
Faculty Scholarship

1992

Patriarchy, Paternalism, and the Masks of Fetal Protection.

A. Kimberley Dayton

Mitchell Hamline School of Law, kim.dayton@mitchellhamline.edu

Publication Information

2 *Kansas Journal of Law & Public Policy* 25 (1992)

Repository Citation

Dayton, A. Kimberley, "Patriarchy, Paternalism, and the Masks of Fetal Protection." (1992). *Faculty Scholarship*. Paper 179.
<http://open.mitchellhamline.edu/facsch/179>

This Article is brought to you for free and open access by Mitchell Hamline Open Access. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

Patriarchy, Paternalism, and the Masks of Fetal Protection.

Abstract

This essay is a response to John Kennedy's defense of Johnson Controls, Inc.'s fetal protection policy which was struck down last year in *International Union, UAW v. Johnson Controls, Inc.* A unanimous Supreme Court held in the case that the policy, which excluded women from a "fetotoxic" workplace, violated the federal employment discrimination laws. The Court's decision was issued only a day before Kennedy was scheduled to debate the issue of whether Title VII bars fetal protection policies with Professor Elinor Schroeder at the Kansas Journal's first symposium on March 21-22, 1991. The Court's decision rendered the technical statutory issues that might otherwise have been discussed at the symposium essentially moot and freed Kennedy to address, at least in part, some of the more interesting philosophical questions that the notion of fetal protection suggests. Although to some extent this essay reacts to Kennedy's article previously published in this Journal, it results more directly from and responds more explicitly to his oral defense of fetal protection policies generally, and the language in which that defense was couched.

Keywords

women's rights, workplace equality, legal language, legal rhetoric, *International Union, UAW v. Johnson Controls, Inc.*

Disciplines

Labor and Employment Law | Law and Gender

“[T]he way people talk . . . is of significance, . . . the language they use and the connections they make reveal the world that they see and in which they act.”¹

Patriarchy, Paternalism, and the Masks of “Fetal Protection”

Kim Dayton

Patriarchy is the power of the fathers: a familial-social, ideological, political system in which men—by force, direct pressure, or through ritual, tradition, law and language, customs, etiquette, education, and the division of labor, determine what part women shall or shall not play, and in which the female is everywhere subsumed under the male.²

This essay is a response to John Kennedy’s defense of Johnson Controls, Inc.’s fetal protection policy which was struck down last year in *International Union, UAW v. Johnson Controls, Inc.*³ A unanimous Supreme Court held in the case that the policy, which excluded women from a “fetotoxic” workplace, violated the federal employment discrimination laws. The Court’s decision was issued only a day before Kennedy was scheduled to debate the issue of whether Title VII bars fetal protection policies with Professor Elinor Schroeder at the *Kansas Journal’s* first symposium on March 21-22, 1991. The Court’s decision rendered the technical statutory issues that might otherwise have been discussed at the symposium essentially moot and freed Kennedy to address, at least in part, some of the more interesting philosophical questions that the notion of fetal protection suggests. Although to some extent this essay reacts to

Kennedy’s article previously published in this *Journal*,⁴ it results more directly from and responds more explicitly to his oral defense of fetal protection policies generally, and the language in which that defense was couched.

I am actually somewhat reluctant even to use the term “fetal protection” in this essay. In many ways, the use of such words, at least to describe the mandatory policy invalidated in *Johnson Controls*, is but one example of the manner in which the patriarchal socio-legal structure has successfully manipulated language to validate such policies—and their historical antecedents—despite their patent discriminatory effects on women. For the most part, these policies do not protect fetuses. Rather, the policies exclude women from certain workplaces because they are deemed capable of bearing children. As I discuss below, these policies generally apply to the extremely broad category of all women “of childbearing age” whether or not an individual woman within that category intends to or is likely to carry a fetus while working in the toxic environment. The term “fetal protection” is thus inaccurate; yet it allows advocates of such policies to frame the debate surrounding the underlying issues in terms of a conflict between a mother and her fetus. The implicit

Kim Dayton is a Professor of Law at the University of Kansas.

