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Reconstructing Pregnancy

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RECONSTRUCTING PREGNANCY

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ABSTRACT

Congress passed the Pregnancy Discrimination Act in 1978 to amend Title VII's prohibition against sex discrimination to include discrimination on the basis of pregnancy, childbirth, and related medical conditions. More than thirty-five years after the passage of the Pregnancy Discrimination Act, courts have failed to fulfill that act's promise. This failure lies, in part, in the law's tendency to reduce pregnancy, with all of its social and cultural meaning, to its "purely" biological elements. For the purposes of the Pregnancy Discrimination Act, courts ground the legal conception of pregnancy in a form of biomedical essentialism that treats pregnancy as a universal given. Under the PDA, courts have reduced pregnancy discrimination only to the discrimination that occurs during gestation or because of gestation-related physiological conditions. This reductive definition of pregnancy is not only profoundly under-inclusive and unresponsive to the needs of workers but also contradictory and incoherent. In response, this article proposes that pregnancy should be reconstructed in law. Judges, administrative actors, and advocates should reject reductive forms of biomedical essentialism and embrace possibilities beyond biology. Pregnancy should not, and indeed cannot, be understood independent of the social, cultural, and relational interactions that give it meaning. Pregnancy is, in fact, pregnant with social and cultural meaning. Reconstructing pregnancy in this way has the potential to provide much needed clarity to the Pregnancy Discrimination Act, and to ensure that pregnancy discrimination is comprehensively prohibited—whether it occurs before, during, or after conception.

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INTRODUCTION

CONGRESS passed the Pregnancy Discrimination Act (the PDA or the Act) in 1978.[1] The PDA was passed in response to the U.S. Supreme Court's determination that pregnancy discrimination is not sex discrimination for the purposes of Title VII of the 1964 Civil

1. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) ("An Act [t]o amend title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy.").

Rights Act.[2] Drafted as part of Title VII's definition section, the PDA provides protection for pregnant employees in two ways: First, the PDA defines sex discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions.[3] Second, the PDA requires employers to treat pregnant employees in the same way as other employees who are not pregnant but are similarly situated in their ability or inability to work.[4]

Although the PDA made explicit what feminists believed and what women already knew—that pregnancy discrimination is sex discrimination—the Act has its limitations.[5] One of the major limitations of the PDA emerges from the fact that it does not explicitly define pregnancy or provide guidance for determining the scope of related medical conditions that the Act addresses. As pregnancy discrimination jurisprudence has evolved, the scope and meaning of pregnancy, childbirth, and related medical conditions has become unclear.[6] Furthermore, courts have interpreted the PDA in ways that fail entirely to protect women in the workplace from discrimination on the basis of pregnancy, childbirth, and related medical conditions.[7]

The current pregnancy discrimination jurisprudence emerges from a fundamentally naïve misunderstanding of the nature of pregnancy. At first blush, most individuals believe they know and understand the nature of pregnancy. Because pregnancy is such a ubiquitous part of human life, many individuals have experienced pregnancy either firsthand or as the partner of a pregnant person. For this reason, pregnancy is believed to be a commonly accessible experience, widely available to individuals whether they have been pregnant or not.[8] There is also a presumption that the boundaries of pregnancy are easily understood and can be reduced strictly to biology and physiology.[9] In 1999, the Honorable Richard Posner, a prolific jurist and scholar, made a bold but insightful statement about the judiciary and its knowledge of sex.[10] He claimed that the processes of educating and selecting judges may create a circumstance where the judiciary has little knowledge about the nature of sexuality and the scope of sexual desire.[11] According to Judge Posner, "judges know

2. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 160 (1976).

3. 42 U.S.C. § 2000e(k) (2012).

4. According to the PDA, "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.*

5. *See id.*; *see also infra* Part I.D.

6. *See infra* Part II.A.

7. *See, e.g.*, Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679–80 (8th Cir. 1996).

8. *See infra* Part III.D.i.

9. *See infra* Part III.A.

10. *See* RICHARD POSNER, SEX AND REASON 1 (1994).

11. *Id.*

next to nothing about the subject."[12] This article echoes Judge Posner with a distinct but similar claim. Judges, while they may be highly educated, knowledgeable, and worldly in other regards, often may know very little about pregnancy. Not only do they lack the sophisticated medical and scientific knowledge that many doctors, maternal nurses, and midwives possess, they also typically lack the experiential, hedonic knowledge of pregnancy that many women possess.[13]

In interpreting the PDA, courts currently limit the scope and meaning of pregnancy by grounding the concept in biomedical essentialism.[14] Biomedical essentialism is an ideological perspective that reduces the process of pregnancy to its biological and physiological facets, obscuring the important ways in which society and culture shape the meaning of pregnancy and structure our experience of it.[15] Adherence to a perspective on pregnancy that embraces biomedical essentialism also entails adopting the presumption that pregnancy is an ahistorical, natural event that is the same for all women across all cultures and social contingencies.[16] Such a perspective fails to provide a nuanced understanding of the nature of pregnancy; a proper understanding would respond to the diversity among pregnant women alongside the historically contingent social, cultural, psychological, and economic aspects of pregnancy. Until the definition of pregnancy is pushed beyond the presumption that pregnancy can be reduced to physiology and biology, courts will consistently fail to protect women from sex discrimination through the PDA.

This article explores how the federal courts have defined pregnancy for the purposes of Title VII of the 1964 Civil Rights Act. It reveals how the PDA fails to protect pregnant workers, in part, because courts fundamentally misunderstand the nature and scope of pregnancy. In passing the PDA, Congress intended to address many "manifestations" of pregnancy discrimination beyond those linked to physiology and biology.[17] Yet,

12. *Id.*

13. Saru M. Matambanadzo, *The Fourth Trimester*, 48 U. MICH. J.L. REFORM 101, 164 (2014).

14. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974) (noting that "[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics").

15. *See infra* Part III.A.

16. *See* Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267–68 (Carol S. Vance ed., 1992).

17. Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 821 (2001).

from breastfeeding[18] to infant care[19] to paid leave,[20] even narrow, specific efforts to clarify and expand the scope of antidiscrimination have had limited success in the courts. The task of interpreting the PDA in ways that do not reduce pregnancy to its biological and physiological aspects and that succeed in recognizing the importance of social and cultural aspects of pregnancy presents a difficult challenge for courts and policymakers.[21]

This article argues that pregnancy should not be reduced to its biomedical elements, and that pregnancy must not be essentialized in ways that render it neutral, natural, and ahistorical. The article seeks to show that pregnant bodies in law do not exist as pre-cultural artifacts that lie outside of social interactions; instead, pregnant bodies are forged through discourse, experienced through social interactions, and endowed with meaning by cultural expectations. Pregnancy, even in its material biological and physiological aspects, is experienced, mediated, and understood through culture, discourse, and social relations. For this reason, the so-called biology or physiology of pregnancy cannot be defined separately from the cultural and social frameworks of pregnancy. It follows that the meaning and scope of pregnancy should be reconstructed for the purposes of the PDA in ways that resist the pull of biomedical essentialism. This intervention offers a counter-narrative to deal with the intractable notion of nature, resisting the ways in which courts have reduced pregnancy to its biological and physiological aspects. As such, this reconstructed meaning of pregnancy does not represent a totalizing, general theory of pregnancy or the body, but rather a localized disruption of received legal wisdom about pregnancy.[22] Furthermore, simultaneously denaturalizing pregnancy and expanding its scope and meaning through an emphasis on cultural and social meaning has the potential to foster a more robust conception of what types of discrimination the law should prohibit.

Part I reviews the problem of pregnancy discrimination in the workplace and examines the federal statutory response, highlighting both the

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18. Barrash v. Bowen, 846 F.2d 927, 932 (4th Cir. 1988); Ames v. Nationwide Mut. Ins. Co., No. 4:11-cv-00359 RP-RAW, at *19 (S.D. Iowa, Oct. 16, 2012) (mem. op.), *cert. denied*, 135 S. Ct. 947 (2015); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 868 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991).

19. *See, e.g.*, Fleming v. Ayers & Assocs., 948 F.2d 993, 997 (6th Cir. 1991) (finding that the PDA does not mandate leave to care for special needs infants); *see also* Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491–93 (D. Colo. 1997) (citing Wallace v. Pyro Mining Co., 789 F. Supp. 867 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991)) (stating that the needs or conditions of a child that require the mother's presence are not within the purview of the PDA); Barnes v. Hewlett-Packard Co., 846 F. Supp. 442, 445 (D. Md. 1994).

20. The PDA does not mandate paid leave for employees. *See, e.g.*, Maldonado v. U.S. Bank, 186 F.3d 759, 767–68 (7th Cir. 1999); Piantanida v. Wyman Ctr., Inc., 116 F.3d 340, 342 (8th Cir. 1997); Smith v. F.W. Morse & Co., Inc., 76 F.3d 413, 425 (1st Cir. 1996).

21. *See* Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 231–32 (1998).

22. Mary Jo Frug declared unabashedly in her final article, "I am in favor of local disruptions. I am against totalizing theory." Mary Jo Frug, *A Postmodern Legal Feminist Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1046 (1992).

successes and limitations of the PDA. In Part II, the article reveals how a reductive, biomedical model of pregnancy underpins the current jurisprudence of pregnancy discrimination. It argues that this model of pregnancy not only has produced inconsistency and uncertainty in how pregnancy discrimination is understood in federal law, but also has failed to address the diversity and complexity of pregnancy discrimination in the workplace. Finally, Part III of the article focuses on rendering pregnancy a socially constructed, culturally situated concept. It provides a "thick" description of pregnancy, drawing on interdisciplinary scholarship and a variety of cultural materials. Drawing on this "thick" description of pregnancy, it argues that federal antidiscrimination law, as embodied by the PDA, should move beyond a reliance on the biomedical model of pregnancy. Part III concludes by suggesting some possibilities that might begin to expand the meaning and scope of pregnancy for purposes of the PDA.

In some ways, this article's underlying argument—that courts interpreting the PDA have adopted the ideology of biomedical essentialism—is not novel in legal literature. This article is not the first to challenge the biologically reductionist legal reasoning regarding pregnancy and reproduction,[23] or to call for increased attention to the social, cultural, and economic aspects of pregnancy or reproduction.[24] Scholars have critiqued the tendency to reduce pregnancy to biology not only in relation to reproductive rights, but also in relation to pregnancy discrimination.[25] This ar-

23. *See* Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1149 (2010) (arguing that the Supreme Court frames gender related law as a regulation of illicit sexual activity in ways that "accepts the biological excuses for gender classifications"); *see also* Dan Danielsen, *Representing Identities: Legal Treatment of Pregnancy and Homosexuality*, 26 NEW ENG. L. REV. 1453, 1453 n.3 (1992) (using pregnancy as a "metaphor for the locus of social, personal and legal relations of and to women's biological sex, gender, reproductive desires, capacities or conditions" to unpack the meaning of pregnancy without reducing pregnancy to a woman's reproductive capabilities); Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 373 (2010) (arguing for a conception of pregnancy that incorporates both physical and social components); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 816 (2007) (examining how equality-based arguments for reproduction require critical engagement with the social aspects of reproduction).

24. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 417–18 (2011) (challenging biological reductionism in pregnancy discrimination law); Greenberg, *supra* note 21, at 228–32 (arguing that courts have relied on a biological definition of pregnancy); Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1208–09 (1992) (examining how the biomedical ideology of the perfect pregnancy harms and marginalizes women along lines of race, class, and sexual orientation); Matambanadzo, *supra* note 13, at 118 (challenging the impact of biological essentialism by arguing that antidiscrimination law should be expanded to account for the fourth trimester of pregnancy).

25. *See* Hendricks, *supra* note 23, at 372–73; *see also* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 265 (1992) (arguing that the Supreme Court's abortion jurisprudence proceeds from a presumption of physiological naturalism, which fails to account for the ways in which social aspects of gender shape reproduction).

ticle is also not the first to argue that pregnancy entails important social,[26] economic,[27] and cultural aspects.[28] It does, however, build upon this work de-centering the biological and physiological aspects of pregnancy by arguing that pregnancy discrimination must be understood in ways that disentangle pregnancy's complexities and also by interrogating pregnancy's status as "natural." The notion that pregnancy represents a "real" sex difference reflects a larger "common sense" consensus inside and outside of the legal community. Answering the call of feminist scholars to resist essentialism in anti-discrimination law,[29] this article challenges the nature and source of pregnancy-related differences. By pushing against this "common sense" conception of pregnancy, this article opens the possibility to reconstruct the legal understanding of pregnancy to reflect the diverse ways in which society understands and experiences pregnancy. This article also contributes to the larger body of scholarship that argues that bodies in law are constructed and shaped through discourse,[30] and to the larger body of literature that challenges the fixed nature of the categories underpinning antidiscrimination law.[31]

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26. Siegel, *supra* note 23, at 815 (examining how equality-based arguments for reproduction require increasing critical engagement with the social aspects of reproduction).

27. Dinner, *supra* note 24, at 415; Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. LAW. 293, 293–94 (2007).

28. Lindy Fursman, Ideology of Motherhood and Experiences of Work: Pregnant Women in Management and Professional Career (May 2002) (Ctr. for Working Families, University of California, Berkeley, Working Paper No. 34), https://workfamily.sas.upenn.edu/sites/workfamily.sas.upenn.edu/files/imported/new/berkeley/papers/34.pdf [https://perma.cc/48PZ-CMTF].

29. *See, e.g.*, Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1101 (2015) (examining how a variety of disparate treatment is justified as a result of women's "natural" capacities and differences).

30. ALAN HYDE, BODIES OF LAW, 3–4 (1997) (arguing bodies are discursively constructed by legal discourse); Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1341 (1996) (starting with the socially constructed nature of the body to argue that postmodern theory offers a normatively superior framework for analyzing the challenges of commodification).

31. Scholars have challenged these underlying categories along the lines of sex, *see, e.g.*, Cary Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 HARV. L. REV. 1307 (2012); race, *see, e.g.*, Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1289–90 (2005); D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REF. 87, 87 (2013); and disability, *see, e.g.*, Craig R. Senn, *Perception Over Reality: Extending the ADA's Concept of "Regarded As" Protection Under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 827 (2009). *See also* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 2 (2015) (arguing that the "new" forms of immutable identity add new challenges without eliminating the doctrine's previous problems).

I. PROBLEMS AND SOLUTIONS: THE PREGNANCY DISCRIMINATION ACT

A. The Problem of Pregnancy Discrimination in Historical and Contemporary Context

Feminist legal scholars have argued that pregnancy is not merely a condition that some women choose, but is instead the defining feature that shapes a woman's experience and relationship to law.[32] Pregnancy, according to some feminists, is a crucial aspect of gender difference and, as such, has implications for how women's lives are shaped.[33] Legal and economic institutions, however, are not designed to distribute the costs of pregnancy evenly between those individuals who benefit from it.[34] Instead, the majority of costs are borne by women.[35] For this reason, feminist legal commentators have argued that to ensure equality, the costs must be distributed such that all individuals benefiting from pregnancy internalize its costs.[36]

Although women have performed paid and unpaid work in homes, farms, and artisan workshops throughout the history of the United States, during most of the nineteenth and twentieth centuries the legal system has presumed that women occupy a sphere of domesticity.[37] For women, this "separate spheres" ideology necessitates an existence that is separate from the public spheres of markets, politics, and law.[38] For example, before the "Second Wave" of the women's movement in the United States, some women were socially relegated to the "separate sphere" of the home.[39] The separate sphere of the home was the space where women's social and "biological" roles in reproduction and care were lo-

32. Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79, 79–81 (2009) (arguing that "gender differences, real and imagined, create social disadvantage when women are measured against unspoken and unacknowledged masculine norms").

33. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1316, 1324 (1987) (agreeing that differential treatment of biological differences, such as pregnancy and breastfeeding, should be accommodated in ways that minimize their impact on women).

34. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 230–33 (1995).

35. MARTHA ALBERTSON FINEMAN, MOTHERS IN LAW FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD, at ix–xiii (1995) (noting that even women without children are treated as though they may become mothers); Dara E. Purvis, The Rules of Maternity (Sept. 14, 2015) (manuscript at 3–4) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660340 [https://perma.cc/9VQ6-34HT] (examining how women bear the costs of a piecemeal regulatory system that monitors diverse and various aspects of their pregnancies).

36. *See* Dinner, *supra* note 24, at 418.

37. "Separate spheres" was not merely an ideology; it is also a myth. At least some women have always engaged in work outside of their homes. Saru M. Matambanadzo, Personifying Bodies and Embodying Persons: A Feminist Perspective on Legal Personhood 355, 357 (2010) (unpublished Pd.D. dissertation, UCLA) (on file with author).

38. Martha May, *The Historical Problem of the Family Wage: The Ford Motor Company and the Five Dollar Day*, 8 FEMINIST STUD. 399, 403 (1982).

39. Courtni E. Molnar, *"Has the Millennium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America*, 12 MICH. J. GENDER & L. 163, 170–76 (2005).

cated.[40] This separate spheres ideology meant that women often were disenfranchised legally and excluded politically from the benefits and privileges of citizenship.[41] For women that consistently performed market work outside of the home, the requirements of their reproductive roles and the notion that their "place" was in the home justified low wages, poor working conditions, and outright discrimination.[42] After all, if women who worked at home, on the farm, or in a factory merely worked for "pin money," then they did not to earn a wage that would have supported a family.[43] They could conceivably leave employment at any time to return to their proper sphere in the home.[44] This perception was augmented by the myth of the family wage,[45] which further entrenched notions that men performed the primary market work and brought home the bulk of family wages.

In the United States, as part of the separate spheres ideology, women often have been conceptualized and defined by reference to their capacity to become pregnant.[46] In Justice Ruth Bader Ginsburg's Senate confirmation hearings, for example, Justice Ginsburg highlighted pregnancy as the aspect of sex difference that most "conspicuously distinguishes women from men[.]"[47] The social and economic roles of women have been shaped by a cultural understanding that women, and not men, can be conceptualized as "potentially pregnant."[48] Historically, it has been permissible for private and public actors to treat women and men differently: the capacity to become pregnant has defined women as socially, physically, and psychologically different from men.[49] During the era of women's exclusion from the workplace, "[a]ll women were potentially pregnant women, . . . [and their] reproductive function needed to be care-

40. *Id.* at 170–71.

41. Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 347 (1979).

42. May, *supra* note 38, at 418; Molnar, *supra* note 39, at 170–71;

43. May, *supra* note 38, at 417.

44. Molnar, *supra* note 39, at 168.

45. May, *supra* note 38, at 399.

46. FINEMAN, *supra* note 34, at 230–33 (noting that even when women do not have children they are treated as though they might become mothers); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 35 n.129 (1992) (claiming that, "if men could become pregnant, they would not be men (indeed no one would be a man as we understand that term)"). Courts have followed this tendency by defining women by their reproductive capacity. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421–23 (1908).

47. Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 771 (2010) (quoting Justice Ruth Bader Ginsburg).

48. SHERRY F. COLB, WHEN SEX COUNTS MAKING BABIES AND MAKING LAW at x (Rowman & Littlefield Publishers, Inc. 2007) ("[A] woman's identity is . . . intimately and inevitably bound up in her potential state of containing another life within her.").

49. Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (describing how a woman's destiny is to be a wife and mother); Brief for the State of Oregon, Defendant in Error, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605 ("Brandeis Brief"); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 37 (1985).

fully guarded and preserved . . . ."[50] Even for so called "exceptional" women seeking access to market work, politics, and the public sphere, courts have limited options because "[t]he paramount destiny and mission of woman [is] to fulfill the noble and benign offices of wife and mother."[51] In many circumstances, childrearing and nurturing have been regarded as civic duties that women must bear.[52] Women faced workplace discrimination because of the perception that pregnancy and childrearing should relegate them to their proper place in the home.[53] Although many feminists have resisted the more reductive aspects of this perspective,[54]

50. Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 595 (2010).

51. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring). Some scholars have characterized the difference between reproductive roles as having a subordinating function whereby women are not only different from men because of their reproductive capacity, but also because they occupy an inferior position in the legal hierarchy. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215–16 (1989); *see also* Littleton, *supra* note 33, at 1329 (comparing the similarity between the cultural valuation of warriors and mothers).

52. *See* Deborah L. Brake, *On Not "Having it Both Ways" and Still Losing: Reflections on Fifty Years of Pregnancy Litigation under Title VII*, 95 B.U. L. REV. 995, 1012 (2015) (arguing that women's citizenship has been conceptualized around caretaking and nurturing contributions, while men's citizenship has been conceptualized around fighting); *see also* Littleton, *supra* note 33, at 1290.

53. Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1129 (1986) (discussing how women's "biological capacity" for pregnancy was used to justify their exclusion from the public sphere). Although this is often regarded as historical discrimination, discrimination still emerges in contemporary contexts from social attitudes and stereotypes about pregnant women in the workplace. *See, e.g.*, AT&T Corp. v. Hulteen, 556 U.S. 701, 718 (2009) (Ginsburg, J., dissenting) (As "history demonstrates, societal attitudes about pregnancy and motherhood severely impeded women's employment opportunities."). Even in the twenty-first century, women face intractable presumptions concerning both capacities and incapacities for work. For example, in the modern workplace, pregnant women are often subject to what Joanna Grossman calls the "presumption of uninterrupted capacity," which presumes that an "uncomplicated pregnancy has no meaningful physical effects that bear on a woman's ability to work." *See* Grossman, *supra* note 50, at 578. This presumption operates even when there are very real physical limitations for pregnant women. *See id.* at 579 (discussing research indicating that pregnant women perform more poorly on ergonomic tasks than did other individuals); *see also* Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 3–12 (1995) (discussing how physical changes in pregnant women may impact their capacity to work).

54. Feminists have rightfully argued against the impulse to embrace repronormativity, which obscures the diverse desires and identities that women hold dear by naturalizing how reproductive capacity and caretaking play a central role in women's lives. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 185 (2001) (critiquing repronormativity and the presumption that reproduction is natural, inevitable, and communal in creating obligations); Cynthia Godsoe, *Marriage Equality and the New Maternalism*, 6 CAL. L. REV. CIR. 145, 147 (arguing against a maternalist philosophy deployed in *Obergefell v. Hodges* because maternalism brings "dual harms of limiting all women's roles while ignoring the many women, particularly low-income women and women of color, who do not fit the ideal mother paradigm"). Many women do not define themselves through pregnancy or motherhood. Some "[p]ostmodern women, for whom the optimal lifestyle involves no children, see themselves as *childfree* rather than *childless*. They extoll the virtues of a life unencumbered by diapers, running noses, incessant chatter, and endless anxiety." NEIL GILBERT, A MOTHER'S WORK: HOW FEMINISM, THE MARKET, AND POLICY SHAPE FAMILY LIFE 40 (2008) (arguing for a social policy that moves beyond the male model of work). A legal and political framework that permits repronormativity to shape the lives of women may have a particularly pernicious effect on

the suspicion that a woman is pregnant—even her capacity merely to become pregnant—can shape the legal, cultural, political, and social realities of women's lives in important ways.[55]

Pregnancy, as a marker of women's difference, challenges the underlying legal norms of "formal equality" that animate the current antidiscrimination regime in the workplace. In spite of some recent examples of pregnant men,[56] many judges, scholars, and movement activists embrace the notion that, "only women become pregnant."[57] If equality means that likes must be treated alike, then it is permissible for individuals who are different, as pregnant women are from non-pregnant persons like men, to be treated differently.[58] For this reason, part of the challenge of formal equality as a lens for fighting employment discrimination lies with the

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young girls whose educational and economic opportunities are limited by a legal regime that permits sex discrimination and subordination.

55. Brake, *supra* note 52, at 1007 ("[S]tereotypes about pregnancy and maternity affect women at all points in their work lives, whether they are mothers, pregnant, or merely 'potentially pregnant.'"); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2165 (1994) ("Fertility influences leaving employment[;] . . . women often leave employment because of a pregnancy.").

56. One particular pregnant man, Thomas Beatie, has even received legal recognition of his male sex after giving birth to three children. *See* Beatie v. Beatie, 333 P.3d 754, 755–56 (Ariz. Ct. App. 2014) (treating Beatie's Hawaiian marriage between a transgender man who had given birth to a child and an identified woman as a valid marriage between a man and a woman). Beatie has been quite public about his experience as a pregnant man. *See, e.g.*, Guy Trebay, *He's Pregnant. You're Speechless*, N.Y. TIMES, June 22, 2008, at ST1 (describing Thomas Beatie's pregnancy, particularly his appearance on Oprah Winfrey's talk show). The experiences of pregnant trans men have also been the subject of memoir and scholarly inquiry. *See, e.g.*, J. Wallace, *The Manly Art of Pregnancy*, *in* GENDER OUTLAWS: THE NEXT GENERATION 188, 189 (Kate Bornstein ed., 2010) (One man noted, "[b]efore I was pregnant, I feared that pregnancy would make me into a woman or a lady. But it didn't; it made me more of a dude. . . . Pregnancy became a manly act."). Some legal scholars have even made the claim that the legal conception of pregnancy should be reconceptualized apart from the norms of binary biology that associates women with gestation. *See* Lara Karaian, *Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law*, 22 SOC. & LEGAL STUD. 211 (2013); *see also* Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57, 60 (2012) (arguing that motherhood should be unsexed to attack the linkage between biological and sexual roles).

57. Thomas H. Barnard & Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace–Legislation, Social Change and Where We are Today*, 22 J.L. & HEALTH 197, 198 (2009). Some recent engagements in feminist legal theory have adopted a masculine approach to discuss the law of pregnancy discrimination. Mirroring the current flaws of the PDA's male-centered comparator approach, scholars have argued that a more expansive understanding of pregnancy requires conceptually disentangling pregnancy from its focus on women. Karaian, *supra* note 56, at 222. While there can be significant analytic force in such arguments, *see, e.g.*, Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 6–7 (1995) (arguing that feminine women will not receive protection from discrimination in the workplace until men coded as feminine do), substantial evidence shows that courts do not adequately consider women's experiences with pregnancy when analyzing pregnancy discrimination claims. *See* Grossman, *supra* note 50, at 607–08, 610 (arguing that current interpretations of the PDA operate under pregnancy blindness); Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 222 (2005) (arguing that the comparator requirement in the PDA should be eliminated).

