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UAW v. JOHNSON CONTROLS: THE SUPREME COURT FAILS TO GET THE LEAD OUT, OVERLOOKS FETAL HARM RESULTING FROM WORKPLACE EXPOSURE

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I. INTRODUCTION

UAW v. Johnson Controls, Inc.,¹ recently decided by the United States Supreme Court, has resulted in what one commentator described as "[t]he strongest and most important sex-discrimination victory in nearly 30 years."² The issue before the Court was whether an employer discriminates against unsterile women in violation of Title VII of the Civil Rights Act of 1964³ by implementing policies which prevent them from obtaining jobs that pose a threat of harm to their potential fetuses.⁴ In a unanimous decision, the Court held that the Company's sex-based fetal protection policy violated Title VII's prohibition

¹ 111 S. Ct. 1196 (1991).

² Marcia Coyle, *Fetal Protection Ruling Buys Rights Groups*, THE NATIONAL LAW JOURNAL, April 1, 1991, at 5.

³ 42 U.S.C. § 2000e2(a) (1991).

⁴ 111 S. Ct. at 1202. This case was not limited to the issue of balancing the rights of the woman against the harm facing the unborn child. Included in this class action was a male employee denied a transfer following concern for the safety of his reproductive role, a female employee who avoided the loss of her job by choosing to have herself sterilized, and a 50-year-old divorcee whose transfer resulted in reduced wages. *Id.* at 1200.

against gender discrimination.⁵ As a result of the decision, employers can no longer bar women from hazardous jobs through fetal-protection policies, except under the most extreme and narrow circumstances.⁶

This legal victory for women in the workplace, however, has seriously impacted the debate over the protection of fetal health and safety. Ever since *Roe v. Wade*⁷ established the woman's right to privacy regarding her decision to obtain an abortion⁸ and the constitutional nonrecognition of the fetus as a person,⁹ the fetus has been sacrificed in favor of the mother's rights. In *Johnson Controls*, the woman and her unborn child were once again placed as adversaries in the courtroom. The Supreme Court, in a seemingly encore presentation of *Roe*, again overlooked the harm facing the unborn child in *Johnson Controls* as it rejected the employer's fetal-protection policy as sex discrimination within the workplace. In both *Johnson Controls* and *Roe*, the Court provided favorable results for the woman at the expense of the fetus. It may well be that the Court, in its attempt to protect the woman, is practicing its own form of discrimination against the fetus.

II. APPLYING THE BFOQ DEFENSE TO FETAL-PROTECTION POLICIES

Johnson Controls is a manufacturer of batteries that utilizes lead as a primary ingredient.¹⁰ In 1982, *Johnson Controls* initiated a plan of excluding women with childbearing capacity from jobs that exposed them to high levels of lead in the manufacturing process.¹¹ The company was concerned that this

⁵ *Id.* at 1204. Justice Blackmun delivered the opinion of the Court in which Justices Marshall, Stevens, O'Connor and Souter joined. *Id.* at 1199. Justice White filed an opinion concurring in part and concurring in judgment in which Chief Justice Rehnquist and Justice Kennedy joined. *Id.* at 1210. Justice Scalia authored a separate opinion concurring only in the judgment. *Id.* at 1216.

⁶ A company must establish that its discriminatory policy falls within the strict application of the bona fide occupational qualification (BFOQ) defense. See *infra* note 14. In analyzing a BFOQ defense, the court should focus on the person's ability to do the job, not the harm it poses to third persons. See *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, 93 (1980). The Supreme Court has allowed exceptions, however, when the safety of others is threatened due to the environment of prisons, *Dothard v. Rawlins*, 433 U.S. 321 (1977), and where potential emergency situations on airlines threaten the safety of passengers. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).

⁷ 410 U.S. 113 (1973).

⁸ *Id.* at 154.

⁹ *Id.* at 156-62.

¹⁰ 111 S. Ct. at 1199.

¹¹ *Id.* at 1199-1200.

exposure to lead, which has been linked to certain health risks, would pose a danger to potential fetuses.¹² In 1984, the plaintiffs commenced legal action against the company alleging that the fetal-protection policy constituted sex-discrimination in violation of Title VII of the Civil Rights Act of 1964.¹³

Allegations of employment discrimination required the lower court to apply a two-step approach in its analysis of Johnson Controls' fetal-protection policy. First, the trial court had to determine the proper standard for evaluating the company's policy, specifically whether the bona fide occupational qualification (BFOQ) defense or the more lenient defense of business necessity should be used.¹⁴ To determine which standard should apply, the court had to focus on the result the company's policy would have on the female employees.¹⁵ If the

¹² *Id.*

¹³ *Id.* at 1200.

¹⁴ In cases of discrimination, the District Court's first inquiry should be to focus on classifying the fetal-protection policy as either disparate impact or disparate treatment in order to determine the appropriate defense to apply. The narrow BFOQ is an affirmative defense, available under Title VII, that focuses on the employee's ability to perform the job. In order to establish a successful BFOQ, the employer must show that the practice is "reasonably necessary to the normal operation of that particular business." 42 U.S.C. § 2000e2(e) (1991). Unlike the BFOQ defense, which is found in the language of the statute, the business necessity defense was established by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The business necessity defense protects an employer's discriminatory policy upon a finding that the policy is necessary to the success of the company's performance. *Id.* at 431. Courts have subsequently broadened the business necessity defense to include discriminatory policies that have a legitimate business purpose in facilitating the safe and efficient operation of the business. *See, e.g., Wright v. Olin Corp.*, 697 F.2d 1172, 1188-89 (4th Cir. 1982).

