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Fertile Women May Now Apply: Fetal Protection Policies After *Johnson Controls*

Barbara Ruhe Grumet*

Introduction

The National Institute for Occupational Safety and Health (NIOSH) has identified reproductive hazards as one of "10 leading work-related diseases and injuries."¹ Effects of occupational exposure to substances hazardous to reproduction include:²

reduced fertility, unsuccessful fertilization or implantation, ... spontaneous abortions (both early and late), major and minor birth defects, perinatal death, low birth weight, altered sex ratio, developmental or behavioral disabilities, and transplacental exposure to carcinogen.

Exposures may also change the chromosomes of a potential parent and become embedded in the genetic pool. Attention is usually focused on females, but, in this and other ways, males and/or their progeny are also at risk.

The reproductive potential of many occupational exposures, e.g., noise, bacteria, viruses, and a host of chemicals is not known,³ but

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¹ *Leading Work-Related Diseases and Injuries — United States*, 34 MORBIDITY AND MORTALITY WEEKLY REPORT 537 (1985).

² *Id.*

³ See Schnorr et al., *Video Display Terminals and the Risk of Spontaneous Abortion*, 324 NEW ENGLAND J. OF MEDICINE 733 (1991) (recent study exonerating

NIOSH has estimated that over 14 million workers are exposed to ethylene, formaldehyde, lead, and radiation — each of which has been identified as posing reproductive risks.⁴

One company that was responsive to such risks was Johnson Controls, Inc. (Johnson). Beginning at least as early as 1977, it had adopted a policy of warning workers and encouraging pregnant, or potentially pregnant, employees not to work in areas of high lead exposure. However, several had become pregnant nonetheless.

After spending about \$15 million to reduce lead exposure and feeling that further reductions were technically and financially unfeasible, in 1981, the battery division took further measures. It adopted a policy barring women of childbearing age from working where they might accumulate lead in excess of 30 µg/dl of blood — the level determined by the Centers for Disease Control to be excessive for children — unless their “inability to bear children [was] medically documented.”⁵

Meanwhile, in 1978, Title VII of the Civil Rights Act of 1964 (hereinafter the Act) was amended to define forbidden sex discrimination as including discrimination “because of or on the basis of pregnancy, childbirth or related medical conditions.”⁶ The amendment also provided that:⁷

[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, ... as other persons not so

video display terminals as a factor in miscarriage).

⁴ *Supra* note 1, at 538–39. See also, Mattison, *Risk Assessment for Developmental Toxicity...*, 2 RISK 225, at 227 (1991).

⁵ A description of Johnsons’ policy can be found in *International Union v. Johnson Controls, Inc.*, 886 F.2d 871, 877-88 (7th Cir. 1989), *aff’d* 680 F.Supp. 3099 (E.D. Wis. 1988), *rev’d*, No. 89-1215 (S.Ct. Mar. 20, 1991).

⁶ P.L. 95-555, 92 Stat. 2076 (Oct. 31, 1978), amending 42 U.S.C. § 2000e (k).

⁷ *Id.*

affected but similar in their ability or inability to work... .

On this basis, Johnson's policy was challenged by the United Auto Workers and several employees, but the District Court granted summary judgment for defendants.⁸ The Court of Appeals affirmed;⁹ and, last March, the U.S. Supreme Court reversed, finding Johnson's "fetal protection policy [to be]... forbidden under Title VII."¹⁰

Johnson Controls gives rise to the need to re-examine a variety of broad policy issues and stakeholder options. This paper will address some of those issues and options, first, from a legal standpoint and, then, from a broader perspective.

Legal Issues

The Narrow Issue in Johnson Controls

Traditionally, employment policies or practices have been found to impermissibly discriminate in one of two ways, through disparate *treatment* or workers or disparate *effects* on them. Different treatment because of gender is facially forbidden but may be permitted if gender is a bona fide occupational qualification [BOFQ]; this would be the case with, e.g., sperm donors or wet nurses. Moreover, a practice neutral on its face may violate the act if it systematically excludes members of one gender. Classic examples of impact discrimination are height, weight and body strength requirements. These may be upheld if the employer can demonstrate business necessity. In most circumstances, height or weight limits would be rejected, but a minimum strength requirement for jobs such as firefighting would pass muster.

