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Oren, Laura E.

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# PROTECTION, PATRIARCHY, AND CAPITALISM: THE POLITICS AND THEORY OF GENDER-SPECIFIC REGULATION IN THE WORKPLACE

Laura Oren\*

## INTRODUCTION

Even in a common law system, lawyers and legal scholars tend to set their sights on the future rather than the past. This symposium implicitly looks forward to the day that "Institutional Barriers to Women in the Workplace" may be removed. The authors included here are developing the legal analysis necessary to arrive at that goal. In shared hope for that future, this article looks to the past. It tells two stories, one about England in the 1830s - 1840s and another about the United States in the 1970s - 1980s. Both are narratives about protection, patriarchy, and capitalism.

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\* Associate Professor of Law, University of Houston Law Center; J.D., University of Houston Law Center, 1980; Ph.D. (History), Yale University, 1974.

In this article, I have referred to interviews I conducted by telephone with the following participants in the campaign against fetal protection policies: Joan Bertin, Marsha Berzon, Dr. Eula Bingham, Carin Clauss, Odessa Komer, Mary Win O'Brien, and Wendy Williams. I am indebted to them and to the many other interviewees who provided their insights and valuable background information. My thanks also go to my colleague, Mark Rothstein, who made available to me interviews he conducted in 1984 in conjunction with his report to the Office of Technology Assessment (OTA) on regulation of reproductive hazards under the Occupational Safety and Health Administration.

I am grateful for research assistance provided by the University of Houston Law Library and a long list of student assistants, including Susan Stanton, Pat Tidwell Wilkinson, and Vicky Fealy. Financial support was provided by the University of Houston Law Center Foundation. I am especially appreciative of a grant from the Center for Research on Women in Higher Education and the Professions of Wellesley College, provided in 1977 to enable a then-unemployed historian to travel to England for research.

The English tale concerns the Ten Hours movement, a campaign to limit factory workers' hours to a maximum of ten per day. This extraordinary alliance of upper-class reformers and a working-class mass movement successfully wrested protective labor legislation from a reluctant and unrepresentative Parliament. In the birthplace and in the heyday of laissez-faire capitalism, however, protection for workers took the form of limits on *women's* hours. The Ten Hours Act of 1847 was once viewed exclusively as a triumph for the working class and for the principle of industrial regulation over a laissez-faire economic philosophy. More recently, however, women's historians and other feminist critics have reassessed that victory and blamed the protective legislation for reinforcing gender stereotypes and occupational segregation by sex.

The American tale concerns a different kind of "protection," one that was imposed by employers rather than won from the state. Beginning in the 1970s, chemical and metal companies in the United States and Canada adopted so-called "fetal protection policies." These policies barred women capable of bearing children from working in certain areas where they would be exposed to lead or other substances deemed harmful to fetuses. Women were fired, forced into lower paying jobs, or had to be sterilized in order to keep their jobs.

Public health, labor, feminist, and other activists joined forces to oppose an upsurge of company fetal protection policies.<sup>1</sup> The allies first sought regulatory action from sympathetic appointees of the Carter Administration between 1977 and 1980. After Reagan brought his antiregulatory philosophy to the presidency, however, they understandably focused on litigation. By the 1980s, efforts to use labor or occupational health and safety law also met reverses. Ultimately, Title VII of the Civil Rights Act of 1964 became the only vehicle left with which to mount a successful challenge to corporate fetal protection policies.

In 1991, the Supreme Court ruled in *UAW v. Johnson Controls, Inc.*<sup>2</sup> that exclusionary fetal protection policies constituted

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1. Eula Bingham, *Preface to WENDY CHAVKIN, DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME ix-x* (1984) [hereinafter *DOUBLE EXPOSURE*].

Sally Kenney observes that "fetal protection policies" should be more properly called "exclusionary policies." SALLY J. KENNEY, *FOR WHOSE PROTECTION? REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITAIN 1* (1992).

2. 499 U.S. 187 (1991).

sex discrimination in employment, prohibited by Title VII. Despite significant differences between majority and concurring opinions, the justices all agreed that Johnson Controls could not eliminate women workers because of their capacity to become pregnant.<sup>3</sup> While the anti-exclusionary policy coalition hailed the Court's decision as a victory, critics existed even in feminist ranks. Women's historian Ruth Rosen, for example, questioned what it would gain women to have the same right as men to labor in hazardous workplaces.<sup>4</sup> She lamented what she saw as a "hollow victory" for liberalism and individual rights which did not do anything to make the workplace safer for everybody.<sup>5</sup> Demonstrating a profound misunderstanding of the dual strategy that lay behind the coalition against fetal protection policies, this statement nonetheless reveals the complexities of a progressive analysis. Rosen failed to see that it was necessary to eliminate the bogus issue of excluding women in order to successfully address the need for a safe workplace. If she were right, on the other hand, there would be cause for concern about a feminist jurisprudence which ignores class realities. Overlooking the class significance of *Johnson Controls* would be just as troublesome as ignoring the gender implications of the Ten Hours movement's victory.

Modern fetal protection policies inspired much discussion of the lessons of history by scholars, litigators, and the courts involved in the challenges to their legality. Professor Mary Becker found history very relevant to her critique of corporate policies which exclude women from certain jobs in order to protect their potential fetuses.<sup>6</sup> She began her analysis with *Muller v. Oregon*,<sup>7</sup> the 1908 case which validated sex-specific protective labor legislation.<sup>8</sup> American Civil Liberties Union (ACLU) lawyers who coordinated suits against fetal protection policies carefully researched and briefed what they believed history revealed about the fallacies and traps for women that lie in protection and pater-

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3. *Id.* at 211; *id.* at 211-12 (White, J., concurring in part and concurring in judgment); *id.* at 223 (Scalia, J., concurring in judgment).

4. Ruth Rosen, *What Feminist Victory in the Court?* N.Y. TIMES, Apr. 1, 1991, at A17. Rosen is a professor of history at the University of California at Davis and author of *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918* (1982).

5. Rosen, *supra* note 4, at A17.

6. Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1218, 1221-25 (1986).

7. 208 U.S. 412 (1908) (upholding Oregon's law prohibiting the employment of women for more than ten hours a day in factories or laundries).

8. *Id.*

nalism.<sup>9</sup> Two of the judges on the Seventh Circuit debated the significance of apparent historical parallels between *Muller* and *Johnson Controls*. Judge Posner warned that the court should not be deceived by "superficial historical analogies,"<sup>10</sup> while Judge Easterbrook (whose legal position ultimately prevailed at the Supreme Court level) found that the exclusionary policies were suspiciously "redolent of *Muller*."<sup>11</sup>

This article deliberately avoids the more obviously related history of protective labor legislation in the United States. Instead, it pairs contemporary American issues with the early beginnings of protective labor laws in England. In part, this choice reflects my background as a student of nineteenth-century British history. Taken together, the two stories also make a broader point about the lessons of history. My historical and legal training teach me that it is a mistake to analyze any issue affecting women from only one angle. Rather, institutional barriers facing women in the workplace must be evaluated through the lens of a class analysis at the same time as they are examined for gender implications.<sup>12</sup> If we want genuine progress, we have to know how the social and economic systems work which link these two forms of oppression in ways which are often subtle and not self-evident. The pairing of the Ten Hours movement with the campaign against fetal protection policies is meant to encourage analysts to look through gender to class, and through class to gender, before they decide what is needed in order to remove institutional barriers to women in the workplace.

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9. Professional historians were even asked to review the briefs for historical accuracy. Telephone Interview with Joan Bertin, formerly of the ACLU Women's Rights Project (Oct. 15, 1992) (on file with author).

10. *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 906 (7th Cir. 1989) (en banc) (Posner, J., dissenting), *rev'd*, 499 U.S. 187 (1991).

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

12. Although this article omits race, that factor is an equally critical dynamic in the American workplace today. It is often the intersection of gender and class with race which raises the most troublesome questions. For analysts who discuss the intersection between race and sex, see, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 348 (D. Kelly Weisberg ed., 1993) [hereinafter *FEMINIST LEGAL THEORY*]; Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

## I. THE ENGLISH STORY

Women and children had always worked in British agriculture and trades.<sup>13</sup> In the early factories, children, young people, and women actually constituted the majority of the workforce.<sup>14</sup> The first protective legislation was directed at children. Sir Robert Peel's Cotton Factories Regulation Act of 1819 banned the employment of children under nine and established a twelve hour workday for children between the ages of nine and sixteen.<sup>15</sup>

In the 1830s, a Ten Hours movement arose which combined upper-class Tory reform leadership inside Parliament with a mass organization of working-class "Short Time Committees" outside of Parliament.<sup>16</sup> The factory reform movement ignited throughout the northern mill districts of Yorkshire and Lancashire after the publication of Richard Oastler's famous "Yorkshire slavery" letter, which unfavorably compared the plight of the little mill children to "the negro slave."<sup>17</sup> The campaign initially focused on regulating the labor of children, but with an eye toward achieving a normal workday for all.<sup>18</sup> But the reformers failed in the 1830s. Instead of a ten hours bill, the government enacted a

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13. MARGARET HEWITT, *WIVES AND MOTHERS IN VICTORIAN INDUSTRY* 1-2 (1958). All members of laboring families in preindustrial England were expected to contribute to their subsistence. Laura Oren, *The Welfare of Women in Laboring Families: England, 1860-1950*, in *CLIO'S CONSCIOUSNESS RAISED: NEW PERSPECTIVES ON THE HISTORY OF WOMEN* 226-27 (Mary S. Hartman & Lois Banner eds., 1974).

14. SYLVIA WALBY, *PATRIARCHY AT WORK* 97-98 (1986).

15. B.L. HUTCHINS & A. HARRISON, *A HISTORY OF FACTORY LEGISLATION* 16 (reprint 3d ed. 1926) (1966).

16. Lord Ashley, the Earl of Shaftesbury, led the parliamentary movement for many years. He was succeeded by John Fielden, the most successful cottonmaster in Lancashire. STEWART A. WEAVER, *JOHN FIELDEN AND THE POLITICS OF POPULAR RADICALISM, 1832-1847*, at vii-viii, 4-5 (1987).

Upper-class leadership was necessary because Parliament was still undemocratic. Until 1832, even the middle classes were largely denied representation. It took a constitutional crisis to gain the vote for middle-class men in the Reform Act of 1832. See 3 ELIE HALÉVY, *A HISTORY OF THE ENGLISH PEOPLE IN THE NINETEENTH CENTURY: THE TRIUMPH OF REFORM, 1830-1841*, at 3-59 (E.I. Watkin trans., 1961); DAVID THOMSON, *ENGLAND IN THE NINETEENTH CENTURY, 1815-1914*, at 73-74 (1950). In 1832, some 217,000 additional voters were added to an electorate of 435,000. More importantly, seats were redistributed, affording representation to some cities in the industrial north for the first time. THOMSON, *supra*, at 74. The broad class of working-class men did not receive the vote until 1884 and 1885, while women remained disfranchised until 1918. *Id.* at 175.

17. CECIL DRIVER, *TORY RADICAL: THE LIFE OF RICHARD OASTLER* 8 (1946).

18. See Marianna Valverde, *Giving the Female a Domestic Turn: The Social, Legal and Moral Regulation of Women's Work in British Cotton Mills, 1820-50*, 21 *J.*

version that would permit the mills to continue running as usual for twelve hours, while using children in eight hour relays.<sup>19</sup> After these defeats, in the 1840s the reformers and short timers refocused their campaign on a demand for limiting the hours of women. They finally succeeded in the Ten Hours Act (Fielden's Act) of 1847. The statute limited to ten the hours of employment of young persons and adult women in the factories of England.<sup>20</sup> Because of the ratio of women and young persons to adult men in the industrial workforce, this legislation achieved the general effect long sought by the reformers — a ten hour workday for most factory workers.

#### A. *England in the 1840s: Class Conflict*

The Ten Hours factory reform movement was but one of a number of interrelated struggles involving the old and the new Englands in the unsettled early years of industrial capitalism. The introduction of the factory system into the northern textile districts of Britain was not a smooth and continuous process with predictable results.<sup>21</sup> Britain experienced great economic and social change, and many other political changes seemed possible, perhaps even revolution.<sup>22</sup> The factory system and the forms of wealth it produced emerged on contested terrain. The new class of industrialists was obliged to struggle for political representation and influence in Parliament against the landed classes that still maintained their control of both Houses. The masters, or millowners, contended with their workforce for control over the social conditions of labor.<sup>23</sup> In Parliament, the industrialists also faced a group of Tory reformers who were equally upset by the new market relationships between upper and lower classes.

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SOC. HIST. 619, 626 (1988) (noting that because of the organization of mills, regulation of children's hours would affect the mills' hours of operation).

19. DRIVER, *supra* note 17, at 228; Robert Gray, *The Languages of Factory Reform in Britain, c. 1830-60*, in THE HISTORICAL MEANINGS OF WORK 143, 166 (Patrick Joyce ed., 1987).

20. 92 PARL. DEB. (3d ser.) 313 (1847) (noting the passage of the bill); HUTCHINS & HARRISON, *supra* note 15, at 70.

21. For sectoral and regional discontinuities, see, e.g., Gray, *supra* note 19, at 143.

22. HALÉVY, *supra* note 16, at 23. These changes are explored in JOHN RULE, THE LABOURING CLASSES IN EARLY INDUSTRIAL ENGLAND, 1750-1850 (1986); E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1966).

23. See, e.g., E.P. Thompson, *Time, Work, Discipline and Industrial Capitalism*, 38 PAST & PRESENT 56-97 (1967) (depicting millowners' struggle to impose a factory sense of time on artisanal culture).

In this environment of class conflict, trade unions grew and some became national in scope, especially after the 1824 repeal of the Combination Acts which outlawed such organizations. But unionism also suffered spectacular defeats. In the years 1832 to 1834, Owenism, a cooperative form of socialism improbably led by the successful capitalist millowner Robert Owen, flourished and then collapsed dramatically.<sup>24</sup> Militant Owenite trade union struggles of 1833-34 culminated in the first attempt at a general union of the working classes, the Grand National Consolidated Trades Union (GNCTU).<sup>25</sup> Owenites proposed to strike not only for less work and more wages, but also for control of production and for political power.<sup>26</sup> The Owenite National Regeneration Society sought to bring about an eight hour workday at the same wages by industrial action and as a first installment of a "revolution . . . coextensive with society."<sup>27</sup> Although scorned by Marx and Engels for lack of a "scientific" basis, Owenism was the world's first socialist movement.<sup>28</sup> The great Owenite campaign suffered a sound defeat after many employers used lock-outs against the unionists and the government prosecuted and transported the Tolpuddle Martyrs.<sup>29</sup> Clearly, workers were not

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24. BARBARA TAYLOR, *EVE AND THE NEW JERUSALEM: SOCIALISM AND FEMINISM IN THE NINETEENTH CENTURY* xi (1983) (on Robert Owen); *id.* at xiii (on the definition of Owenite "socialism").

25. At its peak, the GNCTU had a membership of 500,000 to 800,000. DRIVER, *supra* note 17, at 262; S.G. CHECKLAND, *THE RISE OF INDUSTRIAL SOCIETY IN ENGLAND, 1815-1885*, at 348 (1966).

26. In 1834, the GNCTU failed in its effort to achieve an eight hour workday through direct industrial action. *See, e.g.*, G.D.H. COLE, *ATTEMPTS AT GENERAL UNION: A STUDY IN BRITISH TRADE UNION HISTORY, 1818-1834*, at 109 (1953); DRIVER, *supra* note 17, at 262-67; TAYLOR, *supra* note 24, at xii (noting the collapse of the GNCTU in 1834); *To the Operatives of the United Kingdom of Great Britain and Ireland*, HERALD RTS. INDUSTRY, Feb. 8, 1834, at 1-6 (on file with author); *Summary of the Origin, Objects and Progress of the National Regeneration Society*, HERALD RTS. INDUSTRY, Feb. 8, 1834, at 1-6 (on file with author). An employer's "lockout" strategy and government prosecution of the leaders defeated this Owenite initiative. *See* COLE, *supra*, at 129; TAYLOR, *supra* note 24, at 88.

27. *To the Operatives of the United Kingdom of Great Britain and Ireland*, *supra* note 26, at 1-6; *Summary of the Origin, Objects and Progress of the National Regeneration Society*, *supra* note 26, at 1-6.

28. TAYLOR, *supra* note 24, at xiii (explaining that the word "socialist" in Britain prior to 1850 referred exclusively to Owenites).

