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REPRODUCTIVE HAZARDS WITH TITLE VII RIGHTS

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ARTICLES

EMPLOYER FETAL PROTECTION POLICIES AT WORK: BALANCING REPRODUCTIVE HAZARDS WITH TITLE VII RIGHTS†

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I. INTRODUCTION

Perhaps one of the most compelling divisive workplace issues of the decade which involves legal, economic, medical as well as moral concerns, the question of employer fetal protection policies ("FPPs") was recently before the United States Supreme Court. Approximately twenty million workers (mostly women) were potentially affected by some form of workplace exclusion from employment opportunities. Moreover, it has been estimated that twenty percent of American companies and at least fifteen of the Fortune 500 corporations utilized FPPs, and those numbers were growing. This phenomenon was due in part to three factors. First, women have increasingly become a presence in the workforce, taking on jobs in higher-paying, historically male-dominated industries. Second, industry consumes many chemicals, both organic and inorganic, and there are unprecedented ad-

vances in synthetic chemistry resulting in an increasingly complex chemical work environment. Third, advances in occupational medicine, toxicology and scientific studies are beginning to uncover toxic effects from these workplace chemicals with possible long term adverse health and reproductive consequences.

Employers, concerned with both fetal health and the specter of massive tort liability for injured third parties, were caught in a legal crossfire: do nothing about these issues and be sued by injured parties, or utilize an FPP and be sued by workers denied their equal employment rights. Employers typically contended that there was no acceptable level of risk for possible harm to fetuses involuntarily exposed to workplace toxins through their mothers—"perfect risk protection," in other words, was their solution. It appears that reproductive injuries are included among the ten most common work-related illnesses as well. The excluded employees, more often than not, were single women heads of households with relatively low socio-economic status and educational credentials. They argued that FPPs amounted to sex discrimination requiring them and not their male counterparts to choose between their livelihood and parenthood in violation of Title VII of the Civil Rights Act of 1964. While the plaintiffs acknowledged that there are irreducible risks in the workplace, they objected, arguing that FPPs are a manifestation of a stereotypic selective concern for the female aspects of reproduction. They questioned why the focus was only on fetuses—and why there was not the same concern for all the workers.

Who should make these choices? How much safety are we willing "to buy?" How much unsafe technology are we willing to accept? Although the United States Supreme Court recently ruled on the legality of one sex-specific FPP, these issues promise to be with us for a long while.

II. FACTS IN *INTERNATIONAL UNION, UNITED AUTO WORKERS V. JOHNSON CONTROLS, INC.*

The employer, Johnson Controls, Inc., ("JCI") agreed to acquire Globe Union, Inc., a Milwaukee-based supplier of automobile batteries, in 1978.¹ JCI currently controls about one-third of the \$2 billion market for car batteries and is the largest publicly held company in Wisconsin.² Fourteen of

1. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 875 (7th Cir. 1989) (*en banc*), cert. granted, 110 S. Ct. 1522 (1990), rev'd and remanded, 111 S. Ct. 1196 (1991); Lappen, *Damn the Analysts. Full Speed Ahead*, FORBES, Mar. 20, 1989, at 171 (Johnson Controls paid \$250 million to acquire Globe Union in 1978).

2. See generally Lappen, *supra* note 1, at 172; THE BUS. J. (Milwaukee), Sept. 11, 1989, at 17 (citing Johnson Controls as the largest Wisconsin public company with total revenues more than double of any other in-state company). Johnson Controls also manufactures building controls,

the JCI plants manufacture batteries in which lead is the principal active ingredient; indeed, battery manufacturers consume nearly 80 percent of the lead produced domestically.³ Concerned with industrial safety, and cognizant of the risks posed by high lead exposure, JCI's predecessor, Globe Union, established a voluntary FPP in 1977.⁴ Such policies started to appear in the 1970s, shortly after the passage of federal anti-discrimination laws, and due in part to the civil rights and women's movements.⁵

auto seating, and plastic soft-drink containers. The company motto is "managing energy, comfort, and protection."

3. *International Union, UAW v. Johnson Controls, Inc.*, 680 F. Supp. 309, 310 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989) (*en banc*), *cert. granted*, 110 S. Ct. 1522 (1990), *rev'd and remanded*, 111 S. Ct. 1196 (1991) (battery plants located in Arkansas, California, Delaware, Georgia, Kentucky, Michigan, Ohio, Texas, Vermont, and Wisconsin). Both parties stipulated that scientific evidence has proven lead is an insidious toxic substance, and at large enough doses will cause significant harm to persons. However, the parties did not agree on whether or not there was a risk of harm to fetuses from lead exposure. *Id.* Toxicologists classify lead as a mutagen, an agent which causes basic genetic changes in male and female reproductive cells. See Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 647 (1981) (lead used in pigments, pesticides, rubber, and batteries); Waldman, *Lead and Your Kids*, NEWSWEEK, July 15, 1991, at 42 (discussing devastation lead has caused); Jaroff, *Controlling a Childhood Menace*, TIME, Feb. 25, 1991, at 68 (lead poisoning the most severe American environmental disease); Hackett, *Top Court to Decide Fetus Suit*, Am. Metal Mkt., March 30, 1990, at 2, col. 1; Bronson, *Issue of Fetal Damage Stirs Women Workers at Chemical Plants*, Wall St. J., Feb. 9, 1979, at 1, col. 1 & 33, col. 2. See generally 29 C.F.R. § 1910.1025 App. A (1989) (lead exposure "occurs in at least 120 different occupations").

4. *Johnson Controls*, 886 F.2d at 875-76. The policy was designed to prevent fetuses from suffering the adverse effects of high lead exposure. *Id.* During this time the Occupational Safety and Health Administration's ("OSHA") regulation of employee lead exposure was "virtually non-existent." *Id.* at 875. The company, therefore, initiated this program attempting "to control and regulate industrial lead exposure." *Id.* A lead standard, established by OSHA in 1978, set an exposure limit of 50 milligrams per deciliter. 43 Fed. Reg. 54,395 (1978).

5. See *Johnson Controls*, 886 F.2d at 879 (no women were working in lead exposures prior to the 1960s); Bronson, *supra* note 3, at 1 (women steadily moving into production jobs at chemical companies). See generally Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1225-26 (1986) (during 1970s employers under pressure to admit women into "traditionally male, unionized, blue-collar jobs" and at same time companies adopted FPPs); Lewin, *Protecting the Baby: Work in Pregnancy Poses Legal Frontier*, N.Y. Times, Aug. 2, 1988, at A1, col. 1 & A15, col. 3 (lawyers have grappled with this issue since company disclosed that 10 years ago women underwent sterilization to keep their jobs); Bertin, *Workplace Bias Takes the Form of 'Fetal Protectionism'*, LEGAL TIMES, Aug. 1, 1983, at 18 (FPPs developed in petrochemical and manufacturing industries); Bronson, *supra* note 3 (women steadily moved into jobs "where they once were found rarely" and it presented "new set of challenges" to employers); Hyatt, *Protection for Unborn? Worker Safety Issue Isn't As Simple as it Sounds*, Wall St. J., Aug. 2, 1977, at 1, col. 1 & 31, col. 3 (fetal safety question forced upon employers in part because rising number of job-holding women of childbearing age).

The company announced its FPP by issuing a memorandum to all battery plant and personnel managers.⁶ Acknowledging that scientific and medical evidence had established that lead exposure creates health risks for fetuses, as well as pregnant or fertile women, the company encouraged its managers to advise women of these risks and to have the women sign a statement that they had been advised of such risks.⁷ During the four years that JCI sponsored this voluntary policy, six of approximately 275 female employees in lead exposed jobs became pregnant while maintaining blood lead levels in excess of the Centers for Disease Control's ("CDC") 30 microgram per deciliter standard in effect at that time.⁸

Like many other companies, JCI in 1982 adopted the mandatory FPP challenged here, concluding that its voluntary program was not sufficiently effective and that it was "medically necessary to bar women" from working in high lead exposure jobs.⁹ Indeed, the company claimed that it had a moral requirement to protect female employee offspring.¹⁰ The JCI FPP prohibited women, absent proof of sterility and regardless of age, from working in jobs where their blood level would rise above 30 micrograms per deciliter, an even more restrictive standard than the 50 micrograms per deciliter standard of the Occupational Safety and Health Administration ("OSHA").¹¹ JCI's policy presumed all female employees were capable of

6. *Johnson Controls*, 886 F.2d at 876. JCI acknowledged that the scientific and medical community had not yet conclusively established a risk to fetuses, but that "there is a risk, [and] we recommend *not* working in lead if they [women] are considering a family, and further that we ask them to sign a statement that they have been advised of this risk." *Id.* (emphasis in original).

7. *Id.* Fetal and reproductive protection policies are generally found *inter alia* in such industries as chemical, rubber, semiconductor, and munitions. *Id.* at 878.

8. *Johnson Controls*, 886 F.2d at 876-77 nn. 7 & 9. At least one of the children born to this group suffered from an elevated blood lead level. *Id.* at 877. But even JCI's own medical consultant refused to conclude that the child's hyperactivity was caused by lead. *Id.* The Centers for Disease Control's ("CDC") standard in effect at the time concluded that blood levels in excess of 30 mg/dl were excessive for children. *Id.* at 876 n. 7 (emphasis added). Apparently, the CDC had not researched lead levels in fetuses. The more lenient OSHA standard is currently 50 mg/dl for blood lead levels. See 29 C.F.R. § 1910.1025(c)(1) (1989).

9. *Johnson Controls*, 886 F.2d at 876-78. In changing the policy, JCI emphasized its continuing interest in providing a safe workplace and stated that the FPP was "intended to reduce or eliminate the possible unhealthy effects of lead on the unborn children of pregnant employees and applicants." *Id.* at 877. See generally Paul, Daniels, & Rosofsky, *Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey*, 16 AM. J. OF INDUS. MED. 267, 272-73 (1989) [hereinafter Paul] (nearly 20% of chemical and manufacturing companies surveyed reported some form of FPP).

10. *Johnson Controls*, 886 F.2d at 875-77; see also Fefer, *Maternity Suit*, SAVVY WOMAN, March 1990, at 18.

11. See *Johnson Controls*, 886 F.2d at 876 n.8 (all women are included in the FPP "except those whose inability to bear children is medically documented"); *Johnson Controls*, 680 F. Supp. at 310 (all women presumed capable of bearing children regardless of age, interest, or marital

bearing children "until they medically prove contrary."¹² It is notable that neither the voluntary nor the mandatory policy addressed the issue of reproductive and health hazards to male workers and their offspring due to high lead exposure.

JCI's FPP tolerated no risk of possible maternal-mediated harm to fetuses and it refused to hire women for high lead exposure jobs or to allow women employees the option of transferring into such jobs.¹³ Thus, the employer conditioned employment opportunity for women on sterility. In a grandparent clause, JCI permitted women to remain in lead exposed jobs provided that they could maintain blood lead levels below 30 micrograms.¹⁴ Employees who were removed from high lead exposure jobs were transferred to another job without a loss of pay or benefits.¹⁵ JCI's claim that transferred employees would not suffer monetarily has been disputed, however. Women were transferred to jobs that required little or no overtime pay, extra money counted on by these employees, and they were barred from applying for other higher paying jobs in lead areas of the plant.¹⁶

Prior to adopting this mandatory policy, JCI considered alternatives to the blanket exclusion of women from high lead exposure jobs, but without result.¹⁷ To date, neither JCI nor any other battery manufacturer has developed a commercially feasible lead-free product.¹⁸ Furthermore, JCI has not been successful in reducing the lead exposure to a level considered safe for both workers and fetuses.¹⁹ JCI also considered limiting the FPP to

status). JCI did modify its policy somewhat. See Brief for the United States and the Equal Employment Opportunity Commission at 2 n.2, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (No. 89-1215) [hereinafter U.S. & EEOC Brief] (JCI prohibited women from jobs which could lead to lead exposed jobs, and reduced permissible exposure limits from 30 to 25 micrograms).

12. See *supra* note 10 and accompanying text.

13. *Johnson Controls*, 886 F.2d at 876, 878.

14. *Id.* at 876.

15. *Id.* At least one employee has reported that she remained exposed to lead even in the new job. See Blakeslee, *The Reproductive Rights Battle*, WORKING MOTHER, Dec. 1990, at 44, 47 (Virginia Green, transferred from production line to laundry, still sees a rise in her blood lead level when exposed to men's lead-laden work gloves which she cleans).

16. See generally Kilborn, *Women's Job Rights Collide With Fears of Birth Defects*, N.Y. Times, Sept. 2, 1990, at A1, col. 1, & A28, col. 1 (men only can apply for best paying jobs while working age women excluded); Paul, *supra* note 9, at 273-74 (citing restriction and transfer policies at corporations).

17. *Johnson Controls*, 886 F.2d at 878. The company, though, found itself "unable to structure and implement any alternatives which would adequately protect the unborn child." *Id.*

18. *Id.* at 878. See generally Judge, *Race on for an Electric-Car Battery*, N.Y. Times, July 18, 1990, at D1, col. 3. The article discusses characteristics of the three main types of batteries (lead-acid; sodium-sulfur; and nickel-iron) along with their advantages and disadvantages. *Id.*

19. *Johnson Controls*, 886 F.2d at 880 & n.19 (CDC opined that OSHA standard "not sufficiently strict" to protect fetuses). Compare *Johnson Controls*, 680 F. Supp. at 311 (Dr. Whortin

women actually pregnant, but found that to be less effective as there was a "very definite possibility" that high lead exposure could occur between conception and when the employee actually discovered her pregnancy.²⁰ Finally, JCI considered limiting the policy to women planning pregnancy but found this too would not adequately protect an "unborn child" from risks associated with high lead exposure because many pregnancies are, in fact, unplanned.²¹ At no time, however, did JCI consider the possibility of male mediation of lead toxins to their offspring.

JCI adopted the mandatory FPP in 1982 in response to some, but not all, of the current medical evidence. It also relied on the advice of some occupational medicine specialists.²² The company thereby conditioned employment opportunities for women on sterility. By "protecting" only fertile female employees in a way that created occupational segregation, JCI nevertheless believed that Title VII would allow such an exception to be made, since the "health of unborn children" was at stake, as was the protection of shareholder interests.²³

A. *United States District Court for the Eastern District of Wisconsin*

In 1985, the district court certified as a class the "past, present and future . . . employees" of JCI's Battery Division plants located across the country "who have been and continue to be affected by Defendant's Fetal Protection Policy implemented in 1982."²⁴ The class included at least one male employee whose request for a leave of absence in order to lower his blood lead level because he intended to become a father was denied.

The plaintiffs alleged that JCI's policy violated Title VII of the Civil Rights Act of 1978 as amended by the Pregnancy Discrimination Act ("PDA") because JCI institutionalized sex discrimination in "recruitment and hiring job assignments, wages, promotions and transfers within the bar-

said current OSHA standard sufficient for adults but not fetuses) *with id.* at 312 (Dr. Silbergeld said no one should be exposed to lead levels above 12 micrograms).

20. *Johnson Controls*, 886 F.2d at 878 & n.11.

21. *Id.* The authors decline to follow the circuit court majority's use of the term "unborn child" as this phrase indicates an overbroad approach to issues relating to embryos, fetuses, and post-natal children.

22. *Johnson Controls*, 680 F. Supp. at 310-12.

23. *Johnson Controls*, 886 F.2d at 876, 879; *see also* Kilborn, *supra* note 16. *See generally* Coyle, *A Policy For Her Own Good*, THE NAT'L L.J., Oct. 22, 1990, at 1, col. 1 & 20, col. 1 (such cases are complex and troublesome in that they mix law, science, and morality).

24. *Johnson Controls*, 680 F. Supp. at 310; *see also* Brief for Petitioners at 1, 8-9, International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (No. 89-1215) [hereinafter Petitioner Brief] (plaintiffs included woman who elected to have herself sterilized; a 50 year-old divorced woman; and a man who intended to become a father).

gaining unit, seniority, overtime, layoff and recall, demotions, on-the-job training, maternity policies, fringe benefits, health and safety conditions, and also resulted in "on-the-job harassment."²⁵ Conceivably such a company policy could also invite allegations from employees of violations of their right to privacy,²⁶ the Equal Pay Act,²⁷ the Age Discrimination in Employment Act,²⁸ as well as state civil rights and employment laws.²⁹ Plaintiffs contended that JCI's FPP ran afoul of the Title VII mandate because the plan is at once over and underinclusive. The FPP was overinclusive in that it excluded all women who were not sterile, even those who may have been divorced with no intention of bearing children. It was at the same time underinclusive because it neglected to protect males and their offspring.³⁰ JCI vigorously denied these charges asserting that while the FPP may burden women, it served the legitimate interests of maternal and fetal health, and the protection of the shareholders' return.³¹ It is interesting to note at this point that the FPPs have been found mainly in historically male-dominated industries such as heavy manufacturing, rather than in female-dominated industries such as hairdressing and nursing, even

25. *Johnson Controls*, 680 F. Supp. at 310. Harassment is a prohibited form of discrimination under Title VII. 42 U.S.C.A. § 2000e-2 (West 1981 & Supp. 1990).

26. This penumbral right found in the Constitution is recognized in cases relating to governmental regulation of childbearing and childrearing, and protects autonomy of parental decision-making to a large extent. See generally *Planned Parenthood of Miss. v. Danforth*, 428 U.S. 52, 60-61 (1976).

27. 29 U.S.C.A. § 206(d)(1) (West 1978 & Supp. 1990). See generally *Grant v. General Motors Corp.*, 908 F.2d 1303, 1311-12 (6th Cir. 1990) (Act mandating equal pay for equal work not applicable if employee transferred to lower paying job pursuant to employer FPP). This court failed to consider, however, the fact that the employer treated all transferred employees for compensation purposes the same as their male co-workers who were *not* transferred. The transferred women, solely because of their transfer, lost out on overtime wages and other compensation their male counterparts made, and thus did not make the same pay for work the employer said was the same. It seems to the authors that there was a viable argument for a constructive Equal Pay Act claim.

28. 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1990) (unlawful for employers to fail or refuse to hire or discharge any workers between 40 and 70 years because of age). See generally 29 C.F.R. §§ 1625.1-1625.13 (1990).

29. See generally MASS. GEN. LAWS ANN., ch. 151 B, § 4 (West 1982 & Supp. 1990) (unlawful for employers to discriminate against employees because of race, color, religious creed, national origin, sex, age, or ancestry).

30. See Brief for Massachusetts at 25-26, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (No. 89-1215); Brief for the NAACP Legal Defense and Educational Fund, Inc. at 17-18, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (No. 89-1215).

31. *Johnson Controls*, 886 F.2d at 875-77; Kilborn, *supra* note 16 (JCI concerned not only about female employees and their offspring, but also for its financial position and exposure in form of risk of liability for birth defects in later-born children).

though there exists unsafe exposure to toxins in both types of industries.³² Such a response by employers led many observers to wonder whether the issue was truly one of fetal safety—or something else?³³

The district court first summarized the discovery of expert testimony relating to the toxic effects of lead exposure in the workplace as it harms fetuses, young children, and finally male and female workers.³⁴ Notably, the parties stipulated that excessive lead exposure can result in significant and permanent harm to every person.³⁵ The parties did not agree, however, on “whether there is a significant risk of harm to the fetus from lead exposure and whether that risk is substantially confined to the offspring of females as opposed to male workers . . . [and] whether a fetus is more sensitive to lead than a post-natal child.”³⁶

To the first issue in dispute, the experts agreed that there exists a significant risk of harm to fetuses from lead exposure, but did not agree, however, on whether the risk is confined to transmission via females as opposed to

32. See Paul, *supra* note 9, at 273. See generally Grant, 908 F.2d at 1305 (FPP in foundry jobs involving airborne exposure to lead); Johnson Controls, 886 F.2d at 874-75 (FPP in lead-based battery manufacturing plants); Oil, Chem. and Atomic Workers Int'l Union v. Am. Cyanamid Co., 741 F.2d 444, 444 (D.C. Cir. 1984) (FPP applied to both men and women at pigments manufacturing plant); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547 (11th Cir. 1984) (hospital fired pregnant X-ray technician to protect fetus from radiation); Wright v. Olin Corp., 697 F.2d 1172, 1176, 1182 (4th Cir. 1982) (FPP restricted female access to jobs requiring contracts with toxic chemicals classified as abortifacients or teratogenic agents); Doerr v. B.F. Goodrich Co., 484 F. Supp. 320, 320-21 (N.D. Ohio 1979) (FPP precluded female employees from work entailing exposure to vinyl chloride). Cf. Zuniga v. Kleberg County Hosp., 692 F.2d 986, 988 (5th Cir. 1982) (employer's unwritten policy required dismissal of all pregnant X-ray technicians). See generally Marshall, *An Excuse for Workplace Hazard*, THE NATION, April 25, 1987, at 532, 533 (many large corporations, including AT&T have adopted FPPs).

33. See BUREAU OF NATIONAL AFFAIRS SPECIAL REPORT, PREGNANCY AND EMPLOYMENT: THE COMPLETE HANDBOOK ON DISCRIMINATION, MATERNITY LEAVE, AND HEALTH AND SAFETY 89-91 (1987) [hereinafter BNA Special Report] (protective policies eliminate female workers and change workforce; instead focus should be on changing workplace); Kilborn, *supra* note 16; Murray, *Who Do Fetal-Protection Policies Really Protect?*, TECH. REV., Oct. 1985, at 12 (“suspicious correlation” between FPPs and male-dominated heavy industrial jobs).

34. Johnson Controls, 680 F. Supp. at 310-12.

35. *Id.* at 310; see also 29 C.F.R. § 1910.1025 app. A (1989). Lead is a “potent, systematic poison” which can cause, *inter alia*, encephalopathy, kidney disease, impaired “reproductive systems of both men and women,” decreased hemoglobin, anemia, hyperactivity, and if the exposure is acute, death. *Id.* (emphasis added). See generally BNA Special Report, *supra* note 33, at 68 (lead can cause “decreased libido, impotence, and sterility in men and decreased fertility, and abnormal menstrual and ovarian cycles in women”). Cf. Bridbord, *Review of Lead Toxicity*, Conf. on Women and the Workplace 227 (1976) (toxic effects of lead have been known for approximately two thousand years); Miller, *Equal Protection for Sperm*, SCIENCE NEWS, May 20, 1975, at 332-33 (OSHA's researchers noted that research should be gender neutral, citing “strong correlation” between chemicals and abnormal sperm shape causing genetic mutation. “In addition, the tendency to produce abnormal genes is transmitted to offspring”).

36. Johnson Controls, 680 F. Supp. at 310.

male workers.³⁷ Four of the experts were of the opinion that there was no evidence that linked male exposure to lead with an adverse effect on the development of the fetus or a later-born child.³⁸ Three of the experts, though, were of the opinion that lead is a mutagenic agent, which by definition affects the reproductive tracts of *both* male and female workers.³⁹ Neither did the experts agree on the second issue, with four agreeing that a fetus is more sensitive than a post-natal child to the effects of lead.⁴⁰ One expert disagreed, stating that "there is no evidence that a fetus is more sensitive than a post-natal child."⁴¹ Upon reciting this discovery, the district court reviewed prior law of "Title VII actions involving the health of the fetus," and discussed the conflicting approaches adopted by the other circuits to have then addressed this issue, in determining whether to grant JCI's motion for summary judgment.⁴²

Following the traditional analysis of Title VII actions, the trial court first addressed whether the FPP was facially discriminatory to the plaintiff class, and thus analyzed the facts under the disparate treatment/bona fide occupational qualification ("BFOQ") model.⁴³ In other words, if the policy is discriminatory on its face, the employer may escape liability only by demonstrating that the policy is "necessary to the normal operation of that par-

37. *Id.* at 310-12. This was perhaps the most critical of the disputed points because many viewed this issue as outcome determinative as to the Title VII claim. Of the nine experts deposed in the case, seven stated their opinion on this issue. *Id.*

38. *Compare id.* at 311 (Dr. Scialli "aware of no studies" in which lead-exposed sperm caused abnormalities in offspring) *and id.* (Prof. Hammon "unaware of any human studies which conclude that" excess blood levels in males cause demonstrable effects in fetuses) *and id.* (Dr. Chisolm stated "no medical evidence that lead exposure" to either male or female has adverse effect on offspring) *and id.* at 311-12 (Dr. Whortin cited his co-authored 1981 study that showed no change in semen quality of lead exposed workers) *with id.* at 312 (Prof. Brix concluded that "there is a clear effect of lead upon the male reproductive tract in mammals") *and id.* (Dr. Silverstein cited a 1972 animal study and speculated that "abnormal sperm could carry damaged genetic material which could result in damaged offspring") *and id.* at 311 (Prof. Legator stated while it is unknown about male sensitivity to lead, "lead probably causes a genetic lesion during spermatogenesis").

39. *Id.* (emphasis added).

40. *Id.* at 310. The court reviewed expert testimony on whether the fetus is even more susceptible than a young child to the effects of lead. *Id.* at 310-12. *Compare id.* at 310-11 (Dr. Scialli holds opinion that fetuses more sensitive to lead than young children) *with id.* at 312 (Dr. Silbergeld stated that there is no evidence that fetuses more sensitive than post-natal children).

41. *Id.*

42. *Id.* at 312-17.

43. *Id.* at 312, 314-16. In general, this is a straightforward inquiry. *See, e.g.,* *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414-15, 421-23 (1985); *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978); *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977).

ticular business or enterprise."⁴⁴ JCI's burden then was to show that the banning of fertile female employees was necessary to the successful manufacturing of batteries; *i.e.*, that these women were unable to properly make batteries. Despite the fact that the FPP applied exclusively to women, the trial court declined to find that this was a case of disparate treatment.⁴⁵ "Because of the fetuses possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory."⁴⁶ The court apparently felt that this policy was "good," hence it could not be found to be discriminatory. This position lacked foundation in law and was obviously result-oriented. Later on, in a footnote, the court conceded that the FPP would fail under the stringent disparate treatment analysis because the employer would be unable to "show that the excluded class is unable to perform the [job] duties. . . ."⁴⁷

The district court instead looked to the other framework for Title VII cases—the disparate impact/business necessity defense ("BND") model.⁴⁸ Under this model, an employer policy is facially neutral but happens to have a disproportionate impact on a protected class of workers. If this is so, then the plaintiffs have established a *prima facie* case of disparate impact. The employer's only defense is to demonstrate that the policy is related to

44. See 42 U.S.C.A. § 2000e-2(e)(1) (West 1981 & Supp. 1990). An explicitly discriminatory practice is not necessarily illegal, but is justifiable only under this exception, which is to be narrowly construed. See generally *Dothard*, 433 U.S. at 334 (relying on statutory language, legislative history and agency interpretation, BFOQ meant to be narrow exception); Nothstein & Ayres, *Sex-Based Considerations of Differentiation in the Workplace: Exploring the Biomedical Interface Between OSHA and Title VII*, 26 VILL. L. REV. 239, 306-08 (1981) (despite arguments that BFOQ to be broad exception, Supreme Court has consistently concluded that defense is to be narrow exception).