Few cases were decided under the Act prior to *Johnson Controls*. In one, a pregnant x-ray technician was fired rather than transferred

⁸ *Johnson Controls*, 680 F.Supp. at 309.

⁹ *Johnson Controls*, 886 F.2d at 871.

¹⁰ *International Union v. Johnson Controls, Inc.*, No. 89-1215, slip op. at 11 (S.Ct. Mar. 20, 1991).

under a hospital's pregnancy policy.¹¹ The hospital said that no other job was available, but the court found this unproven. The court found the policy prima facie discriminatory and said that it could be allowed only with a showing of substantial risk to fetuses or fertile or pregnant women, but not to men. The hospital could not meet the test. Besides these deficiencies in its case, the woman was fired after any damage was apt to have already been done.

In another case, an employer won.¹² Its practices were found permissible under a disparate impact analysis. In reaching that result, unborn children were analogized to invitees and licensees, to whom businesses may be liable for injuries.

Regardless of outcome, both courts recognized circumstances where gender discrimination based on fetal risk would be appropriate.

However, the rationale for the Supreme Court's conclusion in *Johnson Controls* seems to leave little room for such occupational policies to withstand future challenges. Of particular importance are its statements that:¹³

The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. ...[T]reat[ing] all its female employees as potentially pregnant... evinces discrimination on the basis of sex.

[T]he language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. ...[P]rofessed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the

¹¹ *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984).

¹² *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982).

¹³ *Supra* note 10, at 7-8, 10, 17.

welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.

Thus, the Court has decided that a proper interpretation of the Act gives the choice of whether and where to work to a woman herself, not to her employer.

Reproductive Freedom

One major question this raises is the legal culpability of women who choose to expose their potential offspring to risks that others would find unacceptable. Some scholars have argued that, once a woman makes a commitment to continue a pregnancy, she has an obligation to behave reasonably towards that fetus, including protecting it from known hazards.¹⁴ Others have argued that the woman's right to decide what to do to her own body supersedes any rights of the fetus, at least until the third trimester of pregnancy.¹⁵

Beyond abortion rights cases, such issues have arisen in a variety of ways. Some cases seem to allow women to expose fetuses to risks potentially even more severe than those normally encountered in the workplace. Consider, for example, criminal charges that may be brought against pregnant women who continue to abuse drugs during pregnancy. Charges such as child abuse, homicide, or endangering the welfare of a minor are often dismissed and are unlikely to result in conviction.¹⁶

¹⁴ Robertson, *Legal Issues in Prenatal Therapy*, 29 *CLINICAL OBSTETRICS & GYNECOLOGY* 603 (1986).

¹⁵ Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 *YALE L.J.* 599 (1986).

¹⁶ See, e.g., *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (App. Dept. 1987). A few states have enacted legislation making intentional behavior which causes the death of a fetus a crime. See, e.g., ILL. ANN. STAT. ch. 38, para 9-1.2 (Smith-Hurd 1988 Supp.).

However, babies may be removed from parental custody under laws creating, e.g., a “presumption of neglect” if a child is born suffering from symptoms of drug addiction.¹⁷ These laws have been upheld on the basis of states’ obligations to act in the “best interests of the child.”¹⁸

Also, courts may require pregnant women to undergo treatment such as blood transfusion or cesarian birth.¹⁹ In the vast majority of these cases, the woman is in the third trimester of pregnancy. In such circumstances, the fetus is viable, and, if it is likely to die without the recommended medical intervention, the state’s responsibility to the fetus may outweigh the mother’s right to decide what should be done to her body.

