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ARTICLES

CLAIMING DISABILITY, RECLAIMING PREGNANCY:

A CRITICAL ANALYSIS OF THE ADA'S PREGNANCY EXCLUSION

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Abstract

Currently, employers are not required to accommodate the physical realities that many pregnant women face at work. A central reason that employers can ignore the needs of pregnant workers is because pregnancy does not qualify as a disability under the Americans with Disabilities Act (ADA). Under the ADA, workers who qualify for protection are entitled to reasonable accommodations. Given that pregnancy is a physiological condition that can significantly alter major life activities, there is no legitimate reason pregnant workers who require some modifications to their work during their pregnancy should not enjoy the accommodation mandates of the ADA.

This paper will examine the reasons why pregnancy has heretofore been excluded from coverage as a disability under the ADA, and critique historical

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reticence by the feminist community to embrace the ADA as a legitimate and effective tool for the advancement of pregnant workers' rights.

In recent months, pregnancy rights advocates have made a variety of sophisticated comparisons between the Pregnancy Rights Act (PDA) and the ADA, arguing that pregnant workers should be entitled to the same types of accommodations as disabled workers. These efforts indicate a growing appreciation for the transformative potential of the ADA in improving pregnant women's work lives. However, advocates have stopped short of demanding that workers with healthy pregnancies receive reasonable accommodations pursuant to the Americans with Disabilities Act. This paper will provide an overview of current efforts, explain the strides the feminist community has made, and provide recommendations for even bolder reforms to current advocacy strategies.

Ultimately, the paper will conclude that the time has come to allow pregnant workers to make reasonable accommodation claims under the ADA. The recent passage of the ADA Amendments Act (ADAAA) allows for a broader and more comprehensive understanding of disability in the pregnancy context, and advocates should continue to seize on the opportunity to provide a robust new set of protections to improve the working conditions of pregnant women.

INTRODUCTION

Are pregnant women disabled? Under current disability doctrine, the answer historically has been "no." As a health condition, pregnancy has long been denied per se designation as a disability under the Americans with Disabilities Act (ADA).[1] The reasons for this exclusion include common law depictions of pregnancy as a "natural physiological condition,"[2] Equal Employment Opportunity Commission (EEOC) guidelines that explicitly rule out pregnancy as a disability,[3] and historical reticence in the feminist community to advocate for a pregnancy rights framework grounded on the premise that pregnant women are disabled persons.[4]

The debate surrounding pregnancy's incorporation into the ADA has led to a confused state of the law around the rights of workers who experience pregnancy-related health problems on the job. Courts have attempted to derive ADA coverage for women facing pregnancy complications by characterizing their pregnancies as "abnormal," thereby subverting suspicion that pregnancy, as a condition, is the disability at issue.[5] However, this doctrinal move has amplified the dissonance between the ADA's pregnancy exclusion and the ADA's statutory framework, because pregnant women who receive ADA coverage on account of "abnormal" pregnancies often experience the same symptoms, simply at a greater level of severity, as those experienced during "normal" pregnancies.

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1. *See* 29 C.F.R. app. § 1630.2(h) (1998).

2. *See infra* note 37 and accompanying text.

3. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html [hereinafter ENFORCEMENT GUIDANCE].

4. *See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 329-33 (1984).

5. *See infra* notes 40-56 and accompanying text.

The recent passage of the ADAAA has provided a timely moment to re-examine the pregnancy exclusion as it is currently applied under the ADA. Given the revised definition of "major life activity" to include reproductive function,[6] understanding pregnancy as a physical impairment could provide an avenue to reasonable accommodations for pregnant workers. Removing the pregnancy exclusion would permit a more fluid and individualized application of the ADA to pregnant workers. Instead of focusing analysis on whether a pregnancy is "abnormal"—which is itself a problematic enterprise—courts could perform an individualized assessment of a litigant's pregnancy and evaluate whether the pregnancy imposes a substantial limitation on a major life activity, and thereby requires employer accommodations.

In recent months, pregnancy rights advocates have made a variety of sophisticated comparisons between the Pregnancy Rights Act and the ADA, arguing that pregnant workers should be entitled to the same types of accommodations as disabled workers.[7] These efforts indicate a growing appreciation for the transformative potential of the ADA in improving pregnant women's work lives. However, advocates have stopped short of demanding that workers with healthy pregnancies receive reasonable accommodations pursuant to the ADA.[8] Thus, while advocates are well positioned to argue that pregnant workers should qualify for ADA coverage, it remains unclear if and when they will mobilize to issue such a demand.

Part I of this Article will examine how the pregnancy exclusion has created doctrinal confusion over how to characterize pregnancy-related disabilities, which has in turn produced a body of case law that strains to distinguish between pregnancies that do and do not merit ADA coverage based on whether they are "normal" pregnancies. Part II will provide a critique of the current ADA doctrine and explain the benefits of eliminating the per se pregnancy exclusion and evaluating pregnancies on an individualized basis under the ADA. Part III will historicize feminist resistance to using disability rights as a tool to combat pregnancy discrimination. Part IV will identify and address feminist concerns surrounding the practical challenges of aligning with the disability rights movement, given significant backlash against the ADA in the past decade. Finally, Part V will explore how current approaches by pregnancy rights advocates both conform to and diverge from past efforts and concerns in navigating the delicate interface between pregnancy and disability rights.

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6. 42 U.S.C. § 12102(2)(B) (Supp. IV 2011).

7. *See infra* notes 188-92.

8. A paper recently authored by Professor Jeannine Cox contains a notable exception. Jeannine Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1961644.

I. THE PREGNANCY EXCLUSION UNDER TITLE I OF THE ADA

A. History and Development of the ADA's Pregnancy Exclusion

The ADA defines having a qualifying "disability" as 1) having an impairment[9] that substantially limits one or more major life activities of an individual, 2) having a "record of such impairment," or 3) "being regarded as having such an impairment."[10] For the purposes of my analysis, this article will focus on the first prong of the disability definition (actual disability), though much of the disputed litigation around pregnancy as a disability is applicable to all three. While there is no statutory exclusion for pregnancy in the language of the ADA, the EEOC issued regulations in 1995 and listed pregnancy as one of many conditions that are "not impairments."[11] This exclusion was also included in the EEOC's Enforcement Guidance, citing to the language of the implementing regulations.[12] It is unclear how the pregnancy exclusion came about in the regulatory process, given that unlike other exclusions, there is no clear legislative history or debate that explains its appearance in the Federal Register. The only language in the Federal Register's Comments and Analysis Section that sheds any light on the exclusion is this rather opaque statement:

> [T]he Commission has specifically noted in the interpretive guidance that pregnancy is not an impairment. This change responds to the numerous questions that the Commission has received concerning whether pregnancy is a disability covered by the ADA. Pregnancy, by itself, is not an impairment and is therefore not a disability.[13]

The comments later go on to state categorically that "conditions[] such as pregnancy, that are not the result of a physiological disorder are also not impairments."[14]

Lawmakers specifically debated and opted not to define certain characteristics as impairments during the ADA drafting process. For example,

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9. The implementing regulations to the Americans With Disabilities Act define "impairment" as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (1998).

10. 42 U.S.C. § 12102(2) (Supp. IV 2011).

11. 29 C.F.R. app. § 1630.2(h) (1998).

12. ENFORCEMENT GUIDANCE, *supra* note 3.

13. Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,727 (July 26, 1991).

14. *Id*. at 35,741.

lawmakers concluded that the term "impairment" does not include homosexuality and bisexuality.[15] Further, reports issued from various committee deliberations reflected that lawmakers concluded that environmental, cultural, and economic disadvantages such as a prison record or a lack of education are not impairments.[16] Finally, several reports indicated that age, by itself, is not an impairment.[17] However, there is no documentation in the Congressional record of debates around pregnancy's inclusion or exclusion from the ADA. Thus, it seems feasible that the current exclusion could be reversed if a strong enough argument is made that it does not accurately reflect Congressional intent.

In addition to the administrative exclusion, several early courts rejected, for a multitude of reasons, the argument that pregnancy was an impairment. In *Gudenkauf v. Stauffer Communications, Inc.*, the U.S. District Court for the District of Kansas elaborated on the "intuitive" conclusion that pregnancy is not a disability: "[b]eing the natural consequence of a properly functioning reproductive system, pregnancy cannot be called an impairment."[18] In *Byerly v. Herr Foods*, the U.S. District Court for the Eastern District of Pennsylvania cited the EEOC regulations to strike down an ADA-based pregnancy discrimination claim.[19] The court stated categorically that pregnancy is not a physiological disorder.[20] Further, the court held that the EEOC's pregnancy exclusion was consistent with the fact that pregnancy discrimination was already covered by the Pregnancy Discrimination Act of 1977 (PDA).[21]

To fully understand why courts have read the PDA to pre-empt protection under the ADA, it is necessary to outline its statutory framework. Understanding the PDA's limited protections exposes the faultiness of the above judicial reasoning and demonstrates how the ADA addresses critical gaps in the PDA's protection of pregnant women from workplace discrimination. The PDA was drafted as an amendment to the Civil Rights Act of 1964 to clarify that discrimination based on pregnancy, childbirth, and related medical conditions did constitute discrimination on the basis of sex.[22]

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15. 42 U.S.C. § 12211(a) (2006); *see also* 29 C.F.R. § 1630.3(e) (1998); H.R. REP. NO. 101-596, at 88 (1990); H.R. REP. NO. 101-485, pt. 2, at 294, 325, 415 (1990); H.R. REP. NO. 101-485, pt. 3, at 461, 471, 515 (1990).

16. H.R. REP. NO. 101-485, pt. 2, at 324-25 (1990); H.R. REP. NO. 101-485, pt. 3, at 468 (1990).

17. H.R. REP. NO. 101-485, pt. 2, at 325 (1990); H.R. REP. NO. 101-485, pt. 3, at 468 (1990).

18. Gudenkauf v. Stauffer Commc'ns, Inc., 922 F. Supp. 465, 473 (D. Kan. 1996).

19. Byerly v. Herr Foods, No. CIV A. 92-7382, 1993 WL 101196, at *4 (E.D. Pa. Apr. 6, 1993).

20. *Id.*

21. *Id.*

22. *See* Molly D. Edwards, *The Conceivable Future of Pregnancy Discrimination: Pregnancy Not Required*, 4 CHARLESTON L. REV. 743, 746 (2010).