45. *Johnson Controls*, 680 F. Supp. at 316. In previous FPP cases, the courts declined to embrace the theory that such a policy is facially discriminatory. See, e.g., *Hayes*, 726 F.2d at 1548-49 (FPP probably discriminatory but "to ensure complete fairness" to employer, court analyzed it under a less stringent and modified disparate impact/BND model); *Wright*, 697 F.2d at 1185-86 (while "facial neutrality" of FPP subject to "logical dispute," disparate impact/BND model best suited for such cases); cf. *Zuniga*, 692 F.2d at 991-94 (court followed disparate impact/business necessity model in this pre-Pregnancy Discrimination Act ("PDA") case).

46. *Johnson Controls*, 680 F. Supp. at 316. The court's result-oriented approach flies in the face of the PDA which amended Title VII. See 42 U.S.C.A. § 2000e(k) (West 1981 & Supp. 1990) (unlawful practice to discriminate on basis of pregnancy, childbirth, or related medical conditions). See generally *Duncan, Fetal Protection and the Exclusion of Women From the Toxic Workplace*, 18 N.C. CENT. L.J. 67, 70-71 (1990) (PDA makes clear that discrimination on basis of pregnancy is facial discrimination).

47. *Johnson Controls*, 680 F. Supp. at 316 n.5.

48. *Id.* at 316-17.

job performance.⁴⁹ Plaintiffs in disparate impact cases, though, ultimately bear the burden of persuasion.⁵⁰ While conceding that the plaintiffs established a *prima facie* case of discrimination, the court felt that JCI's FPP "does not in a strict sense have anything to do with job performance," so it abandoned the traditional business necessity analysis, and adopted the *Hayes v. Shelby Memorial Hospital* approach which broadened the defense to fit such facts, thus allowing employers to justify such a policy due to a "genuine desire to promote the health of employee offspring. . . ."⁵¹ The court concluded that JCI prevailed under this modified BND analysis because the safety of "unborn children" was a legitimate business concern, and a "business should be able to protect itself from future lawsuits which may arise because a child was prenatally exposed to lead."⁵² Since the BND was found to exist, the burden shifted back to the plaintiffs to show that there were no acceptable alternative policies with a less discriminatory impact.⁵³ The court found that the plaintiffs failed to meet this burden. To bolster this finding, the court wrote that JCI is "doing all it can to reduce lead exposure" and has spent millions of dollars on this effort.⁵⁴ Moreover, JCI improved upon the permissible exposure limits set by OSHA, the agency charged with regulating safety and health in the workplace.⁵⁵

49. The most recent guidance on this model is from the case of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (5-4 decision). Where the apparently neutral policy has a disproportionate impact on a protected class, a *prima facie* case of disparate impact exists. "[T]he employer carries the burden of producing evidence of a business justification" for the practice. *Id.* at 659. The employer must demonstrate that the policy serves "in a significant way" its employment goals. *Id.* The ultimate burden of persuasion, however, remains with the plaintiff to prove that the policy is discriminatory. *Id.* *Wards Cove* and other recent employment decisions have been discussed at length in Congress and while one civil rights bill has failed, another has been introduced and is intended to modify the *Wards Cove* analysis.

50. *Id.*

51. *Johnson Controls*, 680 F. Supp. at 316-17 (court agreed with *Hayes'* expansion of BND model to include FPPs reasoning that it is a legitimate employment goal to promote health of employee offspring); *cf. Hayes*, 726 F.2d at 1552.

52. *Johnson Controls*, 680 F. Supp. at 317. The risk of tort liability is still theoretical as no company complying with relevant safety standards (as JCI does) has been found liable for inadequately protecting workers from those very harms; *cf. Security Nat'l Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D. Kan. 1985).

53. *Johnson Controls*, 680 F. Supp. at 316.

54. *Id.* It is not as apparent to the authors as it is to the court that defendant's expenditure of \$15 million automatically means that "the company is doing all it can. . . ." Also, discrimination cannot be excused because of the costs associated with *not* discriminating. See *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978).

55. JCI lessened the permissible level of exposure for fertile women only. See 29 U.S.C.A. § 651 (West 1985 & Supp. 1990) (OSHA has general duty to assume so far as possible and to extent feasible safe and healthful workplace). OSHA promulgates standards after extensive hearings and research. See Rothstein, *Substantive and Procedural Obstacles to OSHA Rulemaking*

Since the plaintiffs could not prevail under either Title VII scheme of analysis according to the district court, it granted JCI's motion for summary judgment.⁵⁶ Thus, the experts' positions could not be tested through cross-examination or peer review. The disputes among the experts as extensively noted by the court were deemed not to be outcome determinative, or in other words, genuine issues of material fact.⁵⁷ Therefore, even though there are experts who contend that *some* evidence existed of male mediated lead exposure to fetuses, the court was unwilling to recognize any possibility that fetuses may be harmed by their fathers.⁵⁸

B. United States Court of Appeals for the Seventh Circuit

In an *en banc* decision, the circuit court, by a 7-4 majority, affirmed the district court's grant of summary judgment in favor of JCI.⁵⁹ In a lengthy opinion which acknowledged the conflicting policies of workplace hazards with the Title VII mandate, the court nevertheless upheld the employer's right to unilaterally refuse to allow women employment opportunities in leaded areas of the workplace.⁶⁰ The case received an unusual amount of publicity and criticism from a vast range of sources.⁶¹

Reproductive Hazards as an Example, 12 ENV. AFFAIRS 627, 643 (1985) (OSHA lead standard not sufficient to ensure zero risk but does attempt to minimize reproductive harm).

56. *Johnson Controls*, 680 F.Supp. at 318. See generally FED. R. CIV. P. 56(c) (summary judgment shall be granted if "there is no genuine issue as to any material fact" and that the movant is entitled "to a judgment as a matter of law." Summary judgment will be granted if the nonmoving party has "failed to make a sufficient showing on an essential element of the case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). See generally Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 53-56 (1988).

57. *Johnson Controls*, 680 F. Supp. at 315. The court allowed that "there is a disagreement among the experts regarding the effect of lead on the fetus and the effect of lead on male and female reproduction," but dismissed these disputes as immaterial, and thus "not outcome determinative." Cf. *Johnson Controls*, 886 F.2d at 915 (Easterbrook, J., dissenting) (EEOC even criticized grant of summary judgment since material evidentiary disputes were still unresolved).

58. *Johnson Controls*, 886 F.2d at 915.

59. *Id.* at 898, 901. In reviewing a lower court's grant of summary judgment the appellate court is to apply a *de novo* standard of review, making all reasonable inferences in favor of the party who opposed the motion for summary judgment. Minor factual disputes will not defeat a summary judgment motion, only those that are material will. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Storer Communications, Inc. v. Nat'l Ass'n of Broadcast Employees and Technicians*, 854 F.2d 144 (6th Cir. 1988).

60. *Johnson Controls*, 886 F.2d at 898, 901. The Seventh Circuit concluded that JCI carried its burden under both the BFOQ and BND models and again denied the plaintiffs an opportunity to test the merits of their case at trial.

61. See Schmidt, *Risk to Fetus Ruled as Barring Women From Jobs*, N.Y. Times, Oct. 3, 1989, at A12, col. 3 (decision barring fertile women from jobs even when they are not pregnant or have no intention of becoming pregnant criticized by labor unions, women's groups, and civil liberties organizations); Fletcher, *Sex discrimination OK [sic] to protect fetus: Court*, BUS. INS., Oct. 15, 1989, at 1, col. 1 (case heard by full panel because of disagreement over appropriate

Judge Coffey, author of the majority opinion, began with a recitation of the facts and a review of *some* of the most recent medical evidence.⁶² In the opinion, Judge Coffey was notably impressed with JCI's concern for safety (albeit for just maternally-mediated fetal safety) apparently so much so that he twice told the reader that the company spent approximately \$15 million on environmental controls at its battery plants.⁶³ The medical evidence reviewed by the court was primarily that of Dr. Fishburn, JCI's own medical consultant.⁶⁴

In Part II of the opinion, the court said the "[p]roper analysis of the Title VII issues this case presents requires a thorough understanding of the following fundamental question: Does lead pose a health risk to the offspring of Johnson's female employees?"⁶⁵ It is the authors' contention that this framing of the issue was fundamentally flawed and led the majority to conclusions both ill-considered and incomplete.⁶⁶ With the issue presented only as one of fetal hazards mediated solely by female employees, the conclusions were foregone. Nevertheless, the court reviewed expert testimony of both the etiology of lead poisoning and its dangers to fetuses and later-

ruling); Kirp, *The Next Right-to-Life Battle*, Christian Sci. Mon., Dec. 13, 1989, at 19, col. 1 (JCI a landmark class action); Swoboda, *EEOC Limits Compliance With Fetal Case Ruling*, The Wash. Post, Jan. 30, 1990, at A4, col. 1 (EEOC has instructed its compliance officers to ignore JCI except in the Seventh Circuit where they are bound to follow this decision); Blakeslee, *supra* note 15 (N.Y. Times reporter asks whether company policies are just discrimination in disguise); Budish, *The New Sex Bias?*, FAMILY CIRCLE, July 24, 1990, at 44 (attorney cites issues on both sides of debate and stated Supreme Court ruling will have significant far-reaching effects on family and workplace).

62. *Johnson Controls*, 886 F.2d at 876-88 (emphasis added). The review of medical evidence neglected to mention studies of male mediation of lead toxins to fetuses. For example, the district court mentioned the expert testimony of Kelly Ann Brix, a Professor of Occupational Medicine who stated that there is a clear effect of lead upon the male reproductive tract in mammals. *Johnson Controls*, 680 F. Supp. at 312. The appeals court, however, neglected to even mention this. It has been reported that Judge Coffey, in a personal statement, characterized this case as one "about the women who want to hurt their fetuses." Kirp, *The Pitfalls of "Fetal Protection"*, SOCIETY, March/April 1991, at 70.

63. *Johnson Controls*, 886 F.2d at 875, 901; *cf. id.* at 910, 914 (Easterbrook, J., dissenting) (incremental cost of female employees no reason for discrimination, thus costs of clean-up or tort liability do not of themselves establish BFOQ).

64. *Id.* at 875-79; *see also infra* notes 381-87 and accompanying text. *Compare id.* at 879 (Dr. Fishburn would never place a reproductive female in area of average lead exposure) *with* Blakeslee, *Research on Birth Defects Turns to Flaws in Sperm*, N.Y. Times, Jan. 1, 1991, at A1, col. 1 and A36, col. 1 (recent animal studies show defects in offspring of lead exposed males).

65. *Johnson Controls*, 886 F.2d at 879. The court failed to come to grips with the larger question, that of workplace toxins and their effect on all workers.

66. The authors wonder why the court neglected to address legal questions relating to health risks to *all* employees *and* their offspring, instead of *only* offspring of female employees. *Cf.* Williams, *supra* note 3, at 643 (difficult policy choices in striking balance between fetus, mother, and father).

born children.⁶⁷ The court concluded that the evidence "clearly approaches a general consensus within the scientific community" that a "significant risk exists to the unborn child from exposure to lead."⁶⁸ In fact, the question relating to risk of harm was discussed by the Justices at the oral argument before the Supreme Court, and both sides conceded that there is no data as yet on the *actual* risk of harm, or magnitude of harm to a fetus or later-born child from parental exposure to lead in the workplace.⁶⁹

In Part III the court asked whether it should follow the lead established by the courts of appeal in the Fourth and Eleventh Circuits and accepted by the Equal Employment Opportunity Commission ("EEOC") which determined that a hybrid and more lenient BND applies, or whether to strike out on its own and apply the disparate treatment/BFOQ model.⁷⁰ Construing recent Supreme Court language concerning the "necessity of avoiding rigid application of proof patterns to particular factual situations," the Seventh Circuit became convinced that the disparate impact/BND model was the best approach.⁷¹ Such a defense, it noted, balanced the interests of the em-

67. *Johnson Controls*, 886 F.2d at 879-83.

68. *Id.* at 883. Both parties, in fact, agreed, that lead poses the risk of harm to fetuses. See Brief for Petitioners, *supra* note 24; Brief for Respondent at 1-3, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (No. 89-1215).

69. One of the authors was present at the oral argument on October 10, 1990. Neither side could provide much needed answers on either the frequency of occurrence or the magnitude of harm from lead exposure in the workplace. Cf. *Johnson Controls*, 886 F.2d at 888 (since parties agreed substantial risk existed, issue not before court on appeal).

70. *Johnson Controls*, 886 F.2d at 883-87. The court first reviewed approaches to the fetal protection issue. In *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982), the first court to address this question decided that since FPPs involve motivations and consequences most closely resembling disparate impact cases, that it should use the business necessity defense. The *Wright* court never mentioned the PDA and the outcome reflects this absence. The court in *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984), also found the FPP neutral in that it equally protects offspring of all employees and set forth a modified business necessity defense. The EEOC in 1988 issued a policy statement, which is an agency communication of the lowest caliber, agreeing with the Fourth and Eleventh Circuits. See EEOC: Policy Statement on Reproductive and Fetal Hazards Under Title VII (1988), reprinted in *Fair Empl. Prac. Manual (BNA)* 401:6013 [hereinafter 1988 Policy Statement]; cf. EEOC: Policy Guide on *United Auto Workers v. Johnson Controls* (1990), reprinted in *Fair Empl. Prac. Manual (BNA)* 405:6797 [hereinafter 1990 Policy Guide]. The Seventh Circuit did not review the Fifth Circuit *Zuniga* opinion, as that case did not involve an FPP and occurred prior to the PDA amendment. *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986 (5th Cir. 1982).

71. *Johnson Controls*, 886 F.2d at 883, 886. See Simon, *Fetal Protection Policies after Johnson Controls: No Easy Answers*, 15 *EMPLOYEE REL. L.J.* 491, 498-99 (1990) (JCI II "broke no new ground" since it relied on *Wright*, *Hayes*, and EEOC); Comment, *Title VII - Equal Employment Opportunity - Seventh Circuit Upholds Employer's Fetal Protection Plan*, 103 *HARV. L. REV.* 977, 979 (1990) (JCI court adopted previously formulated modified business necessity analysis); Hembacher, *Fetal Protection Policies: Reasonable Protection or Unreasonable Limitation on Female Employees*, 11 *INDUS. REL. L.J.* 32, 39-40 (1989) (JCI analysis represents summary of *Wright* and *Hayes* approaches); cf. EEOC Brief, *supra* note 11, at 8-12.

ployer, employee, and "unborn child" in a manner consistent with Title VII.⁷² The court did not begin with an examination of the FPP itself which adversely affected female employees who are a protected class under Title VII and the PDA amendment to it.⁷³ Under such an inquiry, the FPP is facially discriminatory, justifiable only under the more rigorous BFOQ defense. The court's choice of model was, therefore, outcome determinative given its view of the risk and magnitude of harm from lead exposure in the workplace.

Part IV of the court's opinion set forth the disparate impact/BND model along with the proof burdens each side is to bear.⁷⁴ Essentially, the question in a disparate impact case is "whether a challenged practice serves in a significant way, the legitimate employment goals of the employer . . . [a] mere insubstantial justification . . . will not suffice, because such a low standard of review would permit discrimination. . . ." ⁷⁵ But "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."⁷⁶ The employer carries the burden of producing such a justification, but the burden of persuasion ultimately remains with disparate impact plaintiffs to prove that it was because of their sex they were denied employment opportunities.⁷⁷

The court found that the FPP disproportionately affected female employees, so then it next addressed the employer's burden, that of presenting a business necessity justification for the FPP. This is examined in a three-

72. *Johnson Controls*, 886 F.2d at 886. The court reasoned that the risk to fetuses was so significant and confined only to the offspring of female employees. *Id.*

73. The PDA, seemingly critical to any issues relating to pregnancy, childbirth, and "related medical conditions" was mentioned only once by the majority, and not even until halfway through the fifty page opinion. *Id.* at 893. The court, while conceding that the PDA demands application of the more rigorous BFOQ defense, declined to read it in the narrow manner Congress intended, and instead expanded the defense to include safety concerns relating only to fetuses, and presumably other nonconsenting third parties. *Id.* at 896-99.

74. *Id.* at 887-93. The court restated the most current Supreme Court pronouncement of the analysis announced in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). The employee must first allege discrimination. Then it is up to the employer to prove that the challenged practice was "based solely on a legitimate neutral consideration." *Id.* at 660. Finally, the plaintiff has the burden of proving that it was because of gender (in this case) that she was denied a "desired employment opportunity." *Id.*

75. *Johnson Controls*, 886 F.2d at 887 (quoting *Wards Cove*, 490 U.S. at 659).

76. *Johnson Controls*, 886 F.2d at 887.

77. By characterizing the FPP as a disparate impact case, plaintiffs must then satisfy the strict requirement of *Wards Cove*, a nearly impossible task. See Lansing & Podhajsky, *The Conservative Shift in U.S. Supreme Court Labor Law Decisions During the 1988-1989 Term*, 41 LAB. L.J. 67, 71-72 (1990) (*Wards Cove* "dramatically increased the burden upon the plaintiff" making it "much more difficult" for employees to win); cf. Hagler & Cleveland, *Wards Cove and the Theory of Disparate Impact: From Bad Law to Worse Policy*, 41 LAB. L.J. 138, 144 (1990) (*Wards Cove* Court eliminated requirement that employer show the business necessity of its policy).

part inquiry: (a) the substantial risk of harm to the "unborn child"; (b) exposure through a single sex; and (c) adequate less discriminatory alternatives.⁷⁸ For Part A, the court found that the issue was not contested on appeal therefore it conclusively found that such a risk existed so that JCI met this first component of the BND.⁷⁹

Part b, exposure to lead through a single sex, was much more contentious. Since JCI filed a motion for summary judgment, the nonmoving party ("UAW") bore the burden of demonstrating that there existed a "genuine issue of material fact" with regard to even one of the parts in the court's three-step analysis of JCI's BND.⁸⁰ If the UAW succeeded, then the motion would have been defeated, and a trial would have taken place. The court again found that JCI carried its burden in the second step by showing that mediation of lead to fetuses occurred exclusively through female employees.⁸¹ While acknowledging UAW's expert testimony that there was possible risk of genetic damage to offspring from male lead exposure, the court criticized their animal studies and wondered why they failed to present human studies.⁸² However, the court accepted JCI's expert testimony without asking where their human studies were.⁸³ In regard to this second issue, the court found that the UAW simply did not present enough evidence to negate the "conclusion" that women only transmit lead, which would have established a genuine issue of material fact and defeated the summary judgment motion.⁸⁴

Likewise, the UAW failed to establish an issue with regard to Part c of the analysis a court makes when scrutinizing an employer's BND. Here, if the plaintiff had demonstrated the availability of acceptable alternative policies which would better accomplish JCI's purpose, or accomplish the same

78. *Johnson Controls*, 886 F.2d at 888-93. This approach was adopted from the Fourth and Eleventh Circuits.

79. *Id.* at 888-89; see also *supra* note 37 and accompanying text.

80. See *supra* notes 56, 57, 59, and accompanying text.

81. *Johnson Controls*, 886 F.2d at 889-90.

82. *Id.* The court characterized the UAW's animal studies as unconvincing, and complained that they failed to present "solid scientific data." *Id.* at 889. The court felt that the UAW studies ignored the "differences between the effect of lead on the human and animal reproductive systems." *Id.* The court failed to even mention Brix's expert testimony that there is a "clear effect of lead upon the male reproductive tract in mammals." *Johnson Controls*, 680 F. Supp. at 312.

83. *Johnson Controls*, 886 F.2d at 889-90. "Because scientific data available as of this date reflects that the risk" of harm is confined to female employees, the court again agreed with the employer. *Id.* at 890; see also *Wright*, 697 F.2d at 1190-91.

84. *Johnson Controls*, 886 F.2d at 889-90. "Accordingly, we are convinced that the UAW has failed to present facts sufficient to carry its burden of demonstrating the absence of the second element of *Johnson Controls'* business necessity defense. . . ." *Id.* at 890.

purpose with a less discriminatory impact, then JCI's FPP would fail.⁸⁵ Thus, if the UAW had shown that protecting fetuses could be done in a less intrusive and feasible manner, then the FPP would have been found to be in violation of Title VII since JCI did not meet its burden of showing a legitimate business necessity for its FPP. Since the UAW "fail[ed] to present any of its own alternatives" and courts will not "research and construct the legal arguments" on their own, the court accepted JCI's recitation of how it failed to "structure and implement any alternatives" and concluded that JCI met its burden of establishing a BND, a legitimate business justification for its FPP.⁸⁶ The employees, according to the court, could not prove that it was because of their sex that they were denied employment opportunities.

The court in Part V, in an effort to foreclose all possibilities, considered the disparate treatment/BFOQ defense analysis even though it never conceded that the policy was facially discriminatory.⁸⁷ The Seventh Circuit, then, went beyond analyses done by the other circuits to have considered FPPs. (Interestingly, one year later at oral argument, counsel for JCI admitted that its FPP was facially discriminatory and justifiable, if at all, only under the BFOQ analysis.) The court of appeals noted that while the BFOQ exception was meant to be an extremely narrow one, it should not be an invitation for courts to conclude "that the employer automatically loses."⁸⁸ To prevail under this defense, employers must demonstrate to the

85. *Id.* at 890-93. JCI's FPP "might very well not have been sustainable had the UAW presented facts and reasoning sufficient" for the court to conclude that there were alternative policies which could have protected fetuses equally well with a less discriminatory impact on female employees. *Id.* at 890-91. This was a thinly veiled message to the UAW that the court was looking for more evidence in this regard. See generally *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971) (discussing this third prong of employer's business necessity defense).

86. *Johnson Controls*, 886 F.2d at 891-93. If the employees are to succeed under such an analysis, they need expertise to the degree only employers possess. The court is asking employees to show their employers how to run the business in a less discriminatory fashion. In a determined fashion the court wrote that the UAW's "failure to specifically articulate a less discriminatory argument in the manner required . . . means that it has failed to adequately present this issue to the court. *Id.* at 891. The employer anticipated this third prong of the business necessity defense, and in Section I of the opinion, the court recited alternatives the company "seriously considered" but later decided would be unworkable. *Id.* at 878; see also *supra* notes 19-21 and accompanying text.

87. *Johnson Controls*, 886 F.2d at 893-901. See generally *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (employer can rely on BFOQ exception only by proving "that he had reason to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved"); Note, *Fetal Protection Policies: A Statutory Proposal In the Wake of International Union, UAW, v. Johnson Controls, Inc.*, 75 CORNELL L. REV. 1110, 1137 (1990) (*JCI* court went beyond lead of *Wright* and *Hayes* courts and analyzed the FPP under the BFOQ analysis).

88. *Johnson Controls*, 886 F.2d at 893.

court that there is some "factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."⁸⁹

The UAW's position was that the BFOQ analysis is really about ability to perform the assigned task, rather than about safety concerns of women and their offspring. Women, they contended, are as able as men to produce batteries, whether or not they are pregnant. Therefore, JCI's FPP could not be justified as a BFOQ. JCI's response to the UAW, and its main point at oral argument, was that while its FPP might fail under such a narrow "essence of the business" construction of the BFOQ, its policy passed muster under a BFOQ exception broad enough to include justifications based on protecting the health and safety of innocent, unconsenting third parties such as customers and fetuses. JCI urged the circuit court to expand the BFOQ beyond just a consideration of the health and safety of workers while performing their jobs, to also include the well-being of third parties.⁹⁰

The court of appeals again agreed with JCI concluding that its FPP constituted a BFOQ, as reformulated by the majority.⁹¹ The FPP "is reasonably necessary to further industrial safety" which is "part of the essence of Johnson Controls' business."⁹² The court indicated that the employer may unilaterally regulate jobs women could have because they "might somehow rationally discount this clear risk" of harm to fetuses if left to make employment decisions on their own.⁹³ The majority was unwilling to

89. *Id.* at 894.

90. *Id.* at 896. The court agreed declaring that "more is at stake" than a woman's decision to weigh and accept the risks of employment. "The 'unborn child' has no opportunity to avoid this grave danger, but bears the *definite* risk of suffering permanent consequences." *Id.* at 897 (emphasis added).

91. *Id.* at 898. Previously the BFOQ defense permitted consideration only of job performance; now, safety has become part of the formula under this approach. See generally *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) (safety considerations of passengers in age discrimination claim); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (methadone users denied employment with transit authority); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (women denied employment as prison guards in maximum security prison due to concerns not primarily related to women's safety). But see *Gunther v. Iowa State Men's Reform.*, 612 F.2d 1079 (8th Cir. 1980), *cert. denied*, 446 U.S. 966 (1980) (female correctional officers at men's reformatory prevailed in claim that employer's restrictions not a legitimate BFOQ).

92. *Johnson Controls*, 886 F.2d at 898.

93. *Id.* at 897. This statement, made by seven of the judges, is especially insulting and insensitive. The implications are that women do not know what is best for them and their offspring but that the company and the panel of male judges do. Furthermore, the risk of harm was not established as was conceded at the oral argument. The court also stated that women "have become a force in the workplace . . . because of their desire to better the family's station in life. . . ." *Id.* at 897. This statement assumes that all women have the *choice* of whether to work, and that they are marginal workers. Such flawed assumptions sadly ignore the social and economic reality of the current workforce. See Note, *supra* note 87, at 1125 and accompanying text.

tolerate any risk relating to offspring of female employees apparently concluding that the FPP was acceptable in spite of Title VII.

Apparently anticipating review by the Supreme Court, the Seventh Circuit reached to find an analogy to this difficult case, in a 1989 First Amendment decision by the Court, *Sable Comm'n's v. FCC*.⁹⁴ In that case the Court upheld the use of the strict scrutiny level of review for "dial-a-porn" services since there was a compelling governmental interest "in protecting the physical and psychological well-being of minors."⁹⁵ The circuit court must have thought that citation of this case, which is about minors, would be a reminder to the Supreme Court and a harbinger for this fetal protection case. The Court of Appeals for the Seventh Circuit concluded that JCI's FPP passed muster under both tests for Title VII cases and affirmed the district court's grant of summary judgment in favor of JCI.⁹⁶

Three stinging dissents followed, and indeed, these received almost more coverage and commentary than the majority opinion. Each dissent disagreed with the summary judgment disposition of the case.

