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Women's rights to work should not be viewed as in conflict with the welfare of future generations. This is particularly true with respect to traditional fetal protection policies (FPPs), which, in the wake of the Supreme Court decision in Johnson Controls are, for the most part, legally discredited. Just as the women's movement may be recast as a human movement in this decade, sex-specific FPPs will be discarded in favor of broader reproductive and health programs (RHPs) that shelter all workers and potential offspring from reproductive and other hazards in the workplace. Gender-balanced research analyzing mediation of harm to both workers and fetuses is a vital priority at this time because many dormant questions regarding the impact of various toxins remain. The primary stakeholders in this controversy must cooperate in a proactive effort to improve technology, clean up toxic work environments, and set standards and goals that will permit the maintenance of a gender-integrated workforce without sacrificing the health and well-being of either workers or fetuses.

INTRODUCTION

The authors posit that sex-specific fetal protection policies (FPPs) represented a symptom of opposition to women in nontraditional jobs.

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FPPs were an incomplete and ineffective attempt to address complex concerns about reproductive hazards in the workplace. The implementation of such policies, in the absence of solid scientific justification, indicates that employers continue to perceive women as marginal workers who are unable to make responsible reproductive decisions and who are easily dispensed with at no loss to industrial productivity. A lingering patriarchal attitude of employers is evidenced by the adoption of FPPs, which incorporate a myth that men are generally reproductively invulnerable to toxins and women are the sole mediators of harm to fetuses. The controversy about women's rights versus fetal rights has consequently been magnified in the context of the workplace.

The women's rights/fetal rights debate in the workplace gained momentum as women entered the workforce in significant numbers in the last several decades. A number of social, legal, and economic factors encouraged this trend. The modern women's movement of the 1960's stressed self-development and de-emphasized women's roles as nurturers.[1] Just as feminist sentiment grew that women must abandon their traditional role to avoid domestic subjugation and economic disenfranchisement, medical advances occurred that enhanced both prenatal care and the availability of reliable birth control.[2] Accordingly, family size decreased as did women's consequent commitment to dependent care.

The introduction of federal legislation regulating employment discrimination also fostered a brighter future for women in the workplace during this era. For example, the Equal Pay Act of 1963, passed as an amendment to the Fair Labor Standards Act of 1938,[3] mandated equal pay for equal work. Title VII of the Civil Rights Act of 1964 made discrimination on the basis of sex illegal in employment.[4] Title VII's 1978 amendment, the

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1. *See* BETTY FRIEDAN, THE SECOND STAGE 15-41 (1981); CAROL GILLIGAN, IN A DIFFERENT VOICE 156 (1982); SUZANNE GORDON, PRISONERS OF MEN'S DREAMS 1-40 (1991). *See generally* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991).

2. *See generally* Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1992). One criticism of birth control measures is that they are often designed by men for women and that women bear the medical and psychological consequences of these interventions. For example, pharmaceutical products contaminate women's natural bodily integrity and result in unwanted side effects including mutilation from intrauterine devices and hormonal changes resulting from surgical sterilization and from the effective agents in birth control pills. Scientists have primarily focused on developing methods for women to forestall unwanted pregnancies despite the fact that women's reproductive systems are far more complex than men's.

3. 29 U.S.C. § 206(d) (1976); *cf.* Sar A. Levitan & Frank Gallo, *Work and Family: The Impact of Legislation*, 113(3) MONTHLY LAB. REV. 34, 37 (1990) (Equal pay laws and other governmental policies encouraged women to work but were "probably not determinative.").

4. *See* Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283-84 (1991) (prohibition on sex discrimination was added as, at best, an afterthought to

Pregnancy Discrimination Act,[5] clarified that pregnancy, childbirth, and related medical conditions were subject to Title VII scrutiny. The impact of these national legislative developments was both profound and inadequate in terms of remedying women's second-class status in the workplace. The fact that this legislation was federal resulted in its preemption of conflicting state statutes that "protected" women out of job opportunities.[6] Nevertheless, because these statutes guaranteed women neither the right to job preservation for even brief periods of pregnancy-related disability nor leave for childbirth, fertile women remained in a tenuous position—their job security depending at times upon the largesse or location of their employers.[7] Moreover, the embodiment of complementary statutes on a state level prohibiting sex discrimination expanded the number of employers regulated.[8]

The economic picture also hastened women's entry into the marketplace. Over the past fifteen years, the majority of American families suffered declines in household income, and women worked longer and harder to support their families as the value of wages declined relative to purchasing power.[9] The prevalence of single-parent households and the increasing dependence on two earners also contributed to women maintaining paid

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legislation (citing 110 CONG. REC. 2577 (1964))); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising The Lack of Interest Argument*, 103 HARV. L. REV. 1750, 1788 (1990) (discussing that the prohibition against sex discrimination may have started as a "joke" but the 1972 amendments to Title VII indicated that Congress took it seriously).

5. Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1982)).

6. Professor Becker, among others, notes the similarity between sex-specific fetal vulnerability policies and state protective legislation that assumed women could not make responsible decisions about their health and their future offspring. *See* Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1221-24 (1986).

7. *See* Christine N. O'Brien & Gerald A. Madek, *Pregnancy Discrimination and Maternity Leave Laws*, 93 DICK. L. REV. 311, 336 (1989) (discussing state maternity leave laws as inadequate patchwork that necessitate passage of federal legislation mandating job preservation for period of pregnancy-related disability).

8. *Compare* Title VII, § 701(b) Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. § 2000e(b) (1982)) (regulating employers of fifteen or more employees) *with* MASS. GEN. LAWS ANN. ch. 151B, § (1)(5) (West 1982) (regulating employers of six or more employees). The size of covered employers is of note because women traditionally gravitated to smaller businesses. BUREAU OF NATIONAL AFFAIRS, PREGNANCY AND EMPLOYMENT: THE COMPLETE HANDBOOK ON DISCRIMINATION, MATERNITY LEAVE AND HEALTH AND SAFETY 119 (1987) [hereinafter BNA SPECIAL REPORT].

9. *See, e.g.*, David Nyhan, *Wiping Out American Worker*, BOSTON GLOBE, Oct. 17, 1991, at 17 (discussing the widening gap between the rich and the poor in America and the plight of American workers versus the rising wage rates in Japan and Western Europe); Bureau of National Affairs, *Survey Asserts Many Families, Young Adults Have Experienced Wage Decline Since 1979*, DAILY LAB. REP. (BNA) No. 215, at A-2 (Nov. 7, 1988).

employment outside the home even when they remained responsible for young children.[10]

Paralleling these equal opportunity and economic efforts, there developed a growing environmental concern about toxic substances and harmful processes in industrial environments. In 1970, with the enactment of the Occupational Safety and Health Act (OSHA),[11] Congress attempted to address and prevent job-related deaths, illnesses, and injuries. This federal legislation imposes a general duty upon employers to maintain a workplace free of recognized hazards, and provides for agency investigation and rulemaking regarding employee exposure to various toxins.

The judicial recognition of the right of privacy encouraged women in the workplace because it allowed them to better plan their families. Although the Constitution does not explicitly mention the right of privacy, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[12] This right of privacy has been recognized in the context of marriage,[13] procreation,[14] contraception,[15] family relationships,[16] childrearing and education,[17] and reproductive autonomy.[18] Although the Court has not identified the precise constitutional source of this right of privacy, it is now recognized as broad enough to protect women's reproductive choices. Just as women were prepared socially, psychologically, and economically to expand their role beyond that of childbearing and childrearing, the Court placed its imprimatur on the legal right of the individual to largely control reproduction.

Paralleling the women's movement, and perhaps because of it, the fetal rights movement ascended as well. The fetal rights movement only gained momentum subsequent to the improvements in women's social, economic, and legal status.[19] The fetal rights movement posits that the fetus has an

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10. *See* Levitan & Gallo, *supra* note 3, at 37 ("Until recent decades, relatively few women whose youngest child was in elementary school worked outside the home. . . ."); Linda B. Samuels, et al., *Responding to Social and Demographic Change: Family and Medical Leave Proposals*, 39 LAB. L.J. 748, 750 (1988).

11. Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C.A. §§ 651-57 (West 1985 & Supp. 1991)).

12. Roe v. Wade, 410 U.S. 113, 152 (1973). *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The right to be left alone [is the] most comprehensive of rights and the right most valued by civilized man.").

13. Loving v. Virginia, 388 U.S. 1, 12 (1967).

14. Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

15. Eisenstadt v. Baird, 405 U.S. 438, 453-54, 460, 463-65 (1972).

16. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

17. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

18. Roe v. Wade, 410 U.S. 113, 152-53 (1973), *aff'd*, Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (1992).

19. *See generally* John Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983).

absolute right to be born with a sound mind and body, and that once a woman chooses not to terminate the pregnancy, then the state may regulate her to achieve this end.[20] The fetus, even a pre-viable one, then is vested with rights exceeding even those of later-born children. For example, while children cannot generally sue their parents for excessive drinking, it is commonplace to hear of interventions into the woman's behavior under the guise of protecting the fetus.[21] The woman, according to the fetal rights theorists, "assumes obligations to the fetus that limit her freedom over her body."[22] The fetus, under this theory, has become "endowed with attributes of personhood."[23] The pattern of vesting in the fetus qualities of living persons, and consequently arming them with legal rights, has created an imbroglio of the first order.

I. How the Fetal Rights/Women's Rights Issue is Manifested at the Workplace

"The past is never dead. It's not even past."
William Faulkner, Requiem for a Nun 92 (1951)

A. *Fetal Protection Policies*

The FPP is an attempt by employers to protect fetuses who are exposed to environmental harms at the workplace. FPPs historically targeted the fetuses of women workers, rather than their male counterparts, thus prohibiting women from working in areas that would expose them to toxic harms. FPPs generally are found in industries overwhelmingly employing male workers. The effect of FPPs, then, is that fetuses of women workers are protected from toxic workplaces, and so the fetuses' mothers are taken out of their jobs. The corporate implementation of FPPs that excluded women from jobs, without scientific study of repro-

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20. *See id.* at 437-38; Patricia A. King, *The Juridical Status of the Fetus: A Proposal For Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1672 (1979) (even pre-viable fetuses deserve legal protection); *cf.* John Robertson, *Reproductive Technology and Reproductive Rights: In The Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 575 (1990).