Beyond this, there seems to be a new interest in fetal health. For example, New York State has recently enacted legislation requiring restaurant and liquor store owners to post signs warning pregnant women that alcohol is harmful to the fetus.²⁰ Lawsuits against pregnant women who behave irresponsibly toward their fetuses are on the increase. Fears that “pregnancy police” are crusading to protect the unborn are being raised throughout the country.²¹

Thus far, concern for the unborn seems to be focusing on such things as illegal activity, smoking and drinking. Pregnant women are being criticized for knowingly endangering the future well being of

[Editor’s note: However, an AP report out of Houston, Texas indicates that a mother received a twelve year sentence when the liver of her newborn contained enough cocaine to kill an adult. See, e.g., *Stillbirth Sends Mom to Prison*, Concord (NH) Monitor, July 2, at A5.]

¹⁷ See, e.g., MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1985).

¹⁸ See, e.g., *In re John Children*, 306 N.Y.S.2d 797 (Fam. Ct. 1969).

¹⁹ See, e.g., *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457 (1981).

²⁰ 1991 N.Y. LAWS __.

²¹ Kantrowitz, *The Pregnancy Police*, Newsweek, April 29, 1991, at 52.

unborn children. To the extent that women are accountable for doing so, *Johnson Controls* may extend the reach of this concern into the workplace. However, should women be coerced into avoiding occupational settings that pose a threat to their offspring, this will be a result of state action or social pressure — and not the policies of any given employer.

Employer Liability to Unborn Children

As recognized in one of the cases mentioned earlier, employer liability to offspring is a major, if not *the* major factor, underlying occupational fetal protection policies.²² A number of states have allowed recovery for injuries inflicted on fetuses by third parties. Most cases have involved physical injuries caused by, e.g., automobile accidents, where a fetus was injured or killed.²³ However, others have involved, e.g., drugs such as DES. In the latter cases, manufacturers have been found liable for failing to warn of known fetal risk,²⁴ and, in at least one case, a manufacturer was found liable for failing to *test* for fetal risk.²⁵

In another case, a physician and hospital were found liable to a child born eight years after her mother received a transfusion of RH incompatible blood.²⁶ The Illinois Supreme Court ruled that, even though the plaintiff had not been conceived when the alleged negligence occurred, a reasonable health care provider should anticipate that a

²² *Supra* note 12.

²³ *See, e.g.,* diDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987). *But see* Johnson v. Verrilli, 139 App.Div.2d 497, 526 N.Y.S.2d 600 (1988).

²⁴ Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal Rptr. 132 (1980); Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37 (1984).

²⁵ Bichler v. Eli Lilly Co., 450 N.Y.S.2d 776, 55 N.Y. 571 (1982).

²⁶ Renslow v. Mennonite Hospital, 67 Ill.2d 348, 367 N.E.2d 1250 (1977). *See also* Enright v. Eli Lilly & Co., __ N.Y.2d __ (1991) (limiting foreseeability to one generation of offspring).

young female patient would some day become pregnant and, thus, had an obligation to use due care in preventing transfusions of blood which could sensitize a patient to the RH factor. Failure to exercise this due care would make the provider liable for any harmful consequences.

Suits may also be couched as ones for wrongful birth or wrongful life. Most of these have alleged that a health care provider did not exercise reasonable care in failing to detect or warn a pregnant woman of her risk of giving birth to a child with a detectable defect.²⁷ These cases would suggest that, even if a fetal risk is (or should have been) identified only after conception, the parents should still be informed.

Obviously, plaintiffs do not always win. For example, when parents of a child afflicted with fetal alcohol syndrome sued a liquor manufacturer for failure to warn, the jury returned a verdict for the defendant. Not only was there testimony that the mother had been warned by her physician, but also that “the dangers of drinking during pregnancy were common knowledge in the community at the time.”²⁸

Even with adequate warnings, it might be argued that liability can attach if a risk is not “voluntarily” assumed. Advocates for working women have argued, e.g., that economic necessity makes it impossible for some women to choose not to work in jobs that may pose a risk. However, tobacco is a known hazardous substance. Since the 1960’s, manufacturers have been required to warn consumers that cigarette smoking may be “hazardous to your health.” These warnings have generally been held to absolve manufacturers of liability to smokers even if the victim was proven to be addicted to nicotine (and arguably unable to choose not to use cigarettes).²⁹ By analogy, employers

²⁷ See, e.g., *Becker v. Schwartz*, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978)(wrongful birth); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984)(wrongful life).