Judge Cudahy dissented, stating that such "painful complexities" as are present here "are manifestly unsuited for summary judgment."⁹⁷ Since this was a disparate treatment case, the defendants may only use the BFOQ defense.⁹⁸ Judge Cudahy's BFOQ formula, however, would allow employers to consider risks to even potential third parties.⁹⁹ He cautioned, though, that the employer must "demonstrate 'a factual basis for believing that all

94. 492 U.S. 115 (1989). Of course *Sable* dealt with different issues, but much of what the Seventh Circuit references actually supports the Union's argument that at the least, any FPP should be narrowly tailored to reach its stated goal. Surely a less restrictive means, short of a total ban could work. See, e.g., Vanderwaerd, *Resolving the Conflict Between Hazardous Substances in the Workplace and Equal Employment Opportunity*, 21 AM. BUS. L.J. 157, 177 (1983) (solution to dilemma must be found and should include all workers); Williams, *supra* note 3, at 703-04 (suggesting interpretation of Title VII which should balance all interests equitably); Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798, 851-55 (1981) (proposal made which balances worker safety, equal employment opportunity, business profitability, and well-being of future generations). *But see* Becker, *supra* note 5, at 1267 (FPPs, no matter how reasonable, discriminate).

95. *Sable*, 492 U.S. at 126. Nevertheless, the Supreme Court invalidated the statutory amendment for such services because it was not "a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages." *Id.*

96. *Johnson Controls*, 886 F.2d at 901. The court reached for a result by making an analogy between Title VII and the First Amendment.

97. *Id.* at 901-02 (Cudahy, J., dissenting).

98. *Id.* at 901. Judge Cudahy said that it "may (and should) be difficult to establish a BFOQ here" but that JCI should have the opportunity to try. *Id.*

99. *Id.* at 901-02 n.1. Under his formulation of the BFOQ defense, employers may "consider the possible risks to (even potential) third parties. . . ." *Id.* Reciting the *Weeks* standard with one variation which is emphasized here, Judge Cudahy said that the employer must demonstrate "a factual basis for believing that all or substantially all women would be unable to perform safely

or substantially all women would be unable to perform safely [*i.e.*, without inordinate risk to third parties, including fetuses] and efficiently the duties of the job involved.’”¹⁰⁰ This approach has received probably the most attention from courts and commentators as an appropriate balance of the interests involved. The judge chastised the majority for following the “results-oriented gimmickry of *Wright v. Olin Corp.*”¹⁰¹ He characterized the *Johnson Controls* case as a controversy of great potential consequence, finding that it demanded a context beyond that of just legal rules into the realm of social and economic realities.¹⁰² Finally, he wondered whether the better-paid lead exposed pregnant woman is any worse off than her pregnant sister who is unemployed and uncovered by health insurance.¹⁰³ Judge Cudahy posed a challenging question: What if you take the pregnant woman’s job and health benefits away—“to save her fetus”—will she not end up impoverished and in an environment as inhospitable to the child as her former place of employment?

Judge Posner in the second dissent, also characterized the grant of summary judgment as a mistake and further urged the court to remand this case to enable the compilation of a sufficient evidentiary record, since the “legality of fetal protection is as novel as it is contentious”¹⁰⁴ Classifying this FPP as facially discriminatory, Judge Posner concluded that the only available defense was the BFOQ, and although narrow, “is not the proverbial eye of a needle.”¹⁰⁵ Not all FPPs are unlawful, he wrote, and an employer may successfully defend such a policy if it is reasonably necessary to

[*i.e.* without inordinate risk to third parties including fetuses] and efficiently the duties of the job involved.” (emphasis added). See sources cited *supra* note 87 and accompanying text.

100. *Johnson Controls*, 886 F.2d at 901-02 n.1 (quoting *Weeks*, 408 F.2d at 235).

101. *Johnson Controls*, 886 F.2d at 902 (Cudahy, J., dissenting); see also *Wright*, 697 F.2d at 1185-86 & n.21 (court felt employer would lose under disparate treatment analysis so applied disparate treatment test even while conceding its analysis “subject to logical dispute”).

102. *Johnson Controls*, 886 F.2d at 902 (legal theories and paradigms need to be connected to peoples’ lives). He also lamented that all of the decisionmakers were men. *Id.*

103. *Id.* Judge Cudahy does not present just an idle query since it is known that children of impoverished families suffer from a number of adverse environmental influences such as low birth weight and malnutrition. See Jaroff, *supra* note 3, at 68-69. Significantly, children in poverty are more likely to become lead poisoned from residential hazards such as house paint or a contaminated water supply. *But see Johnson Controls*, 886 F.2d at 889 n.28 (Judge Coffey refuted this point).

104. *Johnson Controls*, 886 F.2d at 908 (Posner, J., dissenting) (record here too sparse for such a complex case and facts need to be developed “by the full adversary process of a trial”).

105. *Id.* at 904 (“normal operation” of business encompasses ethical, legal, and business concerns about effects on third parties). Judge Posner rejected a rigid “four-corners” approach to Title VII and the BFOQ exception, concluding that the PDA does not outlaw all FPPs. *Id.* at 904-06. Rather, the validity of a policy is a question of fact, and a matter of degree. *Id.* He noted, however, that this FPP failed as it was “excessively cautious.” *Id.* at 907-08.

the normal (civilized, humane, prudent, ethical) operation of his particular business.¹⁰⁶ Judge Posner criticized the other circuits which have decided FPP cases, since they found that the FPPs failed under the BFOQ test, and then went on to "stitch" new defenses expressly for these cases.¹⁰⁷ He also criticized the majority for "recasting" this case as one of disparate impact where the expanded BND would be available, calling it a questionable practice.¹⁰⁸

Perhaps the most quoted observation is that of Judge Easterbrook, who in his dissent, wrote that this was perhaps "the most important sex-discrimination case in any court . . ." affecting perhaps 20 million jobs.¹⁰⁹ While lauding JCI's goal of protecting fetuses, the Judge said that the FPP is still sex discrimination justifiable only by the BFOQ defense, "which it is not."¹¹⁰ Under such an analysis, therefore, FPPs always fail to pass muster. Reviewing the legislative and case history of Title VII and the PDA, Judge Easterbrook wrote that if sex is a basis for the employer's decision, it is discriminatory.¹¹¹ While "the rigors of the BFOQ suggest the need for a fresh approach," he added, that is for Congress rather than the courts.¹¹²

106. *Id.* at 903-05. Judge Posner wondered about a result which would have the effect of shutting down all battery operations—so the plaintiffs would be in the same place as if the BFOQ prevailed—out of a job. *Id.* at 907.

107. *Id.* at 903. Although Judge Posner was not "shocked" at this judicial activism, he found it indefensible that the courts recast "what is plainly a disparate treatment case. . . ." *Id.*; *cf. Hayes*, 726 F.2d at 1548-54; *Wright*, 697 F.2d at 1186-92.

108. *Johnson Controls*, 886 F.2d at 903. See generally Note, *supra* note 87, at 1135-36 (JCI II majority applied disparate impact analysis because it balanced parties' interests); Comment, *Fetal Protection and UAW v. Johnson Controls, Inc.: Job Openings For Barren Women Only*, 58 FORDHAM L. REV. 843, 844, 855 (1990) (JCI II court erred in finding that the FPP was not a case of disparate treatment). Judge Posner also raised the points of the employer's potential tort liability and its moral mandate. *Johnson Controls*, 886 F.2d at 905-08 (Posner, J., dissenting). He speculated that at some point the cost of tort liability may supply the ground for a BFOQ. *Id.* He noted that there is not yet precedent for a BFOQ based upon moral qualms. *Id.*

109. *Johnson Controls*, 886 F.2d at 920. Even the majority cited this observation. *Id.* at 901 n.43. The majority, however, dismissed the numbers as speculative. *Id.* See generally Wermiel, *Justices to Study Fetal Risk Rule in Job-Bias Case*, Wall St. J., Mar. 27, 1990, at A3, col. 4, & A4, col. 3 (citing Easterbrook and "enormous ramifications" of JCI case); Kirp, *supra* note 61 (citing Easterbrook and characterizing it as a landmark class action in competition for 20 million jobs); Fletcher, *supra* note 61 (citing Easterbrook and implications for women in employment); Ashford & Caldart, *The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention*, 5 INDUS. REL. L.J. 523, 524, 540-62 (1983) (authors examine avenues of relief, remedies available for workplace hazards).

110. *Johnson Controls*, 886 F.2d at 908 (Easterbrook, J., dissenting); *cf. id.* at 901-02 n.1 (Cudahy, J., dissenting). But see *id.* at 893-98 (majority held FPP survived challenge under expanded BFOQ analysis).

111. *Id.* at 908-12; see also 42 U.S.C.A. § 2000e(k) (West 1981 & Supp. 1990).

112. *Johnson Controls*, 886 F.2d at 910, 915, 921 (Easterbrook, J., dissenting); see also Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the*

In Part B of his dissent, Judge Easterbrook addressed the crux of this problem which is really about risks and assumptions:

No legal or ethical principle compels or allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation, that the interests of the next generation always trump the interests of living woman, [sic] and that the only acceptable level of risk is zero. "[T]he purpose of Title VII is to allow the individual woman to make that choice for herself."¹¹³

Judge Easterbrook further noted that the costs associated with not having any policy whatsoever, those being the costs of a cleaner workplace on one hand, and/or the cost of tort liability should a child be injured by lead on the other, still do not amount to a BFOQ.¹¹⁴

He then analyzed the case under the three-part modified business necessity defense inquiry used by the majority. As for the substantial risk of fetal harm, Judge Easterbrook cited complex medical studies and lamented that conflicts of these kind are not suited to resolution in a courtroom. Risks have not been defined, he contended, and then queried: what of the small risk of a great harm, or alternatively, the significant risk of a small harm? What about pregnant employees who smoke or drink? Regrettably, "[n]othing in the record shows the net risks."¹¹⁵ He then reviewed evidence of the mediation of lead and OSHA guidelines which regulate female as well as male exposure to lead. He found that animal studies are often the only answer and should have been accepted by the majority.¹¹⁶ As for the third

Workplace, 95 YALE L.J. 577 (1986) (recommendation for Congressional action); Note, *supra* note 87, at 1111, 1146 (Title VII inadequate as framework for analyzing FPP cases and author offers model statute).

113. *Johnson Controls*, 886 F.2d at 913 (partially quoting *Dothard*, 433 U.S. at 335). This suggestion that there are acceptable risk levels other than zero is an important one, and will surely be debated long into the future as the law and science both develop.

114. *Johnson Controls*, 886 F.2d at 914 (no cost or fear of tort liability BFOQ available under Title VII); see also *supra* note 54 and accompanying text.

115. *Johnson Controls*, 886 F.2d at 916-18. Judge Easterbrook commented that there are even risks if one stays in bed all day. *Id.* at 920. His point is that judicial forums are inappropriate for this complex set of issues which more logically belong in the Congress where a national debate can take place to resolve questions such as acceptable levels of risk for the various parties. *Id.* at 916-20.

116. *Id.* at 918-20. Judge Easterbrook asked why the majority refused to accept OSHA's conclusion that "lead in men as well as women is hazardous to the unborn." *Id.* at 918. He further chastised the majority for rejecting evidence supporting this position without holding a trial. *Id.* at 919. See generally *United Steelworkers v. Marshall*, 647 F.2d 1189, 1256-58 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981). What, the judge asked, is wrong with animal studies when they are often "the best foundation for [a] decision." *Johnson Controls*, 886 F.2d at 919; see also *Industrial Union Dep't v. Am. Petro. Inst.*, 448 U.S. 607, 657 n.64 (1980) (plurality decision concluding animal studies admissible). See *infra* notes 376-96 and accompanying text.

part of the analysis, the judge cited some less restrictive alternatives, thus negating the validity of the "striking sweep" of JCI's FPP.¹¹⁷

Judge Easterbrook concluded that Title VII was designed to eliminate such "matching of sexes to jobs," even though this statute has as one of its costs possible prenatal injuries.¹¹⁸ He suggested that the court needs to define "tolerable risk," because to require zero risk and selectively so, as JCI does, "produces not progress but paralysis."¹¹⁹

C. *The United States Supreme Court*

Demonstrating its interest in these issues, and to resolve the split among the circuit courts of appeals and state courts, the Court granted *certiorari* to hear *Johnson Controls*.¹²⁰ Justice Scalia already enjoyed a certain familiarity with the issues as he was one of the decisionmakers in *Oil, Chemical and Atomic Workers v. Amer. Cyanamid Co.*, which held that OSHA's general duty clause to maintain a safe and healthful workplace does not apply to an FPP which is an employer policy, as opposed to a physical condition, at the workplace.¹²¹

The Supreme Court framed for review of *JCI*, two questions. First, which party bears the burden of proving that JCI's justifications for the FPP meets Title VII standards. Then, the Court asked which defense—the BFOQ or the BND, is the appropriate one, and whether the FPP falls within the bounds of either one.¹²² Second, the Court asked whether scientific animal studies are "insufficient as a matter of law to demonstrate signif-

117. *Johnson Controls*, 886 F.2d at 919-20.

118. *Id.* at 920. This FPP would allow "employers to consign more women to 'women's work' while reserving better-paying but more hazardous jobs for men." *Id.*; see also Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1398-1400 (1988).

119. *Johnson Controls*, 886 F.2d at 920-21. Judge Easterbrook indicated that while JCI's goal is laudable, its plan fell short of the Title VII promise to women. There are many unfortunate examples of differential risk selection. Compare *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (male prisoner not allowed to be sterilized) with *Buck v. Bell*, 274 U.S. 200 (1927) (mentally retarded women allowed to be sterilized).

120. 110 S. Ct. 1522 (1990). See generally *Johnson Controls*, 886 F.2d 871; *Johnson Controls, Inc. v. Calif. Fair Empl. and Housing Corp.*, 218 Cal. App. 3d 517, 267 Cal. Rptr. 158 (1990); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); cf. *Grant v. General Motors Corp.*, 908 F.2d 1303 (6th Cir. 1990) (four months after JCI *certiorari* granted, Sixth Circuit vacated judgment in favor of General Motors FPP and remanded case for disposition under more stringent BFOQ standard).

121. 741 F.2d 444 (D.C. Cir. 1984). Judge Bork wrote the opinion to this OSHA challenge. *Id.* The policy was not challenged under Title VII principles. See *infra* notes 301-305 and accompanying text (discussing *American Cyanamid*).

122. *International Union, UAW v. Johnson Controls, Inc.*, 110 S. Ct. 1522 (1990). The Court's special concern in this question relates to the boundaries of the BFOQ defense.

icant risk to humans due to exposure to toxic substance[s]?”¹²³ The Court heard oral arguments on October 10, 1990, the first week of Justice Souter’s tenure as an Associate Justice, who replaced retiring Justice Brennan. The Court’s decision was announced March 20, 1991.

The Supreme Court’s decision, widely covered and eagerly anticipated by employers as well as workers, appeared to be a resounding victory for the rights of workers to make their own employment and family decisions.¹²⁴ The Court, in a rare unanimous ruling, reversed the Court of Appeals for the Seventh Circuit in *JCI*, and remanded the case for further proceedings consistent with its opinion.¹²⁵ Justice Blackmun wrote the opinion, joined by Justices Marshall, Stevens, O’Connor, and Souter, addressing the “important and difficult question” of FPPs, and then had “no difficulty concluding that Johnson Controls cannot establish a BFOQ.”¹²⁶ Justice White, joined by Chief Justice Rehnquist and Justice Kennedy, while agreeing that *JCI*’s FPP failed, claimed that the BFOQ defense is not “so narrow that it could never justify a sex-specific” FPP, and urged the Court to adopt a broader interpretation of the BFOQ defense.¹²⁷ Justice Scalia, in a separate concurrence expressed reservations. Most importantly,

123. *International Union, UAW v. Johnson Controls, Inc.*, 58 U.S.L.W. 3609 (U.S. Mar. 27, 1990) (No. 89-1215).

124. *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) *rev’g and remanding*, 886 F.2d 871 (7th Cir. 1989). The decision ended a seven year battle between the company and its workers. See *Give Workers Fair Warning on Hazards*, *BUS. WEEK*, April 8, 1991, at 100 (Court makes clear companies may not impose their own values about acceptable workplace risks); Smolowe, *Weighing Some Heavy Metal*, *TIME*, April 1, 1991, at 60 (Court held unambiguously that employer could not impose work rules on women to protect their fetuses); *The Boston Globe*, March 21, 1991, at 20, col. 1 (editorial applauding decision); Negri & Lewis, *‘Fighting Mad’ worker celebrates her victory at a Vermont Factory*, *The Boston Globe*, March 21, 1991, at 1, col. 1; Bronner, *Restrictions on women are held to be biased*, *The Boston Globe*, March 21, 1991, at 1, col. 3 (Court made sweeping statements about sex discrimination certain to set tone for future litigation); Greenhouse, *Court Backs Right of Women to Jobs with Health Risks*, *N.Y. Times*, March 21, 1991, at A1, col. 3; Kilborn, *Employers Left With Many Decisions*, *N.Y. Times*, March 21, 1991, at B12, col. 1 (citing how employers are accommodating Court’s ruling); Wermiel, *Justices Bar ‘Fetal Protection’ Policies*, *Wall St. J.*, March 21, 1991, at B1, col. 3, & B5, col. 1; Lublin, *Decision Poses Dilemma for Employers*, *Wall St. J.*, March 21, 1991, at B1, col. 2 & B5, col. 2 (employers fear Court has left them with unpleasant choices); cf. Goodman, *A Warning on Warnings*, *The Boston Globe*, April 4, 1991, at 11, col. 4. *But see Pregnant Women: Their Choice*, *THE ECONOMIST*, April 6, 1991, at 23 (citing Prof. Rosen’s opinion that now women can enter a world designed for men that is still full of hazards for women); Kaplan, Hohn, & Seringen, *Equal Rights Equal Risks*, *NEWSWEEK*, April 1, 1991, at 56 (citing Prof. Freed’s opinion that it is odd that women “would fight for the right to expose their fetuses to lead”).

125. Justice Blackmun wrote the opinion of the Court which struck down *JCI*’s FPP as discriminatory in violation of Title VII as amended by the PDA. Since the Court found that *JCI* could not establish a BFOQ, the plaintiffs prevailed.

126. *Johnson Controls*, 111 S. Ct. at 1202, 1207.

127. *Id.* at 1210-16 (White, J., concurring in part and concurring in the judgment).

he stated, that employer costs so prohibitive as to threaten the very survival of the business should also support a BFOQ defense.¹²⁸ The decision, though unanimous, displays a split of reasoning at its core, likely to divide the Court in later cases. Thus, while all of the Justices agreed that this FPP failed, four of the Justices, significantly, would expand the BFOQ in future cases.¹²⁹

1. The Court's Opinion

The Court, in Part II of its opinion, framed the question presented as "whether an employer, seeking to protect fetuses, may discriminate against women just because of their ability to become pregnant."¹³⁰ The Court concluded that JCI's FPP was biased on the basis of sex in that "[f]ertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job."¹³¹ This amounted to a facially discriminatory classification reasoned the Court.¹³² The assertion of an "ostensibly benign" reason for this sex-plus-fertility exclusionary policy, namely the protection of potential "unconceived offspring," did not alter the fact that it still constituted sex-based discrimination violative of Title VII.¹³³ Significantly, the Court noted that JCI "does not seek to protect the unconceived children of *all* its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, JCI is concerned only with the harms that may befall the unborn offspring of its *female* employees."¹³⁴ Thus, JCI's policy required proof of

128. *Id.* at 1216-17 (Scalia, J., concurring in the judgment).

129. *See supra* notes 128-29 and accompanying text; *cf. Grant*, 908 F.2d at 1311 (court approves of approach which factors in fetal concerns); *Johnson Controls*, 886 F.2d 871 (even some dissenters in Seventh Circuit approve of expanded BFOQ); 1990 EEOC Policy Guide, *supra* note 70, at 6801-02 (Commission, like Sixth Circuit, concurs with Judge Cudahy's dissent in the Seventh Circuit which allows employers to factor in fetal safety and risks). *See generally* Felten, *Under a Civil Rights Cloud, Fetal Protection Looks Dismal*, INSIGHT, April 15, 1991, at 40.

130. *Johnson Controls*, 111 S. Ct. at 1202; *cf. Johnson Controls*, 886 F.2d at 879 (appeals court framed issues differently when it asked whether lead posed a "health risk to the offspring of Johnson's female employees"). It is noteworthy that many women which the JCI FPP would classify as "fertile" could not realistically become pregnant. However, because JCI's policy placed the burden of proof regarding infertility on the women, absent proof of surgical sterilization or a medical doctor's certification of the woman's inability to conceive (which few doctors would be willing to certify due to fear of malpractice liability in the event that the improbable did in fact occur), at least some of the women who were excluded from the jobs in question because they were classified as "fertile" did not have the ability to become pregnant.

131. *Johnson Controls*, 111 S. Ct. at 1202; *cf.* 29 C.F.R. § 1910.1025 (1989) (OSHA found that both male and female employees need protection from toxic effects of lead).

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

133. *Id.* at 1203-04.

134. *Id.* at 1203 (emphasis added).

infertility from women only, in a manner that the Court analogized to *Phillips v. Martin Marietta Corp.*¹³⁵ In *Phillips*, the Supreme Court invalidated a facially discriminatory hiring policy which excluded mothers but not fathers of pre-school age children from jobs. The theory in *Phillips* was that the employer wrongly established additional hiring criteria on only one gender in violation of Title VII.¹³⁶

Central to the Court's analysis of JCI's sex-specific exclusionary policy was the statutory mandate embodied in the PDA.¹³⁷ As the Court wrote: "Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the Pregnancy Discrimination Act means what it says."¹³⁸ JCI's policy, which used the words "capable of bearing children" in its mandatory FPP, classified applicants and employees on the basis of potential for pregnancy.¹³⁹ Thus, the policy was applied so as to exclude fertile women but not fertile men from broad categories of employment. The Court held that the "classification, must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. Respondent has chosen to treat all its female employees as potentially pregnant. . . ."¹⁴⁰ Moreover, the Court explained that the "absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."¹⁴¹ The "explicit terms of the discrimination," rather than "arguably benign motives," determine that sex discrimination is facial rather than neutral, demanding disparate treatment rather than disparate impact analysis.¹⁴²

All of the Justices agreed that the statutory BFOQ was the only defense available to an employer in this instance; however, the Court and the con-

135. 400 U.S. 542 (1971).

136. *Id.* at 544. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969) was the leading case establishing a "sex-plus" theory. The "sex-plus" doctrine applies to instances where employers classify employees on the basis of sex plus some other characteristic (e.g., sex plus marriage, sex plus race, sex plus appearance and grooming standards) establishing additional job criteria on only one gender in violation of Title VII. B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 403-17 (2nd ed. 1983).

137. *Johnson Controls*, 111 S. Ct. at 1203-04. Because of the PDA, the Court concluded that JCI's classification "must be regarded . . . in the same light as explicit sex discrimination." *Id.*

138. *Id.* at 1210. The PDA, of course, prohibits discrimination on the basis of pregnancy or ability to become pregnant.

139. *Id.* at 1203.

140. *Id.* at 1203.

141. *Id.* at 1203-04. This argument can be found in the Fourth, Sixth, and Seventh Circuits' majority opinions.

142. *Id.* at 1204.

currences disagreed as to the scope and contours of the BFOQ.¹⁴³ The Court, in Part IV of its opinion, grounded its interpretation of the BFOQ on the language of Title VII, and the PDA which amended Title VII,¹⁴⁴ in its definition section to clarify that sex discrimination included discrimination "because of or on the basis of pregnancy, child-birth or related medical conditions; and women . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected. . . ."¹⁴⁵

The Court relied upon a literal interpretation of the statutory language and held that the BFOQ must be narrowly construed because it "contains several terms of restriction that indicate that the exception reaches only special situations."¹⁴⁶ Thus, "discrimination is permissible [in] 'certain instances' where sex discrimination is 'reasonably necessary' to the 'normal operation' of the 'particular' business."¹⁴⁷ These terms do not permit "general subjective standards," rather they indicate actual occupational qualifications, "objective, verifiable requirements [that] must concern job-related skills and aptitudes."¹⁴⁸ The Court followed the so-called "essence of the

143. *Id.* at 1209-10 (White, J., concurring), 1216-17 (Scalia, J., concurring). The Seventh Circuit was the first appeals court to hold that an employer FPP could be justified as a BFOQ. *Id.* at 1202.

144. *Id.* at 1205-07; *see also supra* note 70 and accompanying text. The 1990 EEOC Policy Guide was issued in direct response to the Seventh Circuit's decision. This policy guidance, which aligned the analysis of FPPs with Title VII precedent substantially revised its 1988 EEOC Policy Statement on Reproductive and Fetal Hazards Under Title VII. *See generally* Majority Staff of the Committee on Educ. and Labor, H. Rep., 101st Cong., 2d Sess., A Report on the EEOC, Title VII and Workplace Fetal Protection Policies in the 1980's (Comm. Print 1990) [hereinafter EEOC Report]. The Report chastised the EEOC for the agency's absence of policy directives during the first 8 years of the 1980s. The EEOC at the time was under the leadership of Clarence Thomas. While indicating that these cases would instead be handled "case-by-case," the agency proceeded to "warehouse" them "because it had no policy directive." *Id.* at 2. The EEOC Report commented on the agency's "circular argument" in this regard which led to "the agency's alarming decade-long enforcement paralysis." *Id.*

145. 42 U.S.C.A. § 2000e(k) (West 1981 & Supp. 1990).

146. *Johnson Controls*, 111 S. Ct. at 1204.

147. *Id.* The Court further noted that it has read the BFOQ narrowly in past cases. *See, e.g.,* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122-25 (1985); *Dothard*, 433 U.S. at 332-37.

