Who Is Protected? What's Wrong with Exclusionary Policies

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SUMMARY. Many employers have excluded women whose infertility is not medically documented from allegedly hazardous work claiming they feared if the women became pregnant, their fetuses would be harmed. In United Auto Workers v. Johnson Controls, the Supreme Court held in 1991 that so-called "fetal protection policies" are unlawful sex discrimination. After examining four cases challenging exclusionary policies in Britain and the United States, this article unmasks and argues against the assumptions underlying such policies. By returning to well-established sex discrimination doctrine, moving away from a male norm, and reaffirming women's right to both work and have children, the Supreme Court's decision in UAW v. Johnson Controls is an important victory. The decision should help to break down job segregation, prompt the EEOC to act, and clear the way for addressing questions of health and safety rather than equality and difference.

INTRODUCTION

Once federal and state sex discrimination laws began to be enforced in the mid-1970s, employers in male-dominated industries could no longer refuse to hire women solely because of gender. As the first women began
to work in high-paid, skilled industrial jobs such as foundries and chemical manufacturing, employers developed policies to exclude all women whose infertility was not medically documented from allegedly hazardous work because they might become pregnant (Becker 1986; Bertin 1983; Bertin 1986; Williams 1981). Employers called these exclusionary policies "fetal protection policies," however partial their protection of future generations and however removed from an actual fetus. The courts' and the media's adoption of the employers' term, like their use of the term "pro-life," reveals that opponents lost an important rhetorical battle. Calling them fetal protection policies renders women invisible, as mere vessels for future generations who have rights or interests conflicting with yet-to-be-conceived offspring (Petchesky 1987; Pollitt 1990). The policies do not protect women. Furthermore, the term protective suggests a benign, laudable policy rather than exclusion which connotes discrimination. I call them exclusionary policies because, as I shall argue, they do not protect the unborn but discriminate against women and men.

The term "fetal protection policies" also implies that the main risk to the unborn comes from its mother's exposure to toxins in the workplace while pregnant. Yet reproductive hazards are biological, physical, or chemical agents that interfere with men's and women's ability to produce healthy offspring. Examples include radiation or pesticides that may make men and women sterile, cause mutations in the genetic material, or cause a woman to miscarry (Chavkin 1984; Chenier 1982). The important point to remember is that it "takes two to tango." A malformed child could be the result of damage to either maternal or paternal chromosomes, damage to egg or sperm cells, or damage to the fetus in the womb.

Scientific studies of reproductive hazards, however, infrequently reflect the knowledge that men and women both contribute to reproduction. Feminist scholars often begin their work by critiquing the women's and girls' exclusion from their discipline, whether in the study of moral reasoning, the Renaissance, or cardiovascular disease. For reproductive hazards, the opposite is the case. Most studies only examine the effects of toxins on women's ability to reproduce, ignoring the chance that men's exposure may produce malformations (Barlow and Sullivan 1982; Davis 1991; Fletcher 1985). The consequence of leaving men out is that when the studies discover a reproductive effect, employers assume it is confined to women, and proceed to exclude women from jobs.

The failure to explore male effects is unjustified since scientists have long known about them. For example, not only are pregnant women exposed to anesthetic gases more likely to miscarry, but so are the partners of exposed men. The problem may be in the dominant conception of repro-
duction itself. The so-called “macho sperm theory” posits that the fittest, strongest, most perfect sperm, like Rocky storming the steps of the Philadelphia Art Museum, streaks through to “penetrate” the egg (Martin 1991). Recent evidence suggests that the egg chemically draws sperm to it, calling into question the passive egg active sperm model. As Dr. Davis, from the National Academy of Sciences quipped, “You don’t have to be Sigmund Freud to figure out there are cultural factors to say why we have paid so much attention to the female and so little to the male” (Blakeslee 1991). The following four cases show how employers simultaneously magnified the risk to offspring through women’s exposure to toxins while minimizing the risk through men’s exposure.

**CASES**

*American Cyanamid*

In 1973, federal investigators informed American Cyanamid that if it did not begin to hire women at its Willow Island, West Virginia, chemical-based production factory it would soon face sanctions. As “the only workplace for miles offering a living wage” applications flooded in (Faludi 1991, 441). In 1975, the corporate medical director of American Cyanamid Corporation, Dr. Robert Clyne, began drafting a policy to ban women from any jobs that exposed them to any amount of 29 substances (OTA 1985, 252). He compiled the list by scanning a computer sheet of hazardous substances in a process he described as “an educated guess.” Cyanamid neither conducted animal studies nor epidemiological studies of its own workforce to see if they had experienced reproductive problems. The director did not consider substituting other products, reducing exposure, or using protective equipment.