Johnson Controls' hiring personnel were instructed to tell women that the company had *no* openings for women capable of bearing children.

connotation these two words carry is that a fetus is a person needing protection from something—from its mother, as it turns out. Though I do not accept the term as accurately describing the true nature of these policies, I yield to custom to facilitate my discussion.

Although I do not intend to focus exclusively in this essay on the specific policy at issue in *Johnson Controls*, some background on it will provide a context for the broader discussion. Johnson Controls' "fetal protection" policy was in almost all respects typical. The policy precluded all "fertile" women from working in any area of the plant determined to be "fetotoxic." Fertile women, as defined by the policy, were all women between the ages of five and sixty-three who could not prove that they were infertile. In other words, the policy presumed a woman's, or girl's, capacity to and interest in bearing children. In practice, this meant that if a woman fell within the prescribed age range, she had to show that she had been surgically sterilized.⁵ The policy defined a "fetotoxic" environment as one that, in the estimation of the company's medical advisors, created a likelihood of injury to a fetus carried in the womb. How likely that injury must be, however, was not clear. Interestingly, the environments within the plant determined to be fetotoxic were the ones where most of the company's highest paying blue collar jobs were located. Moreover, the effect of the policy was to exclude women from *all* industrial jobs at Johnson Controls because the policy barred women not just from fetotoxic environments per se, but from "any job that might lead to a promotion to" a job in a fetotoxic environment.⁶ Indeed, Johnson Controls' hiring personnel were instructed to tell women that the company had *no* openings for women capable of bearing children.⁷

The effect of Johnson Controls' policy on its female employees was real and immediate. One of the named plaintiffs in the case was an employee who underwent "voluntary" sterilization for economic reasons; she simply could not afford to give up the income associated with the high-paying jobs from which she would otherwise be excluded.⁸ The policy excluded from the fetotoxic workplace women whose husbands were sterile, those using effective methods of birth control, lesbians, and women who did not wish to undergo major surgery to preserve their right to work.⁹ It also forced women who wished to remain in the higher paying jobs encompassed by the policy publicly to identify themselves as sterile.

In defending this policy of exclusion, Kennedy raised a number of points that seemed extraordinary to me at the time and became even more so as I began to learn more about fetal protection policies and their history. Among other things, Kennedy said that Johnson Controls adopted the mandatory policy because women did not respond to a voluntary policy which the company had in place from 1977 to 1982. He said that in situations involving "conflicts" between maternal rights and fetal rights, women are simply incapable of understanding the difficult medical and bioethical issues raised by fetotoxic environments; or, alternatively, that fertile women will be motivated by short-term economic considerations (rather, presumably, than by the interests of their unborn children) when deciding whether to work in such an environment. Finally, he said that the policy was adopted on the advice of the company's doctors, not its lawyers—as though the involvement of the medical profession *a fortiori* eliminated any possibility of covert discrimination or gender bias in the formation and implementation of the policy.¹⁰ Though many other aspects of Kennedy's argument are problematic, it is the above-mentioned claims that I will address. For purposes of my discussion, I will assume that *in utero* lead exposure at the levels involved in the *Johnson Controls* case poses a significant risk to fetuses that does not exist for adults exposed to the same environmental lead levels.

First, consider Kennedy's assertion that women did not respond to the company's voluntary policy. In support of this claim, he said that "a substantial number" of women became pregnant while working in the fetotoxic environment (eight, actually), and that one of them had a child who demonstrated some characteristics associated with prenatal lead exposure.¹¹ At the most pragmatic level, though, the facts belie the claim that these eight "bad" women to whom Kennedy alludes were even in a position to make a rational decision with respect to the voluntary policy. Contrary to what Kennedy would like us to think, women working at Johnson Controls were *not* privy to the information, statistics, and medical opinion concerning prenatal lead exposure that the company provided to the Supreme Court of the United States when it was forced to justify its policy under Title VII. As Professor Schroeder has so aptly demonstrated,¹² the language of the policy was hardly designed to encourage women to remove themselves from a high-paying, though fetotoxic, working environment because of pregnancy. Johnson Controls' voluntary policy, quite simply, did not contain the kind of information a woman