58. RUTH COLKER, PREGNANT MEN: PRACTICE, THEORY, AND THE LAW 183 (1994).

perception that men and women are situated differently in terms of their reproductive roles, specifically pregnancy and care work.[59] If equality's requirement that likes be treated alike presumes that men, along with male existence and experience, constitute the starting point,[60] then a condition like pregnancy that only women experience firsthand will create challenges and contradictions for equal inclusion and participation.[61]

Among legal scholars, there is deep disagreement regarding the cause of pregnancy-related differences and remedies for pregnancy-related discrimination. Many scholars downplay the importance of biology, instead focusing on the sociocultural impact of pregnancy on women's lives.[62] Others work to highlight the importance of both physiological-biological aspects and sociocultural aspects while still treating each as a conceptually separate problem for law to address.[63] Many argue that it is not the

59. Marcia L. McCormick, *Gender, Family, and Work*, 30 HOFSTRA LAB. & EMP. L.J. 309, 310–11 (2013). Pregnancy discrimination could be regarded as part of the larger work/care conundrum, which has been the subject of much legal scholarship. *See* Calloway, *supra* note 53, at 2 (arguing that the workplace should accommodate pregnancy to ensure the health and well-being of children); *see also* Michelle D. Deardorff, *Beyond Pregnancy: Litigating Infertility, Contraception, and Breastfeeding in the Workplace*, 32 J. WOMEN, POL. & POL'Y 52, 52–53 (2011) (examining how statutory interpretation has limited the expansion of pregnancy discrimination protections); Grossman, *supra* note 50, at 570 (arguing that antidiscrimination law's failure to address the realities of pregnancy with accommodations limits women's access to equal citizenship); Sally J. Kenney, *Pregnancy Discrimination: Toward Substantive Equality*, 10 WIS. WOMEN'S L.J. 351, 352 (1995) (arguing that gaps exist between the potential promises of antidiscrimination law and the perspectives of judges and employers on accommodating pregnancy); Magid, *supra* note 17, at 821 (arguing that the courts narrowly interpret the PDA to deny families the protections that Congress intended with the passage of the Act). Pregnancy discrimination also resonates in the realm of reproductive liberty and privacy. Laws limiting a woman's free choice of whether to become pregnant implicate concerns related to privacy, equality, and liberty because of the current social arrangement of pregnancy, childcare, and motherhood. Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63, 63 (2013) (noting that the importance of sex equality in constitutional protections for reproductive rights and contraception is not reflected in "doctrines protecting women's access to contraception," even though sex equality has been implicitly internalized).

60. *See* Littleton, *supra* note 33, at 1306 (noting that the structure of work renders pregnancy a disability); *see also* MACKINNON, *supra* note 51, at 215–16; Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 149 (2000) (arguing that "women's subjective, hedonic lives are different than men's" and that legal subjectivity does not reflect women's experiences of physiological connectedness). Many feminist legal theorists have claimed that MacKinnon's articulations of women's experiences are overly simplistic and obscure important aspects of class, race, gender, and sexuality. *See, e.g.*, JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 54, 186 (2006) (arguing that MacKinnon's views on sexuality and dominance may obscure the existence of many women who fail to conform to them); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 591–92 (1990) (arguing that MacKinnon's perspective functions in an essentialist way that renders black women less visible).

61. COLKER, *supra* note 58, at 184. This has led some commentators to argue against specific accommodations for pregnancy because such "special treatment" has the potential to undermine equality. *See, e.g.*, Bradley A. Areheart, Accommodating Pregnancy, 67 ALA. L. REV. (forthcoming 2016) (manuscript at 55–56) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534216 [https://perma.cc/5DBT-4BW2].

62. *Supra* note 24.

63. Hendricks, *supra* note 23, at 373.

biological aspects that create "problems" for women in the workplace, but the social and cultural construction of work and workers.[64] For example, some feminist scholars suggest that, instead of regarding breastfeeding as the "problem" for women, courts and commentators should understand that employers have made a social choice to accommodate and include the non-lactating bodies of men, while simultaneously marginalizing and excluding the lactating bodies of women.[65]

The so-called biological and physiological differences distinguishing men from women engender slightly more controversy.[66] Many scholars have claimed that the inequality between women and men in terms of their differing reproductive roles is not natural or inevitable, but instead is shaped by cultural forces that define women's roles in mothering and gestating children in disadvantaging ways.[67] However, other scholars claim that the origins of women's differences, and the differential outcomes they reap in the labor market, are tied to physiological "realities" of biology.[68] Even feminists committed to reproductive rights are very willing to acknowledge that the "realities" of biology shape women's lives.[69] Drawing on the intuitive appeal of this claim, some commentators rely on common sense regarding the "nature" of reproductive roles for women and men, arguing that there is a "biological reality that men and women's bodies differ with regard to reproduction[.]"[70] They argue that

64. *See, e.g.*, Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REF. 371, 436 (2001) (examining the ways in which women's cultural caregiving is often beyond the reach of antidiscrimination); *see also* Williams & Pinto, *supra* note 27, at 293–94. One of the key problems is the cost of childcare. *See* Noah D. Zatz, *Supporting Workers by Accounting for Care*, 5 HARV. L. & POL'Y REV. 45, 46 (2011) (arguing against current policy provisions that render childcare inaccessible and very costly for poor, low-wage workers).

65. *See*, Paige H. Smith, *Breastfeeding and Gender Inequality*, 34 J. WOMEN, POL. & POL'Y 371, 371 (2013).

66. *See* Kessler, *supra* note 64, at 436.

67. For example, in feminist legal theory, scholars have revealed how "[m]otherhood is central to the social and legal definition of woman." FINEMAN, *supra* note 35, at xii; *see also* Kessler, *supra* note 64, at 372–73.

68. KINGSLEY R. BROWNE, BIOLOGY AT WORK: RETHINKING SEXUAL EQUALITY 68 (2002) (arguing that biology explains the differences in wages and employment outcomes); Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981, 998 (1992) (arguing that biological sex differences explain inequality in the labor market). Even feminists robustly committed to equality and reproductive rights are willing to acknowledge the "reality" that biology shapes women's lives. *See, e.g.*, COLKER, *supra* note 58, at 5 ("Being pregnant . . . made me see that there are some genuine, distinctive biological experiences for women[;] . . . feminists . . . should [not] ignore the biological reality of women's reproductive capacity."); *see also* Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE. L.J. 929, 930 (1984) ("[P]regnancy discrimination involves the social valuation of a real sexual difference.").

69. COLKER, *supra* note 58, at 5; *see also* Sylvia A. Law, Rethinking Sex and the Constitution, 5 U. PENN. L. REV. 955, 955 (1984) (arguing that constitutional sex equality law fails to recognize the "reality" of sex-based physical differences).

70. Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 916, 940, 942 (2011) ("[P]regnancy . . . is a natural condition[.] . . . It is not sexist to state the facts of female reproductive anatomy and physiology. It *is* sexist to despise them.").

pregnancy and women's reproductive roles emerging from pregnancy can explain, if not justify, discrimination against women in the workplace.[71]

The twentieth century brought the ideological erosion of separate spheres and the subsequent expansion of women performing paid work in industry, business, and government.[72] However, even in the twenty-first century, pregnancy often imposes significant socioeconomic costs on women.[73] Pregnant women frequently are subjected to an unsubstantiated and contradictory set of presumptions about their capabilities in the workplace, particularly during the third trimester of their pregnancies.[74] And after they give birth, their workplace relations may become even worse. Stories abound in the popular press[75] and academia[76] about women who, by their own choice or due to mere circumstance, ae relegated to the "mommy track" in their careers.[77] In popular representations, women who find reproduction, care work, and market work too difficult to balance often choose, if they can, to "opt out" of the workforce in order to devote themselves to full-time care work in the home.[78] In terms of compensation, researchers have found a wage penalty of approximately 7% per child for mothers in the United States.[79] When low-wage workers

71. Pregnancy has been used to deny women access to the workplace, resulting in what Justice Ruth Bader Ginsburg has called "subordinate social status" for women. Siegel & Siegel, *supra* note 47, at 774–75; *see also* BROWNE, *supra* note 68, at 60; Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 Sw. L.J. 617, 658 (1984).

72. Barnard & Rapp, *supra* note 57, at 201–04.

73. Issacharoff & Rosenblum, *supra* note 55, at 2165; Dinner, *supra* note 24, at 417–18. According to Robin West, *Roe v. Wade*, 410 U.S. 113 (1973), "might have [had] the effect not only of legitimating the coercive sex that might have led to it, but also of legitimating the profoundly inadequate social welfare net and hence the excessive economic burdens placed on poor women and men who decide to parent." Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE. L.J. 1394, 1409 (2009) (critiquing *Roe v. Wade* from a pro-choice perspective). In this model, the decision to parent or to terminate a pregnancy is a matter of choice and consent. *Id.* at 1410 (characterizing the choice to parent as a consensual, informed market transaction).

74. Grossman, *supra* note 50, at 579–80.

75. Deborah L. Jacobs, *At Law Firms, Mommy Track Still Holds Women Back*, FORBES (Aug. 05, 2014), http://www.forbes.com/sites/deborahljacobs/2014/08/05/at-law-firms-mommy-track-still-holds-women-back/ [https://perma.cc/KB9Q-UWSF]; Olga Khazan, *The Mommy-Track Myth*, ATLANTIC (Feb. 04, 2014), http://www.theatlantic.com/business/archive/2014/02/the-mommy-track-myth/283557/ [https://perma.cc/VM7Q-RW8H]; *The Mommy Track*, ECONOMIST (Aug. 25, 2012), http://www.economist.com/node/21560856 [https://perma.cc/3UKN-66CY].

76. *See* Nicole B. Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, 65 (2006); *see also* Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1594–95 (1991).

77. *See* Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117, 119 (1997).

78. There is some evidence that the women who are "choosing" to opt out of a career have been making a constrained choice to do so. *See* PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 114–15 (2007) (finding evidence that women leave the workforce because of employer inflexibility and conflicting family responsibilities).

79. Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 204–05 (2001). Although approximately one-third of this penalty could be

face discrimination on the basis of pregnancy or caregiving responsibilities, such discrimination often leads to economic insecurity, exacerbating poverty.[80] As many commentators note, the current failure to provide workplace accommodations—paid maternity leave and reasonable accommodations for mothers and pregnant women in the United States, for example—forces female workers and their employers to internalize the costs of pregnancy and reproduction.[81]

The PDA and federal courts' interpretations of it embody (in part) the federal government's legal response to the challenges facing pregnant women in the workforce.[82] The next section addresses the PDA, with a focus on its evolution, passage, and application.

B. Before the Pregnancy Discrimination Act: Early Cases

The roots of the PDA lie in earlier antidiscrimination jurisprudence derived from the Fourteenth Amendment and Title VII of the 1964 Civil Rights Act.[83] The Supreme Court's mid-twentieth century considerations of pregnancy discrimination occurred in the constitutional context of employment discrimination law.[84]

The twentieth century constitutional jurisprudence on pregnancy discrimination begins with *Cleveland Board of Education v. LaFleur*.[85] This case involved a constitutional challenge to a school district policy requiring pregnant teachers to take mandatory, unpaid maternity leave five months before their expected delivery date and forbidding women who had given birth from returning to work before their infants were three months old.[86] The Supreme Court held in its analysis that the school board's mandatory maternity leave policy and three-month return policy violated the Due Process Clause of the Fourteenth Amendment.[87] According to the Court, the "freedom of personal choice" in decisions related to marriage, family, and procreation is one of the essential aspects of liberty protected by the Due Process Clause of the Fourteenth Amendment.[88] Policies that impact these decisions "must not needlessly, arbitrarily, or capriciously impinge upon" these liberties.[89] And while it might

attributed to seniority, past work experience, and job experience, two-thirds remains after controlling for these aforementioned factors in the experiment. *Id.* at 219–20.

80. Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 Geo. J. Poverty L. & Pol'y 1, 16 (2012).

81. *Id.* at 15.

82. There are other legislative responses to pregnancy discrimination embedded not only in the Fair Labor Standards Act (FLSA), but also in the Family Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA). Matambanadzo, *supra* note 13, at 131–40.

83. Dinner, *supra* note 24, at 417.

84. *See* Geduldig v. Aiello, 417 U.S. 484, 486 (1974); *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 638 (1974).

85. *LaFleur*, 414 U.S. at 632.

86. *Id.* at 634–35.

87. *Id.* at 639–40.

88. *Id.*

89. *Id.* at 640.

be simpler and more efficient for the school board to make determinations about a teachers' capacities to work during the later stages of their pregnancies, mandatory maternity leave policies that do not consider an individual's capacity to work violate the Due Process Clause of the Fourteenth Amendment.[90] *LaFleur* clarified the relationship between pregnancy and the Due Process Clause of the Fourteenth Amendment.[91] However, the decision did not resolve the disagreement among the courts of appeals as to whether mandatory maternity leave policies based on pregnancy were "classification[s] based on sex" and thus subject to a heightened scrutiny for purposes of the Equal Protection Clause of the Fourteenth Amendment.[92]

The Supreme Court then addressed pregnancy discrimination under the Equal Protection Clause of the Fourteenth Amendment in *Geduldig v. Aiello*.[93] *Geduldig* addressed California's disability insurance scheme, which provided coverage for disabilities arising from a variety of illnesses and injuries, but excluded disabilities arising from pregnancy, related injury, and illness.[94] In Justice Stewart's majority opinion, the Court refused to recognize that a California statute's exclusion of pregnancy-related disabilities from coverage under the state's disability insurance scheme constituted invidious sex discrimination under the Equal Protection Clause.[95] According to the Court, California's justification for excluding pregnancy from state disability insurance coverage relied upon reasons related to controlling costs and ensuring the disability insurance scheme's financial viability.[96] Justice Stewart's majority opinion distinguished California's exclusion from those in other sex discrimination cases, arguing as follows:

> While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.[97]

Determining that the statute merely distinguished between pregnant and non-pregnant persons, the Court refused to link the condition of pregnancy to gender.[98] Lawmakers were permitted to exclude pregnancy

90. *Id.* at 647, 649–50. Building on *La Fleur*, the Supreme Court determined that pregnant women were guaranteed a right to individual assessment and protection against generalized presumptions of incapacity in the workplace by *Turner v. Department of Employment Security*. 423 U.S. 44, 46 (1975) (finding employer could not adopt a policy presuming incapacity during the last twelve weeks of gestation and the first six weeks after delivery).

91. 414 U.S. at 648, 650.

92. Kay, *supra* note 49, at 3.

93. 417 U.S. 484 (1974).

94. *Id.* at 486–89.

95. *Id.* at 494.

96. *Id.* at 495–97.

97. *Id.* at 496 n.20.

98. *Id.*

from the coverage of legislation without violating the Equal Protection Clause so long as pregnancy was not shown to be a pretext designed to discriminate against women.[99]

For the purpose of Title VII, the Supreme Court first addressed the issue of pregnancy discrimination in *General Electric Co. v. Gilbert*.[100] Because many circuit courts disagreed about whether sex discrimination included discrimination on the basis of pregnancy, the *Gilbert* decision promised to provide some clarification about whether pregnancy discrimination was prohibited by Title VII.[101] While feminists involved in the litigation operated under the presumption that sex discrimination included pregnancy discrimination,[102] the majority endorsed a different perspective. The case concerned the exclusion of pregnancy-related disabilities from a private employer's disability insurance scheme.[103] In the decision, the future Chief Justice Rehnquist analogized the discrimination prohibitions in Title VII with the discrimination prohibitions in the Equal Protection Clause of the Fourteenth Amendment.[104] Due to the factual similarities between California's exclusion of pregnant women under its disability insurance program and General Electric's exclusion of pregnant women under its disability insurance program, Justice Rehnquist incorporated the discrimination analysis from the line of cases dealing with the Equal Protection Clause into his reading of Title VII.[105] The majority determined that the insurance package was facially neutral, providing male and female employees with the same coverage, including some risks and excluding others.[106] Such exclusions were permissible and were not discriminatory because "pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks."[107] In analyzing the meaning of discrimination under Title VII, Justice Rehnquist's opinion also argued that the Court should not "readily infer that [Congress] meant something different from what the concept of discrimination has traditionally meant."[108] The Court's decision in *Gilbert* determined that an employer could treat pregnant workers differently than non-pregnant workers without running afoul of Title VII's prohibition against sex discrimination.[109] For the *Gilbert* Court, disparate treatment on the basis of pregnancy did not, by itself, constitute sex

99. *Id.*
100. 429 U.S. 125, 127–33 (1976).
101. Barnard & Rapp, *supra* note 57, at 206–08.
102. For example, Justice Ginsburg's conceptual understanding of sex discrimination included a presumption that pregnancy discrimination was an aspect of sex discrimination. Siegel & Siegel, *supra* note 47, at 773.
103. *Gilbert*, 429 U.S. at 127–29.
104. *Id.* at 133–34.
105. *Id.* at 134–36.
106. *Id.* at 138.
107. *Id.* at 139.
108. *Id.* at 145.
109. *Id.* at 145–46.

discrimination.[110]

Justice Brennan, in a dissent joined by Justice Marshall, argued that the majority opinion ignored context by overlooking General Electric's history of limiting employment opportunities and presuming that female employees ultimately would leave to have families.[111] Furthermore, Justice Brennan suggested that it was "purely fanciful" for the majority to assume that General Electric's risk assessment was gender-neutral in its analysis.[112] He opined that the majority's suggestion that pregnancy is not minimally sex-related would "offend[ ] common sense."[113] Justice Stevens also wrote a dissent, arguing that General Electric's policy placed the risk of pregnancy-related absenteeism apart from the risk of other forms of absenteeism.[114] For Justice Stevens, this type of exclusion definitively constituted sex discrimination because "it is the capacity to become pregnant which primarily differentiates the female from the male."[115]

In *General Electric*, the Supreme Court's determination that pregnancy discrimination was not necessarily sex discrimination contradicted the rulings of six circuit courts of appeals, eighteen district courts, and the Equal Employment Opportunity Commission's (EEOC's) legislative guidelines for applying Title VII.[116] Employment decisions distinguishing between pregnant and non-pregnant persons, however, would not remain permissible. In response to *Gilbert* and to inequality in the workplace, Congress superseded the Supreme Court's interpretation of Title VII by passing the Pregnancy Discrimination Act. In the next section, this article will examine the passage of the Act, highlighting the contemporary jurisprudence that has emerged from the federal circuit courts concerning pregnancy.

C. The Pregnancy Discrimination Act: Its Passage

In response to the Supreme Court's decision and the lobbying of a coalition of labor unions, feminist groups, and church groups,[117] Congress passed the Pregnancy Discrimination Act in 1978. The PDA supersede *General Electric*, defining sex discrimination to include discrimination

110. *Id.*
111. *Id.* at 149–50 n.1 (Brennan, J., dissenting).
112. *Id.* at 148.
113. *Id.* at 149.
114. *Id.* at 161 (Stevens, J., dissenting).
115. *Id.* at 162.
116. S. Comm. On Labor and Human Res., 96th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 2 (Comm. Print 1980).
117. Kay, *supra* note 49, at 8 (citing J. Gelb & M. Palley, Women and Public Policies 159–60 (1982)). Some commentators have argued that the coalition of feminists, business leaders, and reproductive rights activists advocated for the PDA from a framework of "neomaternalism," which emphasized liberal individualism, in turn privatizing and individualizing the costs of pregnancy and the social roles mothers play to gain increased protections for pregnant workers. Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 Wash. U.L. Rev. 453, 453–54 (2014) (arguing that the liberal impetus to privatize the costs of childcare undermines anti-subordination objectives of antidiscrimination law).

"because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions."[118] Instead of providing a separate cause of action for pregnancy discrimination, it incorporated pregnancy, childbirth, and medically related conditions into the broader prohibition against sex discrimination in Title VII.[119] The Act prohibits employers from discriminating against employees based on pregnancy, childbirth, or related medical conditions for all employment-related purposes, including in the provision of fringe benefits.[120]

The Act is designed to protect women engaged in paid work from stereotypes regarding the capacities of women in the workplace. Specifically, the Act was designed to combat the stereotype that women who become mothers are unable to participate in the workforce and ultimately belong in the home.[121] According to the PDA's legislative history, Congress passed the Act not only to prevent sex discrimination on the basis of pregnancy, but also to ensure that the stereotypical assumptions about women's reproductive roles were not used to deny women access to equal opportunities in employment.[122]

D. The Aftermath: Successes and Limitations of the PDA

This section examines the current state of the PDA's jurisprudence with a focus on its successes and limitations. The PDA has been successful in some important ways in part because the Act has shifted social presumptions about whether women belong in the workforce during pregnancy.[123] There is empirical evidence that the Act has contributed to significant increases in the numbers of pregnant women and mothers in the workforce.[124] Furthermore, in prohibiting the exclusion of pregnant women from the workplace, the Act has undermined the deep cultural norms that had dictated that a woman's place is in the home.[125] The PDA

118. 42 U.S.C. § 2000e(k).

119. *Id.*; Wright v. DaimlerChrysler Corp., No. 4:03CV1843 (CDP), 2005 U.S. Dist. LEXIS 42366, at *9–10 (E.D. Mo. Jan. 10, 2005).

120. 42 U.S.C. § 2000e(k).

121. Hitchcock v. Angel Corps, Inc., 718 F.3d 733, 740–41 (7th Cir. 2013) ("Animus towards pregnant women may be inferred based on these comments; specifically, a belief that pregnancy disqualifies women from effectively participating in the workforce.").

122. S. Comm. On Labor and Human Res., 96th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 61–62 (Comm. Print 1980); *see also* Carney v. Martin Luther Home, Inc., 824 F.2d 643, 646–47 (8th Cir. 1987) (describing how the PDA's legislative history was designed in part to combat attitudes about pregnancy and the role of women in the home and the workplace).

123. *See* Michelle A. Travis, *The PDA's Causation Effect: Observations of an Unreasonable Woman*, 21 Yale J.L. & Feminism 51, 51–64 (2009) (detailing how the PDA successfully "launched a quiet revolution" by shifting judges' causal attributions toward explanations that normalize pregnancy in the workplace).

124. Sankar Mukhopadhyay, *The Effects of the 1978 Pregnancy Discrimination Act on Female Labor Supply*, 53 Int'l Econ. Rev. 1133 (2012), http://business.unr.edu/Faculty/SankarM/lawpaper_rev.pdf [https://perma.cc/KPH6-MYNX].

125. S. Comm. On Labor and Human Res., 96th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 2–3 (Comm. Print 1980).

has also radically changed the culture of work by ensuring that women cannot be fired simply because they become pregnant. It also has ensured that female workers receive insurance benefits and disability protections that include pregnancy.[126] Furthermore, the PDA has been interpreted in a way that does not limit the option for states, local governments, and private employers to adopt more expansive protections for pregnant workers.[127]

Part of the PDA's success emerges from how its protections have been interpreted broadly to protect women and men from pregnancy discrimination.[128] For example, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, the Supreme Court held that an employee benefit plan covering employees' spouses could not discriminate by providing more comprehensive health insurance coverage for the husbands of female employees than the wives of male employees.[129] The Court determined that the employer insurance plan, which provided more limited benefits for hospital stays related to pregnancy, discriminated against employees on the basis of pregnancy because it provided fewer health insurance benefits to married male employees than to married female employees.[130] Another court even determined that male plaintiffs could sue for negative employment actions taken against them due to discrimination against the pregnant woman to whom they are married.[131]

In cases alleging sex discrimination under Title VII, plaintiffs have had some success in persuading the federal courts to expand the definition of pregnancy-related medical conditions. For example, following the EEOC's guidelines, courts have been willing to expand the PDA's definition of pregnancy-related medical conditions to prohibit discrimination arising from an employee's decision to have an abortion.[132] An employee is protected under the Act whether the employee actually terminates the pregnancy or only considers terminating the pregnancy.[133]

The success of the PDA, however, has its limits. In spite of the PDA, women frequently experience pregnancy discrimination in ways that may

126. *E.g.*, Aubrey v. Aetna Life Ins. Co., 886 F.2d 119, 122–23 (6th Cir. 1989) (affirming a district court finding that pregnancy was not a preexisting injury or condition that would bar coverage).

127. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285–88 (1987) (holding that the PDA does not bar employers or the state from providing additional benefits to pregnant workers).

128. Wright v. DaimlerChrysler Corp., No. 4:03CV1843 (CDP), 2005 U.S. Dist. LEXIS 42366, at *6 (E.D. Mo. Jan. 10, 2005).

129. 462 U.S. 669, 676 (1983).

130. *Id.*

131. *See* Nicol v. Imagematrix, Inc., 773 F. Supp. 802, 803–04 (E.D. Va. 1991) (finding a husband alleging he was fired because he was married to a pregnant woman had standing to bring an action claiming that he had been discriminated against in violation of Title VII).

132. Turic v. Holland Hosp., Inc., 85 F.3d 1211, 1213–14 (6th Cir. 1996), *aff'g in part and rev'g in part* 849 F. Supp. 544 (W.D. Mich. 1994) (noting that Congress intended to ensure that employees could not be penalized for exercising their right to have an abortion); *see also* Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 364 (2008) (holding that the term "related medical conditions" includes abortion).

