ACCOMMODATING PREGNANCY

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ABSTRACT

Courts have interpreted the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA) not to affirmatively require accommodations for pregnant workers. This has generated protest and led all three branches of the federal government to address the issue of pregnancy rights. The Pregnant Workers Fairness Act is pending in Congress and has drawn strong vocal support from President Barack Obama. The U.S. Supreme Court recently decided Young v. UPS*, which found the PDA does not affirmatively require pregnancy accommodations. Finally, many commentators have argued in support of considering pregnancy a disability under the ADA.*

This Article agrees substantively with the end of accommodating pregnancy, but disagrees with the various proposals commentators have advanced. In contrast to those who favor a pregnancy-specific right to accommodations, this Article argues that such proposals create risks to women's long-term equality in the workplace. In particular, characterizing pregnancy as a "disability" or pregnant women as a class in special need of accommodation poses a danger of expressive harms. Currently proposed measures may revitalize exclusionary and paternalistic attitudes toward pregnant employees, signal incapacity to work, or actually increase sex discrimination. We should thus consider the potential expressive impact of pregnancy accommodation schemes in light of current social norms in which pregnant women are generally seen as capable of productive work. This Article concludes by suggesting alternative approaches to securing pregnancy accommodations that would avoid expressive harms and employ a gender- symmetrical approach.

This Article's critique and the question of how best to accommodate pregnancy resonate across several areas of the law. For those who study civil rights, Accommodating Pregnancy *illustrates the expressive perils of rights claiming. For historians and scholars interested in gender issues, this Article provides a chance to reconsider the consequences of gender-asymmetrical laws. For family law scholars,* Accommodating Pregnancy *highlights the current capacity of the law to reshape work–family balance. To assume that implementing gender-asymmetrical rights is the best way to help women in the workplace overlooks the potential of the law to ameliorate broader social issues. These include the way in which employment is typically structured to accommodate the most privileged employees and how everyone would benefit from more accommodating workplaces.*

INTRODUCTION

In recent years, a near consensus has arisen that pregnant women need the affirmative right to workplace accommodations. Legal commentators have advanced three approaches to potentially secure such a right. One argument is that pregnancy should fall within the scope of the Americans with Disabilities Act (ADA)[1] and warrant accommodation as a disability.[2] A second approach is that the Pregnancy Discrimination Act (PDA)[3] should entitle pregnant workers to any accommodations offered to other employees who are similar in their ability to work.[4] A third proposal is that pregnant workers need an independent statute entitling them to accommodation.[5]

The PDA approach has been for now constrained. In 2015, the U.S. Supreme Court decided *Young v. United Parcel Service, Inc.*,[6] which clarified, among other things, that the PDA is not a guarantor of accommodations for pregnant employees.[7] However, the other two

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1. American with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–03, 12111–17, 12131–34, 12141–50, 12161–65, 12181–89, 12201–13 (2012)).

2. *See, e.g.*, Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC'Y 1 (2012) (arguing pregnant workers ought to be able to make reasonable accommodation claims under the ADA); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995) (arguing employers are required to accommodate pregnancy under the ADA); Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012) (arguing the ADA should be interpreted to require accommodation for pregnancy-related limitations); Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97 (2013) (arguing that more conditions associated with pregnancy can constitute ADA-qualifying impairments than has typically been understood); Anastasia Latsos, Note, *ADA Reform and Stork Parking: A Glimmer of Hope for the Pregnant*, 32 WOMEN'S RTS. L. REP. 193 (2011) (advocating for coverage under the ADA); Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193 (1993) (arguing pregnancy should be covered under the ADA).

3. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)).

4. *E.g.*, Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 68 (2013) (arguing the PDA should be reinvigorated to more often provide pregnant workers with accommodations); Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 961–62 (2013) (arguing pregnant women ought to be entitled to accommodations under the PDA if an employer makes accommodations for other employees with comparable workplace limitations). Part I will explain why courts do not interpret the PDA to afford pregnant employees that right.

5. See, for example, the federal bipartisan bill currently pending in Congress, Pregnant Workers Fairness Act, S. 1512, 114th Cong. (2015); H.R. 2654, 114th Cong. (2015).

6. 135 S. Ct. 1338 (2015).

