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I. Introduction

On August 9, 1982, Johnson Controls, the nation's largest manufacturer of car batteries, instituted a new "Fetal Protection Policy."[2] This policy banned all fertile women working in the company's United States Globe Battery Division, regardless of age or personal circumstances, from working in jobs that involved exposure to lead. Lead, an integral component of batteries, was abundant in battery manufacturing facilities. Johnson Controls explained its policy shift as a response to scientific evidence linking lead exposure before and during pregnancy with birth defects in children, and noted that several workers had recently shown lead levels that exceeded the OSHA standard for pregnant women. Johnson Controls' policy followed the practice of other companies in the chemical and heavy metal industry which, fearing mounting tort liability for employees' children born with lead-associated birth defects, had adopted similar policies in the preceding decade.

Almost overnight, life changed dramatically for most of the Globe Battery Division's 275 female employees in 14 plants across the country. Johnson Controls' Fetal Protection Policy left most female production and maintenance employees with an agonizing choice: either get surgically sterilized and continue working in a production/maintenance job that in the blue collar world paid top dollar and came with excellent benefits, or accept a transfer to a lower-paying, lower-prestige job that had reduced benefits and opportunities for promotion and overtime but lower lead exposure levels. The new policy also meant that a female employee's very presence on the shop floor exposed an intimate detail about her life – her infertility – to her male co-workers.

Some women, such as 34-year old Gloyce Qualls, opted for sterilization. Qualls was making $450 a week burning lead posts into large industrial batteries at Johnson Controls' Milwaukee, Wisconsin plant. In August 1982, when the company enacted its fetal protection policy, she had just bought a new car, moved into a new apartment, and was planning to marry a man with four children. Two weeks after company officials told her that they would transfer her to a new $200-a-week position, pursuant to the new fetal protection policy, she underwent tubal ligation.[3] Many women workers like Qualls were juggling tangible hazards in their lives – domestic violence, health problems, and poverty – and needed the financial and professional cushion their factory jobs provided. They had tried to reduce their exposure to lead by wearing protective gear, maintaining good hygiene, and requesting temporary transfers to reduce body lead levels. Such measures, however, were no longer an option under the new fetal protection policy.

Others decided against sterilization. This was the case for Virginia Green and other older female employees, many of whose doctors warned of serious risks associated with such surgery for women over age 50. Although Green was aware of the dangers lead posed to fetuses, she was not particularly concerned about this risk affecting her, as she was 50 years old, divorced, and not planning on having any more children. After eleven years on the shop floor, Green was transferred from the battery assembly line, where she was making nine dollars an hour plus time and a half overtime, to a job as a respirator sanitizer, "a glorified laundress," where she made far less money and became the butt of male co-workers' fertility jokes.[4]

Across the country, Johnson Controls employees, mostly female, trickled into the local bargaining units of their union, the United Auto Workers (UAW), to file grievances. The grievances culminated in a class action lawsuit against Johnson Controls. The individual complainants represented a cross-section of employees: Elsie Nason, a fifty year old divorcee; Mary Craig, who elected to be sterilized in order to ensure her job; and Donald Penney, who requested but was denied a three-month leave of absence in order to lower his blood lead levels to enable him to safely father a child, and who was subsequently "harassed and intimidated" by the plant's personnel manager. Both the District Court and the Court of Appeals dismissed the case on summary judgment, and the Supreme Court granted certiorari. On March 21, 1991, the Supreme Court held that sex-specific fetal protection policies violate Title VII's prohibition on sex discrimination in employment contained in Title VII of the 1964 Civil Rights Act. The Court found Johnson Controls' policy, which explicitly categorized employees on the basis of potential for pregnancy, constituted impermissible facial discrimination that could not be defended as a bona fide occupational qualification (BFOQ).[5]

Johnson Controls is best known as a great victory for women's rights and reproductive freedom. It is the culmination of a long legal campaign to invalidate restrictions on women's employment based on pregnancy. It decisively narrows the use of Title VII's BFOQ exception to situations where "sex or pregnancy actually interferes with the employee's ability to perform the job."[6] The case shows the potency of litigation to mobilize alliances aimed at achieving legal change. *Johnson Controls* brought together a remarkable coalition of labor, women's rights, and workplace safety activists. The case also illustrates the impact of relationships among repeat players in the legal advocacy community, particularly the strong relationships between labor attorneys in the UAW and feminist attorneys in national women's rights organizations. The history of this litigation alliance can be tracked through organizations' participation as amici in appellate and Supreme Court cases involving women's rights. These cases powerfully demonstrate the use of amicus briefs as opportunities to link the efforts of groups with overlapping agendas and to shape the Supreme Court's understanding of the surrounding empirical, social and political context.

But *Johnson Controls* also provides important lessons about the narrowing effects and fragility of litigation-centered mobilization. The issue framed in the courts necessarily zeroed in on the unfairness of excluding only women from dangerous jobs based on the potential impact on fetuses. But the problem, as it was experienced by

women (and men) was far broader and more complex. As the stories of the *Johnson Control* plaintiffs illustrate, gender bias permeated the way many industries and unions responded to hazardous workplace conditions. It also shaped scientific research on reproductive hazards. Moreover, removing fetal protection policies did not address the underlying health and safety issues threatening the reproductive health of both men and women. But like much test-case litigation, the *Johnson Controls* coalition was organized to win the case at hand. Once the legal victory at the national level was achieved in the courts, the national labor-women's rights coalition assembled to achieve that goal proved difficult to sustain, particularly in light of the increasingly conservative political and regulatory environment. The anti-discrimination goals of the national advocacy groups organized around test-case litigation had been met. The workplace health issues that remained could not easily be addressed as discrimination issues in court. Administrative agency support for addressing those issues did not exist at the national level. The national groups disbanded and moved on to a new set of issues.

The *Johnson Controls* story poses questions that have taken on much greater urgency in the current legal and political environment. What does this litigation-centered focus for mobilization mean for how problems are defined and addressed? How does it determine who participates in and influences the course of the advocacy and change process? Does a national law reform campaign have the capacity to sustain public attention to problems not addressed by the legal claim? Are there ways to connect litigation to a broader mobilization strategy that keeps problems' multiple dimensions in view and sustains crucial alliances when litigation ends?

Interestingly, the federal mobilization story has a state-level analogue, which adopts a different strategy for connecting litigation to mobilization. In the 1980s, California employment, women's rights, labor and public health advocates mobilized at the state level to address the threat posed by workplace reproductive hazards and industry's response to them. Like their federal counterparts, this coalition used litigation as a tool, challenging Johnson Controls' fetal protection policy in California state court. But the California initiative defined its agenda as developing long-term solutions to the complex problems these hazards posed. They found venues beyond the courts to come together and advocate for changes in employer practices affecting workers, including educational arenas and media. They cultivated working relationships with non-lawyer partners to keep the focus on issues broader than those defined by the legal standard. For California advocates, the court victory did not fully solve the problem, and thus was only a step toward the larger goal. Taking advantage of the more hospitable political and regulatory environment and the diverse stakeholders at the table, the California coalition undertook to mobilize in a way that would enable repeat players with long-term interests to sustain their participation so that the problem, as experienced by workers, would be addressed.

II. Historical, Regulatory and Judicial Backdrop

A. The Origins of a Labor and Women's Rights Alliance

Workplace fetal protection policies that emerged in the 1970s were one chapter in a long history of women's exclusion from hazardous but higher paying jobs. They were rooted in the stated goal of protecting the health and safety of women and their offspring. A century of this state protectionist legislation and a longstanding tradition of male-dominated unions had effectively precluded women in the past from accessing physically demanding and high-paying factory jobs.[7] Indeed, before the 1960s, women's absence from these jobs had become largely normalized in the national psyche.[8] Many unions had opposed women's entry into traditionally male positions and supported protectionist legislation and policies.

With the passage of new civil rights laws in the 1960s, however, industries and unions faced legal challenges to the exclusion of women from these jobs. The civil rights and women's rights movements gave rise to landmark civil rights legislation, including the Equal Pay Act of 1963 and the Civil Rights Act of 1964, and the creation of administrative agencies, such as the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). The law now required employers and unions to admit women to employment unless their exclusion could be justified.

Many groups formed in the wake of this legislation, which had opened up new avenues for mobilization, activism, and litigation. After the passage of Title VII, employers and unions seeking to preserve the status quo focused on pregnancy and argued for a broad BFOQ exception that would exclude women from jobs perceived as posing risks to them or their unborn children. As major unions like the AFL-CIO and the International Union of Electrical, Radio, and Machine Workers (IUE)[9] hesitated to advocate on behalf of labor women in the 1960s, women formed their own groups to challenge employers' restrictive practices. Some unions, responding to the demands of a growing female membership, changed their position and challenged policies discriminating based on pregnancy. This mobilization included a developing alliance between segments of the labor movement and women's rights advocates.