133. *Turic*, 849 F. Supp. at 549–50.

not trigger Title VII protections.[134] Pregnancy discrimination is such a pervasive problem in the workplace that it has been found to have had a negative psychosocial impact on women.[135] Although the Act was forged by a political coalition spanning both sides of the aisle,[136] it has been interpreted by a judiciary that is increasingly hostile to antidiscrimination law.[137] Furthermore, pregnancy discrimination is costly for workers because it can result in "job loss, reduced hours, demotions, lost wages, unpaid leave, and sometimes even costly health problems . . . and this in turn can lead to difficulty paying the rent or to a need for public benefits."[138] Additionally, efforts to expand the definition of pregnancy discrimination through the use of the statute's provision for "related medical conditions" have not been consistently effective.[139] For instance, the Supreme Court recently denied certiorari in a case where a district court refused to expand the PDA's scope to include discrimination related to lactation, breastfeeding, or breast milk expression.[140]

Plaintiffs have been unsuccessful in persuading the judiciary to expand the scope of the PDA to discrimination related to care responsibilities, even when these responsibilities arise in relation to pregnancy. Courts have typically interpreted the Act narrowly so that its prohibitions do not include discrimination based on the care of young infants.[141] Courts have repeatedly rejected claims that an employer's denying new parents leave to care for their young infants violated Title VII.[142] Although the EEOC

134. H.M. Salihu et al., *Pregnancy in the Workplace*, 62 OCCUPATIONAL MED. 88 (2012).

135. *See id.* at 88–97; *see also infra* Part II.B.

136. Kay, *supra* note 49, at 8.

137. Trina Jones, *Response: Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 428–39 (2010) (discussing the increasing difficulty of establishing a successful discrimination claim).

138. Elizabeth M. Gedmark, *Using Pregnancy Discrimination Claims to Fight Poverty*, 46 CLEARINGHOUSE REV. 390, 390 (2013).

139. *See, e.g.*, Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679–80 (8th Cir. 1996) (interpreting the PDA's related medical conditions clause to exclude infertility).

140. Ames v. Nationwide Mut. Ins. Co., 760 F.3d 763, 768–70 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 947 (2015) (affirming district court's grant of summary judgment to Nationwide in a constructive discharge case involving lactation discrimination).

141. *See, e.g.*, Fleming v. Ayers & Assocs., 948 F.2d 993, 996–97 (6th Cir. 1991); Barrash v. Bowen, 846 F.2d 927, 931–32 (4th Cir. 1988); Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491–92 (D. Colo. 1997) (citing Wallace v. Pyro Mining Co., 789 F. Supp. 867 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991)) (stating that the needs or conditions of a child that require the mother's presence are not within the purview of the PDA); Barnes v. Hewlett-Packard Co., 846 F. Supp. 442, 443–45 (D. Md. 1994).

142. *Barnes*, 846 F. Supp. at 443–45 (finding denial of leave request to care for infant is not gender-based sex discrimination under the PDA); Record v. Mill Neck Manor Lutheran Sch. for the Deaf, 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (finding Title VII's prohibition against sex discrimination does not extend to parental leave for childrearing). *But see* Roberts v. U.S. Postmaster Gen., 947 F. Supp. 282, 288 (E.D. Tex. 1996) (recognizing that a disparate impact claim could be established where women are forced to resign more often than men because of their employers' denial of parental leave). Although the EEOC has provided guidelines that may alter the way in which federal courts interpret the PDA, courts may not follow this guidance. OFFICE OF LEGAL COUNSEL, EEOC, NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiv-

guidelines specify that discrimination related to caregiving may be prohibited by Title VII as amended by the PDA,[143] courts have repeatedly held that an employer's refusal to grant parental leave to an employee is not sex discrimination.[144] Similarly, if an employer discriminates on the basis of marital or parental status, such actions are not prohibited under Title VII unless the discrimination is on the basis of sex.[145]

Deference to employer ideologies, particularly with regard to religious affiliation and neoliberal adherence to cost-efficient, market-based rationales, further limits the effectiveness of the PDA. The PDA may be weakened by an increasing deference to the religious proclivities of employers that would permit the termination of women who become pregnant under conditions that violate their employers' religious beliefs.[146] The Act's prohibition against discrimination is also weakened by cases like *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, where the Court found that employment discrimination law contains a ministerial exemption.[147] There is also some evidence that the current antidiscrimination protections of Title VII prohibit irrational animus while permitting employers to exercise cost-efficient forms of market-based discrimination.[148]

Furthermore, the Act's protections do not require that pregnant employees be treated equally in all circumstances. For example, employers

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ing.html [https://perma.cc/2F7L-23VT]; FINEMAN, *supra* note 34, at 14–20 (arguing that firmly held societal notions of equality and gender roles inform the present state of the law and thus make the law difficult to change).

143. There are limited circumstances in which the EEOC regards discrimination against caretakers unlawful under Title VII, particularly when such discrimination is grounded in stereotypes. OFFICE OF LEGAL COUNSEL, EEOC, *supra* note 142.

144. *E.g.*, *Record*, 611 F. Supp. at 907 (finding that the prohibition against sex discrimination embodied in Title VII does not protect women that wish to take parental leave for childrearing); *Barnes*, 846 F. Supp. at 443–45 (finding denial of leave request to care for infant's medical issues is not gender-based sex discrimination under the PDA).

145. *See* Mabry v. State Bd. of Cmty. Colls. & Occupational Educ., 813 F.2d 311, 314–16 (10th Cir. 1987).

146. For example, although Title VII protects the right of an employee to be pregnant in the workplace, it does not insulate them from negative consequences if such pregnancy occurs as a result of premarital sex. If an employee becomes pregnant as the result of a premarital sexual encounter, then the employee may be fired for this reason. Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1319–20 (11th Cir. 2012) ("Title VII does not protect any right to engage in premarital sex, but as amended by the Pregnancy Discrimination Act of 1978, Title VII does protect the right to get pregnant.").

147. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707–08 (2012). Some commentators speculate that the ministerial exemption adopted in *Hosanna-Tabor* may permit employers to fire women because they became pregnant under conditions that violate their employers' religious beliefs. *See* Jessica L. Waters, *Testing* Hosanna-Tabor*: The Implications for Pregnancy Discrimination Claims and Employees' Reproductive Rights*, 9 STAN. J. C.R. & C.L. 47, 71–73 (2013) (arguing that *Hosanna-Tabor* may enable religious institutions to terminate pregnant employees who become pregnant before they are married or use reproductive technology to become pregnant). Some scholars have argued that the deference and respect for deeply held religious beliefs should be balanced with deference and respect for deeply held feminist principles. Mary Anne Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, 19 AM. U. J. GENDER SOC. POL'Y & L. 549, 550–56, 560–69 (2011).

148. Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 834–55 (2001).

can use customer safety to justify differential treatment for pregnant workers.[149] Additionally, differences in benefit plans produced by bona fide seniority systems may not constitute sex discrimination for the purposes of Title VII unless there is intent to discriminate.[150] Title VII also contains a personal staff exemption, which exempts individuals chosen to be the personal staff of a person elected to political office from sex discrimination protection, and ultimately pregnancy discrimination protections.[151]

Scholars have criticized the inadequacies of the pregnancy discrimination protections in the United States from a variety of angles.[152] Some scholars have addressed the PDA's failures by focusing on emerging trends in antidiscrimination law that the narrow contours of the Act, as currently interpreted, do not address. For example, some commentators have focused on the emergence of discrimination on the basis of family responsibilities.[153] As the PDA is applied, the antidiscrimination policy embodied by the PDA preserves the dominance of the ideal worker

149. *See* Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 676–77 (9th Cir. 1980); *see also* Levin v. Delta Air Lines, Inc., 730 F.2d 994, 997–1002 (5th Cir. 1984) (sanctioning a blanket exclusion of pregnant flight attendants from duty because of the inability to predict which pregnant flight attendants might be overcome with fatigue, nausea, or spontaneous abortion); Burwell v. E. Air Lines, Inc., 633 F.2d 361, 371–73 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (permitting a mandatory grounding of flight attendants as a business necessity). *But see In re* Nat'l Airlines, Inc., 434 F. Supp. 249, 261–64 (S.D. Fla. 1977) (finding no justification for grounding flight personnel during the first two trimesters of pregnancy).

150. AT&T Corp. v. Hulteen, 556 U.S. 701, 708–09 (2009) (finding that an employer policy enacted prior to the PDA that gave less retirement credit for personal leave for pregnancy after six weeks than it gave for other types of medical leave did not violate the PDA because it constituted a bona fide seniority system).

151. 42 U.S.C. § 2000e(f). In one case, this personal staff exemption applied even when the supervisor in question made blatantly discriminatory remarks. Upon discovering that plaintiff was pregnant, Judge Ann M. Butchart told her "that a former law clerk took medical leave due to pregnancy complications . . . and that she 'should hire only lesbians or men.'" Gupta v. First Judicial Dist., 759 F. Supp. 2d 564, 565, 573 (E.D. Pa. 2010) (finding no violation of Title VII where pregnant employee was dismissed from her job as a state court clerk because of the personal staff exemption). Yet, Congress intended for exceptions like these to be construed narrowly to provide as much Title VII coverage for employees as possible. Teneyuca v. Bexar Cty., 767 F.2d 148, 152 (5th Cir. 1985) (citing Owens v. Rush, 654 F.2d 1370, 1375 (10th Cir. 1981)).

152. *See, e.g.*, Dinner, *supra* note 24, at 417–18; Grossman, *supra* note 50, at 610; Issacharoff & Rosenblum, *supra* note 55, at 2159–71, 2179–89 (arguing that the level "playing field" created by the PDA does not adequately address the costs of pregnancy for women in the workforce).

153. Family responsibility discrimination has been described as "discrimination at work based on *unexamined biases* about how employees with family caregiving responsibilities will or should act." Williams & Pinto, *supra* note 27, at 293–96 (describing a 400% increase in Family Responsibility Discrimination claims). Although some commentators have also argued for discrimination protections on the basis of parental status, it is unclear whether this would merely mask discrimination behind a cloak of invisibility within the home or revive the debates around accommodation and equality that emerge in PDA discussions. *See* Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 569 (2002) (arguing that a focus on formal equality and antidiscrimination law will not ensure that workplaces accommodate parental care responsibilities).

norm.[154] The ideal worker norm[155] is the normative presumption that individuals in the workplace should be free of care responsibilities for children, elders, or spouses. It presumes that workers' home lives, including pregnancy and childcare, should not impact their availability or their ability to work.[156] Furthermore, it prohibits pregnant employees from getting sick and requires them to perform at their peak even during times of physical, psychological, and emotional duress.[157] Other scholars have focused on expanding the PDA to encompass additional medically related conditions like lactation,[158] infertility,[159] fertility,[160] or a combination of these conditions.[161] The exclusion of these conditions has led many commentators to argue that the best solution for expanding the PDA's protections is through additional legislation.[162]

One of the major controversies surrounding the interpretation of the PDA concerns whether it requires employers to provide accommodations to pregnant employees. According to the second clause, the PDA requires that employers treat "women affected by pregnancy, childbirth, or related medical conditions . . . the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work[.]"[163] However, an employer is not required to treat pregnant employees better than other employees, and employers may treat pregnant employees differently if a similarly situated individual, hypothetical or real, would be treated the same.[164] In analyzing the PDA, the federal

154. JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 61–72, 81–84 (2000).

155. The ideal worker is an individual who works forty-hour weeks throughout the year and has no childbearing or caretaking responsibilities. *Id.* at 2. The ideal worker norm, which presumes a highly individualized male body with socially male attributes and no ties of dependency, shapes not only the workforce, but also the distribution of social welfare. *See* FINEMAN, *supra* note 34, at 20–24, 101–25, 161–66, 213–17. The ideal worker norm even affects the architecture of the space we occupy. *See* Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1297, 1297–1301 (2008).

156. WILLIAMS, *supra* note 154, at 2.

157. *Id.* at 1–9.

158. *See, e.g.*, Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender, and Discrimination*, 80 CHI.-KENT L. REV. 875, 875–76 (2005); Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women who Breastfeed in Public and at Work*, 14 LAW & INEQ. 179, 181 (1995).

159. *E.g.*, Elizabeth A. Pendo, *The Politics of Infertility: Recognizing Coverage Exclusions as Discrimination*, 11 CONN. INS. L.J. 293, 294–97 (2005).

160. This often appears in discussions of pre-Affordable Care Act contraception exclusions in employer-provided health insurance plans. *See, e.g.*, Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 363–64 (1998).

161. Deardorff, *supra* note 59, at 52–53 (examining how district courts have defined medically related conditions under the PDA).

162. *See, e.g.*, Alison A. Reuter, *Subtle but Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1416–20 (2006) (arguing for the passage of a Parental Discrimination Act to ensure accommodations and protections for pregnant women, breastfeeding women, and caretakers).

163. *See* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k); 29 C.F.R. pt. 1604, app. (current through Mar. 3, 2016).

164. *See* Troupe v. May Dep't Stores Co., 20 F.3d 734, 736–39 (7th Cir. 1994).

circuit courts have adopted an analysis that examines the treatment of similarly situated male comparators to establish the actual floor below which the treatment of pregnant workers may not fall.[165] For example, if no similarly situated workers are granted sick leave or light duty, then an employer need not grant a hypothetical pregnant worker sick leave or light duty.[166] Violations of Title VII can be found in cases where the record has shown that similarly situated pregnant employees were treated differently than similarly situated non-pregnant employees.[167]

Some scholars have made the case that the Act should be read to require that employers make some reasonable accommodations for pregnant employees.[168] Some commentators argue that, in order for women to realize equal opportunity in employment, there must be some accommodation or compensation to address the different cultural and physiological roles that women play in relation to reproduction.[169] Although many commentators have argued that accommodations for pregnancy should be available to individual pregnant employees through the ADA,[170] pregnant plaintiffs seeking relief under the ADA generally have been unsuccessful.[171]

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165. *See id.* at 738 (employing comparator approach).

166. *See id.* at 736.

167. *See, e.g.*, Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 364 (3d Cir. 2008).

168. *See* Calloway, *supra* note 53, at 1–3 (arguing that the workplace should accommodate pregnancy); Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 963–70 (2013) (arguing that the PDA creates a substantive accommodation right).

169. Kay, *supra* note 49, at 18. Many commentators maintain that antidiscrimination law must adopt a more accommodationist model that accounts for the diversity of individual differences across groups. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 194–96 (2006) (arguing for a civil rights approach that forces conversation); *see also* Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 891–92 (2014) (arguing that difference is universal and discrimination law should protect the unique differences in expressions of maleness and femaleness).

170. *See* Calloway, *supra* note 53, at 1–3; *see also* Widiss, *supra* note 168, at 963–70.

171. *See, e.g.*, Hernandez v. City of Hartford, 959 F. Supp. 125, 130 (D. Conn. 1997) (stating that "[p]regnancy and related medical conditions have been held not to be physical impairments"); *see also* Gudenkauf v. Stauffer Commc'ns, Inc., 922 F. Supp. 465, 473–74 (D. Kan. 1996); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995) (citing EEOC guidance in support of finding that pregnancy is not a disability under the ADA); Byerly v. Herr Foods, Inc., No. CIV. A. 92-7382, 1993 WL 101196, at *4 (E.D. Pa. Apr. 6, 1993). The Supreme Court has narrowly interpreted the ADA, consistently ruling against plaintiffs. Samuel R. Bagenstos, US Airways v. Barnett *and the Limits of Disability Accommodation*, *in* CIVIL RIGHTS STORIES (Myriam Gilles & Risa Goluboff eds., 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953759 [https://perma.cc/BG84-C9X3] (discussing the "Disabilities Act Term" in which the Supreme Court ruled against plaintiffs in four ADA cases). Although the Supreme Court's jurisprudence in the *Sutton* trilogy, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), placed substantial limitations on the definition of disability, the ADA Amendments Act of 2008 (ADAAA) may lead to a more expansive definition of disability under the ADA. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). The ADAAA provides that individuals with pregnancy-related impairments may receive discrimination protections. 29 C.F.R. pt. 1630, app. (defining disability as "a pregnancy-related impairment that substantially limits a major life activity").

In the recent case *Young v. United Parcel Service, Inc.*, the Supreme Court considered an employer policy that provided accommodations for many, but not all, workers with non-pregnancy-related disabilities.[172] The Supreme Court granted certiorari to Young[173] to determine whether the ADA requires an employer to provide reasonable accommodations for pregnant employees who are limited in their ability to work if the employer provides reasonable accommodations to other temporarily disabled employees who are similarly limited in their ability to work.[174] U.P.S. accommodated lifting restrictions for many of its drivers, including those that became disabled on the job, those that sought disability accommodations under the ADA, and those who had lost driver certifications necessary for work.[175] This policy, however, did not include accommodations for pregnant female employees who were similarly situated in their inability to work.[176] U.P.S. denied accommodations to Peggy Young after her doctor told her that she could lift only a certain amount, but it provided accommodations to other, non-pregnant workers who had similar lifting limitations.[177] The majority of the Court determined that the burdens imposed upon women by this unequal treatment could be used to show intentional sex discrimination under the *McDonnell Douglas* test.[178] However, the Court rejected a literal reading of the PDA, which would have required an employer to provide accommodations for pregnant employees whenever it grants any accommodations to other, similarly situated employees.[179]

For this reason, courts examining employer accommodation policies that include most disabilities but exclude disabilities arising from pregnancy should consider the extent of the burdens borne by pregnant women and determine whether the gender-neutral policy is a pretext for discrimination. It is unclear how much impact *Young* will have on future litigation or employer policymaking. Although the Supreme Court rejected a reading of the PDA that would require generous accommodation for pregnant women, it reiterated the importance of pretext in Title VII cases.[180] As the Supreme Court acknowledged in the majority opinion, however,[181] this case arose in 2006, both before Congress amended the ADA in 2008 and before the EEOC suggested that employers should accommodate temporary lifting restrictions for pregnant employees on the same basis that they would accommodate temporary lifting restrictions

172. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1344 (2015).
173. 707 F.3d 437 (2013), *cert. granted*, 134 S. Ct. 2898 (2014).
174. SCOTUSBLOG, Petition for Writ of Certiorari, Young v. United Parcel Serv., Inc., http://www.scotusblog.com/case-files/cases/young-v-united-parcel-service/ [https://perma.cc/XL42-RJ66].
175. *Young*, 135 S. Ct. at 1344.
176. *Id.* at 1341.
177. *Id.* at 1344.
178. *Id.* at 1342–43.
179. *Id.* at 1352–54.
180. *Id.* at 1341.
181. *Id.* at 1348.

for other disabled employees.[182]

In light of the Supreme Court's decision, it is probable that courts will continue to use the comparator approach to make determinations about pregnancy discrimination, thereby requiring women seeking the protections of the Act for pregnancy-related absences and illnesses to compare themselves to men or other employees who are not pregnant.[183] In disparate treatment PDA cases, courts have found that for an employee to be similarly situated to another employee, he or she must be comparably situated to the other employee in "relevant respects."[184] This has been interpreted by some courts to mean identical in terms of their circumstances and job duties.[185] For example, when Officer Sabrina Marie Freppon sought a light duty assignment to accommodate her pregnancy, her employer refused, telling her that there were no light duty assignments for her.[186] When Officer Freppon found out that other officers had received light duty assignments, she was told that other officers who had received light duty assignments only received them because they were recovering from on-the-job injuries.[187] Even though other city employees, specifically a paramedic in the fire department and a code officer, were given light duty assignments to recover from off-the-job injuries, the Tenth Circuit affirmed the district court's decision in favor of the City of Chandler.[188] It granted summary judgment in favor of the city, finding that a jury could infer that the plaintiff's request was denied because she "failed to put forth sufficient evidence" that she was similarly situated either to the other policemen given leave for on-the-job injuries or to the non-police officers, like the paramedic and code officer, who were given light duty for off-the-job injuries.[189] Although a pregnant employee does not necessarily need to find another similarly situated employee who has been treated more favorably in order to prove her case,[190] the require-

182. 29 C.F.R. § 1604.10 (current through Mar. 3, 2016) ("Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment."); EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [https://perma.cc/RAN5-KSF5].

183. *See* Jirak v. Fed. Express Corp., 805 F. Supp. 193, 195–96 (S.D. N.Y. 1992) (noting that plaintiff did not produce evidence that the company's termination policy was applied differently to males than to females).

184. *See, e.g.*, Freppon v. City of Chandler, 528 F. App'x 892, 902 (10th Cir. 2013) (citing McGowan v. City of Eufala, 472 F.3d 736, 745 (10th Cir. 2006)).

185. *See McGowan*, 472 F.3d at 745.

186. *Freppon*, 528 F. App'x at 895.

187. *Id.*

188. *Id.* at 902–03.

189. *Id.*

190. EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1195 n.6 (10th Cir. 2000) (noting that "[n]othing in the case law in this circuit requires a plaintiff to compare herself to similarly-situated co-workers"). Even within circuits, courts disagree about the required scope of comparator evidence. *Compare* Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1320 (11th Cir. 2012) (finding to survive summary judgment, a plaintiff need only show "enough non-comparison circumstantial evidence to raise a reasonable infer-

ment for comparators represents a "formidable" hurdle for plaintiffs seeking relief from pregnancy discrimination.[191]

Title VII's prohibition against sex discrimination, as amended by the Act, does not require preferential treatment for pregnant employees.[192] For this reason, employers may reject reasonable requests by pregnant women for accommodations, requiring that employees be completely capable of performing all of the job duties of their position throughout their pregnancy. The text of the Act makes this explicit, requiring that pregnant persons be treated no worse than other individuals "so affected but similar in their ability or inability to work."[193] Employers often continue to require heavy lifting, refusing to provide light duty assignments.[194] In order to establish a prima facie case for disparate treatment, a plaintiff-employee must establish that she is qualified for the job in question.[195] Courts have interpreted lifting restrictions to render a pregnant employee unqualified for her job, effectively upending the plaintiff-employee's prima facie case.[196] In other circumstances, employers have prohibited the use of chairs for pregnant employees whose professions require them to stand on their feet for long periods of time.[197] This has led some commentators to claim that the law of sex discrimination for pregnant workers conforms to a capacity-based model in its application.[198] Although employers are free to provide additional benefits or accommodations on their own initiative,[199] remedies for discrimination are available only to those employees who are able to work at their full capacity.[200] In the next section, this article will build on the previous claims by revealing how contemporary interpretations of Title VII of the 1964 Civil Rights Act, as

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ence of intentional discrimination"), *with* Chapter 7 Tr. v. Gate Gourmet, Inc., 683 F.3d 1249, 1256 (11th Cir. 2012) (determining that the record contained enough non-comparator based evidence for the jury reasonably to infer that the plaintiff's supervisor discriminated against her because she was pregnant).

191. *See* Troupe v. May Dep't Stores, Co., 20 F.3d 734, 738–39 (7th Cir. 1994); *see also* Franklin, *supra* note 31, at 1367.

192. *Troupe*, 20 F.3d at 735.

193. 42 U.S.C. § 2000e(k) (2012).

194. *E.g.*, A BETTER BALANCE: THE WORK & FAMILY LEGAL CENTER ET AL., WHY WE NEED THE PREGNANT WORKERS FAIRNESS ACT: STORIES OF REAL WOMEN (2015), http://www.nationalpartnership.org/site/DocServer/PWFA_Stories.pdf?docID=11442 [https://perma.cc/GY3N-Q9KM].

195. Grace v. Adtran, Inc., 470 F. App'x 812, 814–15 (11th Cir. 2012) (finding a ten-pound lifting restriction rendered plaintiff unqualified for her job).

196. *Id.* at 815.

197. *See* Ensley-Gaines v. Runyon, 100 F.3d 1220, 1223 (6th Cir. 1996).

198. *See* Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 15 (2009).

199. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987) (finding that the PDA provides a floor for the treatment of pregnant workers, not a ceiling).

200. Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1316 (1994) ("To the extent that a pregnant employee is able and willing to work . . . the PDA protects her right to remain in the workplace. The language of the statute simply does not address the right of a pregnant employee, fully able to work, to receive benefits that are different from, and arguably superior to, the benefits available to other employees.").

amended by the PDA, fail to provide clear, consistent pregnancy discrimination jurisprudence.

II. EXPANDING THE PDA'S MEANING BEYOND GESTATION DISCRIMINATION

In *Young v. United Parcel Service, Inc.*, Justice Alito introduced his concurrence with the statement that the first clause of the PDA, which defines discrimination based on pregnancy, childbirth, and related medical conditions in the realm of sex discrimination, is "straightforward."[201] In spite of Justice Alito's comment, efforts to elucidate the meaning of pregnancy discrimination have been anything but. Instead, the courts have created a jurisprudence of pregnancy discrimination that is contradictory in its articulations and inconsistent in its outcomes: the seemingly clear prohibition against discrimination for pregnancy, childbirth, or related medical conditions in actuality lacks clarity and consistency across the federal courts.[202] It is not clear what pregnancy discrimination includes, what it excludes, and why.

Current disagreements about the interpretation of the PDA's prohibition of pregnancy discrimination reveal the profound ways in which the meaning and scope of pregnancy discrimination protections remain uncertain. This section argues that many of the disagreements about the scope and meaning of pregnancy discrimination arise in part because the courts struggle to define the nature and scope of pregnancy itself. Through an examination of court disagreement about the meaning and scope of pregnancy discrimination, this section argues that the conventional framework for statutory interpretation fails to capture the complex, dynamic nature of pregnancy and the experience of being pregnant. This section also shows how current interpretations of the Act fail to provide an appropriate level of protection for pregnant workers, ensures that pregnant persons need not choose between their families' health and well-being and their jobs, and provides clarity and consistency in the statute's application.

A. Interpreting Pregnancy

The Supreme Court's PDA jurisprudence embraces the notion that there are "biological facts" about the nature of women's reproductive roles.[203] The federal courts, following the Supreme Court, often operate under the presumption that "[n]ormal pregnancy is an objectively identi-

201. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1356 (2015).

202. *See infra* Part III.B; *see, e.g.*, Berrios v. Univ. of Miami, 920 F. Supp. 2d 1274, 1276–77 (S.D. Fla. 2012) (citing opposite conclusions reached by federal courts in Florida and the Florida courts of appeals).