Of the 29 substances, the medical director only had evidence that one substance, lead, was embryotoxic (injuring a fetus in the womb through maternal exposure). He quickly narrowed the range of reproductive effects of concern to encompass only effects to the fetus of the mother’s exposure. Although the medical director was willing to assume that any substance that was carcinogenic to adults might harm a developing fetus, he quickly dismissed the risk of infertility or sterility to either men or women and, without looking at the evidence of reproductive hazards to men or extrapolating from evidence about carcinogens, he concluded men were not at risk.

Because the medical director believed women neither knew when they were pregnant nor planned their pregnancies, Cyanamid’s policy excluded all women aged 15-50 from exposure to hazardous substances unless they
were sterilized. Although the company had not yet decided to implement the policy, managers at Willow Island, West Virginia, announced it in 1978. Glen Mercer, director of industrial relations, told women that seven of them could transfer to the janitorial pool for less pay if they were not sterilized. All others would lose their jobs, even if their husbands had vasectomies or they were taking oral contraceptives or they agreed to monthly pregnancy tests. The company doctor and nurse at the meetings told the women that sterilization, described as “buttonhole surgery,” was a simple procedure a local doctor could perform. The company’s medical insurance would pay for the procedure and women could use their sick leave.

Between February and July of 1978, five women in the lead pigments department were sterilized and two women transferred. The men who had greeted women’s entry into the plant by posting signs saying “Shoot a Woman, Save a Job,” placing violent pornography in their lockers, and sexually assaulting them in the locker room laughed that the sterilized women had been “spayed,” were “one of the boys now,” and commented, “the veterinarian’s having a special” (Faludi 1991, 443, 448). Although the women did not know it, the company had decided to delay implementation of the policy, seeking better scientific justification, and it took most of the substances off the list. The women’s sacrifice was in vain. Cyanamid closed the lead pigments department in 1979 and the women lost their jobs. The women claimed that requiring women but not men to be sterilized as a condition of employment was sex discrimination. Three and a half years later Cyanamid settled out of court for $200,000 to be divided among eleven plaintiffs (Christman v. American Cyanamid; OTA 1985, 251).

The Occupational Safety and Health Administration had become concerned that employers were using health and safety as a justification for demanding that women workers be sterilized. In 1979, OSHA issued citations to both Cyanamid and Bunker Hill, a lead smelter that instituted a similar exclusionary policy, alleging that requiring women workers to be sterilized violated the general duty of employers to provide a safe and healthy workplace (Randall and Short 1983; Tate 1981). Cyanamid challenged the citations and won the first two rounds (Secretary of Labor v. American Cyanamid 1981). On appeal, Judge Robert Bork wrote the opinion for the Court of Appeals for the D.C. Circuit. He ruled that an employer’s general duty to provide a safe and healthy workplace did not forbid requiring sterilization as a condition of employment for women only (OCAW v. American Cyanamid 1984). Judge Bork held that the women underwent the sterilizations voluntarily and not because the job required it. The only issue before the court was whether they violated health and safety law, not whether the policies were discriminatory.
When Judge Bork came before the Senate Judiciary Committee as the nominee to the Supreme Court, Senator Metzenbaum called his opinion "shocking" (Senate Hearings 1987, 467). Judge Bork replied that he had faithfully followed the legislative intent of Congress. Moreover, the company was offering women a choice: "I suppose the five women who chose to stay on that job with higher pay and chose sterilization—I suppose that they were glad to have the choice—they apparently were—that the company gave them" (Senate Hearings 1987, 470). His televised testimony stunned Betty Riggs, one of the women who was sterilized, and she sent a telegram to the committee.

Only a judge who knows nothing about women who need to work could say that. I was only 26 years old, but I had to work so I had no choice. . . . This was the most awful thing that happened to me. (Senate Hearings 1987, 678)

Judge Bork's ruling had legal and political consequences far beyond the parties to the case. His decision effectively shut down OSHA's ability to fight exclusionary policies, unless it wrote specific guidelines. The issue was reformulated as a matter of sex discrimination rather than one of health and safety. Once so framed, the outcome turned on whether women and men were sufficiently alike in their vulnerability to toxins to merit equal treatment rather than whether exclusionary policies were sound health and safety policies.