¹⁵ It is this point of the analysis that has created confusion among the various courts throughout most discrimination cases. *See Johnson Controls*, 111 S. Ct. at 1202 (describing conflicts among the Fourth, Seventh and Eleventh Circuit Courts of Appeals). The discriminatory policy or action must fall within one of the following three categories: First, disparate impact results when a protected group is significantly burdened under an employment policy which appears neutral on its face. An example of disparate impact would be a hiring policy that sets height or weight requirements which results in the automatic exclusion of one gender from consideration for the job. Second, facial discrimination focuses on employer intent and occurs when the policy treats an individual differently because that individual is a member of a protected group. Facial discrimination is apparent in *Johnson Controls* where the employer expressly prohibited fertile women from obtaining certain jobs. A third category includes the employer who does not explicitly discriminate but the results of the employer's hiring methods indicate otherwise. This type of discrimination exists when the employer has no intention of hiring from a protected group although the employer continues to accept job applications

effect of the policy is judged to result in disparate impact, then the business necessity defense would apply.¹⁶ A finding of disparate treatment, however, would impose the more difficult task of establishing the narrow BFOQ standard as prescribed by Congress.¹⁷ Once the court has established the proper standard, the second step requires the court to determine whether the employer's policy falls within that framework.

The District Court granted summary judgment to Johnson Controls, stating that because the plaintiffs failed to satisfy the three-part business necessity inquiry, there was no need to undertake the BFOQ analysis.¹⁸ The Seventh Circuit affirmed, holding that business necessity was the proper standard to use for evaluating the company's fetal-protection policy.¹⁹ The Seventh Circuit noted, however, that even if the BFOQ defense was applicable, Johnson Controls would still be entitled to summary judgment.²⁰ Due to the conflict among the various appellate courts as to the question of which standard controls, the Supreme Court granted certiorari to resolve the confusion surrounding the BFOQ defense as it applies to fetal-protection policies.²¹

In establishing that Johnson Control's practice was facially discriminatory, the Supreme Court took the proper course by applying the BFOQ. Johnson Controls had established a policy that directly targeted a particular group, the unsterile female.²² Although it has been shown that hazardous lead exposure may also create risks for the male reproductive system,²³ men were not mentioned in the company's exclusive policy. Since the company's policy was

from that group. See *Furnish*, *supra* note 6, at 87-103 (discussing Title VII defenses). See also 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, 678-703 (1981).

¹⁶ See *supra* notes 14-15.

¹⁷ See *supra* notes 14-15.

¹⁸ 111 S. Ct. at 1200. See *supra* notes 14-15 and accompanying text.

¹⁹ 111 S. Ct. at 1200-01.

²⁰ *Id.* at 1211.

²¹ *Id.*

²² *Id.* at 1203.

²³ Exposure to lead from either parent may cause genetic damage prior to conception. Since there is a greater concern for intrauterine exposure, less research has been conducted regarding paternal exposure. This lack of research provides inconclusive results concerning the effects on the fetus resulting from the male's exposure to lead. See Herbert L. Needleman & David Bellinger, *Commentary: Recent Developments*, 46 ENVTL. RES. 190 (1988). But see *infra* notes 81-89 and accompanying text (indicating the relationship between the woman's exposure and the harm to the fetus).

not gender-neutral, the business necessity defense would not be available.²⁴ Support for the company's use of the policy would thus depend upon the Supreme Court's interpretation of the BFOQ defense as it relates to fetal-protection policies. The Supreme Court has allowed discriminatory policies to qualify under the BFOQ defense upon a showing that there is a risk of harm to third parties.²⁵ An employer's fetal-protection policy, therefore, could qualify as a BFOQ if the Court expanded the defense to include the fetus as a third party.

Rather than expanding the BFOQ defense to recognize the unborn child, however, the Court limited the BFOQ defense to the narrow language provided by Congress under Title VII.²⁶ In the opinion written by Justice Blackmun, the Court concluded that discrimination based on pregnancy or childbirth within the meaning of the Pregnancy Discrimination Act (PDA)²⁷ is synonymous with sex discrimination.²⁸ Justice Blackmun relied on the language of the PDA and reasoned that it was the intention of Congress to limit the BFOQ defense in all cases of discrimination.²⁹ Although the opinion focused upon the language of the statute and the intent of Congress, the Supreme Court expressed its allowance for exceptions to the statute in previous cases,³⁰ but stated that the exception is narrowly limited to third-party safety.³¹ The majority rationalized their failure to extend the exception to the fetal-protection policy by stating that the actions of a company can only qualify as a BFOQ if the company's purported safety requirement related "[t]o the essence or to the central mission of the employer's business."³² Thus, the BFOQ's safety exception would only apply when protecting the safety of third parties is directly associated with the job performance, and not where its effect on third parties is only ancillary.