203. Bachiochi, *supra* note 70, at 905 (claiming that the Supreme Court has determined that "a legislature does not engage in sex-role stereotyping when it passes a law that is based upon the biological facts of childbearing (for example, that women, and not men, gestate and bear children)"). *But see* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 160 (1976) (Brennan, J., dissenting) (arguing that the employer's discriminatory actions are "not crea-

fiable physical condition with unique characteristics."[204] And in analyzing PDA claims, the federal courts consistently reduce the relational, social, and cultural processes of pregnancy to its biomedical facets. Like the Supreme Court, courts distinguish between pregnancy and gender, treating pregnancy like "a physical condition that some people get and some people don't."[205] This has not gone unnoticed by commentators. For example, Reva Siegel has teased apart the complex relationship in jurisprudence between the so-called "real" biological sex differences and the social ramifications of gender difference.[206] According to Siegel, when it comes to reproduction and sex differences, the Supreme Court has adopted a jurisprudence of physiological naturalism that regards the social arrangements of reproduction as biological and actual sexual differences.[207]

Even when courts adopt a more expansive conception of pregnancy that takes its social aspects into consideration, courts still focus on the biological aspects of pregnancy when evaluating discrimination claims.[208] In many ways, the current protections against pregnancy discrimination were forged from a theory of equality that allowed for the existence of biological differences, even while arguing against their relevance.[209] This section will argue that the current efforts to interpret the PDA using textual plain meaning or legislative intent fail to capture the nature and scope of pregnancy.

Judges have used the methods of statutory interpretation to define pregnancy and delineate the boundaries of pregnancy discrimination. In making their determinations, federal judges rely on the rules of statutory construction to interpret the meaning and scope of the PDA and to determine which conditions, illnesses, and injuries are medically related to pregnancy and childbirth for the purposes of the statute.[210] When judges define the scope and meaning of pregnancy for the purposes of the PDA, they often do so by relying on plain meaning textualism, using the dictionary definition of the word in question, legislative intent, or some combination of the two.[211]

Plain meaning interpretation has been called the simplest approach to textualism.[212] Courts applying the plain meaning approach to statutory

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tures of a social or cultural vacuum devoid of stereotypes and signals concerning" pregnancy).

204. Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974).

205. Danielsen, *supra* note 23, at 1458.

206. Siegel, *supra* note 23, at 817.

207. *Id.* at 836–37.

208. Greenberg, *supra* note 21, at 231–32.

209. Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1029 (1992) ("[E]quality theory . . . did not deny all biological differences, but denied their relevance to a number of institutional settings.").

210. Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 364 (3d Cir. 2008).

211. *Id.*

212. WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 38 (1994) (arguing for a dynamic theory of interpretation).

interpretation adopt a reasonable person's interpretation of the "ordinary meaning[ ]" of the word, given accepted precepts of grammar and syntax.[213] In determining the plain meaning of part of a statute, the plain meaning of the text can be understood by examining its relationship to the statutory scheme as a whole.[214] If the words of the statute have a clear and unambiguous meaning, then the "plain meaning" of the statute will be given effect.[215] Plain meaning can be determined using a dictionary that the judge may have in his or her chambers.[216] It is also informed by the cultural worldviews of the judge and judicial clerks.[217] But plain meaning, importantly, arises from an individual's personal perception of the "shared cultural meaning" of the term.[218] This personal perception inevitably is informed by personal experiences and the individual's sociocultural paradigm.[219] Thus, plain meaning may be a more uncertain tool than it seems. This is a site in which the personal may become, for a particular purpose, the juridical. Judges making determinations about the meaning and definition of pregnancy do not necessarily call in outside experts. The plain meaning approach to statutory interpretation, whether due to differences in personal perspectives, differences arising from the process of legislative drafting, or differences emerging from shifting meanings over time, guarantees that the meaning of statutes like the PDA will be ambiguous.[220] This ambiguity, and the resulting indeterminacy, will only compound over time.[221]

Courts frequently interpret PDA cases from a perspective animated by the underlying presumption that pregnancy has a plain meaning. They interpret the PDA by relying on a "plain meaning" of pregnancy that is universally accessible regardless of cultural, historical, and personal contingencies.[222] Pregnancy, from that perspective, is a biological "reality" that is naturalized apart from social, political, legal, and cultural frameworks.[223] This adherence to plain meaning endorses a form of biomedical essentialism that limits the scope of pregnancy by presuming that pregnancy is an ahistorical, universally applicable, strictly biological event that begins with conception and ends with the birth of the child. While the plain meaning approach need not adopt a perspective that adheres to biomedical essentialism, its tendency to do so not only creates uncertainty and indeterminacy for the statute, but also falls short of providing discrimination protections for pregnant women. Like the Supreme

213. *Id.*
214. Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2002).
215. ESKRIDGE, *supra* note 212, at 38.
216. *Id.* at 42.
217. *Id.* at 43.
218. *Id.* at 58.
219. *Id.*
220. *Id.* at 38–41.
221. *Id.*
222. *See, e.g.*, United States v. Bd. of Educ. of Consol. High Sch. Dist. 230, 983 F.2d 790, 795 (7th Cir. 1993).
223. *See, e.g.*, Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67 (2013).

Court, many courts of appeals operate under the presumption that "[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics."[224]

Judges, the majority of whom are male, may lack a complex understanding of the scope and meaning of pregnancy, not only as biological and physiological phenomenon, but also as a psychological, cultural, social, and economic phenomenon.[225] This is not to say that judges should be disqualified from making determinations about pregnancy because they are male, but that there should be a sense of humility and robust inquiry. By taking a perspective that often excludes the experiences of women who have been pregnant or of those who have cared for pregnant women, judges adjudicating these cases adopt the wrong approach. Instead of recognizing, in line with congressional intent[226] and Supreme Court precedent,[227] that the definition of pregnancy already entails both biological and social aspects and should be understood to prohibit a broader range of discrimination, courts adopt a plain meaning approach that flattens the experiences of pregnancy and obscures how sociocultural meaning construct not only our understanding of work and the workplace, but also the limits and contours of pregnancy itself.

Part of the appeal of plain meaning, however, is its supposed clarity and consistency. Some argue that a textual approach to meaning will lead to less indeterminacy in the application of the law.[228] They argue that if courts can adhere to an analysis that draws upon the clear and unambiguous meaning of the word, then it is less likely that they will reach different results in similar circumstances. However, a plain meaning, biologically-based approach has not lead to clarity and consistency in applying the PDA.

When courts adhere to a strict, biological-essentialist view of pregnancy, which restricts pregnancy to the forty-week period between conception and childbirth, it permits employers to discriminate against women based on pregnancy-related conditions and social circumstances. This undermines the PDA's explicit, textual prohibition against discrimination on the basis of pregnancy-related medical conditions. It also undermines a pervasively shared intuition among feminists, caretakers for

224. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

225. Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1704–10 (1991) (discussing the reality that a majority of judges are male); *see also* Fact Sheet, National Women's Law Center, *Women in the Federal Judiciary: Still a Long Way to Go* (Nov. 18, 2015), http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1 [https://perma.cc/TX23-A54Z].

226. *See* Carney v. Martin Luther Home, Inc., 824 F.2d 643, 647 (8th Cir. 1987).

227. *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 190, 211 (1991) (finding that "an employer's gender-based fetal-protection policy" relating to lead exposure was "discrimination on the basis of woman's ability to become pregnant" and thus violated the law); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 669 (1983) (The "[employer]'s plan is unlawful, because the protection it affords male employees is less comprehensive than [that] afforded . . . female employees.").

228. ESKRIDGE, *supra* note 212, at 38.

pregnant women, and those giving birth[229] that pregnancy, for the purposes of pregnancy discrimination, should include more than just the period between conception and birth.[230] Finally, such a myopic perspective of the nature of pregnancy and pregnancy discrimination fails to recognize how workplace norms continue to be defined, socially constructed, and culturally understood to exclude women, pregnancy, and care.[231]

In the alternative, some courts have relied on legislative intent to shed light on the purpose and scope of pregnancy discrimination prohibited by the Act. For example, drawing on legislative intent, courts have determined that the PDA was designed to combat the stereotype that women who become mothers are unable to participate in the workforce and that they ultimately belong in the home.[232] Like the textual approach to plain meaning, deference to legislative intent has its own challenges; the use of legislative intent by courts has not led to an expansion of the understanding of the Act.

Many have argued that the PDA defines pregnancy broadly so that a large range of potential discrimination related to pregnancy and reproduction will be prohibited.[233] The legislative history indicates that it was intended to provide Title VII's protections to a "whole range of matters concerning the childbearing process"[234] and a variety of conditions and circumstances related to childbearing.[235] The PDA's legislative history indicates that it was designed not only to combat discrimination based on gestational pregnancy, but also to encompass a broader range of discriminatory treatment and exclusionary policies that would limit workforce participation.[236] Furthermore, the legislative history explicitly states that the Act was passed with the intention to protect not only individual female workers, but also their families.[237] However, as the previous section

229. Matambanadzo, *supra* note 13, at 119–20.

230. *See, e.g.*, Kessler, *supra* note 64, at 436–38.

231. *Id.* at 437 (citing WILLIAMS, *supra* note 154, at 82); Zatz, *supra* note 64, at 45–46.

232. Hitchcock v. Angel Corps, Inc., 718 F.3d 733, 740–41 (7th Cir. 2013) ("Animus towards pregnant women may be inferred based on these comments; specifically, a belief that pregnancy disqualifies women from effectively participating in the workforce.").

233. Sarah E. Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U. L. REV. 591, 599–600 (1982) (arguing that a broad range of pregnancy-related conditions such as a miscarriage should be included under the PDA).

234. H.R. REP. No. 95-948, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4753.

235. Carney v. Martin Luther Home, Inc., 824 F.2d 643, 648 (8th Cir. 1987) (analyzing legislative history to show how the PDA "will also prohibit discrimination on the basis of pregnancy *or conditions arising out of pregnancy* for all employment-related purposes" and arguing that Congress clearly intended to extend protections beyond simple pregnancy to include nausea, potential miscarriage, and many other conditions); Magid, *supra* note 17, at 822 (offering a critique of the PDA's evidentiary standards).

236. *See Carney*, 824 F.2d at 648.

237. This intent is made apparent in Senator Hiram William's introduction of the Act, in which he noted that the Supreme Court's decision in *Gilbert* that pregnancy discrimination is not necessarily sex discrimination for the purposes of an employer's disability insurance scheme, represented a setback for individual women and their families. *See* S. COMM. ON LABOR AND HUMAN RES., 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 1 (Comm. Print 1980); *see also* Dinner, *supra* note 24, at 417.

reveals, lower courts have applied the PDA in ways that have limited its textual potential, recreating the conditions of discrimination that motivated Congress to pass the Act over thirty-five years ago.[238] This has led some to argue that when courts narrowly construe the Act, they are operating from presumptions that do not mirror the expectations of the legislators who wrote the Act and the coalition that lobbied for its passage.[239] Furthermore, one of the main challenges in determining meaning from legislative intent lies in the difficulty of interpreting a collective group of differentially motivated persons' intentions.[240] Legislative intent can be used to limit[241] or to expand the scope of the PDA.[242]

The next section examines how the current interpretive approach to the PDA, with its reliance on plain meaning and legislative intent, fails not only to provide consistency and clarity jurisprudentially, but also to protect pregnant workers in reality.

B. INDETERMINACY AND THE PDA

The Supreme Court has rarely addressed the scope and nature of pregnancy under the Act. And on the rare occasion that the Justices seem to do so, the meaning of pregnancy is treated as obvious or uncontroversial and thus remains unaddressed.[243] Some commentators have even noted

238. There is some evidence that the PDA, passed during an historical period of rapidly expanding employee benefits, required employers to provide more robust protections for pregnancy. Brake & Grossman, *supra* note 223, at 73–74. As Deborah A. Widiss argues, the intention of the PDA was not to use comparisons between pregnant and non-pregnant persons to limit the rights of pregnant women but instead to provide a foundation for substantive accommodations to pregnant and non-pregnant workers alike. Widiss, *supra* note 168, at 975–77.

239. There is historical evidence that feminist activists regarded redistribution as an essential aspect of sex discrimination and made significant efforts to ensure that women did not shoulder the costs of reproduction and childcare alone as an important aspect of antidiscrimination law. Dinner, *supra* note 24, at 442. According to Dinner's historical findings, "[f]eminists sought to redefine childrearing as a collective, public responsibility rather than a private responsibility of individual women." *Id.* at 457.

240. *See* Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 173 (2012) (noting that the collective members of the legislature produce a shared outcome without necessarily signaling a shared intent).

241. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679–80 (8th Cir. 1996) (drawing on legislative intent to exclude discrimination on the basis of fertility treatments from the scope of the PDA's protections because Congress made no reference to infertility treatments).

242. Carney v. Martin Luther Home, Inc., 824 F.2d 643, 647–48 (8th Cir. 1987) (drawing on the legislative history and the house report to determine that "the bill makes clear that its protection extends to the whole range of matters concerning the child-bearing process"); *see also* Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1401 (N.D. Ill. 1994) (drawing on legislative intent to find that discrimination because of esphofical reflux, a medical condition that prevented plaintiff from becoming pregnant naturally, is prohibited by the PDA because discrimination on the basis of potential or intended pregnancy is prohibited).

243. For example, in Justice Alito's concurrence in *Young v. United Parcel Service, Inc.*, he does not define pregnancy but claims that the first clause of the PDA, which expands sex discrimination to include discrimination on the basis of "pregnancy, childbirth, or related medical conditions," is not ambiguous. 135 S. Ct. 1338, 1356–57 (2015) (Alito, J., concurring) (claiming that the first clause of the PDA is "straightforward").

that the members of the Supreme Court seem "baffled" by the nature of pregnancy.[244] As one pair of commentators note, the interpretations of the PDA have been "tortured and inharmonious," while the PDA's language and legislative history are remarkably clear.[245]

The question as to which particular pregnancy-related conditions are included within the purview of the PDA remains contested and indeterminate. For the purposes of Title VII, circuit and district courts disagree about the meaning and scope of pregnancy discrimination because they dispute the very nature of pregnancy itself.[246] Ultimately, this means that courts deny relief to numerous individuals who are discriminated against because of pregnancy-related medical conditions.

In some circumstances, the lack of clarity concerning the PDA's scope and meaning derives from interpretive disputes about the PDA's second clause.[247] In the interpretations of judges[248] and the EEOC,[249] disputes arise regarding the question of whether employers are required to provide accommodations to pregnant employees on the same grounds that they provide accommodations to other employees. This failure to provide reasonable accommodations has been one of the most intractable problems associated with the PDA.[250] Although the PDA does not require that employers provide special accommodations only to pregnant employees, it does require that pregnant employees be treated no worse than other employees similarly situated in their capacity to work.[251] This requirement has become more complex, particularly in circumstances where the PDA interacts with the ADA.[252] In the wake of the ADA, courts have been inconsistent in determining whether employers are re-

244. Brake, *supra* note 52, at 995–96 (discussing oral argument in *Young*).

245. Issacharoff & Rosenblum, *supra* note 55, at 2179–80 (arguing that the PDA does not adequately address the costs of pregnancy for women in the workforce).

246. *See id.* at 2187–88.

247. *Id.*

248. *Compare* Young v. United Parcel Serv., Inc., 707 F.3d 437, 446 (4th Cir. 2013) (determining that a "pregnancy blind" policy that treated pregnant employees suffering from lifting restrictions differently than employees whose lifting restrictions arose from on the job injuries did not constitute pregnancy discrimination), *with* Latowski v. Northwoods Nursing Ctr., 549 F. App'x 478, 483 (6th Cir. 2013) ("Although these employees differed from Latowski because their medical conditions were work-related, they were similarly situated in their ability to work because they were placed under lifting restrictions of up to fifty pounds.").

249. The EEOC's guidelines state that "[d]isabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment." 29 C.F.R. § 1604.10(b) (2014). This guideline applies to policies and practices that are both written and unwritten, formal and informal. *Id.*

250. *See generally* Grossman & Thomas, *supra* note 198, at 15 (examining how the PDA's requirement that pregnant workers be "similarly situated" to other workers in order to receive accommodations creates a choice for workers between following medical advice and forgoing the benefits of work during pregnancy).

251. *Id.*

252. Brief for Law Professors and Women's Rights Organizations as Amici Curiae in Support of Petitioner at *11–12, Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. 2013) (No. 12-1226), 2013 WL 2103656.

quired to grant pregnant employees accommodations to address temporary limitations on their ability to work.[253]

In other circumstances, these disputes concern the way circuit courts define the scope of pregnancy and medically related conditions.[254] To illustrate this claim, the next section examines four interpretive areas where federal courts disagree on the scope and meaning of what pregnancy discrimination includes and excludes. Specifically, the section focuses on interpretive disagreements as to the inclusion of infertility, lactation, contraception, and menstruation discrimination under the PDA. Many courts have refused to recognize the full scope and nature of pregnancy discrimination, and instead adopt an approach that provides relief only for gestation discrimination.[255]

1. The PDA and Infertility

Although the Supreme Court has held that reproduction is a major life activity under the ADA,[256] employer insurance coverage for infertility treatments has not been widely adopted.[257] U.S. courts of appeals are split as to whether discrimination against women undergoing fertility treatments constitutes pregnancy discrimination under Title VII.[258]

The Supreme Court has not determined whether fertility falls within the scope of Title VII's prohibition against pregnancy discrimination as pregnancy, or a condition that is medically related to pregnancy. Other courts remain agnostic about whether discrimination because of fertility constitutes pregnancy discrimination. For example, in its most recent decision concerning fertility discrimination, the Second Circuit did not reach the question of whether fertility discrimination qualified as pregnancy discrimination.[259] When courts have weighed in on the question of whether discrimination because of fertility treatments constitutes pregnancy discrimination, they have reached contradictory conclusions about whether it is sex discrimination.

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253. *Id.* at 12 (arguing that the ADA Amendments expanded the pool of employees entitled to reasonable accommodations to include pregnant workers who are temporarily limited in their ability to work).

254. Deardorff, *supra* note 59, at 52–53 (analyzing disagreements between district courts as to whether the PDA prohibits discrimination because of contraception, pregnancy, and infertility).

255. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 640 (1998).

256. *Id.* at 638.

257. Pendo, *supra* note 159, at 295.

258. *See* Hall v. Nalco Co., 534 F.3d 644 (7th Cir. 2008); *see also* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996).

259. Govori v. Goat Fifty, L.L.C., 519 F. App'x 732, 736 (2d Cir. 2013) (failing to reach the question of whether the PDA would cover a claim related to infertility because plaintiff failed to show employers legitimate, non-discriminatory reason for an adverse employment action was a pretext for discrimination). The court held that the defendant offered a non-discriminatory reason and defendant fired plaintiff "because of her subpar customer service that included ignoring her tables, her quarrelsome relations with other employees, and her refusal to complete menial tasks required of servers." *Id.* at 734.

In the Eighth Circuit, the courts defined pregnancy discrimination to exclude fertility-related discrimination. Judge Longstaff of the U.S. District Court for the Southern District of Iowa determined that infertility is not included in the scope of pregnancy-related medical conditions because unlike pregnancy or childbirth, both men and women can "be infertile."[260] Drawing on the rules of statutory construction, the court also noted that infertility "occurs prior to" conception and pregnancy.[261] The Eighth Circuit Court of Appeals affirmed Judge Longstaff's opinion, noting that the plain language of the PDA "does not suggest that 'related medical conditions' should be extended to apply outside the context of 'pregnancy' and 'childbirth.'"[262] The court distinguished infertility from pregnancy and childbirth by noting that pregnancy and childbirth are conditions that occur after conception, while infertility is categorically defined as an inability to conceive.[263] Further, the court noted that employer policies related to infertility are gender neutral because infertility is a condition that impacts both men and women.[264] Unlike potential pregnancy, which only impacts women, infertility is not sex-related.[265]

The Second Circuit Court of Appeals reached a similar conclusion with a similar analysis. In *Saks v. Franklin Covey Co.*, the benefits plan covered a variety of surgical and non-surgical fertility treatments, including remedies related to varicose veins in the testicles, blockages of the vas deferens, endometriosis, tubal occlusions, ovulation kits, oral fertility drugs, and penile prosthetic implants.[266] It excluded "surgical impregnation procedures," including artificial insemination, in-vitro fertilization, or embryo and fetal implants.[267] Rochelle Saks, an employee of Franklin Covey, sought reimbursement for a variety of fertility treatments including the use of ovulation kits, Clomid to regulate and induce ovulation, intrauterine insemination, in-vitro fertilization hormones, injectable fertility drugs, and a set of ultrasounds and blood tests to monitor the potentially harmful effects of the drugs.[268] Although she sought reimbursement for all of her fertility-related expenses, the insurance company refused to reimburse her for the intrauterine inseminations, the in-vitro fertilization, the injectable fertility drugs, and the monitoring tests.[269] Saks brought suit, claiming that the plan's benefits for insurance coverage of fertility related treatments were inferior to its coverage of non-pregnancy-related illnesses and because the plan provided differential coverage for male and female fertility issues.[270] The plan, according to Saks, violated the

260. Krauel v. Iowa Methodist Med. Ctr., 915 F. Supp. 102, 112 (S.D. Iowa 1995).
261. *Id.*
262. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679 (8th Cir. 1996).
263. *Id.* at 680.
264. *Id.*
265. *Id.*
266. Saks v. Franklin Covey Co. 316 F.3d 337, 341 (2d Cir. 2003).
267. *Id.*
268. *Id.* at 341–42.
269. *Id.* at 342.
270. *Id.*

PDA because it provided complete coverage for surgical procedures related to male infertility, while providing inferior coverage for surgical procedures related to female infertility.[271]

The Second Circuit found that the exclusion of the surgical infertility treatments did not violate Title VII.[272] In interpreting the scope of the PDA's protections for fertility related discrimination, the Second Circuit focused on infertility in relation to the broader objective of Title VII.[273] Title VII, according to the court, was designed to prohibit discrimination on the basis of sex.[274] Pregnancy and related medical conditions are recognized within the scope of Title VII's protections against discrimination because they are sex-based characteristics of women.[275] According to the Second Circuit, infertility is a medical condition that is gender neutral.[276] It impacts women as well as men. In examining the statute, it determined that related medical conditions within the PDA were not intended to "introduc[e] a completely new classification of prohibited discrimination based solely on reproductive capacity."[277] Furthermore, an insurance plan excluding surgical procedures for infertility equally disadvantages men and women because men and women are both subject to the difficulties of infertility.[278] As such, infertility is not a pregnancy "related medical condition" for the purposes of Title VII, as amended by the PDA.[279]

Commentators have been critical of these decisions, in part because they obscure the cultural and social meaning of infertility. Although the medical condition of infertility can impact both men and women, there is empirical evidence that in the U.S. cultural context women bear a disproportionate burden of the physical and emotional burden of infertility.[280] As Elizabeth Pendo notes, even medical reference texts, like the Merck Manual, categorize infertility as a women's health issue.[281]

The Seventh Circuit has included infertility within the scope of the PDA specifically by not defining it as infertility but as "childbearing capacity."[282] In 2008, the Seventh Circuit reached this result in *Hall v. Nalco*.[283] In 2003, Cheryl Hall, one of two sales secretaries employed by Nalco Co., requested a leave of absence to undergo in-vitro fertilization ("IVF") treatments.[284] The treatments—which consist of weeks of fertil-

271. *Id.*
272. *Id.* at 343.
273. *Id.*
274. *Id.*
275. *Id.* at 345.
276. *Id.* at 346.
277. *Id.*
278. *Id.*
279. *Id.*
280. Pendo, *supra* note 159, at 320–22.
281. *Id.* at 336–37 n.218 (noting that after the Supreme Court's decision, many commentators believed that employer medical coverage for infertility treatments would expand).
282. Hall v. Nalco Co., 534 F.3d 644, 644 (7th Cir. 2008).
283. *Id.*
284. *Id.* at 645.

ity drugs, followed by the extraction and fertilization of viable eggs, and then the implantation of embryos within a woman's womb—were unsuccessful the first time.[285] In July of 2003, Hall requested an additional leave of absence to try the procedure again in August.[286] During late July, Hall was terminated from her position when the company began the process of consolidating two Chicago-area offices.[287] The company decided to terminate Hall and retain the other secretary. When the company terminated Hall, her supervisor told her that it "was in [Hall's] best interest due to her health condition."[288] Hall's personal files concerning the termination discuss how she missed work for health related reasons and specifically mention the link between her absenteeism and her infertility.[289] While the district court granted summary judgment for the employer, determining that infertility was a gender-neutral condition that did not constitute sex discrimination under the PDA,[290] the Seventh Circuit reached a different result. According to the circuit court, the district court made the mistake of focusing on infertility without acknowledging that that decision to terminate Hall for undergoing IVF treatments is really based on her capacity or potential (or lack thereof) to become pregnant and bear a child.[291] Nalco terminated Hall not for a gender-neutral reason, but for the sex quality of childbearing capacity.[292] The Seventh Circuit redefined the employer's action related to infertility, noting that Nalco "terminated [Hall] for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—[such individuals] will always be women . . . . Hall was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity."[293]

2. *The PDA and Lactation*

Many state and federal government offices have adopted a positive public policy that attempts to encourage new mothers to breastfeed their infants for at least six months and ideally, a year.[294] However, it is not

285. *Id.*
286. *Id.* at 646.
287. *Id.*
288. *Id.*
289. *Id.*
290. Hall v. Nalco Co., No. 04 C 7294, 2006 WL 2699337, at *3 (N.D. Ill. Sept. 12, 2006), *rev'd*, 534 F.3d 644 (7th Cir. 2008).
291. *Hall*, 534 F.3d at 648.
292. *Id.* at 649.
293. *Id.* at 648–49.
294. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Before the passage of the Affordable Care Act, there were no federal or state statutes that required employers to provide support for women choosing to breastfeed after they return to work. In some ways, the federal government has adopted a pro-breastfeeding stance. Breastfeeding mothers received protection when the Patient Protection and Affordable Care Act amended the Fair Labor Standards Act, requiring that employers make provisions to support breastfeeding mothers at work. U.S. DEPT. OF LABOR, WAGE & HOUR DIV., *Section 7(r) of the Fair Labor Standards Act – Break Time for Nursing Mothers Provision*, http://www.dol.gov/whd/nursingmothers/Sec7rFLSA_btnm.htm

clear whether this positive policy of promoting breastfeeding includes a prohibition against lactation discrimination. The federal courts of appeals that have addressed the question of whether lactation or breastfeeding discrimination is prohibited by the PDA do not agree.[295] According to the contradictory decisions by the federal circuits, lactation, like infertility and menstruation, is and is not a condition that is medically related to pregnancy.[296]

There is some evidence that Congress intended to include lactation within the scope of the PDA.[297] Despite this evidence, some federal courts have refused to recognize that discrimination on the basis of lactation and breastfeeding falls within the scope of Title VII's prohibition against sex discrimination.[298] The Fourth Circuit Court of Appeals has chosen to narrowly interpret the scope of the Act to exclude lactation discrimination.[299] According to the court, the incapacitation and pregnancy-related medical conditions is not similar in kind to the limitations placed upon mothers nursing infants.[300] Similarly, Judge Simpson of the United States District Court of the Western District of Kentucky rejected a breastfeeding plaintiff's claim that an employer's refusal to grant personal leave because the employee's six-week old infant refused to wean or take a bottle constituted impermissible discrimination based upon pregnancy, childbirth, or a related medical condition.[301] According to Judge Simpson, while "breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not 'medical conditions' related thereto."[302]

Other judges, like Judge Pratt of the Southern District Court of Iowa, have taken a different route. Judge Pratt granted summary judgment to

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[https://perma.cc/744X-U7GC]. Employers must provide reasonable breaks for mothers expressing milk for one year after the child's birth and a place to express milk "other than a bathroom" that is shielded from view and intrusion. *See* 29 U.S.C. § 207(r)(1) (2012). States have also passed an array of other laws designed to take breastfeeding into consideration. Matambanadzo, *supra* note 13, at 139–40.

