

# **FETAL RIGHTS WOMEN'S RIGHTS**

**GENDER EQUALITY  
IN THE WORKPLACE**

**Suzanne Uttaro Samuels**

# Fetal Rights, Women's Rights

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## Gender Equality in the Workplace

Suzanne Uttaro Samuels

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# Fetal Rights, Women's Rights

Dedicated to the memory of my father,  
Ralph T. Uttaro

## Preface

The proliferation of fetal protection policies in the 1980s raised difficult and fascinating questions about the role of women in society and about our government's commitment to equal employment opportunity and occupational safety and health. These policies, which were promulgated by private employers and barred fertile women from jobs that might expose an embryo or fetus to certain toxins, severely limited women's employment opportunities and may have placed at risk occupational safety and health.

The debate about fetal protection policies touched upon several highly charged issues. Fetal protection policies allowed employers to bar women from jobs solely out of concern about fetal health. As a result, these policies had grave implications for women's ability to find jobs. The policies were almost always confined to male-dominated occupations, which tended to pay more and provide better benefits and more opportunities for advancement. Thus, fetal protection policies reinforced the existing sex segregation of the work force and impaired women's ability to achieve economic equality.

Fetal protection policies also implicated the abortion debate, which intensified in the middle to the late 1980s and early 1990s. These policies placed the fetus's "right" to be free from exposure to maternally transmitted harm above the woman's right to choose her employment. This balancing approach paralleled that adopted by the Supreme Court in *Roe v. Wade*. In this landmark case, the Supreme Court held that the woman's right to choose abortion was paramount in the first and second trimesters, while the state's interest in fetal health, and by implication,

the fetus's right to life, became dominant in the third trimester. The balancing of fetal rights against women's rights has been a recurrent theme in the debate about fetal protection policies, and one that has often been overlooked in analyses of these policies.

My interest in the issue of fetal protection policies was sparked in an employment discrimination seminar given at the University at Buffalo Law School in the spring of 1989. Initially, I was interested in this topic because I thought that fetal protection policies bridged the gap between abortion and employment rights: "protecting" fetuses imbued them with rights independent of the mother, and served to undermine women's reproductive and employment rights. It was this conception of fetal protection policies that prompted me to undertake this project. Clearly, my views on the abortion controversy and the importance of equal employment opportunity provided the frame of reference for my research on these policies. At the outset, I assumed that fetal protection policies were subtle devices employed to reinforce sex segregation in employment. The whole concept of fetal "protection" policies seemed to be nothing so much as a clever public relations ploy: Who would argue with the employer's motive of protecting fetuses? On their face, these policies appeared to be benign measures taken by employers seeking to eliminate fetal exposure to occupational toxins. While these policies may have protected fetuses from certain occupational hazards, however, they were not benign. Any employment policy that bars women from certain jobs on the basis of their procreative capacity undermines their ability to compete effectively in the workplace.<sup>1</sup>

Only after I had begun my research did I understand that these policies also implicated policies concerned with occupational safety and health. In fact, in workplaces that pose significant health hazards to both male and female workers, these policies seemed to provide the proverbial "half a loaf" for individuals concerned with occupational safety.

Underlying the debate about these policies is the question of whether fetuses have rights independent of women. Moreover, where workplaces are not safe and cannot be made safe for fetuses without significant cost to both employers and to the public, the issue is one of determining who should decide whether these fetuses should be exposed to occupational toxins.