III. SUPREME COURT OVERLOOKS OPPORTUNITY TO INCLUDE THE FETUS WITHIN THE BFOQ

Three months following the decision in *Johnson Controls*, Justice Blackmun recognized the Court's power of judicial review in a concurring opinion by

²⁴ 111 S. Ct. at 1203-04.

²⁵ See *supra* note 6.

²⁶ See *supra* note 14.

²⁷ The PDA amended Title VII in 1978, indicating Congress' intention to treat women with childbearing capacity no differently for purposes of sex-discrimination. See 42 U.S.C. § 2000e(k) (1991).

²⁸ 111 S. Ct. at 1203.

²⁹ *Id.* at 1204.

³⁰ *Id.* at 1205. See also *supra* note 6 for BFOQ exceptions under the PDA.

³¹ 111 S. Ct. at 1205.

³² *Id.*

stating that "[t]his Court has the power to say what the law is, when the court changes its mind the law changes with it."³³ This power was neglected in *Johnson Controls* when Justice Blackmun's majority opinion failed to expand the BFOQ defense. The Court's strict adherence to the language of the PDA overlooked two alternatives that would have permitted fetal harm to qualify as a BFOQ.

First, *Johnson Controls* could have been distinguished from other discrimination cases arising under the PDA, thereby allowing the Court to provide another exception to the BFOQ. The Supreme Court's conclusion that the PDA was enacted to prevent discrimination based on childbirth or pregnancy is not without fault. It has been suggested that the PDA was a response by Congress to prevent future acts of discrimination that may affect a woman's interest regarding abortion.³⁴ The language of the PDA explicitly refers to abortions but is silent regarding the relationship between a woman's choice to maintain her pregnancy and the protection of the fetus.³⁵ *Johnson Controls* did not present the questions which revolve around abortion but did encompass the social concern for protecting the fetus and future generations. Congress' failure to address this issue thrust upon the judiciary the necessary task of striking a balance between fetal protection and sex discrimination. A proper balance could have been negotiated between the two interests by reevaluating the BFOQ defense and permitting the inclusion of the fetus within the BFOQ framework.³⁶

Johnson Controls provided the Supreme Court with an opportunity to draw a distinction between the facts of this case and other forms of discrimination. This case dealt with an employer whose concern for the health of the fetus, as well as the business risks associated with it, precluded unsterile women from jobs which exposed them to hazardous conditions. It may be argued that the result in *Roe v. Wade*³⁷ afforded the female the freedom of choice regarding the future of her unborn child. The precise issue and holding in *Roe*, however, focused only on the woman's right to privacy regarding her decision to have an abortion.³⁸ Though the Supreme Court held that a woman has a funda-

³³James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2451 (1991).

³⁴Furnish, *supra* note 6, at 82.

³⁵42 U.S.C. § 2000e(k) (1991).

³⁶Thus, where there is a risk of harm to the fetus, a company's discriminatory policy could still qualify under the BFOQ on the theory that a fetus is a third party whose safety is a legitimate concern to the company. Unfortunately, the Court focused only on the discriminatory impact on the woman, ignoring its responsibility to protect the fetus from risk of harm. See *infra* pp 6-8.

³⁷410 U.S. 113 (1973).

³⁸*Id.* at 154.

mental right to abort the fetus,³⁹ their decision in *Roe* no longer applies when the woman's decision is not to end, but to maintain the pregnancy. There can be no legal analogy between abortion and childbirth. The two situations necessitate segregated treatment by the courts because the argument supporting the right to obtain an abortion cannot be applicable in the context of fetal protection. Where an abortion discards any future for the fetus, a continued pregnancy may result in human life. Therefore, consideration should be given to any harm that may have a detrimental effect on that potential life.

The second alternative that would have permitted fetal-protection policies to fall within the BFOQ would have been the inclusion of the unborn child as a third party for purposes of the safety exception. Justice Blackmun's opinion clearly stated that the predominating factor to consider in determining the BFOQ is the woman's ability to safely and efficiently perform her job.⁴⁰ Yet, as Justice White pointed out in his concurring opinion, the Supreme Court has previously stated that its first inquiry under the BFOQ analysis must "[a]djust to the safety factor."⁴¹ The Court, however, indicated its unwillingness to extend the BFOQ defense by the deceptive use of the safety exception set out in *Dothard v. Rawlinson*.⁴² In *Dothard*, the Court was faced with a woman's attempt to secure a job as a prison guard, a job which would pose a danger to her safety as well as the safety of the convicts. The majority in *Dothard* stated that Title VII permits the woman to decide whether to assume the risks associated with a dangerous job.⁴³ The Court, however, applied the safety factor in establishing a BFOQ defense that supported the employer's discriminatory policy.⁴⁴ *Dothard* could have been used as the authority to

³⁹ *Id.* at 153.

⁴⁰ 111 S. Ct. at 1207.

⁴¹ *Id.* at 1212. In *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), the Court, in its analysis of the relationship between safety and age discrimination, stated that the "inquiry adjusts to the safety factor by ensuring that the employer's restrictive job qualifications are reasonably necessary." *Id.* at 413.