21. *See* Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 615 n.67 (1986) [hereinafter Note, *Fetal Rights*] (arguing that restrictions on pregnant women exceed in magnitude and breadth any other state regulation).

22. *See* Robertson, *supra* note 19, at 437-38 (Fetuses are "genetically unique living human entities that have the potential to develop into full persons.").

23. MacKinnon, *supra* note 4, at 1309.

ductive effects of toxins mediating from both parents, clearly amounted to discriminatory decisionmaking.

FPPs posit that fetal rights preempt women's rights. As a corollary to this, FPPs also presume that no harm may befall fetuses of male workers laboring in that same toxic environment, so that fetal rights could not likewise trump men's rights. FPPs may be found in industries where the processes involve lead, radiation, mercury, rubber, glycol ethers, arsine gas, benzene, carbon disulfide, formaldehyde, methylene, chloride, vinyl chloride, trichloroethylene, and toluene.[24] As early as 1977, it was reported that a number of corporations developed FPPs, including General Motors, Dow Chemical, Chrysler, Allied Chemical, Olin, and NL Industries.[25] The chemicals are used in a variety of processes: to produce ammunition, as solvents in photocopying, as pigment in paint, and for the manufacture of batteries, pesticides, rayon, and even cellophane wrap.[26]

There is no known FPP regulating male workers. Although OSHA, as the primary regulatory agency for workplaces, does not differentiate between male and female workers, companies departed from this stance by adopting FPPs for women and retreating to oral warnings at most for men.[27]

In a particularly compelling and widely reported case, women workers at American Cyanamid's Willow Island, West Virginia plant in 1978 elected sterilization rather than face dismissal because of the company's newly enacted FPP.[28] The word 'elected' is questionable in view of the

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24. *See* Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 647-48 (1981); Becker, *supra* note 6, at 1225-26; *see also* Maureen Paul et al., *Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work, and Health Survey*, 16 AM. J. INDUS. MED. 267, 267-68, 270 (1989).

25. *See* Becker, *supra* note 6, at 1225-26; Andrea Hricko, *Social Policy Considerations of Occupational Health Standards: The Example of Lead and Reproductive Effects*, 7 PREV. MED. 394, 399 (1978) (citing three examples of policies implemented by major corporations which transferred fertile women out of lead-exposed jobs to lower paying positions, in article adapted from testimony before OSHA); James C. Hyatt, *Early Warning, Protection for Unborn? Worker Safety Issue Isn't as Simple as it Sounds*, WALL ST. J., Aug. 2, 1977, at 1, 31. It appears that General Motors instituted an FPP for lead exposed jobs as early as 1952. Grant v. General Motors Corp., 908 F.2d 1303, 1305 (6th Cir. 1990).

26. *See* Williams, *supra* note 24, at 647-49; Gail Bronson, *Bitter Reaction, Issue of Fetal Damage Stirs Women Workers at Chemical Plants*, WALL ST. J., Feb. 9, 1979, at 1, 33; Hyatt, *supra* note 25, at 31.

27. *See* 29 C.F.R. § 1910.1025 (1990). *See generally Grant*, 908 F.2d at 1305 n.4; Wright v. Olin Corp., 697 F.2d 1172, 1182 (4th Cir. 1982) (stating that oral warnings to men "much less formal" than warnings to women).

28. Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984). The case was eventually settled for $200,000 plus costs and attorney's fees without an admission of liability from the company. In 1978, the company declared that it had

fact that the women lived in a company town in an economically depressed area. The women had little formal education and considered themselves fortunate even to have a job. No less telling is another employer's denial of a male worker's request for a leave of absence in order to lower his blood lead level because he intended to become a father.[29] These are but a few of the distressing stories involving individuals desperate not to lose a job, who were forced to choose their livelihood over parenthood, while companies were trying to protect themselves and the status quo.

As with much of FPP law, the assumptions are many and the proven facts remain scarce. FPPs were neither the result of balanced scientific research nor construed with the genuine interest in workers and their offspring in mind. Rather, they worked to entrench those in power while excluding female workers. Consider the typical case at a batterymaking plant that uses lead in its manufacturing process. Prior to the Civil Rights Act of 1964, it was legal to advertise this production job as one for men only. Indeed, as late as 1970, industry assumed it could deny opportunities to individuals it felt were incompatible with the work.[30] Women started applying for such jobs, not because they enjoyed inhaling lead, but because the pay was substantially higher than they could earn elsewhere based upon their educational credentials and job skills. It cannot be seriously considered that FPPs coincidentally emerged when women appeared in small but significant numbers in work areas heretofore the exclusive domain of men. Employers' ostensible concern for fetuses was surely a charade, especially so because they failed to protect other workplace victims—offspring of male workers. In the typical situation where a company sponsored an FPP, the male employers and workers stayed on at their jobs as they always had, and women, because

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decided to exclude women between the ages of 16 and 50 absent proof that they had been surgically sterilized. *Id.* at 445-46. At least five women underwent sterilization in order to retain their higher-paying jobs. *Id.* at 446. Circuit Judge Bork lamented that women "were put to a most unhappy choice." *Id.* at 450. The court went on to decide a much narrower issue, ruling that OSHA's general duty clause to maintain a safe healthful workplace does not apply to FPPs, which are employer policies and not physical conditions of the workplace. *Id.* at 449-50. *See* JOHN B. MATTHEWS ET AL., POLICIES AND PERSONS: A CASEBOOK IN BUSINESS ETHICS 72-80 (1985) (discussing ethics of FPPs); Bronson, *supra* note 26, at 1 (citing workers who chose sterilization out of fear of losing their jobs which paid well in an otherwise "bleak spot in a depressed region . . .").

29. International Union, UAW v. Johnson Controls Inc., 111 S. Ct. 1196, 1200 (1991).

30. *See* Becker, *supra* note 6, at 1239 n.100; Bronson, *supra* note 26, at 1; *see also* Schultz, *supra* note 4, at 1751 n.1 (documenting sex segregation in occupations whereby women are relegated to lower-paying jobs); Maxine N. Eichner, Note, *Getting Women Work that Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1397-99 (1988) (stating that sex segregation in workplace limits opportunities for women).

of FPPs, had to give up their jobs and any hopes of advancing.

Nor was it any consolation to these women that many of them were channelled into traditionally female jobs—such as into the laundry room.[31] There, the same women who were forced to relinquish their manufacturing jobs due to lead exposure were assigned to wash the face masks and lead-laden gloves of the men who took their places.[32] The blood-lead levels in these women, not surprisingly, failed to fall to safer levels.

That FPPs are so blatant in their intent and effect is exemplified by the fact that not one legal challenge has involved an FPP in an occupation primarily employing females.[33] In fact, there is no known FPP in the historically female occupations. For example: nurses work with anesthetic gases; hairdressers work with solvents; teachers interact with contagious children; laundry, dry cleaning, and garment workers are exposed to toxins; and clerical employees rely on video display terminals and are frequently exposed to photocopier solvents.[34] Yet there are no FPPs in these jobs protecting fetuses of these workers. Women, it seems, are "rarely protected from jobs for which they are needed."[35] Women are needed for these jobs in part because the status and pay is generally so low that men do not consider the job—especially if they are the family's

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31. Sandra Blakeslee, *The Reproductive Rights Battle,* WORKING MOTHER, Dec. 1990, at 44.

32. *Id.* The employees reported sexual harassment as well. *Id.*

33. International Union, UAW v. Johnson Controls Inc., 111 S. Ct. at 1196 (batterymaking plant); Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990) (foundry jobs); Johnson Controls, Inc. v. California Fair Empl. & Housing Comm., 267 Cal. Rptr. 158 (1990) (battery assembly plant); Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984) (inorganic pigments department at chemical plant); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984) (x-ray technician in radiology department); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (lead exposure in manufacturing process); Doerr v. B. F. Goodrich Co., 484 F. Supp. 320 (N.D. Ohio. 1979) (vinyl chloride polymerization facility).

34. Contrast these with the industries previously mentioned. *See infra* note 35. *See generally* Becker, *supra* note 6, at 1238-39 & nn.92-99.

35. Wendy Kaminer, *The Fetal-Protection Charade,* N.Y. TIMES, April 29, 1990, § 4 (The Week in Review), at 21. Thus, when women are perceived to be centrally needed for a task, employers are apparently unconcerned or oblivious to hazards. If the reverse is true, if women are perceived to be intruders to a male domain, they are more easily let go. *See* Schultz, *supra* note 4, at 1755-56; Eichner, *supra* note 30, at 1398-99. The FPP result, then, becomes a self-fulfilling prophecy. Because work is so sex-segregated there are few women in male-dominated industries; the women who are there are considered marginal; thus it is relatively easy to displace them and less expensive than it would be to institute proper controls or research new technology. *See* Leslie Berkoff, Note, *Protective Exclusion in the VDT Workplace, Why Alternatives are Needed,* 6 HOFSTRA LAB. L.J. 281 (1989) (explaining that women typically operate VDT terminals, and so FPPs impracticable as alternative). *See generally* Hricko, *supra* note 25, at 399; Carolyn Marshall, *Fetal Protection Policies, An Excuse for Workplace Hazard,* THE NATION, April 25, 1987, at 532, 534.

primary wage-earner. The lack of FPPs in traditionally female occupations highlights the sex segregation of the American labor force and the hostility towards women who are in jobs traditionally dominated by men.

The corporate reaction to reproductive toxins has frequently been gender-biased. This is evident in the instance of dibromo-chloropropane (DBCP), causative of infertility and testicular atrophy and cancer among male employees of Occidental Chemical Company in the late 1970's. There, evidence of reproductive harm to men resulted in hasty procedures to ban the substance rather than the male workers.[36] The union at Occidental petitioned OSHA for an emergency temporary standard banning DBCP from the workplace. OSHA issued the standard in a matter of two weeks, followed by a permanent standard six months later based upon evidence that DBCP was a carcinogen and a gametotoxin.[37] The speed with which OSHA responded and the fact that neither standard was ever challenged in court[38] reflects the societal predisposition to retain male workers while eliminating the hazard. This sharply contrasts with the sex-specific FPPs which have targeted women for exclusion from the workplace.