**Page v. Freight Hire**

In Britain, too, the issue was taken up as a question of sex discrimination rather than health and safety. In 1980, a British haulage company fired a woman truck driver hauling dimethylformamide (DMF) because the chemical contractor said no women could haul DMF into its plant, claiming DMF was a reproductive hazard to a developing fetus. The driver, Jacqueline Page, claimed the company's action violated the Sex Discrimination Act of 1975. The industrial tribunal did not agree, relying on a Court of Appeal's holding that held that employers could treat one sex less favorably than the other for safety or administrative convenience. The industrial tribunal took the view that treating women less favorably than men could not be illegal discrimination if it struck them as reasonable. The tribunal was also willing to assume that the exclusion was reasonable without requiring the employer to offer any evidence.

On appeal, Page's barrister, joined by the Equal Opportunities Commission as *amicus curiae*, argued that the Court of Appeal had overturned the
precedent the industrial tribunal relied on. They argued that the employer carried the burden of showing that DMF was embryotoxic and that it produced no effects in males. The company had failed to demonstrate that Page was exposed to enough of the substance to put her at risk—she only drove the truck, others did the loading and unloading. If there was a spill, a reproductive injury would be the least of her worries—DMF posed other serious health risks. Nor had the company offered any evidence about the relative risk of men’s versus women’s exposure. Page maintained that she had no intention of becoming pregnant. She was 23-years-old and divorced, and had offered to sign an indemnity form. Her partner had had a vasectomy. The lawyer for the company immediately rejected her claim that she did not want to have children, because that, he said, was a decision for her future husband, and not Page, to make. She felt that declaring her desire to remain childless made the tribunal think she was a monster.

Rather than inventing a broad exception to sex discrimination law, as the Court of Appeal had done, and then recanted, the Employment Appeal Tribunal (EAT) turned to an exception in the statute. Section 51 permitted discrimination if a statute passed before 1975 required or allowed it. The EAT held that since Parliament passed the Health and Safety at Work Act in 1974, employers could discriminate against women if they claimed health and safety as the justification. Contrary to the protestations of Page’s barrister and the EOC, the EAT would not scrutinize whether the employers’ argument for health and safety had any scientific merit. Page lost her appeal (Kenney 1987).

**Pregnancy and Polygraphs**

The EEOC warehoused the third case, thus it never reached the U.S. courts. The EEOC’s policy was to do nothing to set policy or resolve complaints in the 1980s (Cooke and Kenney 1988; House Education and Labor Committee 1990). An African-American woman applied for a job at a Mississippi bank and passed her typing test. Deciding to hire her, the bank signed her up for her mandatory pre-employment polygraph test. The polygraph operator asked her a battery of questions that included, “Are you pregnant?” When she answered that she was two months pregnant, he refused to administer the test because the results of polygraphs of pregnant women are unreliable. The bank told her to come back after she had the baby. When she filed a complaint with the EEOC claiming to be the victim of blatant pregnancy discrimination, the EEOC questioned the polygraph operator. His written replies reveal that he changed his story. Writing later that he was dependent on the bank for his business, he asserted that the problem was not that he...
could not ensure the accuracy of a pregnant woman’s polygraph, but that the stress of the test might cause the woman to miscarry.  

After EEOC local office completed its investigation, it sent the file to Washington. Under Chairman Clarence Thomas, the EEOC had decided that any case involving reproductive hazards was too scientifically and legally complex for the agency to resolve, although it had resolved such cases in the past, submitted amicus curiae briefs in litigation, and had the guidance of rulings by several federal appellate courts. In this case, as in others, the investigator’s report revealed the claim of reproductive hazards to be obviously spurious. Having no lawyer, the woman turned to the EEOC to enforce the law. The EEOC did nothing, and she did not get the job.

**UAW v. Johnson Controls**

Litigation against Johnson Controls coupled with pressure from Congress finally goaded the EEOC into action. In 1977, a mere 13 years after Congress had outlawed sex discrimination in employment, the company hired its first women for jobs with high lead exposure. It advised women who were planning to have children not to take the jobs, and required them to sign a waiver stating the company had informed them of the risks. Between 1979 and 1982, eight employees whose blood leads exceeded 30 µg/dl (the limit OSHA recommends for pregnant women) became pregnant. In 1982, Johnson Controls began to exclude all women who did not have proof of infertility from jobs in which any employee had recorded blood lead levels higher than 30 µg/dl, or where air samples exceeded 30 µg/cubic meter, as well as jobs that fed into high lead exposure jobs. Having learned from the public relations debacle of American Cyanamid, the company officially discouraged sterilization.