would need to make a fully informed choice about the risks involved. The policy did not merely minimize the potential risks of fetal exposure to high levels of lead in the workplace—it implicitly denied that serious risks to fetuses existed at Johnson Controls. It characterized the principal risk of excessive lead exposure during pregnancy as being miscarriage and claimed that the relationship between lead exposure and risk to the fetus was less than that of smoking and cancer.¹³

Thus, the evidence of the eight bad women is all but irrelevant to the question of whether well-informed women would respond to a voluntary policy. In fact, there is a great deal of sociological evidence that women who are fully informed of the risks that particular kinds of conduct pose to fetuses they intend to carry to term, *and who have a choice to eliminate those risks*, do not engage in the problematic conduct.¹⁴ Most of us know anecdotally what empirical studies have demonstrated: pregnant women are more likely to moderate their behavior to protect a fetus than to protect themselves.¹⁵ Moreover, one could just as easily cite the dozens or hundreds of women who worked in the fetotoxic environment during the voluntary policy's tenure and did not have children as evidence that in fact most women did respond to the voluntary policy in the manner that Kennedy believes they should have responded. That eight women did not respond "appropriately" (the eight who had children) surely cannot justify penalizing all women—whether or not they planned to have children—in the sweeping manner envisioned by the mandatory policy ultimately adopted by Johnson Controls.

Kennedy's argument concerning the need for a mandatory policy is related to his second argument: that women are incapable of evaluating the evidence, balancing the risks and benefits of working in the fetotoxic environment, and making the proper choice to protect the fetus. Obviously, all women confronted with the policy did respond to it. It is just that some of them did not respond in the manner which Kennedy deemed appropriate. In arguing that the voluntary policy obviously failed because eight women conceived despite the dangers of lead exposure to their fetuses, Kennedy implicitly suggested that any rational woman would choose to take a pay cut rather than endanger a fetus. It is certainly not clear that the alleged conflict between possibly endangering a fetus and, for example, failing to meet the economic needs of existing children, must be resolved in favor of the fetus. I will turn to

Obviously, all women confronted with the policy did respond to it. It is just that some of them did not respond in the manner which Kennedy deemed appropriate.

this premise in a moment. But consider first the seemingly innocuous claim that a voluntary policy could not be expected to be successful because women are not in a position to make "the difficult toxicological choice[s]" involved in such a decision. This paternalistic claim masks, among other things, an implicit assumption that women essentially are not capable of deciding complex questions in any reasoned way.

The notion that women lack the intellectual resources to make "rational" decisions in any sphere, is, of course, older than history. And it has been espoused overtly more recently than one might expect, particularly in connection with matters of family and work. The Victorian concept of "separate spheres" regarded women as intellectually inferior but morally superior to men.¹⁶ During the nineteenth century, the American Medical Association (AMA) mobilized public support for criminalizing abortion by contending that women who had abortions simply did not, and could not, understand what they were doing.¹⁷ Opponents of women's suffrage in the late nineteenth and early twentieth centuries argued that women lacked the capacity to make reasoned judgments concerning the political process and hence should not be permitted to vote.¹⁸ This belief in women's limited intellectual capacity is, unfortunately, still popular in some circles. Even today, one theme of the right to life movement is that women who have abortions do not understand that they are killing their babies.¹⁹

Admittedly, Kennedy did not ever say explicitly that women are intellectually inferior to men. In arguing that a mandatory policy was necessary, Kennedy spoke in terms of "employees," not "women."²⁰ His claim, however, that a mandatory policy was necessary to protect them and the unborn from the consequences of their own foolishness may well have been the product of such an unconscious belief. In fact, fetal protection policies are just one facet of the tradition of "protectionist" legislation which developed from such premises.²¹ It requires no great interpretive leaps to see this belief in women's irrationality in Kennedy's defense of Johnson Controls' actions. In justifying a mandatory policy on the ground of women's inability to make rational choices on their own, Kennedy revealed, perhaps unwittingly, the continued influence of such views upon the formation of corporate and public policy.