This purported resistance to women in the workplace, employers have countered, does not exist. Employers have expressed concern for fetal health, and especially for the potentially devastating tort liability should they be sued by an injured later-born child.[39] Employers perceived themselves to be caught in a legal crossfire: do nothing to protect fetuses and be sued by injured parties, or utilize an FPP and be sued by workers denied their equal employment opportunity rights.[40] The employers' position deserves sympathy; competing rights create conflict. What the authors take issue with is the reaction to such conflict. Rather than reconciling these rights in a creative fashion, employers retreated behind the mask of selective fetal protection. Companies considered women more expendable than the toxic process. However, this was not the case with male DBCP workers.

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36. *See* Williams, *supra* note 24, at 649 n.55; Becker, *supra* note 6, at 1245 n.20. *See generally* Office of Technology Assessment, *Reproductive Health Hazards in the Workplace* 35-36 (1985) [hereinafter OTA Report].

37. Mark Rothstein, *Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example*, 12 B.C. ENVTL. AFF. L. REV. 627, 642-43 (1985).

38. *See id.* at 642.

39. *See generally* International Union, UAW v. Johnson Controls Inc., 886 F.2d 871, 876-77 (7th Cir. 1989).

40. *See generally* Tamar Lewin, *Protecting the Baby: Work in Pregnancy Poses Legal Frontier*, N.Y. TIMES, Aug. 2, 1988, at Al, A15 (stating that employers wary of "barrage of liability lawsuits").

Employer FPPs tolerated no risk to potential offspring of women working in the typically male jobs. In practice, the zero-risk policy forced women out of their jobs. Is a fetus better off being born into poverty, or being born into a home where the mother is exposed to toxins at the workplace?[41] These were the two unfortunate and unacceptable alternatives historically available to women.

FPPs represent a tide of opposition to women in the workplace and evidence a patriarchal attitude by employers that they can make better choices than the mother can. This negative stereotyping is all the more pernicious when one considers that employers often think that women are marginal rather than mainstream workers, are the sole mediators of harm to fetuses, and are unable to make responsible reproductive decisions.[42] FPPs are the result of selected science and inherent biases.[43] For example, lead is classified as both a teratogen and a mutagen.[44] Mutagens affect the germ cells (sperm and egg) of both men and women.[45] It becomes apparent, then, that not every company received reliable information on this point, or if they did, they ignored it.

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41. Steven Waldman, *Lead and Your Kids*, NEWSWEEK, July 15, 1991, at 42 (stating that experts characterize lead as top environmental threat to children which equally affects the poor and the wealthy); Leon Jaroff, *Controlling a Childhood Menace*, TIME, Feb. 25, 1991, at 68 (explaining that lead poisoning in homes possible through paint, crystal glassware, pottery, and water carried through lead pipes).

42. *See* BNA SPECIAL REPORT, *supra* note 8, at 89-91 (FPPs eliminate female workers and change workforce where instead focus should be on altering workplace); Janet Gallagher, *Fetus as Patient*, *in* REPRODUCTIVE LAWS FOR THE 1990's 190 (Cohen and Taub, eds. 1989) (positing that fetal rights movement fueled by deep social unease over changing roles of women and consequent changes in the workplace); Devra Lee Davis, *Fathers and Fetuses*, N.Y. TIMES, March 1, 1991, at A27 ("Fetal vulnerability begins before pregnancy . . . Yet can anyone imagine a workplace policy that requires the sterilization of men?"). Employers apparently assume that any male mediation is much more remote, and thus proof of liability in a tort case would be quite attenuated.

43. Furthermore, FPPs adversely affect those who are the least senior and most vulnerable in their jobs. *See* MARY GIBSON, WORKERS' RIGHTS 48 (1983) (discussing conflicts of interest in occupational hazard research where it is sponsored by government, dominated by industry connected experts, and may be partially funded by industry); VANDONA SHIVA, STAYING ALIVE 15 (1988) (depicting science as a "specific project of western man," which is masculine and patriarchal in ways that subjugate "both nature and woman"); Madeline Drexler, *Ruth Hubbard, an Outsider Inside*, BOSTON GLOBE, May 16, 1990, at 73 (profiling scientist who observed that science is political in that it frames its examination of problems to entrench those in power). *See generally* Diane Lewis, *In Somerville, a Work Hazard that Hasn't Changed for Years*, BOSTON GLOBE, Oct. 17, 1991, at 47, 48 (discussing situation of primarily Latino workers who communicated to investigators through interpreters; workers so intimidated that they do not assert rights).

44. *See* 29 C.F.R. § 1910.1025 (1991); *see also* Gary Z. Nothstein & Jeffrey P. Ayres, *Sex-Based Considerations of Differentiation in the Workplace: Exploring the Biomedical Interface Between OHSA and Title VII*, 26 VILL. L. REV. 239, 245 n.17 (1981).

45. *Id.*

Examples of inappropriate corporate response to women's entrance into traditionally male industrial settings abound. Thus, the FPPs adopted at American Cyanamid Co. and Olin Corp. documented the typical decisionmaking process in companies experiencing shifts in traditionally sex-segregated positions. The Medical Director at American Cyanamid described the basis upon which threshold limit values for fertile females were set as "solely by professional judgment and 'educated guessing' and certainly . . . not based on any clinico-laboratory experience."[46] In describing Olin's decision to set a higher threshold limit value, Cyanamid's medical director further noted that "[n]either of us has any good documentation for adopting the levels we have."[47] Yet the same director did not exclude fertile men due to the lack of human studies on the issue.[48] The double standard regarding scientific evidence and corporate reaction is clearly exhibited in this situation; the company was content to exclude fertile women despite the absence of the very same evidence that they would have required to exclude fertile men.

Many studies have been done relating to lead and its outcome on later-born children. However, the studies overwhelmingly focus only on the mother's role in mediating lead. To date, there is not one known reliable study on male mediation of lead to fetuses *even though lead is a mutagen.*[49] Could it be that the scientific studies have a built-in, inherent bias that reflects that scientists have historically shared the same attitudes as their corporate counterparts?[50]

B. Present Legal Status of Fetal Protection Policies

More than a decade after the first challenges to FPPs arose, the United States Supreme Court granted *certiorari* in *International Union, UAW v. Johnson Controls, Inc.* to hear a challenge to a mandatory FPP in

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46. *See* Becker, *supra* note 6, at 1239 n.101. *See also* OTA Report, *supra* note 36, at 253, 255. The OTA Report discusses the Cyanamid Medical Director's exclusion of fertile women ages 16 to 55 from exposure to twenty-nine chemicals without information on fetal risk with respect to twenty-eight of the substances. With respect to one listed substance in particular, the Medical Director was aware that NIOSH had found no fetal risk from exposure, but this chemical was removed from the list only when labor problems resulted in a study by the company. The study found that no fetal hazard was presented. This was reportedly the only substance studied by the company. *Id.*

47. OTA Report, *supra* note 36, at 253, 255.

48. *Id.*

49. Peter F. Infante & Joseph K. Wagoner, THE EFFECTS OF LEAD ON REPRODUCTION, PROCEEDINGS, CONFERENCE ON WOMEN AND THE WORKPLACE 232, 232 (1977).

50. *See* GIBSON, *supra* note 43 and accompanying text (discussing that scientific studies may have "an attitude"—assumptions at the very start of the research which will affect the results gathered).

lead-exposed areas of a batterymaking plant.[51] The company, Johnson Controls, Inc. (JCI), adopted a mandatory FPP in 1982, concluding that its voluntary policy adopted in 1977 was inadequate so that it was "medically necessary to bar women" from working in lead-exposed jobs.[52] JCI's policy prohibited women, absent proof of sterility and regardless of age, from working in leaded jobs where their blood lead levels would exceed the OSHA standard.[53] JCI's zero-risk FPP targeted all women for exclusion, but failed to consider male mediation of harm to their offspring.[54] The lower courts were apparently troubled by the many vexing issues involved in FPP cases, and demonstrated a lack of scholarship in their decisionmaking.[55] Instead of simply resolving the allegations of sex discrimination against female workers, the court cast these women as the perpetrators of harm rather than their employers who were responsible for the workplace toxins.[56] The lower courts analyzed this case from a purely fetal rights perspective and disregarded Title VII law in the process. For example, the trial court heard testimony from nine experts on various issues such as differential reproductive risks, fetal harm, post-natal risks, and studies relating to lead exposure.[57]

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51. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1990), *cert. granted*, 110 S. Ct. 1522 (1990). The Court's opinion was announced in March, 1991. *See* International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). The case resolved a split opinion among the courts that have addressed the issue of FPPs. *Johnson Controls* was the most widely watched employment discrimination case of the term.

52. *Johnson Controls*, 886 F.2d at 876. This insensitive and condescending statement is the product of the seven-judge majority of the Seventh Circuit, all of whom were male. They further commented that employers could regulate women's jobs because women "might somehow rationally discount this clear risk of harm" to fetuses if left to their own devices. *Id.* at 897.

53. *See* International Union v. Johnson Controls, Inc., 680 F. Supp. 309, 310 (E.D. Wis. 1988). JCI's FPP was typical in its requirement for medical documentation of sterility. JCI's policy applied to work environments where there was lead. Female employees whose blood lead level exceeded 30 mg/dl would be removed from that job and transferred. *Johnson Controls*, 886 F.2d at 876. At that time, the Centers for Disease Control's standard concluded that a level in excess of 30 mg/dl was excessive for children. *Id.* & n.7. The OSHA standard in effect at that time permitted blood lead levels up to 50 mg/dl. *Id. See generally* 29 C.F.R. § 1910.1025(c)(1), (k)(i)(D) (1988). The CDC revised its standard downwards to 25 mg/dl in 1985. Waldman, *supra* note 41, at 45. Most recently, the CDC again revised its standard downwards to 10 mg/dl. *See* Philip J. Hilts, *Lower Lead Limits are Made Official*, N.Y. TIMES, Oct. 8, 1991, at C3.

54. *Johnson Controls*, 886 F.2d at 875-876. It is interesting to note that JCI transferred these women to jobs which supposedly were not lead-exposed. One woman was assigned to the laundry area of the plant and ended up washing the lead-laden gloves of the male workers.

55. *See id.* at 871, *aff'g* 680 F. Supp. 309.

56. *See id.* at 879. The opinion resonates with this point of view. The court framed the issue as whether the mother's lead harms "the unborn child." But the issue is larger and more complex than the smaller sub-part that the circuit court majority reduced it to. *See infra* note 60 and accompanying text.

