, the company bluntly rejected Penney's request. In

83. See NANCY M. CHENIER, *REPRODUCTIVE HAZARDS AT WORK* 44-45 (1982); James C. Hyatt, *Protection for Unborn? Work-Safety Issue Isn't as Simple as It Sounds*, *WALL ST. J.*, Aug. 2, 1977, at 1.

84. Stuart P. Adler, *Cytomegalovirus and Child Day-Care Workers*, 321 *NEW ENG. J. MED.* 1290, 1290-91 (1989).

85. See OFFICE OF TECH. ASSESSMENT, *supra* note 26, at 75-76.

86. Adler, *supra* note 84, at 1290.

87. *Id.* at 1291-92.

88. See Testimony of Donald Penney, *cited in* Amici Curiae Brief of Trial Lawyers for Public Justice, in Support of Petitioners, *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (No. 89-1215) [hereinafter Penney Testimony]. The following discussion is also based in part on Donald Penney's deposition. Berzon Interview, *supra* note 70; Telephone Interview with Carin Clauss, Professor of Law, Univ. of Wisconsin (Jan. 1990).

his complaint, Penney said that the personnel director berated him for even raising the idea, telling him to quit if he felt that way.⁸⁹

Another individual who had worked for nearly a quarter of a century around toxins (the ACLU's amicus curiae brief in *Johnson Controls* called him John Doe 1) reported that only three of his five children were still alive; one was stillborn and another developed cancer early in life.⁹⁰ He blamed the toxins:

A lot of men have a hard time relating their chemical exposures to their own health problems or those of their children. Men just assume that during a pregnancy the health of a baby can only be affected by something the mother is exposed to. I also think for economic reasons this issue is a hard one. . . . You might say we're sort of caught between a rock and a hard place. Some men prefer to ignore the health issue and just gamble that they or their children won't get sick.⁹¹

Although a mother can pass toxins to the fetus directly, the link between father and fetus is more remote and, because less well studied, more speculative.⁹² It is well known that, at high lead levels, sperm as well as ova can become misshapen.⁹³ It is uncertain whether those sperm remain fertile, however, and, if so, whether this sperm damage translates into the chromosomal damage that means brain-damaged offspring.⁹⁴ In answering the pertinent policy question of what to make of this uncertainty, corporations have depended more on perceptions of sex roles than on the findings of science. Pennzoil, a leading petroleum company, insisted that the matter was not even worth looking into because "[n]o amount of

89. Penney Testimony, *supra* note 88.

90. ACLU Amicus Brief, *supra* note 35, at A-63 to -64.

91. *Id.* at A-64 to -65.

92. See Chris Winder, *Reproductive and Chromosomal Effects of Occupational Exposure to Lead in the Male*, 3 REPRODUCTIVE TOXICOLOGY REV. 221 (1989) (reviewing studies on the link between fathers and fetuses). The author concludes that "[a] unisexual workplace lead policy which excludes only women from exposure to occupational lead hazards leaves male employees relatively unprotected from the harm that may be associated with paternal lead exposures." *Id.* at 230. In an accompanying editorial, the journal took the unusual step of criticizing that article, citing with approval the district court's opinion in *Johnson Controls*. Anthony R. Scialli, *Sexism in Toxicology*, 3 REPRODUCTIVE TOXICOLOGY REV. 219, 219-20 (1989).

93. See Winder, *supra* note 92, at 221-22.

94. See Scialli, *supra* note 92, at 219.

legislation or regulation can equalize the risks associated with the reproductive cycle.' ”⁹⁵ Testifying in Queen Elizabeth Foster’s case, a corporate physician rather cavalierly characterized the situation: “If you don’t look for a problem, you don’t find it.”⁹⁶ The doctors at Johnson Controls, who described themselves as ultraconservative about female workers, dismissed the evidence on risk from male-to-fetus transmission as simply too speculative.⁹⁷ They did so despite OSHA’s determination that, at high levels, lead is potentially dangerous to the newborn, whether carried by the father or the mother.⁹⁸

The preeminence of market values, rather than ethical principles or medical norms, explains why day-care centers employ pregnant women—and also why Johnson Controls treated Donald Penney’s request for a leave of absence as a hostile act. “Johnson Controls standards of ethics provide that it will not engage in any activity . . . that threatens the physical well-being of any person,”⁹⁹ the company declared in a press release, while insisting that there was no alternative to lead-acid batteries and therefore no way significantly to reduce workplace risks.¹⁰⁰ A far less toxic battery could in fact be made, but only at substantially greater cost. Keeping women from manufacturing batteries is cheaper than changing the process of manufacture. For supposedly indispensable male workers, employers calculate costs differently. Cost is not the only relevant consideration, however. Were it otherwise, Title VII would not be on the books to safeguard individual rights even against—*especially* against—efficient forms of discrimination.¹⁰¹

95. Bayer, *supra* note 80, at 645 (quoting Pennzoil Company).

96. Johnson Controls, Inc. v. California Fair Employment and Hous. Comm’n, 267 Cal. Rptr. 158, 168 (Cal. Ct. App. 1990).

97. Culver Interview, *supra* note 16.

98. Rebecca L. Rawls, *Reproductive Hazards in the Workplace*, CHEMICAL & ENGINEERING NEWS, Feb. 11, 1980, at 28, 36.

99. Background: Johnson Controls Fetal Protection Policy (July 1989) (unpublished corporate memorandum).

100. *Id.*

101. See 42 U.S.C. § 2000e-1 to -17 (1988).

III. FETAL PROTECTION IN THE COURTHOUSE, PART ONE: THE SEVENTH CIRCUIT

The social distance separating the factory floor from the federal courthouse is measurable.¹⁰² In June 1989, when counsel argued *International Union, UAW v. Johnson Controls, Inc.*¹⁰³ before the judges of the Court of Appeals for the Seventh Circuit, sitting en banc, the narratives that gave rise to the litigation were not discussed. According to the record, Virginia Green was just someone who had signed her name to a brief, colorless, ghost-written account of her life; and Dr. Charles Fishburn was a neutral expert, not a company man. There was never a trial, just a series of attorneys' arguments, a pile of depositions with their simplified stories and lawyer-polished rationales, and a motion for summary judgment that the Seventh Circuit affirmed three months later.¹⁰⁴