148. *Johnson Controls*, 111 S. Ct. at 1204. *Compare* Brief for Petitioners, *supra* note 24, at 31 (sex specific FPPs not exempted by BFOQ) *and* Brief of the State of California at 22-23, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, (7th Cir. 1989) (No. 89-1215) (asserted fetal safety interest "unrelated to actual operational needs of business") *and* Brief for Massachusetts, *supra* note 30, at 19-20 (BFOQ justification not met because women "unquestionably" perform job at issue and fetal protection not "essence" of JCI's business) *with* Brief for Respondent, *supra* note 68, at 15-21 (employer's reasonable ethical, legal, and business concerns are part of normal operations and can constitute a BFOQ) *and* Brief of the Equal Employment Advisory Council at 17-19, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (No. 89-1215) (BFOQ allows employers to consider legitimate safety concerns, even those of third parties) *and* Brief for the National Safe Workplace Inst. at 12, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (No. 89-1215) (BFOQ exception

business test."¹⁴⁹ The Court took issue with Justice White's concurrence which defined "occupational" in a more subjective manner allowing requirements to be classified as job-related "simply because the employer has chosen to make the requirement a condition of employment."¹⁵⁰ This approach, argued the Court, would nullify the BFOQ and renew the very problems that Title VII and the PDA sought to eradicate.¹⁵¹ The parameters of the "so-called safety exception to the BFOQ" suggested by JCI in justification of its FPP were rebuffed by the Court which continued to limit application of the BFOQ to "narrow circumstances," such as those outlined in *Dothard* and *Criswell*.¹⁵²

In both *Dothard* and *Criswell*, sex and age respectively related to the employees' actual ability to perform the job.¹⁵³ The JCI Court noted that the safety of third parties in those cases went to the "essence" of the job or to the "central mission of the employer's business," and that the third parties in question were "indispensable to the particular business at issue."¹⁵⁴ These two cases are inapposite to the facts in *JCI* because "[t]hird party safety considerations properly entered into the BFOQ analysis in *Dothard* and *Criswell* as they went to the core of the employee's job performance . . . [a] performance involv[ing] the central purpose of the enterprise."¹⁵⁵ The Court distinguished unconceived fetuses of female employees from customers and third parties whose safety is essential to the business. Although the possibility of injury to a fetus was deemed a "deep social concern," the Court held that the BFOQ was not broad enough to transform this into an "essential aspect of battery making."¹⁵⁶

The Court held that the BFOQ is a narrow exception to the ban on sex discrimination because of its language as well as the language and legislative

"not so narrowly drawn as to preclude consideration of all 'non-job-performance related concerns'").

149. *Johnson Controls*, 111 S. Ct. at 1205-06.

150. *Id.* at 1205; *cf. id.* at 1201-11 (White, J., concurring) (FPP could be justified if employer could show exclusion of women reasonably necessary to avoid substantial tort liability).

151. *Id.* at 1206-07. The Court meant that to hold otherwise would render Title VII and the PDA mere surplusage.

152. *Id.* at 1205; *see also* *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

153. *See supra* note 152 and accompanying text.

154. *Johnson Controls*, 111 S. Ct. at 1205-07.

155. *Id.* at 1205-06.

156. *Id.* at 1206. The Court declined to expand the BFOQ burden justification because such an expansion contradicts not only the literal language of the BFOQ, but the plain language and history of the PDA. *Id.*

history of the PDA.¹⁵⁷ The Court cited the PDA's second clause which contains its own BFOQ standard in that it requires that pregnant employees must be "treated the same" as other employees "similar in their ability or inability to work."¹⁵⁸ Such language indicated congressional intent that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."¹⁵⁹ Analysis of the legislative history of the PDA supports the statutory interpretation that women should not be treated differently "because of their capacity to bear children."¹⁶⁰ Where a worker is pregnant, the focus must be on "the actual effects of that condition on [her] ability to work."¹⁶¹ The Court essentially confirmed that an employer's concern regarding an employee's pregnancy must be limited to job performance, leaving other decisions about the confluence of employment and reproduction to the individual.¹⁶² Summing up, the Court stated:

We conclude that the language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. We reiterate our holdings in *Criswell* and *Dothard* that an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the 'essence' of the particular business.¹⁶³

In Part V of the opinion, the Court expanded upon this holding stating that the employer's "professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. 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."¹⁶⁴ The Court quoted from Judge Easterbrook's

157. *Id.* at 1207. The Court used a four corners approach to the question, while the concurrences advocated a more expansive "common sense" approach.

158. *Id.* at 1206.

159. *Id.*

160. See Becker, *supra* note 5, at 1247-50.

161. *Johnson Controls*, 111 S. Ct. at 1206.

162. *Id.* at 1206-07; *cf. id.* at 1210-11 (White, J., concurring) and *id.* at 1216 (Scalia, J. concurring) (employer FPPs allowable in certain situations).

163. *Id.* at 1207.

164. *Id.* Courts in many states have increasingly dealt with cases involving fetuses and later-born children, whom prosecutors allege were injured by their mothers. As in JCI III, courts have, in general, refused to pit the child against the mother. See generally Gertner, *Women v. Fetus*, BOSTON B.J., July/Aug. 1990, at 27 (many assert pregnant women waive their rights in favor of their fetuses but at the same time "turn a blind eye to the complicity of men" whose own repro-

dissent on the point that these concerns are not part of the "essence" of JCI's business,¹⁶⁵ and concluded that "the company may not exclude fertile women at all."¹⁶⁶ The company's contention that it cannot predict which fertile women would become pregnant was consequently dismissed as an "academic" argument.¹⁶⁷ The Court commented on the "small minority of women" whose fetuses might be affected in light of evidence that the birth-rate drops to two percent for blue collar workers over age thirty, and that the record did not reveal any "birth defects or other abnormalities" among the eight pregnancies reported.¹⁶⁸ JCI did not "begin to show that substantially all of its fertile women employees are incapable of doing their jobs."¹⁶⁹

Part VI of the opinion addressed the employer's concern about tort liability and the attendant fear that such would increase the company's costs. The Court reiterated, however, that Title VII "bans sex-specific fetal protection policies. . . ." ¹⁷⁰ The Court recognized that while 40 states permit a right to recover for prenatal injuries based on negligence or wrongful death, absent negligence, "it would be difficult for a court to find liability on the part of the employer, if the company complies with the lead standard set by OSHA" which includes mandatory protections that "effectively minimize any risk to the fetus and newborn child," and warns its female employees about the potential damage from lead.¹⁷¹ Thus, "[i]f under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer

ductive capacity may be impaired); Wilkerson, *Court Backs Woman in Pregnancy Drug Case*, N.Y. Times, April 3, 1991, at A15, col. 1 (first appellate decision that woman should not stand trial on charges of delivering cocaine to newborn).

165. *Johnson Controls*, 111 S. Ct. at 1207 (quoting *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting)).

166. *Johnson Controls*, 111 S. Ct. at 1207-08.

167. *Id.* at 1208.

168. *Id.* See generally *Johnson Controls*, 886 F.2d at 877 (JCI's medical consultant refused to attribute any adverse effects on later-born children solely to lead); Brief for the American Civil Liberties Union, International Union, UAW v. *Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (No. 89-1215) [hereinafter ACLU Brief]. It is notable that the Supreme Court declined to adopt the term "unborn child" and instead typically used "unconceived fetuses." See Denniston, *Sex Discrimination Case Exposes Fear of Liability*, The Am. Law., Dec. 1990, at 79-80 (recalling how at oral argument of *JCI*, Justices Stevens and Scalia unsuccessfully tried to elicit from JCI actual risks of harm, and even how it would define the risks).

169. *Johnson Controls*, 111 S. Ct. at 1208. Applying the *Weeks* test to JCI's FPP, the Court concluded JCI failed to produce a legitimate justification, and therefore plaintiffs prevailed in their sex discrimination claim. *Id.*

170. *Id.*

171. *Id.* The Court's formula, then, for avoiding liability seems to consist of two prongs: (1) fully informing women of the risk, and (2) not acting negligently.

fully informs the *woman* of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best."¹⁷²

The Court's position is problematic in at least two respects. First, the Court retreated to assumptions it declared outdated in this very case by suggesting employers need to inform women only of risks. What of informing men of possible risks to their potential offspring? Employers, after this decision, have obligations to all workers and their offspring. Second, the Court hedged when it wrote that the basis for employer liability "seems remote at best." This is little comfort for employers trying to grapple with complex employment safety and health issues. And as Justice White pointed out, what of the case where the parents gave an informed consent but the manufacturing process is abnormally dangerous, resulting in strict liability.¹⁷³ Could not the later-born child sue notwithstanding the parents' consent? The answer surely is in the affirmative.¹⁷⁴ Finally, in a related point, the Court failed to address the changing nature of scientific studies of workplace toxins. Toxicology studies will undoubtedly change our knowledge and outlook on this issue. Also, standards continually change and, for example, the Centers for Disease Control may have a different standard from OSHA. Again, employers are in a precarious position—especially if the materials they work with are not tested or regulated by OSHA. Negligence, then, becomes an almost impossible issue to determine.

On the issue of Title VII's relationship to state tort law vis-a-vis preemption, the Court in dicta declared that any state law which impedes advancement of Congress's goals in enacting Title VII will be preempted.¹⁷⁵ This issue, a troubling one, will most likely reach the Court as well. For if the employer is faced with crippling costs, what is the employer to do? The concurrence suggests that this could amount to a BFOQ; however, the Court dismissed the question as premature.¹⁷⁶ The Court overruled the employer's attempt to solve the problem of reproductive health hazards with an exclusionary policy rather than by policing the workplace.¹⁷⁷ The employer's asserted specter of tort liability amounted to a fear that fertile women in the workplace will cost more, which is not a defense under Title

172. *Id.* (emphasis added).

173. *Id.* at 1211 & n.3 (White, J., concurring).

174. *Id.*

175. *Id.* at 1208-09.

176. *Id.* at 1209; *cf. id.* at 1212 (White, J., concurring) and *id.* at 1216-17 (Scalia, J., concurring).

177. *Id.* at 1209. See generally ACLU Brief, *supra* note 168, at 56-57 (tort cost-based defense eliminates incentives created by tort system to make workplace safe, while giving employers license to exclude any workers).

VII.¹⁷⁸ However, the Court specifically left open the issue of a case where "costs would be so prohibitive as to threaten the survival of the employer's business," a point Justice Scalia urged the Court to adopt in his concurrence.¹⁷⁹

The Court characterized its holding, that sex-specific FPPs are illegal under Title VII, as "neither remarkable nor unprecedented. Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."¹⁸⁰ FPPs disadvantaged only women, while men have not been historically disempowered by their reproductive capacities. The Court ruled that Congress has left it to the individual woman, not to employers or the courts, to decide whether her "reproductive role is more important to herself and her family than her economic role."¹⁸¹

2. Concurrences

The first concurrence, by Justice White, took issue mainly with the contours of the BFOQ. Justice White criticized the Court for "erroneously hold[ing] . . . that the BFOQ defense is so narrow that it could never justify a sex-specific" FPP.¹⁸² Justice White agreed with the Court's judgment only because on the record presented, summary judgment was improperly affirmed by the court of appeals.¹⁸³ Had the lower court properly considered the evidence, it would have concluded that summary judgment was inappropriate as there were disputes over material issues of fact.¹⁸⁴

178. *Johnson Controls*, 111 S. Ct. at 1209. While Congress considered the extra costs associated with providing equal treatment, it nevertheless passed the PDA. See generally *Norris*, 463 U.S. at 1084 n.14; *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978).

179. *Johnson Controls*, 111 S. Ct. at 1209; cf. *id.* at 1216-17 (Scalia, J., concurring). See generally *Johnson Controls*, 886 F.2d at 905 (Posner, J., dissenting) (potential tort liability at some point "may become large enough to affect the company" and supply ground for a BFOQ).

180. *Johnson Controls*, 111 S. Ct. at 1210. See generally *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); cf. *Muller v. Oregon*, 208 U.S. 412 (1908).

181. *Johnson Controls*, 111 S. Ct. at 1210. The Court properly returned the role of parenting to the parents, thereby avoiding the trap of allowing employers to make private family decisions for their employees.

182. *Id.* (White, J., concurring). Chief Justice Rehnquist and Justice Kennedy joined in the concurrence. They would not stick doggedly to the literal plain meaning of the statutory language, but rather would inject some "common sense" into the BFOQ justification. *Id.* They reason that avoidance of injury and consequent tort liability is part of the normal operation of business. *Id.* But see *id.* at 1207 (Congress intended only BFOQs which actually affect ability to perform job).

183. *Id.* at 1210, 1216.

184. *Id.*

Justice White stated that Title VII forbids sex discrimination except in cases where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that business.¹⁸⁵ So while the Court construed this standard with "heavy reliance" on the phrase "occupational qualification," approving of only those policies required for the essence of the business, Justice White would relax the standard and allow FFPs which are reasonably necessary to the normal operation of making batteries.¹⁸⁶ The Court, Justice White observed, has read into the statutory language a new requirement that gender actually interferes with the employee's ability to perform the job, an interpretation bereft of "case support."¹⁸⁷

Justice White offered guidance on when and how FFPs could be justified. "[F]or example, an employer could show that exclusion of women from certain jobs was reasonably necessary to avoid substantial tort liability."¹⁸⁸ Because, he reasoned, is not avoidance of tort liability part of the normal operation of any business? Problems relating to tort liability loom, Justice White noted, because it is unclear whether compliance with Title VII preempts state tort liability, and it is possible for injured later-born children to sue the employer.¹⁸⁹ Justice White opined that a cost-justification defense could legitimize FFPs.¹⁹⁰

Second, Justice White proposed that the BFOQ defense is broad enough to include considerations of safety, relying in large part on *Dothard* and *Criswell*.¹⁹¹ He stated, "I merely reaffirm the obvious—that safety to third parties [fetuses and customers] is part of the 'essence' of most if not all businesses."¹⁹² Protecting fetal safety, he submitted, is as much a legitimate concern as is safety to third parties in guarding prisoners as in *Dothard*, or in flying airplanes as in *Criswell*.¹⁹³ Justice White neglected to acknowledge, however, that the latter two cases dealt with the employees' ability to safely

185. *Id.* 1210-11.

186. *Id.* at 1210 & n.1; cf. *Johnson Controls*, 886 F.2d at 901-02 n.1 (Cudahy, J., dissenting) (BFOQ need not be narrowly limited to productivity, quality, and safety and should include risks to third parties).

187. *Johnson Controls*, 111 S. Ct. at 1210 n.1, 1214 n.8. (Court offers no judicial or legislative support for its overly narrow reading of BFOQ justification).

188. *Id.* at 1210. *But see id.* at 1209 (such arguments divert attention from real issue of employer's obligation to provide safe workplace).

189. *Id.* at 1211 (parents cannot waive children's causes of action and parental negligence will not be imputed to children).

190. *Id.* at 1212. (BFOQ justification "broad enough to include considerations of cost and safety of the sort that could form the basis" of FFPs).

191. *Id.* at 1211-13. *See generally* *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

192. *Johnson Controls*, 111 S. Ct. at 1212 n.5.

193. *Id.*

perform the job. In *JCI*, the women employees have always been able to safely perform the job of batterymaking, as the Court pointed out.

Finally, Justice White commented on the lack of data relating to the risk of harm and the extent of fetal injury likely to occur.¹⁹⁴ He wondered about male-mediated toxic harm to offspring and felt that what evidence there was should not have been discounted as speculative, as the Court had already announced its support for the use of animal studies to assess risks.¹⁹⁵ Justice White agreed with Judge Posner of the Seventh Circuit on the novelty and difficulty of the issues presented, and urged a case-by-case approach involving careful examination of all the facts.¹⁹⁶

Justice Scalia wrote a lone concurrence agreeing with the judgment of the Court for the reason that *JCI* failed to establish a BFOQ for its FPP.¹⁹⁷ Justice Scalia departed there and developed two main propositions. Since the PDA prohibits differential treatment based upon sex or pregnancy absent a BFOQ, evidence relating to negative effects on male reproductive systems is irrelevant.¹⁹⁸ Furthermore, by "reason of the [PDA] it would not matter if all pregnant women placed their children at risk . . . just as it does not matter if no man do[es] so."¹⁹⁹ He, like Judge Easterbrook, suggested that the powers of Congress are available if there are perceived problems with the PDA.

Most importantly, Justice Scalia also urged a two-point expansion to the BFOQ defense, and agreed with Justice White that there is no support for what they perceive to be the Court's overly narrow interpretation of the scope of the BFOQ.²⁰⁰ Justice Scalia first argued that "substantial risk of tort liability" would be a viable BFOQ exception.²⁰¹ Justice Scalia concluded by arguing that when costs are so prohibitive as to threaten survival of the business, a BFOQ defense should be allowed.²⁰²

194. *Id.* at 1215 & n.9; *cf. Johnson Controls*, 886 F.2d at 915-18 (Easterbrook, J., dissenting) (judge complained that "nothing in the record show[ed] the net risks").

195. *Johnson Controls*, 111 S. Ct. at 1215-16. Justice White emphasized the Court's acceptance of scientific animal studies. *Id.*; *cf. id.* at 1216 (Scalia, J., concurring) (science aspect of case secondary because even without such evidence, PDA bans sex specific discrimination).

196. *Id. Cf. Johnson Controls*, 886 F.2d at 908 (Posner, J., dissenting). When the next FPP case reaches the Court, the response may not be so unanimous, seems to be Justice White's message.

197. *Johnson Controls*, 111 S. Ct. at 1216-17.

198. *Id.* at 1216.

199. *Id.*

200. *Id.*

201. *Id.* at 1216-17. Justice Scalia neglected, however, to offer support for this proposition.

202. *Id.*

3. Case Analysis

The United States Supreme Court, therefore, unequivocally rejected JCI's sex-specific FPP, but as in most controversies, the discussion does not end after the disposition of the case. *JCI* was perhaps an easy case for the Court (although the lower courts labored over it) because the discrimination was so clear, and the justifications so weak. However, the unanimity of the decision belies the fact that overall, the opinion resonates with shakiness. For example, had there been proof that damage to fetuses was female-mediated only, and that related costs and tort liability "would be so prohibitive as to threaten the survival of the employer's business," the Court indicated that in such a situation the employer might prevail.²⁰³ Though the Court was unanimous, the tensions among the Justices are apparent regarding the scope and contours of Title VII's BFOQ justification. Five of the Justices subscribe to the "literalist essence of the business approach" to the BFOQ, so that if an asserted justification does not actually relate to the "essence" of the business, it will fail.²⁰⁴ Four of the Justices, however, expand on the literal language of the BFOQ and advocate a "common sense approach" in which avoiding injuries to third parties and potential third parties is part of the normal operation of any business.²⁰⁵ This balance of Justices will be more difficult to sustain in future, closer cases.

Several other points bear mention as well. First, while *JCI* addressed lead in a manufacturing plant, the Court's decision affects every place of employment, including those which use video-display terminals and semiconductor computer chips. Many employers might be inclined to dismiss the effect the *JCI* decision has, but that would be incorrect.

Also, courts and commentators assert that the Title VII analytical paradigm is not necessarily adequate for FPP cases with their often emotion-charged facts involving reproductive, social, economic, and ethical considerations.²⁰⁶ Under the *JCI* Court's approach, many would argue, fetal health is relegated to a secondary role behind that of maternal reproductive choice and family material prosperity. At least an equal number would

203. *Id.* at 1209; see also *supra* notes 175-79 and accompanying text.

204. *Id.* at 1206-08. The Court adopted the employees' position in this respect. See Brief for Petitioners, *supra* note 24, at 25-35.

205. *Johnson Controls*, 111 S. Ct. at 1210-17. This view generally favors the employer's position. See Brief for Respondent, *supra* note 68, at 14-19.

206. See generally *Johnson Controls*, 111 S. Ct. at 1216 (Scalia, J., concurring) (legislative forum available for those disagreeing with Court's interpretation of statutes); *Wright*, 697 F.2d at 1184 (FPP facts do "not fit with absolute precision into any Title VII theories"); *Duncan*, *supra* note 46, at 67 (courts have yet to devise workable solution to FPP conflict as problem grows more acute).

counter that Title VII represents a consensus in this country to tolerate neither discrimination in the workplace nor intrusion by employers into the autonomous domain of private family decisionmaking. Does Title VII, as Judge Easterbrook queried, have as one of its costs, prenatal injuries?²⁰⁷ While none were proven in *JCI*, there may be such costs in future cases. The debate whether such injuries should even be a cost of the Title VII legislation will continue. There is a possibility that Congress may take notice of this situation and address it legislatively.

While one of the two questions certified to the Supreme Court related to the admissibility of scientific animal studies, this issue was skirted in the opinion. Future cases might involve toxins which are sex specific and thus affect only one class of workers. In *JCI*, the vast majority of studies cited related to female-mediated harms. Unfortunately, employers such as *JCI* too often routinely accept scientific studies without questioning their veracity or completeness. Further, in the absence of comprehensive data relating to male-mediation of harm to fetuses, employers have been prone to dismiss the possibility that such harm exists. Consequently, companies have drawn up exclusionary FPPs based upon flawed assumptions such as those that the Seventh Circuit failed to detect. It should be noted, too, that science continually changes and what might not be considered toxic currently might be discovered to be a toxin over time. What are employers to do, for example, if a workplace substance is merely a suspected toxin, as opposed to lead, a long-known toxin. Science has not yet answered questions these employers need to know now.

Of course, the practitioner now wonders how to best respond: What kind of advice to give a client? *JCI* has indicated that it will probably retreat to the voluntary policy it had in effect prior to the now invalid mandatory policy. Their voluntary policy is also legally questionable and has not yet been tested in court. The Supreme Court indicated that if employers fully inform workers of all risks and are not negligent, there is little risk of liability. The *JCI* Court, by banning sex-specific FPPs, makes it necessary to protect all workers and their offspring. The solutions, then, become easier to see. Employers must focus on cleaning up their workplace, rather than eliminating employees they feel are susceptible to their toxic workplaces. This translates into more effective ventilation, breathing, safety, and hygiene devices. A more radical solution would be to simply eliminate the toxin and that would automatically create a cleaner work-

207. *Johnson Controls*, 886 F.2d at 920 (Easterbrook, J., dissenting). See generally Rosen, *What Feminist Victory in the Court?*, N.Y. Times, April 1, 1991, at A17, col. 3 (decision is actually an "equal opportunity jeopardy" for all parties).

place. This is problematic because there are not always alternative feasible substitutes for certain materials. Workers need to be better educated and informed of all risks known, possible, and suspected, in order to make the informed choice available to them. A related point is that healthcare needs emphasis. For if employers are to escape liability, should not the employer offer specialized healthcare relating to the particular toxins their employees are exposed to? Finally, research of toxins needs to continue and expand. Research must be free of gender (or even racial, age, or other) stereotypes which lead scientists or reviewing courts to conclusions based upon assumptions that are suspect.

OSHA has to date investigated only a handful of toxins for adverse safety and health effects. It would behoove employers and industry associations, as well as worker organizations, to sponsor or even initiate their own research, or better yet, to support a mutual research program to ensure neutrality and completeness. These and other solutions can cut down on one of the perceived costs of the Title VII legislation, and on the potential for employer liability.

III. EMPLOYER LIABILITY: THE ANALYTICAL FRAMEWORK OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE PREGNANCY DISCRIMINATION ACT OF 1978

A. Title VII

Employers are prohibited, under Title VII of the Civil Rights Act of 1964, from making employment decisions which discriminate against individuals on the basis of their race, color, religion, sex, or national origin. The prohibition against sex discrimination was attached to the Title VII legislation in the final stages of drafting. Representative Smith of Virginia who proposed that sex discrimination be included in the Act was an opponent of the Civil Rights Bill.²⁰⁸ His alleged interest in doing so was to prevent Title VII from becoming law. Title VII became the law nevertheless; but the litigation of sex discrimination claims reflected, at least initially, a lack of interest in pursuing this theory.

In one of the earliest sex discrimination cases, *General Electric Co. v. Gilbert*,²⁰⁹ the United States Supreme Court held that an otherwise comprehensive disability plan did not violate Title VII even though it failed to

208. 110 Cong. Rec. 2577 (Feb. 8, 1964); Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 74 (1980).

209. 429 U.S. 125 (1976) (private employer-sponsored disability insurance program challenged as violative of Title VII).

cover pregnancy-related disabilities.²¹⁰ In other words, discrimination on the basis of pregnancy was not a sex-based classification even though only women may become pregnant. Congress swiftly reacted to *Gilbert* and related cases by introducing an amendment to Title VII addressing pregnancy discrimination.²¹¹ Finding *Gilbert* to be incompatible with the overall objectives of Title VII, Congress passed the Pregnancy Discrimination Act of 1978 ("PDA") which specifies that sex discrimination includes discrimination on the basis of pregnancy and its related medical conditions.²¹² As Senator Williams, a sponsor of the PDA, stated: "The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workplace, without denying them the fundamental right to full participation in family life."²¹³ Congress recognized that if pregnancy was not viewed as sex discrimination, women could not move out of the shadow of *Muller v. Oregon's*²¹⁴ restrictive protections.

1. The Pregnancy Discrimination Act of 1978

The PDA states that:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ."²¹⁵

The legislative purpose here was clearly to preclude future use of the legal reasoning found in *Gilbert*, an approach which the lawmakers believed

210. *Id.* at 136. The Court rejected the approach adopted by the circuit courts to have considered the issue, and instead concluded that Congress did not intend to include pregnancy discrimination within the proscribed sex discrimination. *Id.* In *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974), the Court first determined that pregnancy was not facial discrimination based on sex, and so heightened scrutiny was inappropriate. *Id.* The Court concluded that the women's Fourteenth Amendment rights were not violated as all women were treated in the same manner. *Id.*

211. See generally 42 U.S.C.A. §§ 2000e-2(a), 2000e-2(k) (West 1981 & Supp. 1990); 15 U.S.C.A. § 2601(b)(1) (West 1985 & Supp. 1991); 29 U.S.C.A. §§ 651-78 (West 1985 & Supp. 1990); 29 C.F.R. § 1910.1025 (1989); 1990 EEOC Policy Guide, *supra* note 70.

212. 42 U.S.C.A. § 2000e(k) (West 1981 & Supp. 1990).

213. *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 955 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess.* 482 (1977); *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy, 1977: Hearings on H.R. 50-55 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess.* 84, 88 (1977).

214. 208 U.S. 412 (1908).

215. 42 U.S.C.A. § 2000e(k) (West 1981 & Supp. 1990).

subverted Title VII's goal of providing workplace equality for women. For Congress recognized that a failure to protect women from discriminatory treatment when pregnant will, in essence, prevent her from being viewed as seriously as her male colleagues in the workplace. In fact, Title VII's underlying mission can be seen as an attempt to neutralize such previously negative stereotypes like the stereotype of the pregnant worker whose performance is somehow compromised and who consequently becomes less valuable in the workplace. The reality is that, unless an active effort to root out such stereotypes is made through rigorous application of the PDA to discriminatory actions in the workplace, women will not achieve the legally mandated equality.

Under the PDA, employment decisions based on pregnancy and related medical conditions, including physiological conditions connected with childbearing that are unique to women, are now *prima facie* violations of Title VII.²¹⁶ The PDA's legislative history indicates that Congress recognized its passage would considerably increase the employers' cost in disability benefits and health insurance.²¹⁷ There is also evidence that Congress knew the PDA could be used to prevent employers from refusing certain work to pregnant employees where such work arguably posed a threat to the health of the pregnant woman or her fetus. The testimony, however, was minimal with respect to the issue of exposing pregnant women to toxic work environments.²¹⁸

B. Title VII's Litigation Framework—Disparate Impact or Disparate Treatment Analysis

There are two basic ways in which an allegedly discriminatory employment practice is analyzed under Title VII. In the first instance, an employment practice appears to be neutral on its face, but is discriminatory in its effect. The classic case of such a claim, *Griggs v. Duke Power Co.*, involved an employer aptitude test administered to both minority and nonminority applicants where the former class consistently scored lower, and thus were excluded from better jobs.²¹⁹ The Court invalidated the purportedly neu-

216. *Id.* See generally House Comm. on Educ. and Labor, *Prohibition of Sex Discrimination Based on Pregnancy*, H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. Code Cong. & Admin. News 4751; Williams, *supra* note 3, at 679-81; Furnish, *supra* note 207, at 77-83 & nn. 67-82; Becker, *supra* note 5, at 1248-51 nn. 128-32.