⁴² 433 U.S. 321 (1977).

⁴³ *Id.* at 335. The *Dothard* Court addressed the issue of whether a state policy, which set height and weight requirements and thereby limited women from obtaining positions as prison guards, violated Title VII of the Civil Rights Act of 1964.

⁴⁴ It would appear that the *Dothard* Court applied a double standard in its recognition of the BFOQ defense. Justice Marshall in his *Dothard* dissent infers the double standard when he points out that, although the Court finds it unacceptable to disqualify a woman because of the potential danger posed by the job, the majority justifies the BFOQ defense by speculating on her sexuality as a female guard. *Id.* at 342.

expand the BFOQ safety exception, but the *Johnson Controls* Court left it undisturbed, recognizing it as a narrow exception.⁴⁵

Nevertheless, *Dothard* illustrates that the Supreme Court has not always maintained strict adherence to the language of Title VII when evaluating which exceptions qualify as a BFOQ. Congress could not possibly foresee all situations and the various circumstances under which the BFOQ defense may arise. It is these unanticipated circumstances which merit reconsideration by the courts in expanding the analysis. Safety was not a factor explicitly presented within the PDA,⁴⁶ but was judicially created to provide the courts with a certain amount of flexibility for calculating the BFOQ in cases of discrimination. When faced with the choice of obtaining a job which may present health risks or reproductive dangers, the *Johnson Controls*' majority, like the *Dothard* Court, left the decision to the woman.⁴⁷ But the Court in *Johnson Controls* distinguished *Dothard*, failing to include prenatal health concerns under *Dothard*'s third-party safety factor for the purpose of establishing a BFOQ.

Accepting the Supreme Court's position in *Johnson Controls* would be to assume that the unborn child or fetus cannot be considered a third party in analyzing the BFOQ. By establishing the right of the woman to make the unfettered decision regarding the risks she takes in her job, the Court has failed to recognize the harm facing the unborn. It is a mistake to overlook the fetus as a third party for purposes of the BFOQ analysis, especially when the unborn child has historically been recognized throughout the civil and criminal courts.⁴⁸

IV. LIABILITY RESULTING FROM SUPREME COURT'S RULING

A. *Harmful Exposure and the Fetus: Criminal Neglect and Abuse?*

Women who take drugs and alcohol during pregnancy increasingly find themselves facing criminal prosecution.⁴⁹ In most of these cases the

⁴⁵ 111 S. Ct. at 1207.

⁴⁶ The language of the statute that describes the BFOQ defense reads "[r]easonably necessary to the normal operation of that particular business." U.S.C. § 2000e-2(e) (1991).

⁴⁷ 111 S. Ct. at 1210.

⁴⁸ Criminal action is being taken against women who have used drugs or alcohol during pregnancy. The courts consider the fetus as a child for purposes of the substance abuse cases. See *infra* notes 49-54 and accompanying text. Tort liability is being recognized for injuries to the child resulting from harm to the fetus prior to birth. See *infra* notes 59-63 and accompanying text.

⁴⁹ At least 50 women have found themselves faced with criminal action following the use of drugs and alcohol while pregnant. Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack Abuse,"* BROOK. L. REV. 1213, 1245 (1991).

prosecution challenges the woman's fitness as a mother in order to prove a finding of criminal neglect.⁵⁰ To establish the neglect of the mother, prosecutors introduce into evidence drug and alcohol abuse during pregnancy.⁵¹ The assumption being made by both the prosecutors and the courts in these substance abuse cases is that the fetus should be treated like a neglected or abused child.⁵² Support for these decisions is based on the theory that the child has been placed in danger as a result of the mother's prenatal conduct.⁵³

A woman's decision to take a job which poses a hazard to the fetus is not unlike the woman's decision to take drugs or alcohol during pregnancy. Both involve choices made by the woman that may present risks to the health of the unborn child. If criminal charges and convictions can be brought against the mother for substance abuse,⁵⁴ it follows that action should be taken against the woman who chooses to work in an occupation that presents these same risks to the fetus.⁵⁵

Although a mother faces criminal charges for fetal abuse in other regards, the *Johnson Controls* Court stated that "decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."⁵⁶ Perhaps the Court is suggesting that the only time a mother should be absolved from responsibility regarding the well-being of the fetus is when her decision relates to employment. But the majority further implies that economic considerations should not be used for the purpose of evaluating discriminatory policies.⁵⁷ It follows that there should exist no meaningful distinction between a woman's

⁵⁰ *Id.* at 1246-49.

⁵¹ *Id.* at 1247-50.

⁵² *Id.* at 1247-51.

⁵³ See *In re Valerie D.*, 595 A.2d 922 (Conn. App. Ct. 1991); *In re Stefanel Tyesha C.*, 556 N.Y.S.2d 280 (1990).

⁵⁴ The discovery of cocaine in the unsevered umbilical cords of two babies resulted in a woman's conviction for delivering a controlled substance to the fetuses. *Johnson v. State*, 578 So.2d 419 (Fla. Dist. Ct. App. 1991).