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

The appeals court, however, discussed the testimony of only seven of the nine experts and disproportionately focused on the employer's medical consultant.[58] The two experts whose opinions the Seventh Circuit disregarded both testified about the negative reproductive outcomes relating to children whose fathers had been exposed to lead.[59] Clearly, the decisionmaking process failed.

In a unanimous opinion authored by Justice Blackmun, the United States Supreme Court had "no difficulty concluding" that Johnson Controls' FPP violated Title VII.[60] The Court held that an employer seeking to protect fetuses may not discriminate against women just because of their ability to become pregnant.[61] JCI's facially biased policy constituted sex-based discrimination, which it failed to justify through a bona fide occupational qualification (BFOQ).[62] Essentially, the Court reasoned that the employer's BFOQ failed because it could not prove that all or substantially all fertile women could not adequately perform the assigned task.[63] This represents the so-called "essence of the business" approach to the analysis of employer policies.[64] The Court further noted that despite "evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harm that may befall the unborn offspring of its female employees . . . [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."[65]

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58. *See Johnson Controls*, 886 F.2d at 877-82.

59. *See supra* notes 56-57 and accompanying text. The appeals court neglected to discuss the testimony of experts Brix and Silverstein.

60. *Johnson Controls*, 111 S. Ct. at 1202, 1207. The Court thereby overruled the Seventh Circuit which had such a difficult time with the same issue. *Johnson Controls*, 886 F. 2d 871. *See generally* Christine N. O'Brien et al., *Employer Fetal Protection Policies at Work: Balancing Reproductive Hazards with Title VII Rights*, 74 MARQ. L. REV. 147 (1991) (discussing and analyzing *JCI* and FPP phenomenon).

61. *Johnson Controls*, 111 S. Ct. at 1202. This framing of the issue is in stark contrast to the lower court which asked whether lead posed a "health risk to the offspring of Johnson's female employees." *See Johnson Controls*, 886 F. 2d at 879. The answer to the Seventh Circuit's question is, of course, yes—but, that was not the correct legal question to be addressed to test JCI's FPP. The lower court in a sense answered part of the larger overall question the authors address in Part III. By framing the question as they did, the lower court trammeled the rights of female employees.

62. *Johnson Controls*, 111 S. Ct. at 1205-06. *See generally* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

63. *Johnson Controls*, 111 S. Ct. at 1205-06. *See generally* O'Brien et al., *supra* note 60, at 174-76 & nn.148-57 (discussing parameters of BFOQ defense).

64. *See generally Johnson Controls*, 111 S. Ct. at 1202-07.

65. *Id.* at 1203, 1207.

The Court stressed its contention that Title VII bans sex-specific FPPs and characterized its decision as "neither remarkable nor unprecedented."[66] Thus the Court discredited sex-specific FPPs which have been historically used to disempower women because of their reproductive capacities. Four concurring Justices, however, approved the adoption of sex as a BFOQ in certain limited circumstances.[67]

The concurring Justices criticized the Court for "erroneously" holding that "the BFOQ defense is so narrow that it could never support a sex-specific [FPP]."[68] Instead the four Justices urged that the BFOQ should be expanded beyond productivity, product quality and occupational safety to include such considerations as cost, tort liability, and risks to third parties occurring in the course of business.[69] Under the concurrence view, an employer's BFOQ would be scrutinized to determine whether there is a factual basis for believing that all or substantially all fertile women would be unable to perform the assigned task safely without inordinate risk to third parties—including fetuses.[70] This broader interpretation of the BFOQ defense enjoys substantial support, and may even become the majority view in the near future. Therefore, even as one reads *Johnson Controls* as a case in which women's rights preempt fetal rights, it is clear that this case marks the beginning of a new chapter in the fetal rights/women's right controversy in the employment context.[71]

The *Johnson Controls* Court simply announced that sex-specific FPPs would be invalidated where there is evidence that the other sex may mediate harm as well. JCI's FPP was adopted to address lead in the workplace, a relatively well-studied toxin with a long history dating back two thousand years.[72] Future cases, however, will involve challenges to toxins not as well known or even studied. Should fetal rights preempt

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66. *Id.* at 1210; *see Justices Adopt Fetal Position,* WALL ST. J., March 22, 1991, at A8 (editorial condemning *JCI* decision).

67. *See generally Johnson Controls,* 111 S. Ct. at 1210-17. Chief Justice Rehnquist and Justices White, Kennedy, and Scalia argued that at some point the liability potential becomes so great as to threaten the existence of the very business.

68. *Id.* at 1210, 1214 n.8.

69. *Id.* at 1212-13.

70. *Id.* at 1212-14. *See* Grant v. General Motors Corp., 908 F.2d 1303, 1311 (6th Cir. 1990) (favorably citing expanded BFOQ formulation); *see also Johnson Controls,* 886 F.2d at 901-02 (Cudahy, J., dissenting).

71. Thus, *Johnson Controls* stands for the proposition that women's rights preempt fetal rights at the workplace. When the harm is specific to one sex, however, the outcome is likely that fetal rights preempt those of the sex who mediates the harm.

72. Jaroff, *supra* note 41, at 69 (knowledge of lead's hazardous effect dates back to Roman Empire); Waldman, *supra* note 41, at 44 (lead problem persists and continues to affect millions); *see* Kenneth Bridbord, *Review of Lead Toxicity, Conf. on Women and the Workplace* 227, 227 (1977) (toxic effects of lead known for two millenia).

women's rights in such cases? Surely not where the evidence is inconclusive; employers should not fall into the trap of relying on underlying biases and selected science. Consider, as well, the possibility of a challenge to an FPP created because the toxin affects only women, for example. It is possible that a toxin would attack the reproductive systems of only one sex, and in such a scenario, the Court indicated that it would be willing to allow rights of fetuses to trump the rights of their mothers. The Court indicated that such a result may be warranted as a sex BFOQ upon proof that the potential tort costs of employing these women "would be so prohibitive, as to threaten the survival of the employer's business."[73] Proof, however, may be problematic because such a threat is speculative, whereas the past damages are, by their nature, easier to compute. It is perhaps worth considering whether products and processes which subject society to such high costs are worth the price. There may not be such a bright line in future cases, as was the case of lead in *Johnson Controls*.

Johnson Controls is neither a victory nor a loss to those in either the fetal rights or women's rights camps. As many have observed, the decision now gives women the right to enter a workplace still designed for men, and to expose their fetuses to toxins.[74] Even so, as others would counter, women now have the autonomy and the dignity to make a personal decision, which was wrongfully taken away from them by employers.[75] The inherent problem, the authors submit, is that the

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73. *Johnson Controls*, 111 S. Ct. at 1209; *cf. id.* at 1216-17 (Scalia, J., concurring). Thus in such a situation, fetal rights would preempt women's rights. Presumably, guidance on such issues would be issued by the Equal Employment Opportunity Commission (EEOC). The agency has been in disarray over the FPP issue and still has outstanding two nearly contradictory policy statements. *See* EEOC: Policy Guide on United Auto Workers v. Johnson Controls (1990), *reprinted in Fair Empl. Prac. Manual* (BNA) 405: 6797; EEOC: Policy Statement on Reproductive and Fetal Hazards Under Title VII (1988), *reprinted in Fair Empl. Prac. Manual* (BNA) 401:6013. For almost all of this decade-long period of neglect over FPPs, Clarence Thomas acted as Chairperson of the EEOC.

The proof of a sex BFOQ due to concerns of tort liability is really a distant cousin of the Seventh Circuit's moral mandate approach, appearing now as an economic mandate, albeit with a more supportable argument. Courts must be vigilant in scrutinizing claims of potential tort liability as a basis for excluding women, lest they fall in the same trap as the lower courts.

74. *See* David Kaplan et al., *Equal Rights Equal Risks*, NEWSWEEK, April 1, 1991, at 56 (citing scholar's opinion that it is odd that women "would fight for the right to expose their fetuses to lead"); Ruth Rosen, *What Feminist Victory in the Court?*, N.Y. TIMES, April 1, 1991, at A7 (questioning whether she is the only feminist underwhelmed by *Johnson Controls*, which grants "women the right to risk the health of their unborn," and characterizing it as a hollow victory for women's rights over those of a fetus); *cf.* Bronson, *supra* note 26, at 33 (in 1979 it was suggested that the problem is to control the substance rather than the worker).

75. *See* Kaminer, *supra* note 35, at 21 (at the "heart of women's struggle for . . . employment rights is a demand for economic and reproductive autonomy").

underlying and perhaps larger issues motivating FPPs still have not been addressed. For example, why are these toxins in our workplaces; how much environmental damage will society tolerate; and should not the priorities be reordered? The women's rights/fetal rights controversy will continue to rage in the workplace and, as the authors will next discuss, in other segments of our society until we find a noncompetitive solution to fairly assess and protect all the various interests at stake.[76]

II. EMERGENCE AND SIGNIFICANCE OF FETAL RIGHTS AS A LEGAL CONCEPT

"Men are what their mothers made them."
Ralph Waldo Emerson, Conduct of Life (1860) Fate

Workplace FPPs are centrally related to the fetal rights/women's rights debate.[77] As the fetus has made gains in law and is recognized as a person in many instances, this status has diminished the horizons of pregnant and fertile women's rights. Criminal and civil laws and employer policies monitor women because they are cast as the exclusive perpetrators of harm, despite evidence that men also can negatively affect their offspring via workplace and other exposures.[78] Despite the glaring absence of a national policy that would support all pregnant women with proper prenatal care, various governmental agents and even the general public has taken it upon itself to oversee and intervene into the behavior of women who are visibly pregnant. Society seems more willing to provide the fetus a lawyer than to ensure it receives proper prenatal care.[79] Cocktail waiters reportedly have refused to serve a pregnant woman a strawberry daiquiri, and an employee at a fitness-center denied a truck driver who was thirty-three weeks pregnant access to a hot tub even though the woman had authorization from her physician.[80] Waiters

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76. *See infra* notes 140-43, 148-53 and accompanying text (discussing nonconflictual model for resolving workplace hazards).

77. *See* Blakeslee, *supra* note 31, at 44 (FPPs represent "backlash against the women's movement"); FALUDI, *supra* note 1.