29. *Id.* at 88; COLE, *supra* note 26, at 129. The Tolpuddle Martyrs were six Dorchester agricultural laborers who formed a union which was to be part of the GNCTU. They were arrested and prosecuted for administering illegal oaths, and sentenced to transportation to the overseas British penal colonies for seven years. They returned as martyrs of the labor movement. *Id.* at 127.



going to be able to achieve a normal working day at this time through industrial action alone.<sup>30</sup>

Other class conflicts developed. In 1836, the Poor Law Commissioners came north to impose their Benthamite regime of poor relief on textile districts which often suffered from cyclical unemployment.<sup>31</sup> There was massive resistance.<sup>32</sup> Many of the working-class leaders of the early factory reform movement moved naturally into the "Anti-Poor Law" organizations and later into a political movement called Chartism.<sup>33</sup> Frustrated with the poor results of industrial action and parliamentary lobbying alike, Chartists urged a democratic seizure of political power. The Six Points of the Charter included: universal manhood suffrage, the secret ballot, the elimination of the property qualification to serve in Parliament, payment of Members of Parliament, equal-sized constituencies, and annual Parliaments.<sup>34</sup>

### B. *The Ten Hours Movement in the 1840s: Sex and Class*

The struggle for a ten hour workday occurred against this backdrop. The reformers had always deplored the evil effects of the factory system on females to some degree, but in the 1840s the demand for shorter hours focused particularly on women.<sup>35</sup>

30. The defeat was disastrous both for unionism and the early factory reform movement. J.T. WARD, *THE FACTORY MOVEMENT, 1830-1855*, at 119 (1962). After it was clear that industrial action was not going to achieve a shorter working day, cotton operatives turned back to a renewed factory reform movement. See COLE, *supra* note 26, at 150; TAYLOR, *supra* note 24, at 86-87.

31. The Poor Law Commissioners proposed to reorganize poor relief in England along lines inspired by Bentham and Malthus. Relief to the poor, orphaned, disabled, or unemployed would no longer be given outside the walls of a workhouse. In addition, the Poor Law Commissioners devised emigration and migration schemes which were designed to move excess agricultural labor either to the manufacturing North or overseas. See NICHOLAS C. EDSALL, *THE ANTI-POOR LAW MOVEMENT, 1834-44* (1971); WARD, *supra* note 30, at 121.

32. See EDSALL, *supra* note 31; WARD, *supra* note 30, at 121. Parliament's refusal to extend a normal working day and its enactment of the new poor law seemed to be two sides of same middle-class aggression against laboring people. See DRIVER, *supra* note 17, at 276.

33. The leadership of the two reform movements overlapped considerably. EDSALL, *supra* note 31, at 57-58, 67-69.

34. See THE SIX POINTS OF THE PEOPLE'S CHARTER, *reprinted from* an 1837 handbill, in *BRITISH WORKING CLASS MOVEMENTS: SELECT DOCUMENTS, 1789-1875*, at 352 (G.D.H. Cole & A.W. Filson eds., 1951). An even more radical demand for female suffrage gained little support. TAYLOR, *supra* note 24, at 270-72.

35. Witnesses before the Sadler Committee complained that young girls brought up working in factories never acquired domestic skills. These "factory dolls" were unsuited for domestic life. REPORT FROM THE SELECT COMMITTEE ON THE BILL TO REGULATE THE LABOUR OF THE CHILDREN IN THE MILLS AND FACTO-

The terms of the debate became expressly gendered. In 1844, the Tory evangelical reformer Lord Ashley opened the parliamentary debate by moving to amend a government twelve hour bill to a version limiting the hours of young people and adult women to a maximum of ten.<sup>36</sup> In the speeches that followed, reformers spoke of the exceptional nature of women and their special need for protection.

Lord Ashley denounced the impact of long hours in the factory on female workers, their families, and on relationships between the sexes:

But Sir, look at the physical effect of this system on the women. See its influence on the delicate constitutions and tender forms of the female sex. . . .

. . . .

Where, Sir, under this condition, are the possibilities of domestic life? How can its obligations be fulfilled? Regard the woman as wife or mother, how can she accomplish any portion of her calling? And if she cannot do that which Providence has assigned her, what must be the effect on the whole surface of society?<sup>37</sup>

He condemned the physical effects that undermined the constitution of females and caused severe injury in a state of pregnancy.<sup>38</sup>

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RIES OF THE UNITED KINGDOM, 2 BRITISH PARLIAMENTARY PAPERS, INDUSTRIAL REVOLUTION: CHILDREN'S EMPLOYMENT 21 (1831-32 sess.) (Irish Univ. Press Series) [hereinafter SADLER COMMITTEE REPORT].

The first "protective" legislation, banning women from underground work in the mines, went through "at railroad speed" in 1842. ANGELA V. JOHN, *BY THE SWEAT OF THEIR BROW: WOMEN WORKERS AT VICTORIAN COAL MINES* 12 (2d ed. 1984). Although the parliamentary debate on the Mines Act rehearsed some of the arguments to follow, the story told in this article is that of the factory reform movement. See, e.g., 63 *PARL. DEB.* (3d ser.) 1328-29 (1842). Lord Ashley condemned the practice of half-naked girls and even pregnant women engaging in "horsework," chained and harnessed to carts they hauled underground in the mines. *Id.* Opposition to regulation came on the grounds that the principles of political economy were sacrosanct. See, e.g., 65 *PARL. DEB.* (3d ser.) 571-72 (1842).

For preindustrial restrictions on apprenticing women to a skilled craft in Britain, see B.L. HUTCHINS, *WOMEN IN MODERN INDUSTRY* 13-14 (1915). The first women's hours law in the United States was enacted in Ohio in 1852. JUDITH A. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* 32 (1978).

36. 73 *PARL. DEB.* (3d ser.) 1074 (1844).

37. *Id.* at 1089, 1092; cf. *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding, during the heyday of *Lochner v. New York*, 198 U.S. 45 (1905), a ten hour limit for women's hours because absolute liberty of contract may be limited for women, who were thought to be weaker and more dependent than men). On the gendered nature of *Muller*, see Becker, *supra* note 6; Nancy Erickson, *Muller v. Oregon Reconsidered*, 30 *LAB. HIST.* 228 (1989).

38. 73 *PARL. DEB.*, *supra* note 36, at 1093.

Children were left with child minders who dosed them with opium to quiet them.<sup>39</sup> Miscarriage and varicose veins plagued the women; even married women resorted to the practice of abortion.<sup>40</sup> Adverse social and moral consequences resulted as well. Factory women did not know how to make or mend their husbands' shirts.<sup>41</sup> Factory work encouraged a thirst for strong drink in the women and impaired their modesty as a result of working with the men for so many hours.<sup>42</sup> Lord Ashley further deplored how the mills often dispensed with the labor of men in favor of that of women and children, leaving the men to "ramble about the streets unemployed."<sup>43</sup> The reformer's speech raised a final issue "deserving of serious attention:"

[T]he females not only perform the labour, but occupy the places of men; they are forming various clubs and associations, and gradually acquiring all those privileges which are held to be the proper portion of the male sex. These female clubs are thus described: — Fifty or sixty females, married and single, form themselves into clubs, ostensibly for protection; but, in fact, they meet together, to drink, sing, and smoke; they use, it is stated, the lowest, most brutal and most disgusting language imaginable. Here is a dialogue which occurred in one of these clubs, from an ear witness: — "A man came into one of these club-rooms, with a child in his arms; 'Come lass,' said he, addressing one of the women, 'come home, for I cannot keep this bairn quiet, and the other I have left crying at home.' 'I won't go home, idle devil,' she replied, 'I have thee to keep, and the bairns too, and if I can't get a pint of ale quietly, it is tiresome. This is the only second pint that Bess and me have had between us; thou may sup if thou likes, and sit thee down, but I won't go home yet.' Whence is it that this singular and unnatural change is taking place? Because that on women are imposed the duty and burthen of supporting their husbands and families, a perversion as it were of nature, which has the inevitable effect of introducing into families disorder, insubordination, and conflict. What is the ground of which the woman says she will pay no attention to her domestic duties, nor give the obedience which is owing to her husband? Because on her devolves the labour which ought to fall to his share, and she throws out the taunt, 'If I have the labour, I will also have the amusement.'" The same mischief is taking place between children and their parents . . . .<sup>44</sup>

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39. *Id.* at 1093-94.

40. *Id.* at 1093.

41. *Id.* at 1093-94.

42. *Id.* at 1095.

43. *Id.* at 1095-96.

44. *Id.* at 1096.

This speech by the parliamentary leader of the Ten Hours movement portrays a factory world in which the relations between the sexes have been turned upside down. In addition to the physical ills suffered peculiarly by females, Ashley spoke eloquently of social and moral evils that followed from women's work in the factories. The proposed bill, of course, was not meant to eject women entirely from the industrial workforce. But, the reformer justified shortening the hours of female labor by raising the specter of a system which purportedly idled men and paid excessive wages to women, permitting them to develop an unnatural independence.

The opponents of Ten Hours, by contrast, de-emphasized the different qualities of female labor. Their answer to the indictment of a social system gone awry was a defense of the principles of political economy, a view associated with the new middle class. In his elucidation of that economic and political philosophy, David Ricardo wrote that labor was a commodity that, like all other things which are purchased and sold, "has its natural and its market price."<sup>45</sup> Wages rose and fell roughly with the laws of supply and demand. In order to best procure the happiness of the community, wages, like all other contracts, "should be left to the fair and free competition of the market, and should never be controlled by the interference of the legislature."<sup>46</sup> Any misguided effort to interfere was bound to deteriorate the conditions of both rich and poor.<sup>47</sup>

Influenced by these beliefs, opponents of the Ten Hours bill rose in Parliament to warn of the disastrous effects of *any* regulation of labor on Britain's ability to compete with foreign manufacturers.<sup>48</sup> While proponents of reform argued that intervention in order to protect women was justified because they occupied a different place in the labor market, opponents believed that adult women were no different in this respect than men. Sir James Graham, who was prepared to accept a twelve hour limit but not a ten hour day for women, noted the novelty of the intervention on behalf of adults, calling it a "restriction questionable on principle, and an exception to all legislation on such subjects."<sup>49</sup>

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45. DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY* (2d ed. 1819), in J.F.C. HARRISON, *SOCIETY AND POLITICS IN ENGLAND, 1780-1960*, at 139 (1965).

46. *Id.* at 143-44.

47. *Id.* at 144 (speaking about the old Poor Laws).

48. 73 *PARL. DEB.*, *supra* note 36, at 1108-09.

49. *Id.* at 1378.

Graham's view contrasted sharply to Lord Ashley's, who opined that although adult women might have been free agents in theory, "in practice they were no such thing."<sup>50</sup> The reformers believed that adult women were not able to take care of themselves and resist the temptations of excessive labor.<sup>51</sup> Opponents of regulation, on the other hand, insisted that mature women had a right to make their own bargain, relying on their own judgment or on the tenderness of their husbands.<sup>52</sup> As true proponents of political economy, the free market advocates believed that an adult woman was no different than any man who had to work in a factory.<sup>53</sup> Conceding that it was all very nice to talk about the domestic sphere, parliamentary opponents of Ten Hours for women observed that the working class still needed to work for their subsistence.<sup>54</sup> In other words, economic laws dictated that *all* working-class people, male and female alike, had to labor. By contrast to the alternatives available in agriculture, factory work could even be considered favorable for female workers.<sup>55</sup> Defenders of laissez-faire for women's labor noted that at least factory work was warm, comfortable, and did not require any exertion except continuous attention.<sup>56</sup> Thus, the opponents of Ten Hours rejected the argument that working-class women were exceptional and therefore should be exempted from the general rule that each laborer was to make his or her own contract with the owners free of any interference or protection from the state. The final basis for opposition, and perhaps the most important argument, was that this effort to regulate women's work really amounted to an attempt to improperly interfere with the labor of adult males as well by effectively shutting down the factories.<sup>57</sup>

Even in the parliamentary speeches, where the debate was framed largely in terms of women's special role, there were other subtexts.<sup>58</sup> But the broader class themes of the Ten Hours movement were clearest outside the confines of Parliament, in the words addressed to the working-class supporters of the Short

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50. *Id.*

51. *Id.*

52. *Id.* at 1395, 1403.

53. *Id.* at 1377-78.

54. *Id.* at 1121-22.

55. *Id.* at 1106.

56. *Id.*

57. *Id.* at 1111.

58. For example, Members argued over the point of whether reducing hours would also reduce earnings, or whether it was a strategy designed to raise the *rate* of wages by withholding some of the supply of labor. *See, e.g., id.* at 1381, 1384, 1393.

Time Committees. There, one could find the fullest expression of an alternative vision to the masters' view of the industrial system and to the liberal principles of political economy.<sup>59</sup> In 1841 John McDouall, reformer, Chartist doctor, and parliamentary candidate, published a continuing analysis and condemnation of "The Modern Factory" in his newspaper.<sup>60</sup> He asserted that the adult laborer was no more a "free man" than the child piecer or woman "factory slave."<sup>61</sup> When labor must be sold to the capitalist, and the worker was bound to the rules of the mill, McDouall asked, is that not slavery?<sup>62</sup> The laborer was free to leave only to another mill and to another master, he continued. Wages were not enough to eat, to dress, or to save for old age.<sup>63</sup> According to McDouall, labor was sold for lower than its worth and for even lower than the labor of slaves because the master had no interest except in getting work at the lowest price.<sup>64</sup> Any adult was in fact a "slave to the powers of the law, and the wages of his master. He is not a free labourer."<sup>65</sup>

John Fielden, the radical manufacturer and latter-day leader of the Ten Hours movement in Parliament, similarly indicted the factory system in a speech which the Central Short Time Committee of Manchester republished in pamphlet form.<sup>66</sup> He condemned both the factory system and the laissez-faire assumptions about the labor of so-called "free agents":

Here, then, is the 'curse' of our factory-system: as improvements in machinery have gone on, the 'avarice of masters' has prompted many to exact more labour from their hands than they were fitted by nature to perform, and those who wished for the hours of labour to be less for all ages than the legislature would even yet sanction, have had no alternative but to conform more or less to the prevailing practice, or abandon

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59. See, e.g., Gray, *supra* note 19 (arguing that factory reform language embodied alternative notions of moral economy and a theory of political economy).

60. John McDouall, *The Modern Factory System*, MCDOUALL'S CHARTISTS J. & TRADES ADVOC., May 15-Aug. 28, 1841, reprinted in RADICAL PERIODICALS OF GREAT BRITAIN, PERIOD I: PROTEST LITERATURE OF THE INDUSTRIAL REVOLUTION 53 (Greenwood Reprint Series) [hereinafter RADICAL PERIODICALS].

61. John McDouall, *The Modern Factory System*, MCDOUALL'S CHARTISTS J. & TRADES ADVOC., July 10, 1841, reprinted in RADICAL PERIODICALS, *supra* note 60, at 115.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. CENTRAL SHORT TIME COMM. OF MANCHESTER, A SELECTION OF FACTS AND ARGUMENTS IN FAVOUR OF THE TEN HOURS' BILL, AS REGARDS ITS PROBABLE EFFECTS ON COMMERCE AND WAGES, IF UNIVERSALLY ADOPTED 21 (1845).

the trade altogether. This has been the case with regard to myself and my partners. . . .

The Legislature has always assumed, that it is wrong in principle to interfere with the labour of adults, whom they call 'free agents,' and every Act they have ever passed, previous to that of 1833, bears witness against them, that rather than do this, they will allow the sacrifice of children. . . .

Let us see, then, whether the *adults* employed in factories are more 'free' than the slaves in the colonies, for whose protection, it should never be forgotten, the same Parliament of 1833, passed an Act to limit the time of employment to forty-five hours in the week, an Act which no one has yet attempted to repeal. What a pity that these 35,000 factory children happen to be white instead of black!<sup>67</sup>

With a great sense of the irony involved, Fielden compared the parliamentary concern to protect slave laborers in the colonies, with its indifference to the plight of "free" laborers in England of all ages, who had no protection from entering into contracts to work excessive hours.

Fielden blamed this lack of concern on greed. The issue, he said, is " 'Mammon against Mercy'."<sup>68</sup> Unlike he and his partners, some millowners sought to get the last ounce of labor out of their workers. He asked whether the factory masters would "allow their work-people to thrive with them, by allowing them to participate in the advantages arising from improvements which their ingenuity, their skill, and their labour have introduced," or would they continue to permit one part of the community to toil excessively while others starve in the poorhouse?<sup>69</sup>

McDouall and Fielden indicted a factory system which sacrificed all its laborers, young and old, female and male, on the altar of maximum profit, and refused to share with them any of the benefits of progress. These views demonstrate why historians have long believed that, for all their talk about the need to protect vulnerable female workers, the male operatives of the Short Time Committees were merely strategically "hiding behind women's petticoats."<sup>70</sup> Starting with Marx and continuing through recent times, students of British labor history portrayed the Ten

67. *Id.* at 17, 21 (emphasis added).

68. *Id.* at 25. Mammon represents riches or avarice, personified as a false god in the New Testament. *Matthew* 6:24; *Luke* 16:9, 11, 13.