However, disparate treatment[23] claims under the PDA require comparators who are similarly situated but treated differently than pregnant employees.[24] Courts have widely held that suitable comparators are non-pregnant workers who are temporarily disabled whom employers treat better than pregnant workers with similar limitations.[25] Finding such similarly situated comparators can be extremely challenging, particularly in small workplaces, and if a plaintiff cannot find a comparator, her claim is likely to be seen as a request for preferential treatment, which is not mandated by the PDA.[26] Further, courts have been historically reluctant to apply disparate impact analysis to workplace policies that disproportionately affect pregnant women because they have viewed such challenges as a "backdoor" route to preferential treatment for pregnant women.[27] As will be discussed later in the Article, pregnancy rights advocates are currently pushing for more progressive interpretations of the PDA, but continue to face resistance from lower courts.[28]

The absence of an accommodation mandate in the PDA has real and devastating effects on the work lives of pregnant women. Absent overt pregnancy-based discrimination, pregnant workers exist in the same at-will world as all other workers, while combating a host of physical complications brought on by a normal pregnancy. Workers who experience extreme nausea and vomiting can be terminated for tardiness or excessive breaks during the work day.[29] Requests to use the bathroom more frequently can be grounds for discipline.[30] Even asking for light duty assignments, such as working a cash register instead of lifting heavy containers in a service job, can be considered as evidence of inadequate work performance.[31] Moreover, employers can use such job responsibilities as a pretext towards pregnant workers by giving them job

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23. Disparate treatment claims under Title VII require a plaintiff to show that 1) he or she is a member of a protected class under the statute and 2) he or she was subjected to negative terms and conditions of employment because of his or her class membership. *See* Terry v. Ashcroft, 336 F. 3d 128 (2nd Cir. 2003). For an in-depth treatment of evidentiary methods to prove disparate treatment, *see* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, REVISED ENFORCEMENT GUIDANCE ON RECENT DEVELOPMENTS IN DISPARATE TREATMENT THEORY (2009), *available at* http://www.eeoc.gov/policy/docs/disparat.html.

24. Sarah Stewart Holland, Comment, *Pregnancy in Pieces: The Potential Gap in State and Federal Pregnancy Leave*, 27 BERKELEY J. EMP. & LAB. L. 443, 451 (2006).

25. *Id.*

26. *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, 34 (2009).

27. *Id.* at 42.

28. *See infra* notes 189-91 and accompanying text.

29. *See infra* notes 46-47 and accompanying text.

30. Sharon Terman, Written Testimony at the Meeting of the Equal Employment Opportunity Commission (Feb. 15, 2012), *available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm.

31. Joan Williams, *Heavy Lifting: Pregnant Women Are Forced to Carry an Extra Load in the Workforce*, HUFFINGTON POST, Feb. 27, 2012, http://www.huffingtonpost.com/joan-williams/heavy-lifting-pregnant-women_b_1291673.html.

responsibilities they know they will be unable to perform (for example, ordering a pregnant worker to perform heavy lifting in a work environment with a variety of light and heavy duties), thereby subverting the anti-discrimination mandate of the PDA by supplying a valid reason for termination. Thus, the PDA, while outlawing overt animus towards pregnant women's presence in the workplace, has limitations in addressing the double bind that women are more commonly placed in today: pregnant women are ready and able to work, but require some level of accommodation to maintain their health while performing their job duties at an adequate level.[32] The ADA could be critical in filling this gap in protection, and interpreting it to exclude pregnancy as a qualifying disability results in only partial protections for pregnant women under the PDA.

Some may argue that the Family Medical Leave Act (FMLA) provides the accommodation mandate that the PDA is lacking, but the FMLA contains critical gaps in protection for pregnant workers, particularly in the low-wage and informal labor sectors. The FMLA provides up to twelve weeks of unpaid leave for women who have worked for their employers for at least twelve months 1,250 hours.[33] The FMLA only applies to workplaces with fifty or more employees, thus excluding coverage for pregnant plaintiffs at small workplaces.[34] FMLA protections are also largely unavailable to pregnant workers who live at or below the poverty line because these workers cannot afford to take unpaid leave, which is the only type of leave the FMLA provides for.[35] Low wage workers are much more likely to request work modifications than blanket leave, given the economic necessity of earning a paycheck for as long as possible during and after pregnancy. Thus, the FMLA does not fill certain gaps that a clear accommodation mandate would if pregnancy were considered a disability worthy of accommodation.

Despite the critical need for ADA protections to complement the PDA's mandate against pregnancy-based discrimination, by 1996, a flurry of litigation had led to widespread judicial acceptance of the pregnancy exclusion from the ADA.[36] In *Wenzlaff v. Nationsbank*, the U.S. District Court for the District of

32. *See id.*

33. 29 U.S.C. §§ 2611-2612 (2006).

34. § 2611(2)(B).

35. NAT'L ADVOCATES FOR PREGNANT WOMEN, GUIDE TO PREGNANCY DISCRIMINATION IN EMPLOYMENT 4, *available at* http://advocatesforpregnantwomen.org/06CFinalDraft.pdf.

36. Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 980 (N.D. Ill. 1998) ("[M]any courts have held that pregnancy, absent abnormal or unusual circumstances, is not a disability."); Hernandez v. City of Hartford, 959 F. Supp. 125, 130 (D. Conn. 1997) ("Pregnancy and related medical conditions have been held not to be physical impairments."); Jessie v. Carter Health Care Ctr., Inc., 926 F. Supp. 613, 616 (E.D. Ky. 1996) ("No unusual circumstances exist with respect to Jessie's pregnancy and thus such condition is not a 'physical impairment' under the ADA."); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995) ("[P]regnancy and related medical conditions do not, absent unusual circumstances, constitute a 'physical impairment' under the ADA. Therefore, pregnancy and related medical conditions are not 'disabilities' as that term is defined by the ADA.").

Maryland concluded that "[w]ith near unanimity, federal courts have held that a pregnancy is not a 'disability' under the ADA," absent some atypical complication.[37] Thus, with limited analysis or historical explication, an entire condition became excluded from ADA protection pursuant to an opaque regulatory process and subsequent common law developments.

B. Carving Out Rights Through Pathologizing Pregnancy: Courts Distinguish "Normal" and "Abnormal" Pregnancies to Circumvent the Pregnancy Exclusion

While the pregnancy exclusion quickly took hold in common law jurisprudence, courts began just as quickly to grapple with the contours of the exclusion as applied to conditions related to pregnancy. Pregnant plaintiffs plagued with debilitating pregnancy complications confronted courts with the intricate realities of pregnancy, and exposed the limited protections of the PDA. Thus, a parallel jurisprudence developed alongside the pregnancy exclusion doctrine that led to a subtle shift in the exclusion itself. Instead of excluding pregnancy as a normal process of a functioning reproductive system, some courts began to frame the exclusion as applying to "normal" pregnancies, carving out an exclusion for special conditions related to pregnancy that were deemed unusual.[38]

Litigators experienced success when they were able to set plaintiffs' pregnancies apart from "normal" pregnancy in a significant way. In *Hernandez v. City of Hartford*, the U.S. District Court for the District of Connecticut engaged in a detailed analysis of pregnancy-related disabilities that provided the template for several other cases.[39] In *Hernandez*, the plaintiff was denied a request to work at home while she suffered from preterm labor, brought on by uterine fibroids.[40] The court noted that while the EEOC regulations did exclude pregnancy, there was no explicit exclusion of pregnancy-related impairments.[41] The court also went on to cite a medical dictionary's definition of "physiological disorder," which stated that it was the "abnormal functioning or state of the body or a tissue or an organ."[42] Hence, the court found that Ms. Hernandez's preterm labor, confining her to bed rest, was an abnormal function of her pregnancy.[43] As a result, the court concluded that as a matter of law, the pregnancy complication constituted an impairment because it was a physiological disorder.[44]

Similarly, in *Cerrato v. Durham*, the U.S. District Court for the Southern District of New York applied a nuanced analysis to the pregnancy exclusion to

37. Wenzlaff v. Nationsbank, 940 F. Supp. 889, 890 (D. Md. 1996).
38. See *infra* notes 39-55 and accompanying text.
39. 959 F. Supp. 125 (D. Conn. 1997).
40. *Id.* at 127-28.
41. *Id*. at 130.
42. *Id.* (citing DORLAND'S MEDICAL DICTIONARY (27th ed. 1988)).
43. *Id*.
44. *Id.*

find in favor of the plaintiff.[45] In *Cerrato*, the plaintiff began to experience spotting, leaking, dizziness and nausea during her pregnancy.[46] The plaintiff was fired for missing too many days of work due to complications attending her pregnancy.[47] The court rejected the categorical exclusion of pregnancy as a disability and pointed to courts that had applied a more refined analysis to pregnancy-related conditions.[48] It also incorporated into its analysis the American Medical Association's Council on Scientific Affairs Report, which differentiated between healthy pregnancies, where women could work up to labor, and pregnancies with "substantial complications," which included preeclampsia, premature rupture of the membranes, vaginal bleeding, threatened miscarriage, risks of premature birth and incompetent cervices.[49] The court expressly declined to re-evaluate whether pregnancy constitutes a disability, but denied the defendant's motion to dismiss, concluding that the plaintiff had alleged facts that could lead to a jury finding of an impairment based on spotting, leaking, cramping, and dizziness caused by her pregnancy.[50]

While these cases provided a hopeful avenue to accommodations for women suffering from debilitating conditions in their pregnancies, these analyses often produced erratic results. Courts in different jurisdictions would apply the same analysis to similar conditions, and would reach different conclusions as to whether the condition constituted an impairment. For example, in *Gorman v. Wells Manufacturing Corp.*, the U.S. District Court for the Southern District of Iowa held that the plaintiff's pregnancy-related nausea, vomiting, dizziness, severe headaches and fatigue (symptoms similar to those of Hernandez) did not qualify her pregnancy as a disability under the ADA.[51] The court went so far to say that it was a matter of "common knowledge that all of these symptoms, at some degree of severity, are part and parcel of a normal pregnancy. Even assuming that these additional symptoms constitute 'complications' of [plaintiff's] pregnancy, they are too short-term to qualify as a disability under the ADA."[52] In *Appel v. Inspire Pharmaceuticals, Inc.*, the U.S. District Court for the Northern District of Texas held that a pregnant plaintiff's incompetent cervix constituted a disability for the purposes of ADA protection.[53] However, in *Lacoparra v. Pergament Home Centers, Inc.*, U.S. District Court for the Southern District of New York found no disability where the plaintiff had a similar history of infertility, a prior miscarriage, and spotting

45. Cerrato v. Durham, 941 F. Supp. 388 (S.D.N.Y. 1996).

46. *Id.* at 390.