217. H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4757-58.

218. Furnish, *supra* note 207, at 77-78, 82.

219. 401 U.S. 424 (1971). Disparate impact is the unintentional discrimination which operates to "freeze" the status quo. *Id.* at 430.

tral practice, because it had a disparate impact on a protected class and could not be shown to be a business necessity, in other words, related to job performance.²²⁰ The second framework, that of disparate treatment, involves practices discriminatory on their face, such as a case where an employer openly refused to hire an otherwise qualified person because of one of the characteristics protected under Title VII.

1. Disparate Impact

The disparate impact framework of analysis was developed by case law and invokes a more lenient standard of scrutiny than is available in disparate treatment cases requiring the statutory BFOQ defense. This standard involves a burden-shifting framework. The *Griggs* Court and its progeny established a three-part analysis of disparate impact claims. The plaintiff must first show that the facially neutral employment practice has a significant discriminatory impact.²²¹ Second, the employer must demonstrate that the practice had a manifest relation to the job at issue.²²² Even in such a case, however, the plaintiff may prevail by showing the employer was using the practice as a mere pretext for discrimination.²²³ In sum, Title VII prohibits practices fair in form but discriminatory in operation. The touchstone is business necessity, so that if a practice cannot be shown to be related to job performance, it violates Title VII.

This model was altered, to the detriment of disparate impact plaintiffs, in the 1989 decision *Wards Cove Packing Co. v. Antonio*.²²⁴ In that case, the minority cannery workers alleged that hiring and promotion practices were based on nepotism, nonobjective criteria, rehiring preferences, and separate hiring channels.²²⁵ This allegedly caused racial and economic workforce stratification whereby minority employees were relegated to cannery jobs, while nonminorities filled the better-paying jobs. The Court, in a 5-4 decision, reversed judgment for the workers and remanded the case with the instructions for the circuit court to follow a reformulated disparate impact/BND analysis.²²⁶

First, to establish a *prima facie* case, plaintiffs must demonstrate "that specific elements of the petitioner's hiring process have a significantly dispa-

220. *Id.* at 431.

221. *Id.*

222. *Id.*

223. *Id.*

224. 490 U.S. 642 (1989).

225. *Id.* at 674.

226. *Id.* at 655.

rate impact on nonwhites."²²⁷ A mere imbalance in the workforce alone is insufficient to establish plaintiffs' case. If this is met, the case shifts to the employer to articulate a business justification for the challenged practice.²²⁸ This phrase contains two components: "first, a consideration of the justification an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact."²²⁹ The dispositive issue at this stage, then, is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."²³⁰ The Court continued, a "mere insubstantial justification . . . will not suffice. . . . [A]t the same time, though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business. . . ."²³¹ Finally, the ultimate burden of persuasion belongs to the plaintiff to prove that it was because of a protected characteristic that he or she was denied a desired employment opportunity.²³²

After *Wards Cove*, employers no longer must persuade courts that the challenged practice is necessary, and thus the justification stage is easier to meet. The Court departed from *Griggs*' declaration that the touchstone is "business necessity," and embraced a standard that is simply "a reasoned review" of the justification.²³³

The dissent in *Wards Cove* was especially disturbed with the majority requiring the plaintiff to carry the heavy burden of proof in a disparate impact case leading it to state "[o]ne wonders whether the majority still believes that race discrimination — or, more accurately, race discrimination against nonwhites is a problem in our society, or even remembers that it ever was."²³⁴ For plaintiffs to prevail under this theory currently, they must present an alternative business practice which is economically and technologically feasible and, when considering this alternative, the court should proceed from the understanding that "[c]ourts are generally less competent than employers to restructure business practices."²³⁵

This reformulated disparate impact/BND analysis was used by the Seventh Circuit, as well as by the *Wright* and *Hayes* courts, in deciding the validity of sex specific FPPs, even though, as the *Wright* court conceded,

227. *Id.* at 658.

228. *Id.*

229. *Id.*

230. *Id.* at 659.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 662.

235. *Id.* at 661 (citing *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

this was subject to "logical dispute."²³⁶ These circuit courts were uniformly incorrect, the Supreme Court pointed out, because FPPs which intentionally ban female employees from the workplace are not facially neutral but discriminatory in effect. The leap of logic that the circuit courts engaged in permitted such policies to be scrutinized under the disparate impact/BND model with the obvious outcome that employers almost always prevailed. For how well placed is the plaintiff/employee to demonstrate a way to run the employer's business in an economically feasible less-discriminatory fashion?

The Supreme Court made clear that since the FPP excluded women only, it was facially discriminatory.²³⁷ It is interesting to note that JCI conceded this point in its brief.²³⁸ The Court opined that the circuits applied the disparate impact/ BND test because the FPPs were ostensibly for benign purposes, but criticized that reasoning. The Court declared that for the JCI FPP to stand at all, it would have to survive scrutiny under the more rigorous statutory BFOQ model, which it did not.

2. Disparate Treatment

In these cases, employers have engaged in overt discrimination against a protected class of employees in violation of Title VII. Proof of a discriminatory motive is a necessary part of the plaintiff's case, although direct proof of actual intent to discriminate may be inferred from the mere fact of differences in treatment. Once the plaintiff has proved the discrimination, for the employer to escape liability, it must produce a justification for its practice, known as a bona fide occupational qualification (BFOQ). Thus, Title VII prohibits employment discrimination except as mandated in the statute where the protected characteristic "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."²³⁹ The judicial interpretation most often cited when passing on the validity of disparate treatment cases and the corresponding BFOQ justification is from the Fifth Circuit opinion *Weeks v. Southern Bell Tel. & Tel. Co.*²⁴⁰ In that case, a female plaintiff was denied employment as a switcher because the job was allegedly too strenuous for women. The court held for the plaintiff, finding the employer's BFOQ defense insufficient because it had not proved a "factual basis for believing

236. *Wright v. Olin Corp.* 697 F.2d 1172, 1186 (4th Cir. 1982).

237. *International Union, UAW v. Johnson Controls*, 111 S. Ct. 1196, 1202 (1991).

238. Brief for Respondents, *supra* note 68, at 40-41.

239. 42 U.S.C.A. § 2000(e)(1) (West 1981 & Supp. 1990). The BFOQ applies only to those cases involving religion, sex, and national origin.

240. 408 F.2d 228 (5th Cir. 1969).

that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."²⁴¹

The legislative and judicial history and interpretation by the EEOC of this employment rights legislation inevitably leads to the conclusion that the BFOQ clause provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities. This interpretation was also incorporated into the PDA which has its own BFOQ standard: pregnant employees must be "treated the same" as others "for all employment-related opportunities" unless they differ from others "in their ability or inability to work."²⁴²

C. *The Proper Scope of the BFOQ*

While the language of both Title VII and the PDA amendment to it could not be more clear, courts have struggled with the equal employment opportunity mandates for years. As the Title VII section above states, employment practices will pass muster only if they are: (1) an occupational qualification (in contrast to a mere cosmetic one); (2) reasonably necessary (rather than absolutely necessary); and (3) to that business's normal operations. The line of demarcation, that bright line between permissible and impermissible qualifications violative of Title VII, however, is still evolving on a case-by-case basis. This battle of interpretations, between which qualifications are essential to a business and which are just peripheral or tangential, never amounting to a BFOQ, is perhaps one of the most important legacies of *JCI*.²⁴³ Three different BFOQ defenses were discussed by the *JCI* Court, and each will be described and analyzed below in relation to FPP cases.

1. Sex BFOQ Due to Safety Concerns

This of course, was *JCI*'s principal contention: that its FPP was reasonably necessary to normal business operations. Protecting third party fetuses (even potential ones) from possible toxic harm, they argued, was a central part of their mission as battery makers. The leading cases involving claims that safety demands an exception to the civil rights mandate are *Western Air Lines, Inc. v. Criswell*²⁴⁴ and *Dothard v. Rawlinson*.²⁴⁵

241. *Id.* at 235.

242. *See supra* note 212-215 and accompanying text.

243. *See supra* notes 161-63, 186, 200, and accompanying text.

244. 472 U.S. 400 (1985).

245. 433 U.S. 321 (1977).

In *Criswell*, the Supreme Court examined a mandatory retirement rule to determine whether it qualified as a safety BFOQ. At trial, the jury was instructed that the " 'BFOQ defense is available only if it is reasonably necessary to the normal operation or essence of defendant's business,' " and that " 'business is the safe transportation of their passengers.' " ²⁴⁶ In other words, if a sixty-five-year-old flight engineer is more likely, because of age, to pose a threat to passenger safety, then age is a legitimate BFOQ.

The *Criswell* Court adopted the approach established by the Fifth Circuit to evaluate the merits of a safety BFOQ defense to this claim of age discrimination. First, some "job qualifications may be so peripheral to the central mission of the employer's business that no age discrimination can be 'reasonably necessary to the normal operations of the particular business.' " ²⁴⁷ Second, employer qualifications must "be something more than 'convenient' or 'reasonable'; they must be reasonably necessary. . . ." ²⁴⁸ The Court, then, rejected the employer's contention that the "rational basis in fact" standard applied which would have been tantamount to rubber-stamping the employer's beliefs that certain job qualifications are necessary. ²⁴⁹

In sum, the *Criswell* Court recognized that Congress did not ignore the public interest in customer and passenger safety. It warned, however, that the BFOQ standard is one of reasonable necessity, rather than of reasonableness or rationality.

Earlier, in *Dothard*, the Court considered the case of a female applicant who was rejected for the job of corrections counselor requiring close physical proximity to inmates in the all-male maximum security prison. ²⁵⁰ The Court upheld the employer's position conceding that while Title VII allows individuals to make choices, "[m]ore is at stake . . . than an individual woman's decision to weigh and accept the risks of employment. . . ." ²⁵¹

In contrast to *Criswell*, the *Dothard* Court agreed with the employer which denied women access to jobs because the safety of both the inmates (and the women guards) would be imperiled just by their presence in the prison. When deciding this case, the Court cited with approval the *Diaz* and *Weeks* formulations and borrowed from both opinions when it declared

246. *Criswell*, 472 U.S. at 407.

247. *Id.* at 413.

248. *Id.* at 414.

249. *Id.* at 421.

250. *Dothard*, 433 U.S. at 323-27.

251. *Id.* at 335.

that the essence of the job was to maintain prison security, and that all women would be unable to safely perform the job.²⁵²

The application to FPPs of the safety BFOQ defense, then, becomes apparent. *Criswell* involved third-party customers, *Dothard* involved employee safety as well as third-party safety, and FPP cases involve third parties, too. The *JCI* Court dismissed this analogy, however, declaring that the earlier cases involved third parties "indispensable to the particular business at issue," and were part of the essence or central mission of the business.²⁵³ Fetuses, it stated, "are neither customers nor third parties whose safety is essential to the business of battery manufacturing."²⁵⁴ The concurrences, of course, rejected this essence of the business approach and urged acceptance of an expanded, less rigid paradigm. They asserted that safety is the essence of most businesses, and that protecting fetal safety while manufacturing batteries "is as much a legitimate concern as is safety to third parties guarding prisons (*Dothard*) or flying airplanes (*Criswell*)."²⁵⁵ In future FPP cases, sex could very well become a BFOQ due to safety concerns as evidenced by the strong support for an expanded BFOQ by four members of the Court.

2. Sex BFOQ Due to Privacy Concerns

Privacy concerns requiring differential treatment of employees has never been addressed by the Court, however, the lower courts have consistently recognized this as a legitimate BFOQ. The Court acknowledged these cases, but declined to address and expand on privacy-based sex discrimination because *JCI* "does not involve the privacy interests of Johnson Controls' customers."²⁵⁶

The Court contrasted the instant case with *Backus v. Baptist Medical Center*,²⁵⁷ which upheld the employer's female-only requirement concluding that the essence of a nursing position in obstetrics and gynecology is to provide sensitive care for patient's intimate and private concerns. In *JCI*, the third party fetus or customer had no such privacy concern, but as the concurrences warned, such a case may arise in the future.

252. *Id.* at 333.

253. *Johnson Controls*, 111 S. Ct. at 1205-06.

254. *Id.* at 1206.

255. *Id.* at 1213.

256. Compare *id.* at 1207 & n.4 with *id.* at 1213 n.6.

257. 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982).

3. Sex BFOQ Due to Concerns of Tort Liability

This theory is that if there is a substantial risk of employer tort liability, so prohibitive as to threaten the survival of the business, then this rises to a BFOQ defeating the allegation of discrimination. Justice Scalia, in concurring, asserted that there is "nothing in our prior cases" to suggest the specter of tort liability could not support a BFOQ defense.²⁵⁸ Similarly, Justice White's concurrence criticized the Court for its failure to cite precedent supporting their thesis that a tort liability BFOQ is not really possible.²⁵⁹

The Court instead relied on *City of Los Angeles Dep't of Water and Power v. Manhart*,²⁶⁰ in which it invalidated a pension system requiring female employees to contribute more, because as a class, they outlive their male counterparts. *Manhart* did not, however, expressly address cost as a BFOQ defense. The *JCI* Court cited *Manhart* to suggest that the extra costs of employing women cannot be, without more, an affirmative defense to a charge of discrimination.²⁶¹ It conceded, in dicta, that where the case involved a failing industry, a different result might be warranted.²⁶² For as Judge Posner stated in *JCI*, Circuit the female employees would be in the same place under the FPP as they would be if *JCI* faced a massive tort liability judgment—out of a job.²⁶³

Addressing the problem of exposure to tort liability as a BFOQ, the Court suggested that there would be no problem if employees are fully informed of all risks and employers are not negligent.²⁶⁴ The concurrences roundly criticized this solution, pointing out that compliance with Title VII does not necessarily shield employers from state tort liability, and furthermore, later-born children may sue employers. Such potential exposure to liability, they argued, surely rises to the level of providing employers with a legitimate BFOQ defense.²⁶⁵ The issue of whether excluding a protected class of employees because of a well-founded fear of tort liability can be justified as reasonably necessary to the normal operation of a particular business is an open one—in fact it may be a promising way for employers to prevail in future FPP cases. How great would the risk of tort liability have

258. *Johnson Controls*, 111 S. Ct. at 1216-17.

259. *Id.* at 1211 & n.2 (White, J., concurring).

260. 435 U.S. 702 (1978).

261. *Johnson Controls*, 111 S. Ct. at 1209.

262. *Id.*

263. *International Union, UAW v. Johnson Controls*, 886 F.2d 871, 907 (7th Cir. 1989) (*en banc*) (Posner, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990), *rev'd and remanded*, 111 S. Ct. 1196 (1991).

264. 111 S. Ct. at 1208-09.

265. *Id.* at 1212 (White, J., concurring) and at 1216-17 (Scalia, J., concurring).

to be for it to become a BFOQ? For example, if a workplace toxin constitutes a scientifically documented harm to offspring that presents a significant potential tort liability in the future, an employer may prefer to move its production facilities outside the U.S. where it need not comply with *JCI*. Yet another level of gravity exists in those instances where the hazard amounts to a risk that no insurer is willing to underwrite, or where the cost of such insurance will precipitate the unprofitability of the business. Clearly, if a company is faced with bankruptcy as a consequence of following the directives outlined in *JCI*, some defense or relief would appear practical to at least four members of the Court. Discussion relating to the scope and contours of the BFOQ defense promises to continue.

An appropriate issue to raise at this time is whether the Title VII and PDA statutory frameworks effectively and comprehensively deal with the complexities of FPP cases. For as the majority of the Court stated in *JCI*, the civil rights statutes allow consideration only of matters essential to the business at hand. All other concerns, such as those for fetal safety and health, do not come within this range, and so may not be considered in a Title VII claim. Courts and scholars have wrestled with this perceived shortcoming of Title VII, and some have even advocated amending Title VII in a way which would speak to the issue of fetal safety. For as one industry attorney mused, the Court's decision was correct, but the statute is wrong. Proposals such as these are typically sponsored by those in favor of FPPs as a way of addressing workplace risks. Opponents of FPPs, in general, favor the use of the existing Title VII disparate treatment/BFOQ paradigm for resolving the issues.

The authors conclude that the *JCI* Court correctly interpreted the case as one involving disparate treatment demanding analysis under the BFOQ model. Furthermore, the Court properly established the line of demarcation between permissible and impermissible BFOQs in FPP cases. To hold otherwise would lead employers and courts down a veritable slippery slope—FPPs for women only would be allowed and employers would never have an incentive to eradicate such practices; employers might next prohibit employees from smoking or drinking or engaging in other behavior it deems contrary to its beliefs. In short, to expand the employers' BFOQ as the concurrences urged would be to curtail the employees' rights of privacy and autonomy.

Has, then, the present interpretation rendered the BFOQ ineffective and obsolete? Arguments have been made that the *JCI* decision has left companies defenseless, and thus, it is a troubling decision. Employers, they say, must have a right to protect themselves when employees do not or will not. The response, of course, is that employers still have available the BFOQ

defense; it is simply not as broad as these employers would like it to be. The BFOQ defense continues to be a vital, effective screening device to weed out discriminatory practices. JCI's FPP would not have been invalidated had it applied to both men and women in a neutral fashion.

IV. CASE HISTORY

When considering the legal precedents leading in *JCI* to both the majority decision and the concurring opinions, which object to elements of the majority's approach, two opposing lines of argument become clear. It is perhaps inevitable that courts, when dealing with FPPs, will be divided, as the issue is one which involves two worthy but apparently contradictory dictums. On one hand, there is the compelling mandate to protect fetuses who have no say in the decision to subject them to apparently toxic, potentially damaging substances. On the other, there is the equally compelling mandate to uphold the clear national policy of offering equal employment opportunity to all people regardless of their sex. At first glance, this may not seem like a difficult dilemma. After all, can the right to a particular job really be equated with the right to a life unhampered by serious physical disability? However, the true complexity of the issue becomes clear when examining the legislative history relating to the *JCI* decision.

Such an examination reveals an early set of cases which supports the view that the ability to become pregnant is a real, biologically based difference between men and women, exempt from the most demanding requirements of Title VII. These cases suggest that because this difference makes a woman's work choices potentially damaging to innocent third parties, the courts should allow private employers to structure the workplace so as to offer maximum protection to these parties. In opposition to these cases is a later set of cases which suggest that exempting FPPs from the most rigorous scrutiny under Title VII does less to protect fetuses than it does to perpetuate the erroneous belief that women are solely responsible for the outcomes of pregnancies, while essentially ignoring the dictates of the PDA as written by Congress, and rewriting it to fit the predetermined goal of protecting fetuses. Various federal statutes and guidelines, for the most part, support the latter view. An analysis of these cases and statutes then illuminates the legal background of *JCI*, and raises some serious questions about the direction of FPP cases in the future.

A. Upholding Fetal Protection Policies: The Common Law and Protective Legislation

This discussion begins prior to passage of Title VII and the PDA. At this point, the legal landscape was simpler. In fact, at the start of this cen-

ture, an assortment of state labor laws regulated a wide range of working conditions for women.²⁶⁶ By 1908, twenty states had laws regulating hours or prohibiting night work for women. These restrictions governed the number of hours and consecutive days a woman could work, the types of industry in which she could work, the times of the day during which she could work, and the number of rest periods she had to take during the day.²⁶⁷ In a similar case, *Muller v. Oregon*,²⁶⁸ the Supreme Court upheld Oregon's "protective" maximum hours law for women because the Court felt that "healthy mothers are essential to vigorous offspring," and that the federal government had a compelling interest in protecting future generations.²⁶⁹ This was the first case involving protective laws for women to reach the Supreme Court. The Court's paternalistic attitude in *Muller* was typical of the prevailing societal belief at the time, that it was the legitimate province of the law to safeguard the welfare of all by safeguarding the childbearing abilities of women workers, so as to enable them to fulfill their home responsibilities and to protect them from unscrupulous employer practices. *Muller*, then, simply reflected the pre-Title VII belief that women were essentially childbearers who could not take care of themselves or their offspring in a work environment. Although the Court's somewhat condescending stance may have stemmed from a benign purpose, its effect on women's work lives was clearly negative. Besides treating women in a stereotypical way in the workplace, disallowing the possibility that a woman would define herself as something other than a mother and move up in the employment hierarchy, these protective laws upheld in *Muller* reduced women's hours, hourly wages, and annual income, ensuring that women would not, for several generations, move outside of the stereotyped definition the *Muller* Court confined them to.

266. See Becker, *supra* note 5, at 1221-25; Note, *Constitutional Law—Regulation of Conditions of Employment of Women: A Critique of Muller v. Oregon*, 13 B.U.L. REV. 276 (1933). See generally Office of Tech. Assessment, *Reproductive Health Hazards in the Workplace* 236-37 (1985) [hereinafter OTA Report].

267. See *supra* note 266 and accompanying text. Indeed, this has been documented in medical care as well. See Forman, *An epidemic of maternal deaths*, *The Boston Globe*, July 15, 1991, at 25, col. 2 (women's health attended to simply because of motherhood and receive care secondary to people they care for).

268. 208 U.S. 412 (1908).

269. *Id.* at 415-17, 421-22.

1. Federal Statutes Relating to Discrimination in Employment

The need to statutorily root out such stereotypes is illustrated in the case, *Doerr v. B.F. Goodrich Company*.²⁷⁰ The cause of action accrued in 1979, yet the court grounded its reasoning solely on Title VII, with not one reference to the PDA. In *Doerr*, the district court refused to grant preliminary injunctive relief to a thirty-year old fertile female employee who was demoted from her job because it involved exposure to vinyl chloride, a suspected carcinogen in fetuses.²⁷¹ The plaintiff asked the court to enjoin B.F. Goodrich from implementing its FPP and to direct that she be reinstated to the job she formerly performed, before she had exhausted the EEOC's filing procedures.²⁷² As will be seen in a later section, the EEOC's record of inactivity on discrimination claims relating to FPPs appeared to make this a reasonable request. Doerr claimed "work experience lost as a consequence of reassignment would necessarily hinder her future career development. . . ." ²⁷³ However, the court followed the Sixth Circuit's lead in *Jerome v. Viviano Food Co.*²⁷⁴ and denied the injunctive relief because the plaintiff would suffer no irreparable harm, and would not necessarily ultimately win her discrimination suit on its merits.

Doerr was demoted to her entry level job and only guaranteed a salary equal to the salary of the restricted job for one year. Nonetheless, the court saw this as reasonable compensatory action by B.F. Goodrich, not likely to damage her future career prospects. In rejecting the plaintiff's claim that the very fact that a violation of Title VII had occurred suggested that irreparable injury should be presumed, the *Doerr* court, in essence, refused to take Doerr's claims to equal access to the career ladder seriously. For a person to be promoted to a higher-paying job and then demoted to a job requiring less experience and commanding less money is clearly a career setback. That such action should be taken only because of a woman's *potential* for bearing children suggests that Congress later enacted the PDA to declare statutorily that what happened to Doerr is sex-based discrimination.

Even after the passage of Title VII in 1964, which specifically prohibits the paternalistic treatment of *Muller*, the Supreme Court continued to view

270. 484 F. Supp. 302 (N.D. Ohio 1979). See generally Comment, *Fetal Protection Programs Under Title VII—Rebutting The Procreation Presumption*, 46 U. PITT. L. REV. 755, 773-74 (1985).

271. *Doerr*, 484 F. Supp. at 321.

272. *Id.* at 321-23.

273. *Id.* at 320.

274. 489 F.2d 965 (6th Cir. 1974). The court found that the plaintiff had not satisfied the prerequisites for instituting a suit under Title VII, and affirmed the decision denying the temporary injunction and dismissing the complaint. *Id.*

pregnant women as fair game for discriminatory employment practices by refusing to view pregnancy discrimination as a form of sex discrimination.

The first attempt to reconcile these conflicting imperatives after enactment in 1978 of the PDA was the Fourth Circuit's decision in *Wright v. Olin Corporation*,²⁷⁵ a case cited frequently by the JCI lower courts. At issue was Olin's "female employment and fetal vulnerability program," which classified all plant jobs in terms of whether or not they posed threats to fetuses.²⁷⁶ Unrestricted jobs posing no fetal threat were open to all women. Controlled jobs requiring some contact with toxic substances were open only to non-pregnant women who indicated in writing that they had been advised of the risk.²⁷⁷ Restricted jobs requiring "contact with and exposure to known or suspected abortifacient or teratogenic agents" were closed to all fertile women.²⁷⁸ In this context, all women between the ages of 5 and 63 were considered to be fertile unless certified as sterile by Olin's medical staff.²⁷⁹ The effect on opportunities for women working at Olin can be seen in the fact that five of eleven upward tracks in the corporation were not as available to women as to men because the entry level jobs on these tracks fell into either the "controlled" or "restricted" categories.²⁸⁰

When challenging Olin's FPP, the female plaintiffs noted that from the date of passage of the PDA, this was a case of overt discrimination requiring a BFOQ and asked the court to treat it as such.²⁸¹ Given that the policy in question established a classification limited to women and based on potential or actual pregnancy, this seemed a legitimate request. Pursuant to the PDA's mandate, the case appears most suitable for analysis following the paradigm for disparate treatment cases which require the employer to

275. 697 F.2d 1172 (4th Cir. 1982), *remanded to* 585 F. Supp. 1447 (W.D.N.C. 1989) (case eventually dismissed as plaintiff no longer interested in pursuing claim). *See generally* Comment, *Employment Discrimination—Wright v. Olin Corp.: Title VII and the Exclusion of Women from the Fetally Toxic Workplace*, 62 N.C. L. REV. 1068 (1984).

276. *Wright*, 697 F.2d at 1180-82; *see also* Timko, *Exploring the Limits of Legal Duty: A Union's Responsibility with Respect to Fetal Protection Policies*, 23 HARV. J. ON LEGIS. 159, 162-63 (1986).

277. *Wright*, 697 F.2d at 1182. Olin Corp. orally warned its male employees of the same risks. *Id.*; *cf.* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 876 (7th Cir. 1989) (*en banc*), *cert. granted*, 110 S. Ct. 1522 (1990), *rev'd and remanded*, 111 S. Ct. 1196 (1991) (JCI's earlier voluntary FPP requested that women sign statement advising them of workplace risks).

278. *Wright*, 697 F.2d at 1182.