In contrast to other unions, the UAW had historically been active in the women's and civil rights movements. The UAW was the first union to establish, in 1944, a Women's Department, and as early as the 1960s it was lobbying the EEOC to oppose protectionist legislation.[10] In 1966, Betty Friedan, former EEOC commissioners, a UAW Women's Committee representative, and members of state women's status commissions formed the National Organization for Women (NOW) in reaction to a lax EEOC response to sex discrimination.[11] In 1974, a UAW leader became the first president of the Coalition of Labor Union Women (CLUW), a group of women who felt powerless within their unions and sought to develop a women's agenda within the established labor movement.[12] Many UAW lawyers had a background in and commitment to women's rights and connections with women's rights organizations across the country.

Women's groups celebrated several judicial, legislative, and administrative agency victories in the Title VII arena in the early 1970s. A new crop of women's rights groups soon emerged, looking to make these victories the beginning of something

larger.[13] All of these groups came to play an important role in developing litigation, legislative, regulatory, and other advocacy strategies to promote women's rights, and they became important players in the events producing the Supreme Court's decision in *Johnson Controls*.

B. Mobilization Around Supreme Court Losses

Several Supreme Court decisions in the 1970's threatened women's progress toward workplace equality, and defined the mobilization agenda for women's groups and their sympathetic labor partners. These cases became the focus of a sustained law reform campaign. Pregnancy discrimination– reflected in a constellation of employers' policies including forced leave, loss of seniority, lack of medical coverage, and outright dismissal for pregnant workers—was one of the first issues that this new coalition of women's groups tackled.[14] The first major case in this area was *Geduldig v. Aiello*,[15] an unsuccessful 1974 equal protection challenge to California's refusal to grant disability benefits to pregnant women. Foreshadowing what would soon become a familiar amicus lineup, the ACLU, AFL-CIO, EEOC, IUE, Physician's Forum, and WEAL filed an amicus brief arguing that the policy was unconstitutional.

In the years following *Geduldig*, women's groups looked to Title VII, rather than the Constitution, as a means to combat pregnancy discrimination. In *General Electric v. Gilbert*,[16] the Supreme Court rejected IUE's Title VII challenge to General Electric's disability plan which, like California's, did not grant disability benefits to pregnant women. The Court held that, under Title VII as well as the equal protection clause, pregnancy discrimination was not sex discrimination.

Women's groups immediately mobilized in response to *Gilbert* and, alongside labor and civil rights groups and churches, soon formed the 300-plus member Campaign to End Discrimination against Pregnant Workers (CEDAPW) with the express goal of legislatively overruling *Gilbert*. In 1978, Congress passed the Pregnancy Discrimination Act (PDA), which amended Title VII to include discrimination based on pregnancy, childbirth, or related medical conditions.

In 1983, the Supreme Court again saw the familiar lineup of amici from *Geduldig* and *Gilbert* in *Newport News v. EEOC*, where the Court found that a corporate policy granting better pregnancy benefits to female employees than to the wives of male employees violated Title VII.[17] Four years later, in *California Federal Savings & Loan v. Guerra*, the Court ruled that policies that treated pregnancy more favorably than other disabilities were lawful under the PDA, since Congress intended the PDA to promote equal employment opportunities for women and to be a floor, not a ceiling.[18] Significantly, *Guerra* produced a rift amongst the nation's women's rights groups. East Coast organizations, including the ACLU WRP, NOW LDEF, the Women's Law Project, NWLC, and WLDF, feared the implications of promoting measures that could be viewed as "special protections" for women and thus submitted "equal treatment" amicus briefs in support of neither party and that advocated treating pregnant women the same as other disabled individuals. West Coast organizations, including the Legal Aid Society-

Employment Law Center (LAS-ELC), ERA, the California Teachers' Association, the Mexican-American Legal Defense and Education Fund (MALDEF), the Northwest Women's Law Center, and the San Francisco Women Lawyers Alliance, as well as Betty Friedan and CLUW, submitted "special treatment" amicus briefs in support of the respondent emphasizing the importance of recognizing the real differences between men and women and the harms suffered by women whose employers ignored their pregnancy-related needs. Several years later, as the *Johnson Controls* case worked its way up to the Supreme Court, these groups reunited in a common effort to eradicate fetal protection policies.

At the same time that PDA-related litigation was winding through the courts, litigants were struggling to define the scope of Title VII's BFOQ exception. In 1977, the Supreme Court found in *Dothard v. Rawlinson* that a prison could properly assert a BFOQ defense to justify the prison's decision to hire only male guards in contact areas of maximum security male penitentiaries.[19] The Court found that "[t]he likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel."[20] Because maintaining safety and order were related to the "essence" of the employer's business, the Court found that it could categorically exclude women from certain jobs.[21] Several federal courts, relying on *Dothard*, subsequently permitted airlines to use the BFOQ defense to justify layoffs of pregnant flight attendants, on the ground that the airlines' policies were necessary to ensure the safety of passengers.[22]

Dothard had opened the door to widening the BFOQ standard by permitting sex stereotypes to be a legitimate basis for excluding women from jobs. Advocates wondered whether *Dothard* could jeopardize their momentous gains on the pregnancy discrimination front. In particular, they worried that the case could lead to legal recognition of the fetus as a "third party" whose safety was placed at risk by its mother's employment. The concern was that courts would permit employers to exclude women based upon concerns for fetal safety.

C. The Failure of Regulatory and Litigation Efforts Proceeding Under Workplace Health and Safety Requirements

Statutes and regulations governing health and safety offered another avenue for tackling the reproductive hazards facing women and men in the workplace. These efforts, however, were thwarted by agency paralysis and litigation failures.

On December 29, 1970, after much political wrangling, President Nixon signed the Occupational Safety and Health Act (OSHA Act),[23] creating an Occupational Safety and Health Administration (OSHA) that was charged with promulgating workplace health and safety standards and conducting inspections to monitor compliance with these standards. [24] Between 1971 and 1984, OSHA implemented fifteen standards regulating toxic substances, including lead.[25] Chronic overexposure to lead through inhalation or ingestion, the agency found, could cause severe damage to the blood-forming, nervous,

urinary, and reproductive systems of men and women.[26] In order to avoid the risks posed to workers by exposure to lead throughout a working lifetime, the agency stated, worker blood lead levels should be maintained at or below 40 [mu]g/100g, and the blood lead levels of all workers who intend to have children should be maintained below 30 [mu]g/100g "to minimize adverse reproductive health effects to the parents and to the developing fetus."[27]

In November 1978, OSHA passed a controversial new lead standard that required employers to remove from the workplace any employees – female and male – with abnormally high blood lead levels or actual physical impairment from lead exposure, to place these employees in low-exposure workplaces or on leave, and to continue to grant them the earnings, benefits, and seniority rights of their original jobs for at least 18 months.[28] The impact of the new lead standard reverberated throughout the United States, where industry consumed annually over one million tons of lead and at least 800,000 workers, representing 120 occupations in over 40 industries, were exposed to airborne lead on the job.[29]

Although OSHA's lead standard addressed both male and female-mediated harm resulting from workers' exposure to airborne lead, the majority of the studies upon which it relied focused on female-mediated risk. Importantly, the biological mechanism by which paternal transmission of a toxin to a fetus occurs is scientifically difficult to identify. Therefore, scientists in the 1970s and 80s studying the effects of exposure to toxic substances in the reproductive context had focused almost exclusively on teratogenic effects –the effects of maternal transmission to a developing fetus – and had largely overlooked the effects of paternal environmental exposure on offspring. [30] Moreover, science is not immune to the gender stereotypes and biases that pervade other fields and industries. Many scientists researching reproductive hazards have mistakenly assumed that only the fittest sperm can and will fertilize an egg, or that there is an exclusive link between birth defects and maternal transmission of toxins.[31] Recent data indicate these assumptions are incorrect, and that both paternal and maternal exposure to numerous chemical, physical, and biological agents can cause spontaneous abortions or birth defects.[32]

OSHA's increased attention to the health hazards associated with lead and the growing scientific research linking maternal lead exposure with birth defects in children alarmed many corporations in the chemical and heavy metal industries. Corporate lawyers feared that the growing focus on lead would result in the filing of multi-million dollar lawsuits on behalf of children with lead-related birth defects, since the workers' compensation system, which bars employees from suing employers on their own behalf for health problems associated with workplace hazards, does not foreclose litigation on behalf of a fetus. Doctors employed by industry advocated protecting women from potential toxic exposure as a matter of public health and to avoid medical malpractice lawsuits.[33] Corporate executives were concerned about the ethical dilemmas posed by risking harm to a fetus by exposing pregnant (or "potentially" pregnant) workers to lead. Managers and industry scientists were convinced that it was not technologically or economically feasible to clean up workplaces enough so that all workers would have

blood lead levels below OSHA's standard.[34] Male factory workers and supervisors continued to resist women's entry into traditionally male jobs. In response to these considerations, many major automobile, chemical, tire, and photographic manufacturing companies adopted fetal protection policies throughout the 1970s that, despite the dictates of the new OSHA lead standard, transferred or banned women (without compensation) from jobs in which they were exposed to airborne lead and other toxic substances.[35]