295. In some cases, courts do not reach the substance of this question of law and make determinations on other grounds. *See, e.g.*, Ames v. Nationwide Mut. Ins. Co., 747 F.3d 509, 513–14 (8th Cir. 2014) (determining that because the company treated all nursing mothers the same and all employees in that position the same, there was no pregnancy discrimination in violation of the PDA), *withdrawn on reh'g*, 760 F.3d 763 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 947 (Jan. 15, 2015).

296. *Compare* Barrash v. Bowen, 846 F.2d 927, 932 (4th Cir. 1988), *and* Wallace v. Pyro Mining Co., 789 F. Supp. 867, 868 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991), *with* EEOC v. Hous. Funding II, Ltd., 717 F.3d 425, 425 (5th Cir. 2013).

297. For example, the Breastfeeding Promotion Act of 2011, S. 1463, 112th Cong. § 101 (2011), would amend Section 101 of the Civil Rights Act of 1964 to include breastfeeding. It explicitly states that "Congress intended to include breastfeeding and expressing breast milk as protected conduct" when it passed the PDA in 1978. *Id.* § 101(a)(8).

298. *Barrash*, 846 F.2d at 932; *Wallace*, 989 F. Supp. at 868.

299. *Barrash*, 846 F.2d at 932.

300. *Id.* The Fourth Circuit's opinion characterizes breastfeeding as a purely volitional act. The court distinguished recovering pregnant persons from "young mothers *wishing* to nurse little babies." *Id.* (emphasis added). In this way, the court regards breastfeeding not as an imperative aspect of childbirth and pregnancy, but as a lifestyle choice.

301. *Wallace*, 789 F. Supp. at 868.

302. *Id.* at 869.

Nationwide Insurance Company over a plaintiff seeking protection from nursing related discrimination on the grounds that she had not produced sufficient direct or circumstantial evidence to ground her claim.[303] In making this determination, however, Judge Pratt noted that Ames, as a lactating mother, may not even be a member of the class of persons protected under Title VII's prohibition against sex discrimination and pregnancy discrimination.[304] In a footnote, Judge Pratt distinguished breastfeeding from the medical condition of lactation and, in what may have been an accidental post-structural feminist twist, even decoupled lactation and breastfeeding from gender and the female sex.[305]

By contrast, in *EEOC v. Houston Funding II, Limited* the Fifth Circuit Court of Appeals found that terminating a female employee because she is lactating or expressing milk constitutes impermissible sex discrimination under Title VII.[306] Although the Fifth Circuit stopped short of requiring employers to accommodate lactation, the court rejected the argument that Title VII did not cover "breast pump" discrimination and that terminating an individual's employment because of lactation or breast-pumping is not actionable discrimination under Title VII.[307] The court found that negative employment actions on the basis of lactation or expressing milk can give rise to an actionable claim of sex discrimination under Title VII and that lactation is a medical condition related to pregnancy under the PDA.[308] Noting that the PDA's expansion of sex discrimination to include "pregnancy, childbirth or related medical conditions" does not explicitly define "medical conditions," the Fifth Circuit drew on the "plain meaning" of the words in the statute.[309] In analyzing the notion of a medical condition, the court reasoned that it included any physiological condition, a broadly defined designation that would not on its face tend to exclude breastfeeding.[310] The court held that "[i]t is undisputed in this appeal that lactation is a physiological result of being pregnant and bearing a child."[311] As such, discrimination because of lactation, like menstruation discrimination, would be included in the scope of the Act within the "reasonable definition of 'pregnancy, childbirth, or related medical conditions.'"[312] It may be the case that the Act, however, still does not mandate special accommodations for pregnant employees who are nursing.[313]

303. Ames v. Nationwide Mut. Ins. Co., No. 4:11-cv-00359 RP-RAW, at *42 (S.D. Iowa Oct. 16, 2012) (mem. op.), *cert. denied*, 135 S. Ct. 947 (2015).
304. *Id.* at *20 n.31.
305. *Id.* at *12 n.28 (Judge Pratt writes, "Ames has not presented sufficient evidence that lactation is a medical condition related to pregnancy . . . . Furthermore, it is a scientific fact that even men have milk ducts and the hormones responsible for milk production.").
306. EEOC v. Hous. Funding II, Ltd., 717 F.3d 425, 425 (5th Cir. 2013).
307. *Id.* at 428–30.
308. *Id.* at 428.
309. *Id.* at 429–30.
310. *Id.* at 428–29.
311. *Id.* at 428.
312. *Id.* at 430.
313. *See supra* Part I.D.

3. *The PDA and Contraception*

In the United States, circuit courts have produced contradictory determinations as to whether discrimination in contraceptive health coverage by employers violates the PDA. In some cases, when an employer's health insurance plan excludes coverage for contraceptives, courts have found that such exclusions constitute sex-based discrimination.[314] Even "seemingly neutral classifications that in fact burden women constitute facial sex discrimination" for the purposes of Title VII.[315] For example, the Court of Appeals for the D.C. Circuit found that such a plan constitutes sex discrimination prohibited by Title VII.[316] The court determined that, "regardless of whether the prevention of pregnancy falls within the phrase 'pregnancy, childbirth, or related medical conditions,'" employer plans providing comprehensive coverage for men but, excluding contraception for women, were operating from a logic that mirrors the Supreme Court's *Gilbert* decision.[317] However, the Eight Circuit came to a different conclusion.[318] In analyzing a railroad employer's plan, which excluded comprehensive coverage for contraception, the court determined that the PDA did not prohibit disparate treatment in terms of contraceptive coverage.[319] Comparing contraception to fertility, and drawing on *Krauel v. Iowa Methodist Medical Center*, the court noted that, "[c]ontraception is not a medical treatment that occurs when or if a woman becomes pregnant; instead, contraception prevents pregnancy from even occurring.[320] While such circuit court splits many be rendered moot by the Affordable Care Act, which requires employer health plans to cover contraception and other preventative medical treatments,[321] these decisions reveal how the scope of the discrimination arising from pregnancy-related medical conditions has been conceptualized by courts in contradictory ways that fail to offer real protection from pregnancy discrimination.

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314. Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979, 985 (E.D. Mo. 2003) (finding the exclusion of prescription contraceptives facially sufficient to state a claim for disparate treatment and disparate impact under Title VII). Although the policy was facially neutral, Judge E. Richard Webber of the U.S. District Court of the Eastern District of Missouri noted that because prescription contraceptives are available only to women, the exclusion of prescription contraceptives from health insurance plans burden female employees. *Id.* at 984. For this reason, the court determined that the exclusion of prescription contraception from the employer's health insurance plan was not gender neutral. *Id. But see* Wright v. DaimlerChrysler Corp., No. 4:03CV1843 (CDP), 2005 U.S. Dist. LEXIS 42366, at *6 (E.D. Mo. Jan. 10, 2005) (finding that the PDA creates no separate cause of action for pregnancy discrimination, but that such claims may be brought under Title VII).

315. *Cooley*, 281 F. Supp. 2d at 984.

316. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1274 (W.D. Wash. 2001).

317. *Id.*

318. *See In re* Union Pac. R.R. Emp't Practices Litig., 479 F.3d 936, 942 (8th Cir. 2007).

319. *Id.*

320. *Id.*

321. 29 C.F.R § 2590.715-2713 (2015).

4. The PDA and Menstruation

Discrimination by employers on the basis of menstruation both is and is not prohibited discrimination under Title VII, as amended by the PDA.[322] Policies requiring that women have a regular menstrual cycle before returning to work have been viewed by some courts as violating Title VII's prohibitions against pregnancy discrimination.[323] However, in other cases, courts have held that menstrual cramps are not a medical condition related to childbirth or pregnancy for the purpose of the PDA and therefore disparate treatment on the basis of menstrual cramps is not sex discrimination.[324]

C. The Frontiers of Pregnancy Discrimination

The real life contradictions of the PDA, as exemplified by the circuit court disagreements about fertility, lactation, contraception, and menstruation, do not represent the full diversity of pregnancy discrimination that may occur in society. Pregnancy, like other forms of reproduction, has been subject to profound shifts in its possibilities through scientific and cultural changes.[325] In the twenty-first century, pregnancy has become untethered from the binary patriarchal heterosexual family unit in important ways. The increasing use of assisted reproductive technologies and other interventions has had a significant impact on how pregnancy takes place, who becomes pregnant, and the reasons people do so.[326] Further, the changing nature of family and the diversity of ways in which families are formed[327] also creates complications. These changes in social circumstances create the conditions that make it possible for employers to engage in pregnancy-related discrimination and reproduction-related discrimination that should be prohibited by the PDA on grounds of fairness and justice.

The following hypotheticals illustrate possibilities that may emerge in future challenges for pregnancy discrimination protections. These scenarios concern pregnancy-related discrimination that is experienced either by those who have not been pregnant or by those individuals who have been pregnant, but whose pregnancy flouts conventional social norms in some way:

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322. *Compare* Harper v. Thiokol Chem. Corp., 619 F.2d 489, 493 (5th Cir. 1980), *with* Jirak v. Fed. Express Corp., 805 F. Supp. 193, 195 (S.D.N.Y. 1992).

323. *Harper*, 619 F.2d at 489 (finding a company policy that required women to have a regular menstrual cycle before returning to work after pregnancy lacked a business necessity and imposed a burden on women that it did not impose on men).

324. *Jirak*, 805 F. Supp. at 195.

325. Multiple births, for example, have become more common. Debran Rowland, The Boundaries of Her Body: The Troubling History of Women's Rights in America 405–06 (2004).

326. *Id.*

327. *See* Nancy D. Polikoff, Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law (2008) (examining the diversity of family configurations and needs beyond the monogamous married family).

Ling is a single woman who works as a mid-level manager at a tech company. Happily unmarried, Ling seeks out a sperm donor in order to have a child. As the rumors trickle in, Ling is treated differently. She is denied access to interesting projects, left home when her peers are traveling, and considered "unserious" about her work even though her performance has not changed. During her fertility treatments, Ling does not become pregnant and receives a diagnosis of unspecified female infertility. Ling was never pregnant and was not a caregiver. Has Ling experienced pregnancy discrimination?

Loretta is social worker at a nonprofit organization that serves children. She is also a woman of size. At five foot, four inches tall her weight fluctuates between 180 pounds and 220 pounds. After injuring herself in a 5K run, she gradually shifts from 184 pounds, to closer to 200 pounds. Her supervisor assumes she is pregnant and removes her from the most challenging and, admittedly upsetting, cases. Her supervisor also starts to indicate that Loretta is not serious about her job. In Loretta's annual review, her supervisor also jokes that any promotion in title is unlikely because she is just going to be consumed by the baby anyway. Loretta is not pregnant. Has she suffered from pregnancy discrimination?

Jackie and Maria are a lesbian couple. Although Maria is giving birth to their daughter, Jackie is the egg mother and intends to induce lactation in order to breastfeed. Jackie is a nurse at a local private hospital. Her employer is a big supporter of breastfeeding and infant bonding. It provides six weeks of paid leave for mothers who have given birth. When Jackie asks for the paid time off, she is told that although they support her efforts to breastfeed her infant son, she is ineligible for the paid leave because she has not given birth. She was not pregnant, after all. Should discrimination against a breastfeeding mother who did not carry the child constitute pregnancy discrimination?

Samantha is a surrogate for James and Louise. She is Louise's sister. James and Louise decided to conceive through a surrogate because Louise is a survivor of breast cancer. As part of her treatment, Louise underwent a double mastectomy. She is very keen to breastfeeding, but is unable to do so. Samantha is willing to pump breast milk for a year after the birth to provide for her nephew. Samantha is a teacher and plans to give birth in the summer to accommodate her employer. When she returns to work in August, her employer refuses to accommodate her need to express breast milk. Her employer claims that as a surrogate, she is not entitled to the protections that other women at her workplace receive. Providing breast milk for her infant nephew is a lifestyle choice. Is this a form of pregnancy discrimination?[328]

328. This factual pattern shares some elements with the case of *Gonzalez v. Marriott International, Inc.*, in which an employee who had performed surrogacy services took breaks to express milk for the infant. No. CV15-03301MMM(PJWx), 2015 WL 6821303, at *16 (C.D. Cal. Apr. 11, 2015) (denying motion for summary judgment).

These scenarios differ in many respects. In some situations, the individuals have been denied accommodations typically granted by an employer to other employees because they do not fit the ideal image of persons protected from pregnancy discrimination by the PDA. In other cases, employers have made presumptions about the employees' work ethic or work ability because of their perceptions about pregnancy. However, the employees all bear the costs of cultural presumptions about appropriately pregnant persons, even if they do not conform to the biomedical definition of pregnancy. While many of these workers may find relief in the patchwork of caretaker protections emerging for employees at the state level,[329] it is not clear that Title VII as amended by the PDA would provide them with similar, appropriate protections.[330] If we reduce pregnancy to its biomedical definition and require gestation as a necessary precondition, then no pregnancy discrimination occurs as a matter of law. However, perhaps there has been some form of sex-related caregiver discrimination or sex-based sexual orientation discrimination.

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329. Although plaintiffs have often not been successful in obtaining relief, new state legislation protecting individuals from discrimination on the basis of family responsibilities might provide women and men caring for children some level of protection from employment discrimination. In response, many state legislatures have expanded the antidiscrimination protections that Title VII provides beyond pregnancy to encompass family responsibilities like infant care within the scope of their antidiscrimination regime. ALASKA STAT. § 18.80.220 (1996) (prohibiting discrimination on the basis of pregnancy or parenthood); *see also* CONN. GEN. STAT. § 46a-60(a)(9) (2011) (preventing employers from requiring information related to an individual's "child-bearing age or plans, pregnancy, function of the individual's reproductive system, use of birth control methods, or the individual's familial responsibilities, unless such information is directly related to a bona fide occupational qualification or need . . . ."); D.C. CODE § 2-1402.11 (2006); N.J. ADMIN. CODE § 4A:7-3.1 (2015). Sixty-three cities or counties currently have laws that "explicitly prohibit employment discrimination based on parental status, familial status, or family responsibilities." Stephanie Bornstein & Robert J. Rathmell, *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination*, CTR. FOR WORKLIFE LAW, UNIV. OF CALI, HASTINGS COLLEGE OF THE LAW (2009), http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf [https://perma.cc/8NW8-A93C]; *see also* Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 4, 2000) (ordering that federal employees cannot be discriminated against on the basis of their parental status).

330. Discrimination against caregivers seems to persist in the workplace. Press Release, EEOC, Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities Widespread Problem, Panelists Tell EEOC (Feb. 15, 2012), http://www.eeoc.gov/eeoc/newsroom/release/2-15-12.cfm [https://perma.cc/4JSH-TMTM]; *Written Testimony of Joan C. Williams*, EEOC (Feb. 15, 2012), http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm [https://perma.cc/4JSH-TMTM]. Increasingly, employees are seeking protection from discrimination on the basis of care responsibilities, but they have not been entirely successful in their efforts. *See* Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 171 (2006) (examining the "rapidly expanding" field of family responsibility discrimination). Many commentators regard discrimination against caretakers and caretaking in the workplace as among the most important contemporary crises in the United States. *See, e.g.*, Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making a Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTING L.J. 1463, 1464 (2008); Kessler, *supra* note 64, at 436 (examining the ways in which women's cultural caregiving is often beyond the reach of antidiscrimination); Zatz, *supra* note 64, at 46.

Each of these individuals is similarly situated to pregnant employees in important ways. In each of these scenarios, individuals experience pregnancy-related discrimination, or the lack of a socially and culturally mainstream pregnancy, in the workplace. They are all on the receiving end of harm because of pregnancy-related stereotypes and cultural presumptions about women and work. They also bear the same social and cultural costs of care that often emerge from pregnancy. Each of them, however, does not conform to the biomedical definition about what a culturally appropriate pregnancy should look like. However, each of them will suffer discrimination because of stereotypes about the limitations on women who have been pregnant. Even if they are similarly situated in terms of responsibilities, bodily fatigue, emotional bonding, and social stigma, they will not receive the same benefits accorded to other pregnant women. In each of the cases, they and their loved ones could be considered to be "expecting" to expand their families.

Furthermore, employer policies that provide additional benefits and privileges to persons who fit the biomedical model of pregnancy, while excluding those that are socially and emotionally engaged in the work of reproduction, have a pernicious discriminatory impact. The Supreme Court's determination that the PDA constitutes a floor but not a ceiling for employers permits employers to provide additional benefits to employees who are carrying a child, while denying such benefits to other employees.[331] There are some circumstances where it is unlikely that some types of pregnancy-favoring employer policies survive scrutiny under Title VII;[332] nonetheless, many policies that are similar to those exemplified by the hypotheticals are permissible under the PDA.

However, policies that privilege gestational pregnancy and refuse to recognize the diversity of family formations and the work of reproductive labor beyond gestation may frustrate the purpose of the Act. First, they fail to value similarly situated employees with similar social circumstances equally. If a parent adopting a child is denied maternity leave, while other parents gestating a child are provided with leave, the employer has failed

331. Cal. Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987). If one takes seriously the Supreme Court's "floor . . . but not a ceiling" characterization of the PDA, the Act allows employers to provide accommodations and even additional benefits to pregnant employees without providing them to other employees, in part because such policies serve the larger purposes of the statute. *Id.*

332. As Noah Zatz argues,

> Were the Court serious about the 'floor . . . not ceiling' principle, then these policies should be permissible under Title VII so long as they were triggered by pregnancy; indeed, men should simply never have standing to bring a 'reverse' pregnancy discrimination claim. Such an understanding would make pregnancy-favoring decisions permissible entirely without any anchor in a remedial framework . . . . Instead, [the PDA as interpreted in *Cal. Fed.*] requires that employers provide a remedy to a group of employees, each of whom otherwise would suffer workplace harm because of her sex. In other words, the principle of distribution is not pregnancy, but rather pregnancy-based harm.

Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155, 1176–77 (2015).

to treat adopting parents fairly. Many of the costs and challenges of incorporating an infant into a family emerge from social and emotional aspects of the endeavor.[333] And while the recovery from pregnancy entails physiological changes and costs, some of the physical demands of caring for the infant during the first three to six month are similar whether one has gestated the infant or not.[334] For this reason, the provision of maternity leave and other benefits that manage to exclude adoptive parents or parents who have opted for a surrogate has the potential to create resentment among those excluded from the ameliorative protections and a perception of an "undeserved" favored status. Reconstructing pregnancy may also provide a strategy for dealing with the future challenges to pregnancy discrimination law that will map onto the changing way in which families are formed.

D. Conclusion

When courts adjudicate the contours of pregnancy discrimination in reference to the "plain meaning" of pregnancy or the legislative history of the PDA, this gives rise to contradictory interpretations of the Act, creating significant circuit court splits that the Supreme Court has yet to weigh in on. Despite claims that pregnancy has a "plain meaning," the pregnancy discrimination jurisprudence reveals how the simplicity of certain definitions can obscure complex disagreements about pregnancy's meaning.[335] Pregnancy, as defined for the purposes of sex discrimination law, has an indeterminate meaning. Often, courts adjudicating matters related to pregnancy fail to define the term at all, assuming that the nature of the condition is clear and needs no explanation. The meaning of "pregnancy discrimination" has not been sufficiently clear so as to ensure that judges, who are mostly male,[336] apply the PDA's protections in a fair and consistent fashion. The lack of consistency and fairness creates a type of circuit court lottery for plaintiffs seeking protection from pregnancy discrimination. In relying on a biomedical model of what pregnancy discrimination means, courts have failed to produce a clear, consistent definition of pregnancy and have failed to consistently determine which conditions, ill-

333. Matambanadzo, *supra* note 13.

334. *Id.* (discussing the demands of feeding, bonding, and care for infants).

335. *See supra* Part II.B. It is unsurprising that pregnancy discrimination law is characterized by its inconsistency and indeterminacy because it is a subset of sex discrimination law. The law of sex discrimination has been characterized by its inconsistency and ambiguity. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 Cal. L. Rev. 1, 18–19 (1995) (showing how the law of sex discrimination contains a loophole that permits sexual orientation discrimination). As Cary Franklin has argued, examining the legislative history of Title VII, the "traditional conception" of sex discrimination is an invented one that has been subject to malleability and multiple interpretations. Franklin, *supra* note 31, at 1312.

336. Fact Sheet, National Women's Law Center, *supra* note 225. While this represents significant progress, there are certain circuits that have far lower percentages of female judges, including the Third Circuit (17%) and the Eighth Circuit (20%). *Id.* Moreover, six district courts have never had a female judge on the bench. *Id.*

nesses, or injuries are medically related to pregnancy. The next part of this article offers an alternative to biomedical understandings of pregnancy. Such understanding involves a "thick" conception of pregnancy, which demonstrates the importance of the social and cultural aspects of pregnancy.

III. RECONSTRUCTING PREGNANCY

[I]n a dynamic model, law is always becoming. And the judge has a legitimate role in determining what it is that the law will become.[337]

In order to give effect to the scope of pregnancy discrimination, in all its ambiguity and complexity, the current understanding of pregnancy must be replaced with a legal perspective that regards pregnancy, and its material effects, as a culturally-contingent, socially constructed process. This section provides perspectives on pregnancy that challenge the biomedical model of pregnancy that is often employed by the judiciary. It provides theoretical, historical, scientific, and experiential examples of the ways in which pregnancy is constructed through social and cultural forces. Then the article begins reconceiving pregnancy by articulating a more responsive, multi-faceted conception of pregnancy for the purposes of the PDA. It argues for expanding the legal conception of pregnancy beyond the presumptions of biological essentialism that currently characterize the current PDA jurisprudence and moving towards a more responsive conception of pregnancy discrimination.

The meaning of pregnancy is dependent upon a variety of variable factors, situated in a particular social moment. This meaning is constructed not only by the actions of the state, but also by a variety of institutional and individual actors.[338] The meaning of pregnancy is responsive to these particularities and also to the practices of various actors. As policies, laws, and community attributes change, so does the meaning of pregnancy.[339] Drawing on a variety of interdisciplinary sources, this part of the article highlights how social and cultural forces have the power to construct and shape the nature of pregnancy, our understanding of pregnancy, our experiences with pregnancy, and, ultimately, the medical, biological "realities" of pregnancy. This part reconstructs pregnancy to transform it into a product of culture, social relations, and historical forces.

A. AN INTRODUCTION TO BIOMEDICAL ESSENTIALISM

In the realm of federal antidiscrimination law, the social, cultural, and relational aspects of pregnancy *and* physiological aspects of pregnancy, which can encompass the period of fertility before conception through

337. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 6 (1975).

338. RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA 10–13 (2005).

339. *Id.* at 17.

gestation and into the period during the fourth trimester, have often not been recognized as pregnancy-based discrimination.[340] Instead, courts have adopted a perspective that considers pregnancy through the lens of biomedical essentialism.[341] This section undercuts biomedical essentialism as a lens for understanding the pregnant body and begins to reconstruct the definition of pregnancy in ways that reveal the socially-contingent, culturally-mediated nature of pregnant bodies.

Biomedical essentialism is an ideological perspective that privileges medical and biological explanations and understandings of social phenomenon.[342] In privileging these perspectives, it naturalizes and universalizes historically-contingent, cultural understandings of physical processes, like pregnancy. It is a species of essentialism.[343] In its broadest philosophical articulation, philosophers could describe essentialism as "the belief that things have essential properties, properties that are necessary to those things being what they are."[344] Biomedical essentialism (1) reduces the process of pregnancy merely to physiological and biological aspects, as defined by the medical community, (2) privileges the biological and physiological aspects of pregnancy over its social and cultural aspects, and (3) treats biological and physiological aspects of pregnancy as "natural," pre-cultural "facts" of universal human existence that exist separately and apart from the social and cultural forces that give them meaning.[345]

Biomedical essentialism is embedded within the "common sense" approach to pregnancy, which presumes that pregnancy can be reduced to a biological event that is limited to the approximately forty-week period between conception and birth. From biological essentialism perspective, pregnancy is a natural aspect of what happens to women and women alone. It presumes that pregnancy is a trans-historical phenomenon that is unchanging, asocial, and universal for all women across cultures and historical periods. Like other forms of essentialist thinking,[346] biological es-

340. *See supra* Part II.B.