78. *Study Links Cancer in Young to Fathers' Smoking*, N.Y. TIMES, Jan. 24, 1991, at B8 [hereinafter *Study*]; Sandra Blakeslee, *Research on Birth Defects Shifts to Flaws in Sperm*, N.Y. TIMES, Jan. 1, 1991, at A1; Rita Robinson, *High-Proof Paternity: Dads who Drink Conceive Low-Birthweight Babies*, 20 HEALTH, June 1988, at 80; Julie Ann Miller, *Equal Protection for Sperm*, 113 SCIENCE NEWS 332 (1978).

79. *Cf.* Barbara Kantrowitz et al., *The Pregnancy Police*, NEWSWEEK, April 29, 1991, at 52-53; Katha Pollitt, *'Fetal Rights' A New Assault on Feminism*, THE NATION, March 26, 1990, at 409.

80. Kantrowitz, *supra* note 79, at 52; *cf. Hot Tubs and Saunas are Linked to Birth Defects*, N.Y. TIMES, Aug. 19, 1992, at A19.

certainly are not focusing on the low birthweight babies of fathers who drink[81]—nor are fitness centers concerned about the effect of hot tubs on men's reproductive fitness—because this is a less visible problem and far too speculative for the public to address.[82] Illustrative of the fetal rights movement and its impact upon women are examples of medical, civil, criminal, behavioral, and economic interventions aimed at women, presented here in survey form.

A. Medical Intervention

Expanded scientific knowledge and corresponding medical capabilities have converged to create a phenomenon whereby the fetus is now treated as a patient separate from its mother in many instances.[83] Previously, the limits of medicine were such that the mother and fetus were treated as a single medical entity. New scientific knowledge has led the medical community to intervene on behalf of fetuses, in some cases without the consent of their mothers (or fathers). Recognizing fetuses as separate entities thus has the potential effect of devaluing the rights of their mothers.

In the medical arena, the fetal rights/women's rights controversy arises when a procedure is available which would protect and/or improve the health of the fetus, and where the mother either is unable to agree or disagrees. In many cases the medical community, unable to grapple with such complex issues and unwilling to be found liable, seeks a judgment in court on whether the forced medical treatment may be ordered.

The courts that have considered this state intervention in prenatal care generally have performed a balancing test, weighing the mother's constitutional right to privacy, autonomy, free exercise of religion, and bodily integrity against the fetus's right to be born with a sound mind

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81. *See* Robinson, *supra* note 78.

82. It should be noted that the first few months of a woman's pregnancy may be a critical period when the embryo is most at risk with respect to a mother's exposure to some substances. This is also a time when the woman may be unaware of the pregnancy. Analogous to the lack of concern regarding potential harm to men's offspring, the probability of external intervention early in the pregnancy, for the sake of the future child, is slight.

83. *See* Note, *Developments - Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1522, 1556 (1990) [hereinafter Note, *Developments*] (discussing advances in modern medical science which "implicate fundamental questions about the value of human life"); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1325-26 (1990) [hereinafter Note, *Rethinking (M)otherhood*] ("As medical technology advances to permit more treatment of fetuses, potential for state intervention increases."); Gina Kolata, *A Major Operation on a Fetus Works For The First Time*, N.Y. TIMES, May 31, 1990, at A1, B8 (considering fetus as patient separate from mother from medical viewpoint).

and body.[84] State intervention in the form of forced medical treatment is typically manifested in court-ordered caesarean sections and blood transfusions. A particularly vivid example of forced medical treatment is reported in *Jessie Mae Jefferson v. Griffin Spalding County Hosp. Authority*.[85] Ms. Jefferson had been receiving her prenatal care at the hospital, and it was discovered in her thirty-ninth week that she suffered from a condition which created a ninety-nine percent risk of fetal death and a fifty percent chance of maternal death in natural childbirth.[86] The hospital petitioned the court for an order authorizing it to perform a caesarean section.[87] The court framed the issue as whether this unborn child had any legal rights to the protection of the court.[88] The court neglected to inquire as to the mother's religious beliefs "that the Lord has healed her body and that whatever happens to the child will be the Lord's will."[89] In a *per curiam* decision, the court granted the hospital's petition, reasoning that the fetus was a human being fully capable of sustaining life independent of the mother."[90] Temporary custody of the fetus was to be granted to state agencies during the surgical procedure. It was later reported that the mother's condition changed, and she successfully delivered the child through natural childbirth.[91]

Even when surgery would impair the mother's life, the District of Columbia Court of Appeals took just six hours to uphold an order permitting a ceasarean section on a pregnant terminally ill woman without her consent.[92] The court performed a balancing test, but its reasoning was based solely on the interests of the fetus even though doctors admitted that the woman would suffer detriment because of the procedure and acknowledged that her life was probably shortened by it.[93] Forced

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84. *See* Shannon S. Sullivan, Note, *Maternal Liability: Courts Strive to Keep Doors Open to Fetal Protection - But Can They Succeed?*, 20 J. MARSHALL L. REV. 747 (1987) (fetal surgery being performed with increasing success). *See generally* Robertson, *supra* note 19, at 437-38 (suggesting that once a woman chooses to continue pregnancy, she has sacrificed her freedom to act as she wants); *cf. Roe v. Wade*, 410 U.S. 113, 159 (1973) ("pregnant woman cannot be isolated in her privacy").

85. 274 S.E.2d 457 (Ga. 1981).

86. *Id.* at 458.

87. *Id.*

88. *See id.* at 460.

89. *Id.* at 459.

90. *See id.* at 460.

91. Note, *Rethinking (M)otherhood*, *supra* note 83, at 1327 n.18.

92. *In re* A. C., 533 A.2d 611 (D.C. 1987), *judgment vacated and reh'g en banc granted*, 539 A.2d 203 (D.C. 1988). During the hearing at the hospital, the patient was heavily sedated.

93. *Id.* at 613. This case then goes beyond *Griffin* in that it approved a procedure intended to benefit the fetus alone. *See* Jill Lawrence, *Sick Woman, Even if Pregnant, Can Refuse Care, D. C. Court Rules*, BOSTON GLOBE, April 27, 1990, at 11 (discussing case in which an appeals

medical treatment in the above-mentioned contexts has been upheld at the stage in which the fetuses have been viable. The concept of a "window of viability" was first introduced in *Roe v. Wade*, which held that, at the point of viability, the state's interest in the fetus becomes compelling and so the state may regulate to an even greater extent.[94] Future, more difficult cases will arise where the fetus is not yet viable. For example, operations have been performed on fetuses for excessive fluid in the brain, and fetuses have been temporarily removed for minor surgery on their bladders.[95] Major surgery on a pre-viable fetus succeeded for the first time in 1990, in "an operation that may open up a new era in fetal medicine."[96] The right of a state to regulate, according to *Roe*, had not yet reached the compelling stage. Women's rights, it appears, would preempt fetal rights in such instances. If, however, the fetus always has an absolute right to be born with a sound mind and body, as the fetal rights advocates would have it, fetal rights might transcend even the *Roe* viability requirement. Thus, the state could intervene at any time under the fetal rights model.

B. Civil Law Intervention

The Supreme Judicial Court of Massachusetts in 1884 denied recovery in tort for the wrongful death of a pre-viable fetus caused by a third party, primarily on the theory that the unborn child was not a separate entity from its mother at the time of the injury.[97] This holding remained largely undisturbed until 1946, when a cause of action for negligently

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judge criticized trial court for failing to determine what the woman would have wanted had she been able to make clear decision).

In *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964), *cert. denied*, 377 U.S. 985 (1964), a woman was forced to have a transfusion even though she objected to the procedure on religious grounds. The court ordered the transfusions if necessary. This case was decided prior to the recognition of the constitutional right of privacy. The court avoided the conflict between the mother's and fetus's rights by noting that the welfare of the two are so intertwined that it would be impracticable to distinguish them. *Id.* at 538. Yet the court ordered the transfusion anyway, disregarding the mother's religious beliefs.

94. *Roe*, 410 U.S. at 163 (holding that state interest in potential life becomes compelling at point of viability when fetus has "capability of meaningful life"). *See generally* Sullivan, *supra* note 84, at 762 (discussing idea that fetal rights posits right to be born with sound mind and body and this may be sufficient to outweigh women's rights even prior to viability stage).

95. *See* Susan R. Weinberg, Note, *A Maternal Duty to Protect Fetal Health?*, 58 IND. L.J. 531, 531-33 (1983) (discussing various forms of fetal diagnosis and treatment).

96. Kolata, *supra* note 83, at A1.

97. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 15 (1884); *see also Roe*, 410 U.S. at 161 (discussing traditional rule of tort law that denied recovery for prenatal injuries even though child was born alive).

inflicted injuries upon a viable fetus proved successful.[98] Later cases have expanded this right to situations where the fetus was nonviable at the time of the injury but was subsequently born alive.[99]

More recent legal developments in this area abrogating the doctrine of parental immunity have permitted maternal liability in the absence of reasonable care.[100] For example, in *Grodin v. Grodin*,[101] where a child sued his mother because he was born with discoloration of the teeth, allegedly because she ingested the prescriptive drug tetracycline during the pregnancy, the court held that a triable issue of fact existed.[102] Another case, *Stallman v. Youngquist*,[103] found that no tort liability accrued where a woman was sued by her later-born child because of injuries sustained when the then-pregnant mother was involved in a car accident.[104] The Illinois Supreme Court characterized the mother and child connection as distinct from other situations that give rise to tort liability, stating that "[n]o other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world."[105]

Indeed, if the fetal rights movement were to reach its natural legal conclusion, women would be held civilly responsible for a myriad of acts or omissions that could be shown to have caused harm to the later-born child. Even the concept of wrongful life, established to permit recovery in cases where doctors negligently performed surgical sterilization and an unwanted pregnancy resulted, is subject to extension to include parents of children as defendants where the parents permitted a pregnancy to proceed when the "quality" of the gametes (eggs and sperm) was questionable or where information exists from prenatal tests that the child is defective.[106] Another civil fetal right regards one that

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98. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). The child was born alive. *Id.* at 139; *see also* Sullivan, *supra* note 84, at 750-51 (discussing *Dietrich* and *Bonbrest* and noting that all jurisdictions now allow a cause of action for negligent injury of a viable fetus later born alive).

99. *See* Sullivan, *supra* note 84, at 751.