Fetal protection policies, initiated around the same time that protectionist legislation was being dismantled nationwide, effectively re-segregated (by gender) many of the forty-plus industrial workplaces nationwide in which employees were exposed to lead. By the time the PDA was enacted in 1978, fetal protection policies marked a growing trend amongst industry leaders, one that commentators thought signaled "the emergence of a major new civil rights and civil liberties issue that poses medical, legal, economic, and moral dilemmas."[36] The issue involved not only women's rights in the workplace, but also "the more portentous question" of the reproductive harms caused to both men and women by exposure to toxic substances at work.[37]

Women's rights and labor advocates initially enlisted OSHA's support in both invalidating fetal protection policies and reducing health risks to women and men. This mobilization began with a challenge to American Cyanamid Company's fetal protection policy. In January 1978, just four years after women were first hired on the production floor of the company's lead pigment plant in Willow Island, West Virginia, American Cyanamid instituted a policy barring women from all jobs on the factory floor except those who underwent surgical sterilization.[38] Five female employees, aged 26 to 43, chose sterilization over job loss. When they returned to work, male co-workers taunted them for having been "spayed" by the veterinarian.[39]

Workers filed complaints with their union, the Oil, Chemical and Atomic Workers Union (OCAW), and the union went public with the story of the sterilization in late 1978. "No More Willow Islands" became a "rallying cry" of unions and interest groups.[40] Soon, more than 44 feminist, labor, civil rights, and civil liberties organizations[41] joined together to form The Coalition for Reproductive Rights of Workers (CRROW), whose statement of purpose read:

> To resist sex-biased sex-specific policies from the outset; to push corporations to eliminate hazards affecting all workers, regardless of sex or occupation; and to devise compensatory strategies, such as voluntary "reproductive leave" or transfers, with full pay and benefits for both female and male workers in jobs where hazards still exist.[42]

CRROW initially framed the problem broadly. Reflecting the breadth of its membership's interests, the coalition sought to link the pursuit of substantive workplace safety precautions with eliminating sex discrimination.

OCAW and CRROW teamed up to respond to American Cyanamid, and the first step in their advocacy strategy was to lobby OSHA – at the time a friendly ally, having

recently lowered its blood lead level standards and denounced fetal protection policies as an unacceptable response to concerns about workplace health – for action.[43] In May 1979, OSHA levied fines against Cyanamid for overexposing workers to lead and cancer-causing chromates,[44] and in October 1979, the agency charged Cyanamid with violating the "general duty clause"[45] of the OSH Act, which obligates employers to provide safe workplaces to employees, by subjecting female employees to the "hazards" of sterilization as a condition of employment.[46] After extensive administrative litigation, in which OCAW and CRROW were intimately involved, the independent Occupational Safety and Health Review Commission (OSHRC) vacated the citation on April 29, 1981,[47] finding that that the decision to be sterilized was due to external economic factors for which the company was not responsible and concluding that "the [fetal protection] policy is not a hazard within the meaning of the general duty clause."[48] OCAW appealed to the D.C. Circuit.

Before the case was heard on appeal, Joan Bertin from the ACLU Women's Rights Project filed and settled a companion case that challenged American Cyanamid's fetal protection policy under Title VII. Bertin had also assisted OCAW in developing the factual record and expert testimony in the OSHA case. On appeal, the three-judge panel, which included then-Judges Bork and Scalia, unanimously affirmed the OSHRC's decision.[49] Judge Bork wrote for the majority, finding that American Cyanamid's women workers had no remedy under the Occupational Safety and Health Act for being "put to the most unhappy choice" between sterilization and discharge in a case such as this, where the employer complied with OSHA's lead-level standard and still did not eliminate the risk of serious harm to fetuses carried by women employees.[50]

In the wake of *American Cyanamid*, CRROW and its members pressured the EEOC and other executive agencies to propose guidelines on workplace reproductive hazards and fetal protection policies.[51] In 1980, the EEOC proposed guidelines that permitted single-sex exclusionary policies temporarily and as a last resort, and forbade use of the BFOQ defense in the context of fetal protection policies. OSHA assisted with the development of the guidelines and initially agreed to provide technical assistance with enforcement.[52] These guidelines prompted grievances from groups on both sides of the aisle, and the Carter-appointed EEOC, fearing that the incoming Reagan administration would significantly alter the guidelines, withdrew them and instead issued a simple statement that discrimination claims related to fetal protection policies should be resolved on a case-by-case basis.[53] The EEOC subsequently drafted a supplement to its 1981 Compliance Manual directing field offices to coordinate with OSHA and other agencies to evaluate scientific data relevant to a claim. However, this section was also withdrawn after budget cuts at OSHA precluded it from participating in this collaboration.[54]

From 1981 to 1988, the EEOC had no guidelines for evaluating claims related to fetal protection policies, and claims that were filed during this period were often left unresolved.[55] In 1988, the EEOC issued a Policy Statement which provided that the business necessity test, rather than the more rigorous BFOQ test, should be the appropriate measure of the legality of a fetal protection policy under Title VII. Contemplating a far less prominent role for OSHA, the 1988 Guidelines directed the

EEOC to OSHA's expertise "whenever possible," but declined to characterize OSHA's determinations about workplace hazards as binding on the EEOC.[56]

The 1988 guidelines also declared that, in cases where there was inconclusive evidence about the effects of workplace hazards on male workers – even if this paucity was due to the fact that this evidence did not exist (rather than some inconsistency in existing evidence) – the EEOC could consider the claim as if the hazard was "substantially confined to female employees."[57] Because the limited scientific data that existed focused far more on the effects of maternal transmission of toxins to a fetus than on the effects on a fetus of paternal exposure to such toxins, these guidelines operated as a disincentive to employer-sponsored research on paternally-transmitted risks and ultimately encouraged employers to exclude women from the workplace.[58]

The EEOC was not alone in responding passively in the 1980s to the growing corporate fetal protection policy trend. The Office of Federal Contract Compliance Programs (OFCCP), which is specifically authorized under Executive Order 11246 to require non-discrimination for private employers who contract with the federal government, did little in the 1980s and instead deferred to the EEOC as the appropriate agency to take action in the area.[59] Similarly, the Environmental Protection Agency repeatedly delegated responsibility for investigating chemicals used in the workplace to OSHA.[60] The EEOC's unwillingness to incorporate health and safety concerns into its anti-discimination approach seemed to deflate the robust coalition of these interests. Subsequently, CRROW does not appear much in the Johnson Controls story. Advocates increasingly focus their challenges to fetal protection policies on anti-discrimination arguments.

Throughout the 1980s, OSHA, the EEOC, EPA, and OFCCP "engaged in a balancing approach forced by political exigency,"[61] industry pressure, inadequate funding, and the looming abortion issue. The Reagan administration cut agencies' budgets and operating staffs and their ability to formulate policy and enforce existing regulations, and Congress was not interested in taking on the fight against this deregulation. The retreat of both Congress and executive regulatory agencies from the fetal protection debate created a policy vacuum in which agencies maintained out of date standards and only minimally enforced their own regulations, and in which employers knew they could get away with using toxic chemicals and adopt fetal protection policies, even if doing so might technically violate agency guidelines.

In this context, advocates turned once again to the courts as a potential avenue for dismantling fetal protection policies. This time, however, they avoided litigating under OSHA and turned instead to the Title VII sex discrimination framework. This move began the process of narrowing from a multi-prong, problem-oriented coalition to an alliance focused on winning a test case.

D. The Development of a Litigation Strategy Under Title VII

Between 1982 and 1990, five federal appeals courts heard Title VII challenges to sex-specific fetal protection policies.[62] Ordinarily, a policy that specifically excludes women from the workforce will be considered intentional discrimination under the Title VII "disparate treatment" framework. An employer can justify such an employment practice only in "those certain instances where [sex] is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise."[63] Courts considering fetal protection policies, however, repeatedly reasoned that these cases presented new and unique issues that justified straying from traditional proof rules. Instead, most courts applied a "disparate impact" analysis, under which neutral policies or practices that have a disproportionate and adverse impact on any protected class constitute discrimination. An employer can justify an employment practice that has a disparate impact with a lesser showing that it is "job related for the position in question and consistent with business necessity."[64]

Some courts indicated that the "valid business necessity" defense could cover employers' legitimate business interests in avoiding tort lawsuits filed by the children of lead-exposed mothers.[65] Others emphasized that fetal protection policies were most justifiable if intended to protect the safety of third parties – in this case, the "unborn children" of female employees.[66] Over time, corporate defendants increasingly focused on this moral/public policy justification for adopting fetal protection policies and deemphasized the financial considerations related to tort liability. These decisions energized the women's rights and labor advocates that had already been working together on fetal protection issues and marked a new phase in the movement.