Prohibiting women from certain jobs to protect the welfare of the race has Orwellian overtones. At the root of these policies is the belief

that the individual rights of women may be subjugated to the larger interests of the society. The conception of women as “vessels” for child-bearing would seem to be more properly the stuff of fiction. In fact, *The Handmaid’s Tale*, by Margaret Atwood, chronicles a distopia in which women’s sole function is to bear children. In one eerie passage, one with significance for both fetal protection policies and state protective legislation of the early twentieth century, a high government official explains why the new system is preferable to the old. He states that in the old system “[m]oney was the only measure of worth . . . [and] women got no respect as mothers.” As a result, he says, women chose not to become pregnant. In the new society women are barred from participating in the workplace. The result, the official states, is that “[women] are protected, [and] they can fulfill their biological destinies in peace . . . [w]ith full support and encouragement.”<sup>2</sup> Similarly, fetal protection policies “protected” women and their offspring from exposure to hazardous toxins. Like the distopia in Atwood’s *The Handmaid’s Tale*, a society that allows employers to adopt fetal protection policies reifies women’s procreative role while denigrating their other contributions. In such a society, women can never be the equals of men.

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# Fetal Rights, Women's Rights



# **1. Introduction: Fetal Protection Policies and Gender Equality**

In the late 1970s and throughout the 1980s, many private sector employers formulated policies that restricted fertile women, defined as women of childbearing age who had not undergone surgical sterilization, from jobs that might pose a risk to an embryo or fetus. These policies, which employers termed “fetal protection policies,” typically barred all women between the ages of 15 and 50 from hazardous jobs unless the women could establish that they had been sterilized. According to estimates, two-thirds of working women fell within this age category and were potentially at risk of exclusion.<sup>1</sup> In 1991, the Supreme Court held that these policies were prohibited under Title VII of the 1964 Civil Rights Act; nonetheless, the policies appear to have had a significant impact upon women’s attempts to achieve equality in both the workplace and the larger society. Most particularly, these policies implicated both equal employment opportunity and occupational safety and health, since fetuses were presumed to be at risk of harm through maternal, but not paternal exposure to occupational toxins. All three branches of government had statutory responsibility for regulating these policies. This book assesses both how governmental institutions responded to the proliferation of fetal protection policies in the 1980s and the extent to which each branch fulfilled this duty.

The American government has evinced a surprising ambivalence in dealing with gender-related issues in the past. Beginning with the state protective laws of the early 1900s, decision-makers have revealed that

they are unable to distinguish between sex, which is based on biological characteristics, and gender, which is socially constructed. Throughout the twentieth century, American administrators, legislators, and judges have confused gender with sex, often permitting gender-based distinctions to stand despite statutory mandates to eliminate gender discrimination.

Perhaps equally surprising, the American people, and American theorists in particular, have demonstrated a willingness to allow such distinctions. The governmental response to fetal protection policies in the late 1980s and early 1990s may be viewed as another manifestation of this ambiguity. These policies brought to the forefront fundamental questions about women's "basic nature," responsibility for reproduction of the species, and control over pregnancy and contraception. Much of the ongoing debate among feminists about the contours of equality analysis and about the need for special treatment of women in the workplace, especially with regard to pregnancy benefits, may be discerned in the fetal protection controversy. Furthermore, the abortion controversy, which raged throughout the 1980s, also played out in the debate about fetal protection policies. In a sense, the fetal protection issue is a microcosm of the ongoing debate in American society about the ordering of sex roles and about the perceived conflict between women's responsibility for wage-earning and for propagation of the species.

Even apart from their wider ramifications for gender equality, fetal protection policies were significant in their own right. These policies were adopted in a large number of workplaces, and their long-term impact on sex segregation in the workplace and on occupational safety and health has yet to be determined.

### **The Prevalence of Fetal Protection Policies**

The adoption of fetal protection policies was not isolated to a few random workplaces. In fact, a large number of employers in a variety of workplaces used these policies in the 1980s and early 1990s. There has been no definite accounting of the number of women barred from jobs as a result of these policies, but one estimate suggested that as many as twenty million women were at risk of exclusion.<sup>2</sup> In 1985, the Office of Technological Assessment (OTA), an organization that gathers information for Congress, estimated that at least fifteen of the Fortune 500

companies and a significant number of hospitals utilized fetal protection policies.<sup>3</sup>