²⁸ *Liquor Executives Expect More Cases over Birth Defects*, Wall St. J., May 19, 1989, at B3, col. 1.

would not be held liable to a child for harm due to the non-negligent exposure of a parent to a hazardous workplace.

Based on such principles, in *Johnson Controls*, the Supreme Court stated:³⁰

If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.

While there is more than a remote possibility of employer liability lurking in the terms “fully informed” and “not acted negligently,” the court was clearly disinclined to permit employers to use pregnancy policies as a form of blanket insurance against the risk of suits brought by or on behalf of injured offspring of pregnant workers.

Compensating Injuries of Employees

To wind up this part of the discussion, some mention of employee compensation is warranted. State and federal workers compensation laws provide compensation for injuries and illnesses which arise out of, and in the course of, employment and generally bar tort suits against employers for job related injuries. Laws vary in the scope of coverage, proof of occupational exposure required, and types of employers covered. One issue of some interest is whether infertility, for example, might be regarded as an “injury” or a “disease.” In some states, occupational diseases and occupational injuries are considered similarly and require only proof of exposure in the workplace. In others, occupational diseases are listed specifically in statute or regulations. If a worker suffers a particular ailment and works in a specified industry, the ailment is presumed to have arisen from the employment. Conversely, in many states, the employee must prove “that the

²⁹ *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3rd Cir. 1990), *cert. granted*, 59 U.S.L.W. (Mar. 25, 1991) (No. 90-1038).

³⁰ *Supra* note 10, at 19.

employment exposes workers to a higher risk of contracting the disease than that to which the general public is exposed.”³¹

In any case, reproductive hazards are similar to a host of others posed in various occupational settings. For that reason, it is doubtful that the situation has been significantly affected by *Johnson Controls*.

The Social Implications of *Johnson Controls*

Women comprise a substantial portion of the workforce. The Census Bureau reported that, in 1988, 54.7 million women and 66.9 million men over age 16 were in the workforce.³² A total of 38.5 million women, 73% of the female population between the ages of 18 and 44, which are considered the prime childbearing years, are included in these figures.³³ Of the 3,667,000 births during 1988, 1,866,000 were to women in the labor force.³⁴ The rate of childbirth during that year was 48.4 per 1000 women.³⁵ If similar rates continue, we can assume that the phenomenon of working women having children will continue to be a significant factor.

Laws restricting women's hours and locations of employment have been around for decades, from the bakery cases of the 1900's to the barring of women in the armed forces from direct combat roles.³⁶ Jobs that expose workers to hazardous substances tend to be high paying, particularly considering the skill levels required of the workers. Many employees feel that economic necessity forces them to take these jobs,

³¹ J. NACKLEY, PRIMER ON WORKERS COMPENSATION 29 (1989).

³² U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES 378 (1990).

³³ *Id.* at 68.

³⁴ *Id.* at 69.

³⁵ *Id.* at 68.

³⁶ *Muller v. Oregon*, 208 U.S. 412 (1908); *Radice v. New York*, 264 U.S. 292 (1924); *Rostker v. Goldberg*, 453 U.S. 57 (1971).

despite risks. The Supreme Court has restored the option of choice to women who are no longer “forced to choose between having a child and having a job.”³⁷

Increasing concerns about the reproductive effects of various hazards do not warrant a different result. Love Canal, Chernobyl, Bhopal, and Agent Orange have all been alleged, among other harms, to have increased rates of miscarriage, stillbirths and birth defects. The workplace is thus but one of many sources of exposure to potential hazards. Clearly employers need to guard against such hazards, but they may no longer discriminate against women in doing so.