⁵⁵ This is not to dispute the fact that drug use is illegal and might be an improper comparison to toxic exposure on the job. Alcohol, however, is not illegal and despite warnings women may continue to consume alcohol throughout pregnancy. Although alcohol may present some risk to the fetus, it remains the woman's choice to drink alcohol. The pregnant woman who drinks may nevertheless find herself facing charges for criminal neglect. A related argument can be advanced against the woman who takes a job under conditions which may pose the same threat of harm to her fetus.

⁵⁶ *UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1207 (1991).

⁵⁷ The Court stated that additional costs associated with hiring one gender cannot justify an employer's discriminatory policy. *Id.* at 1209.

economic and social choices. According to their logic, a woman should have the same right to determine the well-being of the unborn child regardless of whether or not she is within the work place. This would mean that a woman's decision to use drugs or alcohol while pregnant would be supported under the reasoning used in *Johnson Controls*. The results in the cases dealing with substance abuse indicate that the woman does not have this choice, thus contradicting the *Johnson Controls* rationale.

Although various existing studies indicate that exposure to lead will harm the fetus,⁵⁸ what distinguishes that harm from the dangers resulting from the woman's use of alcohol or drugs? The Court's precedents stand at odds when it rules that it is a crime for a female to use her social time in a way which poses a danger to her pregnancy, but that it is that same woman's right to obtain a job which presents these same risks to her unborn.

B. Suing the Employer and Mom for Damages

Another issue raised in *Johnson Controls* concerned the potential tort liability that employers may bear resulting from harm to the fetus. Prenatal torts were first recognized in 1946 when a federal district court in *Bonbrest v. Kotz*⁵⁹ held that a child born alive was entitled to damages if the injury occurred while the fetus was viable.⁶⁰ Currently, every jurisdiction allows an action for damages due to prenatal injuries provided the child is born alive,⁶¹ and in many jurisdictions, courts have even abandoned the viability requirement.⁶² In a few cases, the courts have extended recognition to injuries resulting from negligence occurring prior to conception.⁶³

In *Johnson Controls*, the Court dismissed the issue of tort liability by stating that the BFOQ analysis does not consider the potential costs incurred by future lawsuits.⁶⁴ The majority claims that a business will not be liable for injuries to the fetus as long as the employer acts without negligence and the employee is

⁵⁸ See *infra* notes 81-89 and accompanying text.

⁵⁹ 65 F. Supp. 138 (D.D.C. 1946).

⁶⁰ *Id.* at 142.

⁶¹ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368-69 (5th ed. 1984).

⁶² *Id.*

⁶³ See *Bergstreser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978) (permitting infant to maintain suit for injuries resulting from caesarean section negligently performed on mother 32 months prior to birth); *Jorgensen v. Meade Johnson Laboratories, Inc.* 483 F.2d 237 (10th Cir. 1973) (allowing twins to maintain cause of action for defendant's defective birth control pills ingested by their mother prior to conception resulting in their birth as mongoloids). See generally KEETON, *et al.*, *supra* note 61 § 55 at 369.

⁶⁴ 111 S. Ct. at 1208-09.

warned about the risks associated with the job.⁶⁵ This is a baseless assertion for the following two reasons. First, although a person has been warned and will later be barred from recovery, a child's cause of action for negligence cannot be waived by the parent.⁶⁶ Second, the majority failed to consider the possibility that strict liability can be imposed on the employer upon a determination that the manufacturing process is abnormally dangerous.⁶⁷ Although a business complies with appropriate regulations by incorporating safeguards, the question remains whether the precautions taken will be adequate enough to absolve the employer from liability due to the shifting levels of safe exposure.⁶⁸ A 1988 study indicated that the standard of lead exposure determined safe by the Occupational Safety and Health Administration (OSHA) in 1978 should now be considered hazardous to the employee.⁶⁹ It cannot be discounted that an employer will be held strictly liable due to abnormally dangerous conditions resulting from the diminished safe levels of exposure.

It is unreasonable to overlook the employer's impossible task of avoiding negligence. Recent studies reveal that lead levels considered safe for the woman or child may nonetheless be dangerous to the fetus.⁷⁰ Although OSHA

⁶⁵ *Id.* at 1208.

⁶⁶ See RESTATEMENT (SECOND) OF TORTS § 488(1) (1965).

⁶⁷ *Id.* at § 869 comment b (1979).

⁶⁸ The problem facing the employer regarding strict liability and negligence is two-fold. First, satisfying the revised safe standards will force the employer to implement more stringent safeguards. As a result, a business will be required to expend more time and money to cover the additional costs. Second, establishing proper safeguards may take time before a business is able to conform to the safe exposure level. In order to avoid liability, an employer may be forced to reassign or possibly terminate the affected employees. An employer will not be permitted to choose the latter alternative under the holding in *Johnson Controls*. Thus, an employer is confronted with additional expenditures protecting against liability that may be unavoidable.

⁶⁹ David Rempel, *The Lead-Exposed Worker*, 262 JAMA 532 (1989).