7. Certainly, *Young* has made it more likely that employers will voluntarily extend pregnancy accommodations simply as a matter of being safe rather than sorry. In other words, because the holding is complicated and not perfectly clear, overcompliance may be rational. Still, the holding of *Young* is a far cry from what was sought by the petitioner and had been sought for years by advocates. See also *infra* Part I.A for more explanation of *Young*.

approaches remain viable for potentially guaranteeing pregnancy accommodations. The ADA approach has proven to be the most popular among commentators,[8] especially in the wake of the ADA Amendments Act of 2008 (ADAAA),[9] which relaxed the legal standard for proving disability. The independent law approach is reflected in legislation emerging across the country that aims at expanding the accommodation rights of pregnant workers. In June 2015, Congress reintroduced the Pregnant Workers Fairness Act, a federal bill originally introduced in 2012 that would require employers to make reasonable accommodations for pregnancy, childbirth, and related medical conditions.[10] The bill is currently pending in Congress and has drawn strong support from President Barack Obama.[11] Additionally, sixteen states have recently passed, or have pending, laws designed to ensure reasonable accommodations for pregnant employees.[12]

But are these proposed reforms unequivocally beneficial for pregnant employees, and women more generally? This Article agrees substantively with the goal of pregnancy accommodations, but takes issue with the proposals[13] outlined above, all of which seek a pregnancy-specific right to

8. *See, e.g.*, Alemzadeh, *supra* note 2 (arguing pregnant workers ought to be able to make reasonable accommodation claims under the ADA); Cox, *supra* note 2 (arguing the ADA should be interpreted to require accommodation for pregnancy-related limitations); Latsos, *supra* note 2 (advocating for coverage under the ADA).

9. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

10. S. 1512; H.R. 2654.

11. Emily Martin, *President Obama Stands Up for Pregnant Workers*, NAT'L WOMEN'S L. CTR. (June 24, 2014), http://www.nwlc.org/our-blog/president-obama-stands-pregnant-workers (quoting President Obama as saying we must "treat[] pregnant workers fairly, because too many are forced to choose between their health and their job. Right now, if you're pregnant you could potentially get fired for taking too many bathroom breaks—clearly from a boss who has never been pregnant—or forced [onto] unpaid leave. That makes no sense.").

12. These states have a varied assortment of laws and proposals. Four states grant a general right to reasonable accommodation for pregnancy, usually upon the advice of a physician. CAL. GOV'T CODE § 12945 (West 2011 & Supp. 2016); DEL. CODE ANN. tit. 19, § 711 (West 2013 & Supp. 2014); N.J. STAT. ANN. § 10:5-12s (West 2013 & Supp. 2015); W. VA. CODE ANN. § 5-11B-2 (2013 & Supp. 2015). Two states provide a right to reasonable accommodation by transfer. CONN. GEN. STAT. ANN. § 46a-60(a)(7) (2009 & Supp. 2015); LA. STAT. ANN. § 23:342 (2010). Three states provide a pregnancy-related, disability-based right to reasonable accommodation. 775 ILL. COMP. STAT. ANN. 5/2-102(I), (J) (West 2011 & Supp. 2015); MD. CODE ANN., STATE GOV'T § 20-609 (LexisNexis 2014); HAW. CODE R. § 12-46-107 (LexisNexis 1990). Two states have reasonable accommodation laws that apply only to certain public employers. ALASKA STAT. § 39.20.520 (2014) (providing a right to accommodation by transfer for public employees); 15 TEX. LOC. GOV'T CODE ANN. § 180.004 (West 2008) (providing a right to reasonable accommodation for public employees, upon the advice of a physician). Finally, five more states have pending legislation, which would grant a general right to reasonable accommodation, subject to an undue hardship defense—similar to that which exists under the ADA. S.B. 417, 152d Gen. Assemb., Reg. Sess. (Ga. 2014); H.B. 2102, 97th Gen. Assemb., Reg. Sess. (Mo. 2014); S.B. 1209, 2013–14 Gen. Assemb., Reg. Sess. (Pa. 2014); S. File 308, 85th Gen. Assemb., 2d Sess. (Iowa 2013); S. 1479, 81st Assemb., Reg. Sess. (N.Y. 2013).