Some employers have argued that complying with tightened environmental and safety standards is economically infeasible. Rather than comply with increased requirements, they may close down a factory and move elsewhere — including out of the country. That is, in fact, what many battery manufacturers have apparently done. Other countries may have less stringent requirements for environmental and occupational safety. They may also not have labor unions or a workforce as expensive as that in the U.S. The serious loss of manufacturing jobs during the last two decades has been blamed, at least in part, on these factors.

There is clearly a need to address such matters — but not at the expense of women’s freedom to choose their jobs.

Options for Employers and Workers

Now that fetal protection policies have been held to violate the Act, it is time to look at other ways of dealing with the acknowledged, and unacknowledged, workplace hazards for fetuses.

Make the Workplace Safer

Clearly more research needs to be done to identify which workplace

³⁷ *Supra* note 10, at 15.

exposures may pose hazards to reproduction. It is somewhat surprising, perhaps, that more attention has not already been paid to this area. In 1978, NIOSH announced "a commitment to conduct research that would 'identify and eliminate reproductive effects due to workplace hazards to workers of either sex'."³⁸ However, little has been done to implement this commitment. Areas which need to be addressed include "develop[ing], expand[ing], integrat[ing] and link[ing] current surveillance activities in the government, private industry, unions, and academia."³⁹ Research in this area is also complicated by the fact that reproductive disorders may be due to genetics, environmental exposures outside the workplace, interactions between workplace and non-workplace exposures, factors such as parental smoking or use of alcohol, timing and duration of exposure, or other unknown factors.⁴⁰

If reproductive problems have been identified as one of the top ten areas of occupational risk, more attention should be given to identifying specific risk factors, as well as the interaction between them. Perhaps labor unions need to become more proactive in this area. Concerns over costs of research, as well as fears that manufacturers may simply relocate overseas rather than face scrutiny and pressure to make work environments less hazardous are, unfortunately, real factors — particularly in uncertain economic climates. However, they cannot be used as an excuse for avoiding efforts to make workplaces safer, both for workers and their offspring. In addition, the Occupational Safety and Health Administration should increase its activity in research and regulation of reproductive hazards.

³⁸ NIOSH, PROCEEDINGS OF A WORKSHOP ON METHODOLOGY FOR ASSESSING REPRODUCTIVE HAZARDS IN THE WORKPLACE, 1978, quoted in Bregman et al., *Surveillance for Work-Related Adverse Reproductive Outcomes*, 97 AM. J. PUBLIC HEALTH 53, 55 (Supp. 1989).

³⁹ *Id.*

⁴⁰ *Id.*

More research needs to be done to find safer substitutes for workplace chemicals known to cause reproductive hazards. Examples from industries that used asbestos show that, if the hazard is considered serious enough, substitutes can be found. Petroleum manufacturers were forced to eliminate lead from gasoline, even though, at the time, it was alleged to be a crucial ingredient.

Right to Know

Once a substance has been identified as a reproductive hazard, workers should be informed of this risk. At present, 40 states and the federal government have some form of "right to know" requirement.⁴¹ These requirements generally require employers to inform their workers if they are exposed to hazardous substances. Some laws apply only to specific substances, or specific industries, or specific employers. Right to know laws should be made uniform to require that all employers warn all employees of hazards in the workplace. Reproductive hazards need to be included in the required warnings.

A right to know requirement will require employers to be more aggressive in identifying substances which may cause harm to their employees. At the same time, a worker, once informed, who continues to work has assumed the risks of exposures to these hazardous substances. This should be an acceptable tradeoff for employers.