In 1984, the United Autoworkers union filed a class action suit arguing that Johnson Controls’s adoption of an exclusionary policy at its 14 battery manufacturing plants violated Title VII. Plaintiff Mary Craig had herself sterilized to keep her job. Plaintiff Ginny Green was 50-years-old, divorced, and supporting a nine-year-old daughter on her $9 an hour job that offered opportunities for overtime at time-and-a-half. When the company transferred her to a job as a glorified laundress, she became the butt of “fertility jokes from all the Archie Bunkers” (Kirp 1990, 1). Not all of the plaintiffs were women. In March of 1984, Donald Penney had asked for a three month leave of absence to lower the amount of lead in his blood so he could father a healthy child. Johnson Controls refused, and, according to his complaint, the personnel director told him, “If you feel this way, quit” (Kirp 1990, 7).
Johnson Controls requested the district court grant it summary judgment—that the court dispense with a trial because there were no contested issues of fact or law. The UAW protested that two important facts were in dispute: whether fetuses were at risk from low levels of maternal exposure to lead, and whether men’s exposure endangered their reproductive capacity. The company and the union also disagreed about how the court should classify the exclusionary policy under the law. How the court chooses to classify the policy assigns the burden of proof between employers and workers and determines how hard it is for an employer to justify its policy.

Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, prohibits sex discrimination in employment. Sex discrimination includes discrimination because of pregnancy, childbirth, or related medical condition (Furnish 1980). To justify excluding all women from a job, an employer must show that sex is a bona fide occupational qualification for the job (BFOQ)—that you cannot do the job if you are a woman. If, however, an employer adopts a “neutral” policy that excludes disproportionately more women than men, such as a height requirement, the employer must justify the policy as a business necessity.

Although the policies discriminate on their faces, three circuit courts treated them as neutral, allowing the employer to argue a business necessity defense (Buss, 1986; Hayes v. Shelby Memorial Hospital 1984; Wright v. Olin 1984; Zuniga v. Kleberg County Hospital 1982). Judges in both Britain and the United States had been willing to set aside the clear mandates of sex discrimination statutes because excluding women from hazardous work to protect offspring they have not yet conceived seems reasonable and benign rather than a sinister attempt to deny women employment opportunity (Kenney 1992).

The consequences of treating facially discriminatory exclusionary policies as if they were neutral (disparate impact) became more significant as the Supreme Court lessened the standard of justification for business necessity during the 1980s (Wards Cove Packing Co. v. Atonio 1989). Because the Court’s rulings had made it virtually impossible to challenge neutral employment policies that froze women in low paying jobs, Congress fought to amend the law, and eventually succeeded in passing the Civil Rights Act of 1991. As UAW v. Johnson Controls worked its way through the appeals process, however, the reduced standard of proof for disparate impact was in effect.

Both the district court and the court of appeals analyzed the exclusionary policy as if it were neutral, although it discriminated against women on its face, and applied the reduced standard of justification for business necessity. Both did so without a trial record since District Judge Robert
Warren granted Johnson Controls’ motion for summary judgment. The Court of Appeals for the Seventh Circuit affirmed. Both courts accepted that lead posed a risk to a developing fetus and dismissed the evidence of the effects of lead on men’s reproductive capacity.

In 1978 when OSHA developed standards of exposure for lead, it explicitly rejected permitting employers to exclude all women (29 C.F.R. §1910.1044, 1978). Because of evidence that men’s reproductive capacity was also at risk from high lead exposure, OSHA set a single standard for men and women. OSHA recommended that employers permit men and women planning to conceive to transfer out of high lead exposure jobs. Because of evidence that lead might harm a developing fetus, OSHA recommended that pregnant women not have blood lead levels that exceeded 30 μg/dl. Judge Warren, however, found convincing Johnson Controls’ evidence that blood lead levels far below 30 μg/dl might injure children, and extrapolated that fetuses were also at risk from very low levels of maternal levels of lead in the blood. Several of the medical experts that Johnson Controls cited objected to how the company used their evidence. They did not agree that the fetuses were at risk from low levels of lead in their mothers’ blood nor that men’s reproductive capacity was not at risk. Since the district judge granted summary judgment, their testimony was available only in the briefs of the parties and amici.

At the opening of the oral argument before the court of appeals, Judge John L. Coffey reportedly leaned over the bench and remarked: “This is the case about the women who want to hurt their fetuses” (Kirp 1991, 70). Judge Coffey wrote the opinion for a seven to four majority affirming the district court’s decision to grant summary judgment to Johnson Controls. Four dissenting justices on the Court of Appeals, however, including Reagan-appointed conservatives, argued that summary judgement was inappropriate because important matters of fact and law were in dispute. Judge Easterbrook, in words perhaps intended to pique the attention of the Supreme Court, wrote, “this is the most important sex-discrimination case this circuit has ever decided. It is likely the most important sex-discrimination case in any court since 1964 when Congress enacted Title VII” (886 F.2d 871, 920).