47. *Id.* at 397.

48. *Id.* at 392.

49. *Id.* at 393 (citing Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 JAMA 1995, 1997 (1984)).

50. *Id*.

51. 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002), *aff'd,* 340 F.3d 543 (8th Cir. 2003).

52. *Id*.

53. Appel v. Inspire Pharms., Inc., 712 F. Supp. 2d 538, 548 (N.D. Tex. 2010); *see also* Soodman v. Wildman, Harrold, Allen & Dixon, No. 95C3834, 1997 WL 106257, at *6 (N.D. Ill. Feb. 10, 1997).

and cramping.[54] In *Gabriel v. City of Chicago*, U.S. District Court for the Northern District of Illinois found that back pain, stomach pain, and swelling could constitute a physiological disorder of the reproductive system.[55] In contrast, a number of other jurisdictions have rejected such "typical complications" of pregnancy as qualifying disabilities under the ADA.[56] These conflicting interpretations of what constitutes a pregnancy-related disability have created a patchwork of rights across the country, leaving pregnant plaintiffs to the mercy of individual judges' interpretations of 1) whether pregnancy related complications even qualify as an exception to the EEOC's pregnancy exclusion, and 2) whether such complications, in the view of the judge, meet the requisite level of "abnormality" to qualify as an impairment.

To complicate matters further, the medical community itself has not provided a clear answer to the question of what constitutes an abnormal pregnancy. In fact, the medical community's evaluation of pregnancy and work has focused on debunking previous arguments that pregnant women were unfit to participate in the labor force. In 1984, the American Medical Association's Council on Scientific Affairs stated in a report that "few of our standard medical beliefs about the physical and emotional characteristics of pregnancy have any scientific basis."[57] The Council acknowledged that medical advice during pregnancy was the product of cultural assumptions about pregnant women more than the outcome of any probing studies on the health effects of pregnancy in workplace environments.[58] "The Council's new recommendation was that most women with uncomplicated pregnancies 'should be able . . . to continue productive work until the onset of labor.'"[59]

The medical consensus that women can work throughout their pregnancy was crucial in combating discrimination against pregnant women who were willing and able to perform their job duties and were treated differently by employers based on stereotypic assumptions about childbearing. However, it detracted from dialogue in the medical community about the serious health issues that can arise with pregnancy and, without accommodation, impede workers' ability to perform certain tasks on the job. In addition, the rhetoric of the medical community mimicked deficient applications of the PDA, in that it

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54. Lacoparra v. Pergament Home Ctrs., Inc., 982 F. Supp. 213, 228 (S.D.N.Y. 1997).

55. Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 980 (N.D. Ill. 1998).

56. *See, e.g.*, Jessie v. Carter Health Care Ctr., Inc., 926 F. Supp 613, 613-14 (E.D. Ky. 1996); Johnson v. A.P. Prods., Ltd., 934 F. Supp. 625, 626-27 (S.D.N.Y. 1996) (holding that neither employee's pregnancy, nor its resultant complications constituted disability under the ADA); Kennebrew v. N.Y. City Housing Auth., No. 01 CIV 1654(JSR)(AJP), 2002 WL 265120, at *1, 18-19 (S.D.N.Y. Feb. 26, 2002) (holding that gestational diabetes is not a disability under the ADA).

57. Laura Schlichtmann, Comment, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335, 351 (1994) (citing Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 JAMA 1995, 1995 (1984)).

58. *Id.*

59. *Id.* (quoting Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 JAMA 1995, 1997 (1984)).

emphasized pregnant women's ability to work "just like everyone else," instead of highlighting ways that employers could and should accommodate pregnant women so they were able to effectively perform their job duties while attending to complications arising out of their pregnancies.[60]

The few studies that have been conducted on the incidence of pregnancy-related symptoms in women reflect that certain conditions that some courts have designated pregnancy-related disabilities are extremely common. Every year, approximately 875,000 women experience one or more complications during the course of their pregnancy.[61] Vomiting and nausea during pregnancy occurs in anywhere from 50 to 70 percent of pregnancies.[62] Hypertensive disorders are also deemed relatively "common," afflicting 5 to 13 percent of pregnancies.[63] Spontaneous abortion occurs in somewhere between 10 to 25 percent of pregnancies[64] and vaginal bleeding occurs in about 20 percent of pregnant women.[65] Thus, courts have somewhat disingenuously deemed certain highly common symptoms accompanying pregnancy "physiological disorders" in order to circumvent the ADA's pregnancy exclusion. Classifying nausea, dizziness or bleeding as abnormal to a pregnancy ignores the reality that almost all pregnancies produce some side effects that have the potential to impact major life activities.

II. A CRITICAL EVALUATION OF THE PREGNANCY EXCLUSION AND PROPOSALS FOR REFORM

A. Analytical Deficiencies in the Pregnancy Exclusion

The pregnancy exclusion creates arbitrary legal distinctions that mire litigation outcomes in uncertainty, is weakly supported by the ADA's statutory mandate and legislative history, and poorly reflects the reality that many pregnant women desperately need accommodations at work to continue working throughout their pregnancy. This section will examine each of these critiques to demonstrate the advantages of removing the exclusion.

Firstly, the shaky distinction between pregnancy as a natural state of physiological health versus pregnancy-related disabilities demonstrates the

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60. *See, e.g.*, Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (holding that the PDA does not require employers to offer maternity leave or take other steps to make it easier for pregnant women to work).

61. *Statistics*, AM. PREGNANCY ASS'N, http://www.americanpregnancy.org/main/statistics.html (last visited Apr. 29, 2012).

62. Schlichtmann, *supra* note 57, at 352 (citing F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 1146 (19th ed. 1993)).

63. *Id.* at 353 (citing F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 763 (19th ed. 1993)).

64. *Id.* (citing F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 662 (19th ed. 1993)).

65. *Id.* (citing F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 22, 675 (19th ed. 1993)).

means by which the pregnancy exclusion has confounded and distorted the potential for the ADA to advance pregnant women's ability to work. As demonstrated above,[66] some courts have navigated around the exclusion by creating an exception to the exclusion for pregnancy-related conditions. However, it is disingenuous at best to term a pregnancy a normal reproductive process, and then term everything around the pregnancy, that occurs precisely because of the pregnancy, a pregnancy-related disability. This doctrinal maneuvering reflects the current ill fit between legal rules and women's realities, and the struggle of courts to bring the two into congruity.

Secondly, there is sparse statutory or legislative evidence that pregnancy was ever meant to be excluded from the ADA.[67] In fact, some commentators have argued that the pregnancy exclusion is itself a violation of the PDA, which prohibits employers from treating pregnant women differently on account of their pregnancy.[68] Given that the EEOC did not single out any other conditions for categorical exclusion beyond those that were explicitly excluded through the language of the statute,[69] there is a strong argument that the regulations are themselves discriminatory. This argument is unlikely to gain traction since the PDA is actionable only against employers, and the regulations were promulgated by the EEOC in its capacity as an administrative authority.[70] However, the argument is a powerful rhetorical critique of the EEOC's rulemaking process. The argument that the regulations are themselves discriminatory undermines the legitimacy of the pregnancy exclusion's continued application by highlighting that the EEOC regulations are in direct conflict with the statutory mandate of the PDA.

The categorical exclusion of pregnancy as a disability also contravenes the statutory mandate that the ADA is to be both broadly construed and individually applied. Unlike the pregnancy exclusion, this mandate is clearly delineated in the ADAAA, where Congress specifically states that disability "shall be construed in favor of broad coverage."[71] In addition, the Code of Federal Regulations was amended to stipulate that the analysis of whether an impairment qualifies as a disability should be individualized.[72] The amendment also loosened the definition of an impairment, stating that it "need not prevent,

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66. *See supra* notes 39-55 and accompanying text.

67. There is no legislative history on the pregnancy exclusion in the ADA beyond a few vague conclusory statements that pregnancy is not an impairment. *See supra* note 13 and accompanying text.

68. *See, e.g.*, D'Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1444 (1996).

69. *See* 29 C.F.R. §§ 1630.2(h), 1630.3 (2011).

70. 42 U.S.C. § 12116 (2006); 29 C.F.R. § 1604.10 (2011).

71. 42 U.S.C. § 12102(4)(A) (Supp. IV 2011); *see also* 29 C.F.R. § 1630.1(c)(4) (2011) ("The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations . . . . The question of whether an individual meets the definition of disability . . . should not demand extensive analysis.").

72. 29 C.F.R. § 1630.2(j)(1)(iv) (2011).

or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."[73]

Moreover, arguments that pregnancy is an ephemeral, minor or "natural" condition stand on dubious ground when reading the rest of the ADA regulations and comparing examples of qualifying disabilities to the limitations that pregnant women face. First, arguing that pregnancy's "naturalness" justifies its exclusion from ADA coverage is an arbitrary and illogical distinction. All disabilities, as health conditions that are part of the life process, are arguably "natural" but that does not warrant their exclusion from ADA coverage. One would never point to the fact that blindness is a "natural" human condition to deny blind Americans reasonable accommodations under the ADA. With regards to the argument that pregnancy is a temporary condition, the interpretative guidance to the EEOC regulations state that impairments that substantially limit major life activities are actual disabilities even if they last, or are expected to last, less than six months.[74] Thus, courts cannot continue to justify excluding pregnancy as a disability because it is a temporary condition.

The EEOC's interpretative guidance to the ADA regulations also provides examples of impairments that are usually not disabilities, such as broken limbs, sprained joints, appendicitis, flu, or seasonal allergies.[75] In contrast, impairments such as hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia are all cited as examples of disabilities.[76] It is hard to distinguish pregnancy from the latter group of disabilities in terms of the debilitating impact they can bear on a woman's ability to perform major life activities. Women experiencing any sort of symptoms during pregnancy are likely to experience similar levels of limitation as individuals with hypertension, back injury, or diabetes at work.[77] All of these conditions are highly common, and all of them could limit a person's major life activities for much shorter than nine months and still qualify as a disability. Further, most courts would likely decline comparing the limitations that pregnant women face to those faced by individuals with seasonal allergies or the common cold. Pregnancies often yield much more debilitating symptoms over longer periods of time.[78] Complications attendant to pregnancy can also carry far greater risk to women's lives than the passing virus or broken bone.[79] Thus, pregnancy's exclusion from a class of conditions that routinely produce *lesser* complications than pregnancy and concurrent relegation to illnesses including the common cold draw out the tension between the reality of pregnancy as a medical condition and its ill-fitted place in the margins of ADA jurisprudence.