100. *See generally* Note, *Fetal Rights*, *supra* note 21, at 604 (1986); Note, *Developments*, *supra* note 83, at 1576-77 (1990); Note, *supra* note 84, at 759-60.

101. 301 N.W.2d 869 (Mich. App. 1980).

102. *Id.*

103. 531 N.E.2d 355 (Ill. 1988).

104. *Id.* at 359.

105. *Id.* at 360.

106. *See* Walker v. Mart, 790 P.2d 735, 738 (Ariz. 1990) (discussing present state of law on wrongful life claims with at least twenty states recognizing a cause of action). *See generally* Gallagher, *supra* note 42, at 44 n.178, *quoting* John Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. OF LEGAL MED. 333, 350 n.82 (1982). The creation of a legal duty to eliminate defective life raises serious moral and public policy questions.

Plaintiffs seeking compensation in civil tort for wrongful death of a fetus have also met with

has been legally recognized "since the Roman Empire,"[107] . . . that of a fetus to inherit property where the testator dies prior to the birth of the fetus.

C. *Criminal Intervention*

Amid unrelenting controversy, states in the past six years have attempted to bring criminal prosecutions against mothers alleging that their actions damaged their fetuses.[108] This is perhaps the most coercive state intervention of all because the woman's liberty is at risk. Prosecutions have been reported against mothers for delivery of illegal drugs to their newborn babies, for child abuse and neglect, and if the woman is still pregnant while the charges are issued, courts often order preventive detention of the mother until after the birth of the child. Currently there are few statutes specifically addressing crimes against fetuses; instead, states are proceeding under general child abuse, neglect, and drug statutes.[109] Because criminal laws are supposed to be construed as strictly and narrowly as possible, this is indeed a questionable tactic. To address this issue, for example, Minnesota amended a statute[110] mandating the report of neglect or abuse of children to provide that

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varying results depending upon the jurisdiction. *Compare* Smith v. Mercy Hosp. & Medical Center, 560 N.E.2d 1164 (Ill. App. 1990) (recognizing cause of action for wrongful death of fetus) *with* Henderson v. North, 545 So. 2d 486 (Fla. App. 1989) (denying cause of action for wrongful death of a fetus).

107. *See* Note, *Developments*, *supra* note 83, at 1559 n.15; Roe v. Wade, 410 U.S. 113, 162 (1973).

108. Perhaps the earliest criminal prosecution of a woman for her conduct while pregnant was against Pamela Stewart for allegedly failing to provide medical care to her fetus. *See* Marcia Chambers, *Dead Baby's Mother Faces Criminal Charges on Acts in Pregnancy*, N.Y. TIMES, Oct. 9, 1986, at A22 (alleging Ms. Stewart failed to follow doctor's advice to abstain from amphetamines and sexual intercourse and to seek help if hemorrhaging began). The child died shortly after birth, and the judge dismissed the charges reasoning that the statute was not meant to criminalize a woman's actions during her pregnancy. *See generally* Note, *Rethinking (M)otherhood, supra* note 83, at 1329 (after *Stewart* case, prosecutions across country began to bring charges in similar cases); Eileen McNamara, *Fetal Endangerment Cases on the Rise*, BOSTON GLOBE, Oct. 3, 1989, at 1.

109. In construing criminal laws, courts favor a narrow construction of the class of those intended to be protected and make every inference in favor of the accused (such as the woman). Thus, if a legislature in writing a statute states, for example, that "a fetus is considered to be a person for purposes of being included in the class of those the statute was intended to address," then it is clear that the legislature intended to remedy fetal harms. If, however, such language is omitted, it cannot be assumed a fetus is among the protected class, as a fetus is not (yet) considered a person in every context in the law. *See infra* notes 114-24 and accompanying text (cautioning that court cannot create new laws by recognizing new class of victims—that is the legislature's job).

110. MINN. STAT. ANN. § 626.556.1 (West 1983) (requiring the reporting of neglect, physical or sexual abuse of children).

"[n]eglect includes *prenatal* exposure to a controlled substance . . . used by mothers for a nonmedical purpose."[111] At least eighty prosecutions have been brought in twenty states.[112] A disproportionate number have been against minorities and women of color.[113]

Consider two prosecutions, pursued in different states, within four months of each other, against women for allegedly delivering cocaine to their babies. In the earlier case, *State v. Hardy*,[114] a unanimous Michigan appeals court refused to allow prosecution under the state's delivery-of-cocaine statute, since "this court is not at liberty to create a crime."[115] The court failed to find legislative intent to apply the statute in such a novel fashion, suggesting that the appropriate forum to resolve "the complexity of prenatal drug use" would be the legislature.[116] The prosecutor's self-described "drug war" on pregnant drug abusers lost out to defense arguments that such a tactic drives these women away from the very care they need because they fear that disclosure would jeopardize their liberty.[117] Similar charges have been dismissed in cases in Ohio, North Carolina, and Massachusetts.[118]

Soon after, a Florida appeals court handed down the first case upholding the conviction of a woman charged with delivery of cocaine

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111. MINN. STAT. ANN. § 626.556.2 (West Supp. 1991) (emphasis added).

112. Dave Fratello, *Prosecution of Pregnant Addict Won't Prevent Crack Babies*, N.Y. TIMES, Oct. 29, 1991, at A26 (prosecutions arise out of usually "unconventional interpretations of drug-trafficking statutes"). Furthermore, several states have made drug use during pregnancy a violation of their civil codes, and seven states are even considering creating a new and separate crime out of this drug use. *Id. See* Paul Marcotte, *Crime and Pregnancy*, 75 A.B.A. J., Aug. 1989, at 14 (estimating 375,000 newborns per year may be harmed by maternal substance abuse).

113. Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1420-21 & n.6 (1991) (In 1990, for example, 80 percent of the women charged were minorities.).

114. 469 N.W.2d 50 (Mich. 1991).

115. *Id.* at 53.

116. *Id. See also Judge Drops Charges of Delivering Drugs to an Unborn Baby*, N.Y. TIMES, Feb. 5, 1991, at B6 (Michigan court dismissed another case against Attorney Lynn Bremer, concluding that to proceed would violate her rights of privacy and due process and that lawmakers never intended statute to be applied this way).

117. *See* Isabel Wilkerson, *Woman Cleared After Drug Use in Pregnancy*, N.Y. TIMES, April 3, 1991, at A15. The prosecution of these women has no apparent ameliorative or rehabilitative effect. In jail, they remain pregnant and drug-addicted without access to treatment programs. Resources should be reallocated from criminal prosecution efforts into prenatal care and drug treatment programs. *See generally* Wendy Chavkin, *Help, Don't Jail Addicted Mothers*, N.Y. TIMES, July 18, 1989, at A21 (New York City drug treatment programs overwhelmingly refuse service to pregnant drug abusers). To rely on criminal prosecution of women as the exclusive method of protecting fetal rights is to deny women their rights. Additionally, such a tactic has a chilling effect on the relation between the physician and the patient, which ultimately defeats the prosecutor's original stated purpose.

118. Tamar Lewin, *Court in Florida Upholds Conviction For Drug Delivery by Umbilical Cord*, N.Y. TIMES, April 20, 1991, at 6.

to her baby through the umbilical cord.[119] Unimpressed that the statute's goal was to prosecute drug dealers, the majority wrote that "[l]ogic leads us to say that appellant violated the statute."[120] It is almost impossible to reconcile these two outcomes—the statutes were so similar, as were the legal strategy and the facts. The judges, it would appear, are the difference, with the Michigan panel reading the statute narrowly rather than reaching for a result. Their decision, of course, favors women's rights. The majority of the Florida panel, in contrast, assigned more weight to fetal rights than to their mother's rights. Such a variance in decisions on a regional or even national level is clearly not desirable. Another theory that has met with limited success is under vehicular homicide statutes wherein the state court construes whether a fetus is considered a person, hence included in the class of victims within the meaning of the statute.[121] Again, the law is expanding the class of victims to include even fetuses.

Still another manifestation of the fetal rights/women's rights controversy occurs under the guise of preventive detention. It has been reported that a woman who was convicted of a separate and unrelated crime was sentenced to jail until the completion of her pregnancy to ensure that the fetus would not be exposed to illicit drugs.[122] It is instructive to highlight the fact that none of the fathers of these fetuses has been charged even as it becomes apparent that illicit drugs cause negative reproductive outcomes in children whose fathers used such drugs. It is yet another example of how society overwhelmingly focuses on the obvious and fails to consider the full range of possibilities. Only recently has science begun to investigate drug-using fathers. In an experiment, it was shown that fathers' cocaine use is linked to birth defects.[123] This information was discovered six years into this wave of prosecutions against women—but for how many children are living today who were drug-exposed from their fathers, not their mothers, yet no criminal intervention was pursued? The leading medical and public health associations disagree with the maternal prosecutions as

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119. Johnson v. State, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991). *See* Lewin, *supra* note 118 and accompanying text.

120. *Johnson*, 578 So. 2d at 420.

121. *Compare* Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984) (4-3 decision) (viable fetus is a person for purposes of vehicular homicide statute) *with* State v. Trudell, 755 P.2d 511 (Kan. 1988) (viable fetus not human being within meaning of vehicular homicide statute). *See generally* Rachel B. Goldman, Comment, *Criminal Law—Viable Fetus is Person for Purposes of Massachusetts Vehicular Homicide Statute*, 19 SUFFOLK U. L. REV. 145 (1985).

122. *See* Note, *Rethinking (M)otherhood*, *supra* note 83, at 1328 & nn.25-26; Marcotte, *supra* note 112, at 14; *see also* Note, *Fetal Rights*, *supra* note 21, at 605 & n.24.

123. *See Cocaine-Using Fathers Linked to Birth Defects*, N.Y. TIMES, Oct. 15, 1991, at C5.

well, suggesting that the problem is one of public health rather than one for the criminal justice system.[124] Legal efforts must complement rather than undermine public health goals.