341. *See supra* Part II.B.

342. This notion of essentialism emerges from feminist theory literature and women's studies, and does not necessarily address the philosophy of biology debates between Aristotelians and Logical Positivists as to whether species have essential attributes due to their biological composition. *E.g.*, Michael Devitt, *Resurrecting Biological Essentialism*, 75 PHIL. SCI. 344, 346 (2008) (arguing for intrinsic essentialism, i.e., that "taxa have essences that are, at least partly, intrinsic underlying properties"). *Contra* Marc Ereshefsky, *What's Wrong with the New Biological Essentialism*, 77 PHIL. SCI. 674, 674 (2010) (introducing a variety of types of biological essentialism, yet arguing that there is no reason to adopt the perspective of biological essentialism).

343. *See* Devitt, *supra* note 342, at 346.

344. Allison Stone, *Essentialism and Anti-Essentialism in Feminist Philosophy*, 1 J. MORAL PHIL. 135, 138 (2004). Biomedical essentialism could be considered a species of biological foundationalism—the idea that the material nature of the bodies, i.e. that women have vaginas and men have penises, reveals "some 'deeper' level of biological commonality . . . ." Linda Nicholson, *Interpreting Gender*, 20 J. WOMEN IN CULTURE & SOC'Y 79, 79–82 (1994).

345. *See* Devitt, *supra* note 342, at 346; *see also* Ereshefsky, *supra* note 342, at 674.

346. For example, sexual essentialism presumes the natural, ahistorical, inevitably biological basis for sexuality. Rubin, *supra* note 16, at 267–92.

sentialism entails the elision of the fact that pregnancy, as it is understood and experienced by women in a particular context, entails important social practices and cultural norms that could be otherwise constructed.[347]

B. Pregnancy in Theory: Feminist Engagements with Pregnancy

This section problematizes the current legal practice of reducing pregnancy to its biological and physiological aspects by arguing that the biological and physiological aspects of pregnancy are not pre-cultural or natural, and that even the materiality of the body and its biology cannot be understood separately and apart from the cultural meanings and social relations that construct them. Its analysis focuses on perspectives of pregnancy that emerge from feminist theory. Feminist theory aids in this effort by highlighting how pregnancy, even in its biological and medical aspects, must be understood as social and relational in nature. This section uses feminist theoretical frameworks, particularly feminist embodiment theory, to provide one potential reconstruction of pregnancy as a foundational framework for thinking about reforming our antidiscrimination law.

The importance of social, cultural, and economic constraints on structuring pregnancy has been highlighted throughout feminist legal theory literature. Authors engaging in this analysis may argue for a legal conception of pregnancy that addresses both the social or cultural aspects of pregnancy and the physiological or biological aspects of pregnancy. What has not typically been addressed in legal scholarship, with a few exceptions,[348] is the ways in which the pregnant body is constructed by discursive cultural frameworks and social relations, and how it is produced as a material effect of power.

Drawing from various scholars in continental philosophy, anthropology, political economy, and the feminist tradition, feminist embodiment theory is a distinct branch of feminist theory[349] that has the potential to provide a productive analytical lens to define the scope and meaning of pregnancy in the law. Embodiment theory has been utilized by some legal

347. The critique of relying on biomedical essentialism is not designed to discount the experience of physiological or biological aspects of sex. After all, some feminists have argued that the examination of women's physiology and biology is not in itself essentialist. Colker, *supra* note 58, at 173–84. Anti-essentialist critiques can employ discussions of physiology and biology in nuanced ways that highlight how so-called biological differences exacerbate inequalities between men and women. *Id.* at 182 ("The *meaning* that society ascribes to . . . biological differences may not be inevitable . . . .").

348. Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 Mich. L. Rev. 371, 389–90 n.83 (1995) (claiming that the law constructs bodies).

349. Saru M. Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 13 Cardozo Women's L.J. 101, 120 (2006).

scholars to discuss a variety of topics including disability,[350] gender,[351] biological sex,[352] legal personhood,[353] corporations,[354] property theory,[355] and animal rights.[356] With a few exceptions,[357] legal scholars have yet to use the fresh perspectives provided by the embodiment theory to interrogate the nature of pregnancy and the pregnant body.

Part of the objective of embodiment theory lies in critiquing the formulation of philosophical questions about rights, subjectivity, personhood, and citizenship, and revealing how the underlying presumptions and normative frameworks, which discursively produce bodies, persons, and identities, are different in their effects.[358] In this effort, embodiment theory takes on the underlying cultural commitment to the binary conception of the self. This binary conception of the self is often traced to enlightenment thinking and attributed to Cartesian dualism,[359] which persistently separates the self into the body, the material "real" aspect of the person, and the mind or soul—the "true" self that is often conceptualized as having an eternal existence.[360] In law, as in other Enlightenment discourses, dualism is a paradigmatic framework for understanding not only persons, subjectivities, desires, and identities, but also the larger mechanisms of the universe, nature, and science.[361] Dualism constitutes "the assumption that there are two distinct, mutually exclusive, and mutually exhaustive substances, mind and body, each of which inhabits its

350. Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181 (2008).

351. Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519 (1988).

352. Matambanadzo, *supra* note 37.

353. Jessica W. Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369 (2008); Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POL'Y 45 (2012).

354. Anna Grear, *Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights*, 7 HUM. RTS. L. REV. 511 (2007); Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457 (2013).

355. HYDE, *supra* note 30; Halewood, *supra* note 30, at 1332–41 (arguing that postmodern conceptions of embodiment provide a conceptual way to resist the commodification of persons inherent in property based theories of the liberal subject); Meredith Render, *The Law of the Body*, 62 EMORY L.J. 549 (2013).

356. Matambanadzo, *supra* note 37.

357. Hanigsberg, *supra* note 348; Siegel, *supra* note 59.

358. Matambanadzo, *supra* note 37.

359. Dualism can also be seen in the Greek Platonic tradition. *See* Elizabeth Spelman, *Woman as Body: Ancient and Contemporary Views*, 8 FEMINIST STUD. 109, 123–28 (1982). And in the Judeo Christian religious tradition, as well. *See* Matambanadzo, *supra* note 37 (manuscript at 63–64) (describing dualism as a common framework held by many philosophers, including Kant, Aristotle and Plato and an aspect of Judeo Christianity).

360. Matambanadzo, *supra* note 37 (manuscript at 64).

361. ELIZABETH GROSZ, VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM 13–14 (1994). Dualist perspectives often adopt a hierarchical way of thinking about bodies and persons, which associates male persons with the mind and soul and female persons with the body and its materiality. As Grosz argues, dualism that privileges the mind over the body is often associated with patriarchal forms of dualism that privilege men over women. *Id.* Due to their reproductive capacity and their sexuality, women are "presumed to be incapable of men's achievements, being weaker, more prone to hormonal irregularities, intrusions and unpredictabilities." *Id.* at 14; *see also* Matambanadzo, *supra* note 37 (manuscript at 123).

own self-contained sphere."[362] As part of this adherence, the body is often conceptualized as natural and "real"–existing in a pre-cultural state that is not influenced by social aspects.[363] Embodiment theory, or feminist theory of the body, challenges the notion that bodies, even in all their physical materiality and biological "reality," exist apart from the discourse that creates them, the culture that gives them meaning, and the social interactions that engender them.[364]

From the perspective of feminist embodiment theory, the biological aspects of "sex" are socially constructed and mediated through culture. The body and its materiality, like gender, is constructed through the same types of acts and reiterations that construct gender.[365] The biological nature of sex is a type of regulatory ideal, one that defines the intelligibility of individual subjects and signals belonging in the social order.[366] For this reason, "[t]he materiality of the body is a product of construction . . . there is no Eden when it comes to the body. There is no going back to the 'pre-constructed' state of the body," outside of language and culture, for the "body is only possible through construction."[367] Instead, the way we conceptualize the body is a product of varied cultural understandings, informed by the larger meaning of what it is to be a man or a woman and shaped by gender norms.[368] Feminist embodiment theory, in its construction of theoretical conceptions of the body, has been influenced by the work of Michel Foucault. For Foucault, the body, even in the realness of its materiality, is an effect of the materiality of power.[369] He notes that, "nothing is more material, physical, corporal than the exercise of power" upon the body.[370] Judith Butler builds on Foucault's insight, explaining the complex way in which culture and the social (through discourse) materializes the body as an effect of power:

> For discourse to materialize a set *of effects*, "discourse" itself must be understood as complex and convergent chains in which "effects" are vectors of power. In this sense, what is constituted by discourse is not fixed in or by discourse, but becomes the condition and occasion for further action.[371]

It is important to note, however, that the materialization of a set of effects, i.e. the body and our understanding of it, does not constitute an unbound process where any possibility is open.[372] Not all discursive itera-

362. GROSZ, *supra* note 361, at 6.
363. *Id.*
364. Matambanadzo, *supra* note 37.
365. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 146 (1993).
366. *Id.* at 1.
367. Matambanadzo, *supra* note 37 (manuscript at 125).
368. Nicholson, *supra* note 344, at 83.
369. MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–77 (1980).
370. *Id.* at 57–58.
371. BUTLER, *supra* note 365, at 187.
372. *Id.*

tions can be materialized and not all discourse has the power to engender materialized effects.[373] Instead, the materialization of discourse is circumscribed, simultaneously, by the power of discourse to constrain what can be recognized and understood through the domain of intelligibility.[374] What is intelligible, i.e., what can be materialized, is effectively circumscribed by the same discourse that is materialized as an effect of power.[375] For this reason, the effects produced in the materialization of discourse are unstable and are never complete in their reiteration of the discursive norm.[376]

Embodiment theory provides a unique perspective on pregnancy that bridges the gaps between various feminist theories, including feminist phenomenology and clinical perspectives from midwifery and maternal nursing and law, and reveals how discursive forces shape even the materiality of biology as we understand it. The insight that pregnancy is socially constructed emerges, in part, from the perspective of queer theory and embodiment theory, which highlights how the body has been constructed through discursive acts and interventions.[377] The tradition of embodiment theory, drawn from the work of Michel Foucault and Judith Butler, reveals how the material realness of bodies is not attributable to nature and does not emerge from a pre-discursive space.[378] It does not exist separately and apart from cultural and social relations, and its current articulation is dependent upon legal, cultural, and social powers and expectations. Instead, the material realness of the body itself is a product of culture and discourse.[379]

Embodiment theory reveals how the materiality of the pregnant body, similar to the materiality of other bodies, is rendered real and intelligible by the discursive processes and practices that produce it. Discursive processes, which entail social and cultural factors, emerge from continual interactions and iterations. Pregnancy is a profoundly cultural and social process, one that is constructed, in part, by often unspoken ideological commitments. It is produced as a material effect of power. The pregnant body, as experienced by individuals, studied by researchers, regulated by the state, and managed by the medical establishment, is a product of these institutional forces.

1. Performatively Pregnant: Constructing the Pregnant Body

The pregnant body can be constructed or concealed through communication. The pregnant body, still as slender as ever, and only slightly nause-

373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.* at 187–88.
377. Michel Foucault, *Nietzsche, Genealogy, History*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 139, 145 (Donald F. Bouchard & Sherry Simon, trans., 1977); GAYLE SALAMON, ASSUMING A BODY: TRANSGENDER AND RHETORICS OF MATERIALITY (2010); BUTLER, *supra* note 365.
378. BUTLER, *supra* note 365, at 146; Foucault, *supra* note 377.
379. *Id.*

ous in the first trimester, is known through the communications shared with friends, family, partners, employers, and strangers. When one declares, "I am eight weeks pregnant" to an employer, friend, or partner, the relational understanding of the body shifts. The pregnant body begins to take shape and form. As the pregnancy continues, clothing and posture might contribute to the iterations, as one alters his or her physicality to demonstrate pregnancy. Similarly, the body is not necessarily intelligible as a pregnant body at the moment of conception, or upon the first day of the missed period, or upon the moment when the early pregnancy test (EPT) reveals a plus or a minus. The body becomes a pregnant body through the iteration and reiteration of communication. Over weeks, months, and trimesters, individuals often communicate their pregnancy to others through social, cultural, and physical interaction, increasing the recognition and understanding of the body as a pregnant body. The way one walks, dresses, talks, sits, and stands communicates the status of a pregnant person.

The pregnant body and its materiality cannot simply be reduced to biological aspects of pregnancy because the pregnant body can be concealed, obscured, or ignored. The pregnant body can be concealed, by accident or intention, through silence or omission.[380] The pregnant body can be further obscured by the refusal of others to regard one as appropriately pregnant. This normative force can be seen in viewing how discursive practices define and delineate the realm of intelligibly pregnant bodies. Even if an individual's body might be pregnant according to biological standards, the cultural and social forces shape who we regard as appropriately pregnant for the purposes of recognition and protection.[381] Individuals may be too young or too old to be regarded as intelligibly pregnant. They might be too butch or too masculine to be regarded as being intelligibly pregnant. Furthermore, as many women of size and disabled women realize, they may be too disabled or overweight to be regarded as intelligibly pregnant. In contrast, some non-pregnant women, due to cultural norms about what a women's body should look like and how it should appear to others, may face the problem of constantly being regarded as pregnant even when they are not. Women of size who are not pregnant often drolly (and not so drolly) recount narratives where they are asked about the status of their pregnancy, how far along they are, or what gen-

380. An entire reality television genre has been built around stories of individuals who did not know they were pregnant. *See, e.g.*, *I Didn't Know I Was Pregnant* (TLC television broadcast 2009–2011).

381. Pregnancy, like reproduction more generally, is constructed through ideologically laden notions of who is appropriately or inappropriately engaged in the process. *See* Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1008–09 (1995) [hereinafter Ikemoto, *The In/Fertile*] (examining how reproductive technology functions differently for women and men on the basis of race, class, and sexual orientation); *see also* Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205 (1992) [hereinafter Ikemoto, *Perfect Pregnancy*] (discussing the idea and practice of controlling women with regard to conception, gestation, and childbirth in a manner which reflects dominant cultural notions of motherhood).

der child they are having. Some women, in response, may brashly declare, "I'm not pregnant thanks. Just fat."

Like gender, pregnancy is often constituted by discourse and is communicated through a set of iterations, repetitions, and gestures. Acts, gestures, and words communicate one's status as pregnant or not pregnant to other individuals. A woman pensively stroking her out-thrust belly on the bus with an "Eating for Two" shirt on proud display communicates a very different message than her seat mate, a younger woman (who conceived on the same day) slouching behind a sweatshirt and oversized sweater, concealing her "condition" from prying eyes. How a pregnancy is disclosed, when it is disclosed, and continued signals around pregnancy disclosure, create the meaning of pregnancy through communication. Pregnancy may even have an important performative dimension, as the ways in which people communicate the status of being pregnant or not pregnant has an impact on its meaning, salience, and visibility. Someone who has become pregnant after a long period of fertility counseling and intervention may prominently display her pregnancy, signaling it with clothing or gestures, physically taking up more room, and broadcasts gestation and pregnancy clearly in conversations. Another individual who, even at a later stage, is trying to hide the pregnancy from an employer may attempt to conceal physical changes, may take up less physical space, and engage in efforts to minimize the appearance of pregnancy. When asked, such an individual may disavow pregnancy, signaling that any perceived physical changes are the result of weight gain, water retention, stress, or some other cause.

The pregnant body's reality, however, may also be precarious in nature. In order to stay pregnant and maintain the pregnancy in the United States, the pregnant body is subject to constant supervision by medical health professionals and the constant monitoring of bio-technologies that continue to affirm the existence of a pregnancy and one's status as pregnant. Fetal ultrasounds, which capture and display the sound of fetal heart beats and images of a viable fetus, are one example of such technologies. The necessity of this monitoring is perceived as essential in the U.S. Even when health insurance is rationed to exclude many low-wage workers, poor adults, and poor children, states have adopted free medical care and monitoring for pregnant persons.[382]

While the physiological effects of pregnancy are often experienced by pregnant persons as being "natural" or as connecting them to some precultural state, often this experience is mediated through social interactions with peers, medical authorities, family members, and even perfect

382. *Health Coverage if You're Pregnant or Plan to Get Pregnant*, HEALTHCARE.GOV, https://www.healthcare.gov/what-if-im-pregnant-or-plan-to-get-pregnant [https://perma.cc/AQP9-MTH5]. This health care, however, is often used to regulate poor women and women of color. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1430–32, 1445 (1991); *see also* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1254–55 (2012).

strangers. Often, pregnancy is characterized as the natural result of heterosexual unions, a natural and essential state of being a woman, and as a natural necessity for the continuation of human life and the architecture of society. After all, human beings must reproduce, and it is human females, i.e. women or mothers, who "have babies." This perspective presumes that pregnancy, and its cultural, social, and biological meaning, remains the result of an ahistorical, universal "fact" of the world and cannot be changed. In spite of those who urge the judiciary to structure its determinations about pregnancy with deference to biology,[383] there is no indication that notions of what is perceived to be "natural" at a particular time and in a particular context should drive public policy.[384] Although pregnancy is generally characterized as a natural event existing apart from social relations, pregnancy should be understood as culturally constructed and historically situated. Given historical contingencies and technological realities, there may be some aspects of pregnancy that cannot currently be changed. At this time, pregnancy has physiological and biological aspects that are experienced by an individual with a uterus, be it a man or a woman, in order for the reproduction of the species to occur. Technology has not advanced to the point where artificial wombs remove the role of humans from reproduction.[385]

For this reason, pregnancy should not be understood merely as a "natural" condition existing separately and apart from sociocultural forces. Further, defining pregnancy in law from a perspective that starts with biological essentialism is misguided because it fails to properly account for the relationship between the "sex" aspects of pregnancy (i.e., biological, physiological aspects) and "gender" aspects of pregnancy (i.e., the social, cultural, discursive, psychological aspects). However, the way in which pregnancy is mediated through medical discourse, cultural norms, and social relations demonstrates that the meaning of pregnancy, its scope, duration, and consequences are a product of sociocultural customs and engagements. The notion that pregnancy is natural also reduces its scope and meaning to the biological period of pregnancy, which spans the period from conception to gestation and birth. This limited perspective on pregnancy disregards the experiences of many women and the expertise of those who care for pregnant women and their infants.[386]

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383. BROWNE, *supra* note 68, at 68 (arguing biology explains differences in wages and employment outcomes); Browne, *supra* note 71; Epstein, *supra* note 68, at 998 (arguing biological sex differences can explain patterns in the labor market); Purvis, *supra* note 35 (manuscript at 3–5, 14, 48) (discussing how criminal law, family law, and other legal systems interlock to regulate motherhood and the experience of pregnancy).

384. Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369, 375–78 (1995); Hendricks, *supra* note 23, at 365 (noting that legal significance does not necessarily arise from nature and that "[m]uch of our legal and social structure is devoted to suppressing what appear to be natural impulses").

385. *See* Hendricks, *supra* note 23, at 330 n.2 (arguing "that men are free to develop technology to become mothers"); *see also* Jennifer S. Hendricks, *Not of Woman Born: A Scientific Fantasy*, 62 CASE W. RES. L. REV. 399 (2012).

386. Matambanadzo, *supra* note 13.

2. *Pregnant with Social and Cultural Meaning*

Our understanding of pregnancy is a product of what theorists like Deleuze and Guitarri call territorial assemblages.[387] The unified concept of pregnancy emerges from an amalgam of discourse, practices, and behaviors stemming from legitimated and non-legitimated actors. As such, pregnancy, as a product of discourse, practice, and behavior, entails social, psychological, and physiological aspects. This shifting meaning of pregnancy can be revealed by engaging in a cursory inquiry into the anthropology and history of pregnancy. Such an inquiry reveals how at different times and in different cultural contexts pregnancy has been constructed in different ways. Pregnancy has been presented as a historical, pre-cultural phenomenon—something that female human beings have always done and will always do. It is a process with social, psychological, and physiological components. Its meaning and its limits are shaped by social forces. Medical discourse is one social force that shapes the meaning of pregnancy. For example, in the mid-twentieth century, the medical establishment treated pregnancy as an illness or a state of being unwell.[388] The sick pregnant body has been routinely categorized as a medical problem requiring extensive intervention and healing.[389] In the 1970s, this paradigm shifted, partly through the work of midwives, maternal nurses, and feminist activists, and this concept of pregnancy as an illness was replaced by a notion that pregnancy was a "natural" state for women that required facilitation in many cases, not heavy-handed intervention.

Although the law perceives pregnancy primarily in its biological and physiological aspects, pregnancy should be understood as a socially constructed phenomenon. Social and cultural perceptions—drawn not only from the law, but also from popular culture—shape how the material effects of pregnancy, i.e. biology and physiology, are understood and experienced. When one argues that pregnancy, like gender, is performative, one is not arguing that pregnancy is neither real, nor powerful, nor material. Pregnancy is not a condition created by the human will, responsive to the volition of individuals, nor is pregnancy merely linguistic in nature.

Instead, as an interdisciplinary engagement with pregnancy reveals, it is a complex product of social and cultural aspects as well as biological and physiological aspects that are mediated through social and cultural frameworks. The biological and social aspects of pregnancy are co-constituting in a foundational way. Social and cultural aspects of pregnancy shape individual experience and mediate the biological and physiological

387. George E. Marcus & Erkan Saka, *Assemblage*, 23 THEORY, CULTURE & SOC'Y 101, 101–04 (2006).

388. The medical model of pregnancy presumes a technological understanding of the body in which the male body is the default standard. BARBARA K. ROTHMAN, IN LABOR: WOMEN AND POWER IN THE BIRTHPLACE 36–39 (1982). This means that often normal or even healthy aspects of the female reproductive process are treated as deviant illnesses to be managed and treated. *Id.*

389. GEORGE RITZER, THE MCDONALDIZATION OF SOCIETY 134–40 (2010).

"reality" of pregnancy. Furthermore, the cultural presumptions around pregnancy assert a powerful force in law, creating a normative notion of pregnancy as a biological or physiological phenomenon experienced only by people with female reproductive organs.[390] These cultural presumptions dictate not only how pregnancy is broadly understood within pregnancy discrimination cases, but also how individuals filing pregnancy discrimination suits should intimately experience pregnancy.

Pregnancy, for this reason, can be considered pregnant with meaning. The ways in which the physical symptoms and so-called biological realities of pregnancy are shaped, experienced, and given meaning happens through discourse and social practice—they are socially situated. The meaning and experience of pregnancy is contingent on being pregnant during a particular time (e.g., the early twenty-first century or late nineteenth century),[391] in a particular place (e.g., rural northern Louisiana, East Los Angles, Southfields, London, etc.),[392] and while occupying a particular social and economic position (e.g., race, gender, tribal affiliation, socioeconomic class, sexual orientation, disability status).[393] Further, one's familial status (being pregnant as a minor daughter as compared to being pregnant as a married wife, or being pregnant as a single woman) and one's professional position (being a pregnant stay at home mother compared to being a pregnant woman working in a warehouse compared to being a pregnant woman working as a lawyer) significantly shape the context and experience of pregnancy and its meaning. The ways in which women discover their pregnancies (for example, through an early test in a doctor's office during the first weeks, after months of spotty periods through an at home pregnancy test, or at the last minute when going into labor) and monitor their pregnancies (for example, pregnancy with a significant degree of medical intervention will be experienced differently than pregnancy under the supervision of a midwife in a traditional society, or a pregnancy that goes undiscovered until shortly before delivery) also contribute to the communication of a pregnancy.

While pregnant persons undergo a physiological process of reproduction that has biological elements, pregnancy cannot be accounted for in law by reducing it to the elements emerging from its "real physiological" or "real biological" elements. The "reality" of pregnancy is constructed and mediated through the discursive construction of pregnant persons,

390. Not all of these individuals are women. *See* Beatie v. Beatie, 333 P.3d 754, 755–56 (Ariz. Ct. App. 2014) (providing legal recognition of a particular pregnant man's male sex after giving birth to three children).

391. RICHARD W. WERTZ & DOROTHY C. WERTZ, LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA 109, 127 (Expanded ed., Yale Univ. Press 1989) (1977).

392. Frances E. Korbin, *The American Midwife Controversy: A Crisis of Professionalization*, *in* CHILDBIRTH: CHANGING IDEAS AND PRACTICES IN BRITAIN AND AMERICA 1600 TO THE PRESENT 96–109 (Philip K. Wilson ed., 1996) (demonstrating that women in rural areas utilized midwives more frequently than those in the cities).

393. Marcia P. Harrigan & Suzanne M. Baldwin, *Conception, Pregnancy, and Childbirth*, *in* DIMENSIONS OF HUMAN BEHAVIOR: THE CHANGING LIFE COURSE 39, 51–52 (Elizabeth D. Hutchison ed., 2008).

and pregnant bodies, as possessing a particular set of vulnerabilities and capabilities. This construction means that pregnancy does not exist separately and apart from social interactions. It is mediated through cultural processes that construct individuals as pregnant and accord value to some pregnancies while denigrating and devaluing others.[394]

C. Biomedical Paradoxes and Pregnancy

Even in the realm of medical and scientific discourse, pregnancy is understood in contradictory ways with shifting meanings. It is not an objective event with a clear beginning, middle, and end that is identical from pregnancy to pregnancy. Instead, it is a uniquely experienced process whereby an individual pregnant woman undergoes physical, emotional and psychological growth and change. Although conception could be conceptualized as the beginning of pregnancy, for many individuals who are undergoing infertility treatments, the experience of becoming and being pregnant begin long before that moment. For others who might not consciously choose to become pregnant, the beginning of the pregnancy may start with a missed period, a positive pregnancy result or even an ultrasound image of the fetus. The beginning of pregnancy from an experiential perspective is not the moment of conception, but instead for the individual who actually is pregnant can occur before conception or after conception.