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73. 29 C.F.R. § 1630.2(j)(1)(ii) (2011).

74. 29 C.F.R. app. § 1630.2(j)(1)(ix) (2011).

75. 29 C.F.R. app. § 1630.2(j) (2010).

76. 29 C.F.R. app. § 1630.2(j)(1)(vii) (2011).

77. *See* Cox, *supra* note 8, at 444-45.

78. *See Pregnancy Complications*, AM. PREGNANCY ASS'N, http://www.americanpregnancy.org/pregnancycomplications/ (last visited Apr. 29, 2012).

79. *See id.*

Judicial discourse that pregnancy is a "natural" part of women's life cycles and that it is voluntary, reflects cultural attitudes about pregnancy that misstate the realities of countless women's experiences. First, labeling pregnancy a "natural" part of womanhood poses the danger of essentializing women to a child-bearing role and marginalizing women who either cannot or choose not to become pregnant by implying there is something "unnatural" about their inability or unwillingness to become pregnant. Second, many pregnancies are unwanted, whether accidental in the course of consensual sex or the result of rape.[80] To assume that all pregnant women desire their pregnancies ignores the pervasive presence of gender-based violence in today's society, and the fact that unwanted pregnancy, like many other health conditions, disproportionately affects poor communities of color.[81]

Finally, courts' insistence that pregnancy does not belong under the ADA's accommodation mandate places women in the impossible position: either they remain silent about the accommodations they desperately need to continue working through their pregnancy term, or they ask for accommodations and become vulnerable to accusations of preferential treatment. In order for pregnant women to be treated equally in the workplace, they must present their pregnancy as a normal state of health that does not impede the performance of their job duties.[82] Requesting accommodation results in the reinforcement of outdated stereotypes surrounding pregnant women's "fragile" condition, but failing to request accommodation could lead to lower job performance or outright inability to perform the job. Thus, pregnant women are forced to choose between protectionist discrimination and suffering through the debilitating aspects of their pregnancy without accommodation.[83] This is exactly the type of bind that the ADA was meant to lift disabled people out of, and yet the pregnancy exclusion prevents women from eradicating this dilemma through the ADA's protections.

B. A Proposed Solution: Remove the Pregnancy Exclusion from the EEOC Regulations

Given the host of critiques above, strong reasons militate removing the categorical exclusion of pregnancy as a disability from the EEOC regulations. Deleting the exclusion would allow pregnant plaintiffs to be treated in the same manner as all ADA plaintiffs. A plaintiff's pregnancy would be evaluated on an individual basis to discern whether the pregnancy substantially limits a major life activity. Rather than cabining off symptoms, pregnancy could be viewed holistically, so individuals with a variety of pregnancy symptoms could group

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80. *See* Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAMILY PLANNING PERSPECTIVES 24, 25 (1998), *available at* http://www.guttmacher.org/pubs/journals/3002498.html.

81. *See* Marc Kaufman, *Unwanted Pregnancies on the Rise for Poor Women*, WASHINGTON POST, May 5, 2006, at A3.

82. *See, e.g.*, Troupe v. May Dep't Stores Co., 20 F.3d 734, 736-37 (7th Cir. 1994).

83. *See* Grossman & Thomas, *supra* note 26, at 17-18.

those symptoms under the general umbrella of pregnancy as the core impairment. This would remove the need to distinguish normal from abnormal pregnancies as a threshold issue in order to be eligible for further scrutiny under the ADA's protective provisions. Courts could focus their attention on whether employers are complying with the actual statutory mandates of the ADA rather than perform medical fact-finding to discern whether a pregnancy falls into the amorphous "pregnancy-related disability" exception to the pregnancy exclusion.

Because the pregnancy exclusion is not grounded in any clear statutory language, the process of revising the regulations would be relatively easy, once proper advocacy efforts are mobilized. Advocacy would center on pressuring the Equal Employment Opportunity Commission to revise its regulations and enforcement guidance to remove the clause categorically excluding pregnancy as a disability. Ideally, to avoid further confusion, the language would be replaced with a clear mandate to consider pregnancy on an individualized case-by-case basis to determine whether it qualifies as a disability based on the impact of the pregnancy on the individual plaintiff's ability to perform major life activities. After such a revision takes place, litigators would need to bring new cases in jurisdictions with precedents upholding the pregnancy exclusion and argue that the regulatory revisions are grounds for overturning legal rulings that pregnancy is not a disability. Upon surmounting the initial hurdle of arguing pregnancy is an impairment, plaintiffs are likely to enjoy increased success in meeting the "major life activity" prong of the disability test due to the ADAAA's expanded definition of major life activities to include bodily functions such as reproduction.[84] Thus, when pregnancies interfere with cardiovascular, endocrinal, or reproductive functions, women would have a strong likelihood of succeeding in arguing their pregnancy qualifies as a disability.

III. FEMINIST RELUCTANCE TO EMBRACE THE ADA FOR PREGNANT WOMEN

While seemingly simple and empowering to pregnant women in the workplace, historically the feminist legal community has not actively pushed for the above proposed solution. Feminist reluctance to designate pregnancy a qualifying disability under the ADA helps explain how the pregnancy exclusion became so quickly entrenched in common law jurisprudence with minimal opposition from the women's rights community. From a theoretical standpoint, feminist legal advocates historically have been hesitant to ally with the disability rights movement, resistant to the prospect of analogizing pregnancy to an illness or disorder. The below sections will provide the historical context that explains the development and rationale of feminist resistance to designating all pregnancies as eligible for coverage under the ADA.

84. *See* 42 U.S.C. § 12102(2)(B) (Supp. IV 2011).

A. Pregnancy as a Lightning Rod in Feminist Legal Debate

Feminist apprehension towards classifying pregnancy as a disability originates in the chasm that developed within the feminist community surrounding the development of pregnancy discrimination and maternity leave policies. This fissure is commonly referred to as the "equal treatment vs. special treatment" debate.[85] While this debate pre-dates the conceptual problem of pregnancy as a disability under the ADA, it provides important explanatory power in defining the complex role of pregnancy in the sex equality debates of the latter half of the twentieth century.

As sex equality jurisprudence developed out of the Constitution with landmark cases like *Frontiero v. Richardson*[86] and *United States v. Virginia*,[87] pregnancy emerged as a perplexing anomaly to the argument that all sex differences were grounded in social distinctions rather than biological differences.[88] Pregnancy was perhaps the most important justification for granting sex-based classification intermediate constitutional scrutiny rather than the strict scrutiny standard applied to racial classifications.[89] At the same time, pregnancy evoked a long and storied history of discrimination, exclusion, and marginalization of women workers.[90] With the passage of the Pregnancy Discrimination Act, feminists were able to document and bring voice to workplace paternalism that had systematically excluded and punished pregnant women.[91]

Interestingly, workplace pregnancy policies historically both normalized and marginalized pregnancy in the workplace. They marginalized pregnancy by evoking protectionist rhetoric designed to protect women's bodies from the rigors of physical labor, thereby promoting healthy human reproduction.[92] Examples of this were prevalent in the airline industry and the teaching profession, where women were routinely excused as soon as employers became

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85. *See* Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?* 9 J. CONTEMP. LEGAL ISSUES 279, 279 (1998).

86. Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (finding that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members").

87. United States v. Virginia, 518 U.S. 515, 532-33 (1996) (holding that parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action).

88. *See* Sylvia A. Law, *Rethinking Sex and the Constitution,* 132 U. PA. L. REV. 955, 955-56, 966 (1984).

89. Under the intermediate scrutiny standard, pursuant to the Constitution's Equal Protection Clause, sex-based classifications are struck down unless they are substantially related to an important government interest. *United States v. Virginia*, 518 U.S. at 532-33.

90. *See* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1120 (1986).

91. *Id.* at 1120-21, 1124.

92. *Id.* at 1132.

aware of their pregnancies.[93] These policies also normalized pregnancy through the "perpetual pregnancy myth," that all women are capable of pregnancy, and will choose to become pregnant.[94] The myth was reflected in the breadth of exclusionary policies. For example, one fetal protection policy[95] excluded women ages five to sixty-three years unless they could prove sterility.[96] By normalizing pregnancy while marginalizing it, employers' protectionist policies had the net effect of legally disabling women from participating as equals to men in the workplace.

Examples of this paternalism were not only present in workplaces but were legitimized in legal jurisprudence. Justice Bradley's infamous words that that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"[97] haunts feminist attempts to articulate gender-specific challenges faced by women workers. Even more poignantly, in *Muller v. Oregon*, the Supreme Court used the anatomy of the female worker to justify limiting women's hours at work.[98] The Court stated that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . . This is especially true when the burdens of motherhood are upon her."[99] These types of institutional affirmations of women's inferiority evoked and continue to evoke residual anxiety in feminists that drawing too much attention to pregnancy as a "woman's issue" reinforces stereotypes that women are less than ideal workers and belong to the domestic sphere.[100]

Thus, "equal treatment feminists" or "assimilation" feminists began to promote policies that focused on the commonalities between men and women workers.[101] To these feminists, including Wendy Williams and Ruth Bader Ginsburg, women need to focus on integrating and challenging sex based stereotypes in male dominated workplaces.[102] Focusing on pregnancy as a distinguishing characteristic between men and women would only serve to

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93. *Id.* at 1132, 1135.

94. *Id.* at 1131.

95. Fetal protection policies are workplace policies that limit women's exposure to hazardous materials and/or hazardous work conditions to preserve the health of current or future fetuses. *See generally* CAROLINE BETTINGER-LOPEZ & SUSAN P. STRUM, *INTERNATIONAL UNION, U.A.W. V. JOHNSON CONTROLS*: THE HISTORY OF LITIGATION ALLIANCES AND MOBILIZATION TO CHALLENGE FETAL PROTECTION POLICIES (Columbia Law School Public Law & Legal Theory Working Group 2007), *available at* http://www.law.uh.edu/faculty/rturner/employment/more-on-johnson-controls.pdf.

96. *See id.*

97. Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

98. 208 U.S. 412, 418-20 (1907).

99. *Id.*at 421.