Various members of the now-familiar cast of characters – labor, civil, and women's rights groups on one side, and corporations, pro-business groups, and anti-abortion advocates on the other – participated in PDA-related advocacy in the 1970s and fetal protection-related litigation in the 1980s as attorneys for the parties and as amici.[67] Marsha Berzon, the Associate General Counsel of the AFL-CIO, who argued the *Johnson Controls* case before the Supreme Court, was a principal drafter of the PDA, which, she said, had been deliberately drafted with sex-specific fetal protection policies in mind.[68] Another major figure representing the anti-fetal protection policy position was Joan Bertin of the ACLU Women's Rights Project, who had spent much of the decade working on *American Cyanamid* and other projects to lay the groundwork for a Supreme Court case challenging fetal protection policies. Bertin has been described as the "mastermind" behind the campaign against fetal protection policies[69] The alliances she created with other advocates set the wheels in motion for a challenge to the company's policy, and the UAW was positioned to take a leading role in representing Johnson Controls employees across the country who sought to challenge a policy they viewed as discriminatory, unfair, and archane. This law reform campaign was characterized by participants as the equivalent of the NAACP strategy in *Brown v. Board of Education*. The long range strategic plan was to have this issue determined favorably in the Supreme Court.[70]

III. Johnson Controls: The National Story

Johnson Controls initially adopted a policy in 1977 that warned fertile women of the potentially harmful effects of lead on a fetus but stopped short of excluding them from the workplace.[71] Five years later, in 1982, the company decided to rethink its approach. Corporate executives at Johnson Controls publicly explained that the policy shift was implemented in response to increasing scientific research pointing to risks of fetal harm associated with lead and upon realizing that its current program was not effectively protecting workers' fetuses. However, rumors were circulating that the company, like others in the industry, initiated the new policy in response to rising fears of tort liability. Lead was an essential component of batteries, so the company could not simply stop using lead in battery production. Johnson Controls had spent $15 million since 1978 on new equipment to remove lead from factory air, but the company believed that reducing airborne lead to a safe level for fetuses would be extremely costly, if not technologically impossible.[72]

As a result, Johnson Controls implemented its exclusionary fetal protection policy relatively late in the game in comparison to other giants in the chemical and heavy metal industries. This triggered the litigation that became the capstone of the effort to overturn fetal protection policies and narrow the scope of the BFOQ.

A. *Johnson Controls* litigation in the lower courts

The UAW's assistant general counsel filed EEOC charges on behalf of 8 individual plaintiffs under Title VII, which issued right-to-sue letters in early 1984. Plaintiffs then filed suit in federal court in the Eastern District of Wisconsin. In early 1985, the district court granted class certification to the UAW and its 2,109 production and maintenance employees (of whom only 275 were female).[73] From the beginning, the case was worker-driven. Beverly Tucker, a UAW attorney, described the workers as "adamant" about pursuing the case even when the attorneys who represented them expressed initial reservations after learning of new research that showed harmful effects of even lower lead exposure levels than previously thought.[74] The UAW filed the complaint in *Johnson Controls* with the plan that it would be a "test case, a policy case" that could eventually get to the Supreme Court.[75] In January 1988, the Eastern District of Wisconsin, relying on a disparate impact framework, granted summary judgment for Johnson Controls.[76] Later that year, the EEOC published its first "Policy Guidance on Reproductive and Fetal Hazards," which adopted the disparate impact approach and pronounced that an exclusionary fetal protection policy could constitute a business necessity if an employer could prove that a workplace toxin posed a substantial risk to the fetus, that this risk only occurred through maternal exposure, and that no less restrictive alternatives existed.

By the time the case was appealed in February 1988, it had attracted considerable outside attention. The LAS-ELC, the ACLU, and the American Public Health Association (APHA) each filed separate amicus briefs in support of the UAW, and Joan Bertin from the ACLU began assembling amici for a potential appeal to the Supreme Court.

In September 1989, the Seventh Circuit Court of Appeals affirmed the lower court's decision in *Johnson Controls* in a sharply divided 7-4 *en banc* decision.[77] The Seventh Circuit found that the company's fetal protection policy was valid under disparate impact and disparate treatment frameworks, becoming the first court of appeals in the country to hold that women's infertility could be a BFOQ for certain jobs.[78] The court found that Johnson Controls had demonstrated a valid business necessity – "the industrial safety-based concern of protecting the unborn child from lead exposure" – for its fetal protection policy.[79] Moreover, the court disregarded the OSHA lead standard and discounted animal studies on the effects of paternal exposure to lead as inconclusive.[80] Employing the reasoning of the recent Supreme Court case *Wards Cove Packing Co. v. Antonio*,[81] the Seventh Circuit placed the burden of proving discrimination, and disproving the company's claimed business necessity, on the plaintiffs.

Judges Richard Posner and Frank Easterbrook dissented. Judge Posner took an intermediate approach to the case, noting that the "the most sensible way to approach it at this early stage is on a case-by-case basis," and upon a full examination of the facts at trial.[82] Judge Posner left room for the possibility that under certain circumstances, fetal protection policies could be "reasonably necessary to the normal (civilized, humane, prudent, ethical) operation of [a] particular business" and could constitute grounds for a BFOQ of infertility.[83]

Judge Easterbrook went several steps further, concluding that the fetal protection policies at issue were facially discriminatory and that, under the PDA, Johnson Controls only had available to it a narrow BFOQ defense – not the business necessity defense that previous appellate courts had applied in similar cases. He concluded that the company's stated objectives – concern for the welfare of the next generation – did not meet that test because they were not related to its ability to make batteries or to any woman's "ability or inability to work."[84] Picking up on a creative argument advanced by the plaintiffs, he noted that "[r]emoving women from well-paying jobs (and the attendant health insurance), or denying women access to these jobs, may reduce the risk from lead while also reducing levels of medical care and the quality of nutrition."[85] Judge Easterbrook, perhaps sending a signal to the Supreme Court, noted that *Johnson Controls* was "likely the most important sex-discrimination case in any court since 1964, when Congress enacted Title VII. If the majority is right, then by one estimate 20 million industrial jobs could be closed to women, for many substances in addition to lead pose fetal risks."[86]

The sharply divided Seventh Circuit decision in *Johnson Controls* caught the attention of the EEOC, which, in January 1990, issued revised policy guidance on workplace reproductive hazards that criticized the Seventh Circuit's reasoning and asserted that fetal protection policies were facially discriminatory; that the employer should be held to a narrow BFOQ defense, rather than that of business necessity; and that the burden of proof should be on the employer, not the employee. The guidance indicated that, outside the Seventh Circuit, the EEOC would require employers to show that such policies were reasonably necessary to the normal operation of the business, based on objective evidence, and that a good-faith intention or effort to avoid liability would be an insufficient defense. The new EEOC guidelines were issued just two days

before the UAW's deadline for filing its certiorari petition to the Supreme Court. These guidelines served as a *de facto* substitute for an amicus brief (since governmental agencies generally do not submit amicus briefs on certiorari petitions).[87]

B. Litigation before the Supreme Court

The UAW filed a petition for certiorari. The ACLU, APHA, and 54 other groups and individuals filed an amicus brief supporting that petition, arguing that the case presented issues of great public importance in the equal opportunity and public health arenas, particularly to working women and their families, and that a Supreme Court decision resolving the conflicting circuit opinions was needed. In March 1990, the Supreme Court agreed to hear the case.[88] In the months before oral argument, the California Court of Appeal and the Sixth Circuit came down with the first two rulings rejecting a BFOQ defense and finding that fetal protection policies that excluded lead-exposed female employees constituted unlawful sex discrimination under a disparate treatment theory.[89]

The plaintiffs reassembled their legal team to handle the Supreme Court briefing and argument, bringing on two experienced Supreme Court litigators from the AFL-CIO, including Associate General Counsel Marsha Berzon. The UAW followed a fairly traditional approach in its briefing on the merits, focusing on questions concerning the interpretation of Title VII, the PDA, and the BFOQ exception, and leaving its amici to highlight the economic and social impact of exclusionary sex-specific fetal protection policies on working women. The union pointed to the PDA and OSHA standards and the California *Johnson Controls* case in support of its argument, emphasizing that under Title VII, the Court must look only to whether or not women could perform the job – not at Johnson Controls' purpose, however benign, in adopting an exclusionary policy.

Johnson Controls responded by arguing that a company's interest in avoiding harm to third parties, including fetuses, was reasonably necessary to the company's normal business operations under Title VII and thus justified its implementation of an exclusionary fetal protection policy. The BFOQ analysis, Johnson Controls argued, was not only limited to a worker's ability to perform the job; a valid BFOQ defense could also include potential tort liability against the company for a fetal injuries.

The UAW responded by noting, as it had in earlier disputes, that Johnson Controls had not presented any evidence that men were *not* at risk for contributing to fetal injuries; that the company could not, under the BFOQ defense, institute a policy of zero risk for fetuses and not for adult workers; that female workers must make their own personal risk assessments; and that responsible employers would not be liable in tort for prenatal harm.