⁷⁰ In *Johnson Controls*, the Court noted that the critical level of lead exposure for employees planning a family was set at 30 micrograms per deciliter by OSHA. 111 S. Ct. at 1200. Current research indicates that concern for the child's health should occur when the blood lead level exceeds 10 micrograms per deciliter. See U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS 43* (July 1988) [hereinafter *A REPORT TO CONGRESS*]; See also U.S. Center for Disease Control, U.S. Dept. of Health and Human Services, *Press Release: Preventing Lead Poisoning in Young Children 1* (Oct. 7, 1991) [hereinafter *CDC Press Release*]. This means that the safe level for employees is three times greater than the level of exposure considered safe for their children. The fetus may be even more susceptible to lead exposure than the child and, thus, would require the use of a lower safe level. See Kim N. Dietrich et al., *Low-Level Fetal Lead Exposure Effect on Neurobehavioral Development in Early Infancy*, 80 PEDIATRICS

sets a standard considered safe for employees who are planning families,⁷¹ a company may be forced to set a more stringent standard to safeguard the fetus in order to avoid liability for negligence. This may be a difficult standard to establish since the full impact of *in utero* exposure to lead is dependent upon ongoing long-term studies that have not yet provided tangible results.⁷² An employer who is unable to bear the burden of establishing a fetal-protection policy will be forced to hire unsterile women even though risks to the health of the fetus may be present.⁷³

Similarly, the mother may also find herself confronted with liability for the harm resulting from her negligence in accepting a job that presents risks to the health of her child. Immunity from tort liability which was once accepted due to the parent-child relationship has been losing recognition and may no longer shield the parent from liability.⁷⁴ It is believed that compensating the injured child outweighs the arguments that were advanced to support the immunity.⁷⁵

V. STATE INTERVENTION AND FETAL-PROTECTION POLICIES

One question left unanswered by *Johnson Controls* is whether the states, as opposed to private employers, may initiate policies that prevent women from working at jobs that pose a threat of dangerous lead exposure to the fetus. State intervention will not be successful unless the state can show that its compelling interest in protecting the life of the fetus is sufficient enough to exceed the woman's fundamental rights.⁷⁶ In *Roe v. Wade*, the Court established a balance

721, 729 (1987). It therefore follows that the employee's safe level should be at least three times greater than what would be considered safe for the fetus.

⁷¹ *Johnson Controls*, 111 S. Ct. at 1200.

⁷² See, e.g., Dietrich et al., *supra* note 70, at 728-29. The authors indicate that future studies will be needed to determine the effects of fetal lead exposure on children throughout their development into later childhood. *Id.* at 729.

⁷³ *Johnson Controls* was unable to establish a BFOQ defense based on the standard established by OSHA. Studies show that a lower standard should be established in order to protect the fetus from lead exposure. See *supra* note 70. OSHA's safe level of exposure for women is three times greater than the recommended level of fetal exposure presented by the congressionally-mandated report. These results indicate that the employer is faced with a significant burden in establishing a BFOQ defense. The company, unable to qualify for the BFOQ, will be forced to employ women in high exposure positions and subsequent harm to their fetuses may result in damages against the employer for negligence.

⁷⁴ See RESTATEMENT (SECOND) OF TORTS § 895G(1) and comment a (1979).

⁷⁵ *Id.* at comment c.

⁷⁶ *Roe's* compelling interest test was controlling at the time *Johnson Controls* was decided. Recently, some of the principles established under *Roe* were weakened in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). *Casey* has

between the woman's fundamental right to privacy and the state's compelling interest in protecting potential human life.⁷⁷ *Roe* determined that a state's interest in protecting the fetus cannot prevail over the mother's rights until the fetus is viable.⁷⁸ It was determined by the Court that the point of viability was at the conclusion of the second trimester.⁷⁹ The Court noted, however, that the state has an "[i]mportant and legitimate interest in protecting the potentiality of human life."⁸⁰

The detrimental effect on potential life caused from lead exposure to the nonviable fetus supports state intervention. The health risks to the unborn child cannot be overlooked by the states. In a recent congressionally-mandated study of childhood exposure to lead, strong evidence was presented which suggests that the human fetus is at high risk to hazardous lead exposure.⁸¹ Results indicate that the impact on *in utero* exposure may be irreversible and that fetal exposure will continue to increase until the hazard is removed from the woman's environment.⁸² The study concluded that fetal lead exposure is an

replaced the compelling interest test with the more lenient standard of undue burden. *Id.* at 2821. Undue burden allows the state to regulate abortions prior to viability, if the purpose or effect does not substantially interfere with the woman's choice. *Id.* The result in *Casey* recognizes the state's greater interest in protecting potential life. *Casey* may be the authority needed to support state action regarding fetal protection policies.

⁷⁷ 410 U.S. 113, 154 (1973).

⁷⁸ *Id.* at 163.

⁷⁹ Although the Court held that a woman had a fundamental right to obtain an abortion, this right was not absolute. 410 U.S. at 154. In *Roe*, the woman's pregnancy was apportioned into three segments referred to as trimesters. *Id.* at 162. The trimester framework provided a guideline for balancing the state's interest in protecting the fetus and the woman's fundamental right to privacy regarding her decision to obtain an abortion. Under the trimester framework, a state does not have a compelling interest until the end of the first trimester. *Id.* at 163. The state may regulate the abortion following the first trimester if its interest reasonably relates to protecting the mother's health. *Id.* State regulation of the abortion may occur following the second trimester if the state's compelling interest is the protection of potential life and there exists no risk to the health or life of the woman. *Id.* The *Roe* trimester framework was still intact at the time *Johnson Controls* was decided. *Casey* has rejected the principle of trimesters in favor of the undue burden standard. 112 S. Ct. 2791 (1992).