13. This Article frequently uses the term "proposal" to discuss en masse the different approaches to potentially securing an entitlement to pregnancy accommodations.

accommodations. This Article critiques these proposals' implicit messages about pregnancy, women generally, and their relationship to work. In particular, laws "make statements" and cause people to internalize certain values.[14] They may also reinforce social norms[15] or send a signal about what the norms of a society ought to be.[16] Further, a law's expression may include negative or inappropriate characterizations and thus inflict expressive or stigmatic harms on an individual or group.[17] Twenty-five years ago, Martha Minow wrote about the "dilemma of difference" as it applies to pregnant workers.[18] Giving pregnant employees exceptional rights, she noted, may "assign negative symbolism" to such an employee, as well as possibly "revitalize prejudices against women as workers more generally."[19]

This Article blends social science and empirical insights regarding pregnancy, disability, and accommodations to argue that the proposals discussed above may inflict expressive harms on and increase discrimination against all female employees.[20] Equating pregnancy with disability or campaigning for a special right to accommodation may signal that pregnancy is a deficiency or send the message that pregnant women are innately less capable of productive work. This is best seen against the contrast of current social norms regarding pregnancy, disability, and accommodations—and the relationship of each to work.[21] The Western perception of pregnancy has evolved over time from a condition seen as requiring isolation to one that allows women to remain active and keep working.[22] The meaning of disability, by contrast, has been more static and is comprised in part by a binary distinction between disability and

14. *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 680 (1998) (observing that expressive law scholars recognize that the expressive function of law works not through something physical, but through something interpretive); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 666–68 (2004) (discussing the expressive capacity of law); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996) (exploring "the function of law in 'making statements' as opposed to controlling behavior directly").

15. *See* Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 670 (2003).

16. *See* Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 43 (2002); Sunstein, *supra* note 14, at 2029–44.

17. *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504, 1527, 1529, 1542, 1544, 1569 (2000). By expressive harms, I mean the negative impact on social norms and understandings that flow from the message or expression of a particular proposal or policy. *See* discussion *infra* Part II.A.

18. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 87 (1990).

19. *Id.*

20. *See infra* Part II.

21. *See infra* Part II.B–D.

22. *See infra* Part II.B.

employability that reaches back to the Elizabethan poor laws.[23] Indeed, the very semantics of the word "disability" may communicate lack of ability.[24] Further, many employers (incorrectly) view accommodations as costly measures intended to compensate for innate deficiencies.[25] How we frame pregnancy rights naturally implicates fundamental principles relating to sex discrimination and thus has expressive value for all women—especially if such expressions signal that pregnant women are less fit to work.[26]

Commentators have generally ignored the potential drawbacks to treating pregnancy specially or as a disability. A few scholars have observed that there could be some negative fallout to pregnancy accommodation reform but they have tended to minimize such concerns.[27] The characterization of pregnancy as a disability or as otherwise in unique need of accommodation is not a trivial concern.[28] As Ruth Bader Ginsburg once wrote, "discrimination by gender generally cuts with two edges and is seldom, if ever, a pure favor to women."[29]

This Article agrees substantively with the proposals above that pregnancy ought to be accommodated, but disagrees over the shape of the remedy.[30] There are alternatives to drawing distinctions for accommodation purposes on the basis of sex or disability. For example, I along with others have argued that reasonable accommodations should be available liberally to all workers and without reference to a protected-class identity.[31] A

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23. *See* Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 821–22 (1966); *see also* Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 230 (2012) ("Disability is rarely understood as a positive state or identity with social or cultural benefits to its bearers or those around them.")

24. Black's Law Dictionary defines disability as "[t]he inability to perform some function; . . . [a]n objectively measurable condition of impairment, physical or mental." *Disability*, BLACK'S LAW DICTIONARY (10th ed. 2014). Dictionary.com defines disability as "lack of adequate power, strength, or physical or mental ability; incapacity." *Disability*, DICTIONARY.COM, http://dictionary.reference.com/browse/disability (last visited Apr. 1, 2016). *See also* Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1178 (2004) (book review) ("A primary social convention regarding people with disabilities is one that equates their biological atypicality with inherent lesser ability.").

25. *See infra* Part II.D.

26. *See infra* Part II.E.

27. *See, e.g.*, Cox, *supra* note 2, at 451 ("*Most obviously*, the ADA's inclusion of relatively minor and short-term physical limitations ameliorates feminist concerns that characterizing pregnancy as a disability might revive exaggerated stereotypes about the physical limitations that accompany pregnancy." (emphasis added)).