69. *Id.*

70. O. JOCELYN DUNLOP & RICHARD D. DENMAN, *ENGLISH APPRENTICESHIP AND CHILD LABOUR: A HISTORY* 295 (1912); see also Wally Seccombe, *Patriarchy Stabilized: The Construction of the Male Breadwinner Wage Norm in Nineteenth-Century Britain*, 11 *SOC. HIST.* 53, 72 (1986) (citing R. STRACHEY, *THE CAUSE: A*

Hours movement in terms of its class-based agenda. Moreover, these observers believed that the Ten Hours movement accomplished its goal in 1847: the working-class demand for a normal working day began to prevail over the masters' laissez-faire version of political economy.<sup>71</sup> As a result of this perspective, few traditional labor historians considered or evaluated the significance of the sex-specific form that this victory assumed.<sup>72</sup>

### C. *The Lessons of the Ten Hours Movement: Class First or Sex First?*

In the 1970s, a new breed of historian brought fresh insights to the study of the Ten Hours movement. This was as much a political as an intellectual development. As late as 1969 when female historians of the Left called for a meeting of those interested in "women's history" at the premier forum for labor history in Britain, the Ruskin History Workshop, they were greeted derisively with "gusts of masculine laughter."<sup>73</sup> The women persevered and held the first National Women's Liberation Conference at Ruskin in 1970.<sup>74</sup> Trained in a British socialist tradition of labor history, these women also were exposed in the 1970s to an American import, a "breath-takingly audacious un-

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SHORT HISTORY OF THE WOMEN'S MOVEMENT IN GREAT BRITAIN 53 (1928 ed.) (1979), as the source of the "pithy phrase"); WALBY, *supra* note 14, at 117.

71. WALBY, *supra* note 14, at 102 (citing KARL MARX, CAPITAL 283 (1954) ("The creation of the normal working day is, therefore, the product of a protracted civil war, more or less dissembled, between the capitalist class and the working class.")); Seccombe, *supra* note 70, at 74 (stating that socialists from Marx and Engels to the Fabian Webbs hailed the Factory Acts as an unmitigated victory for the working class and downplayed the exclusion of women); see also Valverde, *supra* note 18, at 619 (stating that the Whig/Labour interpretation portrayed factory reform as a "glorious step in the forward march of labour").

In light of recent efforts by British industry to eliminate vestiges of protective legislation (in the name of civil rights for women!), Angela Coyle has noted that historically the factory acts represented social recognition of a socially defined working day. Angela Coyle, *The Protection Racket?*, 4 FEMINIST REV. 1 (1980).

72. See Valverde, *supra* note 18, at 620 (arguing that the "masculinist cast" of the 1830s and 1840s movement was "seldom noticed" by "male historians who uncritically identify with the male artisans of the period" but which has now become the "focus for socialist-feminist analysis of the period").

In the early twentieth century, however, some female historians argued that it would be a mistake to wholly dismiss the views of middle-class feminists outside the labor movement who condemned the exclusionary strategy followed by so many trade unions. See, e.g., BARBARA DRAKE, WOMEN IN TRADE UNIONS (1924).

73. Sally Alexander, *Women, Class and Sexual Differences in the 1830s and 1840s: Some Reflections on the Writing of a Feminist History*, 17 HIST. WORKSHOP 125, 127 (1984).

74. *Id.*



derstanding of the relations between the sexes in history," centering on the concept of "patriarchy."<sup>75</sup> Thereafter, these historians struggled to reconcile their socialist and their feminist analyses.<sup>76</sup>

As a result of that effort, over the last twenty years serious deficiencies in the standard account of working-class activism in early nineteenth century England were identified. It became clear that the significant gendered aspects of these battles were overlooked. Marianna Valverde, for example, charged that male historians generally failed to note the "distinctly masculinist cast" that characterized the workers' organized response to the social and economic stresses of the 1830s and 1840s.<sup>77</sup> She notes that male mulespinners, who were able to emerge as the most highly paid and best organized operatives in the cotton mills despite the fact that they could claim no traditional craft skill, achieved this in part by excluding women from their union and training programs.<sup>78</sup> Working-class representatives also put forth a new demand for a male breadwinner "family wage," sufficient to support the family without women's work.<sup>79</sup> Finally, especially in the 1840s, the factory reformers waged their "short time" campaign in expressly gendered terms. After all, this was a fight over *women's* work.

Such attention to gender has led some analysts to reevaluate the strategy and accomplishments of the Ten Hours movement.<sup>80</sup> Sociologist Sylvia Walby, for example, clearly believes that the talk about women's hours was more than an incidental effort to hide behind female petticoats in an era of unrelieved *laissez-faire*. She concludes there was an invidious sex purpose at work as well: "This so-called 'protective' legislation was an important attempt to maintain and reinforce the patriarchal structuring of

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75. *Id.* at 128 (commenting on the influence of American radical feminists Shulamith Firestone and Kate Millett).

76. *Id.* at 128-29.

77. Valverde, *supra* note 18, at 620-21.

78. *Id.*

79. See Seccombe, *supra* note 70, at 72.

80. See, e.g., Robert Gray, *Factory Legislation and the Gendering of Jobs in the North of England, 1830-1860*, 5 GENDER & HIST. 56, 74-75 (1993) (stating that a gendered form of factory reform agitation helped shape cultural definitions of work in an industrial society); Seccombe, *supra* note 70, at 72-73 (arguing that the economic interests of male operatives and their own "patriarchal vision" led them to lump women and children together); Valverde, *supra* note 18, at 620 (noting that the rhetoric of male operatives suggests not only class strategy, but also a strategy in gender struggle).

society, and attempts to construe it as benign and progressive are misplaced. It enforced, rather than diminished gender inequality because of its impact on the position of women in paid work."<sup>81</sup> This is strong condemnation considering that Walby believes that occupational segregation in the labor market is one of the chief sources of women's oppression.<sup>82</sup>

Walby argues that the Ten Hours movement was propelled by an alliance with important patriarchal elements; both the bourgeois humanitarians who led the parliamentary movement, and the male operatives, drew on patriarchal attitudes.<sup>83</sup> She contends that the male workers wished to reestablish a patriarchal order in the family which they saw threatened by women's waged labor in the factories; they wanted to remove women from competition for jobs in the factories; *and* they also sought a shorter normal workday for all laborers.<sup>84</sup> Although the men were not sufficiently organized to exclude the women entirely from cotton textiles, Walby concludes that their efforts successfully structured which jobs were to be defined as "male" and which as "female."<sup>85</sup>

Heidi Hartmann's influential article in *Signs* in 1976 also proposed that occupational segregation lay at the root of patriarchal oppression and male workers were in part responsible for the creation of a gender hierarchy.<sup>86</sup> Contrary to Frederick Engels and the socialist view that *capitalism* produced the unequal relations between the sexes,<sup>87</sup> Hartmann argued that *patriarchy*

81. WALBY, *supra* note 14, at 100.

82. *Id.* at 1-2.

83. *Id.* at 112-18. Elsewhere, Walby defines "patriarchy" as a "system of social structures and practices in which men dominate, oppress and exploit women." SYLVIA WALBY, *THEORIZING PATRIARCHY* 20 (1990). She states that it is composed of six structures: "the patriarchal mode of production, patriarchal relations in paid work, patriarchal relations in the state, male violence, patriarchal relations in sexuality, and patriarchal relations in cultural institutions," all of which are relatively autonomous, but which interact upon each other. *Id.* Walby's critique of the factory reform movement is part of her study of restructuring of gender relations in employment in England, 1800-1914. WALBY, *supra* note 14, at 100-34.

84. WALBY, *supra* note 14, at 119-26.

85. *Id.* at 130-33.

86. Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, 1 *SIGNS* 137 (1976). Walby considers Hartmann an example of "dual-systems" theorists who synthesize Marxist and radical feminist theory. WALBY, *supra* note 83, at 5. These theorists insist that both capitalism and patriarchy play a role in "the structuring of contemporary gender relations." *Id.*

87. FRIEDRICH ENGELS, *THE ORIGINS OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE* (1942). Engels based his portrayal of the origins of the family and

existed first.<sup>88</sup> For Hartmann, the gender rhetoric of the factory reform movement demonstrated that male workers shared responsibility with capitalists for excluding women and promoting occupational segregation.<sup>89</sup> Perhaps this patriarchal viewpoint later led a late-nineteenth-century labor leader to deny working-class suffragists his support for women's voting rights, demurring because the women's suffragists had " 'placed sex first, but . . . we have to put Labour first in every case.' "<sup>90</sup>

Sex first or class first? Jane Humphries attacks what she calls the "patriarchy first" approach of Hartmann and Walby.<sup>91</sup> Humphries insists that the demands of the 1840s — exclusion of women from working underground in the mines and a male breadwinner's wage sufficient to support the whole family without women's work — were strategies of class and not patriarchy.<sup>92</sup> Humphries argues that the "family wage" was a "historically specific goal of working-class men and women struggling in a hostile environment for a better life."<sup>93</sup> Thus, for Humphries, the working-class family, although sometimes divided, was primarily a place of united interests, a space which nourished class consciousness.<sup>94</sup>

Of course, neither "sex first" nor "class first" are entirely satisfactory approaches.<sup>95</sup> The most thoughtful of the recent

private property in part on the anthropologist Lewis Morgan's idealized view of pre-patriarchal society.

88. Hartmann, *supra* note 86, at 138.

89. *Id.* at 139.

90. TAYLOR, *supra* note 24, at 286.

91. Jane Humphries, *Protective Legislation, the Capitalist State, and Working Class Men: The Case of the 1842 Mines Regulation Act*, 7 FEMINIST REV. 1 (1981). Sylvia Walby in turn considers Humphries' work an example of "dual-systems" theories. WALBY, *supra* note 14, at 42.

92. Humphries, *supra* note 91, at 28. For criticism of Humphries' "evidence" (i.e. that male miners opposed women's work underground even though it was not in their own economic interest to do so), see Angela V. John, *Letter*, 7 FEMINIST REV. 106, 107 (1981); Jane Mark-Lawson & Anne Witz, *From "Family Labour" to "Family Wage"? The Case of Women's Labour in Nineteenth-Century Coalmining*, 13 SOC. HIST. 151 (1988) (claiming that Humphries' argument is inaccurate because the miners' economic interests varied by region and kind of mine); see also Valverde, *supra* note 18, at 631 n.2 (characterizing Humphries' view as following Engels).

93. Humphries, *supra* note 91, at 4.

94. *Id.*

95. My own historical work has taken this position. See Oren, *supra* note 13, at 238-40. Interestingly, my work on women's standard of living for the 1860-1950 period in England has been cited by Heidi Hartmann. Hartmann, *supra* note 86, at 138 n.30, 158 n.60. Jane Humphries subsequently wrote:

There has been little empirical work on the relative appropriation of labour time from individual family members and its relation to their

analyses of the Ten Hours movement reflects a more subtle approach.<sup>96</sup> Clearly, the class conflict over factory reform was also fought out in terms of gender. The collective action of laboring families was also gendered, had a "masculinist cast,"<sup>97</sup> and constituted a reaction to patriarchal anxieties provoked by changing social relationships.<sup>98</sup> Regardless of *motive*, the factory acts undoubtedly had the *effect* of putting women into a different relationship to the state than men and also of marginalizing women's labor.<sup>99</sup> Gender and class may be mutually reinforcing systems of oppression or there may be tensions between the two modes

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relative shares in family income. The 'patriarchy first' school obtains some support from Laura Oren's essay in *Clio's Consciousness Raised: New Perspectives on the History of Women . . .*. Alone this evidence is not sufficient to sustain their argument in the face of conflicting evidence such as that cited here. Clearly this is an issue which requires more research.

Humphries, *supra* note 91, at 31.

I find this use of my work by Hartmann and Humphries somewhat ironic. I was schooled in the best Marxist social history without ever becoming a true dialectical materialist. I arrived at my conclusions about the welfare of women in laboring families after reexamining voluminous research I had already gathered in my dissertation study of casual employment (chronic underemployment) and the origins of the welfare state. I had concluded already that much of the early welfare state legislation had less to do with the endemic problems of poverty at the docks uncovered by middle-class investigators and more to do with a political agenda. With the specter of an independent labor party, it became necessary to compete for the votes of the better-off working class. Laura Oren, *The Problem of Casual Labor and the Origins of the Welfare State in England, 1889-1914* (1974) (unpublished Ph.D. dissertation, Yale University).

At the same time, feminism affected me profoundly in the 1970s, personally and intellectually. When I reexamined the same data with different questions, I saw patterns I never noticed before. My article, *supra* note 13, attempted to convey the complexity of working-class life, in which women's relatively more elastic standard of living served as a buffer for the whole family's economic survival. At the same time, however, this occurred at the expense of the women relative to the men in those families.

96. See, e.g., Gray, *supra* note 80, at 74-75 (stating that while the factory acts may not have been the only factor in promoting the exclusion of women from particular jobs, the gendered form taken by the agitation helped shape cultural definitions of work in an industrial society in an effort to restabilize patriarchy in a changing environment); Sonya O. Rose, *Gender Antagonism and Class Conflict: Exclusionary Strategies of Male Trade Unionists in Nineteenth-Century Britain*, 13 Soc. HISTR. 191, 195 (1988) (arguing that the strategies to exclude women from certain occupations reflects the complex interaction between gender and class issues); Valverde, *supra* note 18, at 620-21 (stating that the "masculinist cast" of the organized response to the stresses of the 1830s and 1840s is illustrated by the male mulespinners' exclusion of women from their union and training programs).

97. Valverde, *supra* note 18, at 620-21.

98. See Gray, *supra* note 80, at 74-75 (noting an attempt to restabilize patriarchy).

99. Alexander, *supra* note 73, at 146; see Valverde, *supra* note 18, at 631.

of social organization. The Ten Hours movement illustrates how a truly radical vision of alternative social relations between classes may be undermined by the failure to grapple with its effect on social relations between the sexes.

So ends the first tale about protection, patriarchy, and capitalism. Before this article draws a moral, it will recount the second story, a tale of corporate protection in America in the 1970s.

## II. AN AMERICAN TALE

### A. *Fetal Protection Policies in the 1970s*

One hundred and thirty years after the ten hour workday was achieved in England, corporate America initiated its own version of gender-specific regulation in the workplace. In the early 1970s, occupational health activist Dr. Jeanne Stellman predicted that women would lose jobs when industry became alarmed about the potential adverse effects of certain jobs on women's ability to have children.<sup>100</sup> Odessa Komer, Vice-President of the United Auto Workers (and later co-chair of the Coalition for the Reproductive Rights of Workers) recalled that when she first read Stellman's article, she thought it was unduly alarmist.<sup>101</sup> Events soon proved her wrong.

In the early 1970s, St. Joe Minerals Corporation had already transferred about fifteen women from production jobs at its Monaca, Pennsylvania zinc smelter after a study indicated the smelter created possible hazards to fetuses.<sup>102</sup> In 1975, the Bunker Hill Company of Kellogg, Idaho banned fertile women from employment in the lead smelter area.<sup>103</sup> In the same year, General Motors of Canada adopted a new rule barring women capable of bearing children from working in areas where they

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100. Odessa Komer, *Foreword to JEANNE MAGER STELLMAN, WOMEN'S WORK, WOMEN'S HEALTH: MYTHS AND REALITIES xvii* (1977) [hereinafter *WOMEN'S WORK*].

101. *Id.*

102. *Informal Public Hearing on Proposed Standard for Exposure to Lead, United States Department of Labor, Occupational Safety and Health Administration*, Mar. 16, 1977, at 679 [hereinafter *Lead Standard Hearings*] (testimony of Andrea Hricko) (on file with author); *A Test for Women's Job Rights*, *CHEMICAL WK.*, Mar. 12, 1980, at 58; *The Dilemma of Regulating Reproductive Risks*, *BUS. WK.*, Aug. 29, 1977, at 76.

103. Richard Severo, *Ideas and Trends: Should Firms Screen the Workplace or the Worker?* *N.Y. TIMES*, Sept. 28, 1980, § 4, at 22; *The Dilemma of Regulating Reproductive Risks*, *supra* note 102, at 76; Telephone Interview with Mary Win O'Brien, United Steelworkers of America (June 29, 1993) (on file with author).

would be exposed to airborne lead. The alternative was to move to a lower paying job.<sup>104</sup> Norma James, thirty-five years old and a mother of four children, had herself sterilized in order to keep her job.<sup>105</sup> By 1977, women at Allied Chemical's plant in Danville, Illinois, B.F. Goodrich's polyvinyl chloride facility, and Firestone's PVC operation in Pottstown, Pennsylvania had been fired, forced into lower paying jobs, or sterilized in order to keep their jobs.<sup>106</sup>

The corporate medical director at American Cyanamid's Willow Island, West Virginia lead pigment plant had "first perceived a potential problem for women of childbearing capacity who worked with toxic chemicals" as early as 1975.<sup>107</sup> So began a process which led to the implementation of an exclusionary policy in January 1978 and the sterilization of five women who worked at the plant. As a consequence, the Occupational Safety and Health Administration (OSHA) ultimately filed a charge against the company under the general duty clause.<sup>108</sup> Johnson Controls first took the position that it was the parents' primary responsibility to protect their fetuses. The company therefore required its women workers who were exposed to lead to sign a

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104. NANCY MILLER CHENIER, REPRODUCTIVE HAZARDS AT WORK: MEN, WOMEN AND THE FERTILITY GAMBLE 41-42, 68 (1982); SOCIETY FOR OCCUPATIONAL AND ENV'T'L HEALTH, PROCEEDINGS: CONFERENCE ON WOMEN AND THE WORKPLACE 335 (Eula Bingham ed., 1977) (1976) [hereinafter *WOMEN AND THE WORKPLACE*]; *The Dilemma of Regulating Reproductive Risks*, *supra* note 102, at 76.