Moments before the beginning of that oral argument, Judge John Coffey, who would write the majority opinion in the case, leaned over the bench toward the attorneys and said, "[t]his is about the women who want to hurt their fetuses."¹⁰⁵ Coffey's perspective—that, more judiciously put, only a self-centered woman would choose to work in an environment that might menace her future offspring—echoed the sentiments of the corporation. There is no place in this calculus for women's choices because there are no choices for women to make. Would we grant mothers the right to take away their child's curiosity, the argument runs; do mothers have the right to starve a child's brain? A woman's insistence on her right to make batteries becomes a selfish pleasure, morally indistinguishable from her maintaining a drug habit. Both women are child abusers—or so the judge's comment implies.

"The danger of certainty is that it turns against the generous impulse to open oneself up to the other, and to truly listen, to risk the chance that we might be wrong."¹⁰⁶ Misplaced certainty, a blunt refusal to hear an unfamiliar voice, shaped Coffey's opinion,

102. Cf. DEBORAH L. RHODE, *JUSTICE AND GENDER* 181 (1989) ("Upper-level employment litigation 'confronts courts with their own worlds.'").

103. 886 F.2d 871 (7th Cir. 1989) (en banc), *rev'd*, 111 S. Ct. 1196 (1991).

104. *Id.*

105. David L. Kirp, *The Pitfalls of 'Fetal Protection,'* 28 Soc. 70, 70 (1991).

106. Drucilla Cornell, *The Poststructuralist Challenge to the Ideal of Community*, 8 CARDOZO L. REV. 989, 1018 (1987).

which offered a textbook example of "using stereotypes as though they were real."¹⁰⁷ That opinion oversimplified a treacherous policy terrain marked at every juncture by competing interests and obligations—a terrain not well mapped by either the sextants of discrimination or benign paternalism.

The appellate court cast its opinion in *Johnson Controls* as an uncontroversial ruling that applied prevailing legal standards to the facts at hand. Yet as Judge Coffey acknowledged, relatively little existed in either the language of the statute or the "developed theories"¹⁰⁸ to guide the analysis. Congress added Title VII's ban on sex discrimination in 1964 as an undiscussed afterthought—a *reductio ad absurdum*, some believed—to legislation that had focused on race.¹⁰⁹ Although the 1978 Pregnancy Discrimination Act¹¹⁰ specifies that discrimination because of sex includes discrimination based on pregnancy "or related medical conditions,"¹¹¹ it remained possible to contend that cases about fetal hazards made up a distinct class of their own.

The difficulties posed by *Johnson Controls* involve more than the familiar problem of having to reach a decision with modest guidance from either statutory text or case law. A fuller appreciation of the issue at hand—one that goes beyond the cumbersome legal framework—requires an assessment of how to arrive at a just decision in the face of enduring uncertainty, as well as determining whom to entrust with making such decisions. It also entails assessing whether there exists some other way of casting the question, which does not pit the individual against the corporation. Even though Judge Coffey acknowledged the limitations of conventional legal analysis,¹¹² his opinion buried matters of principle under a flawed and disingenuous discussion of highly technical points of law, summoned to justify a supposedly benevolent paternalism.

107. Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 51 (1987).

108. *Johnson Controls*, 886 F.2d at 884 (quoting *Wright v. Olin Corp.*, 697 F.2d 1172, 1184 (4th Cir. 1982)).

109. Michael L. Sirota, *Sex Discrimination, Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1027 (1977).

110. 42 U.S.C. § 2000e(k) (1988).

111. *Id.*

112. See *supra* note 108 and accompanying text.

The result was a ruling that failed the jurisprudential test of coherence—substituting what one dissenter called “result-oriented gimmickery”¹¹³ for reasoning—and also failed the broader test of the public good.

Nondiscrimination is the touchstone but not the absolute rule of Title VII.¹¹⁴ Sex-based exceptions on the grounds of “business necessity”¹¹⁵ are warranted, the appellate majority in *Johnson Controls* contended, if an otherwise sensible and humanely motivated policy—in this case, one that equally promotes the health of the offspring of both sexes—happens to affect men and women differently.¹¹⁶ The majority reasoned backwards from result to rationale, arguing that the benefits promised by the fetal hazards policy were reason enough to treat the policy as if it were sex-neutral.¹¹⁷

As the dissenters noted, though, any claim of “business necessity” is legally irrelevant when an employment policy explicitly singles out one sex for exclusion.¹¹⁸ Although even such straightforward sex discrimination is sometimes permissible in the statutory scheme of things, *Johnson Controls* would have had to show that sterility was a “bona fide occupational qualification *reasonably* necessary to the *normal* operation”¹¹⁹ of the business, a defense narrowly written by Congress and narrowly construed by the Supreme Court.¹²⁰ The dissenters also pointed to the Pregnancy Discrimination Act,¹²¹ which specifies that, unless pregnant workers differ from others in their “ability or inability to work”¹²² rather

113. *Johnson Controls*, 886 F.2d 871, 902 (7th Cir. 1989) (en banc) (Cudahy, J., dissenting), *rev'd*, 111 S. Ct. 1196 (1991).

114. See, e.g., John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1439-41 (1991) (outlining the judicially developed tests regarding race and gender under Title VII).

115. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

116. *Johnson Controls*, 886 F.2d at 883-93.