28. *See* Anderson & Pildes, *supra* note 17, at 1561–62 (observing that expressive restraints are not "trivial" or a mere matter of etiquette).

29. Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 132, 140 (Vincent Blasi ed., 1983).

30. *See* Wendy W. Williams, *Notes from A First Generation*, 1989 U. CHI. LEGAL F. 99, 109 (distinguishing between agreement over substance of a measure and the "shape the remedy" ought to take).

31. *See generally* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 51–54 (2009); Rachel Arnow-Richman, *Incenting Flexibility: The Relationship*

narrow, protected-class approach to securing workplace accommodations is neither the most expressively, economically, or structurally beneficial regime, nor is it systematically defensible.[32]

This Article proceeds in three parts. Part I sets the stage by briefly examining the law of pregnancy accommodations—in particular, what laws possibly provide such a right and whether they are sufficient to the task. This examination gives special attention to the recently decided *Young* case. Part I then contextualizes the recent push to secure the affirmative right to pregnancy accommodations. Finally, Part I reflects upon the PDA's passage almost thirty years ago. The history of the PDA's passage is instructive in that gender-asymmetrical approaches to helping women in the workplace may be hazardous for long-term equality.

Part II draws upon the rich sociological literature to characterize the social meanings of pregnancy, disability, and accommodations—and, in particular, the way in which those social meanings implicate perceived capacity to work. These strands of inquiry, woven together, constitute the background for my argument that pregnancy accommodation proposals, if successful, may signal that pregnant employees are less fit for work. To the extent this impacts employers' perceptions regarding such employees, there is risk for all women who are seen as likely to become pregnant.[33]

Part III then briefly considers alternatives. There are gender- and disability-neutral ways to conceptualize what the need for pregnancy accommodations entails as well as to accommodate pregnancy. This part builds upon a cadre of esteemed scholars and advocates, who have favored addressing disadvantage more broadly, to sketch out two alternative paths for pregnancy accommodation reform: universal accommodations and parental accommodations. Pitching the need for accommodation more broadly addresses the root problem of unaccommodating workplaces, while mitigating the stigmatic effects that may stem from treating pregnancy specially or equating pregnancy with disability. This part then addresses some objections, and a brief conclusion follows.

Between Public Law and Voluntary Action in Enhancing Work/Life Balance, 42 CONN. L. REV. 1081, 1108–12 (2010); Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689 (2014) (arguing for an ADA-type reasonable accommodation mandate to apply to all work-capable members of the general population for whom accommodation is necessary to enable their ability to work).

32. *See* Stein et al., *supra* note 31, at 750–55 (discussing the benefits of a broad, universal-like right to reasonable accommodations).

33. *See infra* Part II.E.

I. THE LAW OF PREGNANCY ACCOMMODATIONS

There are a myriad of ways in which a routine pregnancy may produce the need for an accommodation. A pregnant employee may experience physical limitations in the areas of sitting, standing, bending, lifting, or climbing, and may require an accommodation in order to keep doing her job. Other accommodations are not required due to any physical limitations in the employee's ability to do the job but are instead needed to avoid running afoul of a company's policies or rules. A few well-publicized examples of the latter involve pregnant employees who lost their jobs because it was against store policy to carry or keep a water bottle nearby.[34] One employer prevented its pregnant employee from modifying her uniform to accommodate her growing belly; instead, the employee was forced to take leave once she outgrew her uniform.[35] The most commonly requested accommodations include frequent bathroom breaks,[36] limits on heavy lifting,[37] and limitations on overtime work.[38]

Some employers voluntarily accommodate such needs, but many do not, and employers are not generally required by law to do so. Even in those few instances where an employer capitulates to a requested accommodation, there is a difference between accommodation by legal right and accommodation by favor. Hence, advocates have sought the force of law to accompany pregnancy accommodation requests.