C. Amicus mobilization

After the Supreme Court granted certiorari, Bertin, who had consulted with the UAW in the early stages of the case, assumed the pivotal role of amicus brief

coordinator.[90] Working closely with Berzon and others, she spearheaded a comprehensive amicus strategy that mobilized a broad-based coalition of influential amici to rally behind the sex discrimination principles at stake in the case and to frame those principles in the context of their broader institutional agendas. This amicus mobilization had several functions. First, securing such diverse and overwhelming opposition to fetal protection policies from experts and other credible sources, Bertin and Berzon felt, would convey a powerful message to the Supreme Court about the importance of the issue and the strength of the empirical and normative consensus behind the union's position. The amicus briefs also provided a comprehensive picture of the harmful effects of fetal protection policies on women and offered arguments to the Court that were more far-reaching and nuanced than those presented by the UAW. Furthermore, the very process of developing a group of amici could reaffirm existing ties between organizations that had previously participated in CRROW, CEDAPW, and other related initiatives, and could spur and sustain, during and after the Supreme Court litigation, new relationships between advocates interested in reproductive and workplace hazards and sex equality. Ultimately, over 110 organizations and individuals signed onto ten amicus briefs in support of the plaintiffs.

1. Communicating Credibility and Consensus

One goal of the amicus mobilization was to show the Court that a broad array of prominent interest groups and experts viewed exclusionary fetal protection policies as unlawful sex discrimination and embraced the narrow BFOQ standard articulated by the UAW plaintiffs. With this goal in mind, Bertin and Berzon successfully courted many groups with longstanding experience litigating before the Supreme Court and a background in women's and/or workers' rights advocacy.

The ACLU, the most active amicus party in the case, had actively participated in Supreme Court challenges to sex discrimination, pregnancy discrimination, and reproductive hazards since the early 1970s, when Ruth Bader Ginsburg founded the Women's Rights Project. Its *Johnson Controls* amicus brief argued that Title VII, as amended by the PDA, represents a comprehensive legislative attempt to eradicate gender discrimination and recognize the serious socio-economic and health consequences of unemployment and occupational segregation on women and families, and that fetal protection policies, offering "neither workplace safety for men nor equity for women," violate these clear objectives. Thirteen scientists and experts, and forty-one organizations (including unions, labor organizations, and civil, women's, and workplace rights advocates, some of whom – such as LAS-ELC, the National Women's Law Center, and NOW LDEF – were repeat players in the pregnancy discrimination arena) signed onto the brief, which Bertin authored.[91]

Well-known women's rights organizations also signed onto another amicus brief authored by Equal Rights Advocates (ERA), which argued that the PDA intended to classify pregnancy-based exclusions as facial discrimination, that only an employee's ability to perform the job – and not fetal health – was relevant in considering the BFOQ exception, and that fetal protection policies could only be legally adopted if they were sex

neutral. With such strong legislative history, Berzon thought this brief would be "our real ace in the deck."[92]

Another notable set of amici were state governments. The State of California submitted an amicus brief urging the Supreme Court to model its decision on the California *Johnson Controls* case, which California's Fair Employment and Housing Commission had recently litigated with LAS-ELC. The Massachusetts Attorney General, joined by several other states, filed an amicus brief addressing the public health, gender, and socio-economic dimensions of the case and underscoring the dangers posed to male reproductive systems by airborne lead. The United States and the EEOC jointly filed an amicus brief focusing on the Title VII framework of the case. Interestingly, the U.S./EEOC's amicus brief argued that under certain circumstances – including when the health or safety of a fetus is at risk – an employer could justify its sex-based fetal protection policies under the BFOQ test. This was a much more cautious approach than the policy guidance on the fetal protection issue that the EEOC had issued just two days before the UAW filed its certiorari petition, and was likely due to the Solicitor General's involvement in the litigation.

A final set of amici were public health and environmental groups such as the APHA and the Natural Resources Defense Council (NRDC). These groups' briefs emphasized the validity and importance of animal studies, a topic the Court had only previously considered in passing.

The prominence of many amici and their nuanced understandings of the vast implications of the *Johnson Controls* case lent a sense of legitimacy to the amicus mobilization. Although the Court never specifically acknowledged any particular amicus brief, it is worth noting that the opinion emphasized the legislative history of the PDA, the topic of the ERA's amicus brief.

2. Providing a Context for Understanding Fetal Protection Policies' Harmful Effects on Women

In *Johnson Controls*, the UAW could not, for the most part, draw the Court's attention to the important health and safety issues underlying the case because these issues were tangential to the sex discrimination questions before the Supreme Court. Bertin, understanding and appreciating the seriousness of these issues, capitalized upon the recognized expertise and legitimacy of well-known public interest organizations to address the intersections between gender, economic and social power, and workplace health and safety via amicus briefs. She realized, for instance, that scientific evidence or public health data would be presented more effectively by groups such as the NRDC and the APHA than by the ACLU and women's rights organizations. The amicus briefs in support of the plaintiffs fell into roughly two different (though sometimes overlapping) categories: women's rights/anti-discrimination and public health.

Some of the more far-reaching arguments set forth in the amicus briefs addressed the socio-economic and public health implications of fetal protection policies. The

ACLU, ERA, and Attorneys' General briefs noted that fetal protection policies would cause women's unemployment or employment in lower-strata, non-unionized jobs that do not offer medical insurance and other important benefits. The NAACP LDF brief observed that this result "may be more harmful than the potential hazard to uncontemplated future offspring posed by working in a job which may involve exposure to hazardous substances"[93] Notably, the NAACP LDF, known for its legal challenges to racially discriminatory policies, entered the reproductive health arena for the first time with *Johnson Controls*. Marianne Lado, the LDF attorney who authored its amicus brief in *Johnson Controls*, described the case as a "bridge case into the reproductive rights area," which ultimately resulted in LDF coming to see reproductive health issues as "squarely within its area of expertise."[94]

3. Building Organizational Alliances

Through the amicus briefs, Bertin, Berzon, and their colleagues reinvigorated and gave voice to the alliance that had formed between labor, workplace health and safety groups, and women's and civil rights organizations over the past two decades through the formation of groups such as CRROW and CEDAPW, via concerted advocacy efforts surrounding the passage of the PDA and related policies before OSHA and the EEOC, and by way of amicus briefs in fetal protection and pregnancy discrimination cases. These groups collectively produced a broad policy statement through their amicus briefs and advocacy in *Johnson Controls* that addressed health and safety, sex discrimination, job and benefits retention, socio-economic mobility, and other complex dimensions of the problems posed by fetal protection policies and workplace toxins.

The question remained, though, whether their involvement as amici would make a difference to any mobilization or advocacy that occurred afterwards. WRP had been preparing for a fetal protection/sex discrimination test case for a decade, and if the plaintiffs' challenge in *Johnson Controls* succeeded, it was unclear who, if anyone, would push ahead on the remaining health and safety issues after the litigation was over.

IV. The Supreme Court Decision & Its Aftermath

On March 20, 1991, the Supreme Court issued a 9-0 decision overruling the Seventh Circuit's decision and finding that Johnson Control's fetal protection policy was facially discriminatory because it categorized employees on the basis of their potential for pregnancy, which was prohibited by Title VII, as amended by the PDA. The BFOQ defense was not available to Johnson Controls, Justice Harry F. Blackmun wrote for the majority, because fetuses were neither customers nor third parties (following *Dothard* and *Harriss*) whose safety was essential to the normal operation of the business.[95] Furthermore, the Court found, a benevolent motive, such as concern for fetal harm, could not justify female sterility as a BFOQ. Justice Blackmun opined that employer liability "seem[ed] remote at best" if the employer adequately warns the employee about the risk and has not acted negligently.[96] In any event, the Court thought, tort liability could not justify a discriminatory policy under Title VII.

In concurrence, Justice White, Kennedy, and Rehnquist asserted that Justice Blackmun's "speculation" about tort liability would be "small comfort to employers," and that an employer who was able to set forth evidence that fertile women's presence in a workplace made the company susceptible to serious tort liability could have a valid BFOQ defense if it chose to exclude fertile women from its workforce.[97] Justice Scalia concurred separately, asserting that a court may take costs to a company into account when ruling on a BFOQ defense.

The Supreme Court's decision made nationwide headlines. Women's rights groups and organized labor celebrated the decision as a victory for millions of working class women. The business community decried the decision as creating a "catch-22" situation for industry, and expressed grave concerns about future corporate tort liability.

The EEOC, following its pattern of issuing guidelines in response to judicial decisions, issued new policy guidance in June 1991 that replaced its old policy guidance and adopted the Supreme Court's ruling in *Johnson Controls*. The new policy stated that employer policies excluding only members of one sex from the workplace for the purpose of fetal protection were unlawful under Title VII and could not be justified under the BFOQ exception.[98]

Congress, too, was supportive of the Court's decision. A 1990 Congressional study issued a "scathing indictment" of the EEOC's response to fetal protection policies in the preceding decade.[99] One year later, Congress passed the 1991 Civil Rights Act[100] to, among other things, mitigate the chilling effects of repeated federal court decisions (especially *Wards Cove*) that restricted plaintiffs' ability to bring Title VII disparate impact suits.