105. *The Dilemma of Regulating Reproductive Risks*, *supra* note 102, at 76.

106. *A Test for Women's Job Rights*, *supra* note 102, at 58; *Controversy Over Fetal Safety*, CHEMICAL WK., Jan. 10, 1979, at 18; *The Dilemma of Regulating Reproductive Risks*, *supra* note 102, at 76. At Danville, two women took janitorial jobs, two others underwent sterilization in order to get their jobs back, and, after a follow-up study showed little risk, three women returned to their jobs. Allied paid the latter women cash to compensate for their losses. *Controversy Over Fetal Safety*, *supra*, at 18.

107. OFFICE OF TECHNOLOGY ASSESSMENT TASK FORCE, REPRODUCTIVE HEALTH HAZARDS IN THE WORKPLACE 252 (1988) [hereinafter *OTA REPORT*].

108. *Id.* at 251-61; see Judith A. Scott, *Keeping Women in Their Place: Exclusionary Policies and Reproduction*, in *DOUBLE EXPOSURE*, *supra* note 1, at 180-95; Richard Lewis, *OCAW v. American Cyanamid: The Shrinking of the Occupational Safety and Health Act*, 133 U. PA. L. REV. 1167 (1985); Gary Z. Nothstein & Jeffrey P. Ayres, *Sex-Based Considerations of Differentiation in the Workplace: Exploring the Biomedical Interface Between OSHA and Title VII*, 26 VILL. L. REV. 239, 257-58 (1981); Lois Vanderwaerdt, *Resolving the Conflict Between Hazardous Substances in the Workplace and Equal Employment Opportunity*, 21 AM. BUS. L.J. 157, 167 (1983); 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 (1981). For a discussion of the general duty clause, see *infra* note 170.

kind of informed consent statement.<sup>109</sup> By 1982, however, Johnson Controls had adopted a full-blown policy of exclusion: women workers aged sixteen to fifty who could not document medical inability to bear children were barred from all jobs which exposed them to lead.<sup>110</sup>

Interestingly, the "fetus fetish"<sup>111</sup> became manifest in the chemical and heavy metal industries shortly after the companies experienced significant pressure to hire women into their highly paid and unionized labor force.<sup>112</sup> Thus, women were brought into the Bunker Hill lead smelting plant at Kellogg, Idaho in 1972 only under threat of Equal Employment Opportunities Commission (EEOC) enforcement action. Thereafter, Bunker Hill hired approximately forty-five women for production jobs in their lead and zinc smelter plants.<sup>113</sup>

Title VII and the EEOC generally lacked effective enforcement powers prior to the 1970s.<sup>114</sup> The first sex discrimination case, *Phillips v. Martin-Marietta*,<sup>115</sup> only reached the Supreme

109. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 191 (1991).

110. *Id.*; Bill Richards, *Women Say They Had to Be Sterilized to Hold Jobs*, WASH. POST, Jan. 1, 1979, at A1.

111. WOMEN'S WORK, *supra* note 100, at 179-80.

112. Lucinda M. Finley, *The Exclusion of Fertile Women From the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate, Neutral Response to an Emerging Social Problem?*, in PROCEEDINGS OF NEW YORK UNIVERSITY THIRTY-EIGHTH ANNUAL NATIONAL CONFERENCE ON LABOR 16-1, 16-7 (Richard Adelman ed., 1985) (1989); Linda G. Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981); Gary Minda, *Title VII at the Crossroads of Employment Discrimination Law and Postmodern Feminist Theory: United Auto Workers v. Johnson Controls, Inc. and Its Implications for the Women's Rights Movement*, 11 ST. LOUIS U. PUB. L. REV. 89, 98 (1992); Scott, *supra* note 108, at 181; Williams, *supra* note 108, at 649.

113. Donna M. Randall & James F. Short, Jr., *Women in Toxic Work Environments: A Case Study of Social Problem Development*, 30 SOC. PROBS. 410, 414 (1983).

114. Andrea H. Beller, *The Effects of Title VII of the Civil Rights Act of 1964 on Women's Entry into Nontraditional Occupations: An Economic Analysis*, 1 LAW & INEQ. J. 73, 79-80 (1983) (stating that new powers were given to the EEOC in 1972, and the coverage of the Act was extended to state and local governments and educational institutions). *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), also expanded the reach of Title VII beyond disparate treatment to disparate impact cases, where a facially neutral policy could nonetheless be found violative of the Act if it had a disproportionate adverse effect on a protected group. See Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987).

115. 400 U.S. 542 (1971) (remanding for determination of whether burdens of motherhood are greater than burdens of fatherhood in terms of employee absenteeism, but stating that sex plus discrimination of femaleness plus charge of school age children was prima facie violation of Title VII); see Ann Corinne Hill, *Protection of*

Court in 1971. By 1977, filings of charges under Title VII had peaked. Some observers believe that as a result, Title VII was beginning to reduce occupational segregation in the 1970s, although the gap was still enormous.<sup>116</sup> Others believe that the impact was primarily “political and ideological.”<sup>117</sup> Whichever the case, women were just breaking the employment barrier when companies began to adopt exclusionary fetal protection policies.<sup>118</sup>

Despite the increased enforcement activity, some corporate medical departments seemed strangely willing to brave the perils of violating Title VII. For example, Dr. Norbert Roberts, medical director of Exxon, stated that “we’d rather face the EEOC than a deformed baby.”<sup>119</sup> Even after Dr. Eula Bingham, Assistant Secretary of Labor for Occupational Health and Safety in the Carter Administration, warned corporate medical directors in May of 1978 that exclusion of fertile women was not an acceptable answer to concerns about workplace health, she still observed an “upsurge” of fetal protection policies.<sup>120</sup>

### B. *The Battle Over the Lead Standard*

While the stage was being set for a confrontation between Title VII and corporate exclusionary policies, industry was em-

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*Women Workers and the Courts: A Legal Case History*, 5 FEMINIST STUD. 247, 264 (1979).

116. Beller, *supra* note 114, at 75.

117. Rosalind Petchesky, *Workers, Reproductive Hazards, and the Politics of Protection: An Introduction*, 5 FEMINIST STUD. 233, 235 (1979).

118. Ronald E. Roel, *Work vs. the Womb: Despite Dangers, Workers Want Right of Choice*, NEWSDAY, Oct. 7, 1990, at 7 (quoting Mary Becker), available in LEXIS, News Library, NWSYD File; see Ronald Bayer, *Reproductive Hazards in the Workplace: Bearing the Burden of Fetal Risk*, 60 MILBANK MEMORIAL FUND Q./HEALTH & Soc’y 633 (1982); Komer, *supra* note 100, at xviii; Petchesky, *supra* note 117, at 236.

119. WOMEN AND THE WORKPLACE, *supra* note 104, at 333 (citing Phyllis Lehmann, *Women Workers: Are They Special?*, JOB SAFETY & HEALTH MAG., Apr. 1975); see also Randall & Short, *supra* note 113, at 417 (“Bunker Hill is willing to be criticized for not employing some women — but not for causing birth defects.” (quoting Dennis Brendel, Vice-President of Environmental Affairs at Bunker Hill)).

Corporate fears of deformed fetuses, however, were unsupported by available scientific evidence. See STAFF OF HOUSE COMM. ON EDUC. AND LABOR, 101st Cong., 2d Sess., REPORT ON THE EEOC, TITLE VII AND WORKPLACE FETAL PROTECTION POLICIES IN THE 1980s, 6-7 (Comm. Print 1990) [hereinafter EEOC REPORT]; OTA REPORT, *supra* note 107, at 3.

120. DOUBLE EXPOSURE, *supra* note 1, at ix; Letter from Dr. Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, to Corporate Medical Directors (May 31, 1978) (on file with author).



broiled in a fight over the promulgation of a new Occupational Safety and Health Act Permissible Exposure Limit (PEL) for lead in the workplace. Company representatives opposed OSHA's first proposal to halve the PEL. In a resounding and surprising defeat for industry, however, the final lead standard was set even lower.<sup>121</sup> More significantly, the regulation incorporated Medical Removal Protection (MRP), a provision which was promoted by organized labor and implicitly rejected the idea of limiting reproductive risks in the workplace by excluding women.<sup>122</sup> Instead, MRP provided a temporary transfer to a safer place for all workers whose lead exposure exceeded certain limits.

It was not a foregone conclusion that progressive, but male-dominated, labor unions would understand or sympathize with women's objections to being excluded from the largely male chemical and heavy metal workplace.<sup>123</sup> For example, the United Auto Workers (UAW) arrived at its anti-exclusionary policy after being educated by the first female vice-president of a major labor union, Odessa Komer. In December of 1975, Komer learned that the UAW might not oppose a General Motors exclusionary policy.<sup>124</sup> Although she could hardly believe this would happen in her progressive union,<sup>125</sup> Komer decided to prepare

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121. *Two Suits Filed Over Lead Limit*, CHEMICAL WK., Nov. 22, 1978, at 15 (stating that the most recent proposal "surprised industry because it is twice as strict as the level proposed by OSHA three years ago"). The original proposal of 100 microgram/cu meter of air was half of the then-current standard. *The Dilemma of Regulating Reproductive Risks*, *supra* note 102, at 76.

For the final standard, see *Occupational Exposure to Lead, Final Standard*, 43 Fed. Reg. 52,952, 52,963 (1978). The standard was an airborne level of 50 ug/m<sup>3</sup> averaged over an eight hour period, with a goal of maintaining the blood lead levels below 40 ug/100g. *Id.* at 52,955. An airborne "action level" of 30 ug/m<sup>3</sup> triggered removal with Medical Removal Protection provisions when blood levels were at or above 60 ug/100g or 50 averaged over the previous six months. OCCUPATIONAL SAFETY AND HEALTH, OCCUPATIONAL SAFETY AND HEALTH STANDARDS § 1910.1025(j)-(k) [hereinafter OCCUPATIONAL STANDARDS].

122. OCCUPATIONAL STANDARDS, *supra* note 121, at § 1910.1025(k). This policy contrasted with the position of the Lead Industry Association which insisted that low levels of lead uniquely threatened the reproductive health of women, who therefore should be excluded from the workplace. See *United Steelworkers of America (USWA) v. Marshall*, 647 F.2d 1189, 1257 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

123. For example, a former Cyanamid worker reported seeing a sign in the factory reading, "Save a job, shoot a woman." Roel, *supra* note 118, at 7.

124. Telephone Interview with Odessa Komer, former Vice-President of the UAW (July 8-12, 1994) (on file with author).

125. The UAW established a Women's Bureau during World War II. As early as the 1950s, the Union questioned the use of "protective" legislation as an excuse for

for the January 1976 meeting with the help of Dr. Jeanne Stellman. After waiting to see if anyone else recognized the problem with protecting the fetus by excluding women, Komer spoke. She could see the impact on the assembled male vice-presidents when she pointed out that *sperm* also was affected by lead exposure. Hearing this, her colleagues all crossed their legs protectively. By the time she finished her presentation, any support for an exclusionary policy had eroded.<sup>126</sup> Instead, a subsequent administrative letter signed by President Woodcock stated that the companies should clean up the workplace, not clean out the female workers.<sup>127</sup>

Highly placed women in the Carter Administration similarly played pivotal roles in exposing the exclusionary fallacy. Dr. Bingham, a respected health professional who enjoyed close relations with organized labor, took the lead in formulating OSHA's anti-exclusionary policy.<sup>128</sup> OSHA specifically addressed reproductive health hazards in the lead industry and rejected gender-specific corporate regulation as a solution. Whether this approach was inspired more by public health or by civil rights concerns is unclear.<sup>129</sup> The lawyers working with OSHA in 1977 were not Title VII experts.<sup>130</sup> They apparently were unaware

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discrimination against women. Women's Bureau officials were among the founding members of NOW in 1968, although they were forced to withdraw temporarily until their union could be persuaded to support the Equal Rights Amendment. SARA M. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* 230, 257-58, 277-78 (1989).

126. Telephone Interview with Odessa Komer, *supra* note 124.

127. *Id.* My thanks to Ms. Komer and to Jim Ellis in Vice-President Carolyn Forrest's office for sending me a copy of Mr. Woodcock's letter. *UAW Policy on Worker Exposure to Lead*, 28 UAW ADMIN. LETTER, Sept. 22, 1976.

128. On Bingham, see CHARLES NOBLE, *LIBERALISM AT WORK: THE RISE AND FALL OF OSHA* 188 (1986) (arguing that Bingham's appointment fit the mold of activists drawn directly from the public-interest movement). In subsequent litigation over the lead standard, Dr. Bingham successfully defended herself against charges of prolabor bias. See *USWA v. Marshall*, 647 F.2d at 1210.

129. Carin Clauss, former Solicitor of Labor, recounts that when she first heard chemical companies argue that they could fire women as a response to workplace hazards, she was horrified from a civil rights perspective. Clauss feels that Dr. Bingham taught her to be equally horrified from a *health* perspective. Telephone Interview with Carin Clauss (Dec. 14, 1993) (on file with author). Dr. Bingham maintains that personally she always saw the issue from a civil rights point of view. Telephone Interview with Dr. Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health (June 2, 1994) (on file with author).

130. For example, Carin Clauss was a career civil servant in the Labor Department, with special responsibility for Fair Labor Standards, Equal Pay, Age Discrimination in Employment Act, child labor, and wage laws issues. Telephone Interview with Carin Clauss, *supra* note 129.

that charges of discrimination against fetal protection policies had been accumulating at the EEOC for some time.<sup>131</sup> Although the EEOC was headed by the respected civil rights lawyer Eleanor Holmes Norton, at this time the civil rights agency displayed an almost diffident policy toward the dilemma of reproductive hazards of the workplace. In the promulgation of the lead standard, however, OSHA took the initiative.

Testimony at the lead standard hearings suggests reasons why class and gender politics converged in opposition to fetal protection policies. It was clear what industry wanted. The companies favored a higher permissible standard of exposure and proposed to achieve reproductive safety by biological monitoring and purging all "hypersusceptible" workers, such as women, from the workplace.<sup>132</sup> But labor, environmental, public health, and feminist witnesses closed ranks in favor of OSHA's proposed engineering and work practice control approach.<sup>133</sup> Feminists decried what they viewed as just another excuse to keep women out of jobs.<sup>134</sup> Union organizer Anthony Mazzocchi found the industry concept of changing the worker and not the workplace "incredible."<sup>135</sup> As a representative of feminist organized labor,

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131. *Id.* For the backlog of charges in 1980, see Scott, *supra* note 108, at 188.

132. See, e.g., *A Reformer's Key Aim: Protect Children*, *Bus. Wk.*, Sept. 11, 1978, at 130D (stating that there is no safe level for pregnant women). The Lead Industry Association insisted that low levels of lead threatened the reproductive health of women alone and that the only answer to the hazard was to exclude them from the workplace or counsel them out on a case-by-case basis. *USWA v. Marshall*, 647 F.2d at 1257.

133. For an explanation of OSHA's source or engineering control approach, see *Lead Standard Hearings*, *supra* note 102, Mar. 15, 1977, at 21-22, 25-26 (testimony of Grover Wrenn, Deputy Director of Health Standards for OSHA). Engineering controls are defined as those which "alter the industry's machines, processes, materials, or products to reduce lead exposure at its source." *USWA v. Marshall*, 647 F.2d at 1205 n.12. Work practice or administrative controls are those, other than personal respirators, which protect employees from the lead which does escape into the workplace. Those include rotation of employees, housekeeping and cleaning, and personal hygiene. Under Bingham's leadership, OSHA preferred to use "source controls." See NOBLE, *supra* note 128, at 189-90.

134. See, e.g., *Lead Standard Hearings*, *supra* note 102, Mar. 17, 1977, at 680 (testimony of Andrea Hricko); *id.*, Mar. 28, 1977, at 1869 (testimony of Catherine East).

135. *Making Lead as Costly as Gold*, *Bus. Wk.*, Jan. 24, 1977, at 26 (quoting Anthony Mazzocchi, Director of Citizenship and Legislation at the Oil, Chemical and Atomic Workers union, and later organizer of the Coalition for Reproductive Rights of Workers). Mazzocchi was one of three critical labor activists whose influence "folded rank-and-file discontent over work into the general movement for health and safety." NOBLE, *supra* note 128, at 72-73. Beginning in the 1960s, Mazzocchi publicized health and safety to the rank and file and to the general public,

the Coalition of Labor Union Women's (CLUW) Olga Madar testified, in words reminiscent of the famous strike for bread and roses, "We want both our jobs and our health . . . [F]ix the workplace, not the worker."<sup>136</sup>

In the lead standard controversy, women's demand for equal job opportunities coincided neatly with labor's position. Industry did not want regulatory agencies telling it how to operate its workplaces. But female and male workers alike shared a common interest in the progressive approach supported by OSHA. Feminist and labor witnesses agreed that industry should be forced to invest in the technology and engineering controls necessary to make the shop floor safe for all workers.