A. No Affirmative Right Under Current Federal Law

The popular upsurge in favor of pregnancy accommodations emerges from the failure of relevant laws to provide such an affirmative right. One might assume statutes like the ADA, the PDA, or the Family and Medical

34. Wiseman v. Wal-Mart Stores, Inc., No. 08-1244-EFM, 2009 WL 1617669, at *1 (D. Kan. June 9, 2009) (pregnant employee fired for carrying a water bottle as recommended by her doctor); Jeannette Cox, *Disability Law Should Cover Pregnant Workers*, CNN (Jan. 10, 2012, 11:00 AM), http://www.cnn.com/2012/01/10/opinion/cox-pregnancy-disability/; Diana Reese, *Laws Fail to Protect Pregnant Women Who Need Special Accommodations on the Job*, WASH. POST: SHE THE PEOPLE (June 18, 2013), http://www.washingtonpost.com/blogs/she-the-people/wp/2013/06/18/laws-fail-to-protect-pregnant-women-who-need-special-accommodations-on-the-job/.

35. Williams et al., *supra* note 2, at 3.

36. *See, e.g.*, Guerrero v. Miami-Dade Cnty., No. 13-CV-21374, 2014 WL 2916447, at *1 (S.D. Fla. June 19, 2014) (pregnant employee whose doctor requested she be allowed "frequent bathroom breaks" was denied by her employer extra bathroom breaks).

37. *See, e.g.*, Serednyj v. Beverly Healthcare LLC, No. 2:08-CV-4 RM, 2010 WL 1568606, at *1 (N.D. Ind. Apr. 16, 2010), *aff'd*, 656 F.3d 540 (7th Cir. 2011) (pregnant employee who was instructed by doctor to avoid lifting heavy weights was denied by employer assistance with minor responsibilities that involved such lifting).

38. *See, e.g.*, EEOC v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944, 945–46 (10th Cir. 1992) (pregnant employee fired for refusing to work overtime, which was the advice received from her doctor).

Leave Act (FMLA)[39] provide an entitlement to pregnancy accommodations. In fact, they do not, except under limited comparative instances.

i. The Americans with Disabilities Act

The ADA prohibits discrimination "against a qualified individual on the basis of disability."[40] The statute defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," unless making such accommodations would result in "undue hardship" to the employer.[41] While some of the ADA's language might seem to hold promise for pregnancy, the ADA's regulations exclude it from coverage.[42] Courts have similarly followed suit, on the rationale that pregnancy is "normal" and "healthy"—i.e., it is not the result of a physiological disorder and thus is categorically not an impairment or disability.[43] In other words, a "normal" pregnancy does not produce ADA-covered limitations, but conditions that arise due to complications in a pregnancy may qualify as disabilities.[44] For example, pregnancy may cause discrete physiological conditions such as gestational diabetes or carpal tunnel syndrome, which may constitute a disability under the ADA, entitling a pregnant worker to reasonable accommodations. But limitations intrinsically associated with a typical pregnancy, such as the need for more rest or more frequent bathroom breaks, would not generally entitle one to accommodations under the ADA.[45] A separate reason many physical limitations accompanying pregnancy have been excluded is that they have

39. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601, 2611–19, 2631–36, 2651–54 (2012)).

40. 42 U.S.C. § 12112(a) (2012).

41. *Id.* § 12112(b)(5)(A).

42. 29 C.F.R. pt. 1630, app. § 1630.2(h) (2015) ("[C]onditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition.").

43. *E.g.*, Young v. United Parcel Serv., Inc., 707 F.3d 437, 443 (4th Cir. 2013) ("With near unanimity, federal courts have held that pregnancy is not a 'disability' under the ADA." (quoting with approval Wenzlaff v. NationsBank, 940 F. Supp. 889, 890 (D. Md. 1996))), *vacated*, 135 S. Ct. 1338 (2015); Gorman v. Wells Mfg. Corp., 209 F. Supp. 2d 970, 974, 976 (S.D. Iowa 2002); *see also* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 556 (7th Cir. 2011); Walker v. Fred Nesbit Distrib. Co., 331 F. Supp. 2d 780, 790 (S.D. Iowa 2004); Gover v. Speedway Super Am., LLC, 254 F. Supp. 2d 695, 705 (S.D. Ohio 2002); Jessie v. Carter Health Care Ctr., Inc., 926 F. Supp. 613, 616 (E.D. Ky. 1996); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995).

44. *See Serednyj*, 656 F.3d at 556; *Walker*, 331 F. Supp. 2d at 790; *Gorman*, 209 F. Supp. 2d at 974, 976; *Gover*, 254 F. Supp. 2d at 705.