The beginning of pregnancy is not a clear-cut event that can be easily reduced to a particular starting point. The social beginning of pregnancy emerges as a combination of a woman's individual discovery of her pregnancy and her subsequent disclosure of her condition to others. Even the physiological aspects of pregnancy, grounded in biology, have an amorphous starting point that makes it difficult to pinpoint when a pregnancy begins. As two commentators reveal, examining the scientific literature, the beginning of pregnancy can be hard to define:

> Depending, therefore, on how each of these terms is defined, "the moment of conception" will vary in duration. If we define conception as if it were fertilization of the egg, it involves a minimum of seventeen to eighteen hours after male ejaculation. If we use the biologically accurate definition of conception as our guide, the "moment" of conception (implantation) is a week-long process.[395]

The medical definition of pregnancy is also contested.[396] Although the American College of Obstetricians and Gynecologists (ACOG) dictate that "[p]regnancy is established when a fertilized egg has been implanted

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394. *See* Ikemoto, *The In/Fertile*, *supra* note 381, at 1008–09 (discussing how reproduction by poor women of color—the "too fertile"—and gays and lesbians—the "dysfertile"—is accorded a different social value than those regarded as appropriately fertile).

395. Elizabeth Spahn & Barbara Andrade, *Mis-conceptions: The Moment of Conception in Religion, Science, and Law*, 32 U.S.F. L. Rev. 261, 265 (1998).

396. Rachel Benson Gold, *The Implications of Defining When a Woman is Pregnant*, 8 Guttmacher Rep. on Pub. Pol'y 7, 7–8 (2005), http://www.guttmacher.org/pubs/tgr/08/2/gr080207.pdf [https://perma.cc/PNC6-9EWP].

in the wall of a woman's uterus[,]" states define pregnancy in diverse ways.[397] Some state laws adopt the definition of pregnancy that requires fertilization and implantation, while other states define the beginning of pregnancy with the fertilization of the egg.[398]

The amorphous temporal nature of pregnancy is documented by women's experiences with their pregnancies.[399] The beginning of pregnancy is experienced and perceived differently by individual women undergoing the process.[400] While fertilization, implantation, or quickening might mark significant medical milestones, the beginning of the pregnancy as a social, emotional, or physiological experience might come before or after these events.[401] As Helen Marshall claims in her discussion of feminist phenomenology and pregnancy, when one becomes pregnant easily and unintentionally, the starting point for the pregnancy as an experience might vary:

> My own pregnancy began biologically at some time . . . but began for me at a different time. . . . I had a positive test on a DIY kit, and I said doubtfully "I think I'm pregnant?" My partner had no trouble with this statement—as far as he was concerned it was instantly a fact. . . . I (in relation to/opposition to my body) knew I was pregnant when I wrote that fact to my closest female friend. As far as other members of my network were concerned, my pregnancy seems to have started at the time they first heard about it . . . .[402]

In another example, Amy Klein, who writes a blog chronicling her struggles with infertility for the *New York Times*, discusses how precarious the beginning of a pregnancy can be, even after the fertilization of the embryo.[403] In one blog, entitled, *A Little Bit Pregnant: The Numbers Game*, Klein notes that even after the egg has been fertilized and the embryo placed inside of one's womb, there is still another step that must occur in order for an individual to be considered pregnant: implantation.[404] Implantation is necessary for the pregnancy to be viable.[405] As Klein notes, "getting those two pink lines on the pregnancy test stick is not the same as actually having a 'viable' pregnancy."[406] As Klein waits to become pregnant after conception, submitting herself to numerous blood tests measuring her Human Chorionic Gonadotropin (HCG) hormone

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397. *Id.* at 7.
398. *Id.* at 7–8.
399. Helen Marshall, *Our Bodies Ourselves: Why We Should Add Old Fashioned Empirical Phenomenology to the New Theories of the Body*, 19 WOMEN'S STUD. INT'L F. 253, 257 (1996).
400. *Id.*
401. *Id.*
402. *Id.*
403. Amy Klein, *A Little Bit Pregnant: The Numbers Game*, N.Y. TIMES (Oct. 15, 2013), http://parenting.blogs.nytimes.com/2013/10/15/a-little-bit-pregnant-the-numbers-game/?_r=0.html [https://perma.cc/EJ7N-YK8P].
404. *Id.*
405. 45 C.F.R § 46.202(f) (2015) (recognizing pregnancy as "the period of time from implantation to delivery").
406. Klein, *supra* note 403.

levels, she details her experience with being a "little bit pregnant," and then losing that pregnancy before the ninth week after fertilization.[407]

The process of pregnancy, similarly, does not necessarily end with birth at the end of gestation.[408] The process of pregnancy, which can involve the process of infertility treatments and more than forty weeks of gestation, often unwinds after the birth of an infant from a period that lasts between eight weeks to six months.[409] Women who have been pregnant do not cease to be physically and hormonally affected by pregnancy merely because they have given birth.[410] The physical aspects of pregnancy continue after the birth of the child.[411] Like the end of a partnership organization, the end of gestation requires a winding up period where many of the physical aspects of pregnancy continue slowly to recede, like the low tide.[412]

Pregnancy is often treated in antidiscrimination law like a biological event with a clear end point.[413] In my previous work, I have highlighted how the boundaries of pregnancy, particularly at its end point, are less than rigid.[414] Drawing on the work of midwives and maternal nurses—individuals who devote their working lives to caring for pregnant women—I introduced the concept of the fourth trimester to antidiscrimination law.[415] The fourth trimester is the three to six month period after the birth during which the pregnancy unwinds.[416] It centers on the social, emotional, relational, and psychological aspects of pregnancy and recognizes that the end of pregnancy is not defined by labor and birth, but by the winding up of the pregnancy process.[417] Even the physiological aspects of pregnancy require a period slowly winding up during this time after birth.[418] The concept of the fourth trimester highlights how pregnancy is less of an event and more of a process where the beginning, middle, and end of the pregnancy is highly individualized and more amorphous than common lay wisdom dictates.[419] Pregnancy, for the purposes of discrimination law, should be understood to include not only the period of gestation but, depending upon the circumstances, preconception, gestation, and even the "fourth trimester" period after the birth of the baby.

The fourth trimester concept also highlights the reality that pregnancy must be characterized by its multiplicity—i.e., its social, psychological,

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407. *Id.*
408. Matambanadzo, *supra* note 37 (manuscript at 117).
409. *Id.* (manuscript at 128–29).
410. *Id.* (manuscript at 128–29).
411. *Id.* (manuscript at 128–29 n.42).
412. *Id.* (manuscript at 180) (discussing how pregnancy unwinds through a process of recovery and restoration).
413. Matambanadzo, *supra* note 13, at 138–39.
414. *Id.* at 128–29.
415. *Id.* at 117, 124–25.
416. *Id.* at 124–25.
417. *Id.* at 128–29.
418. *Id.* at 131.
419. *Id.* at 166–70.

and relational aspects.[420] It cannot merely be reduced to biology and temporally located within the forty weeks between conception and the end of gestation.[421] The process of pregnancy entails social, emotional, psychological, physical, and biological aspects that often begin before gestation and end sometime after the birth of the child.[422] An antidiscrimination regime which reduces pregnancy and pregnancy discrimination to its biological and physiological elements without regard for how discourse, social relations, and cultural norms shape pregnancy will obscure discrimination by employers that should be actionable under law, and fail to protect pregnant workers from discriminatory treatment.[423]

Feminist philosophy, particularly the experience-oriented specialty of phenomenology, provides an account of pregnancy that does not conform to the rigid notion that pregnancy is a forty-week temporal "event."[424] Like Adrienne Rich, many feminists do not regard the emergence of the fetus from the mother's body and the subsequent "separation" of the mother and child as abrupt events that end at birth.[425] Instead, mothers and children emerge as separate, autonomous beings in a gradual process where independence unfolds slowly between two beings that had been intimately interdependent before.[426]

Another space in which the biomedical realities of pregnancy remain contested and complex lies in the realm of viability. The concept of fetal viability, which is the cornerstone of the Supreme Court's *Roe v. Wade* jurisprudence, has come under increased scrutiny.[427] Although characterized as a biological "fact" by some,[428] the viability standard has come under criticism by commentators[429] and attack from state legislatures.[430]

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420. *Id.* at 166–70, 181.

421. *Id.* at 167.

422. *Id.* at 166–70.

423. *Id.* at 169–70.

424. Lisa Guenther, *The Birth of Sexual Difference: A Feminist Response to Merleau-Ponty*, *in* COMING TO LIFE: PHILOSOPHIES OF PREGNANCY, CHILDBIRTH AND MOTHERING 88, 103 (Sarah LaChance Adams & Caroline R. Lundquist eds., 2013).

425. *Id.*

426. *Id.*

427. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (affirming the viability standard as the point where the balance of the state's interests outweigh that of the mother's); Roe v. Wade, 410 U.S. 113, 163 (1973) (determining that the state's interest in preserving fetal life reaches its "compelling" point at viability).

428. Webster v. Reprod. Health Servs., 492 U.S. 490, 553–54 (1989) (Blackmun, J., concurring) (stating that viability "reflects the biological facts and truths of fetal development").

429. Critiques of the viability standard and its presumptions have come from feminist scholars who question its underlying presumption of fetal separateness. *See, e.g.*, Hendricks, *supra* note 385, at 444 (revealing how the artificial womb fantasy fails to recognize the interconnectedness of mother and fetus); Rona K. Kitchen, *Holistic Pregnancy: Rejecting the Theory of the Adversarial Mother*, 26 HASTINGS WOMEN'S L.J. 207, 241–250 (2015). Critiques have come from the right as well. Randy Beck, *The Essential Holding of* Casey*: Rethinking Viability*, 75 UMKC L. REV. 713, 735–40 (2007) (arguing that the viability standard should be abandoned).

430. A number of states have already tried to bypass the problem of viability by focusing legislative efforts on preventing fetal pain. *See* I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J.L. MED. & ETHICS 235, 235 (2011).

The concept of fetal viability was of little concern to legal scholars or advocates of reproductive justice, in part, because it began as a technical term used by scientists and obstetricians.[431] After viability was adopted as a legal threshold for the state's emerging interests in fetal life, activists concerned with reproductive choice began to use it as a rallying cry.[432] However, as technology has improved, the line where viability begins for a fetus has shifted.[433] According to Solinger:

> Fifty years ago, embryologists and neo-natalists were in general agreement that viability – the capacity of the fetus to live outside of the womb – was reached after approximately thirty-four weeks of gestation. Over the decades, scientific advances have pushed the date of fetal viability back, so that today . . . a fetus of twenty-seven or twenty-eight weeks gestation can be rendered viable.[434]

In the United States, biomedical models of pregnancy have undergone various changes in relationships, to social and scientific changes in culture. For example, the medical treatment of pregnancy has undergone various historically located shifts that changed the meaning of "good care" and the standards for how women experience pregnancy and give birth. In the United States, during the colonial period, the process of giving birth was social, and women depended on the care and assistance of other women during pregnancy and childbirth.[435] This process included not only immediate family members and the midwife, but also women from the community who were not related to the family and who received no monetary compensation for their help.[436] In the eighteenth and nineteenth centuries, many upper class women began to utilize the services of male doctors in delivery and childbirth.[437] At the dawn of the twentieth century, midwives attended roughly half of the births in the United States.[438] For African American women, or women in rural communities, the use of midwives was even higher.[439] During the late nineteenth and early twentieth century, professionals in the fields of obstetrics and nursing engaged in a campaign to eliminate midwifery as the dominant form medical care for women during pregnancy and childbirth.[440] During this time, birth moved from the home to hospitals and many women under-

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431. SOLINGER, *supra* note 338, at 19.

432. *Id.*

433. *Id.*

434. *Id.*

435. Richard and Dorothy Wertz call this "social childbirth." WERTZ & WERTZ, *supra* note 391, at 2.

436. *Id.* at 4.

437. *Id.* 29–30.

438. Katy Dawley, *The Campaign to Eliminate the Midwife*, 100 AM. J. NURSING 50, 50 (2000).

439. Korbin, *supra* note 392, at 96–109.

440. *Id.* These campaigns often linked midwives with the provision of incompetent and inadequate care or associated them primarily with abortions. Leslie J. Reagan, *Linking Midwives and Abortion in the Progressive Era*, 69 BULL. HIST. MED. 569, 569–70, 572 (1995).

went "twilight sleep," avoiding the experience of labor.[441]

At the dawn of the twentieth century, medical discourse, according to many feminists, has constructed a conceptual regime in which pregnancy is understood through the lens of risk management and mediated through the consumption of health care services.[442] Pregnancy is no longer "natural" but becomes "medical."[443] As sociologist Barabara Katz Rothman has revealed in her examination of the process and experience of birth in the United States, the modern conception of childbirth, located outside of the home and in the hospital, is mediated by medical intervention.[444] The medical model of pregnancy, which can be credited with ensuring the health and well-being of many women after their pregnancies, often treats pregnancy like an illness that should be cured through the medical intervention of drugs to alleviate symptoms, the introduction of technologies to regulate progress, and the use of drugs and surgery to efficiently bring pregnancy to an end.[445] And many sought an increasingly medicalized birth, scheduling planned inductions or cesarean sections in hospitals.[446] Then in the mid-twentieth century, women, both inside the feminist community and defiantly outside of it,[447] began to seek a variety of options, including the ability to choose a midwife to provide care during pregnancy. Many women sought what they defined as a "natural" childbirth, an experience free (in varying degrees) from drugs, epidurals, episiotomy cuts, and other interventions.[448] Some women sought such an

441. By 1960, 96% of births occurred in hospitals. Neal Devitt, *The Transition from Home to Hospital Birth in the United States, 1930–1960,* 4 BIRTH & FAMILY J. 47, 47, 57 (1977) (arguing that based upon the evidence, home birth was not less safe than hospital birth during this time period); Nancy S. Dye, *History of Childbirth in America,* 6 SIGNS 97, 107–08 (1980).

442. Laura Purdy, *Medicalization, Medical Necessity, and Feminist Medicine,* 15 BIOETHICS 248, 248–49 (2001).

443. *Id.* at 251.

444. Rothman argues that this intervention removes the mother from the medical process in important and profound ways. Rothman, *supra* note 447, at 156–57.

445. IRIS MARION YOUNG, THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 169 (1990); Dianna C. Parry, *"We Wanted a Birth Experience, Not a Medical Experience": Exploring Canadian Women's Use of Midwifery,* 29 HEALTH CARE FOR WOMEN INT'L 784, 784–86 (2008).

446. BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN PATRIARCHAL SOCIETY 40–41 (1989). At the dawn of the twenty-first century, elective cesarean section births have increased by 43.6%. Susan F. Meikle et al., *A National Estimate of the Elective Primary Cesarean Delivery Rate,* 105 OBSTETRICS & GYNECOLOGY 751, 751, 753 (2005) (estimating that primary, elective cesarean section births rose from 19.7% of all deliveries in 1994 to 28.3% in 2001).

447. The home birth movement is extremely diverse, encompassing women who adopt various political, religious, and cultural perspectives. *See* Pamela E. Klassen, *Sacred Maternities and Postbiomedical Bodies: Religion and Nature in Contemporary Home Birth,* 26 SIGNS 775, 776–77 (2001) (defining the *"home birth movement"* as a "loose coalition of birthing women, midwives, . . . childbirth instructors, *doulas*, . . . activists in the women's health movement, and some doctors").

448. WERTZ & WERTZ, *supra* note 391, at 178, 181, 195. Although the origins of this movement can be placed before the 1960s, the alternative birth movement was boosted by activism and information produced during the "second wave" of feminism in the United States. Katherine Beckett, *Choosing Cesarean: Feminism and the Politics of Childbirth in the United States,* 6 FEMINIST THEORY 251, 253–54 (2005). It is important to understand

experience outside of hospitals, seeking instead to give birth at birthing centers or at home.[449] Many women and health workers adopt a different model of pregnancy that conceptualizes the process as a "natural" state of wellness, which requires only the assistance of partners, family members, and a midwife.[450] This is often done outside of a hospital with minimal technological and medical intervention and no painkillers.

D. Experiential Aspects of Pregnancy

This section analyzes the process of pregnancy, deploying embodiment theory to reveal one way to resolve the intractable tensions that often render both the biological or physiological aspects of pregnancy and the social or cultural aspects of pregnancy resistant to legal remedies. The adoption of a "plain meaning" conception of pregnancy, which reduces the process of pregnancy to its physiological and biological aspects, obscures pregnancy as something other than a pre-cultural phenomenon. Pregnancy, even in our understanding of its materiality (i.e. biological and physiological aspects), cannot be understood separately and apart from its social and historical contingencies. While pregnant persons undergo the physiological and biological processes of pregnancy, these processes are shaped, understood, and made intelligible through the discourse and technologies of power deployed by both individuals and institutions. The very experience of pregnancy itself reveals how the pregnant body does not exist in a biological realm, close to nature and apart from legal, political, social, and cultural forces. After all, biological information is the product of a process of data collection and meaning that is shaped by cultural values and perspectives. Pregnancy generally, like individual experiences of pregnancy, is an experiential and cultural process shaped by various social interactions and cultural institutions.[451]

1. Pregnancy is Both Individual and Relational in Nature

In the United States, pregnancy has been culturally characterized as an

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that the notion of a "natural" childbirth experience or pregnancy encompasses a variety of methods for giving birth and a variety of stances on intervention. Chris Cosans, *The Meaning of Natural Childbirth*, 47 Persp. Biology & Med. 266, 268–69 (2004) (discussing various "natural" childbirth methods that attempt to work with the body's processes and rhythms). Also, the notion of "natural child" birth stems from culturally contingent social notions of how the process of pregnancy and birth should be managed. *See* Becky Mansfield, *The Social Nature of Natural Childbirth*, 66 Soc. Sci. & Med. 1084, 1086 (2008) (arguing that natural childbirth has a social dimension).

449. Bonnie B. O'Connor, *The Home Birth Movement in the United States*, 18 J. Med. & Phil. 147, 147–50 (1993) (describing the home birth movement). About 1% of women choose to give birth at home, believing that home birth may be safer, lacks unnecessary intervention, and provides more control over the childbirth process. Deborah Boucher et al., *Staying Home to Give Birth: Why Women in the United States Choose Home Birth*, 54 J. Midwifery & Women's Health 119, 123–24 (2009).

450. Parry, *supra* note 445, at 788–90.

451. Abrams, *supra* note 209, at 1023 (noting that many theorists of social construction interrogate the construction of biology).

individual process.[452] The individual nature of this process has been undermined, in part, by broader cultural understandings of pregnancy and childbirth outside of the twenty-first century United States.[453] In the twenty-first century, the individual process of pregnancy has been complicated by the technologies of reproduction that involve multiple bodies and numerous technological procedures to ensure the success of reproduction.[454] However, the meaning of pregnancy is made even more complex in the experiential realm because it is both relational and individualistic in nature.

Typically, pregnancy is conceptualized for much of gestation as an individual process that need not involve partners or other family members. Pregnancy is individual for the majority of the duration because we conceptualize it as an individual process.

In many U.S. communities, pregnancy for most individuals is characterized by a significant degree of private, individually-determined choices. Typically, individuals who are pregnant can make a set of socially and medically sanctioned choices, often with limited regulatory intervention.[455] While these choices are often made in consultation with partners, family members, or friends as a matter of practice, choices about pregnancy are often left to individual pregnant women. Although states exercise a significant degree of regulatory oversight in relationship to medical facilities, medical licensing for health care, and the regulation of certain health care processes in terms of providing services, many women enjoy some measure of "choice" about (a) whether to have the child (i.e., whether to terminate the pregnancy) and (b) how to give birth to the child.[456] In contrast to historical conditions faced by women, where women's reproductive choices concerning pregnancy were limited by the criminalization of abortion and contraception, and a lack of information,[457] the current amount of "choice" represents a significant departure from the previous status quo. In other cultural or historical contexts, in

452. Leticia Glocer Fiorini notes that "historically, motherhood has always involved the body of only one woman." Leticia Glocer Fiorini, *The Bodies of Present-day Maternity*, *in* MOTHERHOOD IN THE TWENTY-FIRST CENTURY 135, 136 (Alcira Mariam Alizade ed., 2006).

453. Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61, 64 (1998).

454. Hendricks, *supra* note 385, at 403–05, 413–14.

455. Purvis, *supra* note 35 (manuscript at 3–5, 14, 48) (discussing how criminal law, family law, and other legal systems interlock to regulate motherhood and the experience of pregnancy).

456. Of course, some women experience less freedom, but more oversight and intervention. For example, women in prison and women who are perceived to be "drug addicts" often experience the process of childbirth as cruel, punitive, and devoid of robust choice. *See* Roberts, *supra* note 382, at 1430–32, 1445; *see also* Ocen, *supra* note 382, at 1254–55. Furthermore, lacking recourse or access to social support networks significantly limits the choice of whether and how to have a child.

457. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973 224–25 (1996) (discussing how social networks provided information about contraception and abortion during the era of criminalization in the United States).

contrast, many aspects of the pregnancy may be tied to communally dictated norms and practices.

The experiences of pregnancy are uniquely individual; however, those individuals who carry the fetus during gestation often experience changes in their sense of individuality.[458] While pregnant persons may have experienced their previous sense of individual self as fairly impermeable and isolated, women often simultaneously experience themselves in pregnancy as both an individual and a member of a community of two.[459] Perhaps this sense that a pregnant person is simultaneously self and other, simultaneously an individual and a community, stems from the embodied experience of gestation.[460] As Iris Marion Young illustrates in her classic essay on feminist phenomenology, pregnancy challenges the bodily distinction between the inner and outer body, finding that "[p]regnancy challenges the integration of my body experience by rendering fluid the boundary between what is within, myself, and what is outside, separate. I experience my insides as the space of another, yet my own body."[461]

In law, the current conception of pregnancy operating beneath the PDA and other statutory schemes assumes that pregnant women conform to the classical model of the person. This model assumes that persons are "autonomous, rational," ungendered (or gendered male), able-bodied and capable or work, unified, "discrete" individuals.[462] The life of a fetus in utero, however, is neither autonomous nor individual.[463] Pregnancy dissolves the distinction between self and other, and the mother's pregnant body simultaneously contains herself and the possibility of another separate individual that for a time she experiences as herself.[464]

For a pregnant woman, the sense of self that others experience is altered by an embodied experience where the unity of self is decentered through a series of physical, emotional, and psychological changes, and also confounds the boundaries between subject and object.[465] For Young, the experience of pregnancy for a woman is a circumstance where her subjectivity as a separate, individual person is decentered and the usual nature of her physicality is in flux.[466] The pregnant woman's relation to

458. YOUNG, *supra* note 445, at 163.

459. *Id.*

460. This embodied experience is not necessarily positive. Women who experience pregnancy unwillingly or without adequate emotional and social acceptance may characterize themselves as being "invaded" by a hostile foreign enemy or attacked by a hostile parasite.

461. YOUNG, *supra* note 445, at 163.

462. Talia Welsh, *The Order of Life: How Phenomenologies of Pregnancy Revise and Reject Theories of the Subject*, *in* COMING TO LIFE: PHILOSOPHIES OF PREGNANCY, CHILDBIRTH, AND MOTHERING 283, 283 (Sarah LaChance Adams & Caroline R. Lundquist eds., 2013).

463. *Id.* at 289.

464. *Id.* at 293.

465. "For the pregnant subject . . . pregnancy has a temporality of movement, growth, and change." YOUNG, *supra* note 445, at 167. The change is one that a pregnant woman experiences simultaneously as something she causes and creates as well as something she passively experiences. *Id.*

466. *Id.* at 162.

the fetus she is carrying enhances this experience. During gestation and birth, the fetus is simultaneously subject and object, self and other,[467] disrupting the cohesive impermeable individual self.

Pregnancy-related ideologies grounded in individualism are not natural or even inevitable, but represent social and political decisions. While the U.S. federal antidiscrimination regime treats pregnancy as an individual choice[468] and forces the majority of women to internalize the bulk of the employment-related costs of pregnancy,[469] the European Community adopts a different ideology.[470] Like the United States, the European Community's law reflects a commitment to women's workforce participation.[471] However, the ideology of the European Community "starts from the premise that childbearing is a societal good."[472] Furthermore, the European Court of Justice has interpreted its directives to permit women to enjoy special treatment in contexts related to pregnancy and childbirth.[473]

As a society, and in our legal system, those who make and interpret the law could choose to conceptualize pregnancy not as merely an individual responsibility, but as a community responsibility. Instead of saying, easily, that a woman has a baby, we could say that couples have babies, or families have babies, or villages, or blocks, or even law school faculties have babies.[474] While this claim that pregnancy is individual elides some of the embodied, lived experiences of pregnancy that uniquely belong to the

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467. Iris M. Young describes this aspect of pregnancy in further detail,

> As the months and weeks progress, increasingly I feel my insides, strained and pressed, and increasingly feel the movement of a body inside me. Through pain and blood and water this inside thing emerges between my legs, for a short while both inside and outside me. Later I look with wonder at my mush middle and at my child, amazed that this yowling, flailing thing, so completely different from me, was there inside, part of me.

Id. at 163.

468. West, *supra* note 73, at 1409–10.

469. Dinner, *supra* note 24, at 446–47.

470. *Id.* at 492–93.

471. Issacharoff & Rosenblum, *supra* note 55, at 2201.

472. *Id.*

473. *Id.* at 2206–09, 2211–12.