Both Judges Easterbrook and Posner wrote opinions contesting the majority’s legal analysis. Policies that explicitly discriminate on the basis of sex, they argued, could only be defended under Title VII as a bona fide occupational qualification (BFOQ)—not a business necessity. Judge Easterbrook referred to another judge’s characterization of the district court’s reasoning as, “this must be a disparate impact case because an employer couldn’t win it as a disparate treatment case” (910). Judge Easterbrook
thought Johnson Controls' policy was excessively broad since few women would become pregnant.

Judge Cudahy resented having to decide the case without the benefit of a trial, claiming that summary judgment was inappropriate and thought classifying the policy as disparate impact was "result-oriented gimmickry" (902). He also commented on the gender of those who had the power to decide.

It is a matter of some interest that, of the twelve federal judges to have considered this case to date, none has been female. This may be quite significant because this case, like other controversies of great potential consequence, demands, in addition to command of the disembodied rules, some insight into social reality. 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 doctor? Whose fetus is at greater risk? Whose decision is this to make? We, who are unfortunately all male, must address these and other equally complex questions through the clumsy vehicle of litigation. At least let it be complete litigation focusing on the right standard (902).4

The Supreme Court echoed the dissenters, not the majority, on the court of appeals in its ruling. On March 20th, 1991, the United States Supreme Court unanimously held that Johnson Controls' exclusionary policy discriminated against women. Justice Blackmun declared that the policy explicitly discriminated against women on the basis of their sex. The only Title VII defense for explicit sex discrimination is that sex is a bona fide occupational qualification for the job—that you cannot do the job if you are a woman. All nine justices agreed that Johnson Controls' exclusionary policy was facially discriminatory and the lower courts erred in granting the company summary judgment. Justice Blackmun argued that the three circuits had erred in treating exclusionary policies as neutral, allowing the employer to justify them under the business necessity defense.

Justice Blackmun went on, however, to say that employers could never justify an exclusionary policy as a BFOQ. Being potentially pregnant does not render women incapable of making batteries. Nor could the threat of tort liability of injured children justify the exclusion of fertile women. Noting OSHA's lead standard, Justice Blackmun concluded that if employers met established exposure standards and informed women of the risks, courts would not consider them negligent.

In a move that angered anti-abortion groups, Blackmun, author of Roe v. Wade, wrote: "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 (1207).” The rights of a yet-to-be-conceived fetus do not trump all other rights. Justice Blackmun’s opinion issued an unambiguous message of support for Congress’s desire to prevent employers from denying women jobs because they can get pregnant.

In a concurring opinion, Justice White, joined by Chief Justice Rehnquist and Justice Kennedy, thought employers might be able to defend a more narrowly-tailored policy as a BFOQ. Justice White did, however, agree that summary judgement was inappropriate and that the policy constituted disparate treatment. The likelihood of a substantial tort liability could justify a BFOQ, but the burden would be on the employer to prove that threat existed. Justice White thought the BFOQ could include considerations of cost and safety, instead of merely whether women could perform the job. He did, however, believe that Johnson Controls had overstated the risk, and that it should have considered less discriminatory alternatives to excluding all non-sterilized women.

Justice Scalia’s concurring opinion dismissed the evidence on lead as irrelevant. Even if all employed women put their fetuses at risk, and men’s exposure did not jeopardize the health of their offspring, Johnson Controls’ policy was facially discriminatory because “Congress has unequivocally said so [in passing the Pregnancy Discrimination Act] (1216).” Those who find that result unsatisfactory should appeal to Congress to amend the law. Although he agreed with Justice Blackmun that any action required by Title VII could not give rise to tort liability, Justice Scalia did not accept that cost could not be a defense for explicit discrimination. A prohibitive expense might justify excluding women from certain jobs, but the employer would bear the burden of proof.

**CRITIQUE EXCLUSIONARY POLICIES**

These four cases provide the necessary context for understanding exclusionary policies. When considered in the abstract rather than in concrete, the policies seem benign. Who does not want to protect future generations? Employed women certainly share this goal. When we look closely at the context in which exclusionary policies emerge—the history, timing, and type of workplace—when we examine how employers developed, applied, communicated, and hurriedly implemented the policies, they look more suspicious. A more careful examination of specific policies and their implementation reveals that employers who advocate for them and judges who uphold their legality make several (perhaps unexamined) assumptions.
The first assumption is that fetuses are at risk from women’s exposure (even if no women are pregnant) but not at risk from men’s exposure. Employers adopt a gendered posture toward the risk to future generations (Paul 1986). That is, they have a double standard about what constitutes convincing evidence of harm and how one acts in the face of uncertainty. Johnson Controls extrapolated from evidence about children to claims about fetuses while denying that the evidence that lead damaged the sperm of adult male workers had any validity. Similarly, American Cyanamid maintained that exposing men to lead did not endanger their offspring but exposing women to lead did. It presumed that women were always endangering a fetus (even women who were not pregnant) until conclusive evidence emerged to the contrary, but presumed that men were not until conclusive evidence showed otherwise.