Suppose, however, that my interpretation of Kennedy's language is too radical. One need not concede my point here to find troublesome value judgments implicit in Johnson

The theoretical woman who is fully informed of the dangers of lead exposure to a fetus, yet chooses to stay on in a fetotoxic environment, may well be motivated not by disregard for the fetus, but by concern for existing children or other family obligations.

Controls' effort to exclude all women from the fetotoxic environment. According to Kennedy, a mandatory policy of exclusion was necessary to ensure that women made the rational and correct decision to sacrifice present income to protect future children from some unquantified risk of childhood developmental problems.²² This assessment, of course, works only if one concludes that in fact this is the only rational or defensible choice for a person confronted with these two alternatives. Yet Kennedy did not feel the need to explain why this choice was obvious—much less why employers are justified as a moral matter in giving women only those two alternatives.

As I have suggested previously, deciding between the needs of the fetus and the needs of the individual and her family is not as simple as Kennedy would have us believe. The theoretical woman who is informed fully of the dangers of lead exposure to a fetus, yet chooses to stay on in a fetotoxic environment, may well be motivated not by disregard for the fetus, but by concern for existing children or other family obligations.²³ Though Kennedy would like to cast such a woman's decision to stay as morally bankrupt, I would argue that it is the policymaker who forces her to make that decision whose values and judgments should be questioned.

By framing the fetal protection issue as one of conflicting rights—between the mother and the fetus—advocates of the concept of fetal protection successfully have created an analytical framework that invites a resolution of the alleged conflict in favor of fetal protection, even if that means denying the mother job opportunities or even her freedom.²⁴ The conflict seems more difficult to resolve in the mother's favor than the "conflict" raised by the abortion issue: one need not be "pro-life" with respect to the question of abortion to agree that a woman ought to take measures to protect the integrity of a fetus she intends to carry to term. Indeed, when I first began to consider the problem of "maternal rights versus fetal rights," I had little difficulty rationalizing the concept of true fetal protection.²⁵ I consider myself a humanitarian, and it is intuitively difficult to justify social policy that permits one person to jeopardize the lifelong well-being of another for the sake of, as Kennedy put it, "short-

term economic needs."

One problem with this mode of reasoning, however, is that the architects of fetal protection policies imply that there is but a single solution to this conflict. That solution, to exclude the woman from the workplace, depends on denying completely the woman her rights in order to protect the needs of the fetus. But this is not the only way in which the alleged conflict can be resolved. In fact, it is not the way the conflict has been resolved in any but a small group of workplace scenarios. As a number of feminist scholars have observed, fetal protection policies exist only in industries where women might be deemed "expendable"—that is, in industries either where women do not make up a significant portion of the workforce, or from which, historically, they have been excluded because of overt gender discrimination. Many, perhaps even most, workplace environments that employ women on a large scale create risks of harm to the fetus that are at least as serious as, for example, lead exposure at the levels involved at Johnson Controls.²⁶ Nevertheless, fetal protection policies do not exist in such industries because they could not function without women; society's concern for a smoothly running economy evidently outweighs its concern for the millions of young lives potentially affected by *these* workplace hazards. When viewed against this backdrop, fetal protection policies seem to be less about fetal protection and more about keeping historically male-dominated workplaces male dominated.

Equally important, where conflicts between paternal and fetal rights arise, they have inevitably been resolved in favor of paternal rights. A typical response to this observation is that the connection between male exposure to environmental toxins (or of male ingestion of cocaine, or a father's smoking) and fetal damage is "less clear" or "less well-established" than that between maternal exposure and fetal damage. Even assuming that this is true with respect to many kinds of workplace hazards (an assumption that is becoming increasingly suspect),²⁷ the fact is that there do not appear to be *any* examples of fetal protection policies aimed at or which operate to exclude men. Men simply are not precluded from working in environments that, for example, threaten the integrity of their sperm, and hence of the children that they

might someday father. In other words, employers, and ultimately society, are concerned about fetal protection only when the rights being subordinated to the fetus's are those of the mother.