45. *But see* Williams et al., *supra* note 2, at 99 (arguing many pregnancy-related impairments, in the wake of the ADAAA, are now covered disabilities).

been considered temporary conditions.[46] Even after the Amendments, temporary physical limitations requiring accommodation still must satisfy the ADA's definition for "actual disability,"[47] a higher threshold than merely proving one is "regarded as" having a disability.[48] The ultimate result is that pregnant women are left without a general entitlement to workplace accommodations under the ADA.

ii. The Pregnancy Discrimination Act

Courts have similarly interpreted the PDA to not provide pregnant employees with a right to accommodations. The statute principally secures the right to nondiscrimination.[49] The PDA has two clauses and is found in the definitions section of Title VII.[50] The "first clause" redefines "sex" under Title VII to include pregnancy, childbirth, or related medical conditions.[51] The "second clause," which is separated by a semicolon, provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[52] The PDA thus clearly indicates that an employer cannot use pregnancy as a reason to fire a worker, cut her pay, or deny her

46. *E.g.*, *Villarreal*, 895 F. Supp. at 152 (finding pregnancy is not a disability under the ADA because it is too short in duration).

47. *See* 42 U.S.C. § 12102(3)(B) (2012) (exempting from "regarded as" claims, conditions that are both minor and short-term).

48. The ADA's employment provisions allow a claimant to fall under one of three definitions of disability: (a) "a physical or mental impairment that substantially limits one or more major life activities of such individual" ("actual" disability); (b) "a record of such an impairment" ("record of" disability); or (c) "being regarded as having such an impairment" ("regarded as" disability). § 12102(1). Commentators have characterized the Amendments as universalizing the ability to bring a disability nondiscrimination claim, through the "regarded as" prong (since anyone alleging they experienced discrimination on the basis of disability can make a colorable claim they were "regarded as" having a disability), but keeping a higher bar in place for accommodation claims, which may now only be brought under the "actual disability" or "record of disability" prongs. Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 263 (2010) (arguing that keeping the bar relatively high for securing an accommodation was part of the political compromise necessary to achieve the amendments' passage).

49. For example, historian Deborah Dinner writes, "[t]he PDA created a baseline requirement of equal treatment for pregnancy and temporary disabilities but did not create an affirmative entitlement to pregnancy-related benefits." Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 459 (2014); *see also* Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 570 (2010) ("The PDA . . . is modeled on a basic formal equality framework, which provides no absolute right to accommodation necessitated by pregnancy."). *Cf.* Widiss, *supra* note 4 (arguing the PDA is properly interpreted as providing a comparative right to accommodation if an employer accommodates similar workplace limitations).

50. 42 U.S.C. § 2000e(k) (2012).

51. *Id.*

52. *Id.*

health benefits. To do so under the PDA would be discrimination based on sex. The accommodation hook under the PDA is that you also cannot use pregnancy as the reason to deny the "benefit" of accommodations to employees who are "similar in their ability or inability to work"—i.e., who are "comparators."[53]

The critical question is who is an appropriate comparator for accommodation purposes.[54] Prior to *Young v. UPS*, courts universally approved the legality under the PDA of accommodations made pursuant to pregnancy-blind rules.[55] In other words, an employee who was accommodated pursuant to a pregnancy-neutral rule or law—e.g., under the ADA or a rule that entitles those injured on the job to an accommodation—was said not to be an appropriate comparator since the relevant rule kept the employee who was accommodated from being similarly situated to the pregnant worker.[56] Any right to an accommodation under the PDA has thus historically been about pregnant employees' right not to arbitrarily be treated worse than others due to their pregnancy.[57]

The *Young* case considered whether comparators for pregnant employees should be understood more broadly.[58] In particular, the Court was asked to determine under what circumstances an employer who provides work accommodations to non-pregnant employees with work limitations must also provide work accommodations to pregnant employees

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53. *Id.* Disparate treatment, the standard cause of action for all employment discrimination statutes, typically requires proof that the plaintiff was treated differently than a person of a different race or sex or disability status, e.g., was (or would have been) treated. Accordingly, many disparate treatment cases turn on whether the plaintiff can identify "comparators" who are similarly situated to her except for her race, sex, or disability status, and were treated differently. TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 523 (2d ed. 2011). *See generally* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011); Charles A. Sullivan, *The Phoenix from the* Ash*: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009).