Treating evidence differently depending on whether it reveals maternal rather than paternal effects is even more troubling when one recognizes that scientists have almost exclusively focused on harms to offspring from maternal exposure. In some cases, employers have excluded women from hazardous work when one or two studies show a possible risk to the fetus even when no studies have been done on whether men's reproductive capacities are at risk. After two women at Allied Corporation were sterilized to keep their jobs, for example, officials admitted that the fluorocarbon they worked with was not hazardous to the fetus as originally thought (Faludi 1991, 438).

The second assumption is that no risk to the fetus is acceptable, however minimal. After firing a pregnant X-ray technician in 1980, Shelby Memorial Hospital’s administrator testified that a pregnant woman’s sunbathing in a bikini posed an unacceptable risk that radiation would injure the fetus (Hayes v. Shelby Memorial Hospital 1984). Yet the hospital let male X-ray technicians assume a low risk that their exposure to radiation would affect their fertility or cause mutations in their genes. When UAW v. Johnson Controls reached the court of appeals, Johnson Controls’ assessment of the risk to the fetus troubled judges schooled in “law and economics.” Judge Easterbrook denounced its “zero-risk” strategy for pregnant, or even non-sterilized, women. He preferred to assess the risks to the fetus in the context of women’s lives, questioning whether the fetus was more at risk from low-level exposure to lead than from having an unemployed mother who may lose not only her ability to secure health benefits such as pre-natal care but even the ability to maintain proper nutrition. Judge Easterbrook recognized that no life choices for pregnant women, or anyone else, are zero. Pregnant women drive cars, they breathe polluted air, they drink coffee, consume sugar and food additives, and take the subway. If the dissenting
judges on the court of appeals remained unconvinced that the risk to the fetus of pregnant women’s exposure to lead was excessive, they were even less convinced that the risk to the offspring of those women who were not and did not intend to be pregnant was so great that employers should ban them from work.

The third assumption is that reproductive hazards affecting women are different and more serious than other occupational hazards. Exclusionary policies remove reproductive hazards from the context of sound health and safety policies. Some men who have high levels of lead in their blood will develop high blood pressure and heart disease and die prematurely. These men “choose” to assume additional risks by exposing themselves to lead. Yet employers instituting exclusionary policies would deny a 45-year-old single woman the right to assume some risk to a fetus she is determined to avoid bringing into existence. The danger is that focusing on the risks of reproductive hazards, hazards that attract a lot of media attention, such as the alleged higher incidence of miscarriage among video display terminal operators, will eclipse other occupational health issues. Focusing on miscarriages may deflect public attention from serious eye, back, and hand injuries caused by working on the machines, not to mention the revolution in the working conditions of clerical workers.

Many workers’ jobs expose them to carcinogens, and they have an increased risk of developing cancer. When these carcinogens are essential to a manufacturing process, or for a health treatment, employers reduce exposure as much as possible. Is an increased risk of miscarriage, particularly for a woman who is not and does not want to be pregnant, more serious than an increased risk of developing cancer? To compare these risks is not to suggest that since our society permits workers to expose themselves to substances that cause cancer it is acceptable to let them “choose” to poison their offspring. Women should not have to work with substances that damage them or their offspring. Neither should men. Neither should men or women have to face a serious risk of occupational illness. But the reality is we all assume some risk and we should not put reproductive hazards in a class by themselves and treat them more seriously than the risks of heart disease or cancer. We must embed any policy on reproductive hazards in a sound health and safety policy. Removing women workers is a simpler and less expensive alternative to lowering exposures to all hazardous substances, but we should not permit it to be employers’ chief way of minimizing reproductive hazards, or more likely, insulating themselves from an exaggerated risk of tort liability.

The fourth assumption underlying exclusionary policies is that women are always pregnant. Most women, however, plan their pregnancies. All women are not equally likely to get pregnant because they are biologically...
capable of doing so—or more accurately, because they have not been sterilized or reached menopause. We should not allow employers to treat a woman on the pill, a woman whose husband has had a vasectomy, a 45-year-old single mother, a lesbian, a woman who is celibate, as if they were pregnant, or as if they were incapable of making choices about or controlling their reproductive capacities.