⁸⁰ 410 U.S. at 158.

⁸¹ See A REPORT TO CONGRESS, *supra* note 70.

⁸² Unless there is a reduction of lead exposure within the population of pregnant women, the number of fetuses exposed to lead will increase 100% annually. For example, over a ten-year period beginning in 1984, the number of effected fetuses will increase from 400,000 to 4,000,000. See A REPORT TO CONGRESS, *supra* note 70, at 1 48-49. The congressional report indicates that

increasingly important public health issue and that one of the main concerns should be providing an effective system to control the unacceptable quantities of lead to the fetus.⁸³

Lead poisoning in the United States is currently the most common pediatric health problem.⁸⁴ Recently, the United States Center for Disease Control (CDC) stated that greater emphasis should be placed on preventing children from contracting the disease.⁸⁵ More significantly, the CDC has reevaluated the safe exposure level for children and reduced it by 60% from the standard established in 1985.⁸⁶ The findings of the CDC are complemented by a 1989 report which indicates that high postnatal exposure to lead following high prenatal exposure will have an adverse effect on the growth of the child.⁸⁷ This means that a child who is exposed to lead as a fetus, unless subsequently placed in a lead-free environment, will be at a greater disadvantage during his or her development. Additional studies suggest that prenatal exposure will increase the risk for repeated toxicity⁸⁸ as well as cause an inverse effect on the child's mental development.⁸⁹

These studies demand that the health risks facing the unborn child from lead exposure cannot be overlooked. Since abortion is not the issue, and since *Roe* no longer applies when the woman's choice is to maintain the pregnancy, the rationale behind *Roe* cannot be used to defeat the state's compelling interest in protecting potential life. First, viability cannot be the determining factor in balancing the interests of the state against the mother's interest. Although *Roe*

concerns about the health of the fetus should exist when lead exposure exceeds 10 micrograms per deciliter. *Id.* at I 43. Johnson Controls initiated its fetal-protection policy following the discovery that the blood level of pregnant women exceeded 30 micrograms per deciliter. 111 S. Ct. at 1200.

⁸³ A REPORT TO CONGRESS, *supra* note 70, at I 49-50.

⁸⁴ CDC Press Release, *supra* note 70, at 4.

⁸⁵ *Id.* at 3.

⁸⁶ *Id.* at 1.

⁸⁷ Rakesh Shukla et al., *Fetal and Infant Lead Exposure: Effects on Growth in Stature*, 84 PEDIATRICS 604, 611 (1989).

⁸⁸ Morri E. Narkowitz & Howard L. Weinberger, *Immobilization Related Lead Toxicity in Previously LeadPoisoned Children*, 86 PEDIATRICS 455, 457 (1990). Although lead stored in the bones may be metabolically inert, results indicate that an exception may exist for the fetus; maternal bone lead may be released during the pregnancy which poses risks to the sensitive fetus. *Id.* at 455.

⁸⁹ David Bellinger et al., *Longitudinal Analyses of Prenatal and Postnatal Lead Exposure and Early Cognitive Development*, 316 NEW ENG. J. MED. 1037, 1039-40 (1987). An inverse relationship existed between the infant's Mental Development Index score and the umbilicalcord blood lead level. See also Dietrich et al., *supra* note 70 at, 728-29.

determined that the state's interest in the fetus cannot prevail over the mother's interest prior to viability, a lead-exposed fetus faces dangerous health risks even during the early weeks of gestation. Thus, the state's interest in protecting potential life comes into existence prior to viability.⁹⁰ Second, a woman's choice to maintain her pregnancy must be distinguished from her decision to obtain an abortion. When a woman obtains an abortion, the termination of the fetus destroys the state interest. A woman's choice to maintain her pregnancy does not destroy potential life, and consequently, the state's concern for subsequent harm to the fetus should persist throughout the pregnancy.⁹¹

VI. CONCLUSION

Ten years following the enactment of the PDA, a report studying lead exposure among children was presented to Congress indicating the increasing health concern for *in utero* exposure.⁹² Additional research shows that exposure to lead can have a detrimental effect on the fetus.⁹³ *Johnson Controls* presented an opportunity for the Supreme Court to preserve employment policies protecting the developing fetus from dangerous exposure in the workplace. The Court's failure to recognize the fetus as a third party under the BFOQ defense will place an impossible burden upon employers to establish a fetal-protection policy. It defies logic that the Court recognizes the safety of prison inmates⁹⁴ under the BFOQ defense but ignores the safety and health of the unborn child. Such contradictory rulings create an injustice.