54. Identifying a comparator for any discrimination claim is difficult. *See* Sullivan, *supra* note 53, at 216 (observing that "courts continue to develop rules that find most comparator proof insufficient to create a jury question"); *see also* Williams et al., *supra* note 2, at 106–08 (exploring how pregnant women often lose suits under the PDA due to lack of a comparator).

55. Every circuit that considered the issue held an employer does not violate the PDA by denying a pregnant employee an accommodation or benefit pursuant to a pregnancy-blind policy. *See* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 548–49 (7th Cir. 2011); Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312–13 (11th Cir. 1999); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 207–08 (5th Cir. 1998); Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

56. *See, e.g.*, Serednyj v. Beverly Healthcare, LLC, No. 2:08-CV-4 RM, 2010 WL 1568606, at *7 (N.D. Ind. Apr. 16, 2010) (approving, under the PDA, company policy that only provided restricted or limited duty to employees with workplace-related injuries or qualified employees with a disability under the ADA), *aff'd*, 656 F.3d 540 (7th Cir. 2011).

57. The PDA legislates, in essence, that pregnant employees "are to be treated no worse—nor any better—than other 'similar' workers." Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 348 (1984–85).

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

who are "similar in their ability or inability to work."[59] In *Young*, UPS had a policy of providing accommodations to three categories of employees: (1) employees injured on the job; (2) employees with "a permanent impairment cognizable" under the ADA; and (3) employees who lose their Department of Transportation (DOT) certification to drive a commercial motor vehicle.[60] Peggy Young sought a light duty accommodation when her pregnancy caused a lifting restriction.[61] UPS refused because she did not fit into any of the three categories.[62] Young sued, alleging UPS violated the PDA by failing to provide her the same accommodations it provided to other non-pregnant employees who fell within one of the three categories and were similar in their relative ability to work.[63]

The crux of the dispute before the Supreme Court was whether the PDA meant one thing or two. It was clear enough that, under the First Clause, pregnancy discrimination was sex discrimination. The question was what, if anything, the Second Clause added. Young's argument before the Supreme Court was that the Second Clause had to mean something more than the mere redefinition of sex to include pregnancy; otherwise, that part of the statute would be superfluous.[64] Accordingly, Young argued that where an employer accommodates even a few workers pursuant to a rule or policy, it must provide similar accommodations to all pregnant workers with comparable physical limitations.[65]

UPS's argument was that the PDA meant essentially one thing.[66] In particular, its argument was that the Second Clause merely gave application to the First Clause's redefinition of sex.[67] UPS also argued that Young's position would mandate special treatment for pregnancy and grant it "most favored nation" status by entitling pregnancy to better treatment than any other basis under Title VII.[68]

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59. Petition for Writ of Certiorari at i, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2013 WL 1462041, at *i (framing the question presented as such).

60. Young v. United Parcel Serv., Inc., 707 F.3d 437, 439–40 (4th Cir. 2013), *vacated*, 153 S. Ct. 1338.

61. *Id*. at 440–41.

62. *Id*.

63. *See* Young v. United Parcel Serv., Inc., Civ. Action No. DKC 08-2586, 2011 WL 665321, at *9 (D. Md. Feb. 14, 2011), *aff'd*, 707 F.3d 437 (4th Cir. 2013), *vacated*, 135 S. Ct. 1338.

64. Petitioner's Brief at 23–24, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 4441528, at *23–24.

65. *Id.* at 20, 2014 WL 4441528, at *20.

66. *See* Brief for Respondent at 9, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 5464086, at *9 ("The PDA amended Title VII to clarify that traditional anti-discrimination protections apply to pregnant women. It does not mandate accommodations or other special treatment for pregnant employees.").

67. *Id.* at 27, 2014 WL 5464086, at *27 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 n.14 (1983)).

68. *Id.* at 13, 2014 WL 5465086, at *13.