The fifth assumption the policies rest on is that a woman’s childbearing role takes priority over her role as breadwinner. A corollary assumption is that it is only appropriate for women to hold certain kinds of jobs (usually low-paid, dead end). Some employers, judges, and members of industrial tribunals continue to act on the (conscious or unconscious) assumption that women’s place is in the home. Employers and policy makers may see women as “out of place” in traditionally male jobs—certainly the male workers at American Cyanamid did. Women work for the same reasons men do—to earn money to feed themselves and their families, to maintain their standard of living, and to enjoy personal satisfaction and self-esteem. When companies are concerned about reproductive hazards only in male-dominated, well-paid jobs, and ignore reproductive hazards in job groups dominated by women, such as dry cleaning, semi-conductor chip manufacturing, or hospital cleaning, we should be as suspicious as when state legislators sought to “protect” women from tending bar but not from working all night in hospitals (Baer 1978; Goesaert v. Cleary 1948).

Sixth, some employers have assumed that excluding women should be the first option considered rather than the last. The policies of American Cyanamid, Freight Hire, the Mississippi bank, Johnson Controls, and Shelby Memorial Hospital reveal that employers have been too hasty in excluding women rather than exploring alternatives such as lowering exposure, substituting another product, using protective clothing, removing those with high levels of exposure, or more carefully determining who is likely to conceive. Although practicing good industrial hygiene can often minimize exposure, employers who adopted exclusionary policies act on the assumption that they cannot rely on women, and especially pregnant women, to act in their own interests and in the interests of their offspring.

Seventh, employers have assumed that the threat of tort liability from a malformed child whose mother was exposed to work place hazards threatens the financial stability of business. Experts in civil liability have shown, for example in the thalidomide case, how difficult it is to prove causation for any malformation, even when one knows that the mother took a specific dosage of a drug on a specific day. Proving causation for an occupational injury presents even more obstacles (Coley v. Commonwealth Edison 1989; see Daily Labor Report 1992, A-1; Dillon v. S. S. Kresge Co. 1971; In re
“Agent Orange 1980; Hughson v. St. Francis 1983; Jarvis v. Providence Hospital 1989; Security National Bank v. Chloride 1985). While one can show a pattern of increased miscarriages or malformations, it is difficult to prove that a specific occupational exposure caused any particular adverse pregnancy outcome and not that it was one of the high number of unexplained miscarriages or malformations that occur spontaneously. Such suits are nearly impossible to win.

Companies are rightly concerned about having to bear the cost of litigating, even if they are likely to win. Furthermore, being charged with causing miscarriages or malformations damages the public image of the company. However companies assess their vulnerability to lawsuits for offspring damaged as a result of occupational exposure, they would be wrong to assume that only women who believe their exposure has injured their children would sue. In fact, men may be more likely to sue. Men workers who manufactured the pesticide DBCP and veterans exposed to the defoliant Agent Orange claimed their exposure made them sterile or caused them to produce damaged offspring and have sued their employers, although it is difficult for men to win such suits, too (Daniels 1980). Since both men and women can damage their offspring as a result of an occupational exposure, and both men and women can sue, companies who adopt exclusionary policies are trying to shield themselves from the risk of lawsuits from half, or less than half, of their workforce while ignoring the risk of lawsuits from the other half. Employers should not be able to shield themselves from tort liability by making stereotyped assumptions that are untrue: that only women reproduce, that only women may damage their offspring through exposure to toxins, and that only women bring lawsuits.

To conclude, exclusionary policies rest on a misapplication of scientific evidence, and violate sex discrimination law. The policies are underinclusive because they rest on the assumption that men are not at risk. They are overinclusive because they rest on the assumption that women are always pregnant. The policies deny women employment opportunities because of their capacity to bear children while leaving men vulnerable to injury.

THE FUTURE OF EXCLUSIONARY POLICIES

Justice Blackmun’s opinion in UAW v. Johnson Controls exposes and rejects several of the assumptions underlying exclusionary policies. By overturning the lower courts’ rulings upholding exclusionary policies, the Supreme Court restores conventional sex discrimination doctrine. Judges can no longer create an exception to the narrow requirements of the BFOQ
defense because they see employers' policies as benign—they cannot substitute their own standard of what is unreasonable for the law's definition of discrimination. The opinion holds that employers cannot force women to choose between jobs and children, or between jobs and sterilization, rather than cleaning up their workplaces. Beyond sending a clear message to employers that exclusionary policies violate Title VII, the ruling has four principal effects.