279. *Id.*; *cf.* *Johnson Controls*, 886 F.2d at 876-77 (JCI's mandatory FPP excluded all women regardless of age, unless medically proved sterile).

280. *Wright*, 697 F.2d at 1182.

281. *Id.* at 1183-84. Olin Corp. contended that the program was legitimate and nondiscriminatory warranting disparate impact analysis. *Id.* at 1183.

prove a BFOQ.²⁸² However, the *Wright* court refused to view the instant case as a disparate treatment case, and relegated its discussion of the PDA to one brief footnote, dismissing the plaintiffs' arguments except to note that "[w]hile the 'facial neutrality' of Olin's fetal vulnerability might be subject to logical dispute, the dispute would involve mere semantic quibbling. . . ." ²⁸³

In bypassing the mandated BFOQ in this case, the *Wright* court noted that the Supreme Court, in *Furnco Construction Corp. v. Waters*,²⁸⁴ made clear that the formula for demonstrating a *prima facie* case of disparate treatment in *McDonnell Douglas Corp. v. Green*²⁸⁵ was not intended to be an inflexible rule.²⁸⁶ This position was reaffirmed in *International Brotherhood of Teamsters v. United States*.²⁸⁷ However, while the Supreme Court has espoused the flexible use of paradigms in Title VII cases, it does not appear that FPPs analyzed after the PDA can easily make use of flexible proof patterns, for such flexibility was seen by Congress as a method of accommodating subtle discriminatory practices. The PDA unequivocally stated that any classification based on pregnancy is, on its face, discriminatory.²⁸⁸

Why the *Wright* court was anxious to bypass the need for a BFOQ is clear. The court saw Olin's FPP as a positive social good and strained to uphold it. However, as the Fourth Circuit conceded, the requirement of a BFOQ from Olin "would prevent the employer from asserting a justification defense."²⁸⁹ In other words, although Olin's FPP was facially discriminatory, and according to ordinary Title VII and PDA analysis demands a BFOQ for justification, Olin could not meet this rigid standard; requiring them to do so would result in striking down the FPP.

282. See generally *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 231-32 (5th Cir. 1969).

283. *Wright*, 697 F.2d at 1172, 1185-86 & n.21. The Fourth Circuit's rejection of the disparate treatment proof scheme in favor of the lenient disparate impact analysis becomes, of course, outcome determinative. The court reasoned that otherwise, "it would prevent the employer from asserting a justification defense. . . ." *Id.* at 1185 n.21. The court even conceded that a BFOQ defense could not be established in this case. *Id.*

284. 438 U.S. 567 (1978).

285. 411 U.S. 792 (1973) (concerning inferential proof of overt discrimination).

286. *Wright*, 697 F.2d at 1184; cf. *Furnco*, 438 U.S. at 577 (elements of *prima facie* case "never intended to be rigid, mechanized, or ritualistic").

287. 431 U.S. 324, 358-60 (1977).

288. 42 U.S.C.A. § 2000e(k) (West 1981 & Supp. 1990). See generally *Becker*, *supra* note 5, at 1247-56 (any sex-specific FPP facially discriminatory irrespective of employer's intent and justifiable, if at all, under BFOQ defense).

289. *Wright*, 697 F.2d at 1185 n.21.

Instead of relying on the standard required by the PDA, the *Wright* court used the less demanding disparate impact/BND pattern. The court first pointed out that the BND had already been expanded so that employers could permissibly consider workplace safety in relation to customers and, then, further expanded this defense by analogizing fetal safety with customer safety.²⁹⁰ The court then articulated a three-prong test borrowed from *Criswell* to be met by an employer attempting to defend its FPP on the basis of business necessity: the employer had to present objective evidence that a significant risk of fetal harm existed, that the hazard affected only women, and that the employer program is devised to address the risk to the fetus.²⁹¹ As is typical in disparate impact analysis, once the employer met its burden of proof on these three points, the plaintiff could rebut with alternative schemes that would accomplish the same purpose with less discriminatory effect.²⁹²

In substituting the disparate impact/BND model for the disparate treatment/BFOQ model, the *Wright* court affirmed that, in issues of fetal protection, the rights of the fetus preempt those of the mother, and that to effect this preemption the rigors of the BFOQ must be avoided. However, the rigors of the BFOQ were intentional.

A variation on substituting the disparate impact/BND analysis in FPP cases is found in *Hayes v. Shelby Memorial Hospital*,²⁹³ decided by the Eleventh Circuit. This case was brought under the PDA by a female X-ray technician who was fired from her job because she became pregnant. The *Hayes* court did not reject outright the claim of facial discrimination, as did the *Wright* court, but rather admitted that, under the PDA, no pregnancy-based rule can be neutral and that *Hayes'* claim, therefore, had to be analyzed using the facial discrimination model.²⁹⁴ However, the *Hayes* court added a new "dimension" to this model and decided that the hospital could rebut the presumption of facial discrimination by presenting objective evidence that there is substantial risk of harm to the fetus through the exposure of an actually or potentially pregnant woman to toxins in the

290. *Id.*

291. *Id.* at 1186.

292. *Id.* at 1191-92. Frequently mentioned in discussions relating to FPPs is *Zuniga v. Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982), involving a pre-PDA termination of a pregnant female X-ray technician. The court reversed the trial court's judgment for the employer, and remanded the case noting that it is "difficult to conceive a more straightforward prima facie case of sex discrimination." *Id.* at 991 n.8.

293. 726 F.2d 1543 (11th Cir. 1984), *reh'g denied*, 732 F.2d 944 (1984). See generally *Katz, Hazardous Working Conditions and Fetal Protection Policies: Women Are Going Back to the Future*, 17 ENV. AFFAIRS 201 (1989); Buss, *supra* note 112.

294. *Hayes*, 726 F.2d at 1547.

workplace, and that this harm is mediated through women but not through men.²⁹⁵

The *Hayes* court used two of *Wright's* three elements for a BND in lieu of the standard BFOQ analysis to rebut the presumption of facial discrimination. The stricter BFOQ standard would apply, under *Hayes*, only if the employer failed to rebut the presumption of facial discrimination. The court did this "to ensure complete fairness to the Hospital."²⁹⁶ If, in the other instance, the employer showed evidence of potential fetal harm through mothers, not fathers, the FPP would be facially neutral, in that it protected equally the offspring of both male and female employees, and analyzed under disparate impact/BND theory.²⁹⁷ However, the *Hayes* court felt that an employer who successfully rebuts the presumption of facial discrimination will already have met the criteria for a disparate impact/BND analysis. At this point, the burden would shift to the plaintiff to show that an equally effective, less discriminatory alternative existed.²⁹⁸

In essence, then, *Hayes*, like *Wright*, allowed a facially discriminatory policy to be rebutted with a BND, albeit with a more complicated scheme which avoids outright denial of a facially discriminatory policy. The court explained its willingness to allow the employer to more easily rebut the presumption of facial discrimination, even though at the same time alluding to the reality that "when a policy designed to protect employee offspring from workplace hazards proves facially discriminatory, there is, in effect, no defense. . . ." ²⁹⁹ The court ignored the fact that the standard for rebutting a claim of facial discrimination is the BFOQ, and that this standard is deliberately rigorous to protect the rights of working women. Again, then, while the *Hayes* court found that Shelby Memorial Hospital failed to present enough evidence of probable harm to the fetus to rebut the presumption of facial discrimination and that, further, the hospital could have implemented less discriminatory alternatives,³⁰⁰ its finding for *Hayes* was supported by an analysis which suggests that, as in *Wright*, the rights of the fetus preempt the rights of the mother. Neither case presents legal analysis which cogently addresses both sets of rights within established Title VII analysis.

Also in 1984, the District of Columbia Circuit had occasion to pass on a narrow issue related to FPPs, in *Oil, Chemical & Atomic Workers v. Ameri-*

295. *Id.* at 1548; see also Hembacher, *supra* note 7, at 38-39 (*Hayes* court applied "somewhat confusing" BND).

296. *Hayes*, 726 F.2d at 1548.

297. *Id.*

298. *Id.* at 1551.

299. *Id.* at 1549.

300. *Id.* at 1551.

can Cyanamid Company.³⁰¹ For some reason, the plaintiffs bypassed Title VII theory in challenging the FPP, and instead charged that the FPP was a hazard cognizable under the Occupational Safety and Health Act.³⁰² This strategy was probably due in part to the failures plaintiffs experienced in other circuit courts under the Title VII and PDA theories. The court first found that workplace hazards are only those relating to processes and materials which cause injury or disease.³⁰³ The court concluded the FPPs, by contrast, do "not affect employees while they are engaged in work or work related activities."³⁰⁴ Thus, FPPs are not by their nature hazards cognizable under the Act.³⁰⁵

a. *The EEOC's Position*

Although the EEOC has recognized, since 1978, that its duty to oversee enforcement of Title VII required the agency to offer policy guidance on how Title VII impacted FPPs, the Commission effectively abdicated this responsibility.³⁰⁶ In fact, the story of the EEOC's action and inaction on the fetal protection issue is one of prolonged mistakes. For example, the agency's first attempt, in 1980, at issuing interpretive guidelines for analyzing FPPs were drawn, and supported the contorted reasoning used later by the *Wright* and *Hayes* courts with their essential rejection of the BFOQ as the required defense.³⁰⁷ Then, even these mistaken guidelines were withdrawn in the face of opposition from the business community and the pub-

301. 741 F.2d 444 (D.C. Cir. 1984). See generally J. MATTHEWS, K. GOODPASTER, L. NASH, *POLICIES AND PERSONS: A CASEBOOK IN BUSINESS ETHICS* 72-80 (1985) (discussing ethical dimensions of FPPs). This case was eventually settled for \$200,000 plus costs and attorneys' fees without an admission of liability from the company. See generally OTA Report, *supra* note 266, at 251-61; Bronson, *supra* note 3 (women sterilized for fear of losing leaded jobs in economically depressed region); N.Y. Times, Jan 4, 1979, at 7, col. 1 (company which forces choice of job or offspring enforcing a "Draconian" measure).

302. *American Cyanamid Co.*, 741 F.2d at 445.

303. *Id.* In 1979 OSHA issued a citation to the company contending that its FPP violated OSHA's general duty clause. See OTA Report, *supra* note 266, at 257. This citation was overturned, however, by the Occupational Safety and Health Review Commission, a decision affirmed by the District of Columbia Circuit Court.

304. *American Cyanamid Co.*, 741 F.2d at 449.

305. *Id.* at 444.

306. See Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514 (1980) [hereinafter Interpretive Guidelines] (in response to FPPs, EEOC on April 21, 1978, issued policy statement indicating concern). See generally EEOC Report, *supra* note 144, at 1 (Majority Staff of Comm. on Educ. and Labor investigated manner of EEOC's enforcement of Title VII, finding that agency stumbled on the job).

307. See Interpretive Guidelines, *supra* note 306, at 7514-17. The Guidelines first state that employers may not disparately treat workers on the basis of sex, but may establish neutral policies. *Id.* at 7516. Facially neutral policies which adversely impact one sex may be justifiable under any of the nine factors outlined by the EEOC. *Id.* at 7516-17. The EEOC determined that

lic, so that for the next seven years the EEOC provided no overall guidance to employers, employees, or unions attempting to grapple with this issue.³⁰⁸

Rather, during this period of time, the EEOC's official policy was that a case-by-case evaluation was the best method for dealing with FPPs. However, in reality, the EEOC did not handle cases at all during this period, but rather warehoused them. This is not surprising since, as agency operatives declared, disposing of such complex issues requires a clear directive, a position which the EEOC itself took when it set out to formulate the 1980 guidelines.³⁰⁹ Here, then, the EEOC was caught in a trap of its own making. The agency had no directive on FPPs because a case-by-case approach was held to be more logical, and yet the agency did not settle cases on an individual basis because of the lack of an agency-level directive. In fact, even cases which could be settled without an overall directive, like FPPs which clearly ignored OSHA's lead standard, were warehoused. Such total paralysis on the part of the very agency which should have been providing guidance to all sectors involved in the rapidly burgeoning FPP arena led to a runaway problem, and perhaps to such mistaken judicial decisions as the Seventh Circuit's in *JCI*. The fact that the Eleventh Circuit in *Hayes* actually tried harder than the EEOC suggested to fit FPP analysis within the existing statutory framework of Title VII and the PDA emphasized how little leadership this agency provided.³¹⁰

When the EEOC did finally issue interpretive guidance, over seven years after withdrawal of its 1980 proposed guidelines, this guidance was sadly misdirected and actually compounded the problem in two ways.³¹¹ First, the 1988 Policy Guide was meant only for use within the agency by investigators, not as comprehensive guidance for employers, employees and un-

the BFOQ defense was not relevant because employers could never meet its requirements. *Id.* at 7516.

308. See Interpretive Guidelines on Employment Discrimination and Reproductive Hazards; Withdrawal of Proposed Guidelines, 46 Fed. Reg. 3916 (1981) (due to extensive negative comments, proposed guidelines withdrawn in favor of enforcement on case-by-case basis). The EEOC waited for seven years and next issued formal guidelines in 1988. See 1988 Policy Statement, *supra* note 70; see also EEOC Report, *supra* note 144, at 2 (Agency's "wait-and-see" attitude resulted in its "warehousing roughly sixty charges" relating to FPPs). See generally Duncan, *supra* note 46, at 79-81. For a discussion of the criticisms the 1980 guidelines drew, see EEOC Report, *supra* note 144, at 14 n.49.

309. See Interpretive Guidelines, *supra* note 306, at 7514 (policy guidance must be issued due to "widespread confusion among employers").

310. See *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1981); EEOC Report, *supra* note 144, at 22.

311. See 1988 Policy Statement, *supra* note 70.

ions, all of whom had required such guidance for years.³¹² In fact, the actual guidance, adopted without adequate notice or opportunity for public input, was so non-imposing as to rank below regulations, opinion letters, and the compliance manual as a source of law.³¹³ In addition, the content of the guidance was inconsistent with Title VII and the PDA. The EEOC explained this away when it concluded that FPP cases "do not fit neatly into the traditional Title VII analytical framework, and, therefore, must be regarded as a class unto themselves."³¹⁴ Thus, while the PDA clearly calls for production of a BFOQ to justify sex-based FPPs, the EEOC again followed the lead of the *Wright* and *Hayes* courts, providing a tortured rationale for the abandonment of the statutorily-required BFOQ.³¹⁵ The EEOC's guidance on determining whether fetal risk was mediated through one or both sexes is clearly contrary to Title VII, OSHA regulation, and even the *Wright/Hayes* standard so fervently embraced by the Commission.³¹⁶ For these all state that, if a sex-specific FPP is to survive Title VII scrutiny, the fetal risk must be mediated only through the restricted sex. Further, Congress had made clear that the responsibility for generating the data necessary for making decisions about mediation of damage to a fetus is the responsibility of the employers operating toxic workplaces.³¹⁷

The EEOC's 1988 guidelines actually took a position which discriminated on the basis of sex and ran counter to all the mandates it was supposed to oversee and enforce.³¹⁸ Thus, the guidelines held that where there is "reliable evidence on both sides of the question of risk of harm through women," the Commission would proceed as if "substantial risk were

312. 1988 Policy Statement, *supra* note 70, at 6613 (purpose clause states that document to be used only by those analyzing FPP charges rather than by employers).

313. EEOC Report, *supra* note 144, at 22. The Agency had considered guidelines in 1982 after consultation with operatives from the three branches of government, but withdrew them when it became apparent that they could not be enforced due to budgetary and personnel restraints. *Id.* at 15.

314. 1988 Policy Statement, *supra* note 70, at 6615 n.11.

315. 1988 Policy Statement, *supra* note 70, at 6614 ("Commission follows lead of every court of appeals to have addressed the question"). The Agency acknowledged the BFOQ defense, but asserted that the "need . . . has been recognized" for a "narrowly circumscribed business necessity defense. . . ."). *Id.* at 6614 nn. 8, 10, 11.

316. 1988 Policy Statement, *supra* note 70, at 6617-18 & nn. 20-22; *see also* EEOC Report, *supra* note 144, at 23 (Agency failed in its leadership role when it rubberstamped circuit court decisions).

317. *See* EEOC Report, *supra* note 144, at 24 (policy "let employers off the hook").

318. 1988 Policy Statement, *supra* note 70, at 6617-18 (Agency assumed risk of harm mediated solely by women); *cf.* Susser, *The EEOC in 1990: Ongoing Concerns and New Challenges*, *EMPL. REL. TODAY*, Autumn 1990, at 219 (EEOC "responsible for investigating and resolving claims of discrimination in employment").

proven."³¹⁹ However, the guidelines took the opposite position on risk of harm through men, stating that "if there is inconclusive evidence due to, among other things, the paucity of research," the Commission would proceed as if the risk was "substantially confined to female employees."³²⁰ That the agency charged with monitoring discriminatory practices in the workplace could issue such blatantly discriminatory guidelines for monitoring FPPs explains much of the courts' frequently mistaken handling of research data on mediation of risk. In fact, the most serious criticism of these 1988 guidelines is that they actually exacerbated the problem of biased research, focused solely on mediation of fetal risk through the mother, and provided a disincentive to the conduct of research on risk of fetal harm mediated through the father. For why would a business which avoids responsibility for constructing gender-neutral FPPs, when there is no research on risk through the father, even accept responsibility for conducting such research?

Ironically, it was the misapplication of established Title VII law in the Seventh Circuit's decision, a misapplication which echoes not only the *Wright* and *Hayes* courts but the EEOC's own 1988 guidelines, which catalyzed a change in the EEOC's position.³²¹ After having refused to participate in either the district or appellate court's hearing of *JCI*, the EEOC reacted to the appellate court's application of its guidelines with new guidelines.³²² Thus, in 1990, the EEOC issued an internal policy guidance which instructed its staff to disregard the appellate decision in *JCI* for the purpose of investigating charges of discriminatory FPPs, except as to charges arising within the Seventh Circuit.³²³ Instead, the agency embraced the opinions of the dissenters to the Seventh Circuit's decision, maintaining that the EEOC "now thinks the BFOQ is the better approach."³²⁴ While confirming that the BFOQ should be a narrow defense, the 1990 internal guidance noted that an employer might still successfully defend an FPP if the policy addressed a workplace hazard which posed a substantial risk to the fetus, mediated only through one sex, if the policy was tailored as narrowly as

319. 1988 Policy Statement, *supra* note 70, at 6617.

320. 1988 Policy Statement, *supra* note 70, at 6617-18. See generally EEOC Report, *supra* note 144, at 32 (in just such a situation, Agency should have stated it would *not* assume a gender-specific risk) (emphasis in original).

321. See *International Union, UAW v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989). Four months after the Seventh Circuit's decision, the EEOC issued a new policy.

322. See 1990 Policy Guide, *supra* note 70.

323. Policy Guide, *supra* note 70, at 6803-04 & n.13.

324. 1990 Policy Guide, *supra* note 70, at 6800 (BFOQ approach more consistent with Title VII's structure and purpose).

possible, and if there was no reasonable, less discriminatory alternative to the sex-based policy.³²⁵

While the radical shift in the EEOC's 1990 position was heartening, the agency remained somewhat in default of its responsibility to uphold Title VII's purposes, for the 1990 internal guidance did not rescind the flawed 1988 guidelines but rather stated that the new guidance was meant to be used in conjunction with the 1988 policy guide.³²⁶ However, as seen earlier, the EEOC's 1988 position essentially undermines Title VII's purpose and reading these guidelines in conjunction with the agency's 1990 position was, at best, confusing, and at worst, fatal to the agency's leadership role. Again, the EEOC has been largely absent from the public debate over alternative methods for dealing with FPPs through increased policing by federal agencies, legislation, or expanded state worker compensation laws. Thus, while the EEOC has recently begun to espouse and apply the legally correct analysis for FPPs, the agency has yet to assume a rigorous leadership role.³²⁷ Conceivably, *JCI III* may push the EEOC more quickly down the road to leadership in the area of FPPs.

2. The Trend of Fetal Protection Cases

Perhaps the clearest rejection to date of the *Wright/Hayes* standard is found in the Sixth Circuit's 1990 decision in *Grant v. General Motors Corp.*³²⁸ The facts in this case are strikingly similar to the facts in *JCI*, in that *Grant* reviewed an FPP which excludes all fertile females from jobs involving exposure to specified concentrations of airborne lead. The General Motors policy also restricts and monitors women in jobs where the exposure is two levels lower than those in the restricted jobs. In considering *Grant's* challenge of this policy, the district court, like the *JCI* district court, granted summary judgment for General Motors.³²⁹ However, while the Seventh Circuit upheld the district court's decision in *JCI*, the Sixth Circuit vacated the summary judgment finding in *Grant*.³³⁰

325. 1990 Policy Guide, *supra* note 70, at 6800-01. The Agency concurred with the Cudahy approach in which employers may permissibly consider risks to even potential third parties in normal course of business. See *Johnson Controls*, 886 F.2d at 901-02 (Cudahy, J., dissenting); cf. *Grant v. General Motors Corp.*, 908 F.2d 1303, 1311 (6th Cir. 1990) (adopting Cudahy approach).

326. See EEOC Report, *supra* note 144, at 34 (1988 Policy Statement should be withdrawn).

327. See generally EEOC Report, *supra* note 144, at 34 (EEOC has recently begun to address these issues after a decade of neglect); Susser, *supra* note 318, at 219 (EEOC and its general counsel have made a number of changes in policies and procedures).

328. 908 F.2d 1303 (6th Cir. 1990).

329. *Id.* at 1304.

330. *Id.* at 1311.

In rejecting the district court's use of the *Wright/Hayes* disparate impact analysis, the Sixth Circuit asserted that, in view of legislative intent behind the PDA, the conclusion that such FPPs must be analyzed under the disparate treatment/BFOQ model is "ineluctable."³³¹ The court borrowed from the *Weeks* court and Circuit Judge Cudahy's dissent and stated that to establish a BFOQ, General Motors would have to "demonstrate a 'factual basis for believing that all or substantially all excluded women would be unable to' " efficiently perform the duties of the job without inordinate risk to fetuses.³³² Thus, the Sixth Circuit tried to balance the apparently competing rights of women and fetuses by suggesting that, while Title VII requires disparate treatment analysis, a BFOQ could be established by using sex as a proxy for safety here, and that "safety" can be defined as meaning the safety not solely of the female worker, but also of third parties who might be affected.³³³ *Grant*, then, appears to address Title VII requirements more directly than did *Wright/Hayes* or *JCI*, by applying an expanded BFOQ defense, while still acknowledging the legitimate concern for fetal safety.³³⁴

The BFOQ outlined by the *Grant* court, however, still requires a finding that "all or substantially all women"³³⁵ must be excluded to protect fetal health. Clearly, then, the question of whether all fertile women, contemplating pregnancy or not, are appropriate subjects for exclusion can be raised within the context of *Grant*. However, as Circuit Judge Easterbrook pointed out, there are acceptable levels of risk other than zero which can only be determined through careful consideration of the competing rights of all parties.³³⁶ Again, *Grant* left open the possibility of establishing a BFOQ by demonstrating on a case-by-case basis which fertile women could safely work is not feasible, so that overinclusion by sex categorization is necessary.³³⁷

Under this framework of analysis, the Sixth Circuit concluded that the FPP was overtly discriminatory, justifiable only as a BFOQ.³³⁸ It vacated the district court's grant of summary judgment and remanded the Title VII

331. *Id.* at 1308.

332. *Id.* at 1310-11; see also *Johnson Controls*, 886 F.2d at 902 n.1 (Cudahy, J., dissenting); *Weeks*, 408 F.2d at 235.

333. *Grant*, 908 F.2d at 1310-11.

334. *Id.*; see also *infra* note 339 and accompanying text.

335. *Grant*, 908 F.2d at 1311.

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

337. *Grant*, 908 F.2d at 1310-11.

338. *Id.* "To hold otherwise would be to usurp congressional power to regulate pregnancy discrimination. . . ." *Id.* at 1310.

claim for consideration under the Cudahy standard.³³⁹ This order, of course, must be modified in light of the *JCI* Court's decision which confines the BFOQ to allow only discriminatory practices essential to the business at hand.³⁴⁰ The *JCI* Court concurrences, however, approve of the *Grant* approach.³⁴¹

Significantly, another 1990 case which, like *Grant*, rejects the *Wright/Hayes* paradigm for analyzing FPPs, actually addresses *JCI*'s FPP. Decided by the California Appellate Court, fourth district, *Johnson Controls Inc. v. California Fair Employment and Housing Commission*³⁴² involved a challenge to its FPP under the California Fair Employment and Housing Act. Here, the state court went beyond the decision in *Grant* and presaged the Supreme Court ruling in *JCI*.³⁴³ Declaring federal Title VII precedent as established in *Wright* and *Hayes* to be unsound and incompatible with the purpose of the FEHC, the court reaffirmed the finding of the California Fair Employment and Housing Commission that the FPP was clearly disparate treatment requiring a BFOQ defense.³⁴⁴

In so doing, the appellate court rejected the finding of the California trial court that the FEHC erred in applying the disparate treatment paradigm to this policy.³⁴⁵ The trial court, citing *Wright* and *Hayes*, allowed that the facial discrimination was capable of being rebutted by the BND outlined by the Fourth and Eleventh Circuits.³⁴⁶ The state appellate court,

339. *Id.* at 1310-11.

340. International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1207-08 (1991). See *supra* notes 143-55 and accompanying text.

341. *Johnson Controls*, 111 S. Ct. at 1210-17 (White, J., concurring, and Scalia, J., concurring); see also *supra* notes 186-202 and accompanying text.

342. 218 Cal. App. 3d 517, 267 Cal Rptr. 158 (1990). See generally N.Y. Times, May 19, 1990 (California Supreme Court let stand ruling that FPP violated state law with court noting that this is an era of choice where women are not required to become Victorian brood mares).

343. *Cal. Fair Employment & Hous. Comm'n*, 218 Cal. App. 3d at 525, 267 Cal Rptr. at 160-61. *JCI* refused to hire Ms. Foster because of her sex, found by the court to be violative of the Fair Employment and Housing Act. *Id.* at 541, 267 Cal. Rptr. at 191. The court considered the BFOQ defense, but concluded that it was not available since the "essence of the business operation," that of making batteries, was not undermined by the presence of women. *Id.* *Grant*, of course, ordered the trial court to apply the BFOQ defense but in the broader sense so that it would include consideration of safety concerns to third parties. See *supra* notes 204-05 and accompanying text.

344. *Cal. Fair Employment & Hous. Comm'n*, 218 Cal App. 3d at 535, 267 Cal. Rptr. at 167 (FPP blatant, overt discrimination). See generally Brief of the State of California, *supra* note 148, at 19-20 (*JCI*'s FPP fails to treat women as individuals conceding to all women capacity to exercise judgment like rabbits: women "who can become pregnant will become pregnant") (emphasis in original).