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Judges, scholars, and journalists alike have ranked *Johnson Controls* among the most significant Title VII and PDA cases. The Court's decision reaffirmed the broad scope of the PDA and the narrow scope of the BFOQ defense under Title VII. Employers quickly complied, at least *de jure*, with the Court's decision, and advocates witnessed a relatively smooth and speedy end to the sex-specific, exclusionary corporate fetal protection policies that they had vigorously opposed for over a decade.[101]

Johnson Controls' concrete holding and immediate impact have, in fact, made it more a darling of law review articles than the courts. A Westlaw search reveals that only 207 courts, compared with 900 law review articles, have cited to *Johnson Controls*. Despite this outpouring of scholarship, the academic literature has paid little attention to the unique nationwide coalition of labor, workplace health and safety advocates, and women's rights lawyers that formed in the late 1970s and early 1980s to collectively oppose fetal protection policies. How this group came together, and ultimately dissolved, is its own unique story that speaks volumes about legal mobilization and the sustainability of reform efforts.

Mobilizing these diverse interest groups to attack fetal protection policies – a relatively narrow problem that affected a relatively small number of people – took a tremendous amount of energy. Joan Bertin from the ACLU had been largely responsible for this nationwide mobilization. Once the Supreme Court decision came down in *Johnson Controls*, however, these groups "declared victory and retreated to their traditional issue areas."[102] Bertin, exhausted from nearly a decade-long battle, left the ACLU and entered academia. Women's rights organizations and advocates turned to focus on the developing cause of action for sexual harassment, which would enter into Supreme Court litigation in the 1990s.[103] Unions and health and safety groups were left to advocate for the workplace rights of the blue-collar work force, even though the past decade had, in a sense, shown them that no branch of government was willing to tackle workplace health and safety issues in a holistic way. Moreover, *Johnson Controls* illustrated that improving the terms and conditions of work for the labor force required presenting the public and the courts with a problem that had shock value – like an exclusionary fetal protection policy that resulted in sterilization – and that was couched within a viable framework – like sex discrimination.[104] General concern over unsafe working conditions, particularly when couched within an OSHA framework, would just not cut it.

Unions had limited success in winning legislative, judicial, and regulatory protections for workers in the 1990s. The ultimate survival of the OSHA lead standard against court challenges provided for economic protection and independent medical review for male and female workers involuntarily removed from or hoping to be removed from lead exposure and lead hazards were much abated by other provisions of this standard.[105] While advocates were ultimately successful in convincing OSHA to promulgate rules on bloodborne pathogens, cadmium, lead and asbestos in construction and confined spaces, a host of other regulatory proposals continually languished before the agency.[106] Unique coalitions that formed during and after the *Johnson Controls* era faced repeated setbacks, especially after the second Bush administration took office in 2001. The problem of protecting reproductive health for women (and men) who might have sought relief from known reproductive health hazards—such as infectious disease in childcare and healthcare settings, anaesthetic gases and radiation in healthcare settings, and solvent exposure in dry cleaning—was never addressed.[107] After the Bush administration overturned a proposed ergonomics standard, more than 50 labor, occupational safety and health, public health, civil rights, religious, women's, and other organizations collectively petitioned the Secretary of Labor in April 2001 to issue an alternative standard, but the Labor Department never responded.[108] Similarly, after a 15-year dialogue between industry groups, unions, and state and federal agencies on improving injury and illness recordkeeping and data, a revised regulation was issued in January 2001. In June 2003, the Bush administration deleted key elements of the regulation, despite opposition from the unions.

V. A Contrasting Model: The California Example

While the specific goal of advocates at the national level was to establish, through litigation, the illegality of exclusionary fetal protection policies under Title VII and to

affirm the narrowness of the BFOQ defense, a coalition of California advocates emerged in the 1980s with a problem-centered orientation and a broader set of goals to develop a long term strategy for addressing the reproductive health risks and needs of women and men working in hazardous industries. They adopted a holistic approach that included but also extended beyond the discrimination framework. Even before the *Johnson Controls* decisions (the California Court of Appeals' and the Supreme Court's), Patricia Shiu from the LAS-ELC convened an ad hoc committee, designated The Workplace Reproductive Hazards Policy Group, to develop a strategy for tackling the intersecting issues of economic and social power, gender, and workplace health and safety that had clearly emerged in the fetal protection debate. At the table were diverse stakeholders – including experts in reproductive technology, occupational medicine and health, employment discrimination law, and workers' compensation and tort liability law – representing the LAS-ELC, the Santa Clara Center for Occupational Safety and Health (SCOSH), the California Department of Health Services' Occupational Health Program, the School of Public Health at the University of California, Berkeley, and the California Fair Employment and Housing Commission (which, along with Shiu, brought the state court lawsuit against Johnson Controls).

The California committee members shared the sentiments of national advocates who had litigated the Supreme Court *Johnson Controls* case that exclusionary fetal protection policies constituted unlawful sex discrimination, and they celebrated the *Johnson Controls* decisions as an "important first step towards eradicating occupational reproductive hazards."[109] Like their national counterparts, they also realized that "[e]xisting federal and state antidiscrimination law provides a very incomplete set of protections for workers exposed to reproductive hazards,"[110] and that as a result, the national mobilization over sex-specific fetal protection policies, and the *Johnson Controls* decisions themselves, did not (and probably could not) address the larger challenges faced by many low-income, non-unionized women and men of childbearing age who worked in contaminated workplaces.

The California initiative had several distinct advantages that allowed it to address intersectionality issues of health and safety and women's rights. First, California offered a political climate that provided some, albeit limited, possibilities for regulatory and legislative reform in the workplace health and safety arena. Also, the California committee members were affiliated with organizations whose wide-ranging, intersectional mandates embraced broad long-term goals and advocacy strategies that ultimately allowed for organizational cross-pollination that was sustainable beyond a particular issue or campaign. Finally, the California group was guided by Shiu, who was well-connected with diverse stakeholders and was deeply committed to a strategy that took account of the mutual and sometimes divergent interests at the table. For Shiu, it was essential that advocates embracing a sex discrimination analysis also be "sensitive to the economic differences between poor and working class women and women [who] might have a greater ability to resist and challenge fetal protection policies because of their wage-earning capacity."[111] Shiu also saw the connection between health and safety issues and women's rights as "primarily one of economic justice and education,"[112] since many working poor women, a large proportion of whom were racial and language

minorities, "were ill-informed about the effect of the toxins with which they worked, the legal implications for agreeing to work with those toxins, and the potential, probable and likely health outcomes for themselves and their families."[113]

After both *Johnson Controls* decisions, and at the request of California Assemblymember Jackie Speier, the California group analyzed federal and California law and policy in the reproductive health arena from several perspectives: occupational health regulation, equal opportunity and sex discrimination, disability law and the principle of "reasonable accommodation," and tort liability and workers' compensation.[114] After a "series of lively discussions,"[115] the group published a white paper in early 1992 recommending legislative and political responses to the continuing challenges faced by Californians who are exposed to reproductive hazards at work. The white paper focused on key questions concerning these challenges: What reproductive health issues do women working in contaminated worksites continue to confront? What types of scientific data are necessary to fill in research gaps concerning reproductive technology? What are potential remedies (e.g., statutory, tort, workers compensation) for workers exposed to reproductive hazards on the job?[116] After *Johnson Controls*, would employers feel entitled to invoke the Supreme Court decision as their rationale for exposing pregnant women to workplace contaminants as a condition of employment?

The California coalition proposed a set of policy recommendations to address the issues raised in its white paper.[117] Around the same time, the group also drafted and successfully advocated for the passage of an amendment to California's Fair Employment and Housing Act that required employers to provide reasonable accommodations to pregnant women who work in hazardous workplaces. Such accommodations would, for example, permit pregnant employees to take temporary paid leaves of absence from toxic workplaces or temporarily transfer to less toxic worksites while maintaining their economic benefits, seniority status, and advancement opportunities.

The California experience is instructive as an alternative to the model of mobilization and advocacy embraced by the national coalition in the lead-up to the Supreme Court's decision in *Johnson Controls*. The California group embraced a problem-oriented approach to address reproductive hazards in the workplace, using litigation and the sex discrimination framework as only one component of a long-term strategy that involved public education and outreach, legislative advocacy, and regulatory reform. With this structure and vision, the California coalition was able to link the *Johnson Controls* litigation to the health and safety issues that national advocates had also identified. In contrast to the national mobilization, which centered around litigation and largely disbanded after the Supreme Court victory, the California advocates hit the ground running after the *Johnson Controls* decisions, prepared to tackle, through a multifaceted advocacy strategy, the next piece of the reproductive hazards puzzle.

VI. Conclusion: Significance and Legacy of *Johnson Controls*

Johnson Controls is a story of the strengths and limitations of mobilizing a broad set of interest groups and institutional agendas in the context of impact litigation, and the

possibilities for reform that emerge from such mobilizations. On the one hand, the mobilization of diverse groups around a narrow issue can have a powerful impact, as evidenced in *Johnson Controls*. Several groups representing a wide range of interests supported a common position in the case. The diversity of these groups' interests, coupled with the uniformity of their message, effectively demonstrated a widespread problem to the Supreme Court and undoubtedly had some impact on the Court's ruling reaffirming key anti-discrimination principles.