Kennedy's emphasis on the company medical department's role in formulating its fetal protection policy is interesting. His declaration that the mandatory policy imposed in 1982 was adopted "at the urging of the company's doctors, not the company lawyers"²⁸ appears intended to assure us that the policy was a reflection not of corporate greed or intentional sex discrimination, but of pure humanitarian concern. Unfortunately, this argument loses its allure when we are reminded that the male-dominated medical profession has *never* been particularly concerned with the interests and needs of women. The AMA's involvement in the nineteenth century anti-abortion movement is exemplary of the profession's role in the debate over women's rights versus the interests of family, children, and society. Feminists have repeatedly documented the health care industry's "brutal indifference toward women."²⁹ In recent years, we have learned that medical researchers almost universally have excluded women as subjects in their research, and that they have failed to devote the same attention to diseases that affect primarily women as to those which affect primarily men. Recently, a number of hospitals have gone to court to protect the "rights" of a fetus vis-a-vis its mother, almost inevitably taking legal positions that call for complete subordination of the mothers' interests to those of the fetus.³⁰ Indeed, some physicians have gone so far as to encourage and assist in the criminal prosecution of women whose conduct is perceived to endanger their unborn children.

The fact that Kennedy did not know this misogynic side of the medical profession—that he is able to use the medical argument at all—is indicative of the impoverished understanding that policymakers generally have of women's historic oppression. It is extremely unlikely that the medical "advisors" who ostensibly recommended this policy were at all concerned with the needs and interests of women. In view of this, their recommendations concerning corporate policy formation are arguably implicitly suspect. It is more important to me that Kennedy explain why the company's

[E]mployers, and ultimately society, are concerned about fetal protection only when the rights being subordinated to the fetus's are those of the mother.

medical personnel did not recommend making the workplace safe for fetuses than simply to know that Johnson Controls' policy was the product of medical, rather than legal, opinion. In criticizing Kennedy's paternalism, am I suggesting that we should not seek solutions to the reality that maternal exposure to environmental toxins may threaten the future health and development of an unborn fetus? Of course not. Yet, from the perspective of many feminists, the solution to this problem is really quite simple. Construct the job and the workplace as though women matter. Consider the issue in light of its historical context. Reject the view that the fetotoxic workplace raises a problem of conflicting "rights," and

conceive of the problem as one of the limits of responsibility—including the limits of employer responsibility to the fetus that it ostensibly views as so important. Such an approach assuredly implies that an employer should not remove all potential mothers from the workplace, but rather, should make the workplace safe for the potential fetus. Kennedy appears to contend that this was not possible at Johnson Controls, but the fact is that any workplace can always be made safer, and usually safe enough for a fetus. The problem is that the cost of taking measures to ensure such safety may be more than the employer would like to pay. It is far easier—and historically it has been perfectly acceptable—to allow women to bear the economic costs of

societal ills than to allocate that cost more equally among all members of society.

As I began to appreciate the historical and sociological underpinnings of fetal protection policies, in all their guises, it became clear to me that these policies cannot be understood simply as a neutral solution to a thorny conflict between maternal and fetal rights. They are, instead, yet another reflection of an historic pattern that has denied women the right to work in particular employment contexts. Masked in language that conceals this history, fetal protection policies are intuitively justifiable and hence appear just. If society is truly concerned about the rights of fetuses as persons or future persons, it must be willing to devise social and economic policies that will ensure that protection of those rights does not come exclusively at the expense of the women who carry them.