345. *Cal. Fair Employment & Hous. Comm'n*, 218 Cal. App. 3d at 539, 267 Cal. Rptr. at 169-70.

346. *Id.* at 540-41, 267 Cal. Rptr. at 169-71.

however, rejected this invocation of federal precedent, focusing instead on the OSHA lead standard and other medical evidence presented which suggested that excluding only women from a lead-laden workplace does not effectively protect the offspring of all employees, but that a more narrowly tailored policy, applying OSHA's palliative suggestions to both potential mothers and potential fathers, would so protect such offspring.³⁴⁷

The California Appellate Court found that Johnson Controls could not establish the requisite BFOQ for its policy because the medical evidence mitigated any claim the company might make that substantially all fertile women could not make batteries safely and efficiently.³⁴⁸ Thus, the court disregarded the Sixth Circuit's approach, and adopted a more narrow "essence of the business" approach.³⁴⁹ Further, the California court cited approvingly the EEOC's 1990 policy guidance, and asserted the need for a BFOQ to justify an FPP, thereby rejecting *Wright*, *Hayes*, and the Seventh Circuit's *JCI* decision.³⁵⁰ The critical element emphasized by the California Appellate Court and the most recent EEOC policy guidance is that a policy must be as narrowly tailored as possible to withstand the rigors of its BFOQ test. This, of course, was the test used by a majority of the Supreme Court.

3. Federal Statutes: Male Mediation of Toxic Damage

In reality, however, the previous disparate treatment/ disparate impact debate is irrelevant, as both models would require that, for an FPP to be viewed as consistent with Title VII, the toxic damage to the fetus must be mediated solely through the mother. Federal statutes and their accompanying regulations, however, reveal that the scientific evidence suggests this is not the case.³⁵¹ Notably, OSHA presumes that workplace health hazards affect both men and women unless proven otherwise. These statutes also

347. *Id.* at 544-47, 267 Cal. Rptr. at 176-78.

348. *Id.* at 171-73, 267 Cal. Rptr. at 171-73 (motive behind FPP "irrelevant to and not an excuse for overt disparate treatment").

349. *Id.* at 542-44, 267 Cal. Rptr. at 175-76. The court endorsed the EEOC's 1990 Policy Guide for construing the scope of the BFOQ defense. *Id.* This is somewhat confusing because the EEOC adopted the Cudahy approach which allows for consideration of third parties, while at the same time the court stated that it adopted the essence of the business test enunciated by the majority *JCI* Court. Compare *id.* at 543-44, 267 Cal. Rptr. at 171 & n.10 with *id.* at 545-47, 267 Cal. Rptr. at 175-76.

350. See *supra* note 349 and accompanying text.

351. See 29 U.S.C.A. §§ 651-78 (West 1985 & Supp. 1991) (purpose of OSHA to assure safe and healthful working conditions for every working man and woman); 29 C.F.R. § 1910.1025 & app. A (1989) (OSHA's lead standard regulations document that lead "impairs the reproductive systems of both men and women . . . and can 'alter the structure of sperm cells'"); EEOC Report, *supra* note 144, at 8 & 14 (OSHA has identified 26 industrial chemicals which allegedly cause fetal harm, 21 of which also cause male infertility or genetic damage); 43 Fed. Reg. 52,952, 52,959; see

place responsibility on the employer³⁵² for protecting employees and their offspring from workplace toxins. In spite of this federal regulatory framework, however, both employers and the courts have put an inordinate burden for protecting fetal health in the workplace on women workers.

As suggested above, a critical assumption underlying FPPs which exclude women workers only is that toxic damage is transmitted to the fetus only through the mother. However, OSHA concluded that this is not true.³⁵³ In fact, of the twenty-six chemicals which OSHA has identified as allegedly causing harm to fetuses, twenty-one apparently also cause male infertility or genetic damage.³⁵⁴ Acknowledging this reality, OSHA has adopted the general policy that a workplace health hazard affects both men and women unless proven otherwise.³⁵⁵ Lead, the damaging agent in both *JCI* and *Grant*, is no exception to this general policy. In fact, OSHA has concluded that "genetic damage from lead occurs prior to conception in either father or mother."³⁵⁶ Given this fact, OSHA believes "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workforce."³⁵⁷

This finding was accepted and cited in *United Steelworkers v. Marshall*,³⁵⁸ which found that there was "abundant" evidence supporting the belief that lead injures the reproductive systems of both sexes and so concluded that OSHA was correct in deciding that the evidence does not justify excluding only women from the lead-laden workplace.³⁵⁹ Rather, OSHA has established standards for lead exposure and requires employers to make respirators available so that both men and women desiring children can

also 15 U.S.C.A. §§ 2601-71 (West 1982 & Supp. 1991) (Toxic Substances Control Act meant to protect humans and environment from dangers of toxins).

352. See 29 U.S.C.A. § 651(b)(1) (West 1985 & Supp. 1990) (Act encourages employers "to reduce the number of occupational safety and health hazards"); 29 C.F.R. § 1910.1025 (1989) (placing upon employers burden of making determinations regarding lead exposure); cf. 15 U.S.C.A. § 2601(b)(1) (West 1982 & Supp. 1991) (TSCA has policy that employers bear responsibility of developing data on effects of toxic chemicals).

353. See *supra* note 351 and accompanying text.

354. See *supra* note 351 and accompanying text. See generally OTA Report, *supra* note 266, at 35-36 (in 1977 (DBCP), a known carcinogen causing male infertility, was subject of emergency regulation by OSHA, and later banned by EPA). Note in this instance that men were not banned from working in DBCP jobs, but rather the government banned the chemical from the workplace.

355. See *supra* note 351 and accompanying text.

356. See 43 Fed. Reg. at 52,966. This was upheld in *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

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

358. 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

359. *Id.* at 1256-58.

reduce their blood lead levels.³⁶⁰ They also require employers to conduct annual educational programs "with particular attention to the adverse reproductive effects on both males and females."³⁶¹ Thus, in its regulations, OSHA stresses that employers must minimize risk from lead exposure for both male and female employees since both can transmit damage to offspring as a result of exposure to lead. All of the FPP cases discussed thus far have found that, in order to justify an FPP, the toxin in question must be dangerous only to or through women. OSHA's regulations suggest that it should be difficult for any FPP to pass this test.³⁶²

OSHA's regulations pertaining to toxins in the workplace are an attempt to implement the Occupational Safety and Health Act³⁶³ which, in essence, gives the government the right to demand that businesses provide safe and healthful workplaces. This statute, passed in 1970, requires employers to create working environments "free from recognized hazards that are causing or are likely to cause death or serious physical harm"³⁶⁴ to employees. That this duty extends to the protection of fetuses was recognized in *Marshall*, which affirmed OSHA's lead standard.³⁶⁵

Obviously, in order to create safe workplaces, employers need clear knowledge of how toxins affect workers and their offspring. Again, the government put the responsibility on the employer for generating this knowledge with the Toxic Substances Control Act of 1976.³⁶⁶ In this statute, Congress declared that:

It is the policy of the United States that adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of that data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures.³⁶⁷

The mandate to conduct research and use this research to clean up the workplace is clear in these two statutes and yet there is little research in the area of toxic damage to fetuses. Apparently, the cultural predisposition to

360. 29 C.F.R. § 1910.1025 (1989) (employers must make respirators available if engineering and other controls do not reduce exposure to permissible exposure level).

361. 29 C.F.R. § 1910.1025 app. B (1989).

362. See *supra* note 351 and accompanying text.

363. 29 U.S.C.A. § 651(b)(3) (West 1985 & Supp. 1991).

364. 29 U.S.C.A. § 654(a)(1) (West 1985 & Supp. 1991); see also OTA Report, *supra* note 266, at 181-82 (NIOSH, part of the CDC, conducts research for OSHA's use). See generally Stillman & Wheeler, *Expansion of Occupational Safety and Health Law*, 62 NOTRE DAME L. REV. 969 (1987).

365. 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

366. 15 U.S.C.A. § 2601(b)(1) (West 1982 & Supp. 1991).

367. *Id.* See generally *Rollins Env. Services, Inc. v. Parish of St. James*, 775 F.2d 627 (5th Cir. 1985) (discussing purpose of TSCA).

assume that fetal health is solely a function of maternal health has made research in this area less pressing than in other areas involving toxic damage in the workplace. When such research has been conducted, the same cultural bias has resulted in most of the research being focused on women. Indeed, when research implicating fathers in the transmission of toxic damage to offspring exists, the courts have sometimes ignored it. Of particular interest here are *JCI* and *Grant*. In *Grant*, the district court rejected affidavits submitted by the plaintiffs which cited several studies suggesting the impact of lead on both men and women in the workplace.³⁶⁸ While proof of damage to men should have been fatal to the BND which the district court applied to General Motors' FPP, the trial court instead relied on the affidavit of one General Motors expert, submitted by General Motors in support of its FPP.³⁶⁹ In *JCI*, both the district and appeals courts rejected the evidence submitted by the plaintiff, indicating that lead damage can be transmitted from the father, because the evidence consisted of animal studies rather than human studies.³⁷⁰

This rejection is particularly problematic since the courts have traditionally viewed animal studies favorably. For example, in *Industrial Union Department v. American Petroleum Institute*,³⁷¹ the Supreme Court held that such animal studies could be used. Again, in *Public Citizen Health Research Group v. Tyson*,³⁷² the District of Columbia Circuit Court held that animal studies were acceptable tools for determining risk assessment, and in *Public Citizens v. Young*,³⁷³ this same court held that, in some cases, animal studies may actually dictate that responsible agencies must act to protect the public. Perhaps most telling is that, while the *JCI* appeals court rejected animal studies as evidence of paternal responsibility for lead damage, OSHA relied on these very animal studies in formulating its lead rules and had its right to do so affirmed by the District of Columbia Circuit Court.³⁷⁴ Apparently, the failure of employers to carry out the mandates of OSHA for research, and the failure of the courts to accept such research where it did exist, have permitted FPPs which did not really protect fetuses

368. *Grant*, 908 F.2d at 1305-06.

369. *Id.*

370. *Johnson Controls*, 886 F.2d at 889; *International Union, UAW v. Johnson Controls, Inc.*, 680 F. Supp. at 309, 315-16 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989) (*en banc*), *cert. granted*, 110 S. Ct. 1522 (1990), *rev'd and remanded*, 111 S. Ct. 1196 (1991).

371. 448 U.S. 607 n.64 (1980) (plurality opinion).

372. 796 F.2d 1479, 1489-90, 1492 (D.C. Cir. 1986) (sustaining risk assessment based upon animal studies).

373. 831 F.2d 1108 (D.C. Cir. 1987).

374. *See Marshall*, 647 F.2d at 1256-58 (OSHA's view has been sustained after rigorous attention).

but did discriminate against women. In reality, these policies asked fertile women employees to take the responsibility assigned to employers by the Occupational Safety and Health Act and Toxic Substances Control Act and most recently, by the EEOC.

In summary, then, FPPs are untenable if written to exclude only fertile women from a toxic workplace. Such policies, when analyzed under disparate treatment theory prove discriminatory under Title VII since, given the current state of research, proving that the risk to the fetus was mediated only through women is difficult at best. Ironically, these FPPs served neither of the interests in this conflict well. Fetuses were not effectively protected from all damage traceable to a toxic workplace and women did not have the employment equality which was their due under Title VII. As suggested by the federal statutes discussed here, a more appropriate remedy for both fetus and mother would be for employers to create safe workplaces, as OSHA feels they can. If that is not possible, the only solution which would protect both fetus and mother would be an FPP which protects against damage transmitted by the father as well as by the mother.

The judicial and legislative history germane to FPPs require the disparate treatment/BFOQ model. Since evidence currently suggests strongly that both mother and father can transmit toxic damage to offspring, any attempt to establish a BFOQ through evidence that women cannot perform as safely as men in a toxic work environment will fail, and any FPP which excludes fertile females only will also fail. The dissent in the appeals court essentially drew these conclusions, as did the entire Supreme Court.³⁷⁵ The Seventh Circuit's decision affected a needed course-correction in Title VII law which ironically will result in better protection for fetuses than had resulted from recent efforts to bend Title VII and the PDA.

V. FPPS VIOLATE TITLE VII EVEN IN THE ABSENCE OF PLENTIFUL HUMAN STUDIES REGARDING THE EFFECTS OF TOXINS UPON MALES

One of the questions certified to the Supreme Court in *JCI III* was whether "scientific animal studies [are] insufficient as [a] matter of law to demonstrate significant risk to humans due to exposure to toxic substance?"³⁷⁶ The apparent narrowness of this question belied its importance. The Seventh Circuit's summary dismissal of the Plaintiff UAW's scientific

375. *Johnson Controls*, 111 S. Ct. at 1209-10; *Johnson Controls*, 886 F.2d at 901 (Cudahy, J., dissenting), & at 902 (Posner, J., dissenting) & at 908 (Easterbrook, J., dissenting).

376. *International Union, UAW v. Johnson Controls Inc.*, 58 U.S.L.W. 3609 (U.S. Mar. 27, 1990) (No. 89-1215).

evidence based upon animal studies amazed dissenting Judge Easterbrook.³⁷⁷ This approach reacted to an absence of available information by blaming the victims. Thus, in the eyes of the circuit court majority, since the plaintiff was unable to support its thesis that JCI's FPP was discriminatory on the basis of sex with plentiful and dispositive *human* studies comparing male to female reproductive harm from lead, then the plaintiff must lose. Further, the Seventh Circuit's disposition in *JCI* let a company which had a legal obligation to perform risk assessment³⁷⁸ off the hook because it had not done the studies. Finally, epidemiological (human) studies of gender comparative reproductive hazards in the workplace could not be successfully accomplished when employers exclude women from these positions.³⁷⁹

Why have scientists failed to pursue the issue of male-mediated harm to fetuses?³⁸⁰ Certainly the average person's perception of science is one that permits only reasoned analysis of balanced hypotheses, incorporating objec-

377. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 919 (7th Cir. 1989) (*en banc*), cert. granted, 110 S. Ct. 1522 (1990), rev'd and remanded, 111 S. Ct. 1196 (1991). "The medical profession . . . will be stunned to discover that animal studies are too 'speculative' to be the basis of conclusions about risks." *Id.*; see also *supra* note 116 and accompanying text. See generally BNA Special Report, *supra* note 33, at 57, 74, 76 (discussing use of animal data and applicability to humans.); OTA Report, *supra* note 266, at 6, 8 (science is in process of developing methods to extrapolate animal data to humans for purposes of risk assessment).

378. See EEOC Report, *supra* note 144, at 8 and n.18. The report concluded that the 1988 EEOC Policy Guidance "provided a *disincentive* to employers to conduct research as to male-related risks." *Id.* at 24-25. The EEOC permitted an employer's exclusion of women based on evidence of fetal health risk through maternal exposure where no research was done on risk through males. Thus, the EEOC directed its field officers that where there was "reliable evidence on both sides of the question of risk of harm through women," it would be equated with proof of "substantial risk" but where evidence on reproductive harm to men was "inconclusive" because of, *inter alia*, "the paucity of research," the EEOC "would proceed as if the risk was 'substantially confined to female employees.'" *Id.* at 24. The EEOC Report found that this position was totally inconsistent with the EEOC's enforcement responsibility and with OSHA's general rule that a workplace hazard is presumed to affect men and women alike until proven otherwise. *Id.*

379. See generally Winder, *Reproductive Effects of Occupational Exposure to Lead: Policy Considerations*, 8 NEUROTOXICOLOGY 411, 412 (1987) (noting that old observations derived from heavy, unsubstantiated lead exposures not supported by more recent evidence concerning lower exposure of women). The author further states "nowadays it is difficult to document levels and exposures as women are usually excluded from the workforce." *Id.* The Supreme Court's recent decision in *JCI III* should result in the creation of better human data on overall health and male/female reproductive impact from exposure to workplace toxins within permissible OSHA limits.

380. See generally V. SHIVA, *STAYING ALIVE* 14-37 (1988) (science is "a specific project of western man," a masculine and patriarchal project [that subjugates] nature and women). *Id.* at 15. Ms. Shiva takes issue with the notion of a single, objective, neutral or universal scientific method. *Id.* at 27. See M. GIBSON, *WORKERS' RIGHTS* 48 (1983) (discussing conflicts of interest involved where research on occupational hazards sponsored by government and often dominated by industry-connected "experts," and/or is funded directly or indirectly with corporate funds). Professor Gibson further notes that a problem with "independent" research is that employers

tively designed studies which derive meaningful empirical data about both men and women. Yet experience indicates that this has not always been the case.³⁸¹ A body of literature is developing which criticizes the neutrality of projects undertaken, measurements utilized, the failure to eliminate significant confounding variables, and the corporate interpretation of research.³⁸² In the toxic workplace, the paucity of data on reproductive harm to male workers has often given rise to the assumption that the reproductive harm to male workers is insignificant. Despite the sparse representation of women in traditionally male, blue-collar jobs, this is where employers with FPPs apparently most fear risk of harm via female transmission to fetuses.³⁸³

It is revealing to review writing from the 1970s where one employer advocate who served as counsel challenging the OSHA lead standard advised employers to review the literature to assess the level of risk to female workers' offspring, and whether such was "roughly equivalent" to that risk experienced by male workers' offspring.³⁸⁴ In 1977, two National Institute for Occupational Safety and Health ("NIOSH") staff doctors summarized extant research on the effects of lead on reproduction.³⁸⁵ Drs. Infante and Wagoner used a gender-balanced approach to analyzing this reproductive

frequently refuse to cooperate, deny access to premises and information on substances used and other records of previous employees, etc. *Id.*

381. See Drexler, *Ruth Hubbard, an outsider inside*, *The Boston Globe*, May 16, 1990, at 73, col. 5 (science is political, framing its examination of the world to entrench those currently in power); *Johnson Controls*, 886 F.2d at 917, n.15 (Easterbrook, J., dissenting) ("in an effort to measure risk accurately a court would get little aid from existing studies, often tailored to fulfilling regulatory demands for a 'conservative' bias."); M. Paul, *Reproductive Fitness and Risk*; 3 OCCUPATIONAL MEDICINE: STATE OF THE ART REVIEWS 323, 333 (1988) ("a few limited studies suggest the possibility of fetal harm through exposure to male partners, [but] most of these substances have, unfortunately, been investigated *only in relation to direct maternal exposures*") (emphasis added). Dr. Paul advises "[c]aution in the face of uncertainty . . . especially for substances whose toxicity is highly suspect based on *animal data*." *Id.* (emphasis added); see also J. Bertin, *Reproductive Hazards in the Workplace*, REPRODUCTIVE LAWS FOR THE 1990s 297 (Cohen & Taub, ed. 1989) (discussing sexism in design and evaluation of scientific research).

382. See generally *V. SHIVA*, *supra* note 380, at 27; Paul, *supra* note 9, at 277 (employer criteria for restriction of employees by studied group of Massachusetts companies bore little relationship to current scientific knowledge about risks). See J. Bertin, *supra* note 381, at 297 (discussing critical flaws in epidemiological studies that fail to account for paternal exposure and general environmental pollution near a plant).

383. See Paul, *supra* note 9, at 277 (noting higher prevalence of exclusion of women in broad categories among male-intensive firms).

384. Zener, *Women in the Workplace: Toxic Substances and Sex Discrimination*, 1 TOXIC SUBSTANCES J. 226, 234 (1979). Mr. Zener derided the value of the study available on male exposure to lead in a Rumanian battery plant. *Id.* at 232.

385. Infante and Wagoner, *The Effects of Lead on Reproduction*, Proceedings, Conference on Women and the Workplace 232 (1977).

hazard. Although they were limited to available studies, which is a serious limitation, nonetheless, Drs. Infante and Wagoner cited interesting findings from a 1916 study of the pregnancy outcomes of the wives of males employed as house painters.³⁸⁶ The percentage of stillbirths was 23% for these women, as compared to 8% for the rest of the women in that town.³⁸⁷ The 1975 study of human male reproductive ability and workplace lead exposure by Dr. Lancranjan, a neuroendocrinologist, also referenced with approval by Infante and Wagoner, found that male workers exposed to lead suffered decreased fertile ability related to a direct toxic effect on the gonads.³⁸⁸

The authors of one recent study of lead exposure and child development wrote the following response to the citation of their work as one of the justifications for JCI's FPP:

Considerable attention has been given to characterizing the impact of intrauterine exposure to lead on children's growth and development. Much less investigative effort has been devoted to assessing the effect of *paternal* exposure to lead on infant outcome. In our studies *we did not measure paternal exposure* and therefore cannot rule this out a [sic] a contributing factor in our findings. There are studies of paternal lead exposure and reproductive outcome and some, but not all, have shown a toxic effect. This group of investigations has not employed samples comparable in size or outcome measures comparable in sensitivity to those employed in the studies of intrauterine exposure. The *limited data* on paternal exposure should not be weighed equally with the positive findings on maternal exposure . . . The *position that a given level of paternal but not maternal exposure is acceptable is without logical foundation and insupportable on empirical grounds.*³⁸⁹

The authors further noted that the threshold for effect has historically been revised downward as better studies are conducted. They concluded that

386. *Id.* at 235. Many of the painters suffered lead colic. *Id.*

387. *Id.* Of 467 deliveries, 107 were stillborn. *Id.*

388. *Id.* Dr. Lancranjan's work was the principal study relied upon when OSHA set the standard for lead exposure. Significant alterations in spermatogenesis were observed including decreased motility, decreased numbers, and malformed sperm at blood lead levels of 41ug/100g. *Id.* Drs. Infante and Wagoner concluded that both human and experimental studies demonstrated mutagenic effects and reproductive impairment following paternal exposure to lead. *Id.* at 236. See also *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1257 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

389. Needleman and Bellinger, *Commentary, Recent Developments*, 46 ENVTL. RES. 190-91 (1988) (emphasis added).

current data does *not* "provide a sufficient scientific basis for applying different standards to male and female workers."³⁹⁰

In the EEOC's 1980 proposed interpretive guidelines, the issue of scientific investigation was addressed with respect to the employer's obligation and the time frame necessary to conduct such research:

[I]f scientific evidence has been compiled only as to the hazardous reproductive effects of a substance on women, appropriate studies must be done to *determine if any reproductive hazards exist for men*. It is the position of the enforcement agencies that the time provided . . . is sufficient for employer/contractors to investigate, initiate and/or complete any scientific research regarding the harmful effects of a particular reproductive hazard on both sexes. In consultation with OSHA, the National Institute of Occupational Safety and Health, and the National Institute of Environmental Health Safety, it was determined that *such research could be performed in one year*.³⁹¹

Certainly this research has taken longer than the EEOC anticipated in its 1980 proposed rules, but this may be due in part to the EEOC's own inaction.³⁹² The sheer volume of research on female-mediated harm to fetuses as opposed to male-mediated harm creates a misconception that women are more reproductively vulnerable to toxins than are men.³⁹³ Also, if one doesn't *look* for a problem such as male-mediated harm, it is unlikely to be found. The relative indifference shown to male reproductive risks may stem from what one author terms the "male invulnerability myth."³⁹⁴ This myth

390. *Id.* at 191 (emphasis added).

391. 45 Fed. Reg. 7514, 7515 (1980) (withdrawn, 46 Fed. Reg. 3916, 1981) (emphasis added). It should be noted that such studies would have had to involve animals in order to overcome the paucity of epidemiological information.

392. See EEOC Report, *supra* note 144, at 2, 15, 20 (report notes efforts of then Chairman Clarence Thomas to neutralize FPP issue); see also *supra* note 378 and accompanying text.

393. J. Bertin, *supra* note 381; see also M. Gibson, *supra* note 380, at 19-20 (1983) (society identifies women only with reproduction which author terms a cultural "fetus fetish" that presumes women to be pregnant until proven otherwise).

394. J. Stellman, *Protective Legislation and Occupational Hazards*, REPRODUCTIVE LAWS FOR THE 1990s 345 (Cohen and Taub, eds. 1989). Dr. Stellman discusses a 1986 "study" in the semiconductor industry (for Digital Equipment Corp.) by two researchers at the Univ. of Mass. School of Public Health, which despite methodological and conceptual errors, provided the rationale for the exclusion of fertile females. This outcome is of particular note in light of the statement of the authors that the primary exposure of concern, glycol ethers, have been identified with testicular toxicity, evidenced by reversible fertility loss in males and teratogenicity. *Id.* at 347. Dr. Stellman points to the failure to enroll a sufficient number of males in the study such that the description of the results were deemed "statistically insignificant" . . . *not* because a risk did not exist via male mediation but because the *numbers of males examined were too small*. *Id.* at 347-48 (emphasis added). A subsequent report indicated that Digital has discounted the study but "still strongly encourages pregnant workers to transfer elsewhere until their pregnancy is

persists despite increasing evidence that various compounds and chemical agents harm men and their offspring.³⁹⁵

A. Because Science Has Not Shown that Lead Causes Harm to Offspring Only Through Women, Employers Could Not Justify Sex-Specific FPPs

JCI produced no concrete proof that the one allegedly hyperactive child of a female worker who had worked in a "high-lead" area³⁹⁶ was hyperactive because of exposure to lead that occurred prior to the employee's knowledge of conception.³⁹⁷ Further, the record did not reveal whether that woman's husband also worked in a "high-lead" job;³⁹⁸ whether lead

over." Negri & Lewis, *Justices Bar Job Curbs Aimed at Shielding Fetuses*, *The Boston Globe*, March 21, 1991 at 1, col. 1, & at 27, col. 3.

395. See Stillman & Wheeler, *supra* note 364, at 993 (noting example of DBCP, dibromochloropropane, a liquid pesticide associated with infertility in exposed male workers); Vanderwaerd, *supra* note 94, at 159-60 (discussing male-mediated harm due to exposure to herbicides like Agent Orange, asbestos, lead, beryllium, anesthesia, vinyl chloride, etc.); Uzych, *Teratogenesis and Mutagenesis Associated with the Exposure of Human Males to Lead: A Review*, 58 *YALE J. BIOLOGY & MEDICINE* 9 (1985).

Data pertaining to teratogenesis and mutagenesis associated with the exposure of human males to lead is relatively meager and incomplete. Conflicting data findings have been published. There is a strong need for further good studies. However, on the basis of currently available selected data, it is incorrect to assume that paternal lead exposure may not be associated with reproductive-related harm. Available epidemiologic data suggest that the exposure of human males to lead may be associated with significant reproductive-related harm. A unisexual workplace lead policy which excludes only females from exposure to occupational lead hazards leaves male workers, and their offspring, unprotected from reproductive-related and other harm possibly associated with paternal lead exposure.