Moreover, recent findings suggest that these policies were even more widespread than earlier statistics had indicated. A survey conducted in Massachusetts in 1989 suggested that upwards of 20 percent of chemical and electronics firms barred certain groups of employees from jobs on the basis of reproductive health hazards; and another 13 percent offered voluntary transfers to employees concerned about reproductive dangers.<sup>4</sup> All of these employers except one framed their policies with regard to reproductive risks to women alone: even where scientific evidence indicated that a substance posed a danger to both the male and female reproductive systems, women alone were restricted or offered transfers.<sup>5</sup> The results of this survey strongly suggest that the use of exclusionary policies has been grossly underestimated.

The number of jobs from which fertile women were actually excluded was much larger than the number from which they were formally excluded. Because many of the affected workplaces were unionized, women were excluded not only from the hazardous jobs, but from any jobs that might lead to these positions in the lines of progression specified by union contracts.<sup>6</sup> The express exclusion from one job on the basis of reproductive hazards effectively foreclosed access to many other jobs that may not have posed a danger to reproductive health.

Fetal protection policies were most widely utilized in the lead industry, where there was abundant scientific evidence that exposure to lead posed risks to fetuses and embryos at the earliest stages of development. Since 1976, the Lead Industries Association publicly opposed the employment of women in jobs where they would be exposed to lead, and it is estimated that women were excluded from almost one million jobs in this industry alone.<sup>7</sup>

While these policies were often used in the lead industry, they were also adopted by many companies outside of this industry. Among those companies known to have barred fertile women from certain job categories were the Olin Corporation, American Cyanamid, Union Carbide, General Motors, Bunker Hill, Allied Chemical, B.F. Goodrich, Monsanto, St. Joe's Minerals, ASARCO, Sun Oil, and Delco-Remy.<sup>8</sup> It also bears noting that corporate interest in the issue of fetal protection policies intensified in the late 1980s and early 1990s. In late 1985, the Deputy General Counsel for the National Association of Manufacturers stated

that concern about fetal hazards in the workplace was “an emerging issue” with companies.<sup>9</sup> Thus, at the same time that the Supreme Court held that fetal protection policies were prohibited under Title VII, a significant number of employers had either adopted a fetal protection policy or were contemplating such a policy.

Not all industries utilizing or producing reproductive toxins, however, chose to adopt fetal protection policies. These policies were more common among large firms with male-intensive or evenly proportioned male/female work forces than they were among small companies or those with female-intensive work forces.<sup>10</sup> In fact, companies that excluded broad classes of women, such as all women or fertile women, were much more likely to have male-intensive work forces than those that did not.<sup>11</sup>

Even more significantly, many women in traditionally “female” jobs, like operating room nurses, flight attendants, beauticians, workers in dry cleaners, lab technicians, health care workers, dental technicians, hygienists, and pottery painters, are exposed on a routine basis to materials that may harm a developing fetus; however, these women were not barred from working in these occupations.<sup>12</sup> For example, operating room nurses are exposed to waste anesthetic gases, which result in an increased incidence of spontaneous abortion and miscarriage; airline flight attendants are exposed to increased radiation levels, which may result in an increased incidence of miscarriage; beauticians are exposed to halogenated hydrocarbon hair spray propellants, which are known abortifacients, and to mutagenic and carcinogenic hair dyes; and workers in the dry-cleaning industry are exposed to tetrachloroethylene, which is a mutagen.<sup>13</sup>

Some commentators have contended that reproductive hazards to women in female jobs have been downplayed in an effort to keep women in these jobs. For example, prolonged use of video display terminals (vdt's) has long been suspected of increasing the risk of miscarriage. One researcher claims that this risk has been ignored by both employers and the federal government, in large part because these terminals are used in clerical jobs that are overwhelmingly filled by women.<sup>14</sup>