D. Behavioral Interventions

While many substances that adults ingest are legal, they pose health risks of varying degrees depending upon the level of consumption. The use of alcohol, tobacco, prescriptive and over-the-counter drugs, and caffeinated beverages is pervasive in our society, and the abuse of these products may give rise to negative health consequences in adults and their offspring. Recently there have been reports about the impact of paternal smoking and drinking on potential offspring.[125]

Alcohol

In all likelihood, alcohol use has become the most discussed and studied of the behaviors which, while legal, has a potentially deleterious effect on offspring. Until recently, studies have focused only on maternal mediation of harm to the fetus. It has been shown that fetuses exposed to alcohol can develop fetal alcohol effect (FAE), or worse still, fetal alcohol syndrome (FAS) which may lead to stunted growth, facial abnormalities, and retardation.[126] Currently, in drinking establishments and on liquor bottles, warnings to pregnant women (but not to men who may impregnate women) are found, due to an act of Congress.[127] Control of the pregnant woman, it seems, has spilled over from other types of interventions mentioned above to now encompass even behaviors which are legal.

Tobacco Smoking

Smoking, while legal, poses dangers to all segments of the population. Mothers' smoking is associated with fetal oxygen deprivation and low

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124. *See* Lewin, *supra* note 118.

125. *See supra* note 78 and accompanying text. The Blakeslee article discusses environmental and workplace toxins as well as drugs.

126. *See* Note, *Developments*, *supra* note 83, at 1557; Elisabeth Rosenthal, *When a Pregnant Woman Drinks*, N.Y. TIMES, Feb. 4, 1990 § 6 (Magazine), at 30 (even FAE produces symptoms such as lifelong learning disabilities and behavioral problems); *cf.* Pollitt, *supra* note 79, at 409.

127. *See* Michael Dorris, *A Desperate Crack Legacy*, NEWSWEEK, June 25, 1990, at 8. *See generally* MICHAEL DORRIS, THE BROKEN CORD (1989) (author retells story of coping with his son's FAS).

The warnings aimed at pregnant women come despite reports as early as 1988 indicating that fathers who drink conceive low-birthweight babies. *See* Robinson, *supra* note 78, at 20.

birthweight.[128] A researcher has pointed out that while women who smoke produce lower birth-weight children, genetic damage is passed on through men because smoke damages sperm.[129] Quite recently a study was completed suggesting that fathers who smoke have an increased risk of producing children with brain cancer, leukemia, and lymphoma.[130] Yet the federally required smoking warnings disproportionately focus on the pregnant woman. Perhaps Congress is composed of that group author Mr. Michael Dorris identifies as the "many fathers [who] regard their baby's health as solely their partner's concern."[131]

Legal Drugs

Pregnant or nursing women are broadly cautioned against the use of pain relievers, decongestants, and other nonprescription and prescription medications. Recently the FDA required expanded warnings directed at women on labels for drugs containing aspirin,[132] apparently neglecting to consider paternal transmission of these drugs. With respect to the reproductive effects of prescriptive medications, the female focus remains primary if not exclusive.[133]

Caffeine/Nutrition/Exercise

Conceivably, warnings will next appear on containers of coffee and tea, soda and other groceries which may harm fetuses. To date the authors have only found studies linking mothers' caffeine consumption to underweight fetuses.[134] What of the pregnant woman who wishes to participate in aerobics, skiing, skating, etc.—may or must the sponsors of such activities warn these women or exclude them? This last category of exercise is perhaps the only maternal lifestyle hazard in which the mother would be solely responsible for mediating any harm. Thus, this

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128. *See* Note, *Developments*, *supra* note 83, at 1557. *See generally* Gallagher, *supra* note 42, at 42 & n.166; Nancy Gertner, *Women v. Fetus*, BOSTON B.J., July-Aug. 1990, at 27.

129. *See* Judy Foreman, *Smoking Could Cause 20% of Deaths*, BOSTON GLOBE, May 22, 1992, at 14.

130. *See Study*, *supra* note 78 and accompanying text.

131. *See* Dorris, *supra* note 127, at 8.

132. *New Pregnancy Warning on Aspirin*, 24 FDA CONSUMER, Sept. 1990, at 2. Other over-the-counter drugs also contain warnings to pregnant and nursing women.

133. *See supra* notes 101-02 and accompanying text (discussing the *Grodin* case where court permitted tort cause of action by child whose teeth were allegedly discolored by mother's use of tetracycline during gestation). *See generally* Note, *Developments*, *supra* note 83, at 1557.

134. *See* Don Colburn, *Caffeine Consumption Linked to Underweight Infants*, WASH. POST, April 16, 1991, at WH5.

is an instance in which there is an arguable claim for regulating maternal and not paternal behavior.[135]

E. Economic Interventions

The principal economic intervention which reduced employment opportunities for fertile women and mothers due to concern for fetal health was the FPP.[136] The institution of these policies reflected the societal preoccupation with the mother's role in the development of healthy offspring. Genetic testing to identify hereditary markers for susceptibility of workers to certain environmental factors raises analagous issues to FPPs, in that there is a similar potential for exclusion of certain workers rather than modification of the workplace for those workers.[137]

Even working too hard has been a cause of concern—not as much for the mother, though, as for the fetus. This was one of the original rationales for excluding women from the workplace in the case of *Muller v. Oregon*.[138] There is not the same level of concern for men who may conceive children, and so they have not suffered economically. A study was recently completed which challenges the presumption that pregnant women should be barred from strenuous working environments and thus deprived of employment opportunities.[139] Preconceived notions take a long time to adjust to scientifically documented realities.

What this survey of women's rights and fetal rights seeks to show is the entanglements that have grown out of a desire to protect fetuses. Fetal rights are a controversial concept with an agenda that continues to spill over into many areas of society. Furthermore, the expansion of fetal rights has led to inconsistent treatment of mothers and fetuses by the legal system. For example, the medical community treats even pre-

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135. *See* Sullivan, *supra* note 84, at 764 & n.158.

136. *See supra* notes 24-29 and accompanying text.

137. For an excellent discussion of genetic testing, *see* Ellen Peirce, *The Regulation of Genetic Testing in The Workplace - A Legislative Proposal*, 46 OHIO ST. L.J. 771 (1985); *see also* MacKinnon, *supra* note 4, at 1326 (workplace should be "organized with women as much in mind as men").

138. 208 U.S. 412, 421 (1908) (upholding "protective" maximum hour legislation directed at women since healthy mothers are essential for vigorous offspring).

139. *See Stressful Jobs Not Linked to Birth Defects: Study Findings Apply to Well-Off Women*, WASH. POST, Oct. 11, 1990, at A3 (discussing study appearing in *New England Journal of Medicine* surveying reproductive outcomes of female medical school graduates). In fact, socioeconomic status and access to medical and prenatal care are important variables that may have confounded prior studies. *Id.* As was noted in the debate surrounding FPPs, policies that bar fertile women from earning good salaries and entitlement to medical benefits present drawbacks for their potential fetuses.

viable fetuses as patients, while in the legal system, fetuses may or may not be persons upon viability, depending upon the circumstance. Granting fetuses legal rights prior to viability presents a leap of logic from the standard set in *Roe*. Moreover, the selective application of fetal rights such as with FPPs undercuts the genuineness of the asserted concern of those who intervene to promote fetal rights in that such rights are promoted inconsistently. There is apparently a dual agenda present, and the absence of predictability in this regard is destructive.

III. TOWARD A NONCONFLICTUAL MODEL IN THE WORKPLACE

"Creating a better climate for business."[140]

The focus of the entire fetal rights/women's rights debate in the workplace is misdirected. The controversy has manifested itself in the workplace under the guise of FPPs. Even this label—FPPs—is lacking. This is partly because the workplace rules and priorities are fashioned out of male norms and values.[141] The workplace is an historically male

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140. A motto of Johnson Controls, Inc., which appears on their trucks.

141. Much has been written about the contrast between the way men and women generally view the world and make decisions. Leading psychological theorists built their observations on men's lives into the paradigmatic developmental theories which meant adoption of the male life as the norm, and thus cast women as nonconforming. GILLIGAN, *supra* note 1, at 6. Professor Gilligan analogizes women's treatment to the biblical outcome of Adam and Eve in the Garden of Eden. *Id.* Similarly, moral psychologists such as Lawrence Kohlberg developed stages of moral development that are based on maturation of the male in our culture. *Id.* at 10. Thus, women's historical role of assuming primary responsibility for nurturing and care-giving is devalued and considered to be a weakness. *Id.* at 16-17. Professor Gilligan takes issue with this characterization because it should be deemed "a human strength." *Id.*

Women's very integration and prioritizing of attachment and relationships with others is viewed as contrary to the maturation process under the male model of psychological development which necessitates separation and empowerment of the self. *Cf. id.* at 156. The traditional female role in our society incorporates an ethic of self-sacrifice that conflicts to some extent with the concepts of individual rights and self-development as those concepts are defined by men. *See id.* at 132; *see also* Alison Bass, *Studies Find Workplace Still a Man's World - Researcher Demonstrates How Biases Work Against Women and Minorities*, BOSTON GLOBE, March 12, 1990, at 39. The male view of self-development envisions development of the individual largely at the expense of others. The notion of rights is individuated, rather than relational, as well. *See infra* note 148 and accompanying text. It is for these reasons, among others, that the authors see the debate about women's versus fetal rights as one that is at its essence flawed. Even calling it a debate sets the agenda as one that is adversarial in nature. As discussed in this section, the male model, male values and the male view, the authors refer to the perception of such by the prominent feminist theorists referenced herein. Similarly, the prevalent values, beliefs and behaviors attributed to women in our culture are of necessity somewhat generalized. There are, of course, many individuals of both genders who do not fit into these simplified classifications. *See* Lois Vanderwaerdt, *Resolving the Conflict between Hazardous Substances in the Workplace and Equal Employment Opportunity*, 21 AM. BUS. L.J. 157, 173 (1983) (positing that exclusion of women from hazardous jobs in male-dominated industries is a "means of protecting male jobs" and "a vestige of the social mores and the paternalism of a bygone era").

domain and the measure of contribution and success is inherently linked to the male model.[142] The influx of women into the work environment precipitated the trend toward recognizing the fetal rights movement at the workplace in the form of FPPs.[143] These exclusionary policies were at once underinclusive and discriminatory, because they failed to protect fathers' fetuses, and overinclusive by "protecting" women who had no intention of conceiving children. There are three theories which may be used to resolve the women's rights/fetal rights issue in the workplace.