At the conclusion of the hearings, OSHA set the revised PEL at a surprisingly low level which was designed to afford sig-

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forged links with environmental activists, and helped persuade the AFL-CIO to commit to health and safety reform. One result was a successful campaign for the enactment of OSHA. *Id.*

136. *Lead Standard Hearings, supra* note 102, Mar. 21, 1977, at 1144 (testimony of Olga Madar).

After the Massachusetts legislature passed a law limiting the hours of children under eighteen to fifty-four hours a week, the textile corporations retaliated against this worker victory by cutting all employee hours, with a corresponding wage decrease. On January 1, 1912, the workers of the Lawrence, Massachusetts textile mills began a nine week strike. Women workers carried banners demanding "Bread and Roses" as they marched. Their belief that they fought not only for workers' rights but for the quality of life as well was later reflected in a song:

As we come marching, marching in the beauty of the day,  
a million darkened kitchens, a thousand mill lofts gray.  
Are touched with all the radiance that a sudden sun discloses,  
For the people hear us singing, 'Bread and Roses, Bread and  
Roses.'

As we come marching, marching, we battle too, for men,  
For they are women's children and we mother them again.  
Our lives shall not be sweated from birth until life closes,  
Hearts starve as well as bodies:  
Give us bread but give us roses.

As we come marching, marching, unnumbered women dead,  
Go crying through our singing their ancient songs of bread.  
Small art and love and beauty their drudging spirits knew.  
Yes, it is bread that we fight for,  
But we fight for roses, too.

As we come marching, marching, we bring the Greater Days,  
The rising of the women means the rising of the race.  
No more the drudge and idler, ten that toil where one reposes,  
But a sharing of life's glories,  
Bread and Roses, Bread and Roses.

*Bread and Roses, reprinted in ALL OUR LIVES: A WOMEN'S SONGBOOK 189 (Joyce Cheney et al. eds., 1976).*

nificant protection to reproductive health.<sup>137</sup> Conceding that this lowest feasible level achievable through source controls did not provide adequate protection against reproductive harm, OSHA also promulgated the most controversial part of the standard, MRP. MRP provided that whenever monitoring showed that an individual worker had an abnormally high blood-lead level, the employer must remove the employee from the exposed workplace to a safer job or give the employee leave. For up to eighteen months, the worker was entitled to MRP which guaranteed retention of all earnings, benefits, and seniority rights of the original job.<sup>138</sup>

In response, industry immediately launched a massive and largely unsuccessful legal challenge to the lead standard regulation.<sup>139</sup> In an opinion by Chief Judge Skelly Wright, the Court of Appeals for the District of Columbia upheld MRP, the key innovation of the lead standard.<sup>140</sup> The court found a reasonable basis for OSHA's conclusion that this provision was necessary to win the voluntary cooperation of workers with the medical surveillance and removal provisions of the standard.<sup>141</sup> The Court of Appeals also ruled that OSHA was entitled to set the PEL standard low enough to prevent reproductive health hazards.<sup>142</sup> Finally, the court held that the "feasibility" requirement of the statute permitted OSHA to set a new technological standard for the industry, as long as it was possible to achieve in good faith and the companies were given a reasonable time to comply.<sup>143</sup>

This picture of the establishment of the new lead standard is perhaps overly rosy.<sup>144</sup> The regulatory agency was not able to duplicate the success it enjoyed in the lead rule-making. Subsequently, OSHA found it very difficult to move ahead on any

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137. *USWA v. Marshall*, 647 F.2d at 1205 & n.11.

138. OCCUPATIONAL STANDARDS, *supra* note 121, § 1910.1025(k); *see USWA v. Marshall*, 647 F.2d at 1206.

139. *USWA v. Marshall*, 647 F.2d at 1228-29, 1263 n.102.

140. *Id.* at 1228-29.

141. *Id.* at 1236-38, 1263.

142. *Id.* at 1252-63.

143. *Id.* at 1262, 1264-65. For the feasibility standard of the statute, *see* 29 U.S.C. §§ 651-55 (1994).

144. *See, e.g., OSHA Lead Standard a "Success Story," Occupational Health Researcher Says*, DAILY LAB. REP., Jan. 19, 1989, at A8 (noting that although the lead standard is generally a success story, industry has not dealt with reproductive hazards and has generally excluded women); *see also* Hannah Arterian Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980) (arguing that OSHA's solution is inadequate).

other standard of significance.<sup>145</sup> The new lead standard, moreover, did not avert the upsurge of exclusionary fetal protection policies. However, the labor-feminist alliance of the lead standard hearings prefigured the more formal coalition that followed in the next stage of the struggle against fetal protection policies — Willow Island.

### C. *Willow Island: Sterilization, Coalition, Citation*

In January of 1978, after the lead hearings but nearly a year before OSHA promulgated the new lead standard, plant officials called women employees at American Cyanamid's Willow Island, West Virginia plant to two meetings.<sup>146</sup> The company announced that, starting in May, females who could not demonstrate they were surgically sterile would be excluded from eight of the plant's ten departments.<sup>147</sup> This left only two departments and janitorial positions open to the women.<sup>148</sup> By the time the policy was revised and put into effect in October, five women at Willow Island already had themselves sterilized in order to retain their higher-paying production jobs.<sup>149</sup>

The Willow Island Five ranged in age from twenty-six to forty-three. Betty Moler was twenty-seven and had one son. She told company officials that her husband already had a vasectomy, but they responded that this did not matter. Lola Rymer, age forty-three, reported that the women offered to sign waivers excusing the company from liability for any lead exposure problem. That alternative was also rejected. Rymer had three children already, one with cerebral palsy, and a husband disabled with arthritis. She was not planning to have any more children "at my age." She later said in an interview with the *Washington Post*: "But I don't think it's right that a company can tell you to do a thing like this to keep your job. I did it because I was scared and I had to have the income."<sup>150</sup> Barbara Cantwell, a divorced woman with two children, subsequently regretted going ahead with the operation: "I wish now I'd have been stronger. I didn't want to be sterile." She felt that she was pressured by the company: "When you're faced with something like this from a big company

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145. NOBLE, *supra* note 128, at 1.

146. *Controversy Over Fetal Safety*, *supra* note 106, at 18.

147. *Id.*

148. *Id.*

149. OTA REPORT, *supra* note 107, at 257.

150. Richards, *supra* note 110, at A16.

you feel powerless. But this is 1978. What do you have to do to hold a normal job and support your child?"<sup>151</sup> Joyce Elder, who worked in another unit of the plant, recalled how women workers' reproductive lives became an everyday topic of conversation at Willow Island: "We'd hear the guys smarting off about having surgery. Every day somebody had something to say about it. It was degrading . . . . And we were there for the same reason everybody else was — to support our families."<sup>152</sup> The women wanted to be able to earn a decent living without their employer intruding on their reproductive lives.

The company, however, felt justified in imposing the fetal protection policy. A spokesman denied that American Cyanamid was responsible for the sterilization of the women.<sup>153</sup> He claimed that company doctors met with the women in September when the rule was announced and told everyone that the company discouraged sterilization and did not sanction it.<sup>154</sup> Corporate medical director Dr. Robert Clyne stated that women workers did not have the right to harm their "unborn child[ren]. Cyanamid has a right to set job conditions. We have a responsibility to that unborn child."<sup>155</sup> The company wanted clear-cut management control of the workplace, including the right to pursue its preoccupation with fetuses. American Cyanamid resisted the idea that it might have to clean up the workplace, rather than exclude susceptible workers as a matter of prerogative.<sup>156</sup>

After receiving complaints from union members, Oil, Chemical and Atomic Workers (OCAW) organizer Anthony Mazzocchi went public with the Willow Island Five's sterilizations. The press broke the story early in January of 1979.<sup>157</sup> Mazzocchi told the media that American Cyanamid was trying to force wo-

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151. *Id.*

152. Deborah Baker, *Women Who Sued Cyanamid for Sexual Discrimination Say Money Wasn't the Goal*, UPI, Sept. 25, 1983, available in LEXIS, News Library, UPI File.

153. Richards, *supra* note 110, at A1.

154. *Id.*

155. *Controversy Over Fetal Safety*, *supra* note 106, at 18.

156. Marsha Berzon, counsel for UAW and the lawyer who argued *Johnson Controls* in the Supreme Court, believes it was clear that the most important thing to the women was to have their privacy. Management, on the other hand, was resistant to cleaning up the workplace. Telephone Interview with Marsha Berzon (Oct. 28 & Nov. 22, 1993) (on file with author).

157. See, e.g., *Controversy Over Fetal Safety*, *supra* note 106, at 18; Bill Richards, *Company and Union in Dispute as Women Undergo Settlement*, N.Y. TIMES, Jan. 4, 1979, at A7; Bill Richards, *Employees Allege Cyanamid Pressured for Sterilization*, WALL STREET J., Jan. 3, 1979, at 16; Bill Richards, *4 Women Assert Jobs Were*

men out of the workplace rather than clean it up.<sup>158</sup> But, he insisted that the company “has an obligation to bring the lead [exposure] to the level where it is safe for men and women” and not just fetuses.<sup>159</sup> The Willow Island women had been put to the “Draconian choice that nobody should have to make” between relinquishing either their right to have children or their jobs.<sup>160</sup>

The revelations of the sterilizations galvanized opposition to fetal protection policies. “No More Willow Islands” became a rallying cry.<sup>161</sup> In answer to OCAW’s call for support, the Coalition for Reproductive Rights of Workers (CRROW) was established and grew by “spontaneous combustion.”<sup>162</sup> More than forty-four feminist, labor, civil rights, and civil liberties organizations combined under the Willow Island banner including: the Amalgamated Clothing and Textile Workers Union, International Brotherhood of Painters and Allied Trades, International Chemical Workers Union, United Auto Workers, United Rubber Workers, United Steelworkers, Coalition of Black Trade Unionists, Coalition of Labor Union Women, American Civil Liberties Union, Center for Constitutional Rights, Center for Law and Social Policy, National Lawyers Guild, Committee for Abortion Rights and Against Sterilization Abuse, League of Women Voters, National Organization of Women, Women’s Legal Defense Fund, Alan Guttmacher Institute, and Planned Parenthood Federation of America.<sup>163</sup> CRROW’s Statement of Purpose expressed its members’ joint political response to company fetal protection policies:

[T]o resist sex-biased exclusionary policies from the outset; to push corporations to eliminate hazards affecting all workers, regardless of sex or occupation; and to devise compensatory strategies, such as voluntary ‘reproductive leave’ or transfers, with full pay and benefits for both female and male workers in jobs where hazards still exist.<sup>164</sup>

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*Linked to Sterilization*, N.Y. TIMES, Jan. 5, 1979, at A21; Richards, *supra* note 110, at A1.

158. Richards, *supra* note 110, at A1.

159. *Controversy Over Fetal Safety*, *supra* note 106, at 18.

160. Richards, *supra* note 110, at A1.

161. ACLU litigator Joan Bertin says the response came because Willow Island did not pass the “shock the conscience test.” Telephone Interview with Joan Bertin, *supra* note 9.

162. *Id.*

163. Bayer, *supra* note 118, at 634 n.1.

164. Petchesky, *supra* note 117, at 241.



While the cry of "No More Willow Islands" echoed in the press, organized groups lobbied OSHA for action.<sup>165</sup> Dr. Eula Bingham was already focusing on the fetal protection policy issue in her speeches, mostly in the context of defending the new lower lead PEL.<sup>166</sup> When OCAW requested an OSHA inspection at Willow Island,<sup>167</sup> the agency found a dirty workplace that did not even meet the old higher lead standard.<sup>168</sup> In response, Bingham's staff took a dramatic step: On October 9, 1979, OSHA cited American Cyanamid for a violation of the Act's "general duty clause," occasioned by the policy which caused the workplace hazard of sterilization of the Willow Island women.<sup>169</sup>

This was a novel and controversial use of the general duty clause.<sup>170</sup> A spokesperson for OSHA said: "I can't think of anything more harmful to the reproductive system than sterilization, can you?"<sup>171</sup> But Lee Starr, director of environmental, health, and safety affairs for Celanese Corporation thought the "real is-

165. Scott, *supra* note 108, at 188. CRROW organized a meeting which Carin Clauss and other congressional and governmental leaders attended. Telephone Interview with Carin Clauss, *supra* note 129.

166. Telephone Interview with Dr. Eula Bingham, *supra* note 129; Telephone Interview with Carin Clauss, *supra* note 129. On May 31, 1978, Dr. Bingham sent a letter to all major American corporate medical directors expressing OSHA's concern. *Controversy Over Fetal Safety*, *supra* note 106, at 18; Bill Richards, *Faceoff on Hazardous Jobs: Women's Rights, Fetus Safety*, WASH. POST, Nov. 3, 1979, at A6.

167. The union had exercised its right to request an OSHA inspection. The agency inspected Willow Island between January 4 and April 13, 1979. *Oil, Chem. and Atomic Workers Int'l Union (OCAW) v. American Cyanamid Co.*, 741 F.2d 444, 447 (D.C. Cir. 1984). OCAW participated as a party to the proceedings when American Cyanamid contested the citation.

168. Bill Richards, *Lead Level at Pigment Plant Too High, Inspectors Charge*, WASH. POST, May 6, 1979, at A17.

169. The text of the citation was as follows:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that: The employer adopted and implemented a policy which required women employees to be sterilized in order to be eligible to work in the areas of the plant where they would be exposed to certain toxic substances.

*American Cyanamid*, 741 F.2d at 447 (quoting 29 U.S.C. § 654 (a)(1) (1982)).

The plant was also cited for lead standard violations. *OSHA Puts Its Power to a Test*, BUS. WK., Oct. 29, 1979, at 162T. The women's sex discrimination complaints were pending at the EEOC. *See Cyanamid Is Charged in Sterility Case*, CHEMICAL WK., Oct. 17, 1979, at 23; Richards, *supra* note 168, at A17.

170. The general duty clause provides: "Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654 (a)(1) (1994).

171. *OSHA Puts Its Power to a Test*, *supra* note 169, at 162T.

sue is that OSHA is making new law that is not constructive."<sup>172</sup> Many in industry seemed fearful that if the agency could make these charges stick, it would try to use the general duty clause to cite companies for other health violations.<sup>173</sup>

The agency's creative use of the general duty clause soon ran into trouble. American Cyanamid fought the citation, appealing it first to the independent Occupational Safety and Health Review Commission.<sup>174</sup> OCAW intervened as a party, and CRROW, represented by attorney Carol Oppenheimer of the Center for Law and Social Policy, was permitted to intervene as a nonparty.<sup>175</sup> On July 15, 1980, an administrative law judge granted American Cyanamid summary judgment on the ground that it was economically infeasible to reduce the levels of airborne lead sufficiently to protect fetuses.<sup>176</sup> OCAW and CRROW participated in the full Commission review that followed,<sup>177</sup> but lost again, this time on another basis. By a two to one margin, and with a "stinging" dissent, the Commission ruled that "the hazard alleged by the Secretary was not the kind of hazard Congress contemplated in the Act."<sup>178</sup>

In 1984, a panel of the District of Columbia Court of Appeals including then-Judges Bork and Scalia put the final coda to the Willow Island episode.<sup>179</sup> Judge Bork's opinion drew an ideologically-bright line between what happens to employees while they are in the workplace engaged in work and what happens to them in their private lives outside of work. The court agreed with the Review Commission that "the decision to be sterilized 'grows out of economic and social factors which operate primarily outside the workplace,' and hence the fetus protection policy 'is not a hazard within the meaning of the general

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172. *Id.*

173. *Id.*

174. *Id.*

175. *OCAW v. American Cyanamid Co.*, 741 F.2d 444, 446 (D.C. Cir. 1984).

176. *Id.*

177. Marcia D. Greenberger and Nancy Duff Campell, of the Center for Law and Social Policy, appeared for CRROW; and Steven Wodka for OCAW. *American Cyanamid Co.*, 9 O.S.H. Cas. (BNA) 1596 (1981); 1981 O.S.H. Dec. (CCH) ¶ 25,338 (April 27, 1981).

178. *American Cyanamid*, 741 F.2d at 447 (citing *American Cyanamid*, 9 O.S.H. Cas. (BNA) at 1600). The dissenter on the Commission was Cottine, who had been appointed by the new administration in 1977 and had to fight a recusal motion for being too close to labor in general and OCAW's Steve Wodka in particular. See Bayer, *supra* note 118, at 640.