100. *See* Finley, *supra* note 90, at 1139.

101. *See generally* Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984)

102. *See id.*, Joan Williams, *supra* note 85, at 280-81, 299; *see also* Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment*, 10 CARDOZO WOMEN'S L.J. 501, 520 (2004).

differentiate male and female workers in ostracizing ways.[103] Policies that acknowledged difference, to these feminists, would create hostility towards women workers, lower hiring rates, and produce animosity towards "special treatment" that would distract from the key goal of raising women's workforce participation.[104] As Wendy Williams famously stated, "We can't have it both ways, so we have to think carefully about which way we want to have it."[105] Williams went on to promote the equal treatment approach because she believed that special treatment was a proxy for protectionism, which had historically worked to women's detriment.[106]

In contrast, "special treatment" feminists argued that ignoring pregnancy and the ways that it shaped women workers' realities would reinforce the masculine standard of the ideal worker.[107] Allowing women to enter the workforce on the same terms as men, while ignoring the special challenges they faced during pregnancy, would only serve to disadvantage women over time and reaffirm the work/home dichotomy that rendered pregnancy fundamentally incompatible with productive market labor.[108] These feminists criticized the "single standard of equality" mandates of equal treatment feminists and charged them with perpetuating a system of labor that systematically disadvantaged women by elevating the male worker as the ideal prototype and forcing women to adjust to that prototype.[109]

This debate came to a head around the issue of maternal leave policies, brought on by *California Federal Savings & Loan Ass'n v. Guerra*.[110] In this case, a receptionist filed a complaint with the California Department of Fair Employment and Housing when her position was filled after she took a pregnancy leave.[111] Under the state employment law, pregnant women were permitted leave while keeping their jobs.[112] The employer then brought an action for declaratory judgment in federal court that the maternal leave provision of the state law violated Title VII.[113] The Supreme Court rejected the bank's argument that California's pregnancy disability leave statute violated

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103. *Id.*

104. *See* Wendy Williams, *supra* note 101, at 371.

105. Joan Williams, *supra* note 85, at 281.

106. *See* Wendy Williams, *supra* note 101, at 371.

107. *See* Joanna Grossman, *Pregnancy, Work and the Promise of Equal Citizenship*, 98 GEO. L. J. 567, 604 (2010) (*citing* Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981)).

108. *Id.*

109. *See* Joan Williams, *supra* note 85, at 318 (*citing* Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CRT. REV. 201*);* Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 792.

110. 479 U.S. 272 (1986).

111. *Id.* at 278.

112. *Id.* at 275-76.

113. *Id.* at 278.

Title VII because it mandated "special treatment" of pregnant women.[114] Equal treatment feminists saw California's policy as ominously reminiscent of mandatory maternity leave policies and fodder for backlash by employers and male workers against the preferential treatment of women.[115] Special treatment feminists saw the statute as a historical benchmark in valuing women workers' pregnancies and providing them with adequate accommodations.[116]

A final issue that contributed to the pregnancy debates was the emergence of legal challenges to fetal protection policies in the late 1980's.[117] Policies systematically excluding women with pregnancy potential from toxic workplace environments led to a vigorous legal battle to overturn such policies as a violation of Title VII.[118] Historical analysis of such policies reflected that they were used to exclude women from predominantly male work environments.[119] Employers in female-dominated industries that involved the handling of toxic chemicals, such as pharmaceutical production and cosmetics, rarely implemented fetal protection policies as compared with higher-paying male-dominated industries that routinely excluded women's employment through fetal protection rationales.[120] In responding to these policies, equality feminists led the charge in attempting to disentangle pregnancy from work in women's lives.[121] Women, litigators argued, should be entitled to choose work over a healthy pregnancy and it was within their purview, not that of paternalistic employers, to determine whether their desire for employment or motherhood would dictate their choice to work in a toxic work environment.[122] The issue of fetal protection policies' legality came to a head in *UAW v. Johnson Controls*, when the Supreme Court struck down a fetal protection policy as an impermissible encroachment on women workers' autonomy to choose whether to work in toxic work environments.[123] The case was deemed a legal victory in affirming women's autonomy to make decisions about their reproductive health in the context of labor.[124]

Thus, equal treatment and special treatment concerns in the feminist legal community were equally reflected in two of the most important pregnancy debates of the civil rights movement. In the context of maternal leave policies, special treatment feminists could claim victory in upholding a statute that

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114. *Id.* at 284-85.

115. *See* Joan Williams, *supra* note 85, at 280-81.

116. *Id.*

117. BETTINGER-LOPEZ & STRUM, *supra* note 95, at 1-2.

118. *See, e.g.*, Hannah Furnish, *Beyond Protection: Relevant Difference and Equality in the Toxic Work Environment*, 21 U.C. DAVIS L. REV. 1, 3-4 (1987).

119. *See* Elaine Draper, *Reproductive Hazards and Fetal Exclusion Policies after Johnson Controls*, 12 STAN. L. & POL'Y. REV. 117, 118-9 (2001).

120. *Id.* at 119.

121. *Id.* at 123.

122. *Id.*

123. *Id.*; Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, 499 U.S. 187, 211 (1991).

124. *See* Draper, *supra* note 119, at 123.

squarely addressed the special accommodations necessary for pregnant women to thrive in the workplace while fulfilling their maternal role. In the context of fetal protection policies, equal treatment feminists prevailed in asserting women's place in toxic work environments and dismantling the paternalist ideologies that enabled the sex segregation of high-paying industrial labor markets.[125] They did so by emphasizing the disaggregation of womanhood from pregnancy, and arguing that all women suffered from pregnancy stereotyping because of their perceived ability to become pregnant.[126]

While special treatment feminists gained traction in proponing that pregnant women should receive workplace accommodations, arguing that pregnancy was a disability could arguably undermine their agenda, which sought to eventually restructure workplace norms to dismantle the male worker prototype.[127] Hence, special treatment feminists were generally careful to portray pregnancy in a positive light, focusing on women's "unique capacity" to produce human life.[128] Rather than emphasizing the physical limitations that might accompany pregnancy, the debate was framed in terms of accommodating the maternal role in the workplace.[129] Thus, until now, little attention has been paid to accommodations on the job that would greatly alleviate the physical challenges that accompany pregnancy, such as light duty assignments.[130]

B. Re-conceptualizing Disability as an Identity

To some degree, it is understandable that as a historically marginalized group, pregnant women may recoil at the idea of taking on another stigmatizing identity. However, pregnancy rights advocates' worries about the stigma of disability warrant further examination. It is important to interrogate the ways that conflating sickness with abnormality, and diagnosis with stigma, undermines the legitimacy of women's equality imperatives. Feminist disavowal of pregnancy as a disability has the potential to reinforce discriminatory attitudes towards both disabled people and women. Moreover, the bifurcation of pregnancy from disability rights discourse ignores critical junctures at which feminist and disability theories converge. In deconstructing disability as a social category, I will demonstrate that feminist disavowal of the

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125. *See Johnson Controls*, 499 U.S. at 204.

126. *See* Brief of Amicus Curiae, submitted by Equal Rights Advocates, NOW Legal Defense and Education Fund, National Women's Law Center and Women's Legal Defense Fund in Support of Petitioners at 24**,** Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, 499 U.S. 187 (1991), (No. 89-1215) 1990 WL 511292.

127. *See* Colette G. Matzzie, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 194 (1993)

128. *See id.*

129. *Id.*

130. *See* Grossman & Thomas, *supra* note 26, at 18.

ADA's rights framework reflects ableist[131] attitudes that continue to permeate feminist discourse, and this ableism prevents important advances in both feminist legal theory and litigation to improve working conditions for pregnant workers.

The first strand of disability theory most prevalent in legal discourse and at the root of most feminist misapprehension is the medical model of disability.[132] This model's defining trait is "its view of disability as a personal trait of the person in whom it inheres."[133] In this framework, disabled people's "problem" is their functional impairment, and alleviating or "curing" the impairment is the means by which disability is addressed.[134] To the extent the impairment itself cannot be reversed, the social and economic disadvantages that flow from the impairment are seen as part and parcel of the impairment.[135] Society is not expected to significantly restructure itself to make up for the social losses of individuals' "misfortunes."[136] In addition, disabled individuals under the medical model of disability require a medical diagnosis of their impairment to qualify for benefits or entitlements based on their disabled status.[137] This places disabled individuals in a unique power dialectic with the medical community, where presenting certain symptoms is essential to attain the diagnosis that legitimizes the individual's claim to disability entitlements.[138]

The second strand of disability theory is referred to as the "social model."[139] This model is promoted by theorist Susan Wendell, who draws upon feminist work regarding the social construction of gender.[140] Wendell explains that "[s]ocieties that are physically constructed and socially organized with the unacknowledged assumption that everyone is healthy, nondisabled, young but adult, shaped according to cultural ideals, and often, male, create a great deal of disability through sheer neglect of what most people need in order to participate fully in them."[141] As such, disability is both a social and cultural construct, and a person is disabled not by his or her physical characteristics, but rather by the

131. Ableism is a form of discrimination or prejudice against individuals with disabilities. *What Is Ableism? Five Things About Ableism You Should Know*, FWD (FEMINISTS WITH DISABILITIES)/FORWARD (Nov. 19, 2010), http://disabledfeminists.com/2010/11/19/what-is-ableism-five-things-about-ableism-you-should-know/ (providing an in-depth treatment of ableism).

132. Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649, 652 (1999).

133. *Id.* at 649.

134. *Id.* at 650.

135. *See* Arlene S. Kanter, *The Law: What's Disability Got to Do with It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 420 (2011)

136. Crossley, *supra* note 132, at 651.

137. *Id.* at 650.

138. *Id.*

139. *Id.* at 653.

140. *Id.* at 654.