117. See *id.* at 888-93.

118. *Id.* at 913-14 (Easterbrook, J., dissenting).

119. *Id.* at 902 (Posner, J., dissenting) (emphasis added) (citing 42 U.S.C. § 2000e-2(e)(1)).

120. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (stating that defense was not applicable to height and weight requirements for prison guards); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding that employers may not refuse to hire women with pre-school children in favor of hiring men).

121. 42 U.S.C. § 2000e(k) (1988).

122. *Johnson Controls*, 886 F.2d at 909 (Easterbrook, J., dissenting).

than their greater susceptibility to some non-work-related harm, they must be treated like everyone else.¹²³

The majority dismissed these distinctions among the varieties of discrimination as a form of "semantic quibbling,"¹²⁴ which ignored vital differences between a company whose policy showed stereotypical distaste for women and a firm, like Johnson Controls, which was acting as a responsible citizen.¹²⁵ The "business" of Johnson Controls, to which an occupational qualification applied, was not just making batteries, said the majority, but also included protecting future generations.¹²⁶ This contention legitimated fetal hazards policies by effectively rewriting the statute to take into account what the judges saw as a unique situation not contemplated by the legislators.¹²⁷

Subordinating legal formalism to social justice is neither unique nor necessarily disturbing. Yet in this instance, the majority's view of justice was so fixated on the mother as a vessel of reproduction that the judgment actually protected no one. Judge Coffey's appraisal of the evidence revealed this fixation in action. As a framework for decision, both sides accepted that the company's rule was legally unacceptable discrimination unless the firm could show: (1) that a substantial risk of harm existed; (2) that the risk was borne only by members of one sex; and (3) that the employee failed to show that any acceptable alternative policies would have a lesser impact on the affected sex.¹²⁸

Neither party disputed the first point, that exposure to lead could harm fetuses.¹²⁹ Keeping only women, and all fertile women, from the workplace presumably called for scientific proof of the kind of harm that might justify such a policy, but Judge Coffey resorted to legal trickery to finesse that requirement. Misreading Supreme Court precedent, he shifted the burden of proof to the

123. *Id.*

124. *Id.* at 884 (quoting *Wright v. Olin Corp.*, 697 F.2d 1172, 1186 (4th Cir. 1982)).

125. *Id.*

126. *Id.* at 896-97.

127. *Id.* at 900-01.

128. *Id.* at 884-85 (citing *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1554 (11th Cir. 1984)). The dissenting opinions by Posner and Easterbrook also relied on this standard in describing the application of fact to law. *Id.* at 903 (Posner, J., dissenting); *id.* at 915 (Easterbrook, J., dissenting).

129. *Id.* at 888.

plaintiffs; then Judge Coffey determined that the plaintiffs had not proven that an alternative policy would be "equally effective"¹³⁰ in eliminating the hazard because "the challenged [policy] is based upon the reality that only the female of the human species is capable of childbearing"¹³¹ and nothing short of exclusion would have the desired effect.

A demonstration that fathers as well as mothers could transmit lead to their offspring would have undercut the argument, critical to Johnson Controls' case, that even though the company's rule singled out mothers it assured equal treatment for all employees' children. In fact, the record contained evidence of such paternally mediated transmission.¹³² Although the studies involving humans were limited, dated, and flawed, findings from animal studies had impressed OSHA.¹³³ But they did not convince Judge Coffey, who disdained the research on animals as not constituting "solid scientific data,"¹³⁴ by its very nature too "speculative and unconvincing."¹³⁵ This conclusion had to startle the scientific community—as well as OSHA and the FDA, which routinely rely on animal research because it is often the best predicate for decision.¹³⁶

The implausibility of this "don't confuse me with the facts" approach to the evidence hints at another explanation for Judge Coffey's refusal to acknowledge that males might be vectors of risk—an explanation linked to the judge's fixation with "the physical facts of sex, not social considerations of gender"¹³⁷ and his conceptualization of the case as involving "women who want to hurt their fetuses."¹³⁸ The resulting analysis demanded guarantees of

130. *Id.* at 892 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989) (emphasis added)).

131. *Id.* at 883.

132. *Id.* at 889; see also *United Steelworkers v. Marshall*, 647 F.2d 1189, 1256-58 (D.C. Cir. 1980) (describing as "abundant" the evidence for the proposition that lead injures the male, as well as the female, reproductive system).

133. See *United Steelworkers*, 647 F.2d at 1257-58.

134. *Johnson Controls*, 886 F.2d at 889.

135. *Id.*

136. The Supreme Court has concluded that the Food and Drug Administration may rely upon animal studies. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 657 n.64 (1980).

137. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 264 (1992).

138. See *supra* note 105 and accompanying text.

zero risk to the fetus when it came to women workers—an impossible expectation—while dismissing men's health concerns.

Like the company's "fetal protection" policy, this judicial double standard has less to do with the law or the evidence than with a conception of women's role in the workplace that echoes turn-of-the-century arguments for protecting women workers. Johnson Controls' fetal hazards policy represents paternalism, not in its familiar contemporary form of protecting individuals against marketplace excess,¹³⁹ but in its older guise of barely veiled sexism.

A famous legal brief filed three-quarters of a century ago by Louis Brandeis in support of a New York law forbidding the employment of women for night-shift factory work¹⁴⁰ detailed the hazards to which night work would expose them: the terrible consequences of "deprivation of sunlight,"¹⁴¹ the difficulty of getting enough rest during the day,¹⁴² the high mortality rates among night workers,¹⁴³ the dangers that might befall women walking home in the dark,¹⁴⁴ and the hardships of combining motherhood and night work.¹⁴⁵ Night work was hard on men too, Brandeis acknowledged, brutalizing them,¹⁴⁶ often robbing them of a real home life,¹⁴⁷ and delivering them to drink;¹⁴⁸ but *someone* had to do the work. "Ignorant women can scarcely be expected to realize the dangers not only to their own health but to that of the next generation from such inhuman usage."¹⁴⁹ Women needed to save

139. The rationale for OSHA's maximum lead-exposure standards is protection of individuals against marketplace excesses. See 29 C.F.R. § 1910.1025 (1991).