Notes

1. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 2 (1982).
2. ADRIENNE RICH, *OF WOMAN BORN* 57 (1986 ed.).
3. 111 S.Ct. 1196 (1991) (invalidating employer's "fetal protection" policy which barred fertile women from workplaces contaminated by high levels of lead).
4. John P. Kennedy, *Johnson Controls: An Employer's Perspective on Fetal Protection*, 1 KAN. J.L. & PUB. POL'Y 137 (1991); see also Elinor P. Schroeder, *The Other Question in Johnson Controls*, 1 KAN. J.L. & PUB. POL'Y 145 (1991). For additional discussions of the toxic workplace/"fetal protection" issue, see, e.g., Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1981); Linda G. Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981); 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).
5. In his paper, Kennedy rather extraordinarily justified this sweeping exclusion of *all* women from the toxic workplace on the ground that "over half of the pregnancies occurring today are unplanned." Kennedy, *supra* note 4, at 141. Does he mean to suggest that women (who naturally should be held totally and solely responsible for these unplanned pregnancies) are not capable of controlling their reproductive ability? Does the figure he cites include pregnancies resulting from sexual assault and pregnancies of teenagers too young to work at Johnson Controls? Does he know that the birthrate for blue collar working women is less than 2%? That the birthrate for women between the ages of 45-49 is 1/5000? CYNTHIA TAEUBER, *STATISTICAL HANDBOOK OF WOMEN IN AMERICA* 25 (1991); see also *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 913 n.3 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting), *rev'd* 111 S. Ct. 1196 (1991); Schroeder, *supra* note 4, at 146. The observation that many pregnancies are unplanned is of virtually no relevance to this issue; at best, it reflects a rather disturbing attitude toward women who work at his company that unfortunately is fully consistent with the paternalistic tones of his oral presentation at the March symposium.
6. *Johnson Controls*, 886 F.2d at 919 (Easterbrook, J., dissenting).
7. *Id.*
8. *Johnson Controls*, 111 S.Ct. at 1200; cf. *Oil, Chemical & Atomic Workers Internat'l Union v. Am. Cynamid Co.*, 741 F.2d 444, 445-46 (D.C. Cir. 1984) (five women at American Cynamid plant underwent sterilization in order to preserve their right to work).
9. Cf. Schroeder, *supra* note 4, at 146.
10. For example, Kennedy also attacked the Supreme Court's opinion in *Johnson Controls* as an opinion couched in the language of choice, not the language of employment discrimination law. Though I do not intend to address this point extensively, I believe that his comment tells more about his world view than he may realize. It suggests that perhaps what Kennedy would really like to do is defend the policy on religious or moral grounds as a reflection

of pro-life values. Such a defense would more directly explain his attack on Justice Blackmun's word choices and would not be inconsistent with his implicitly stated opinion that women who "choose" to endanger their fetuses at Johnson Controls were making a morally indefensible decision.

11. Schroeder, *supra* note 4, at 146 (eight women); cf. Kennedy, *supra* note 4, at 140 (a substantial number of women).
12. Schroeder, *supra* note 4, at 147.
13. *Id.*
14. See, e.g., Helen M. Cole, *Legal Interventions During Pregnancy*, 264 JAMA 2663 (1990) ("clinicians are frequently impressed with the amount of personal health risk undertaken and voluntary self-restraint exhibited by the pregnant woman for the sake of her fetus and to help ensure that her child will be as healthy as possible."); Henry L. Rosett et al., *Treatment Experience with Pregnant Problem Drinkers*, 249 JAMA 2029-33 (1983) (This study suggests that 67% of 49 pregnant problem drinkers who received counseling about the effects of alcohol consumption on fetuses reduced their alcohol consumption before the third trimester. "The desire to have a healthy baby was a powerful motivating force," *id.* at 2029); David F. Williamson et al., *Comparing the Prevalence of Smoking in Pregnant and Nonpregnant Women 1985 to 1986*, 261 JAMA 70-74 (1989) (reporting prevalence of pregnant women smoking to be below incidence of nonpregnant women smoking); Report, *Progress Toward Achieving the 1990 Objectives for Pregnancy and Infant Health*, 260 JAMA 770 (1988) ("National survey results indicate that pregnant women and women who have recently been pregnant are more knowledgeable about smoking and alcohol risks than are members of the general population 18 to 44 years of age.") [hereinafter 1990 Report].