474. This community-based, relationally oriented understanding of pregnancy is contested by a powerful cultural perception, grounded in actual experience, that women as individuals bear the costs and burdens of pregnancy. Vivian M. Gutierrez and Berta E. Hernandez-Truyol illustrate this point in their "Unsexing Pregnancy?" discussion. According to Gutierrez and Hernandez-Truyol: "A woman is pregnant. A person/parent with a female reproductive system is pregnant, regardless of how that person presents socially or legally." Darren Rosenblum & Noa Ben-Asher, *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207, 233 (2010); *see also* ROTHMAN, *supra* note 446, at 23 (arguing that aspects of pregnancy-related to conception, gestation, and birth are individual). Pregnancy, in its biological, physical, social, and economic dimensions, has not been understood as having the potential to be a relational, multi-general process with costs and burdens that can be internalized not only by the woman gestating the pregnancy, but also by others in the community. This article argues that, perhaps, it should be understood beyond these individualistic paradigms. *See* Barbara Rothman, Spoiling the pregnancy: Prenatal Diagnosis in the Netherlands, *in* BIRTH BY DESIGN: PREGNANCY, MATERNITY CARE, AND MIDWIFERY IN NORTH AMERICA AND EUROPE 185 (Raymond De Vries ed., 2001) (arguing that while parenting can be relational in nature, gestation of a pregnancy is an individual endeavor).

pregnant woman in question, a claim that pregnancy is not merely individual, but a collective community endeavor, has the potential to make real the ethical claims that the child and the woman have on the community. My claim that "we, the family" or "we, the law school" are pregnant would likely be met with a furtive glance away or an uncomfortable cough. Yes, "it's all fine and good to be a feminist," the glance says, but your partner, he is not pregnant, we the faculty are not pregnant, and all of us in the village are not pregnant. And when we do refuse to individualize pregnancy, typically we do not expand its scope to create ethical duties for third parties like partners, friends, or coworkers. Instead, we create more ethical duties for the mother by making claims for the rights of the mother and fetus. But pregnancy need not be conceptualized as individual. In many places in the law, we already recognize that people other than the mother have an interest in the pregnancy in question.[475] One person or one family need not internalize a pregnancy's costs and burdens (and its benefits) alone. And, we could understand pregnancy as being a more collective communal experience and individuals could recognize that even when they are not actually gestating, that there are social and economic costs and benefits to the carrying and birth of a child. Furthermore, these costs and benefits are distributed in ways that push many individuals to be part of the pregnancy and play a role in the care of the particular pregnant woman or child in question.

2. *Paradoxes of Pregnancy: Pregnancy is Both Universal and Particular*

Pregnancy is both universal and highly particular. Pregnancy is universal because, until technological innovation creates other possibilities, all individual human beings alive today owe their existence to a pregnancy carried by a person with a uterus who has, at one time in life, been considered female.[476] This universal aspect of pregnancy has led some scholars to argue for an ethical or political order starting from the realities of reproduction, pregnancy, motherhood and care. Pregnancy is, however, at the same time, decidedly not universal because the experience is foreclosed to men and is not part of many women's lives.[477] Pregnancy is also profoundly individual in that each woman experiences it in unique ways. This upends a universal conception of the legal person, in part, by making it difficult to convey the experience.[478]

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475. Daniel R. Levy, *The Maternal-Fetal Conflict: The Right of a Woman to Refuse a Cesarean Section Versus the State's Interest in Saving the Life of the Fetus*, 108 W. VA. L. REV. 97, 97 (2005).

476. This is meant to be inclusive of trans men who have retained their reproductive capacity. *Supra* notes 56 & 390.

477. Welsh, *supra* note 462, at 292.

478. *Id.* at 292–93 (discussing the idea of limit-experience, a concept derived from Foucault's experiential work, which provides an individual subject with a taste of the possibility of its dissolution).

While some women who are pregnant sometimes manifest similar symptoms and share similar experiences, pregnancy is often a highly individualized process.[479] For example, some women experience severe nausea throughout the pregnancy, some women experience no nausea, and some women experience nausea only for a brief time period.[480] While some pregnant women have constipation, diarrhea, or other digestive problems, other women remain regular and do not have issues with their digestion system. For some women, high blood pressure is a problem, while other women experience the dangers of low blood pressure, and still others experience no blood pressure changes. Some women have severe joint and muscle aches during their pregnancies, while others remain pain free and continue a high degree of activity. From efforts to conceive, to gestation, to childbirth, each woman has a unique experience with pregnancy that is often hard to describe.

While pregnancy is highly individualized and unique in some ways, it is also universal in some important ways. All pregnant persons, at this time, have used, through purchase or some other method of procurement, genetic material from a male (sperm) and genetic material from a female (egg). While the egg may or may not have been produced by the woman gestating the pregnancy to term, each pregnancy is the product of an egg and a sperm. Pregnancy is also universal in nature because, until technological innovation creates other possibilities, all individual human beings alive today owe their existence to gestation in a uterus. This universal aspect of pregnancy has led some scholars to argue for an ethical or political order starting from the reality of reproduction, pregnancy, motherhood and care.[481]

E. On Pragmatic Concerns and Possibilities

In the previous sections, it was shown how a naïve perspective on pregnancy grounded in the plain meaning approach fails to capture the nature and scope of pregnancy discrimination because it reduces pregnancy discrimination to gestation discrimination. The complexities highlighted by an interdisciplinary engagement with the nature of pregnancy provide a starting point to challenge the fundamental notion that pregnancy is a material, biological "reality" and a manifestation of "essential" sex difference. This notion, that pregnancy represents a "real" sex difference, reflects a larger "common sense" consensus inside and outside of the legal community. Pushing against this cohesive common sense conception of pregnancy opens the possibility for reconstructing the legal understanding of pregnancy to better reflect the diversity of ways in which pregnancy is experienced and understood. Even if one acknowledges the insights

479. *See, e.g.*, Nastaran Mohammad Ali Beigi et al., *Women's Experience of Pain During Childbirth*, 15 Iran J. Nursing & Midwifery Res. 77 (2010) (discussing how labor pain is in many ways unique to the individual).

480. *See* Heather Wood et al., *Nausea and Vomiting in Pregnancy: Blooming or Bloomin' Awful? A Review of the Literature*, 26 Women & Birth 100, 101, 103 (2013).

481. *See* Robin West, Caring for Justice 18–21 (1997).

gleaned from embodiment theory—that social and cultural understandings of pregnancy shape biological and physiological experiences and realities—it might be difficult to determine how to proceed in interpreting the PDA. In this section, the article presents some tentative possibilities for expanding the way in which courts might interpret sex discrimination, as inspired by the ways in which courts conceptualize legal sex.

One solution to the challenges presented lies in the passage of additional legislation that clarifies and expands the scope of pregnancy discrimination to make explicit the scope of antidiscrimination protections. The perspective on pregnancy as a historical process that is culturally embedded may also reveal the necessity for additional legislation. If the biological and physiological aspects of pregnancy are contingent upon and indebted to the social, cultural, and historical contexts of pregnancy for their meaning and intelligibility, then perhaps a statutory prohibition against pregnancy discrimination should be amended in ways that are more inclusive of such factors. This is a popular recommendation among commentators,[482] and has been promoted by members of Congress who support more expansive antidiscrimination protections.[483] For example, Congress could explicitly pass legislation that clarifies that the prohibition against sex discrimination embodied by Title VII includes reproductive choice discrimination broadly, whether it is related to fertility treatments, care taking, expecting a child, fourth trimester concerns, infant care or child care, or breastfeeding. Broadly drafted legislation that prohibits reproductive choice based discrimination, however, has its limits. The current political climate makes the passage of such protections almost impossible. Congressional efforts to expand the scope of antidiscrimination protections to include specific kinds of sex discrimination that relate to reproductive choice have not been successful. Since 1999, Congress has introduced and failed to pass legislation protecting the right to breastfeed.[484] Congress has also introduced and failed to pass legislation designed to protect breastfeeding mothers from discrimination in the workplace and provide tax credits for employers who support breastfeeding.[485] Furthermore, even with the passage of expanded protections for

482. Issacharoff & Rosenblum, *supra* note 55, at 2214–15 (arguing that additional legislation is needed); Mary Ziegler, *Choice at Work:* Young v. United States Parcel Service, *Pregnancy Discrimination, and Reproductive Liberty* (Fla. St. Pub. Law and Legal Theory, Res. Paper Series, Nov. 13, 2014) (drawing on historical sources to argue that the PDA embodied a limited principle of meaningful reproductive choice and that the best solution to the PDA's failings is additional legislation), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524142 [https://perma.cc/5S7G-LAWW].

483. *See supra* notes 237–39.

484. *See* The Right to Breastfeed Act, H.R. 1848, 106th Cong. (1999).

485. Congress has tried to introduce amendments to the PDA and tax credits separately, *see, e.g.*, Pregnancy Discrimination Act Amendments of 1999, H.R. 1478, 106th Cong. (1999); Breastfeeding Promotion and Employers' Tax Incentive Act, H.R. 1163, 106th Cong. (1999), and together, *see, e.g.*, Breastfeeding Promotion Act, H.R. 285, 107th Cong. (2001); Breastfeeding Promotion Act, H.R. 2790, 107th Cong. (2003); Pregnancy Discrimination Act Amendments of 2005, H.R. 2122, 109th Cong. (2005); Breastfeeding Promotion Act of 2007, H.R. 2236, 110th Cong. (2007); Breastfeeding Promotion Act of 2009, H.R. 2819, 111th Cong. (2009).

reproductive choice there is always the potential for legal actors to interpret the changes in law narrowly in line with the status quo.

Another potential solution to the current interpretative failings of the PDA, which does not require Congressional action, would be for federal courts to simply recognize how pregnancy is pregnant with a meaning that *already includes* not only social and cultural aspects of pregnancy but also discrimination arising from medical conditions that occur before and after pregnancy. Courts should remember that pregnancy, as written in the PDA, should be conceptualized broadly with an understanding that it entails social and cultural aspects of pregnancy and cannot be reduced merely to gestation based discrimination. Commentators have frequently suggested this as a solution to the PDA's current interpretative challenges.[486] This solution emerges, first, from the text of the statute. The statute explicitly covers pregnancy, childbirth, and related medical conditions without limiting the scope of which pregnancy-related conditions would be covered.[487] Second, this solution also emerges from Congress's legislative intent. In passing the Act, Congress explicitly discussed its goal to combat stereotypical cultural notions that a woman's place is in the home.[488] Congressional actors also explicitly noted that pregnancy discrimination harms not only individual women, but also their families. Recognizing that the harms of pregnancy discrimination have collective costs beyond those born by the individual woman who is "actually" gestating a fetus reveals how the impact of pregnancy discrimination entails social, cultural, and, in particular, economic aspects that cannot be reduced to individual physiological gestation. Finally, the Supreme Court's interpretation of the PDA to cover men and women[489] reveals how pregnancy discrimination cannot be reduced merely to gestation discrimination. After all, the Supreme Court's jurisprudence on pregnancy discrimination, informed by the work of Justice Ruth Bader Ginsburg, has long been concerned with combatting stereotypes and societal perceptions about the abilities of women in the workplace.[490] Instead, pregnancy has relational aspects that are mediated through culture, social, and economic costs that are born both by the partner who is gestating and the partner who is not. This is not meant to obscure the importance of the psychic and physiological costs of pregnancy. Instead, it is intended to highlight how the scope of pregnancy discrimination coverage has already been expanded beyond the limits of biology and to recognize how social factors of pregnancy might impact individuals even when they are not gestating.

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486. Julie Manning Magid, *Contraception and Contractions: A Divergent Decade Following Johnson Controls*, 41 AM. BUS. L.J. 115 (2003).

487. *See id.*

488. H.R. REP. NO. 95-948, at 6–7 (1978).

489. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 669–70, 684 (1983).

490. Siegel & Siegel, *supra* note 47, at 775, 779, 783, 789.

Courts should adopt mechanisms to de-center biomedical aspects of pregnancy to limit the scope of pregnancy discrimination. To this end, this section proposes one possible approach that might alleviate the problems of scope and meaning in the PDA. Although many courts currently reduce pregnancy discrimination to gestation-based discrimination, obscuring not only social and cultural aspects of pregnancy discrimination, but also a host of medical conditions that are explicitly related to pregnancy and childbirth, there are other options. Although there are many possibilities for making this interpretation of the PDA functional for implementation and faithful to the statute, one potential way to implement it could be found in adopting a multifactor checklist that explicitly includes discrimination on the basis of the social, economic, and cultural aspects of pregnancy under the umbrella of prohibited types of disparate treatment. This explicit prohibition would ensure that, before determining that a form of discrimination is *not* covered by the PDA, courts would consider whether it implicates a variety of pregnancy-related factors. Pregnancy discrimination could be found if the discriminatory treatment arises from attitudes or stereotypes that implicate:

-Gamete related aspects of pregnancy;
-Hormonal aspects of pregnancy;
-Perceived or actual physical aspects of pregnancy;
-Perceived or actual physiological limitations of pregnancy;
-Perceived or actual psychological aspects of pregnancy;
-Perceived or actual cultural aspects of pregnancy;
-Perceived or actual caring aspects of pregnancy;
-Perceived or actual economic aspects of pregnancy; or
-Intention or action taken to become pregnant.

A number of benefits would flow from a multifactor test. Such a measure would also ensure that sex-based discrimination accurately and responsively encompasses aspects of pregnancy discrimination and the related medical conditions. It would aid courts in their efforts to understand the scope of pregnancy and pregnancy discrimination in a way that is more responsive to the realities of how pregnancy is lived and experienced. Furthermore, inspired by the insights of individuals who focus on the legal definition of sex, this eight-factor checklist simultaneously decenters the physiological and biological aspects of pregnancy, while recognizing the experiential reality of the physiological and biological aspects of pregnancy.

While such a list of factors may not alleviate the controversies and concerns arising from the Supreme Court's engagement with the second clause of the PDA and whether the Act requires employers to make accommodations for pregnant employees,[491] it may assist courts in making determinations about the scope and meaning of the first clause of the Act. Such a test has the potential to remap the definitional scope of the

491. *See supra* discussion Part II.A.

Act in ways that are more responsive to how pregnancy is shaped by culture and social relations, and to provide more protection for pregnancy-related discrimination that courts currently ignore.

The practical results of a multifactor test, which suggests a wide variety of ways in which pregnancy can be figured and configured in discrimination against women and men, is the potential for employers to be able to address many stereotypes. For example, an employee may be shifted from prime assignments because she is undergoing hormonal fertility treatments, prior to conception. Because the discrimination concerning fertility treatments involves both gamete and hormonal aspects of pregnancy, such discrimination should be covered by the Act. Furthermore, discrimination against pregnant women concerning personal appearance, which arises from a male standard of professional appearance and embraces the presumption that pregnant women do not "look professional," could be considered to arise from perceived or actual physical aspects of pregnancy. Such discrimination would have the potential to be considered pregnancy discrimination for the purposes of the PDA.

A factor-based analysis for pregnancy discrimination that explicitly entails social, cultural, and economic aspects of pregnancy, would help courts resist the pull of biological essentialism. The dominance of a plain meaning presumption that pregnancy can be reduced only to its biological and physiological aspects may recede if courts are cognizant of the complexity of pregnancy. Courts that reckon with the various complex aspects of pregnancy will find it increasingly difficult to reduce the broad protections of pregnancy discrimination to a scope that only includes gestation based discrimination.

How would this impact individuals on the ground seeking protections for pregnancy discrimination? Some may argue that expanding pregnancy discrimination in this way is not necessary or might lead to inefficiencies. They may argue that current protections are adequate for answering many of the challenges of pregnancy discrimination. For this, one might consider how it would expand antidiscrimination protections. For plaintiffs like Ling and Loretta,[492] who have not been pregnant but who have been discriminated against because of social perceptions about what motherhood means, expanding pregnancy discrimination protections may fill a useful gaps in protection. To some, this may be a clear case where actionable sex discrimination has occurred. These hypothetical plaintiffs may be able to recover now under a "sex plus" theory of discrimination[493] or under a "sex-stereotyping" theory of discrimination. Although there has been some success for such plaintiffs,[494] these theories have provided only limited recovery for employees who are subject to care

492. *See supra* text accompanying note 328.

493. Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971).

494. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 79 (2003) (finding progress where employers saw a business case for accommodating caregiving).

related discrimination.[495] There are also other limited possibilities. Maybe Ling would be able to recover for fertility-related discrimination, or Loretta might be able to argue, if a state or local regime is available, that she has faced appearance-based discrimination on the basis of her weight. However, understanding that cultural conceptions about pregnancy and women's social responsibilities related to pregnancy are driving this type of discrimination may provide another avenue beyond caregiver discrimination to make this claim. A PDA that accounts for such cultural stereotypes explicitly and expands to protect individuals (whether they have actually gestated an infant or not) would provide more certain protections against this type of discrimination. It would also provide employers with more certainty about how to treat their pregnant employees.

The other hypotheticals, featuring Jackie and Samantha,[496] provide even more complications. However, these complications may be alleviated by denaturalizing pregnancy and understanding how its social and cultural dimensions produce discrimination on the basis of sex stereotypes. In a lesbian couple where one mother is gestating and the other is not, if the non-gestating mother intends to induce lactation, should her employer be required to provide her with breaks? In 2010, Congress amended the FLSA with provisions in the Patient Protection and Affordable Care Act (ACA).[497] The ACA amendments require employers to support nursing mothers in the workplace.[498] For one year after the birth of a child, employers must provide employees who are nursing with reasonable break time[499] and a private place other than a bathroom in order to pump breast milk.[500] If Jackie is an employee and she is asking for breaks to nurse her child, this seems like an easy case where the employer must comply under the law.[501] However, Samantha might not be permitted to take breaks to provide milk to the child she gave birth to as a surrogate. The FLSA amendments provide that, "[a]n employer shall provide . . . a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk."[502] If Jackie has given the child up for adoption, arguably she is no longer expressing milk for *her child.* The

495. *See* Kessler, *supra* note 64, at 375.

496. *See supra* text accompanying note 328.

497. Patient Protection and Affordable Care Act; Pub. L. No. 111-148, 124 Stat. 119 (2010); Elder Justice Act, Pub. L. No. 111-148, 124 Stat. 782 (2010).

498. 29 U.S.C. § 207(r) (2012). While the United States government has a tacitly "pro-breastfeeding" agenda, failures in regulation and social support lead to low rates of breastfeeding among minorities generally and significant disparities for African American women specifically. *See generally* Andrea Freeman, *"First Food" Justice: Racial Disparities in Infant Feeding and Food Oppression*, 83 FORDHAM L. REV. 3053, 3060, 3063–64 (2015).

499. 29 U.S.C. § 207(r)(1)(A) (2012).

500. 29 U.S.C. § 207(r)(1)(B) (2012).

501. Legal relief might be limited to petitioning the Department of Labor for an injunction. Salz v. Casey's Mktg. Co., No. 11-CV-3055-DEO, 2012 U.S. Dist. LEXIS 100399, at *4 (N.D. Iowa 2012).

502. 29 U.S.C. § 207(r)(1)(A) (2012).

reality is that Samantha, as a surrogate, has been inappropriately pregnant, at least according to social norms. Employers are willing to accommodate those who have given birth and kept their child, but not those who seek to provide the child they have given up for adoption with healthy breastmilk.[503] This is a form of discrimination.

Beyond these hypotheticals, one could imagine other scenarios where those who are not pregnant seek protections from pregnancy discrimination so that they can stand on equal footing with other employees who have similar familial responsibilities, and who face similar cultural and social challenges related to pregnancy.[504] In spite of what some may caution, these various hypotheticals constitute a kind of pregnancy discrimination with social, cultural, and economic costs that may be tacitly permitted under our current PDA regime. People face discrimination for not being appropriately pregnant, or for being perceived as potentially pregnant. They are denied benefits, excluded from promotions, and treated differently than others because they have not been pregnant, thus not conforming to the social norms and expectations of those around them. An expanded conception of pregnancy may not be the answer to every challenge, but it provides a starting point for alleviating some of this inequality through interpretation by courts. It also provides an alternative lens toward an understanding of pregnancy that moves beyond the biomedical models that privileges gestation.

And while some may claim that such a test is unrealistic, similar kinds

503. In circumstances where the mother is supported, breast milk is arguably the healthiest option for infants during the first year of life. *See* Freeman, *supra* note 498, at 3061–63. *But see* Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formula*, 10 NEV. L.J. 29, 46–49 (2009) (arguing that the benefits of breastfeeding may have been oversold).

504. Two hypotheticals may involve employers that provide some form of paid maternity leave. If an employer offers paid leave to mothers who give birth in order to recover, should non-gestational mothers, fathers, parents who have adopted, or others have access to this leave? Often, employers do not include parents who have adopted a child or provide leave for those who have not given birth to a child. Although all employees are similarly situated in dealing with the challenging tasks of a family adjusting to a new infant, only gestating mothers have given birth. Perhaps such a limited policy, due to the remedial nature of the PDA can survive scrutiny. *See* Zatz, *supra* note 332, at 1177. However, if the employer expands the leave to include fathers, which many do in order to promote a type of formal equality in parental leave, then this rationale is more difficult to bear. Although employers are certainly permitted to provide additional benefits to pregnant employees, surely they should not be permitted do so in a way that promotes inequity or unfairness. Furthermore, it is more difficult to justify the discriminatory exclusion of non-gestational mothers or parents who have adopted merely because they themselves have not been pregnant and no one in their family has been pregnant.

of tests have been proposed by scholars[505] and adopted by courts[506] for making determinations about legal sex. Legal sex, which was historically reduced to its biological and physiological aspects,[507] has come to be understood in a more complex fashion. The expansive reconceptualization of legal sex as complex and multifaceted reveals how "simple" determinations about whether an individual should be treated as male or female for the purposes of law must not be reduced purely to biological and physiological aspects.[508] Many judges proceed humbly in their determinations, acknowledging the complexity of what they do not know by seeking out the testimony of expert witnesses in genetics, psychology, and history.[509]

The proposed multifactor test suggests adopting a similar posture toward the complexity of pregnancy. Instead of regarding pregnancy as "natural," easy to understand, and not worthy of the sort of probing expert testimony designed to inform judges and jury members about the meaning of pregnancy, courts may consider how complex aspects of pregnancy—from social, cultural, economic, as well as biological and physiological factors related to gestation—might be used to justify discriminatory treatment. Courts may wish to look to the expertise of professionals in a variety of disciplines that study the process of pregnancy and its social meaning. In making determinations about the nature and scope of the PDA, judges may draw on the practices of courts that have struggled to define the meaning of male or female. Judges seeking to define the nature and scope of pregnancy, like those making determinations about the legal sex of transgender persons, should look beyond biological essentialism. To begin to work of providing more expansive pregnancy discrimination protections, we need a more expansive reconstruction of pregnancy and social relations: one that takes into consideration the ways in which culture shapes pregnancy's meaning and that does not limit our determinations about who is or is not appropriately pregnant. Perhaps in this way, courts can begin to provide plaintiffs with meaningful protection, not only for gestation discrimination but also for pregnancy discrimination.

There are, of course, limits to the efficacy of this move. Moving from a supposed bright-line rule grounded in text to a more complex and respon-

505. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278–79 (1992) (arguing for an eight-prong notion of biological sex that includes genetic or chromosomal sex (XY, XX, XXX, XYY . . .); gonadal sex (reproductive organs like testes and ovaries); internal morphological sex (seminal vesicles/prostrate or vagina/uterus/fallopian tubes); external sex (genitalia); hormonal sex; secondary sex characteristics (body hair, facial hair, breasts); assigned sex of rearing, and gender identity).

506. This has been adopted not only by courts abroad, *see In re* Kevin, (2001) 28 Fam LR 158 (Austl.), but also by courts in the United States, *see In re* Gardiner, 22 P.3d 1086, 1089 (Kan. Ct. App. 2001), *aff'd in part, rev'd in part In re* Gardiner, 42 P.3d 120 (2002).

507. Matambanadzo, *supra* note 349, at 213–14.

508. *Id.* Some courts have even relied on "psychological sex" to make determinations about legal sex that have binding consequences. *See, e.g.*, M.T. v. J.T., 140 N.J. Super. 77 (1976).

509. *See, e.g.*, *Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001).

sive understanding of pregnancy may create costs. From an efficiency standpoint, engaging with experts on pregnancy may seem costly and unwieldy for a federal judiciary already burdened by the weight of antidiscrimination claims before it. However, the demands of efficiency should not outweigh the importance of preventing actionable discrimination in the workplace and carrying out the will of Congress to protect pregnant workers and their families. Furthermore, this conceptual move may not answer all of the challenges currently inherent in the PDA. Such a list of factors may not alleviate the controversies and concerns arising from the Supreme Court's engagement with the second clause of the PDA and the question of whether the Act requires employers to make accommodations for pregnant employees,[510] but it may assist courts in making determinations about the scope and meaning of the first clause of the Act. Such a test has the potential to remap the definitional scope of the Act in ways that are more responsive to how pregnancy is shaped by culture and social relations, and to provide more protection for pregnancy-related discrimination that courts currently ignore.

CONCLUSION

This article explores how the law has defined and should define pregnancy for the purposes of Title VII of the 1964 Civil Rights Act. It argues that the meaning of pregnancy in the jurisprudence related to Title VII for the purposes of the PDA should be untethered from the biomedical essentialism that currently characterizes it. For the purposes of defining pregnancy in relation to the PDA, and perhaps beyond, courts should reject biomedical essentialism by expanding their understanding of what pregnancy means. In response to the changing nature of family formation and basic fairness, reproduction cannot be reduced to its biomedical elements, and pregnancy discrimination should not be reduced to gestation discrimination. Reproduction is not only a biomedical process—it is also a social and cultural process that is experienced through relations with others. This reality should influence the way legal actors understand pregnancy discrimination and apply the law. This article reveals not only the justifications for recognizing this, but also provides a few potential paths for moving forward. From this starting point, it may be possible to more fully realize the promise of the PDA and to reimagine new possibilities for expanding its protections to meet the needs of employees and their families.

510. *See supra* discussion Part II.A.

Casenotes


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