The fetus again stands as the loser in the struggle between the rights of the woman and the protection of potential life. Originally confronted with the issue of sex discrimination in the workplace, the Supreme Court in *Johnson Controls* has replaced fetal protection policies with its own form of a discriminatory policy against the unborn child. Although a woman can be charged for the criminal neglect and abuse of the fetus,⁹⁵ a child can maintain an action for

⁹⁰It was determined in *Roe* that the fetus is considered viable following the conclusion of the second trimester. Lead is absorbed in fetal tissues throughout the pregnancy. See Dietrich et al., *supra* note 70, at 721. When a woman decides to maintain her pregnancy, the state's compelling interest in the potential life of the fetus occurs earlier because the accumulation of lead may pose health risks before the fetus becomes viable.

⁹¹In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Court recognized the state's interest in protecting human life throughout the pregnancy: "We do not see why the State's interest in protecting potential human life should come into existence only at the point of viability." *Id.* at 519.

⁹²A REPORT TO CONGRESS, *supra* note 70.

⁹³See *supra* notes 84-89 and accompanying text.

⁹⁴*Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977).

⁹⁵See *supra* notes 49-54 and accompanying text.

prenatal injuries⁹⁶ and property can be devised to an unborn child,⁹⁷ the Supreme Court still refuses to recognize the fetus when the issue concerns fetal health.

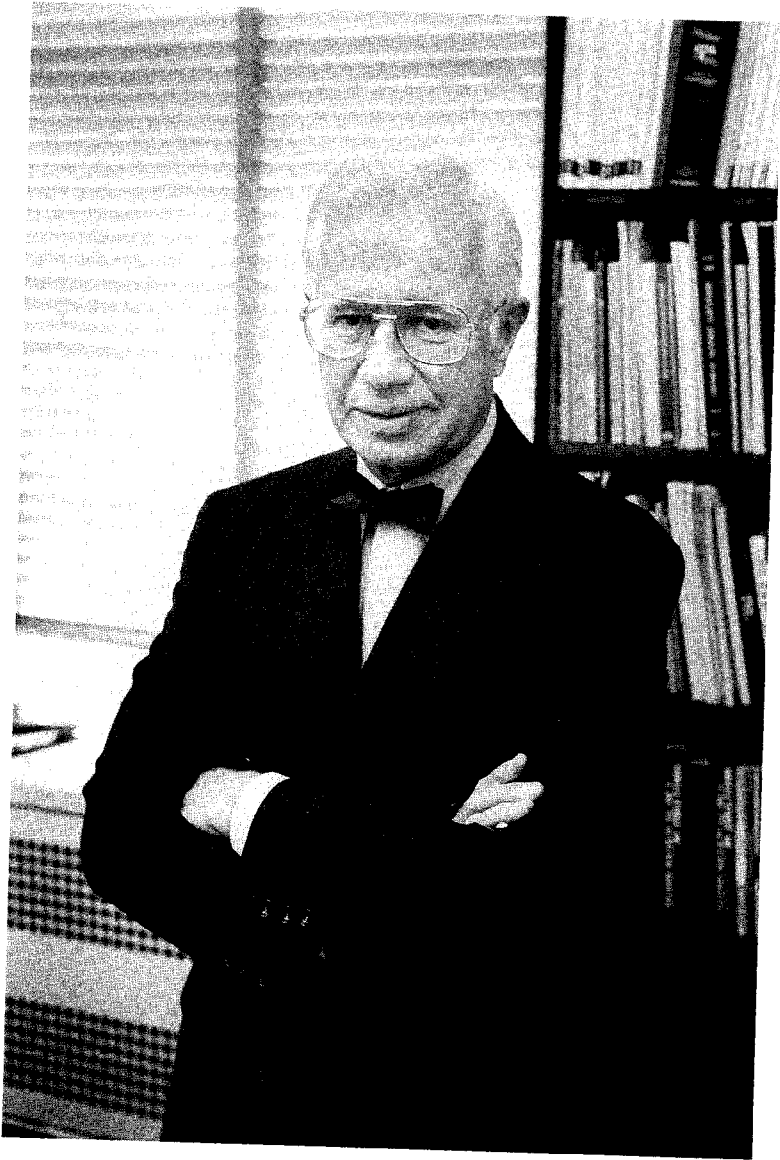
One court has stated that "[a] child has a legal right to begin life with a sound mind and body."⁹⁸ The danger associated with fetal lead exposure hinders that right and demands state intervention. The question remaining is whether state regulation relating to fetal protection will prevail over the rights of the woman. The substantial harm facing the unborn child should support state protection throughout fetal development. Otherwise, the dangers facing the lead-exposed fetus will remain minimal when compared to the harm resulting from a legal system that continues to reject any attempts to protect the unborn child.

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⁹⁶ See *supra* notes 59-63 and accompanying text.

⁹⁷ Most states under "pretermitted heir" statutes, as well as the Uniform Probate Code, allow children born subsequent to the execution of a will to share in the estate. See generally WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS* § 3.6, at 106-07 (1988). State statutes also provide the unborn child with a share of the estate in the situation when a will is lacking. For example, Ohio provides that "[d]escendants of an intestate begotten before his death, but born thereafter, in all cases will inherit as if born during the lifetime of the intestate and surviving him." OHIO REV. CODE ANN. § 2105.14 (Anderson 1990).

⁹⁸ *Matter of Baby X*, 293 N.W.2d 736, 739 (Mich. App. 1980).



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