179. *American Cyanamid*, 741 F.2d at 449.

duty clause.'"<sup>180</sup> According to Judge Bork, any other rule would make employers susceptible to charges of maintaining a hazard whenever they adopted *any* policy which "because of employee economic incentives, left open an option exercised outside the workplace that might be harmful."<sup>181</sup> Congress may want to change this, but for now "the Act should not be read to make an employer liable for every employee reaction to the employer's policies."<sup>182</sup>

The court blithely maintained that this was not comparable to an instance in which management offered sterilization in an effort to circumvent the legal limit on lead concentration in the air. Rather, the opinion assumed the company was unable to reduce lead exposure to a level safe for *fetuses*: "The sterilization exception to the requirement of removal from the Inorganic Pigments Department was an attempt not to pass on costs of unlawful conduct but to permit the employees to mitigate costs to them imposed by unavoidable physiological facts."<sup>183</sup> According to Judge Bork, the company was not the guilty actor here. Rather, American Cyanamid merely allowed their employees to allay the costs of being born female. Despite the women's "unhappy choice," there was no remedy in the Occupational Safety and Health Act.<sup>184</sup>

Judge Bork's remarks were neither forgotten nor forgiven when he was nominated for appointment to the Supreme Court.<sup>185</sup> His opinion reflected an amazingly blind view of reality as experienced by employees in the workplace. Even ten years earlier, Dr. Bingham's more conservative predecessor at OSHA, Dr. Morton Corn, displayed a far better understanding of the exigencies of the workplace than Judge Bork's crabbed view. Dr. Corn was concerned that so-called "voluntary" pro-

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180. *Id.* For a criticism of Judge Bork's view, see Lewis, *supra* note 108, at 1180 n.78 (criticizing Judge Bork's view as a narrow interpretation which characterizes a policy, imposed by the employer as condition of employment, as external to the workplace). Compare Dr. Morton Corn's views on economic pressure to make employment choices, *infra* note 186 and accompanying text.

181. *American Cyanamid*, 741 F.2d at 459.

182. *Id.*

183. *Id.* at 450.

184. *Id.*

185. Sen. Howard Metzenbaum cross-examined Judge Bork rigorously on the OCAW opinion during the hearings on the judge's abortive nomination for the Supreme Court. *Supreme Court Nominee Bork Explains Decision on Employee Sterilization Policy and Views on Precedent*, DAILY REP. FOR EXECUTIVES, Sept. 21, 1987, at A8.

grams to ensure reproductive safety would be ineffective because economic pressure often renders employment choices involuntary.<sup>186</sup> This distinction escaped Judge Bork. Instead, his opinion is consonant with the view embraced in recent years by conservatives on the Supreme Court that there is some magical line between public and private.<sup>187</sup> On the public side of the line, causation is acknowledged, and injury may be recompensed. Anyone said to be damaged due to private economic and social influences, however, leaves the Court empty-handed of all remedy.<sup>188</sup> Inside the workplace versus outside the workplace or employer policy versus employee reaction, are merely alternate versions of the public versus private distinction. The women at Willow Island knew better. They experienced how company policy transformed their reproductive lives into matters for public comment in the workplace.<sup>189</sup> An artificially divided version of workplace reality, however, serves a purpose. It supports a refusal to interfere with the prerogatives of management. As reflected in his dicta, Judge Bork was thinking not only of gender, but more broadly about industrial policy and class interests. He was afraid that recognition of fetal protection policies which induced employees to choose to be sterilized rather than lose their jobs would undermine the employer's right to promulgate other policies that created economic incentives for workers to make harmful choices in their lives.<sup>190</sup>

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186. Dr. Morton Corn, *Job Placement of Women in the Lead Trades: The Department of Labor's Position*, in *WOMEN AND THE WORKPLACE*, *supra* note 104, at 259-61.

187. *See, e.g.*, *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (holding that the failure to protect a child from his father's abuse did not create a constitutional cause of action because it took place in the private sphere, inflicted by the child's father in the "free" world). For a criticism of this view, see Laura Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659, 696-700 (1990).

188. *See also* *Board of Educ. v. Dowell*, 498 U.S. 237 (1991) (holding that schools may be released from court supervision if any remaining segregation is a result of private economic and social choices and can no longer be traced directly to *de jure* segregation).

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

190. *OCAW v. American Cyanamid Co.*, 741 F.2d 444, 450 (D.C. Cir. 1984) (stating that approval of the fetal protection policy citation leaves employers vulnerable to charges under the general duty clause whenever workplace policies create economic incentives for employees to make harmful choices outside of the workplace).

D. *Equal Employment Regulation of Fetal Protection Policies: The Proposed Joint Interpretative Guidelines*

Even OSHA's own chief did not regard her agency's action as the entire answer to the corporate policy of exclusion. Instead, Dr. Bingham believed that fetal protection policies were at heart a problem of "job discrimination."<sup>191</sup> Indeed, the Willow Island sterilizations which provoked the OSHA citation had also given rise to a Title VII lawsuit.<sup>192</sup> But the EEOC also was not a perfect vehicle for resolving this problem by itself. The EEOC had a mixed record of dealing with complaints about exclusionary fetal protection policies. Even after charges had accumulated<sup>193</sup> and the Pregnancy Discrimination Act (PDA) amended Title VII in 1978,<sup>194</sup> the EEOC did not offer any general policy guidance on reproductive hazards in the workplace.<sup>195</sup> The

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191. Richards, *supra* note 166, at A6.

192. The ACLU filed a sex discrimination suit against American Cyanamid's Willow Island operation on behalf of OCAW and thirteen of its women members in February of 1980, even as the proposed interpretative guidelines were issued and the war of the comments began. *A Test for Women's Job Rights*, *supra* note 102, at 58. The lawsuit was settled in 1983 just as the trial was supposed to begin. The settlement included an agreement on hiring women. The part of the suit involving the sterilization allegations had already been settled. See Deborah Baker, *Women's Suit Against Cyanamid Was to Establish a Principle*, UPI, Nov. 1, 1983, available in LEXIS, News Library, UPI File.

193. The EEOC already had received as many as 40 complaints about excluding women from allegedly hazardous jobs. KENNEY, *supra* note 1, at 306; *A Test for Women's Job Rights*, *supra* note 102, at 58. Commentators have criticized the role that the EEOC played in settling the complaint by the women at Bunker Hill. See Randall & Short, *supra* note 113, at 417 (claiming that women felt pressured by the agency to accept an unsatisfactory settlement).

194. The PDA was enacted after the Supreme Court surprised observers by ruling that an employer's disability plan which provided nonoccupational sickness and accident benefits to all employees, but excluded disabilities arising from pregnancy, was *not* prohibited discrimination on the grounds of sex under Title VII. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). Rather than sex discrimination, the Court saw the disability issue as a distinction employers made between pregnant and non-pregnant persons. *Id.* at 136. Within a week of the ruling, the Campaign to End Discrimination Against Pregnant Workers, a coalition of women's rights, labor, civil rights, and public interest groups, formed to seek an amendment overturning the *Gilbert* decision. See *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 30 (1977) (testimony of Susan Deller Ross).

195. See, e.g., Pregnancy Disability Act, 44 Fed. Reg. 13,278 (1979) (guidelines); Pregnancy Disability Act, 44 Fed. Reg. 23,804 (1979) (questions and answers); Pregnancy Disability Act, 44 Fed. Reg. 58,073 (1979) (clarification of guidelines).

Marsha Berzon, who later argued the *Johnson Controls* fetal protection policy case before the Supreme Court as counsel for the United Auto Workers, was a principal drafter of the Pregnancy Discrimination Act. She recalls near unanimity on

respected Chair of the EEOC, Eleanor Holmes Norton, felt personally uneasy about the proper answer to the question of the legality of fetal protection policies.<sup>196</sup> She was suspicious of companies that excluded women “without a scintilla of evidence to support those actions.”<sup>197</sup> On the other hand, even after the passage of the PDA, Norton believed that employers *might* be able to show that exclusion of women was necessary in cases where hazards persisted for fertile women even after industry tried to clean up the workplace.<sup>198</sup>

CRROW members were also concerned about the impact of case-by-case litigation under Title VII. Such lawsuits might convey the wrong message: women want equal rights to labor in a dangerous workplace.<sup>199</sup> The Coalition therefore pressed for coordinated regulation: reproductive risks guidelines to be jointly produced by the two civil rights agencies, the EEOC and the Office of Federal Contract Compliance Programs (OFCCP), assisted by the technical guidance of OSHA.<sup>200</sup> A task force “hosted” by the Solicitor for the Department of Labor, Carin Clauss, and attended by representatives from the EEOC and the Department of Justice struggled to produce guidelines that would enjoy broad support both inside government and outside.<sup>201</sup> But the drafting process proved to be drawn out and contentious. When issued, the compromise proposed guidelines that made the regulators themselves uneasy and drew criticism from all sides.<sup>202</sup>

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following a somewhat strict equal treatment model. Any protectionist sentiment was essentially shouted down. Berzon remembers discussions about fetal protection policies and believes that the draft accounted for the issue. Telephone Interview with Marsha Berzon, *supra* note 156. The hearings on the PDA, however, focused on other debates and merely “touched” on the issue on two limited occasions. KENNEY, *supra* note 1, at 154 (discussing the testimony by Dr. Hellegers and by the U.S. Chamber of Congress).

196. KENNEY, *supra* note 1, at 308 (quoting Eleanor Holmes Norton); James W. Singer, *Should Equal Opportunity for Women Apply to Toxic Chemical Exposure?*, NAT'L J., Oct. 18, 1980, at 1753.

197. Richards, *supra* note 166, at A6.

198. *Id.*

199. Telephone Interview with Joan Bertin, *supra* note 9.

200. Singer, *supra* note 196, at 1753; see KENNEY, *supra* note 1, at 306-07.

Previously, women who had been excluded from the Firestone Rubber plant failed to persuade the EEOC, the Labor Department, and OSHA to write a joint advisory opinion on hiring discrimination against women in the rubber industry. *The Dilemma of Regulating Reproductive Risks*, *supra* note 102, at 76.

201. Singer, *supra* note 196, at 1753; Telephone Interview with Carin Clauss, *supra* note 129.

202. Singer, *supra* note 196, at 1753; see Pregnancy Disability Act, 45 Fed. Reg. 7514 (1980) (proposed rules); Pregnancy Disability Act, 45 Fed. Reg. 16,501 (1980)

No agreement was reached and the guidelines were eventually withdrawn in 1981 after the election of conservative President Ronald Reagan profoundly altered the politics of regulation.

Issued for comment February 1, 1980, the proposed guidelines represented the regulators' answer to the dilemma that troubled Norton: was there something unique about *fetal* health hazards in the workplace that justified creating exceptions to traditional employment discrimination doctrine? The guidelines contained a somewhat confused answer. In general, the interpretation would reaffirm an established Title VII analysis based on a distinction between two kinds of cases. By 1980, the Supreme Court had held that Title VII encompasses proof of two forms of discrimination: disparate treatment and disparate impact.<sup>203</sup> The theoretical base for both types is really the same: the law prescribes formal equality in employment. Members of a protected class who can perform the job must be treated the same as other employees and cannot be singled out for different treatment based on the characteristic of sex.

Procedurally, however, the two kinds of discrimination cases operate quite differently. "Treatment" cases require a showing of *intentional* discrimination, established by proof either of a facially discriminatory rule or of a neutral-sounding rule which is in fact only a pretext for intentional discrimination.<sup>204</sup> Although Title VII contains a statutory defense to intentional sex discrimination when the employer can show the gender distinction is based on a "bona fide occupational qualification (BFOQ),"<sup>205</sup> by 1980 it was well established that this affirmative defense was very strict. The employer had to show that the excluded sex could not perform the "essence of the business."<sup>206</sup> "Impact" cases, on the other hand, do not require proof of intentional discrimination.

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(correction); Pregnancy Disability Act, 45 Fed. Reg. 77,917 (1980) (response to comments); KENNEY, *supra* note 1, at 308-10; Bayer, *supra* note 118, at 643-50.

203. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971) (recognizing the two kinds of discrimination).

204. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (alternating burdens of production of evidence in a pretext case).

205. 42 U.S.C. § 2000(e)-(2)(e) (1994).

206. See, e.g., *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971) (outlining the "essence of the business" rule). *Diaz's* "essence of the business" rule was adopted by every circuit. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 301-02 (N.D. Tex. 1981). *But see* *Dothard v. Rawlinson*, 433 U.S. 321, 334, 336 (1977) (confirming that BFOQ is a very narrow defense, but upholding nonetheless a male-only requirement for guards in a violent maximum security male prison).

Rather, plaintiffs may prevail in such cases if they show that an otherwise neutral work rule has an adverse disparate *impact* on a protected group such as women.<sup>207</sup> Employers may defend against this claim by establishing a “business necessity” for the disputed work rule — *Griggs v. Duke Power Co.* further imposed a “job-relatedness” test for business necessity.<sup>208</sup> The Court ruled that in order to justify use of employment tests or qualifications which disproportionately exclude black applicants, the tests or qualifications must relate to job performance.<sup>209</sup>

The proposed Joint Interpretative Guidelines would have preserved a narrow BFOQ defense for facially discriminatory treatment (e.g., “no fertile women need apply”).<sup>210</sup> But the guidelines reflected a kind of compromise for impact cases.<sup>211</sup> Moreover, the joint task force proposed a two year period during which firms could continue to exclude women even though the only evidence available was about reproductive harm to one sex-based class alone. During that breathing spell, the companies were to conduct scientific research on the hazards posed to men.<sup>212</sup>

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207. See *Griggs*, 401 U.S. at 424.

208. *Id.*

209. *Id.* at 436. Paul Weiler argues that the Civil Rights Act of 1964 opened the “regulatory floodgates” in the workplace. He believes that the *Griggs* decision, however, introduced real change by subjecting the substance of personnel policies to legal scrutiny for the first time. After *Griggs*, employers had to justify the burdens imposed on employee groups by their tests and rules. PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990).

210. 45 Fed. Reg. 7516 (1980); Williams, *supra* note 108, at 668 (arguing that the guidelines reflect the distinction, albeit imperfectly).

211. 45 Fed. Reg. 7515 (1980). A list of nine factors established whether a neutral-sounding employer policy was “nondiscriminatory or justified.” Thus, two discrete inquiries from distinct kinds of cases were mixed: whether a facially neutral policy was a pretext for intentionally discriminatory treatment and whether a facially neutral policy with an adverse impact was justified on the grounds of business necessity. The guidelines contemplated that an employer might be able to show a danger affecting the fetus only through women and that this would make a difference in the Title VII analysis.

212. 45 Fed. Reg. 7514 (1980). Carin Clauss remembers the Justice Department taking the most conservative position in the negotiations over the proposed guidelines. They “could not accept the notion that women had complete autonomy,” and they were uneasy about taking scientific advice. But the EEOC also refused to embrace the more sweeping view later validated by the Supreme Court in *Johnson Controls*, that the language of the PDA flatly precluded a fetal hazard exception to the statutory ban on discrimination based on sex or pregnancy. Clauss says that the Department of Labor took a compromise position. The Department of Justice and the EEOC could not agree whether the correct legal analysis should be “disparate treatment” or “disparate impact,” an important distinction. Telephone Interview with Carin Clauss, *supra* note 129.



The release of the proposed guidelines unleashed a storm of public commentary.<sup>213</sup> Business interests condemned the guidelines for preferring the interests of women over fetuses, the "un-invited visitors" and hapless victims.<sup>214</sup> The companies feared potential tort liability for the injuries of these third parties whose rights could not be waived by their parents.<sup>215</sup> The U.S. Chamber of Commerce insisted that no expensive scientific research was necessary to prove the uniqueness of fetal exposure through the mother.<sup>216</sup> Furthermore, broad-based bans on fertile women were necessary because the employer might not know when a woman was pregnant.<sup>217</sup> The Chamber argued that industry should not be placed between the rock of tort liability and the hard place of equal opportunity claims.<sup>218</sup> The Chamber of Commerce also bridled at the injection of OSHA and OSHA standards into the guidelines.<sup>219</sup> In its opinion, allowing OSHA to assist in evaluation of the scientific studies was like a "fox guarding the henhouse."<sup>220</sup> The Chamber also criticized provisions in the guidelines which would allow a court to consider evidence of whether the employer had complied with OSHA regulations or attempted to protect wage rates and seniority in any necessary transfers. According to the Chamber, these provisions exceeded the authority of the EEOC.<sup>221</sup>

From the other side, the Coalition for the Reproductive Rights of Workers supported the general thrust of the guidelines, but refused to endorse them without guarantees that even the most narrowly tailored policy of exclusion would be accompanied by full economic protection for the excluded employees, that is, a provision resembling the lead standard's MRP.<sup>222</sup> They endorsed an even more active role for OSHA, asking that agency

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213. Singer, *supra* note 196, at 1753. After the guidelines appeared, critical comments by OSHA and NIOSH indicated that they still opposed the Temporary Emergency Exclusion and wanted medical removal protection. Bayer, *supra* note 118, at 643-50.

214. Bayer, *supra* note 118, at 643-44.

215. *Selected Comments Relating to EEOC Proposed Guidelines on Employment Discrimination and Reproductive Hazards*, DAILY LAB. REP., July 9, 1980, at G1, G9 [hereinafter *Selected Comments*].

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at G10.