140. A summary of "Facts of Knowledge" Submitted on Behalf of the People in Support of its Brief, *People v. Charles Schweinler Press*, 108 N.E. 639 (N.Y. 1915) (prepared by Louis D. Brandeis and Josephine Goldmark) (the following discussion of "Facts of Knowledge" is based on excerpts reprinted in Becker, *supra* note 76, at 1223-24, and draws upon Becker's analysis).

141. *Id.* at 97-111.

142. *Id.* at 54-96.

143. *Id.* at 111-55.

144. *Id.* at 252-60.

145. *Id.* at 121, 125, 138-39, 141, 174-97, 213-26.

146. *Id.* at 232-33.

147. *Id.* at 219.

148. *Id.* at 232-33.

149. *Id.* at 175-76.

their strength for the next generation, Brandeis contended.¹⁵⁰ All that truly mattered was the biological imperative.

Similar arguments lie behind modern fetal hazards policies. Then and now, mostly "bottom line" concerns have motivated corporate policy. In Brandeis' day, because a ready supply of men was available to fill night-work factory jobs, women became dispensable; but female nurses were too badly needed to be eased out in the name of protection, and so New York's law made an exception for night nurses.¹⁵¹ Similarly, contemporary arguments for fetal protection most often prevail at companies like Johnson Controls, where there are men ready to do the work.¹⁵²

Inequality between the sexes has been institutionalized in this way in order to promote competitive advantage in the marketplace—then sanitized as a safeguard for the unborn, the unconceived, and even those unlikely ever to be conceived. Meanwhile, women who demur from such judgments must submit to the amateur psychologizing of male judges. "Since [women] have become a force in the workplace," Judge Coffey wrote, "it would not be improbable that a female employee might somehow rationally discount this clear risk [to her prospective children] in her hope and belief that her infant would not be adversely affected"¹⁵³

The deeper problems posed by the fetal hazards rule surfaced in the Seventh Circuit dissenting opinions. Although the existing policy is overly broad, said Judge Posner, not all fetal hazards rules would necessarily fail the test of business necessity.¹⁵⁴ Facts about relative risk, choice, and feasible alternatives—facts missing from the record—would be critical in giving meaning to the concept of a "normal" business operation.¹⁵⁵ "It is possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be

150. *Id.* at 8, 490.

151. JEANNE M. STELLMAN, *WOMEN'S WORK, WOMEN'S HEALTH* 176-77 (1977).

152. See Maureen Paul et al., *Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey*, 16 AM. J. INDUS. MED. 267 (1989) (reporting higher incidence of policies excluding female workers in male-dominated industries).

153. International Union, UAW v. Johnson Controls, Inc., 886 F.2d. 871, 897 (7th Cir. 1989) (en banc), *rev'd*, 111 S. Ct. 1196 (1991).

154. *Id.* at 906 (Posner, J., dissenting).

155. *Id.* at 906-07 (Posner, J., dissenting).

possible to make batteries with slave laborers, but neither mode of operation would be normal,"¹⁵⁶ Posner jibed. In his view, "normal" could encompass "civilized, humane, prudent, ethical"¹⁵⁷ concerns as well as those of cost and quality.¹⁵⁸

Judge Easterbrook in his dissent also acknowledged the "great complexity"¹⁵⁹ of the matter, but he read the law's command much more narrowly. In his view, when the question is the permissibility of keeping women off the job, the statute's exception for "normal" business operations¹⁶⁰ is not a license for an employer to express "concern for the welfare of the next generation."¹⁶¹ Paternalism had no place in Easterbrook's assessment of existing antidiscrimination law, which leaves the hard choices between health and career, and between generations, entirely with the woman.¹⁶² That reading eventually prevailed in the Supreme Court.¹⁶³ Although it does not lack legal plausibility, it offers at best an incomplete guide to social justice.

IV. FETAL PROTECTION IN THE COURTHOUSE, PART TWO: THE SUPREME COURT

The Supreme Court made quick work of the arguments that had persuaded three circuit courts: that fetal vulnerability policies were gender-neutral because they promoted the welfare of future generations¹⁶⁴ or that gender specificity was defensible in the name of fetal protection because only women could transmit lead to the fetus.¹⁶⁵ Specifically recalling the story of Donald Penney, who wanted to father a child but had been refused unpaid leave by the company, the majority opinion noted that "[t]he bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are

156. *Id.* at 904 (Posner, J., dissenting).

157. *Id.*

158. *Id.* at 906 (Posner, J., dissenting).

159. *Id.* at 908 (Easterbrook, J., dissenting).

160. *Id.* at 912 (Easterbrook, J., dissenting).

161. *Id.*

162. *Id.* at 915 (Easterbrook, J., dissenting).

163. *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991).

164. *See Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1548 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172, 1186 (4th Cir. 1982).

165. *See Johnson Controls*, 886 F.2d at 886.

given a choice as to whether they wish to risk their reproductive health for a particular job."¹⁶⁶

Fetal hazards rules could be justified only as a sex-based employment policy under the bona fide occupational qualification provisions of Title VII. According to the majority, the term "occupational" should not be interpreted as meaning whatever an employer decided was related to a job, as Justice White's concurring opinion proposed,¹⁶⁷ because that reading would effectively gut the law; it relates only to qualifications that touch "the core of the employee's job performance."¹⁶⁸ The fetal hazards rule failed this test because it was aimed at a social, not an occupational concern, and did not reflect an interest in safety related to the "'essence'"¹⁶⁹ or "'central mission of the employer's business.'"¹⁷⁰ Although the claims of unconceived fetuses are socially important, said the Justices, they are legally irrelevant, because fetuses are neither employees nor "customers nor third parties whose safety is essential to the business of battery manufacturing."¹⁷¹ Even if "hiring fertile women will cost more,"¹⁷² that fact would not be a legitimate reason to discriminate against them.¹⁷³ Nor did the specter of tort liability justify the company's fetal hazards policy; practices consistent with Title VII cannot give rise to liability under state law, the majority opinion intimated.