Use Temporary, but Long-lasting, Contraceptives

An option that should be explored, at least for occupational hazards which harm the fetus, is contraceptives that provide long term, but reversible, sterility. The drug Norplant, when surgically implanted in a woman's arm, provides contraception for up to five years.⁴²

⁴¹ U.S. Occupational Safety and Health Administration, Hazard Communication: Final Rule, 48 C.F.R. 53280-348 (1983); Baram, *The Right to Know and the Duty to Disclose Hazard Information*, 74 AM. J. PUBLIC HEALTH 385 (1984).

⁴² *U.S. Approves 5-Year Implant to Curb Fertility (Norplant)*, N.Y. Times, Dec. 11, 1990, at A1.

Intrauterine devices, which have been out of favor recently in the U.S., but widely used elsewhere, are being reconsidered.⁴³ Also, long-lasting male contraceptives are being investigated.

A woman who wishes to work in a job where she would be exposed to substances which could harm a developing fetus, but who did not wish to become permanently sterile, could opt for this approach. When she wished to become pregnant, the device could be removed, and she could take another job or go on leave until giving birth. However, this option would not be helpful in dealing with, e.g., mutagens encountered in the workplace.

Adopt a No-fault Compensation System for Birth Deformities

A decision could be made that women's working confers economic and social benefits that warrant some form of insurance for injured offspring. The policy judgment would be similar to that made for compensating infants injured due to childhood immunizations. Congress enacted the National Childhood Vaccine Injury Act in order to encourage vaccine manufacturers to continue making products which were essential to the public health.⁴⁴ Under this approach, state laws could provide funds for medical care, education, and maintenance expenses for children born with severe birth defects. The legislation could apply to all children regardless of what "caused" the birth defect. At the present time, two states have adopted a "no-fault" approach, compensating infants born with severe birth injuries, primarily brain damage.⁴⁵ They were enacted to forestall possible unavailability of obstetrical care.

The costs of compensating children suffering from severe genetic defects, birth injuries or other harm from parental exposure to hazardous substances in *or out of* the workplace could be at least partly offset by

⁴³ *Debate Flares over IUD Challenge*, N.Y. Times, April 16, 1991, at C3.

⁴⁴ 42 U.S.C. §§ 300aa-1-34 (1986).

⁴⁵ *Supra* note 31.

savings in other areas, such as Medicaid, health insurance, obstetrical malpractice and products liability insurance, and disabled children's programs.

A less expensive, and extensive, alternative would be to extend workers' compensation laws to allow compensation to offspring harmed by occupational exposure to hazardous substances. If this were done, proof of workplace exposure as cause of the harm would be required.

Adopt Policies Barring all Fertile Workers From Some Jobs

The problem with Johnson's policy was that it applied only to fertile women. Yet, one of the plaintiffs in the case was a male who had unsuccessfully requested a transfer to a less hazardous part of the factory because he and his wife wished to have a child. If the employer is truly concerned about the well-being of future generations, it still has the option of barring *all* fertile workers from jobs where they may be exposed to reproductive hazards. Jobs would be available to all workers if they could prove that they were medically incapable of reproducing, and the policy would not be discriminatory.

Conclusions

In *Johnson Controls*, the Supreme Court has begun a new era in addressing discrimination in the workplace. It is quite clear that employers may not exclude fertile women from jobs in order to protect potential children from possible harm. This gives rise to widespread obligations to look more closely at reproductive hazards in the workplace.

Employers and labor representatives need to work together to see that more research is done and to assist the scientific community in identifying possible risk factors. Workers have to seek and use information to make responsible choices about, e.g., contraception if they choose to continue working in risky environments.

More effort needs to be given to identifying and regulating hazardous substances — as well as to studying compensation mechanisms for harm that it is not, for one reason or another, possible to avoid. Other matters also need attention, e.g., the possible need to retrain workers in industries that cannot survive domestically in the face of reducing risks to levels found acceptable within the U.S. It may turn out that the economic benefits of increased occupational regulation to reduce reproductive risks more than offset the costs. Regardless of whether that proves to be true, we must now decide the importance of possible hazards to future generations and make an appropriate commitment to identifying and controlling them.