First, Justice Scalia's concurring opinion raises an important point for feminist legal thought. Justice Scalia argued that Title VII prohibits employers from excluding fertile women from hazardous work, not because men face reproductive hazards from lead, too, but because the Pregnancy Discrimination Act states unambiguously that employers may not exclude women from jobs because of their capacity to become pregnant. Justice Blackmun also refers to the plain language of the PDA, but Justice Scalia explicitly mentions that a comparison is not required. As feminist legal scholars have long maintained, pointing to decisions such as General Electric v. Gilbert and its British equivalents (Hayes v. Malleable Working Men's Club 1985; Turley v. Alders Department Stores 1980; Webb v. EMO Air Cargo 1989), the law incorporates a male standard (MacKinnon 1987). Women can have the right to work only if they are just like men, or can compare their circumstances to men. Pregnant women won some rights to protection under discrimination law because they could compare themselves to men with temporarily incapacitating disabilities. In UAW v. Johnson Controls, the Supreme Court says unequivocally that whether women can compare themselves to men or not, the law forbids employers punishing women because they can bear children. The legality of exclusionary policies no longer turns on a careful analysis of the differences between men's and women's vulnerability to toxins and different roles in reproduction.

_UAW v. Johnson Controls_ is a major victory of sex discrimination law, not because it solves the problem of reproductive hazards in the workplace, but because it alters the terms of the debate. Rather than trying to make it appear safe by excluding women workers and ignoring the evidence about men, employers will have to make the workplace safe for men and women. Focusing only on whether employers could exclude women and whether women were different from men deflected attention, not only from the reproductive hazards from men's exposure, but from concerns about the effects of toxins on workers more generally. The United Auto Workers Union and groups supporting them, such as the Women's Rights Project of the American Civil Liberties Union, did not seek, on the same terms as men, the right of women to poison their offspring but for all workers to have the right to a workplace free from hazards, reproductive or non-reproductive.
The Supreme Court’s decision in *UAW v. Johnson Controls* removed this impediment to focusing on the safety of the workplace, rather than the sex of the worker.

Third, the decision should help promote initiatives to break down job segregation by sex. No one wants to exclude women from low-paying hazardous jobs such as working in a dry cleaners, being a surgical nurse exposed to anaesthetic gases, working with children who get measles and chicken pox, or changing the kitty litter. Many of the jobs women do are stressful and hazardous but strangely, employers have only wanted to exclude women from the ones that pay decent wages. The real solution, of course, is to clean up the workplace. The Supreme Court’s decision is a powerful statement that women do not have to give up their right to bear children if they want to work. Business groups protested that because they could no longer ban women from hazardous work, the Supreme Court was forcing them to injure fetuses and incur liability. Most of the women employed by Johnson Controls, however, had no intention of becoming pregnant: they were in their forties or fifties, they were celibate, or on the pill, or their husbands had vasectomies. Only 2% of blue collar workers older than 30 become pregnant each year (Stellman and Henifin 1982, 138). They resented not only having to be sterilized to keep their jobs, but having this fact known by their co-workers who joked about neutering, veterinarians, and the women’s lost femininity.

Finally, the decision should have an impact on how the Equal Employment Opportunity Commission enforces Title VII. Since the Republicans have been in power, the EEOC’s policy has been to do nothing about complaints on exclusionary policies. Now that the Supreme Court has ruled in *UAW v. Johnson Controls* that exclusionary policies are unlawful sex discrimination, the EEOC can no longer justify its inaction by claiming to be mystified by tough legal and scientific issues (*Daily Labor Report* 1991).

Winning a victory in the Supreme Court is not a panacea for employed women. It remains to be seen whether lower courts will follow the Supreme Court’s ruling, whether the EEOC will faithfully enforce it, and whether employers will obey the law. It also remains to be seen whether men and women workers can work together to demand a safe and healthy workplace that does not endanger their offspring. But just as we must not overstate the significance of winning, so we must not understate it either, especially since sex discrimination victories from the Rehnquist Court are few and far between.
NOTES

2. Judge Thomas's record on complaints on exclusionary policies became an issue in his confirmation hearings. See Senate Hearings 1991, 80-82.
4. While the appeal was pending before the Supreme Court, California state courts declared Johnson Controls' policy to be in conflict with California's fair employment laws (Department of Fair Employment and Housing v. Globe Battery 1987, Foster v. Johnson Controls 1990).
5. See the briefs of the American Civil Liberties Union and the American Public Health Association in UAW v. Johnson Controls.
6. A British industrial tribunal was more sympathetic to a pregnant worker's concern about hazards in a female-dominated environment (Johnston 1984).

REFERENCES


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