141. *Id.* (quoting SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 13 (1996)

ways that society ignores or marginalizes the existence of these characteristics.[142]

The final strand of disability theory is referred to as the "minority group" model or the "civil rights" model.[143] This group takes a political stance towards disability, seeing disabled peoples' lives as the product of processes of social marginalization and fighting to reverse those processes.[144] The marginalization stems from "existential anxiety" that able-bodied people will one day be stricken with the affliction of their disabled counterparts, and discomfort with those who physically deviate from able-bodied norms.[145] Under the minority group model, "[t]he presumption is that persons with disabilities are equally capable of flourishing in competitive environments if societally erected barriers are removed."[146] Proponents of the minority group model have probably done the most analogous work to the women's rights movement in struggling to dismantle workplace paternalism for "handicapped" workers. Many of the stereotypes that permeate the workplace for disabled workers resonate with pregnant women: that disabled workers are incompetent, of fragile constitution, and are physically incapable of performing job functions regardless of their personal belief that they can.[147]

In exploring the social and minority group models of disability theory, it is indisputable that salient parallels exist between these theories and pregnancy discourse in the feminist legal community. Disability scholar Mary Crossley points out that

> if an employer…discriminates against a woman based on her pregnancy and related conditions, isn't that discrimination likely to be based on the deviation of the pregnant woman's body from cultural ideals of what the body should look like and how it should perform? And, if that is the case, how much does discrimination based on pregnancy really differ from discrimination based on disability?[148]

Carlos Ball articulates how disability theory addresses this parallel discrimination:

> It is *disability* discrimination law that has . . . adopted the feminist position on difference and equality . . . . Although it can be argued, as many feminist theorists have done, that laws prohibiting

142. David A. Weisbach, *Toward a New Approach to Disability Law*, 1 U. CHI. LEGAL F. 47, 48 (2009)

143. Crossley, *supra* note 132, at 659.

144. *Id.*

145. *See id.* at 662.

146. *Id.* at 659-60.

147. *See* Kanter, *supra* note 135, at 435.

148. Crossley, *supra* note 132, at 675.

> discrimination on the basis of sex or gender *should* address the ways, both physical and socially constructed, that women are different from men, disability discrimination law *already* accounts for the differences between the disabled and the able-bodied. A formal kind of equality, where the only obligation is to treat similarly those who are already similarly situated, will not provide meaningful equality to the disabled. What disability discrimination law demands is something much closer to the understanding of equality held by feminist theory, one sensitive and attuned to issues of difference.[149]

Hence, disability theory adopts and deepens a central tenet of the special treatment approach that pregnant women must not simply be integrated into male-dominated public space, but that public space must be deconstructed and reformed to better reflect the realities of the pregnant worker. As Ball goes on to state, "feminist theory and communitarian theory lead us to grapple with the social contexts that often determine whether particular physical or mental impairments translate into disabilities."[150] Moreover, disability theory challenges the "normal" worker as a legal fiction.[151] Thus, theorists like Crossley and Ball do not simply advocate for the integration of disability rights into feminist discourse, but promote disability discrimination law as the way forward for pregnant women (and all women) to achieve workplace equality. In channeling the ADA's transformative potential to better reflect the realities of pregnant workers through providing reasonable accommodations, the ADA has the ability to foster fundamental workplace restructuring that the feminist legal community has not yet achieved.[152] In short, rather than steering clear of disability discourse and engaging in the same discriminatory attitudes they have been subjected to, feminist legal advocates must band with the disability rights movement to dismantle stereotypes about the able-bodied worker.

IV. PRACTICAL CRITIQUES OF CLASSIFYING PREGNANCY AS A DISABILITY

As demonstrated above, there is enormous rhetorical and moral force in aligning with the disability rights movement to advance the rights of pregnant women in the workplace. However, some critics may point to the strategic disadvantages of such an alignment, given the political backlash suffered by the disability rights movement in the wake of the ADA's passage. This section will briefly describe political reactions to the ADA's passage to demonstrate why feminist legal advocates may fear inheriting ADA backlash if they use the

149. Carlos Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105, 141-42 (2005).

150. *Id.* at 134-35.

151. Kanter, *supra* note 135, at 436.

152. *See* Linda Hamilton Krieger, *Foreward: Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 3-4 (2000).

ADA to obtain accommodations for pregnant women. It will then work to dispel these apprehensions, given that pregnant women already operate under a disability rights/reasonable accommodation framework to some extent through the Pregnancy Discrimination Act.

A. Backlash Against the ADA Creates Feminist Concerns That Pregnancy As a Disability Will Suffer a Similar Fate

The passage of the Americans with Disabilities Act was viewed as an enormous advance in civil rights legislation and received bipartisan support in its passage;[153] however, as ADA claims filtered into federal courts, a number of trends emerged that signaled a socio-legal "backlash" to the transformative statute.[154] Plaintiffs experienced systematic failure in federal courts because judges applied narrow interpretations to the definition of what qualified as a disability, thereby excluding a majority of plaintiffs from ever reaching the key issues of reasonable accommodation or disparate treatment.[155] Commentators attributed this trend in part to the fact that a very limited mobilized social movement preceded the passage of the ADA,[156] and in part to the fact that while disability rights activists and civil rights lawyers informed the ADA's drafting process, defense side employment lawyers unfamiliar with disability discourse were largely tasked with implementing the law.[157]

At the same time that plaintiffs were being shut out of federal courts, the ADA was popularized in print and television media as enabling workers to shirk their duties, humoring hypochondriacs, and creating the ultimate end run around employer attempts to discipline and manage their workforce.[158] Coverage was particularly scathing for individuals with mental illnesses, leading to headlines like "Late for Work: Plead Insanity;"[159] "Protection for the Personality-Impaired;"[160] and "Gray Matter—Breaks for Mental Illness: Just What the Government Ordered."[161] One commentator noted that these headlines paralleled historical scripts of hostility towards the disabled, treating

153. *See id.* at 1.

154. *Id.* at 7.

155. *See id.*

156. *Id.* at 11 (citing Joseph P. Shapiro, *Disability Policy and the Media: A Stealth Civil Rights Movement Bypasses the Press and Defies Conventional Wisdom*, 22 POL'Y. STUD. J. 123 (1994)).

157. *Id.* at 13.

158. *See* Krieger *supra* note 152, at 9.

159. *Id.* (citing Dennis Byrne, *Late for Work? Plead Insanity*, CHI. SUN-TIMES, May 8, 1997, at 39).

160. *Id.* (citing George Will, *Protection for the Personality-Impaired*, WASH. POST, Apr. 4, 1996, at A31).

161. *Id.* (citing Sheryl Gay Stolberg, *Gray Matter--Breaks for Mental Illness: Just What the Government Ordered*, N.Y. TIMES, May 4, 1997, (Week in Review, Sec. 4) at A1).

them as narcissistic, overly demanding, and unreasonable.[162] Professor Krieger analyzes this interaction of media and law, stating:

> To the extent that a particular law or regulatory regime is politically controversial, that controversy will be enacted in the print and broadcast media, as positive and negative scripts, symbols, and condensing themes compete for audience attention. The particular condensing themes that prevail in this contest become the dominant cognitive and attitudinal frames through which people assign meaning to the law and construe efforts to mobilize or enforce it.[163]

In short, the ADA, while holding transformative promise, has received a great deal of negative scrutiny, both from courts and the press. Thus, it makes sense that feminist legal advocates must think carefully about immersing the pregnancy rights movement in the fallout from the law's passage. However, pregnancy rights advocates have many reasons to believe the movement is prepared to address any backlash.

B. Pregnancy Coverage Under the ADA Will Not Produce Significant Backlash Because Pregnancy is Already Conceptualized as a Disability Under the Disparate Treatment of the PDA

First, the disparate treatment framework of the Pregnancy Discrimination Act clearly conceives of pregnant women as disabled, albeit "temporarily disabled." This is demonstrated through judicial analysis in cases like *Young*, in which pregnant women are required to find comparators, which are routinely referred to as "other temporarily disabled workers" who are treated differently than pregnant women in the terms and conditions of their employment.[164] In other words, pregnancy discrimination law already frames pregnant women as disabled in order to cultivate a cause of action under the less comprehensive protections afforded by the Pregnancy Discrimination Act. Thus, the stigmatized identity of "disabled" under the ADA versus that of "temporarily disabled" under the PDA is somewhat of a tortured distinction. This is particularly true since many disabled individuals under the ADA are temporarily disabled.[165] Consequently, pregnant have arguably already been branded with the stigmatizing label they wish to avoid, which begs the question whether it is worth distancing themselves from the dramatically broader protections afforded by the ADA for political purposes.

C. Similarities Exist Between Title VII Disparate Impact and ADA Reasonable Accommodation Litigation, Creating Backlash Against

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162. *See Id.* at 14 (citing Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 196-98 (2000).

163. *Id.* at 15.

164. *See* Grossman, *supra* note 107, at 570.

165. 29 C.F.R. app. § 1630.2(j)(1)(ix) (2011).

Pregnant Workers Who Bring Either Claim

Second, the "reasonable accommodation" framework of the ADA[166], which has fostered such contempt in the popular media, is not so far distinct from the disparate impact framework available under the Pregnancy Discrimination Act. Discrimination scholar Christine Jolls speaks persuasively about the parallels between disparate impact and reasonable accommodation frameworks, in that each require employers to restructure neutral workplace policies to better address the needs of a marginalized minority group.[167] Jolls goes further to state that "disparate impact liability is in fact an accommodation requirement," debunking the notion that anti-discrimination and reasonable accommodation claims trigger separate and distinct remedial frameworks.[168] In Jolls' view, reasonable accommodation advances anti-discrimination efforts by dismantling the structural inequalities that perpetuate animus-based discrimination.[169]

Given Jolls' conceptual continuum, it's questionable whether a pregnant plaintiff would experience backlash in the workplace in a substantially different manner in the aftermath of a disparate impact lawsuit versus a reasonable accommodation lawsuit. For example, a pregnant worker could bring a disparate impact claim under the Pregnancy Discrimination Act challenging a bathroom break limitation for a job, alleging that the requirement disproportionately disadvantages pregnant women. Alternatively, she could bring a reasonable accommodation claim under the ADA, requesting more frequent bathroom breaks on account of her pregnancy. It's unclear that a disparate impact lawsuit would really prevent preferential treatment backlash in her workplace in a manner significantly different than a reasonable accommodation claim. Further, the ADA provides the plaintiff with certain strategic litigation advantages—for example, unlike the PDA, the ADA tasks employers with an affirmative obligation to engage in an interactive process with the plaintiff.[170] Thus, in gauging the comparative backlash likely to occur from disparate impact lawsuits versus reasonable accommodation lawsuits, the advantages of litigating under the PDA to avoid workplace resentment become less clear.

166. The ADA requires that qualified individuals with disabilities receive "reasonable accommodations" that do not pose an undue hardship to the employer. Examples of reasonable accommodations are wheelchair access, job modifications like light duty, modifications to restrooms, ergonomic office furniture and intermittent leave. *See* C.F.R. 1630.2(o)(2) (2011).

167. Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643, 645 (2001).

168. *See id.* at 652.

169. *See id.* at 667.

170. 29 C.F.R. § 1630.2(o)(3) (2011).

D. Counter Backlash and a New Day for the ADA (and Pregnancy as a Disability)

Much of the backlash documented through the 1990's has been met with a counter-movement to solidify the ADA's protections.[171] The ADA Amendments Act has gone a long way to re-affirm Congressional commitment to preserving and legitimating the rights of disabled people after a decade of ungenerous judicial interpretations of the ADA.[172] Moreover, many benefits have accrued to non-disabled workers as a result of the procedural and structural modifications employers have been required to make to comply with their ADA obligations.[173] Thus, feminists are confronted with the reality that the backlash could subside and transform into a stronger and more resilient coalition as ADA jurisprudence continues to develop. The moment is ripe for re-evaluating the backlash of the ADA and questioning whether it has produced an even stronger statutory framework and a new frontier for disability claims like pregnancy, that have been excluded by wooden regulatory and common law interpretations applied to the ADA until now.

In sum, fears of being subsumed under the wave of backlash encountered by the ADA overlook the structural similarities between the PDA and ADA's disparate treatment, disparate impact, and reasonable accommodation models. Further, they ignore the fact that the backlash itself has taken new political significance in triggering the need for the ADA Amendments Act, which has strongly reaffirmed political commitment to the transformative ideals of the Americans with Disabilities Act. Hence, upon accepting the theoretical and moral imperatives of joining forces with the disability rights movement, pregnancy rights advocates can also rest assured that the negative political consequences of such an alignment are overstated.

V. PART V: NEW APPROACHES TO PREGNANCY DISCRIMINATION: MOVING TOWARDS AN INTERSECTIONAL APPROACH THAT LINKS PREGNANCY AND DISABILITY DISCOURSE

Recently, the pregnancy rights community has embraced the ADA in ways that indicate greater comfort with using ADA-mandated accommodations as a benchmark for pregnant workers' rights.[174] However, the arguments currently being used to advance pregnant workers' rights stop short of pushing for the elimination of the pregnancy exclusion from the ADA.[175] Advocates emphasize functional similarities between pregnancy and other disabilities,

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171. Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1284 (2009).

172. *See Id.* at 1270.

173. *See* Michelle A. Travis, *Lashing Back at the ADA Backlash: How the American with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 377 (2009).

174. *See infra* note 197.

175. *See infra* Part V, Sections B-D.

rather than explicitly naming pregnancy a disability that qualifies pregnant women for accommodations under the ADA.[176] This Part of the article will evaluate how current advocacy efforts demonstrate an evolved understanding of the intersection of pregnancy and disability rights, while still informed by historical ambivalence towards connecting the two rights discourses.

Following the passage of the ADA Amendments Act (ADAAA) in 2008, pregnancy rights advocates slowly began using comparisons between disabled and pregnant workers to advance arguments for increasing the accommodations available to pregnant women on the job.[177] At the same time, the feminist community has not issued a clear directive to revise the pregnancy exclusion under the ADA. Nor has there been public alignment between the pregnancy rights and disability rights community on workplace pregnancy discrimination, though it does appear some disability scholars have begun to chime into the public debate. Advocates are mobilizing four major strategies to address the need for greater workplace accommodations for pregnant women. First, advocates have coordinated a number of powerful media commentaries on the inadequacies of existing legal protections for pregnant women. Second, advocates are litigating the PDA to advance the relatively novel legal theory that pregnant women must receive the same accommodations as ADA-eligible workers pursuant to the equal treatment mandate of the PDA. Third, advocates have engaged in administrative advocacy at the EEOC, pushing the agency to clarify its guidance on pregnancy discrimination. Finally, advocates have orchestrated the proposal of state legislation that would mandate accommodations for pregnant workers separate and apart from the PDA and the ADA. I will explore each strategy and identify the means by which the strategy both is informed by and challenges historical reluctance by feminists to argue that pregnant workers qualify for accommodations under the ADA.

A. Shaping Public Discourse Through Media Advocacy

Advocates have seized media opportunities to highlight the persisting inequalities which pregnant women face at work and have authored several powerful opinion pieces in major news outlets. Dina Bakst, co-president of a Better Balance[178], wrote an op-ed for the *New York Times* pointing to the critical gaps that exist in pregnancy and disability law which leave workers with healthy pregnancies in the lurch when even minor accommodations are

176. *Id.*

177. *See* Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Plaintiff-Appellant and in Support of Reversal at 14, Young v. United Parcel Service, Inc., No. 11-2078 (4th Cir. Mar. 5, 2012), *available at* http://www.aclu.org/files/assets/2012.3.5_aclu_et_al_amicus_brief.pdf.

178. *About ABB: ABB Board of Directors*, A BETTER BALANCE (last visited Apr. 19, 2012), http://www.abetterbalance.org/web/aboutabbmenu/abbdirectors. A Better Balance is a non-profit legal organization based in New York City whose mission is to "promote equality and expand choices for men and women…so they may care for their families without sacrificing their economic security." *About ABB: Who We Are*, A BETTER BALANCE (last visited Apr. 19, 2012), http://www.abetterbalance.org/web/aboutabbmenu/about

necessary for them to retain their jobs.[179] Her piece highlighted how current applications of the ADA and PDA place pregnant women in an impossible predicament, where they must choose between their economic security and maintaining a healthy pregnancy. Joan Williams authored a piece for the *Huffington Post* that emphasized how pregnant women are treated worse by employers than other workers who require accommodations, including workers covered by the ADA.[180] Interestingly, Williams emphasized the similarities between pregnant and disabled workers, in that both groups are federally protected classes deserving of the same level of accommodation under federal laws. Jeannette Cox, a prominent disability scholar, was the only commentator of the three discussed to advocate for a clean sweep of the ADA pregnancy exclusion in recent months.[181] It is telling that eliminating the pregnancy exclusion was a recommendation issued from the disability rights community, rather than from an advocate focusing primarily on pregnancy rights.

B. Litigating Light Duty

Several federal court decisions have led the feminist legal community to mobilize litigation efforts, posing legal challenges to employers denying pregnant women light duty.[182] Notably, a group of twelve feminist legal organizations filed an amicus brief in March 2012 in Young v. UPS, Inc., arguing that the District Court of Maryland incorrectly upheld defendant-employer's light duty policy that applied to many workers, but not pregnant women.[183] The case involved a UPS worker who requested light duty upon becoming pregnant.[184] The policy applied to a number of other workers with limited lifting abilities, including those covered by the ADA.[185] The lower court held that because the policy was "pregnancy blind" (in other words, did not contain an explicit exclusion of pregnant women), it was not a violation of the PDA.[186] Moreover, the court held that ADA-eligible workers were not suitable comparators for pregnant women.[187]

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179. Dina Bakst, Op-Ed., *Pregnant and Pushed Out of a Job*, N. Y. TIMES, Jan. 31, 2012, at A, *available at* http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html.

180. Williams, *supra* note 31.

181. Jeannette Cox, *Disability Law Should Cover Pregnant Workers*, CNN OPINION (Jan. 10, 2012, 4:00 PM), http://www.cnn.com/2012/01/10/opinion/cox-pregnancy-disability/index.html?hpt=hp_bn9.

182. *See, e.g.*, Urbano v. Continental Airlines, Inc., 138 F.3d 204, 204 (5th Cir. 1998); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1309 (11th Cir. 1999), Reeves v. Swift Transp. Co., Inc., 446 F.3d 637, 637 (6th Cir. 2006).

183. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Plaintiff-Appellant and in Support of Reversal, *supra* note 177, at 4-5.

184. Young v. UPS, Inc., No. DKC 08–2586, 2011 WL 66532 at *1, *1, *5 (D. Md. Feb. 14, 2011).

185. *Id.* at *2.

186. *Id.* at *11-12.

187. *Id.* at *13-14.

The amicus brief challenged the federal court's holdings in *Young*. First, advocates argued that the PDA mandates that pregnant women receive the same treatment as workers similarly situated in their ability or inability to work.[188] It follows that a pregnant woman who is advised by her doctor not to lift heavy objects is similarly situated in her inability to work as an ADA-eligible worker who provides the same doctor's note and is granted a light duty assignment. The brief argued that both workers must be granted light duty pursuant to the equal treatment mandates of the PDA.[189] Second, advocates vehemently opposed the court's finding that ADA-eligible employees were ineligible comparators.[190] The brief pointed to the ADAAA, arguing that it changed the legal landscape to cover a much larger swathe of workers, and many more ADA-eligible workers now faced limitations functionally identical to pregnant women in the workplace.[191] Advocates argued that the reality that workers are eligible for accommodations under the ADAAA for virtually identical limitations facing pregnant workers who are denied accommodations produces a result that undermines the purpose of the PDA.[192]

The amicus arguments were powerful interpretations of the PDA. They also indicate a growing ease in the feminist community towards comparing pregnant workers to disabled workers. It is indeed a shift from prior efforts to advocate for disabled workers to be the primary comparators used to determine a pregnant woman's entitlement to workplace accommodations. Moreover, the brief cited to disability scholar Jeannine Cox's article,[193] which openly advocated for the ADA to extend to pregnant women.[194] These shifts in rhetorical strategy were significant and noteworthy because they signaled a deeper, more intersectional understanding of the commonalities between disabled and pregnant workers' experiences of discrimination.

Nevertheless, the brief did not go so far as to argue that pregnant women are themselves eligible under the ADAAA for workplace accommodations. Rather, it pointed to disabled workers as a similarly situated group, taking care to differentiate the protective statutes which applied to each group of workers.[195] The brief expressly indicated that Young did not pursue accommodations under the ADAAA because Ms. Young experienced discrimination after the passage of the ADAAA.[196] Thus, it is entirely possible that the brief did not advance an ADA reasonable accommodations argument purely because of the timing of Young's lawsuit. As a result, it remains unclear

188. *See* Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Plaintiff-Appellant and in Support of Reversal, *supra* note 177, at 14.

189. *See id.* at 21.

190. *Id.* at 26.

191. *Id.* at 27-28.

192. *Id.*

193. *Id.* at 28.

194. Cox, *supra* note 8, at 443.

195. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Plaintiff-Appellant and in Support of Reversal, *supra* note 177, at 26.