The text of the Pregnancy Discrimination Act of 1978,¹⁷⁴ with what amounts to its own bona fide occupational qualification test, offers independent support for the proposition that "ability or inability to work"¹⁷⁵ is the only possible reason to treat pregnant or potentially pregnant employees differently. That Act has been interpreted as meaning that an employer legally cannot order a pregnant woman to stop working late during pregnancy out of concern

166. *Johnson Controls*, 111 S. Ct. at 1202.

167. *Id.* at 1210 n.1 (White, J., concurring).

168. *Id.* at 1206.

169. *Id.* at 1205 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977)).

170. *Id.* at 1205 (quoting *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)).

171. *Id.* at 1206.

172. *Id.* at 1209.

173. *Id.*

174. 42 U.S.C. § 2000e(k) (1988).

175. *Id.*

for the welfare of an actual fetus.¹⁷⁶ Surely, then, Johnson Controls could not keep Queen Elizabeth Foster, who was not pregnant, off the battery-making line because the corporation feared possible fetal hazards; nor could the company do so to Ginny Green, who had no intention of ever again becoming pregnant.¹⁷⁷ The Court read the law as embracing a classic liberal conception of choice. "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."¹⁷⁸

At the turn of the century, in *Muller v. Oregon*,¹⁷⁹ the Supreme Court gave its legal blessing to special rules for female workers—rules the Court regarded as benevolently motivated protection, but which operated as a handicap to women in the labor market. "[T]his [fetal] health risk [is] quite different from the concerns in *Muller v. Oregon*, which we would currently characterize as stereotypical rather than real,"¹⁸⁰ Judge Coffey contended in his appellate opinion, but the Supreme Court begged to differ. Pointedly citing *Muller*, Justice Blackmun observed that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."¹⁸¹

Although *Johnson Controls* marked a real advance in social consciousness, it failed to acknowledge that delivering choice is not always the same as delivering social justice. It only posed new dilemmas for workers and for the society—dilemmas to which paeans to volition offer an inadequate response.

Some years before the judgment in *Johnson Controls*, Betty Riggs at American Cyanamid had "chosen" sterilization as a lesser evil to losing her well-paying job.¹⁸² To Judge Robert Bork, who in 1984 had ruled in favor of that company's fetal hazards policy,¹⁸³

176. See S. REP. NO. 331, 95th Cong., 1st Sess., 4-6 (1977).

177. See *supra* text accompanying notes 15-23.

178. International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1207 (1991).

179. 208 U.S. 412 (1908).

180. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 898 (7th Cir. 1989) (en banc), *rev'd*, 111 S. Ct. 1196 (1991).

181. *Johnson Controls*, 111 S. Ct. at 1210.

182. See *supra* text accompanying notes 24-28.

183. Oil, Chem. and Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984).

this was a meaningful decision. "I suppose the five women who *chose* to stay on that job with higher pay and *chose* sterilization—I suppose that they were glad to have the *choice*,"¹⁸⁴ he said during his 1987 Supreme Court confirmation hearings. Betty Riggs thought otherwise. "I cannot believe that Judge Bork thinks we were glad to have the choice of getting sterilized or getting fired,"¹⁸⁵ she stated in a telegram to the Senate Judiciary Committee. "Only a judge who knows nothing about women who need to work could say that."¹⁸⁶

The *Johnson Controls* decision has eliminated such Hobson's choices, and wisely so, but the Court's opinion, and the rigid framework of antidiscrimination law within which it operates, leave other hard choices in the hands of economically vulnerable workers. In the name of civil rights, this generation's Betty Riggses can insist on working in toxic settings, even if doing so conceivably means jeopardizing the health of their future offspring.

"By reason of the Pregnancy Discrimination Act, it would not matter if all pregnant women placed their children at risk in taking these jobs, just as it does not matter if no men do so,"¹⁸⁷ Justice Scalia wrote in *Johnson Controls*. That bluntly phrased proposition is correct in its refusal to define women entirely as the vessels of reproduction that the Supreme Court in *Muller* more than three-quarters of a century ago and, latterly, Judge Coffey would have them be. It may represent "selecting the least evil [legal] option."¹⁸⁸ But, the hardest questions remain. Is this a wise and fair rule, or instead a confession that reasoning about equal rights—constitutional reasoning—does not begin to resolve the deeper concerns about health and security for the men and women of this and future generations?

184. S. EXEC. REP. No. 7, 100th Cong., 1st Sess. 309 (1987) (quoting Judge Bork in his testimony before the Judiciary Committee) (emphasis added).