In his article, Kennedy cites the "failures" of seatbelt, motorcycle helmet, and anti-smoking campaigns as evidence that a voluntary policy cannot be expected to work. Kennedy, *supra* note 4, at 141. Most public health officials consider anti-smoking campaigns, and some aspects of seat-belt campaigns, at least, to have been quite successful even if such campaigns have not completely eradicated the problem to which they are addressed. ("Programs to promote the use of infant safety seats in automobiles have been successful. The objective for such use has been met."). 1990 Report at 770. Additionally, the percentage of Americans smoking is at its lowest point since 1944. THE GALLUP REPORT, SMOKING, July 1989, at 23. He might also be interested to know that public health campaigns have been more effective with respect to women than they have been with respect to men.

In addition, the matter of whether one has a "choice" to remove oneself from a toxic workplace depends partially on the economic consequences of such a decision. Almost inevitably, the jobs that have been barred to women due to fetal protection policies are higher paying than the alternatives, both within and outside the plant, and they are jobs which have traditionally been off-limits to women. See Becker, *supra* note 4, at 1237-41. Employers virtually never offer wage incentives—or even wage parity—to women who leave the

toxic workplace in order to protect fetal interests. Thus, a woman who voluntarily removes herself from a fetotoxic environment is generally making a significant economic sacrifice—a sacrifice that many women may not be able to make because of existing family obligations. Kennedy suggests that a woman who stays in a fetotoxic environment in these circumstances is succumbing to “short-term economic needs.” See Kennedy, *supra* note 4, at 141. An alternative explanation is that she is weighing the interests of a potential person who might potentially be injured if she stays against the interests of existing persons who would in fact be injured if she leaves, and rationally deciding in favor of existing persons.

15. *E.g.*, Rosett et al. *supra* note 14, at 2031 (showing that heavy drinkers modify alcohol consumption during pregnancy); Williamson et al., *supra* note 14, at 70-74 (pregnant women are more likely to quite smoking than nonpregnant women).

My citation to these studies should not be interpreted to mean that I believe a woman ought ever to have to choose between her right to a higher wage and the interests of a fetus that she intends to carry to term. Simply because most women in this position will choose to protect the fetus does not mean that societal conditions that make this choice necessary are acceptable. See generally CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215-34 (1989).

16. For discussions of Victorian notions of the “separate spheres” of women and men, see, e.g., JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 119 (1991); 1 WOMEN IN AMERICAN LAW 140 (Marlene S. Wortman ed., 1985).

17. See KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 21 (1984).

(Why should nineteenth-century physicians have become so involved with the question of abortion? The physicians themselves gave two related explanations for their activities, and these explanations have been taken at face value ever since. First, they argued, they were compelled to address the abortion question because American women were committing a moral crime based on ignorance about the proper value of embryonic life . . . Second, they argued, they were obliged to act in order to save women from their own ignorance because only physicians were in possession of new scientific evidence which demonstrated beyond a shadow of a doubt that the embryo was a child from conception onward.)

Id.; See generally *id.* at 20-341.

18. See, e.g., AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920, at 14-42 (1965); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 n.12 (1991); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 357 (1989); see also *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (“[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be woman’s protector and defender. The natural and proper

timidity and delicacy of the female sex evidently unfits it for many of the occupations of civil life.”).

19. This is the premise of the notorious anti-abortion film “The Silent Scream.”

20. Kennedy, *supra* note 4, at 141 (“The employee is the least informed and the least capable of making a difficult toxicological choice . . . Furthermore, the employee’s decision may be influenced by short-term economic needs.”) (emphasis added).

21. See generally Becker, *supra* note 4, at 1221-25 (discussing history of protective legislation affecting women’s right to work); Ellen Bigge, Comment, *The Fetal Rights Controversy: A Resurfacing of Sex Discrimination in the Guise of Fetal Protection*, 57 UMKC L. REV. 261 (1989).