220. *Id.*

221. *Id.*

222. *Id.* at G2, G3 (CRROW comments).

to issue a generic reproductive hazards standard as a complement to the equal employment regulation.<sup>223</sup>

The ACLU Women's Rights Project and the Oil, Chemical and Atomic Workers Union (OCAW) each took an even harder line than CRROW. Joan Bertin of the Women's Rights Project submitted separate remarks because she felt that it was unwise to compromise the equality principle in deference to "pseudo-scientific" claims about vulnerability.<sup>224</sup> She did not trust the courts to sort out the scientific issue of risk through maternal or paternal exposure. In her view, equality of employment opportunity was an absolute right (along with the equal right to safety in the workplace).<sup>225</sup>

For its part, OCAW, the union of the Willow Island women and the original convener of CRROW, found the guidelines "totally unacceptable."<sup>226</sup> OCAW concluded that it was a mistake to "graft responsibility for making medical, scientific, and engineering decisions onto an agency (like the EEOC) that is not equipped to handle such a burden."<sup>227</sup> Rather, OSHA, which had never favored exclusion as a solution, should issue a generic reproductive hazards standard, including an MRP provision.<sup>228</sup> The union feared that any policy of exclusion would set a dangerous precedent for other high risk groups and employers would find discrimination among groups of workers cheaper than controlling toxic substances by engineering controls.<sup>229</sup>

As a result of the opposition from "the corporate world demanding withdrawal of the guidelines because they went too far and pro-feminists and trade union groups demanding that they be amended and strengthened," the proposal was "extremely vulnerable" even under the best of circumstances.<sup>230</sup> The election of Ronald Reagan sealed the joint effort's fate. CRROW, whose chief mission had been to persuade the EEOC to make policy for reproductive hazards, now asked that the guidelines be withdrawn.<sup>231</sup> It was impossible to achieve agreement in the time

223. *Id.* at G3.

224. Telephone Interview with Joan Bertin, *supra* note 9.

225. *Id.*

226. *Selected Comments*, *supra* note 215, at G1 (OCAW comments by Steve Wodka).

227. *Id.*

228. *Id.*

229. *Id.*

230. Bayer, *supra* note 118, at 650.

231. Telephone Interview with Carin Clauss, *supra* note 129.

remaining for Carter's administrators and safer to pull back the guidelines than to leave them to be completed by Reagan's appointees.<sup>232</sup> EEOC Chair Eleanor Holmes Norton later explained her view: Without a consensus of scientific evidence in support of the proposal, it was considered to be virtually impossible to issue a final regulation dealing with this complex and controversial subject.<sup>233</sup> On January 13, 1981, shortly after Reagan's inauguration, the three agencies concerned withdrew the proposed guidelines on reproductive hazards, concluding again that case-by-case enforcement was the "most appropriate" method of dealing with reproductive hazard cases.<sup>234</sup> With that, CRROW's chief purpose was gone and the regulatory phase of the campaign against exclusionary fetal protection policies ended.<sup>235</sup>

#### E. *Postscript: The Meaning of Johnson Controls*

The national political and regulatory climate of the 1980s was sharply different than that of the 1970s. President Reagan broke the air controllers strike and virtually dismantled many regulatory agencies.<sup>236</sup> Because of the failure to agree on guide-

232. *Id.*

233. Letter from Eleanor Holmes Norton, former director of the EEOC, to Professor Mark Rothstein, University of Houston Law Center (July 6, 1984) (on file with author).

234. Pregnancy Disability Act, 46 Fed. Reg. 3916 (EEOC & Dept. of Labor 1981) (withdrawal of guidelines).

235. In the aftermath, Wendy Williams wrote her article, *Firing the Woman to Protect the Fetus*, a "guidelines-type article," in which she tried to incorporate the feminist perspective of CRROW. See Williams, *supra* note 108. Telephone Interview with Wendy Williams, Professor of Law, Georgetown University Law Center (Oct. 28, 1993) (on file with author).

236. For the antilabor, antiregulatory stance of the Reagan administration and the devastation of the EPA, OSHA, and NIOSH, see Wendy Chavkin, *Introduction to DOUBLE EXPOSURE*, *supra* note 1, at 10; WEILER, *supra* note 209, at 18-20.

At OSHA, Dr. Eula Bingham was succeeded by Thorne G. Auchter, a construction executive who was "committed to bring about significant changes" in the way the agency operated. BENJAMIN W. MINTZ, *OSHA: HISTORY, LAW, AND POLICY* xiii-iv (1984). Mintz had been chief of OSHA's legal division. WEILER, *supra* note 209, at 20 (claiming that the appointment of Auchter was an ideological choice). For the AFL-CIO's view of the Reagan era setbacks in OSHA, see *Statements Adopted by AFL-CIO Executive Council, Bal Harbour, Fla., Feb. 21-22*, DAILY LAB. REP., Feb. 25, 1985, at G1.

Donald Dotson was appointed to chair the National Labor Relations Board. Dotson had characterized collective bargaining as a labor monopoly which destroyed the market place mechanism. During his tenure the Board overturned some forty NLRB doctrines and developed some novel ones "almost invariably antithetical to the union position." WEILER, *supra* note 209, at 20. Brad Reynolds, who was the key official in antidiscrimination policy, took the same market approach. Paul Weiler has concluded that "all in all, in the eighties the free market in employment

lines, the EEOC entered the 1980s without a policy regarding fetal protection regulation. After 1982, now-Justice Clarence Thomas headed the EEOC. The Majority Staff of the House Committee on Education and Labor later accused Thomas' EEOC of abdicating its enforcement responsibilities and engaging in the wholesale warehousing of complaints against workplace fetal protection policies.<sup>237</sup> Right-to-life single-issue politics began to affect the national Parties and judicial support for *Roe v. Wade*<sup>238</sup> began to erode. *Webster v. Reproductive Health Services*<sup>239</sup> signaled the loss of Justice Blackmun's solid majority in favor of abortion rights. The retreat from *Roe* was clear in *Planned Parenthood v. Casey*.<sup>240</sup> In *Casey*, Justice O'Connor's view that state regulations of abortion are to be upheld unless they are found to constitute an "undue burden" on the woman's constitutional right to terminate her pregnancy prior to viability garnered the support of a critical swing bloc.<sup>241</sup>

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enjoyed a favored rhetorical position in a national administration that it had not occupied since the twenties." *Id.*

Changes at the EEOC ultimately led to charges that director (from 1982) Clarence Thomas was warehousing cases. *Regulatory Commissions: In the Twilight Zone*, NAT'L J., Apr. 25, 1981, at 753. As part of the Reagan administration's elevation of cost-benefit analysis for all regulatory agencies, in 1985 the EEOC considered giving formal recognition to a cost defense in Title VII litigation. See Brodin, *supra* note 114, at 320 n.15.

In a portent of things to come, Richard Posner was appointed to the federal bench in 1981 after years of advocating cost-benefit analysis. George M. Cohen, Comment, *Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench*, 133 U. PA. L. REV. 1117, 1117 (1985).

237. EEOC REPORT, *supra* note 119, at 2. On the warehousing, see also *Hearing of the Senate Judiciary Committee, Afternoon Session*, FED. NEWS SERVICE, Sept. 16, 1991, at Capitol Hill Hearing (Sen. Howard Metzenbaum examination of Clarence Thomas during confirmation hearings).

After the courts of appeals recognized a "business necessity" defense to the facial discrimination of fetal protection policies, the EEOC accepted that hybrid. See *EEOC's Policy Guidance on Reproductive and Fetal Hazards*, DAILY LAB. REP., Oct. 5, 1988, at D1. Meanwhile, *Johnson Controls* was pending in the Seventh Circuit. Although the agency had resisted the urgings of former Assistant Attorney General William Bradford Reynolds in 1988 that it file a brief on the company's behalf, it also did not participate at all in the litigation. *Education and Labor Democrats Urge More EEOC Action on Fetal Protection*, DAILY LAB. REP., May 7, 1990, at A3. After *Johnson Controls*, the EEOC directed its employees not to follow the opinion outside of the applicable area. *Id.* Instead, the agency adopted the reasoning of the two Reagan appointee dissenters (Judges Posner and Easterbrook). *Summary of House Education and Labor Committee Report on EEOC and Fetal Protection Policies*, DAILY LAB. REP., May 7, 1990, at E1.

238. 410 U.S. 113 (1973).

239. 492 U.S. 490 (1989).

240. 505 U.S. 833 (1992).

241. *Id.* at 874, 920-22 (Stevens, J., concurring and dissenting).

Due to this political and judicial climate, both labor and women's rights advocates faced new challenges in the 1980s.

The campaign against exclusionary fetal protection policies did not cease because of these difficulties; rather, it shifted from the regulatory arena to the courtroom. Political change and Judge Bork's decision on the OSHA citation of American Cyanamid ensured that the debate would now be argued exclusively in terms of sex discrimination. The first district court decision on a Title VII challenge came in 1980.<sup>242</sup> Thereafter, ACLU women's rights attorneys assumed the task of coordinating continued cooperation in the litigation. Joan Bertin of the ACLU asserts that the coalition litigators were "winning," at least until the Seventh Circuit's *Johnson Controls* decision.<sup>243</sup> Although other circuit courts used confusing legal theories, their rulings generally favored the plaintiffs. In *Wright v. Olin*,<sup>244</sup> for example, the Fourth Circuit improperly conflated the discrete BFOQ and business necessity defenses to disparate treatment and disparate impact cases respectively.<sup>245</sup> Although a policy excluding fertile women from the workplace treats one sex differently than the other on its face, the court did not apply the standard BFOQ defense that was applicable to treatment cases.<sup>246</sup> Instead, the *Wright* court created a special rule for fetal protection policies which effectively allowed the employer to invoke the easier business necessity defense that was generally employed where otherwise neutral rules had a disparate impact on a protected class of workers.<sup>247</sup> Even under this easier business necessity standard, how-

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242. EEOC v. Olin Corp., 24 Fair Empl. Prac. Cas. (BNA) 1646, 1658-59 (W.D.N. Car. 1980) (pattern and practice lawsuit by EEOC included these claims). Other litigation followed in the 1980s. See, e.g., Grant v. GM Corp., 908 F.2d 1303 (6th Cir. 1990); UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (en banc), *rev'd*, 499 U.S. 187 (1991); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982) (pregnant x-ray technician); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Johnson Controls, Inc. v. Fair Employment and Housing Comm'n, 218 Cal. App. 3d 517 (1990) (challenging the same policy under state statute).

243. Telephone Interview with Joan Bertin, *supra* note 9.

244. 697 F.2d at 1172.

245. The Fourth Circuit created a three-part test: a) the employer had the burden of proving that women's occupational exposure posed a significant risk to the fetus (through reputable scientific evidence); b) the employer must show that the risk exists only through exposure of the mother and not the father (not underinclusive); and c) the employer must show no less discriminatory alternatives to exclusion. *Id.* at 1190.

246. *Id.* at 1185.

247. *Id.*

ever, the Fourth Circuit outlined a higher standard of scientific proof of harm to fertile women than apparently had been offered by the company.<sup>248</sup>

*UAW v. Johnson Controls, Inc.*<sup>249</sup> ultimately took the fetal protection policy issue to the Supreme Court. The lawsuit was brought by the union against Johnson Controls, a lead battery company which had adopted an exclusionary policy in 1982. Johnson Controls won summary judgment in the trial court, and a divided court of appeals upheld en banc.<sup>250</sup> The Seventh Circuit opinion of Judge Coffey accepted the business necessity defense as appropriate because it balanced "the interest of the employer, the employee and the unborn child."<sup>251</sup> Worse still, he relied on *Wards Cove Packing Co. v. Atonio*,<sup>252</sup> an intervening decision which made it even easier to establish this defense.<sup>253</sup>

In *Wards Cove* the Supreme Court distinguished the shifting burdens of proof and production in treatment and impact cases.<sup>254</sup> Although the burden of *proof* shifted to an employer to establish a BFOQ defense to a disparate treatment claim, the same procedure did not apply in a disparate impact case.<sup>255</sup> In disparate impact cases the employer acquired the burden of production of evidence of a business necessity, but the plaintiff retained the burden of *persuasion* throughout the case.<sup>256</sup> Using that approach, instead of the employer bearing the burden of scientific research on the relative risks to offspring through women and men, the plaintiff would have to show that maternal exposure was not a unique problem.<sup>257</sup>

Judge Coffey would have further diluted the meaning of BFOQ, with untold consequences in other employment discrimination cases. Instead of a BFOQ being strictly related to job requirements, he would permit the defense to consider interests of

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248. For speculation on why the companies failed to present good scientific evidence in these cases and why they adopted the exclusionary policies in the first place in the absence of such evidence, see Joan E. Bertin, *Workplace Bias Takes the Form of "Fetal Protectionism,"* LEGAL TIMES, Aug. 1, 1983, at 18.

249. 886 F.2d 871 (7th Cir. 1989) (en banc), *rev'd*, 499 U.S. 187 (1991).

250. *Id.* at 874-75.

251. *Id.* at 886.

252. 490 U.S. 642 (1989).

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

254. *Wards Cove*, 490 U.S. at 659-60.

255. *Id.* at 658-59.

256. *Id.* at 659. This ruling was later legislatively reversed by the Civil Rights Act of 1991.

257. *Johnson Controls*, 886 F.2d at 888.

what he considered the third parties — the fetuses.<sup>258</sup> The court was determined to accommodate what it saw as real biological differences between the sexes, even in the face of evidence of reproductive (and other) hazards to *both* women and men.<sup>259</sup>

In a decision whose breadth took even the challengers by surprise, the Supreme Court reversed the Seventh Circuit, resoundingly rejecting its tortured reasoning.<sup>260</sup> Citing feminist commentators,<sup>261</sup> Justice Blackmun, who wrote for the majority, reverted to the plain language of the statute. He cut off the distorted hybrid theories that had been developed in the courts of appeals: a ban that states “no fertile woman need apply” is facially discriminatory treatment under the statute.<sup>262</sup> As a result, such a rule is only permissible under Title VII if the employer can establish a BFOQ.<sup>263</sup> That defense, moreover, must be grounded on an occupational requirement that is essential to the business of making batteries.<sup>264</sup> Finally, the majority ruled that the protection of potential fetuses is not essential to the battery business.<sup>265</sup> Female employees do not differ in their ability or inability to perform the job just because they have the capacity to become pregnant.<sup>266</sup> As a result, concern about the welfare of fetuses must be left to their parents.<sup>267</sup> The woman herself must decide the relative importance of her economic and reproductive roles.<sup>268</sup> On the other hand, Justice White's concurring opinion for four members of the Court, would have left an opening for a defense if the company could demonstrate crushing potential costs in tort liability.<sup>269</sup>

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258. *Id.* at 893.

259. Those hazards had been documented in the lead standard hearings. *See, e.g., Lead Standard Hearings, supra* note 102, March 17, 1977, at 551 (testimony of Dr. Ioana Lancranjan).

260. *Johnson Controls*, 499 U.S. at 187; *see Court Ruling on Fetal Protection Stuns Both Sides*, ATLANTA J./ ATLANTA CONST., Mar. 21, 1991, at E1; David G. Savage, *Court Rejects Limiting Jobs to Protect Fetuses*, L.A. TIMES, Mar. 21, 1991, at A1.

261. *Johnson Controls*, 499 U.S. at 206.

262. *Id.* at 197, 199-200.

263. *Id.* at 200.

264. *Id.* at 206.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at 211-19 (White, J., concurring in part and concurring in the judgment); *see also id.* at 223 (Scalia, J., concurring in the judgment) (stating that increased costs will support a BFOQ defense).

Does *Johnson Controls* just represent the mirror mistake to the Ten Hours movement? Did the Court put sex first, knowingly embracing an updated version of laissez-faire in which women are to be treated again as free agents in a free market, no different than men?<sup>270</sup> Is that what Justice Blackmun meant by these words?:

It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress [in the Pregnancy Discrimination Act, amending Title VII] has left this choice to the woman as hers to make.<sup>271</sup>

Certainly, a number of commentators received the *Johnson Controls* decision in that vein. Not surprisingly, industry called the ruling a "bittersweet victory," in which women had merely won the same right as men to work in a hazardous environment.<sup>272</sup> But the *Boston Globe* also focused on Blackmun's statement and on the freedom of women to choose whether their economic or their reproductive role was more important.<sup>273</sup> Women's historian Ruth Rosen wrote a lengthy piece for the *New York Times* entitled *What Feminist Victory in the Court?*<sup>274</sup> For Rosen, the

270. A similar fear prompted the long-time resistance of a pioneer student of occupational lead exposure of women, Dr. Alice Hamilton, to the Equal Rights Amendment. In 1942, however, she wrote the *New York Times* to say that she had changed her mind because progressive social legislation had created new state conditions on safety and health for all. Vilma R. Hunt, *Overview: Reproductive Health in the Workplace*, in *REPRODUCTIVE HEALTH POLICIES IN THE WORKPLACE: PROCEEDINGS OF SYMPOSIUM 10* (1982) (Enny C. Seabrook & David K. Parkinson eds., 1983).

271. *Johnson Controls*, 499 U.S. at 211.