185. FALUDI, *supra* note 24, at 450.

186. *Id.*

187. International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1216 (1991) (Scalia, J., concurring).

188. Bertin Interview, *supra* note 58.

V. BEYOND NONDISCRIMINATION

Perfect rationality might be the hope, but bounded uncertainty better describes the reality within which judgments must be made.¹⁸⁹ Although one could wish for a world in which no worker who contemplates having a child is exposed to any potential hazard, such a wish contemplates an environment impossibly free from all stresses, human as well as chemical. One can also aspire to the adoption of substantive rules about toxic exposure that confidently guide behavior, but the evidence regarding dangers of exposure is imperfect and inevitably will remain so.¹⁹⁰ There are too many different hazards to estimate, and the task of gauging their distinctive effects—mediated as they are by genetics, environment, and levels of exposure¹⁹¹—poses formidable technical problems. In an environment filled with risks and shaped by unknowns, the more useful policy question becomes: *Who is best situated to make these decisions?*

The standard of nondiscrimination, and the deeper respect for personal autonomy on which the standard rests, suggest that affected individuals are generally better able than corporations to calculate the risk of toxic exposure to themselves and to their potential offspring. The Supreme Court framed the *Johnson Controls* case this way, emphasizing greater autonomy for workers, even as it implicitly argued that autonomy would lead to better health outcomes than would letting corporations make their own rules about fetal hazards.¹⁹²

What is missing from this analysis—and what the framing of the dispute as simply a matter of discrimination prevents the Justices from addressing—is a recognition that the determinations being made affect more than workers and employers. Sensible fetal protection, like worker and corporate protection, calls for a process that allocates risks and cost on a basis broader than either the

189. See generally MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE* (1982) (discussing how society determines what technical and environmental risks are worth taking).

190. See, e.g., *supra* notes 42-47 and accompanying text (discussing the difficulty of judging the danger of even a well-known substance such as lead).

191. See, e.g., *supra* notes 58-59 and accompanying text (showing how even simple factors can alter blood lead levels).

192. See *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1208 (1991).

market or individual rights, one that pays attention to the public good. Uniform standards fixed by government can assure that corporations do not frame safety calculations in terms of competitive advantage; that they do not subject workers to choices too hard to be borne fairly, with health risk set against the prospect of unemployment; and that they pay attention to the welfare of those who are not at the bargaining table. Such rule making can also take into account real differences in circumstances, as the discrimination model cannot.¹⁹³

Defining this public good is the mandate of the Occupational Safety and Health Administration.¹⁹⁴ Even though OSHA rated scant mention in the Supreme Court's opinion, its rules do limit the freedom of maneuver for both individual workers and businesses.¹⁹⁵ When, as in the case of lead, OSHA sets maximum permissible exposure limits for toxics in the workplace, these cannot be negotiated away for wage increases.¹⁹⁶ In 1978, when OSHA adopted the standard for lead, widespread corporate opposition arose because of the high cost of installing the needed technology and the novel requirement that workers whose blood lead concentrations exceeded safe levels be removed from the hazardous setting while remaining on the payroll.¹⁹⁷ But the agency's meticulous review of the available evidence—resisting both corporate urgings for laxity and unfounded claims of risk stemming from any exposure level—can stand as a model for how government should proceed in the face of unavoidable unknowns.¹⁹⁸

The contrast between the Supreme Court's and OSHA's approaches to fetal hazards argues for shifting the locus of debate,

193. Cf. Pendleton E. Hamlet, Note, *Fetal Protection Policies: A Statutory Proposal in the Wake of International Union, UAW v. Johnson Controls, Inc.*, 75 CORNELL L. REV. 1110 (1990) (criticizing the limitations of Title VII and its amendments and recommending a statutory compromise to regulate workplace protection policies).

194. See 29 U.S.C. §§ 651-678 (1988).

195. See, e.g., *id.* § 654 (requiring employers and employees to comply with federal standards).

196. See *id.* § 655(d) (stating that permissible reasons for variances from standards do not include negotiations with employees).

197. See *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980) (lawsuit by union and industry challenging new lead standards).

198. See Valentine & Plough, *supra* note 42, at 154-56 ("The lead standard of 1978 . . . is considered a model standard for regulating reproductive health hazards in the workplace.").

away from a discrimination-oriented judicial review of an individual employer's fetal hazards policies, towards general standard-setting. The bipolar, adversarial judicial process did not—seemingly could not—take into account the relative profitability of a company's approach to fetal hazards (which depends on the firm's perceived need for female workers), the relevance of alternative sources of risk (which depends on the options realistically available to employees), or the impact on overall worker safety.¹⁹⁹

199. Feminist legal scholars frequently have debated the wisdom of formulating gender issues in terms of equal treatment. *See, e.g.,* RHODE, *supra* note 102, at 319 (asserting that "[t]he law's traditional focus on equal treatment cannot cope with situations where the sexes are not equally situated"); Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201 (focusing on particular objections rather than universal principles, and legislative rather than constitutional remedies); Herma H. Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39 (arguing that the model of racial equality fails in situations implicating biological differences between the sexes); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983) (finding equal treatment approach inadequate to protect equal opportunity for women because of differences between the sexes); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984) ("a concept of equality that denies biological difference has particularly adverse effects upon women"); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (arguing for a conception of equality as acceptance, whereby differences between the sexes are costless relative to each other); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1288-89 (1991) ("Where the sexes are different, and sexism does not readily appear to work like racism—as with . . . reproductive control . . . —discrimination as a legal theory does not even come up."); Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1371 (1986) (advocating an "inequality" approach which focuses on domination, disadvantage or disempowerment); Nadine Taub & Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation, or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 825 (1985) (advocating a disparate effects doctrine, to replace the formal equality approach); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985) (comparing "equal treatment" and "special treatment" approaches to sex discrimination); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 200 (1982) ("Do we want equality of the sexes—or do we want justice for two kinds of human beings who are fundamentally different?"); *cf.* DAVID L. KIRP ET AL., *GENDER JUSTICE* 202 (1986) ("We reject a government strategy aimed at producing some fixed set of outcomes, either sex-based indistinguishability or sex-based differentiations.").