The selective exclusion of women from jobs that have been traditionally male, and for which replacements were readily available, strongly suggests that women have been excluded from workplaces in which they were “marginal” workers, i.e., where they occupied jobs that were traditionally male jobs and that were, for the most part, still occupied by

men.<sup>15</sup> This selective exclusion is often cited as evidence that employers did not bar women solely out of a desire to protect them from reproductive injury and their offspring from developmental harm. Moreover, the corporate response to data indicating that a substance poses a threat to the male reproductive system, but not to that of the female, suggests that an employer's motivation in adopting these policies was not always benevolent. In 1977, the pesticide dibromochloropropane (DBCP) was found to cause sterility in male workers exposed to it. Rather than barring male workers from jobs that might expose them to the substance, DBCP was banned. While women have been replaced with men because of reproductive hazards associated with certain workplace toxins, in the case of DBCP no one suggested that the male workers should be similarly replaced.

Thus, it appears that fetal protection policies were adopted in certain types of industries, typically by corporations engaged in heavy industry with work forces predominantly composed of men. In addition, these workplaces were usually unionized.<sup>16</sup> The content and rationale for these policies, however, varied widely. As the OTA concluded in its 1985 report, some policies were based upon extensive epidemiological and toxicological data about particular substances; others were tentative with regard to suspected hazards. Similarly, some were carefully written and meticulously documented; others were more informal.<sup>17</sup> According to the OTA, the policies were usually announced to both the union and the employees in large manufacturing companies, while policies were adopted in an ad hoc fashion in smaller organizations.<sup>18</sup>

Employers contended that they adopted these policies for benevolent, or at least benign, reasons. Typically, employers relied upon two rationales for justifying their adoption of a fetal protection policy.<sup>19</sup> The first of these rationales focused on the employer's moral concerns about the welfare of its workers' offspring; the second focused upon the employer's desire to limit its liability for occupational exposure to hazardous materials.

Nearly all employers contended that they adopted these policies out of a concern about the effects of occupational exposure upon the health of the fetus. Typically, the employer alleged that it was morally obligated to protect the fetus from workplace toxins and that fetal protection policies were the only means of eliminating exposure to these toxins. The employer contended that workplace toxins were transmitted to the fetus



principally through the mother; the employer largely ignored the effects of paternal exposure on fetal health.

This lack of concern about paternal transmission may have stemmed from an abundance of scientific data demonstrating the link between developmental harm and female transmission, and from a corresponding paucity of research about male-mediated effects.<sup>20</sup> The scientific data on reproductive hazards have been in flux in recent years. In addition, the employer's absolute disregard of paternally transmitted harm, coupled with its selective "protection" of the fetuses of women working in predominantly male jobs and its lack of concern about the offspring of women working in female occupations, weakened the employer's argument that the policies had been adopted solely to protect fetal health. The second rationale, that of limiting employer liability, was more likely the driving force for the employer's action than was the concern about fetal health.

The basis of this second rationale is that concerns about potential tort liability drove the employer to adopt these essentially preventative policies. The much bemoaned "explosion" in tort litigation throughout the 1980s was used as the backdrop for this argument. Unlike an adult, a child who is injured in utero as a result of exposure to occupational hazards, or whose injuries have led to death, is not required to exhaust those remedies available under the workers' compensation statute before bringing a tort suit against the employer. Employers adopting fetal protection policies contended that a tort suit based upon injury in utero could result in astronomical awards, the size of which could lead to bankruptcy.<sup>21</sup>

The problem with this rationale was that there were no records of any lawsuits having been brought by the children of women exposed to occupational toxins. Because of the speculative nature of this justification, it was rejected by a number of analysts, and by several courts that considered fetal protection policies.<sup>22</sup> In spite of this rejection, employers continued to assert that concerns about tort liability compelled them to adopt these policies.

By focusing on this seemingly benign concern about liability, employers were able to dodge concerns about the discriminatory effects of fetal protection policies. While it is impossible to know for certain why an employer chose to adopt a fetal protection policy, the available evidence suggests that employers adopted these policies for less than benevolent