272. See, e.g., Tony Mauro, *High Court Bans "Fetal Protection" Policies for Women*, GANNETT NEWS SERVICE, Mar. 20, 1991 (U.S. Chamber of Commerce statement), available in LEXIS, News Library, GNS File; *World News Tonight with Peter Jennings* (ABC television broadcast, Mar. 20, 1991) (statement by a lawyer for the U.S. Chamber of Commerce), available in LEXIS, News Library, ABCNEW File.

273. *The End of the "Fetal Protection" Ploy*, BOSTON GLOBE, Mar. 21, 1991, at 20; see also *Debate: Protect All Workers from On-The-Job Risk*, USA TODAY, Mar. 25, 1991, at 6A (stating that an employer cannot force women to choose between a job and children); Robin Robinson, *Court Decision Has Little Impact on State Industry*, TULSA WORLD, Mar. 31, 1991, at G1 (reporting that it is up to women to make the choice); *Court Right on Fetal Protection, but Does One Rule Fit All Cases?*, ATLANTA J., Mar. 25, 1991, at A12 (expressing editorial disappointment with ability for worker to make own decisions without balancing society's interest in a fetus which happens to be carried by a woman only).

274. Rosen, *supra* note 4, at A17; see also David A. Kaplan et al., *Equal Rights, Equal Risks*, NEWSWEEK, Apr. 1, 1991, at 56 (quoting Professor Mayer Freed of Northwestern Law School on how peculiar it is for women to fight for the right to expose their fetuses to lead, when doing so puts them in the same bind as men).



decision was a "dystopian nightmare" in which the real winners were the companies, who were left free to endanger their workers and who would find other ways to limit their liability.<sup>275</sup> The woman's freedom to endanger herself and her offspring was but a hollow victory. To Rosen, *Johnson Controls* merely demonstrated the inadequacy of liberal feminism and individual rights talk which failed to appeal for a safe workplace for all.<sup>276</sup>

The unusual judicial line-up in support of the ruling invalidating the company's exclusionary policies appears to lend some credence to the view that *Johnson Controls* ignores class concerns. After all, conservative Judges Posner and Easterbrook filed dissenting, albeit significantly different, opinions in the Seventh Circuit.<sup>277</sup> Contributing further to the "blurring of ideological lines,"<sup>278</sup> Justice Blackmun's majority decision in the Supreme Court clearly looked to Judge Easterbrook's lower court dissent.<sup>279</sup> Moreover, the entire Court found the company's fetal protection policy invalid, including Justice Scalia who had joined Judge Bork's appalling decision in *American Cyanamid*.

Clearly, the decision is critical to the struggle against sex discrimination. The case polarized women's rights groups and anti-abortionists. Ironically, CRROW organizer Anthony Mazzocchi initially approached right-to-life groups to join in opposition to the Willow Island sterilizations. Although some representatives attended early meetings of the coalition, organizations like the Catholic Conference of Bishops soon felt out of place in CR-

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275. Rosen, *supra* note 4, at A17.

276. *Id.*; see also Minda, *supra* note 112, at 91-93 (offering a postmodern critique of the sameness/difference analysis in *Johnson Controls*).

277. *Johnson Controls*, 886 F.2d at 902 (Posner, J., dissenting); *id.* at 908 (Easterbrook, J., dissenting). Judge Posner would not have precluded all exclusionary policies. Employers would be permitted to demonstrate the BFOQ of the cost of tort liability or of their own moral concerns under the right circumstances. *Id.* at 904-06 (Posner, J., dissenting). Judge Easterbrook took a harder line against arguments that he found to be redolent of *Muller v. Oregon's* paternalism. *Id.* at 912 (Easterbrook, J., dissenting). He believed the statute did not contemplate either the cost of cleaning up the workplace or the cost of tort liability as a defense to sex discrimination. *Id.* at 914. ACLU litigators felt that Easterbrook in particular understood the issues. Telephone Interview with Joan Bertin, *supra* note 9.

278. Linda Greenhouse, *Court Backs Right of Women to Jobs With Health Risks*, N.Y. TIMES, Mar. 21, 1991, at A1, B12.

279. *Johnson Controls*, 499 U.S. at 207 (citing *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting)).

ROW.<sup>280</sup> *Johnson Controls* became a symbol of other disagreements over reproductive rights. The American Life League, for example, deplored the decision which in their view turned motherhood into a second-class profession and women into economic robots whose paychecks were more important than their natural role as wives and mothers.<sup>281</sup> By contrast, feminists rejoiced in the implications for reproductive rights for women, as well as for employment rights.<sup>282</sup>

But *Johnson Controls* is not really about putting sex first. Neither should it be understood as a latter-day revival of the perils of laissez faire. Justice Blackmun made another statement in his majority opinion which is equally as important as the ruling that companies may not "protect" women out of their jobs. The Court held that "Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obli-

280. Richards, *supra* note 110, at A1 (noting that Mazzocchi approached right-to-life groups for the coalition). Representatives from the Catholic Conference of Bishops attended early meetings. Telephone Interview with Wendy Williams, *supra* note 235; Telephone Interview with Michael Wright, United Steelworkers of America (Dec. 6, 1993) (on file with author).

281. James Vicini, *Supreme Court Bans Fetal Protection Policies for Women Workers*, REUTERS, Mar. 20, 1991, available in LEXIS, News Library, REUNA File.

Beverly LaHaye of Concerned Women for America explained how shocked she was by the unanimous judgment, and especially by Justice Souter's vote: "This kind of opens the door for really bad decisions regarding the pro-life issue." Dawn Weyrich Ceol, *Court Says Safety Rule Is Sex Bias*, WASH. TIMES, Mar. 21, 1991, at A1, A11; see also Rita Ciolli, *Right to Choose a Job: High Court Says Danger Doesn't Justify Bar to Women*, NEWSDAY, Mar. 21, 1991, at 5 (quoting Mark Chopko, counsel to National Conference of Catholic Bishops), available in LEXIS, News Library, NEWSDY File.

282. See, e.g., the remarks of Kate Michelman, from the National Abortion Rights Action League (NARAL). She praised the decision and asked the Court to show a similar respect for choices made by women facing unintended pregnancies; she called for Congress to pass the Freedom of Choice Act. *Supreme Court: Justices Find Bias in Fetal Protection*, ABORTION REP., Mar. 21, 1991, available in LEXIS, News Library, ABTRPT File; see also *Court Ruling on Fetal Protection Stuns Both Sides*, *supra* note 260, at 1 (quoting NOW's Molly Yard: "[I]n effect this upholds the rights of women over fetal rights . . . I think this says clearly that the rights of women come first."); Carol Kleiman, *Bias Ruling Seen as Removing Hurdle for Women*, CHI. TRIB., Mar. 21, 1991, § 3, at 1 (quoting Lauren J. Sugerman, director of Chicago Women in Trades); *id.* (reporting Joan Bertin's remarks on the possible implications for right to choice); Barbara Vobejda & Frank Swoboda, *Court's Removal of Workplace Barrier Shifts Difficult Question to the Woman, Is Holding a High Paying Job Worth Risk to Unborn Children?*, WASH. POST, Mar. 21, 1991, at A14 (quoting Judith Lichtman, President of the Women's Legal Defense Fund).

Nina Totenberg reported that this was a landmark decision for women's rights advocates, that right-to-life groups were upset, and business was nervous. *MacNeil-Lehrer News Hour: Diplomat's Dilemma* (PBS television broadcast, Mar. 20, 1991), available in LEXIS, News Library, NEWSHR File.

gation to police the workplace."<sup>283</sup> With this passage in mind, the significance of the political history of the 1970s campaign against fetal protection policies becomes obvious. Corporate fetal protection was always a "bogus issue" which deflected attention from industry's unwillingness to clean up dirty workplaces.<sup>284</sup> The labor and feminist partners knew they had received only the "half-loaf" of sex equality and not the "full-loaf" of jobs and safety.<sup>285</sup> Immediately after the announcement of the decision, the ACLU was seeking assurances from OSHA that neither women nor men would be forced to accept exposure to unacceptable health risks.<sup>286</sup>

From the lead standard hearings to the Willow Island citation to the proposed Joint Interpretative Guidelines to *Johnson Controls*, two agendas ultimately converged — sex equality and worker safety. With respect to the fetal protection policy issue, formal sex equality litigation was reconcilable with and even a necessary precondition for class-based resistance to total management control of the workplace. It is necessary to clear away the false issue of excluding women before addressing the need for a safe workplace. In other contexts, however, the formal equality theory of feminist jurisprudence may not be as satisfactory, either from a class point of view or even in terms of all feminist goals.<sup>287</sup> For this reason, feminists should resist feeling

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283. *Johnson Controls*, 449 U.S. at 210.

284. *Employment, Unions View Johnson Controls Ruling as a Message to Clean Up Industry*, DAILY REP. FOR EXECUTIVES, Sept. 6, 1991, at A18. See also the remarks of Joan Bertin, ACLU's litigation coordinator, observing that *Johnson Controls* contained a twin message: industry cannot discriminate against women; and, if the hazard is in the workplace, industry must exclude the hazard, not the worker. *World News Tonight with Peter Jennings*, *supra* note 272.

285. Ellen Goodman, *Dangerous Workplace: Court Decision Removes Cloud from Real Issue*, ATLANTA J. ATLANTA CONST., Mar. 26, 1991, at A17 (quoting Phyllis Segal of N.O.W.'s LDEF).

286. Frank Swoboda, *ACLU Urges OSHA to Review Safety Rules*, WASH. POST, Mar. 22, 1991, at B3.

287. The formal equality principle of feminist jurisprudence holds that for all intents and purposes, men and women are alike and should be treated the same at law. So long as the sexes are similarly situated, they should be treated alike. See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829-32 (1990) (explaining the model of "liberal feminism"). This is the philosophy reflected in the Women's Rights Project's (WRP) constitutional attack on sex distinctions in state law, and it is the underlying assumption of Title VII. For the strategy of Ruth Bader Ginsburg and the WRP, see David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. J. 33 (1984). For an explication of the formal equality approach, see, e.g., Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982). For a discussion of some of the limits of formal equality with respect to the issue of

compelled to choose one type of jurisprudence over others.<sup>288</sup> On some issues, moreover, it may be harder to forge the kind of alliance represented in the campaign against fetal protection policies.<sup>289</sup> Even the specific victory represented by *Johnson Controls* may be somewhat illusory given today's political and business climate.<sup>290</sup>

Despite these necessary cavils, there is a positive and an important lesson to learn from the story of the campaign against exclusionary fetal protection policies. In order to develop a truly progressive response to the corporate agenda, the allies needed to develop what Rosalind Petchesky of CRROW called a "doubled vision" of the "relations of work and sex as systematically bound to each other."<sup>291</sup> Awareness of the political history that led to *Johnson Controls*, moreover, should provide guidance

pregnancy, see Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, in FEMINIST LEGAL THEORY, *supra* note 12.

288. For a discussion of the varieties of feminist jurisprudence, see Cain, *supra* note 287, at 829-41 (stating that the four schools of feminist thought are (1) liberal feminism; (2) radical feminism; (3) cultural feminism; and (4) postmodern feminism); see also KATHERINE T. BARTLETT, GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY (1993) (discussing the theories of formal equality, substantive equality, nonsubordination, women's different voices, autonomy, and nonessentialism).

289. Labor and feminists have been uneasy allies on reproductive rights issues. By 1990, although 12 international unions had finally taken pro-choice stands, the AFL-CIO would only declare its "neutrality" after spending many months "studying" the issue. Philip Dine, *Keeping Clear: Labor Leaders Avoid Taking Abortion Stance*, ST. LOUIS POST-DISPATCH, Aug. 1, 1990, at 1C.

290. Rather than change anything substantive in the workplace, the companies immediately reverted to their old "voluntary" plans and later began to seek waivers of liability from their workers. *Businesses' Week in Court, Supreme Court Strikes Down Workplace Fetal Protection Rule*, BUS. INS., Mar. 25, 1991, at 1, 4 (reporting that the National Association of Manufacturers says companies will probably ask workers for waivers of liability); *Employers Rescind Fetal Protection Policies Following Johnson Controls, but Fear Liability*, DAILY LAB. REP., Apr. 1, 1991, at A2, A3 (advising knowing waivers); *Fetal Protection Ruling Criticized by Business Community*, DAILY LAB. REP., Mar. 22, 1991, at A11 (arguing that the decision will just accelerate loss of plants to Mexico where there are few laws and lax enforcement, or will encourage the use of robotics); *Johnson Controls to Follow High Court Decision*, BUS. WIRE, Mar. 20, 1991 (stating that although it will invest in engineering controls, the company will consider going back to a voluntary policy); John S. McClenahan & Joseph F. McKenna, *A Leaden Decision for Industry?*, INDUSTRY WK., Apr. 15, 1991, at 76, 77 (reporting that the decision means a return of the voluntary policy; concerns expressed by National Association of Manufacturers about whether mother can waive liability for child). Johnson Controls put its battery operations up for sale at about the time the Supreme Court took the case. *United States Supreme Court Bans Johnson Controls Fetal Protection Policy*, BATTERY & EV TECH., Apr. 1, 1991, available in LEXIS, News Library, ZEN1 File.

291. Petchesky, *supra* note 117, at 233 (quoting feminist theorist Joan Kelly).

in the selection of the appropriate legal reading of that decision. *Johnson Controls* does not mark a return to free market laissez-faire principles in the name of sex equality. Rather, the decision holds that "Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace."<sup>292</sup>

### III. THE MORAL OF THE STORIES: WHO IS IN CHARGE AND IN WHOSE INTEREST?

There are two morals to these stories. The first is a conclusion about autonomy or agency. When women cannot or do not speak for themselves, their interests will be sacrificed to someone else's end, whether class-based or corporate. Thus, solutions such as Medical Removal Protection which put remedies directly in the hands of women themselves should be favored.<sup>293</sup>

The second is a warning about free markets and laissez-faire. When the millowners in England wanted to continue paying all their workers low wages for long hours, they emphasized their version of political economy. They spoke touchingly of the women's right to be "free agents" and make their own miserable contracts. The American companies took a different approach in adopting fetal protection policies. They spoke touchingly of their moral responsibilities to "protect" women and fetuses. But the unregulated market is not the answer to this hubris either.

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292. *Johnson Controls*, 499 U.S. at 210. Issues left open by *Johnson Controls* should be decided in this light. For example, the question of whether Title VII preempts state tort liability of an employer to an injured child born to a mother exposed to lead or chemicals on the job was not before the Court. *Id.* at 1208. Preemption of tort liability, however, became the subject of oral argument, inspiring both the majority and concurring opinions to speculate. Official Transcript of Proceedings Before the Supreme Court of the United States at 15-16, *UAW v. Johnson Controls, Inc.*, Case No. 89-1215 (provided courtesy of Joan Bertin) (on file with author). Justice Blackmun's "word about tort liability" suggested that it would be difficult for a state court to find liability on the part of the employer who complies with Title VII *in the absence of negligence*. *Johnson Controls*, 499 U.S. at 208. The concurring Justices were not as sure as the majority seemed to be that Title VII would preempt such state tort liability. *Id.* at 211 (White, J., concurring). For some suggestions for reconciling Title VII and tort liability in the wake of *Johnson Controls*, see Mary Becker, *Reproductive Hazards After Johnson Controls*, 31 *Hous. L. Rev.* 43, 88-96 (1994).

293. Compare Catharine MacKinnon's pornography ordinance which created a tort-type civil rights remedy that could be wielded by women themselves, in lieu of state criminal regulation of "obscenity." CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 163, 192, 283 n.52 (1987).

There is reason to be wary when a feminist finds herself in apparent agreement with Judges Posner or Easterbrook, or Justice Scalia, even when they uphold a Title VII claim.<sup>294</sup> These are legal thinkers who each in his own way operates from a view of the world as divided strictly between market and society and between “private” and “public.” This thinking is commensurate with the *American Cyanamid* general duty ruling that the Willow Island sterilizations were not “caused” by the company.<sup>295</sup> Judge Bork wrote the opinion for a panel which included now-Justice Scalia, concluding that the women had made individual private decisions, uncoerced in any meaningful way by the company’s fetal protection policy. Indeed, this same approach explains the disappointing line of reproductive rights cases which somewhat incredibly insists that indigent women who need medically indicated abortions are not coerced in any way by the state’s ban on the use of Medicaid funds for abortions.<sup>296</sup> Free markets and laissez faire, therefore, cannot be the correct reading of *Johnson Controls*, any more than they were a legitimate response to the class claims raised by the Ten Hours movement. The English and the American stories are worth retelling because they continue to remind us to put neither sex nor class first. Instead, we should always look through gender to class, and through class to gender.

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294. For the similarities and distinctions between these judges, see, e.g., James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171 (1986).

295. *OCAW v. American Cyanamid Co.*, 741 F.2d 444, 450 (D.C. Cir. 1984).

296. See *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde amendment’s ban on use of federal money to pay for abortions that are medically indicated except where the life of a woman is in danger or the pregnancy is a result of rape or incest). Justice Stewart stated in *Harris*:

[A]lthough government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.

*Id.* at 316.