On the other hand, narrowly-focused impact litigation often produces limited results that do not address a problem holistically. As some commentators have suggested, *Johnson Controls* affirmed an important anti-discrimination principle but ironically left women with the right to work in unsafe workplaces. It did not, for example, address the flip side of the fetal protection question: what protections did the law offer women factory workers who *wanted* to take time off or be transferred in order to protect fetal health? The national groups that mobilized to support the UAW were neither equipped nor (in some cases) interested in addressing this and other questions that naturally followed from the *Johnson Controls* decision. The example of California, discussed above, contrasts with the federal picture, and is instructive for thinking through these limitations and about potential solutions.

Johnson Controls is also a story about how political realities shape advocacy efforts. Many members of the group that represented plaintiffs and amici before the Supreme Court had experienced firsthand the ineffectiveness of OSHA and the EEOC in addressing workplace lead exposure and reproductive hazards issues, and remembered clearly when the D.C. Court of Appeals issued a crushing blow to the plaintiffs in *American Cyanamid*. These unsuccessful efforts left advocates with few options to address their concerns about fetal protection policies. In the political climate of the 1980s, the sex discrimination framework appeared much more viable than did agency lobbying or an OSHA cause of action.

In the context of repeated political and litigation setbacks, a diverse set of stakeholders, each with different institutional priorities, came together to communicate a unified message: exclusionary fetal protection policies violated Title VII and the PDA, and could never fall within the BFOQ exception. After their victory before the Supreme Court, these stakeholders understood that a larger battle lay ahead to compel employers to clean up unsafe workplaces and grant the requests of fertile employees who sought leave from these unsafe workplaces in order to reduce the risk of reproductive harm caused by workplace toxins. Yet although these groups understood this larger battle, most of them did not participate in it – at least not as a member of this same coalition. Rather, for the most part, groups retreated to their traditional issue areas, recognizing that political realities precluded another large-scale mobilization to address these larger issues.

Broadly-defined mobilizations focused on the narrow goal of winning a case in court may be successful in the short term and may establish important legal principles, but may not be sustainable as a way to address long-term and complex realities, particularly in the lives of marginalized and disempowered populations. The upshot of

such narrowly focused mobilizations may be that, as in *Johnson Controls*, concerted mobilization wins an important battle for a client or institution or both, but is not sustainable beyond a specific moment in time.

As federal courts become less available as a site for affirmative progress, social justice advocates must address problems involving race and gender in the context of broader structural dynamics in order to make a difference on the ground. Public interest organizations must rethink their litigation-centered strategies to find new sites of mobilization and ways of sustaining coalitions that cut across different interests and locations. The *Johnson Controls* story provides some insight into the challenges and opportunities for making this transition.

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[2] The events recounted in this chapter were drawn from the extensive secondary literature on *Johnson Controls* and from conversations with key participants in the litigation and advocacy efforts. We particularly relied upon the comprehensive study of *Johnson Controls* in the book *Litigation as Lobbying: Reproductive Hazards and Interest Aggregation* (Ohio State University, 2003) by Juliana S. Gonen.

[3] Estes, Florence, "Supreme friends: Battery workers pulled together to pursue the right to their jobs," Chicago Tribune, April 28, 1991; "Supreme Court: Health Fears No Excuse For Bias; Fertility issue could affect 20 million," USA Today, March 21, 1991.

[4] David L. Kirp, Hazards, Gender Justice, and the Justices: The Limits of Equality, 34 Wm. & Mary L. Rev. 101, 104 (1992).

[5] *Int'l Union, UAW, et al. v. Johnson Controls, Inc.,* 499 U.S. 187 (1991). The BFOQ provision set forth in Title VII allows employers to discriminate on the basis of sex "in those certain instances where . . . sex . . . is a [BFOQ] reasonably necessary to the normal operation of the particular business." 42 U.S.C. § 703(e)(1).

[6] 499 U.S. at 204.

[7] *See* Mary E. Becker, "From Muller v. Oregon to Fetal Vulnerability Policies," 53 U. Chi. L. Rev. 1219, 1221-22 (1986); *see also* Gonen at 24 (citing to Judith Baer, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION (Greenwood Press) (1978); J. Ralph Lindgren & Nadine Taub, THE LAW OF SEX DISCRIMINATION (West) (1988).

[8] Alice Kessler-Harris, In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in 20th Century America (2001).

[9] Gonen at 22, 46.

[10] Gonen, at 45.

[11] Gonen at 21-22.

[12] Gonen at 47-48.

[13] These groups included: the NOW Legal Defense and Education Fund (NOW-LDEF); the ACLU Women's Rights Project (WRP); the Women's Legal Defense Fund (WLDF); the National Women's Law Center (NWLC); the Women's Law Fund; the Women's Equity Action League (WEAL) litigation fund; the Women's Rights Litigation Clinic at Rutgers Law School; the Women's Law Project; and Equal Rights Advocates (ERA).

[14] Gonen at 26.

[15] 417 U.S. 484 (1974) .

[16] 429 U.S. 125, 136 (1976) .

[17] 462 U.S. 669 (1983).

[18] 479 U.S. 272, 285 (1987).

[19] *Dothard v. Rawlinson,* 433 U.S. 321 (1977).

[20] *Id.* at 335 n.21.

[21] *Id.* at 333.
[22] *Harris* v. *Pan American World Airways, Inc.*, 649 F. 2d 670 (9th Cir. 1980); *Condit* v. *United Air Lines, Inc.*, 558 F. 2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978); *In re National Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977).
[23] P.L. 91-596.
[24] *Id.* at § 6(b)(5).
[25] Gonen at 33 (citing Charles Noble, LIBERALISM AT WORK: THE RISE AND FALL OF OSHA (Temple University Press) (1986)..
[26] With respect to the reproductive system, OSHA found:

> *Overexposure to lead may result in decreased sex drive, impotence and sterility in men. Lead can alter the structure of sperm cells raising the risk of birth defects.* There is evidence of miscarriage and stillbirth in women whose husbands were exposed to lead or who were exposed to lead themselves. *Lead exposure also may result in decreased fertility, and abnormal menstrual cycles in women. The course of pregnancy may be adversely affected* by exposure to lead since lead crosses the placental barrier and poses risks to developing fetuses. Children born of parents either one of whom were exposed to excess lead levels are more likely to have birth defects, mental retardation, behavioral disorders or die during the first year of childhood.

29 C.F.R. § 1910.1025, App. A, § (II)(B)(2) (emphasis added).
[27] *Id.* at § (II)(B)(3).
[28] 29 C.F.R. § 1910.1025(k)(1)(iii)-(v), (k)(2) (1979).
[29] *United Steelworkers v. Marshall*, 647 F.2d 1189, 1204 (D.C. Cir. 1980).
[30] Suzanne Uttaro Samuels, *Fetal Rights, Women's Rights* 59, Univ. of Wisconsin Press, 1995. Wendy W. Williams, "Firing the Women to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII," 69 Geo. L. J. 641, 661 (1980-81).
[31] Samuels, *Fetal Rights, Women's Rights*, at 59.
[32] Samuels, *Fetal Rights, Women's Rights*, 59; Williams, "Firing the Women," at 661.
[33] Kirp, David L., Fetal Hazards, Gender Justice and the Justices: the Limits of Equality, 34 Wm. & Mary L. Rev. 101, 114 (1992) (citing interview with Dr. Benjamin Culver, medical consultant to the Johnson Controls Fullerton, California plant).
[34] *See, e.g.*, Shabecoff, Philip. "Job Threats to Workers' Fertility Emerging as a Civil Liberties Issue," *New York Times*, Jan. 15, 1979, A1, D8.
[35] *See* Laura Oren, "Symposium: Institutional Barriers to Women in the Workplace: Protection, Patriarchy, and Capitalism: The Politics and Theory of Gender-Specific Regulation in The Workplace," 6 UCLA Women's L.J. 321, 340 (Spring 1996).
[36] Shabecoff, Philip. "Job Threats to Workers' Fertility Emerging as a Civil Liberties Issue," *New York Times*, Jan. 15, 1979, A1, D8.
[37] *Id.* at A1.
[38] Bill Richards, Women Say They Had to Be Sterilized to Hold Jobs, Wash. Post, Jan. 1, 1979, at A1; Oren, "Symposium," at 349.
[39] Roth, Rachel. *Making Women Pay: The Hidden Costs of Fetal Rights* 37, Cornell Univ. Press, 2000.
[40] Oren, "Symposium," at 351.
[41] These groups included the Amalgamated Clothing and Textile Workers Union, International Brotherhood of Painters and Allied Trades, International Chemical Workers Union, UAW, United Rubber Workers, United Steelworkers, Coalition of Black Trade Unionists, CLUW, ACLU WRP, ERA, Center for Constitutional Rights, Center for Law and Social Policy, National Lawyers Guild, Committee for Abortion Rights and Against Sterilization Abuse, League of Women Voters, NOW, WLDF, Alan Guttmacher Institute, the Reproductive Rights National Network, and Planned Parenthood Federation of America. Oren, "Symposium," at 351; Gonen at 36.
[42] Oren, "Symposium," at 351.
[43] Oren, "Symposium," at 343, 352.
[44] Bill Richards, "Lead Level at Pigment Plant Too High, Inspectors Charge," Wash. Post, May 6, 1979, at A17.
[45] 29 U.S.C. § 654.