The "different voice" of women, which bears on conceptualizations of equality, is the theme of a highly influential work by social psychologist Carol Gilligan. *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). Feminist theoreticians previously have analyzed variations on that theme. *See, e.g.,* SUSAN GRIFFIN, *WOMAN AND NATURE: THE ROARING WITHIN HER* at xvi (1978) (the book is "not so much utopia as a description of a different way of seeing"); ELIZABETH H. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 14 (1980) ("At bot-

When OSHA and the Equal Employment Opportunity Commission (EEOC) addressed the same issue in 1980,²⁰⁰ three years after adoption of the lead rule, the aspiration was not a workplace free from sex discrimination, where male and female workers would be equally entitled to put themselves and their fetuses at risk.²⁰¹ Instead, the intention was to protect the entitlement of all workers to a safe environment, while acknowledging the importance of worker autonomy.²⁰² Those guiding principles led OSHA and the EEOC, in drafting fetal vulnerability guidelines, to emphasize the processes of production, rather than the characteristics of supposedly hypersusceptible women workers.²⁰³ Those principles also made OSHA skeptical of the claim that, because women alone were vectors of lead transmission, companies could exclude them from jobs for the good of their prospective children.²⁰⁴ "There is *a priori* no reason to believe that the genetic material of a male worker is in any way more resistant to toxic occupational injury than that of the female."²⁰⁵ Before such a claim could be valid, scientific study was needed to examine paternal as well as maternal contributions to the ways lead was passed to the fetus.²⁰⁶

OSHA and EEOC were also unwilling to approve fetal hazards rules that treated all women as if they were perpetually pregnant. A corporation's fetal hazards policy could single out only women who were in fact pregnant; and although the federal guidelines allowed a corporation to remove these women from toxic settings, it first must have tried and found wanting a specified range of less intrusive strategies for promoting health.²⁰⁷ Moreover, under the guidelines, transferred workers would retain the full benefits of

tom of my argument is the conviction that justice requires men and women to be treated differently, not in all areas but in some important ones.").

200. See Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514 (1980) (to be codified at 29 C.F.R. pt. 1603 and 41 C.F.R. pt. 60-20) (proposed Feb. 1, 1980); *infra* note 217 (stating that the guidelines were later withdrawn).

201. See Bayer, *supra* note 80, at 640.

202. *Id.*

203. *Id.* at 642.

204. *Id.* at 641.

205. Rawls, *supra* note 98, at 29.

206. See Bayer, *supra* note 80, at 642-43.

207. *Id.* at 641-42.

their seniority,²⁰⁸ a requirement with enough financial bite to spur corporate innovations short of exclusion. In sum, "reproductive hazards were not to be considered more significant than other occupational harms [and] . . . the potential risk to the fetus was not to be treated more seriously than risks to reproductive capacity itself. Fetal priority was thus dislodged."²⁰⁹

These proposed standards made almost all the interested parties unhappy, but for sharply differing reasons.²¹⁰ Corporations fretted about both the unbearable costs and the moral irresponsibility of the new rules. Fortune 500 companies such as Monsanto and General Motors assailed them as unconscionable, insisting that the claims of the fetus, this "uninvited visitor," should come before those of the mother.²¹¹ " 'Since the fetus derives no primary benefit from its unknown or known presence in the workplace, it should not be exposed to excessive risks,' " ²¹² declared the Synthetic Organic Chemical Manufacturers Association. "This is a small price for mothers, potential mothers, and society to pay."²¹³

On the other side, the Women's Rights Project of the ACLU argued that offering job protection to pregnant women was not enough; the decision whether to accept a transfer had to be made by the women themselves.²¹⁴ The Steelworkers Union complained that by allowing businesses to transfer pregnant women, government was putting a " 'good housekeeping seal' " ²¹⁵ on sex discrimination.²¹⁶ In 1981, less than a month after the Reagan administration took office, the guidelines were withdrawn²¹⁷—and with them went the last comprehensive attempt to devise a fetal hazards policy that incorporated both a civil rights and public health perspective.

208. *Id.* at 642.

209. *Id.*

210. *Id.* at 643-50.

211. *Id.* at 644.

212. *Id.* (quoting the Synthetic Organic Chemical Manufacturers Association).

213. *Id.*

214. *Id.* at 648.

215. *Id.* at 649.

216. *Id.*

217. See 46 Fed. Reg. 3916 (1981) (to be codified at 29 C.F.R. pt. 1603 and 41 C.F.R. pt. 60-20) (withdrawal of guidelines proposed on Feb. 1, 1980).

In its Supreme Court brief, Johnson Controls argued that it should be permitted to impose health precautions more stringent than those that OSHA laid down for workers generally.²¹⁸ As the company pointed out, in other contexts OSHA's regulations create only minimal safety standards which a firm can exceed.²¹⁹ The law authorizes an employer to remove workers with lower blood lead concentrations than those specified as unsafe by OSHA from the line for the worker's health²²⁰—why should a company not have the same freedom when it considers a fetus to be similarly at risk? "In this day and age," declared Johnson Controls, "it cannot seriously be disputed that a company's desire to avoid direct harm to its employees and their families, its customers, and its neighbors from its own toxic hazards goes to the heart of its 'normal operation.'"²²¹ The National Safe Workplace Institute, a pro-union and pro-OSHA group, made much the same point in its amicus brief: "[E]mployers must be held fully accountable for workplace injuries and illnesses and thus must be given discretion to make safety and health decisions, even when those choices are contrary to the economic interests of employees. That philosophy is embodied in the Occupational Safety and Health Act."²²²

It makes better structural sense, however, for OSHA, not the affected company, to fix the ground rules. When corporations argue that fetal protection requires absolute safety, that redesigning the workplace in order to achieve the desired safety levels is too expensive, and that tort liability could bankrupt businesses, their statements represent attempts—entirely sensible from their perspective—to shift the costs of childbearing in potentially dangerous settings to those who may be put out of work. For their part, when unions demand that employers allow fertile women to remain on the job, even in environments where there is some risk, and that corporations reduce the level of exposure to hazardous substances

218. Brief for Respondent, *supra* note 74, at 35-36.

219. *Id.* at 36.