196. *Id.* at 27.

how the feminist legal community will mobilize around the next plaintiff who is denied light duty. Will an argument for ADA coverage emerge for pregnant workers in light of the Amendments Act, or will the ADAAA remain a statutory framework that is used for comparative purposes to advance the PDA?

C. Agency Reform: Recommendations to the EEOC

The third major strategy that feminist advocates are advancing is in the realm of administrative advocacy. In February 2012, the EEOC convened a meeting to discuss the path forward to combat pregnancy discrimination.[197] Several pregnancy discrimination experts testified, and utilized the ADA in their arguments. However, experts tended to focus on the ADA as a statute that produced comparators for the PDA, echoing the arguments deployed in the Young brief.[198] There was almost uniform agreement among expert witnesses that pregnant women must be permitted to receive the same accommodations as ADA-eligible workers whose disabilities produced comparable workplace limitations.[199] Emily Martin, Vice President and General Counsel of the National Women's Law Center, recommended the EEOC make explicit that pregnant workers are entitled to the same accommodations as ADA-eligible workers.[200] Similarly, Judith Lichtman, Senior Advisor for the National Partnership for Women and Families, recommended that the EEOC provide guidance that pregnant workers must be treated exactly the same as "similarly abled" workers under the PDA.[201]

Joan Williams provided the most radical testimony, requesting that the EEOC issue guidance clarifying that the ADAAA has paved the way for many more pregnancy complications to qualify as impairments.[202] She also recommended the EEOC clarify that pregnant women who produce doctors' notes to their employers with recommendations for workplace modifications must be granted such modifications consistent with the ADA.[203] At the same

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197. *See Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*: *Transcript*, U.S. Equal Emp't Opportunity Comm'n (2012), *available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm.

198. *Id.* (statement of Sharon Terman, The Legal Aid Soc'y Emp't Law Center).

199. *See infra* notes 202, 206 ; *see also* U.S. Equal Emp't Opportunity Comm'n, *supra* note 197 (written testimony of Peggy Mastroianni, EEOC), *available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm.

200. U.S. Equal Emp't Opportunity Comm'n, *supra* note 197 (written testimony of Emily Martin, Vice President and General Counsel, Nat'l Women's Law Ctr.), *available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/martin.cfm.

201. U.S. Equal Emp't Opportunity Comm'n, *supra* note 197 (written testimony of Judith Lichtman, Senior Advisor, Nat'l P'ship for Women & Families), *available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/lichtman.cfm.

202. U.S. Equal Emp't Opportunity Comm'n, *supra* note 197 (written testimony of Joan C. Williams, Director, Ctr for WorkLife Law), *available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm.

203. *Id.*

time, Professor Williams acknowledged that agency guidelines explicitly state that pregnancy is not an impairment under the ADA.[204] She also emphasized that pregnant workers had a similar right to ADA-eligible workers to request modifications that would prevent them from exacerbating their physical limitations.[205] Thus, Professor Williams took bold new steps to equate pregnancy to disability, asking both for clarifications that would essentially enable pregnant workers to claim the same rights as their ADA "counterparts" and in some instances to argue for ADA coverage themselves.

While Professor Williams' recommendations were productive, necessary and forward thinking, none specifically advocated for revision of pregnancy exclusion under the ADA. There are several reasons one can surmise that such a bold overhaul was not proposed. The EEOC hosted the meeting, which may have measured advocates' language, in apprehension that such a radical revision would be viewed as overly critical, unrealistic or confrontational. Advocates may also be engaging in an incremental strategy, hoping to address the ADA as the next step in a progression of reforms for pregnant women. This is particularly possible given that the EEOC has not itself litigated many light duty cases, and advocates are trying to discern what the EEOC's stance on the PDA would be in such cases.[206] However, it is also possible that advocates made a conscious choice to focus on the PDA, and that past feminist apprehensions informed their decision to advance the pregnancy discrimination doctrine rather than actively incorporating agency reform of the ADA regulations into their recommendations. It is also telling that no disability advocates testified before the EEOC, given that many pregnant women do currently qualify as disabled and that disability law figured so prominently into the expert testimony.

D. Legislative Fixes: Discrete Pregnancy Accommodation Mandates

The final strategy involves pushing legislators to propose stand-alone bills that mandate employers to accommodate pregnant workers.[207] This strategy was publicized in New York in early 2012. [208] Even more recently, U.S. Representatives Jerrold Nadler (D-NY), Jackie Speier (D-CA), Susan Davis

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204. *Id.*

205. *Id.*

206. *See EEOC Press Releases* U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/newsroom/release/. The EEOC has litigated the light duty issue in one case. The EEOC argued that non-pregnant employees with both on and off the job injuries were suitable comparators under the PDA, but the Tenth Circuit chose to apply the defendant's stricter articulation of the "similarly situated" standard; that a PDA plaintiff should be compared to non-pregnant employees who suffered injuries off the job. Equal Emp't Opportunity Comm'n *v.* Horizon Healthcare Corp., 220 F.3d 1184, 1189, 1184-96 (10th Cir. 2000). However, there is not developed precedent on this area, and no cases litigated as of yet regarding whether healthy pregnancies could qualify for ADA coverage.

207. *See, e.g.*, S. 6273, 2011 Gen. Assemb. (N.Y. 2012), *available at* http://open.nysenate.gov/legislation/api/1.0/lrs-print/bill/S6273-2011.

208. *See* Bakst, *supra* note 179.

(D-CA) and Carolyn Maloney (D-NY) have proposed the Pregnant Workers Fairness Act (PWFA), which would provide reasonable accommodations to pregnant workers.[209] The PWFA and its New York counterpart are clearly intended as legislative fixes to the current opposition by employers and courts to a more progressive reading of the PDA.[210] The PWFA attempts to codify legal interpretations of the PDA advanced by advocates but largely ignored by courts and the EEOC that the PDA should encompass accommodations for pregnant workers identical to those provided to other workers who are similarly limited in their ability to work.[211] Introducing these bills is a laudable effort by lawmakers to prevent pregnant workers from suffering the devastating consequences of the current wooden readings of the PDA and the ADA. However, it mirrors above approaches in its focus on pregnancy rights as a discrete legal regime, rather than incorporating pregnant workers into the accommodations frameworks mandated under federal and state disability laws.[212] While federal legislation, if passed, could dramatically improve the working conditions of pregnant women, it detracts from an intersectional approach that strives to integrate the battles faced by all workers who are denied reasonable accommodations when working with a diverse range of abilities. If pregnant women achieve increased protections through the proposed pieces of legislation, they will do so in a legal regime further distinguished from the disability rights movement.

Each of these strategies indicates a renewed mobilization around the issue of pregnancy accommodations, which has yielded important and positive developments for the visibility of pregnancy discrimination in public discourse. It has also produced interest by courts, agencies and lawmakers in considering new lines of legal argumentation and strategy to better enforce the mandates of the PDA. At the same time, the above strategies demonstrate that advocates have focused their efforts on producing complicated, if accurate and fair, interpretations of the PDA. A cleaner, albeit more radical, approach lies in advocating to eliminate the pregnancy exclusion in the ADA once and for all,

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209. Press Release, National Partnership for Women and Families, Pregnant Workers Fairness Act is "Balanced, Reasonable and Badly Needed Legislation" to Address Workplace Discrimination Based on Pregnancy (May 8, 2012) *available at* http://www.nationalpartnership.org/site/News2?page=NewsArticle&id=33510.

210. *See* Press Release, Congresswoman Jackie Speier, Reps. Nadler, Speier, And Others Announce Legislation Protecting Pregnant Workers From Discrimination (May 8, 2012) *available at* http://speier.house.gov/index.php?option=com_content&view=article&id=641:reps-nadler-speier-and-others-announce-legislation-protecting-pregnant-workers-from-discrimination&catid=1:press-releases&Itemid=14.

211. *See supra* Section V-B; Press Release Equal Rights Advocates Announces the Introduction of the Pregnant Workers Fairness Act and Groundbreaking Report Supporting the Legislation (May 7, 2012) *available at* http://www.equalrights.org/media/2012/PR-PWFAReport.pdf; Dina Bakst, *This Mother's Day, Stand Up for Expecting Moms*, HUFFINGTON POST, May 8, 2012, *available at* http://www.huffingtonpost.com/dina-bakst/pregnant-workers-fairness-act_b_1499657.html.

212. *See supra* note 207 and accompanying text.

and allowing all pregnancy-related limitations to be considered eligible for ADA accommodations. A key means by which to advance this approach would be to increase the presence and voice of disability rights advocates in the pregnancy rights' movement, through aligning with them in the media, insisting on their inclusion in agency reform efforts, and consulting with them in developing multi-faceted litigation strategies.

CONCLUSION

Pregnancy materialized as a confounding conundrum early in the development of ADA jurisprudence. Courts' discomfort with classifying pregnancy as a disability mirrored the ways in which courts misunderstood the social model of disability that advocates sought to implement through the ADA's legal apparatus. The pregnancy rights movement struggled to situate itself within feminist legal discourse, and largely ignored the disability rights framework as an avenue to vindicating the rights of pregnant women at work. This paper has sought to explain this reticence in the feminist legal community by historicizing the development of pregnancy rights discourse and evaluating how historical context informs current efforts to address persisting gaps in protection for pregnant workers.

Careful scrutiny of what disability law is, and where it comes from, provides a salient challenge to reluctance at embracing the ADA as a vehicle for advancing pregnancy rights in the workplace. Examining the intersections of disability theory and feminist legal theory demonstrate the ways in which disability law holds transformative potential for pregnant women at work, and how it has realized some of the goals that pregnancy rights activists have been unable to achieve on their own.

With the passage of the ADAAA, pregnancy rights advocates have made bold new moves in advancing legal theories that require accommodation for pregnant workers. Largely, these theories have stopped short of arguing that the ADAAA calls for the removal of the pregnancy exclusion in ADA regulatory guidance and jurisprudence. Given this fresh moment in political discourse, advocates have the opportunity to make this assertion, and demonstrate once and for all that pregnancy rights have outgrown their stifled place in the ADA. This is reflected in the mystifying legal rules that have developed to try to address the dissonance that has developed between existing ADA doctrine and the medical realities of pregnant women at work. It is also reflected in the arguably over-complicated (albeit powerful) arguments advocating for equal treatment of pregnant and disabled workers pursuant to the Pregnancy Discrimination Act. It is time for the feminist legal community to take the lead in bridging this gap definitively, through aligning itself with the disability rights movement and advocating for the classification of pregnancy as a disability under the ADA.