[46] The text of the citation read:

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

OCAW Int'l Union v. American Cyanamid Co., 741 F.2d 444, 447 (D.C. Cir. 1984) (quoting 29 U.S.C. § 654 (a)(1) (1982)) (emphasis added); "OSHA Puts Its Power to a Test," *Bus. Wk.*, Oct. 29, 1979, at 162T.
[47] *American Cyanamid Co.*, 9 OSHC (BNA) 1596, at *16 (1981); *see also OCAW Int'l Union v. American Cyanamid Co.*, 741 F.2d 444, 447-48 (D.C. Cir. 1984).
[48] *American Cyanamid Co.*, 9 OSHC (BNA) 1596, at *14. *See also* "OSHA Puts Its Power to a Test," Bus. Wk., Oct. 29, 1979, at 162T.
[49] *American Cyanamid*, 741 F.2d at 449.
[50] *American Cyanamid*, 741 F.2d at 450.
[51] Gonen at 37.
[52] Samuels at 85-86; Gonen at 37.
[53] Samuels at 87.
[54] Samuels at 87.
[55] Samuels at 87, 93.
[56] Samuels at 89.
[57] EEOC Policy Guidance 1988, 9 (*in* Samuels at 88-89).
[58] Samuels at 58-59; W. Williams, "Firing the Women," at 661.
[59] Samuels at 99-100.
[60] Samuels at 130-31.
[61] Samuels at 135.
[62] *See Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) ; *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986, 991, 994 (5th Cir. 1982); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984); *Int'l Union, U.A.W. v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989); *but see Grant v. General Motors Corp.*, 908 F.2d 1303 (6th Cir. 1990).
[63] 42 U.S.C. § 703(e)(1).
[64] 42 U.S.C.S. § 2000e-2(k)(1)(A)(i).
[65] *See, e.g., Zuniga v. Kleberg County Hosp.*, 692 F.2d 986, 992 n. 10 (5th Cir. 1982); *Wright v. Olin Corp.*, 697 F.2d 1172, 1190 n. 26 (4th Cir. 1982); *Int'l Union, U.A.W. v. Johnson Controls*, 886 F.2d 871, 884 (7th Cir. 1989).
[66] *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172, 1189-90 (4th Cir. 1982).
[67] Gonen at 53.
[68] *Id.* at 60.
[69] *Id.* at 53.
[70] *Id.* at 56.
[71] *Int'l Union, U.A.W. v. Johnson Controls*, 886 F.2d 871, 876 (7th Cir. 1989) (quoting policy).
[72] *See* "Risk to Fetus Ruled as Barring Women From Jobs," The New York Times October 3, 1989, Tuesday, Late Edition – Final.
[73] *See Int'l Union, United Auto., etc. v. Johnson Controls, Inc.*, 680 F. Supp. 309, 310 (E. D. Wis. 1988) (*rev'd and remanded*, *Int'l Union, United Auto., etc. v. Johnson Controls*, *Inc.*, 499 U.S. 187 (1991)).
[74] Gonen at 57, 65.
[75] Gonen at 58.
[76] *Int'l Union, U.A.W. v. Johnson Controls*, 680 F. Supp. 309 (E.D. Wis. 1988).
[77] *Int'l Union, U.A.W. v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989).
[78] *Int'l Union, U.A.W. v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989). *See also Int'l Union, UAW, et al. v. Johnson Controls, Inc.,* 499 U.S. 187, 196 (1991).
[79] *Id.* at 899.
[80] *Id.* at 876 n. 10, 880, 889, 899.

[81] 490 U.S. 642 (1989) (placing greater burden on plaintiffs to disprove business necessity defense).
[82] 886 F.2d 871, 908 (7th Cir. 1989) (Posner, J., dissenting).
[83] *Id.* at 905-06.
[84] *Id.* at 912 (Easterbrook, J., dissenting).
[85] *Id.* at 918.
[86] *Id.* at 920.
[87] *See, e.g.,* Gonen at 104.
[88] Gonen at 61.
[89] *Johnson Controls v. California Fair Employment and Housing Comm'n*, 267 Cal. Rptr. 158 (1990); *Grant v. General Motors*, 908 F.2d 1303 (6th Cir. 1990).
[90] Gonen, at 66; Email from Joan Bertin, Executive Director, National Coalition Against Censorship, to Caroline Bettinger-López, Post-Doctoral Research Scholar, Columbia Law School, (Feb. 11, 2007, 4:55 p.m.).
[91] Gonen at 67.
[92] Gonen,at 87.
[93] *See* NAACP LDF brief; Attorneys General brief; ACLU brief .
[94] Gonen, at 101.
[95] *Int'l Union, U.A.W. v. Johnson Controls, Inc.*, 499 U.S. at 202-06.
[96] *Int'l Union, U.A.W. v. Johnson Controls, Inc.*, 499 U.S. at 208.
[97] *Int'l Union, U.A.W. v. Johnson Controls, Inc.*, 499 U.S. at 213 (White, J., concurring).
[98] Gonen at 42.
[99] *See* Samuels at 78 (citing interview with Greg Watchman, General Counsel for Majority Staff, U.S. House of Representatives, Committee on Education and Labor, Washington, D.C., Dec. 3, 1990).
[100] 42 U.S.C. § 2000e-2 (2004).
[101] Telephone Interview with Pat Shiu, Vice President for Programs, Legal Aid Society of San Francisco-Employment Law Center, in San Francisco, CA (Dec. 21, 2006).
[102] Interview with Joan Bertin, Executive Director, National Coalition Against Censorship, in New York City (Nov. 13, 2006).
[103] *See Harris v. Forklift Systems,* 510 U.S. 17 (1993); *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).
[104] Interview with Joan Bertin, Executive Director, National Coalition Against Censorship, in New York City (Nov. 13, 2006).
[105] Email from Frank Mirer, Professor, Environmental and Occupational Health Sciences, Hunter School of Health Sciences, to Caroline Bettinger-López, Post-Doctoral Research Scholar, Columbia Law School (Feb. 12, 2007, 11:16 a.m.).
[106] *See "*The Labor Movement's Role in Gaining Federal Safety and Health Standards to Protect America's Workers," prepared by the AFL-CIO Safety and Health Department, April 2003 (provided to authors by Frank Mirer, Professor, Environmental and Occupational Health Sciences, Hunter School of Health Sciences).
[107] Email from Frank Mirer, Professor, Environmental and Occupational Health Sciences, Hunter School of Health Sciences, to Caroline Bettinger-López, Post-Doctoral Research Scholar, Columbia Law School (Feb. 12, 2007, 11:16 a.m.).
[108] Letter from AFL-CIO and others to Elaine Chao, Secretary of Labor, "Request for a Standard in Ergonomic Hazards to Protect Workers from Work-Related Musculoskeletal Disorders," (Apr. 25, 2001) (on file with authors).
[109] The Workplace Reproductive Hazards Policy Group, "Reproductive Health Hazards in the Workplace: Policy Options for California," in California Policy Seminar brief, Vol. 4, No. 1 (Feb. 1992), at 4, *at* http://www.ucop.edu/cprc/rephlthhzd.pdf.
[110] The Workplace Reproductive Hazards Policy Group, "Reproductive Health Hazards in the Workplace: Policy Options for California," in California Policy Seminar brief, Vol. 4, No. 1 (Feb. 1992), at 5, *at* http://www.ucop.edu/cprc/rephlthhzd.pdf.
[111] Email from Pat Shiu, Vice President for Programs, Legal Aid Society of San Francisco-Employment Law Center, to Caroline Bettinger-López, Post-Doctoral Research Scholar, Columbia Law School, (Feb. 11, 2007 (8:51 a.m.).

[112] *Id.*
[113] *Id.*
[114] The Workplace Reproductive Hazards Policy Group, "Reproductive Health Hazards in the Workplace: Policy Options for California," in California Policy Seminar brief, Vol. 4, No. 1 (Feb. 1992), at 3, *at* http://www.ucop.edu/cprc/rephlthhzd.pdf.
[115] Telephone Interview with Pat Shiu, Vice President for Programs, Legal Aid Society of San Francisco-Employment Law Center, in San Francisco, CA (Nov. 14, 2006).
[116] Email from Pat Shiu, Vice President for Programs, Legal Aid Society of San Francisco-Employment Law Center, to Caroline Bettinger-López, Post-Doctoral Research Scholar, Columbia Law School, (Feb. 11, 2007 (8:51 a.m.).
[117] *Id.*