220. *Id.*; see 29 C.F.R. § 1910.1025 (1991).

221. See Brief for Respondent, *supra* note 74, at 18 (quoting 22 U.S.C. § 2000e-2(e) (1988)).

222. Amici Curiae Brief of National Safe Workplace Institute, in Support of Respondent at 5, *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (No. 89-1215).

so that all workers are protected, they make a claim on the resources of corporations and society generally. By contrast, OSHA has a less direct financial stake in the issue than a union or corporation, and can balance cost and safety concerns on an industry-wide, not company-specific, basis. It can assign a value to safety, using techniques more reliable than the inefficient, after-the-fact system of liability law. OSHA is also less insulated from politics, more subject to the salutary push and pull of lobbying by women's groups, unions, and trade associations. In this respect, the widespread unhappiness that the short-lived 1980 guidelines evoked demonstrates not agency wrong-headedness but institutional integrity.

Involving the constituents in setting standards does not imply that all rules about reproductive health hazards will be sex-neutral, because science does not mirror so neatly principle or ideology. The 1980 guidelines on fetal hazards, with their limited authorization of involuntary transfers from highly toxic environments, acknowledged as much.²²³ There will be instances in which one sex is so evidently more vulnerable to fetal risk that a sex-differentiated rule makes sense: the biological agent CMV is one such instance, the pesticide DBCP another.²²⁴ Such determinations, however, are best made by an agency situated to appreciate the full implications of such distinctions.

These assessments remain OSHA's responsibility after *Johnson Controls*, and the agency needs to do more. Workers deserve better information on the health risks that toxic exposure invites, even with feasible safety standards in place. Companies should offer economic security, job retraining, and medical insurance to workers who are removed or voluntarily remove themselves from unavoidably hazardous jobs. Research on reproductive risk, especially studies of paternally mediated effects of various toxics, should be encouraged, because the available evidence offers diminishing scientific support for singling out women as the unique conveyors of risk. Although there was dicta in *Johnson Controls* that corpora-

223. In oral argument in *Johnson Controls*, Marsha Berzon, who represented the plaintiffs, acknowledged that a company legally could treat "pregnancy-related harms similarly to other temporary instances of hypersusceptibility. . . . [O]ne could remove the people temporarily." Tr. of Oral Argument, *supra* note 57, at 6-7.

224. See *supra* notes 84-86 and accompanying text.

tions that follow OSHA's safety standards are legally insulated against the possibility of mega-judgments in fetal tort suits,²²⁵ explicit federal legislation would usefully remove all doubts. It would make sense to use the money thus saved in court costs and lawyers' fees to help pay for retraining and health insurance.

VI. CONCLUSION: HARD CHOICES

The modern workplace swarms with thousands of substances potentially dangerous to the fetus, everything from manganese to gamma rays.²²⁶ The sources of danger extend far beyond the assembly line, crossing the sex line to affect men as well as women and leap-frogging the line that separates work from pleasure. Scientists regularly deliver warnings about what pregnant women eat, drink, and smoke,²²⁷ and in some jurisdictions women who use illegal drugs during pregnancy face criminal charges.²²⁸ In this sense, lead, crack cocaine, and even junk food inhabit the same moral universe.²²⁹

The more we learn about these insidious dangers, the more remarkable it seems that a fetus can navigate the perilous voyage from conception to birth healthy and intact. All this knowledge, however, answers none of the most fundamental questions for the Justices²³⁰—or for ourselves. It only sharpens the value

225. *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1208 (1991).

226. See OFFICE OF TECH. ASSESSMENT, *supra* note 26, at 69, 71, 94.

227. See, e.g., ERNEST L. ABEL, *FETAL ALCOHOL SYNDROME/FETAL ALCOHOL EFFECTS* (1984) (discussing the history, risk factors, and physical harms of alcohol consumption during pregnancy); MICHAEL DORRIS, *THE BROKEN CORD* (1989) (explaining fetal alcohol syndrome); REPORT OF THE SURGEON GEN., *THE HEALTH CONSEQUENCES OF SMOKING FOR WOMEN* (1980) (concluding that smoking is a significant threat to the outcome of pregnancy and to the health of the baby); Richard B. Everson et al., *Quantitative Associations Between DNA Damage in Human Placenta and Maternal Smoking and Birth Weight*, 80 J. NAT'L CANCER INST. 567 (1988) (surveying the potential damage to fetuses of mothers who smoke).

228. See, e.g., *State v. Grubbs*, No. 4FA-S89-415 Criminal (Alaska Sup. Ct. Aug. 25, 1989) (sentencing a cocaine-addicted mother to six months in jail for drug use during pregnancy); *State v. Christenson*, No. CRI. 90 (S.D. Cir. Ct. 1990) (sentencing a mother to six months in jail for giving birth to a baby with cocaine in its bloodstream); cf. *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977) (reversing conviction of mother who used heroin during pregnancy).

229. See Katha Pollitt, *Fetal Rights: A New Assault on Feminism; Laws Protecting the Fetus from the Mother*, THE NATION, Mar. 26, 1990, at 409.

230. In a pointed colloquy with Johnson Controls' attorney, Justice Scalia asked: "How does the Court go about determining what level of protection for fetuses is enough

choices—between the claims of the generations; between maintaining personal sovereignty and surrendering that sovereignty to those who, whether for profit or paternalism, would protect us from ourselves; between the principle of identical treatment and the murkier aspiration to equity. The story of *International Union, UAW v. Johnson Controls, Inc.* offers a way to sift through the implications of those choices.

[When] there is a very, very tiny risk The workplace is full of risks How are we to determine what the proper balance of risk to fetus and freedom for the women to work in the marketplace is?" Tr. of Oral Argument, *supra* note 57, at 41-42.