Id. at 16; see also Manson, *Human and Laboratory Animal Test Systems Available for Detection of Reproductive Failure*, 7 *PREVENTIVE MED.* 322 (1978) (emphasizing need for more extensive study of the association between paternal exposure to hazards and reproductive outcomes).

396. The "high-lead" area was within the exposure limits set by OSHA.

397. See *supra* note 8 and accompanying text (discussing lack of evidence on causation). Employers frequently focus on the earliest stage of pregnancy, when technically, scientists refer to the developing life as an embryo. Their concern is that delay in removal from a high-lead job occurs because the woman is generally not immediately aware of the pregnancy. At least some data indicate that the earliest weeks of pregnancy are not the most critical with regard to lead exposure since lead does not cross the placenta at this stage. A problem remains, however, in that lead is slow to leach out of the blood and also is stored in the bone marrow which may or may not have a deleterious effect on the health of a fetus.

398. Men may mediate harm from lead to the fetus because of potential changes to their sperm prior to conception. See Blakeslee, *supra* note 64; Purvis, *Sins of the Fathers: both parents may be vulnerable to toxins that cause birth defects*, *TIME*, Nov. 26, 1990 at 90-91. "The new research suggests that men exposed to substances such as lead, alcohol . . . could be conceiving children with serious physical and mental abnormalities . . . the most disturbing recent report concerns lead." *Id.* Dr. Ellen Silbergeld, Professor of Toxicology at the University of Maryland and expert witness for the plaintiff, recently reported on a study in "which male rats subjected to even low levels [of lead]—comparable to amounts found in the dust and dirt of many inter-city

paint in their domicile might have contributed to this outcome,³⁹⁹ or whether lead was the cause of the purported hyperactivity.⁴⁰⁰ The absence of conclusive data on this issue of causation posed a significant stumbling block for JCI⁴⁰¹ and for other employers who instituted FPPs that excluded on the basis of gender plus fertility. Such employer policies presume, in contrast to the OSHA standard, that the potential reproductive harm of lead exposure is mediated solely through women. Unlike the field of products liability where significant epidemiological studies often provide data which assists the litigation of issues of causation,⁴⁰² data comparing male/female mediation of lead remains incomplete. Further, because lead exposure results from numerous environmental sources including, among other things, lead paint dust, lead solder in aging pipes that transmit drinking water, lead crystal glassware and some pottery, and lead in the soil near

neighborhoods—often sired offspring with 'substantial' changes in brain development." *Id.* Even after conception, a pregnant woman may be directly exposed to lead-contaminated ejaculate from sexual intercourse with a spouse who is employed in a high-lead job. Lead residues on a man's body and clothes also present a serious hazard to a spouse in the absence of appropriate industrial hygiene.

399. See Jaroff, *supra* note 3, at 68. "By far the highest incidence of lead poisoning is found in children who live in older homes with lead-based paint that is peeling." *Id.* at 69. A 1988 Public Health Service report cited that 52% of households have lead-based paint on walls and woodwork. *Id.* at 68. While a mere 7% of young children from medium to high income families are afflicted with lead poisoning, 25% of poor white children and 55% of children from impoverished black families suffer from lead poisoning. *Id.*

400. The percentage of hyperactivity in children in the general population is estimated to be 4% of school-age children. It appears eight times as frequently in boys as in girls. *Why Junior Won't Sit Still*, TIME, Nov. 26, 1990, at 59.

401. The Supreme Court found that it had not been shown that any of the eight reported pregnancies among JCI's female employees resulted in birth defects or other abnormalities. *Johnson Controls*, 111 S. Ct. at 1208. See generally Note, *International Union v. Johnson Controls, Inc.: Controlling Women's Equal Employment Opportunities Through Fetal Protection Policies*, 40 AM. U. L. REV. 453, 495 & nn. 277-78 (1990) (citing studies and evidence of harm from male exposure to lead).

402. See *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988). In tort cases involving ingestion of the anti-nausea drug Bendectin by pregnant women who later gave birth to defective children, the courts have the benefit of twenty years of epidemiological studies which have been subjected to peer review in the medical and scientific community. These studies did not establish the teratogenicity of Bendectin. The Bendectin cases involve very different issues from those in Title VII claims regarding employer FPPs. The former often focus on admissibility of evidence in a jury trial whereas Title VII does not provide the right to a jury trial and the testimony of each party's experts must be viewed in that context. See generally Landau & O'Riordan, *Of Mice and Men: The Admissibility of Animal Studies to Prove Causation in Toxic Tort Litigation*, 25 IDAHO L. REV. 521, 564-65 (1988-89) (distinguishing appropriateness of use of animal studies for regulatory purposes in setting safety standards versus establishing causation in toxic tort cases). Cf. Black & Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 FORDHAM L. REV. 732, 778 (1984) (animal testing is not as reliable as human epidemiological data for establishing causation in tort cases and suggesting that even for regulatory purposes, epidemiologic studies should be given more weight than animal data).

major highways;⁴⁰³ an employee's occupational exposure is not easily segregated for accurate measurement. In fact, as was noted in the course of OSHA's standard-setting on lead, the great majority of people in the general population, even in the absence of concentrated occupational lead exposure, have blood lead levels near the mean of approximately 20 mg/100g.⁴⁰⁴

B. *Employers and Science After JCI III*

In light of the Supreme Court's decision in *JCI*, employers can no longer exclude workers on the basis of gender plus fertility. This disposition fosters the overriding policies of both Title VII and OSHA in that it categorizes sex-specific FPPs as facially discriminatory and it promotes the clean-up of the workplace for the safety of all. However, *JCI* does not impair OSHA's statutorily vested authority to regulate the workplace based upon balanced scientific research regarding health hazards.⁴⁰⁵ Reproductive impairment is only one of the negative health consequences of exposure of employees to toxins, but it presents important and unique concerns about nonconsenting and vulnerable potential offspring.

JCI simply shifts the burden back to businesses to establish that any given toxin discriminates between men and women such that varying exposure levels are necessitated. If an employer truly fears that tort liability will result from employee exposure to a reproductive hazard, the employer should have a significant economic incentive to perform or support empirical research related to the exposure of all workers and potential offspring. Such an employer would be motivated to keep comprehensive records of health outcomes as data for future epidemiological studies . . . studies that may cause OSHA to sanction distinctions between men and women with regard to some toxins.⁴⁰⁶ The policies behind Title VII and OSHA mandate that the employer carry this burden as both federal agencies have directed businesses to presume that harm to men and women and through men and women is the same until proven otherwise. This burden will also

403. See Jaroff, *supra* note 3, at 68.

404. *Marshall*, 647 F.2d at 1258 n.98.

405. Cf. Nothstein & Ayres, *supra* note 44, at 319 (valid OSHA regulation not preempted by Title VII).

406. The problem with making such distinctions between men and women is that this generally means that women are "protected" out of jobs and men are exposed to higher levels of toxins. The overall health of the adult male may be diminished because he is deemed less able to transmit harm to his potential offspring than a woman. See Hricko, *Social Policy Considerations of Occupational Health Standards: The Example of Lead and Reproductive Effects*, 7 PREVENTIVE MED. 394, 401-02 (1978) (setting different lead standards for men and women takes away the industrial incentive to institute engineering controls necessary to lower exposure).

be carried by employers because the absence of negligence is a primary element of the employer's defense to tort liability. Failure to fully investigate the harm of toxins, especially in light of some evidence of harm to some groups of workers would surely amount to negligence by an employer who exposed workers to the toxin. This is especially true in light of the duties imposed on employers pursuant to the Toxic Substance Control Act.⁴⁰⁷

As to the admissibility of scientific animal studies, although the Court in *JCI* essentially dodged this issue, leaving its full resolution to the lower court upon remand, the court implicitly relied upon animal studies when it stated that there was "evidence in the record about the debilitating effect of lead exposure on the male reproductive system."⁴⁰⁸ When a future FPP case reaches the courts, the evidentiary question may carry the day, much as the determination of the appropriate Title VII analytical framework affected the outcome in *JCI*.

VI. FPPS AS A MANIFESTATION OF THE FETAL RIGHTS/WOMEN'S RIGHTS DEBATE

It is appropriate to ask at this point why the Supreme Court found "no difficulty [in] concluding that Johnson Controls cannot establish a BFOQ,"⁴⁰⁹ when this issue previously confounded and divided courts, commentators, scholars, scientists and businesses alike. Before the Court's disposition of *JCI III* which discredited employer interference into the reproductive domain of employees, there existed a history of controlling women's conduct, a heritage not entirely eradicated today. Employers would have it that they are caught in a sort of web, an inescapable conflict, that if they did not protect women they would be sued, and if they protect women, they are still sued. Employers are whipsawed, in other words. There are essentially three major flaws in this position, however. First, it is an attempt to solve a complex problem through a "quick-fix," ill-conceived, short-term solution. There are risks inherent in all workplaces, from laboratories to office suites to operating rooms, and employers were attempting, through FPPs, to totally shift the risk of one of these hazards (reproductive impairment) onto their female workers. Employers, fearful of one problem,

407. See EEOC Report, *supra* note 144, at 8 & n.18 (manufacturers of chemical substances and mixtures responsible for developing data on health and environment); see also *supra* notes 366-67 and accompanying text.

408. *Johnson Controls*, 111 S. Ct. at 1203; see also *supra* notes 371-74 and accompanying text (discussing the judicial acceptability of animal studies); cf. *supra* notes 377, 381, 388, 395, 398, 402 and accompanying text (sources discussing issues surrounding the reliability and availability of both animal and human studies).

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

excluded personnel, apparently concluding that this was a more efficacious policy than instituting engineering controls capable of protecting all workers. The authors wonder if the manufacturing process had involved gold or platinum, would the employer have allowed these metals to become airborne? Surely, there is a significant economic incentive to capture every milligram of such metals, so that workers would not be exposed to such metals to a significant degree. Why then do manufacturers allow lead and other toxins to become airborne? It would appear that there was not the same incentive, and that management's reflexive response was to shift the "cost" of the reproductive risks to women, and let them become the scapegoats. Employers need more economic incentive to address these issues fairly.

Second, employer FPPs address only one aspect of work-related injury—that of reproductive impairment in female employees. Although such injuries should not be overlooked, if one takes FPPs to their logical conclusion, could not employers prohibit pregnant employees from buying cigarettes in the company cafeteria? (Justice Kennedy asked this at oral argument—Respondent's answer: Yes.)⁴¹⁰ And so employers could shift other risks to supposedly susceptible employees in order to exclude them. In short, employer FPPs tolerated no female-mediated risk in the context of female worker pregnancy outcomes. Had the Supreme Court agreed, this would have opened the door for employers to then demand zero risk for other work-related injuries. Employers may prefer a super-human class of workers but this is not possible. The better response is to address the risks that lead to the injuries—in other words, to shift the risk, in part, back to the creators of those risks. For employers are better situated to know of the risks, define them, and reduce all of them ultimately.

Third, employers, like JCI, have historically chosen those least empowered in the work hierarchy to bear the burden of risk in making its profits. JCI's FPP applied to woman in the manufacturing of batteries, an historically male-dominated industry. Women, the least senior employees, and *a fortiori* the least well-paid, were not coincidentally the first ones out the door.

This contentious debate over FPPs perhaps reached its zenith in the fifty page decision issued by the Seventh Circuit. The authors contend that the

410. In fact, fathers who smoke increase their children's risk of brain cancer and leukemia and research now suggests that smoking might damage the father's sperm. *Study Links Cancer in Young to Fathers' Smoking*, N.Y. Times, Jan. 24, 1991, at B8, col. 4. Once again, the simplistic instinct would be to protect the fetus from the mother smoking but this may be too late because the sperm may already be defective from paternal smoking and the fetus may experience second-hand smoke from the father and others.

controversy engendered by traditional FPPs, which frame the issue as one of conflicting rights between fertile female workers and their potential offspring, runs parallel to the debates regarding such issues as abortion rights, court-ordered medical intervention in pregnancies to save fetuses, post-natal prosecutions for delivery of illegal drugs to babies, or delivering babies with fetal alcohol syndrome, and pre-natal civil liability for maternal conduct during gestation. In short, the emergence of women's equal employment rights is at times seen as not in consonance with the increasing legal attention to independent fetal rights. The law in this area, as emerging, posits women and fetuses as adversaries (although in the case of abortion, women currently retain the legal right to autonomous decisions without state intervention unless reliant on the state for treatment).⁴¹¹ By viewing the interests of mothers and fetuses as conflicting and competing, rather than as generally in common, women lose autonomy in reproductive and parental decisionmaking, losses violative of their rights. Instead, the state and employers make decisions relating to maternal and fetal health as was the case in *JCI*.

The law relating to fetal rights, as well as to women's rights, reflect important concerns in our society, and must be developed in a careful and considered manner. The lower courts were eager to consider the rights of potential fetuses when contrasted with the employment rights of women. Evidence of male-mediated harm to offspring was ignored. The Supreme Court, however, construed the PDA as a mandate for choices to be made by "parents who conceive, bear, support and raise [the children] rather than to the employers who hire those parents."⁴¹² This seemingly benign conclusion, though, is also at the heart of the aforementioned debates which continue unabated. The difference between workplace FPPs and the other fetal/women's rights issues, though, is that Congress, through the PDA, unequivocally mandated that workplace choices be made by parents. Congress has not spoken clearly with regard to those other issues leaving the matter to judicial interpretation of penumbral Constitutional rights.

A. *What Are Employers to Do After JCI III*

Perhaps it is overly idealistic to expect that employers will suddenly internalize the public policy goals of equal employment opportunity legis-

411. *Rust v. Sullivan*, 111 S. Ct. 1759, 1764 (1991); see also Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and The Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Mainor, *Fetal Protection: Drugs & Pregnancy, The Legal Impact*, MD. B. J. May/June 1990, at 23, 26 (Legal efforts should complement rather than undermine public health goals).

412. *Johnson Controls*, 111 S. Ct. at 1207.

lated in Title VII, as amended by the PDA, and thus redirect their resources from defending sex-specific FPPs into maximizing their human resources regardless of gender. Ethically, an institutional commitment to providing improved safety conditions for men *and* women *and* their potential offspring should be the foremost priority. But history has shown and pragmatism dictates that employers will remain primarily concerned with the impact of improved engineering controls on the bottom line . . . their profit. Of course, now an employer must weigh into its decision that maintaining an illegal FPP will contribute to its liability due to civil rights law suits, negative public perception, and consumer boycotts waged by various affected stakeholders, including socially responsible investors.

Will employers then revise their FPPs to exclude all fertile men and women from positions where there is a possibility of mediating harm to future generations? This outcome seems unlikely in view of the practical problems it presents in diminishing the number of available workers and provoking the ire of civil libertarians. Furthermore, Congress has taken notice of this possibility and legislation has been introduced to address it. The Justices in *JCI* evidenced significant reluctance about employer intervention in reproductive decisions. In fact, the right to preserve fertility should be considered an inalienable human attribute in the absence of the individual's choice to terminate reproductive capacity.⁴¹³

Are there other viable alternatives available for employers in the wake of *JCI*? Legally, employers who expose employees to suspected toxins are obligated to conduct or support scientific research and should ensure that studies are gendercomparative with respect to reproductive outcomes. Part of this mission is comprehensive recordkeeping regarding employees for epidemiological study. Employers and scientists have donned a proverbial set of blinders with respect to male-mediated harm to offspring. Not only may sperm themselves be damaged but male workers carry contaminants home to their families and partners on clothing and skin and in body fluids. Placing women workers on a pedestal that excludes them from some toxic exposure simply does not solve the problem of reproductive hazards.

How then are employers to protect themselves from potential tort liability? Purchasing insurance against such liability generally spreads the financial risk and passes the cost on to the consumer of the product. This choice appears to answer the employer's initial economic concern. Whether the

413. The termination of reproductive capacity may result from surgical intervention in response to a pressing medical necessity. In other instances, sterilization is selected as a permanent method of birth control. The efficacy and the morality of this choice have been debated among the medical profession, feminists, theologians, and ethicists.

insurance is purchased privately or funded via revised workers' compensation statutes, the use of insurance does not represent an ethically correct solution as it provides payment for human injury rather than prevention of that injury.

More can be done technologically to clean up the workplace with improved ventilation, equipment that collects toxins from the worksite, etc. The methodology and implementation depend largely upon the individual business. The use of robotics has been suggested for work areas that defy available environmental controls, although unions express concern about the loss of jobs this would entail. Employers are at times reluctant to invest in research and development or to experiment with technology-forcing equipment even if it is feasible. However, companies will have to weigh the risk of tort liability against their traditional disinclination to expend funds for improvements not mandated by law. Additionally, business interests could be attracted to invest more in worker safety with the appropriate tax incentives.

In addition to increasing efforts to clean up the work environment, companies may be able to utilize alternative, less toxic agents in some instances to avoid hazards to workers. There will be instances where the only feasible substitute for the toxic substance is also very toxic. This was true in *JCI* where the alternatives to lead in the batteries are also toxic. In these situations, investing in research regarding other alternatives is one option that might provide a long-term gain for the company that innovates an efficient alternative.

JCI was decided on Title VII grounds. The decision does not negate the statutory authority vested in OSHA to regulate workplace safety and health. Since the BFOQ defense was so narrowly defined by the Court in *JCI*, OSHA remains the preferable avenue for assessment of permissible standards for occupational exposures. The problem here is that OSHA has not set standards for all of the many substances which currently prove, or in the future may prove to be health hazards. Even where the agency has set standards, these may not be strict enough to altogether avoid the tort liability employers are concerned with.

It should be noted that where OSHA does not regulate something, the state has the jurisdiction to provide a standard for worker safety.⁴¹⁴ The probable lack of uniformity among standards set by state agencies makes this option particularly problematic for companies operating in several

414. 29 U.S.C.A. § 667 (West 1985 & Supp. 1990).

states. JCI provides an example of this phenomenon as it has operations in ten different states.⁴¹⁵

There is a critical need for cooperation between the federal agencies EEOC and OSHA, employers, and unions at this time to create more comprehensive standards for the protection of all. Employers who are genuinely concerned with improving upon current standards or creating standards where none exist are best protected from Title VII liability by submitting evidence to OSHA and urging the agency to implement changes where warranted by scientific evidence. The burden is now clearly on employers to institute gendercomparative studies of workplace toxic exposure and resultant harm, including reproductive harm, to their workers.

The Supreme Court's decision in *JCI* should spur the EEOC to deal with the backlog of unresolved FPP cases that were relegated to an administrative limbo over the past decade, a decade when the agency was primarily under the chairmanship of Clarence Thomas. The 1990 Policy Guidance that the EEOC issued for internal use is of no assistance to employers who have perhaps the greatest need for guidance at this time. In the wake of *JCI*, the EEOC should address the issue of FPPs through administrative rulemaking that will effectively eradicate the agency's legacy of neglect during the 1980s. Comprehensive federal agency regulations would incorporate the valuable input of affected parties from the requisite hearings and when finalized, carry significant predictive capacity. This is a critical time for the agency to take a proactive stance in this vital area of discrimination. The agency's prior directives contained inconsistencies and the Supreme Court's recent opinion necessitates that the responsible agency clarify its interpretation and plans for enforcement.

Lastly, *JCI* may encourage some companies to export facilities to outside the United States. Legally, companies can avoid the Supreme Court's pronouncement in *JCI* while operating abroad.⁴¹⁶ Thus, an employer could institute a sex-specific, exclusionary FPP in its foreign subsidiary. As indicated above, this does not eliminate the real risk to offspring from male-mediated harm. Another problem with this determination lies in the possibility that the legislature may amend Title VII to apply extraterritorially as advocated by the Senate Committee on Labor and Human Resources.⁴¹⁷ In some instances, the use of this Title VII loophole may

415. See *supra* note 3 for a list of the states.

416. *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991) (holding Title VII of the Civil Rights Act of 1964 as amended does not apply extraterritorially).

417. See Greenhouse, *Court Says Rights Law Doesn't Protect U.S. Workers Abroad*, N.Y. Times, Mar. 27, 1991, at A16, col. 3 (legislation would be introduced to amend Title VII to provide that American companies may not discriminate against American citizens overseas).

backfire on an employer, in that foreign governments continually change causing a negative impact on the utility of this business strategy.

VII. CONCLUSION

The alternative relating to voluntary FPPs must, of course, be considered in conjunction with an informed consent affidavit on the part of employees. The issue of what constitutes informed consent is unclear. Employers must make a good faith effort to inform employees of all workplace hazards. The National Association of Manufacturers suggests that this means evidence of a training program, a hazard awareness program, and an employee signature that indicates an awareness of the risks. It seems that again employees would be entering into a one-sided proposition. Unless the training and awareness programs are somehow monitored for veracity and accuracy, employers have no incentive to provide the best, most current information. For employees are not well-placed to assess the content of the affidavit. The process could possibly be monitored by occupational health specialists, industrial hygienists, toxicologists, and government agencies.

The problems with this alternative are substantial, however. First, this approach gives employers no motivation to clean up their workplaces. Such a take it or leave it policy surely cannot be seen to be a viable alternative on its own. Second, the informed consent runs only to the signatory employee, and not to the spouse, or to present or later-born children. These individuals, who may be at equal risk with the employee, are not afforded the same information. Such a document, then, offers only partial protection for employers. Third, an informed consent document does not equal a waiver, and does not have the effect of barring a lawsuit. It simply then becomes a question of fact for a court as to whether the consent was informed. Fourth, the 50 states will have to conform their laws relating to informed consent since businesses are interstate in nature. This is a formidable task at best.

Further problems loom after *JCI*, especially in the areas of preemption and workers' compensation law. The issue relating to preemption was discussed in dicta by the *JCI* Court, in the context of whether compliance with Title VII preempts state tort liability. Federal courts will be looking to state law, in attempting to reconcile the applicable law and resolve the preemption question. To the extent federal and state law conflict, of course, federal law governs. State legislatures, therefore, may be one of the more important players in upcoming FPP conflicts to the extent that they enact legislation to address these workplace risks.

A recent twist in this state versus federal oversight of workers and the workplace came when a New York court sentenced two business owners to prison in the nation's first case that analogized exposing employees to toxic chemicals with the charge of "assault with a deadly weapon."⁴¹⁸ The company knowingly endangered employees by exposing them to toxic mercury. Criminal prosecution of employers in recent years has been another way to address workplace safety at the state level. The effect of such prosecutions in the area of FPPs remains to be seen.

In the area of workers compensation, the employer's position is also an uncomfortable one. This type of claim is about all sorts of workplace-related diseases in which the proof of the case is relatively simple, and where there are virtually no defenses. According to the *JCI* Court, employers may not have a policy based on protected characteristics (such as sex), but then when the employee contracts a disease, the employer must pay. Employers are, in effect, whipsawed.⁴¹⁹ In a recent interpretation of workers compensation law, a California Appellate Court held that it provided the exclusive remedy for injuries to the employee's later-born child which resulted from work-related negligence by the employer.⁴²⁰

One point on which both sides would agree, perhaps, is that the present way for handling FPPs is inadequate. Commentators have advocated a special amendment to Title VII and the PDA arguing that the present law is incapable of effectively dealing with the complexities of such cases. Cases involving social and economic pressures interfacing with children's well-being present a compelling, if confusing set of issues. The avenues for relief from such perceived inadequacies in the law could come from agencies as well as the legislature.

Congress, after all, has the power to amend laws, and indeed, Justice Scalia noted this fact in the *JCI* concurrence. How fast and how far Congress will go, though, is difficult to predict.⁴²¹ One thinks perhaps that Congress will not address issues relating to FPPs in the near future, especially since proponents have had a tremendously difficult time sustaining civil rights legislation in both the 1990 and 1991 Congressional terms.

418. See Solomon, *Workplace Toxics Treated as Street Crime*, *The Boston Globe*, May 29, 1991, at 69, col. 1, & at 70, col. 2.

419. See *Wall St. J.*, Mar. 22, 1991, at A10, col. 1 (editorial condemning "this Catch-\$22 million").

420. *Bell v. Macy's*, 212 Cal. App.3d 1442, 261 Cal. Rptr. 447 (1989). See generally Note, *Title VII: Misapplication of the Business Necessity Defense—UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), 15 U. DAYTON L. REV. 241, 283-84 & nn. 380-83 (1990) (discussing workers compensation and preemption issue).

421. See McClenahan & McKenna, *A Leader Decision for Industry?*, *Ind. Week*, April 15, 1991, at 76, 79.

proponents have had a tremendously difficult time sustaining civil rights legislation in both the 1990 and 1991 Congressional terms.

The *Johnson Controls* case caught the public's eye because it harked back to stereotypic views of women's place and the misguided workplace protective legislation that disadvantaged women in employment opportunities. In short, its narrow view of women's biological destiny confined women even beyond their fertile years. It was predictable that some constituencies in our society would rise to object to the frightening specter of endangering a vulnerable, if speculative, fetus from the greed of the parent we invest with primary responsibility for fetal well-being. But FPPs provided smoke and mirrors behind which employers could hide the larger issue of the employer's duty to provide a safe workplace for workers themselves and for *both* parents of any potential offspring. Instituting FPPs that excluded women from certain hazardous positions did not solve the problem of reproductive hazards. It was a classic attempt to socialize the risks of industrial activity while privatizing the benefits.⁴²² One of the effects of *JCI*, then, is to discredit the notion that women are expendable, marginal workers. The social costs of FPPs have fallen primarily upon women, a class long destined to second-class citizenship in both the workplace and society. Women, particularly in the traditionally male industrial setting, were perceived as easy targets for exclusion. Their numbers were small enough that their removal did not pose a labor supply dilemma. The timing of *JCI*'s institution of its mandatory FPP in 1982 reflected a period of national economic recession. With job opportunities scarce, the "marginal" workers were those labelled for removal and exclusion. It is symbolic that fertile women should comprise the class excluded because this corresponds with the societal expectation that the primary responsibility of women is to bear children. It is also commonly the responsibility of women to economically support their children in this era, a reality frequently overlooked by lawmakers.⁴²³ Thus, the Supreme Court affirmed that reproductive choices are distinctly the domain of parents, not to be interfered with by courts or employers. The next step is for employers to prioritize worker and offspring safety and health.

422. Cf. Jackal, *Moral mazes: bureaucracy and managerial work*, 621 HARV. BUS. REV. 118, 129 (1983) (discussing adeptness for inconsistency required for managers to succeed in a bureaucracy and positing concept of the managerial commitment to socializing the risks of industrial activity while privatizing the profits).

423. See generally O'Brien, *Revising the Minimum Wage for the 1990s*, 12 LOY. OF L.A. INT'L & COMP. L. J. 217, 230-33 (1989) (discussing the economic contribution of women to their families); O'Brien & Madek, *Pregnancy Discrimination and Maternity Leave Laws*, 93 DICK. L. REV. 311, 336 (1989) (recommending federal statute to mandate job preservation for period of pregnancy-related disability).