22. According to Johnson Controls’ voluntary policy, the principal risk of prenatal lead exposure is miscarriage. It would seem that perhaps Kennedy is just as concerned about this risk to fetuses as the developmental problems that are thought to occur in some children exposed to lead *in utero*. Emphasizing this aspect of prenatal lead exposure, however, has certain pro-life moral overtones. Overtones that Kennedy no doubt did not have an interest in discussing as a justification for Johnson Controls’ fetal protection policy.

23. See *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 902 (7th Cir. 1989 (en banc) (Cudahy, J., dissenting), *rev’d* 111 S. Ct. 1196 (1991). (“What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored? *Whose fetus is at greater risk? Whose decision is this to make?*”) (emphasis added).

24. Cf. Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1335 (1990) (“Rights discourse transforms problems in a way that makes them subject to legal solution . . . some feminists have suggested that the language of rights is problematic in that it inadequately describes women’s experience while masking issues of power.”).

25. Cf. Becker, *supra* note 4, at 1220 (“At first glance, most people presented with this issue (myself included) assume that ‘reasonable’ restrictions on maternal employment must be appropriate in some circumstances for the protection of fetuses.”). By true fetal protection, I am thinking of protective measures narrowly designed to protect an actual fetus who can be expected to be carried to term. Johnson Controls’ policy, as noted, went far beyond this in its exclusion of all women from the workplace, irrespective of whether they were or intended to become pregnant. Most fetal protection policies are overbroad in this sense, and thus misnamed. In another sense, of course, fetal protection measures are seldom broad enough, in that they *never* evolve in environments in which women are deemed indispensable.

26. See Schroeder, *supra* note 4, at 147; Becker, *supra* note 4, at 1237-40 (list examples of other “fetotoxic” workplaces). It is worth mentioning that in 1981 the EEOC withdrew a proposed fetal protection guideline after it was determined that over 20 million

women worked in jobs that posed risks to fetuses. See Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514 (1980) (to be codified at 41 C.F.R. 60-20) (proposed Feb. 1, 1980) (articulating guideline); Interpretive Guidelines on Employment Discrimination and Reproductive Hazards; Withdrawal of Proposed Guidelines 46 Fed. Reg. 3916 (1981) (proposed Jan. 16, 1981) (withdrawing guideline).

27. Until relatively recently, it was not particularly fashionable to research the relationship between male conduct and fetal damage. Recently, however, it has become clear through a number of studies that many kinds of paternal conduct can have tetragenic effects on offspring. See generally Mary C. Lowry, et al., *Male-Mediated Behavioral Abnormalities*, MUTATION RESEARCH, Apr. 1990, at 213-29; David A. Savitz, et al., *Influence of Paternal Age, Smoking, and Alcohol Consumption on Congenital Abnormalities*, TETRALOGY, Oct. 1991, at 429-40; Ricardo A. Yazigi, et al., *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 JAMA

1956 Oct. 9, 1991; *Vitamin C Deficiency in a Man's Diet Might Cause Problems for Offspring*, N.Y. TIMES, Feb. 12, 1992, at C12 (study reported in Proceedings of the National Academy of Sciences showed direct relationship between a male's diet low in Vitamin C and increased DNA damage in sperm cells); Dwight E.M. Angell, *Sperm Damage Linked to Birth Defects*, GANNETT NEWS SERVICE, Dec. 31, 1991, LEXIS, Nexis Library, Medline File.; *Protecting Unborn*, USA TODAY, Dec. 17, 1991, at 4D; Jane Brody, *Personal Health*, N.Y. TIMES, Dec. 25, 1991, at 64. In fact, the record in *Johnson Controls* itself indicates that lead exposure at the levels involved in the case may have tetragenic effects on sperm. 886 F.2d 918-19 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting), *rev'd* 111 S. Ct. 1196 (1991).

28. Kennedy, *supra* note 4, at 142.

29. RICH, *supra* note 2, at x.

30. See generally Cole, *supra* note 14, at 2664.