A. The Unity Model

The unity model consolidates the woman as the decisionmaker for mother and child thereby preventing subrogation of women's rights to fetal rights. The rights of both are inseparable pursuant to this theory as it considers the fetus to be a body part of the woman. This has "been the closest the law has come to recognizing fetal reality and protecting women at the same time . . . Yet the fetus is not a body part."[144] This model is perhaps best exemplified in *Dietrich v. Inhabitants of Northamption*[145] where the court refused to allow recovery for prenatal injury partly to eliminate suits by fetuses versus their mothers.[146] However, this theory is incomplete since injuries to both parties may be obscured under this theory.

B. The Adversarial Model

This model considers the fetus a separate legal entity from its mother possessing its own legal rights which potentially conflict with the legal rights of its mother. The adversarial model represents the logical conclusion to the fetal rights movement which recognizes fetuses as having legal rights which may supervene even those of their mothers.[147]

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142. *See generally* GILLIGAN, *supra* note 1, at 10; GORDON, *supra* note 1, at 58-60 (criticizing fast track model of professional success that women have not altered from male model); SCHULTZ, *supra* note 4, at 1831-32 (workplace is sex-segregated by its very structure and women are discouraged from aspiring to jobs not "natural" for their gender and these structures that disempower working women left unexamined).

143. The authors refer to work environments heretofore male dominated because, as noted earlier, in traditionally female occupations such as nursing, hairdressing, etc., FPPs were not instituted. *See supra* notes 33-35 and accompanying text. This is not to say that discrimination on the basis of pregnancy has not existed within female-dominated occupations. *See, e.g., Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984).

144. MacKinnon, *supra* note 4, at 1314.

145. 138 Mass. 14 (1884).

146. *Id.* at 15-16. *See supra* notes 97-98 and accompanying text.

147. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 140-41 (D.D.C. 1946).

Consequently fetal rights are seen as in conflict with their mothers'. The adversarial model which polarizes fetal rights and women's rights is a zero-sum solution to the problem of workplace health and reproductive hazards affecting both men and women—a problem which can ill-afford a loser. The weakness of this scheme is its hierarchical ordering of rights which by its very nature requires a winner and a loser. There can be no net societal gain from such an adversarial equation. It is, moreover, counterproductive to concentrate on these two parties only and the balance of power between them since fathers and others (as discussed below) must be included in the equation in order to solve the problems caused by exposure to toxic work environments.

C. The Nonconflictual Model: The Stage Beyond FPPs

In contrast to the unity model which presupposes that mother and child are one, and the antagonistic qualities inherent in the adversarial model, the nonconflictual model views the rights of both mother and fetus as similarly as possible. Moreover, this third model broadens the class of persons entitled to consideration within the paradigm. Therefore, fathers and secondary persons, such as those in the worker's household and community who are exposed to workplace toxins, become stakeholders who are also entitled to their unimpaired health.

The nonconflictual model approaches the rights debate from a multidimensional perspective in contrast to the hierarchical scheme that results from the adversarial model or the integral sameness of the unity model. This third model posits that protecting human beings and their fetuses as well as potential offspring is an ethical responsibility and thus causes the issue to be reframed from one which characterizes the rights of mothers and fetuses as in conflict—a counterproductive theory—to one which focuses less on rights and more on the best interests of all parties, including mothers, fathers, potential offspring, fetuses and secondary persons who are exposed to toxins.

Much energy has thus far been expended defining, preserving and ordering rights . . . an abstract concept typically incorporating a male view of life . . . [148] while an examination of the reality of health and

148. *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 61-62 (1985), where the author criticizes the meaning of women's rights as they are viewed through a male judicial system. Thus, the definition of individualistic liberty did not encompass the termination of parental rights of an imprisoned mother as a sufficient liberty interest such that the mother would be entitled to the due process of court-appointed counsel. *Id.* at 62 n.114 (*citing* Lassiter v. Department of Social Serv., 452 U.S. 18 (1981)). Professor Menkel-Meadow speculates that women judges might be more likely

reproductive hazards with their effects have been neglected. That is to say, because there is a dearth of solid research on reproductive hazards which is gender-comparative, decisions concerning exposure to workplace toxins have been made in a haphazard fashion. The employers making the decisions to exclude fertile women from the workplace continue to be almost exclusively male.

Although the handicap that FPPs represented for women in the workplace was somewhat alleviated by *Johnson Controls*,[149] the field is far from a level one for women in workplaces still primarily male.[150] Even after *Johnson Controls*, critical challenges remain that cannot be solved by the judiciary. First, a fundamental change in values is in order at workplaces so that all workers are viewed as important, making care due to all workers and their potential offspring equally. Second, research into workplace toxins must command more attention and commitment from the companies which manufacture them as well as those which use them.[151] Moreover, the research must reflect diverse points of view accounting for all the stakeholders.

Judicial resolution of workplace injuries caused by toxic work environments, in the form of Title VII, or tort liability, is too reactive and inadequate to resolve these complex issues which stretch beyond neatly framed legal questions and require proactive leadership.[152] Recently

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to view the loss of connection of a woman to her child as a liberty interest. Professor MacKinnon makes analogous observations regarding the value of the privacy right . . . that for women without power, "privacy does nothing . . ." MacKinnon, *supra* note 4, at 1311; *cf.* George J. Annas, *The Impact of Medical Technology on the Pregnant Woman's Right to Privacy*, 13 AM. J.L. & MED. 213, 232 (1988) (recognizing that advances in science will increase the rights of fetuses). Professor Annas notes the inconsistency that laws "do not . . . require parents to provide 'optimal' clothing, food, housing or medical attention to their children or even forbid taking risks with children . . ." *Id.* at 230.

149. 111 S. Ct. 1196 (1991).

150. *Id. See* Rosen, *supra* note 74 (discussing *Johnson Controls* as hollow victory in sense that women now have right to expose fetuses to workplace toxins.)

151. *See, e.g.*, Toxic Substances Control Act of 1976, 15 U.S.C.A. § 2601(b)(1) (West 1982 & Supp. 1991) (burden on employers to develop adequate data concerning the health effects of chemicals in work environment); Occupational Safety and Health Act, 29 U.S.C.A. § 651(b)(1) (West 1985 & Supp. 1990) (general duty clause on employers); 29 C.F.R. § 1910.1025 (1989) (placing on employers burden of making determinations on exposure); O'Brien, et al., *supra* note 60, at 209-12. The data and research must be collected and analyzed in a gender-neutral fashion and include all the stakeholders to an equal degree.

152. The challenge to JCI's policy took nine years to resolve, and when it was, addressed only a portion of this complex issue. Resolution of injuries through tort liability or workers' compensation channels, while providing an economic incentive to employers to act, do not contribute to the alleviation of the larger problems. These are reactive methods of dealing with human injuries that are already sustained when a preferable avenue is, of course, the prevention of injury.

proposed legislative amendments to OSHA begin to address these issues and represent a positive initiative toward a safer workplace for all those affected.[153] Replacing FPPs with Reproductive and Health Programs would go even further toward providing a safer workplace.

Reproductive and Health Programs

Implementing a nonconflictual model requires that the name FPP change to reflect a multi-dimensional framework. The name fetal protection policy (FPP) is really a misnomer. A better term is a Reproductive and Health Program (RHP) in which reproductive concerns would serve as one component of an overall plan for worker safety and health. The word "fetal" in FPP is inadequate because the concern is not just with potential fetuses but rather with the health of adult workers, their potential offspring and others who are in contact with workers exposed to toxins. The use of the word "reproductive" directs attention to this one important aspect of safety and health within the workplace. RHPs are also broad enough to include the health of workers who may not be concerned with their reproductive systems, but who are nevertheless deserving of reproductive protection.

Rather than reverting to the term "protection," which resurrects notions of the "protective" legislation that legally consigned women in the workplace to the status of a weaker sex in the name of protecting future offspring, the authors recommend the word "health." Thus, the phrase "health program" positively expresses the outcome to be derived from workplace investment in RHPs. This cooperative effort contrasts sharply with FPPs which were unilaterally-imposed and ineffectual exclusionary policies. The word "program" connotes a considered and meaningful effort to improve reproductive health for both genders, replacing the prohibitive policies that excluded women based upon stereotypic presumptions instead of solid scientific justification. Reproductive and Health Programs, to have any chance of success, require a genuine commitment from employers, employees and their unions where applicable, regulatory agencies, and the scientific and medical communities. Only when the best, most complete information is available is it possible to make sound decisions and policy judgments.

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153. Congress has, to a limited degree addressed workplace issues. *See* STAFF OF HOUSE COMM. ON EDUC. AND LAB., 101ST CONG., 2D SESS., REPORT ON THE EEOC, TITLE VII AND WORKPLACE FETAL PROTECTION POLICIES IN THE 1980'S (Comm. Print 1990). Also, legislative proposals have been introduced which would be the first major revisions in the twenty year history of OSHA. *See* S. REP. No. 1622, 102nd Cong., 1st Sess. (1991); S. REP. No. 445, 102nd Cong., 1st Sess. (1991); *see also* O'Brien, et al., *supra* note 60, at 224-25.

Economic questions are involved in instituting RHPs. Industry must weigh the potential cost of injuries to workers, offspring, and others against the incremental cost of expanding existing employee safety programs to include a broadened awareness of health and prevention of reproductive and other harms. The value added to our knowledge about human toxins must be deducted from the price of the research on workplace hazards. The decrease in litigation currently arising because of employer policies that exclude protected groups without adequate scientific support is an additional advantage derived from performance of gender balanced studies and the institution of a nonconflictual model.

CONCLUSION

Modeling an employment policy to unify worker's rights and fetal rights requires at once an understanding of how the workplace functions and the effects of the toxins that workers are exposed to. It is far less productive to view this problem as a tug-of-war between just mothers and their fetuses. Such a view allows no net gain for society. By expanding the rights question to include fathers and secondary persons, and then to refocus the discussion to reflect this multidimensional approach, there can be a net gain to society. These rights are not necessarily in conflict under such an approach. For if we are to ensure healthy mothers and fathers and vigorous offspring, it is incumbent on society to abandon the stereotypical thinking that created FPPs which discriminated against women workers. Creative solutions to workplace hazards are demanded. Difficult policy questions must be resolved such as whether to even allow toxins like lead to be included in our manufacturing processes and work environments. Surely we jest, some might say—for such a massive restructuring will bankrupt industry after industry. But, are we not doing the same thing right now, worker-by-worker?