The Court characterized these two interpretations as polar opposites and said that neither was correct.[69] It contended that UPS's claim could not be correct since it rendered the Second Clause superfluous.[70] The Court said Young's approach was also not correct since such an interpretation would run counter to disparate treatment law, which generally allows for differential treatment of protected class members as long as there is a legitimate, nondiscriminatory reason.[71]

The *Young* Court held that the role of policies, which have the effect of accommodating some employees but not pregnant ones, is that such policies can help prove pretext under the *McDonnell Douglas* burden shifting framework.[72] Plaintiffs can argue, for example, that the employer's "legitimate, nondiscriminatory" reasons for such a policy are not very strong and the policy is a pretext for intentional discrimination.[73] A pregnancy-blind policy can thus be used as circumstantial evidence to infer intentional discrimination against pregnant employees, especially if the plaintiff is able to show one or both of the following: (1) that a pregnancy-blind policy is not warranted by neutral business reasons, or (2) that the employer's policies accommodate a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.[74] Here, *Young* departs dramatically from previous case law in that having a pregnancy-blind accommodation policy is no longer an absolute defense against a disparate treatment claim.[75] Also, the *Young* court explicitly stated that cost or inconvenience is typically not a legitimate nondiscriminatory reason for failing to add pregnant women to the category of those whom the employer accommodates.[76] However, the holding is still a far cry from what Young and most amici sought: a guaranteed right to pregnancy accommodations. Unless Congress now chooses to amend the PDA, it appears the Supreme Court has closed the door on the statute's possible guarantee of accommodation rights.

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69. *Young*, 135 S. Ct. at 1349.

70. *Id.* at 1352.

71. *Id.* at 1350.

72. *See id*. at 1354 (explaining how such proof would fit into the *McDonnell Douglas* scheme).

73. *Id.*

74. *Id.*

75. *Compare Young*, 135 S. Ct. 1338, *with* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 548–49 (7th Cir. 2011); Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312–13 (11th Cir. 1999); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 207–08 (5th Cir. 1998); *and* Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

76. *Young*, 135 S. Ct. at 1354.

iii. The Family and Medical Leave Act

The FMLA fails to ensure pregnancy accommodations due to its very structure. First, and most fundamentally, it only guarantees up to twelve weeks of job-protected *leave* and does not confer a general right to accommodation.[77] If the employee takes the leave intermittently, it may function like an accommodation by enabling the employee to continue working by means of a reduced schedule.[78] But this is a fairly narrow accommodation. A second limitation is that the mandated leave is unpaid,[79] making the right accessible only to those who can afford to forego compensation for some amount of time.[80] Third, to be eligible, employees must work for a relatively large company[81] and have at least one year with the company;[82] the net result is that the FMLA covers only about 60% of American workers.[83] Altogether, the FMLA in its current form secures very little in the way of pregnancy accommodations.

B. The Push for Pregnancy Accommodations

A brief chronology shows how the three proposals outlined above have emerged and helped create a cultural groundswell in support of pregnancy accommodations. Though scholarly articles dating back to the 1970s have advocated treating pregnancy as a disability, the amendments to the ADA in 2008 reignited interest, largely because they expanded the scope of disability.[84] In 2011, Professor Jeannette Cox wrote a well-received article supporting the categorization of pregnancy as a disability under the ADA.[85] Her piece explored the capacity of the ADA to give pregnant employees the right to accommodation because the Amendments lowered the bar for proving "disability."[86] Professor Deborah Widiss soon thereafter lent her

77. 29 U.S.C. § 2612(a) (2012).

78. Cox, *supra* note 2, at 455 (citing 29 U.S.C. § 2612(b) (allowing eligible employees to take intermittent FMLA leave)).

79. 29 U.S.C. § 2612(c).

80. Many workers do not take FMLA leave because they cannot afford it. *See* DAVID CANTOR ET AL., U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE § 3.2.1 (2004).

81. 29 U.S.C. § 2611(4)(A)(i) (defining "employer" as one who "employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year").

82. *Id.* § 2611(2)(A) (defining "eligible employee" as one who has been employed by the employer through whom the leave is requested for at least one year).

83. Cox, *supra* note 2, at 457 (observing that "only fifty-seven to sixty-six percent of American workers are FMLA-eligible").

84. *See generally* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

85. Cox, *supra* note 2, at 449–51.

86. *Id.* at 460.

ideas to how pregnancy accommodations might be more consistently achieved. She argued that the legislative history of the PDA supported a stronger right to accommodation than courts had found.[87] Widiss argued that although the PDA does not require pregnancy accommodations in general, it does require them in any instance where the employer has accommodated, or would be required to accommodate, any limitations similar to those caused by pregnancy.[88] The idea of pregnant employees needing the right to reasonable accommodations soon found a larger audience as the press and advocacy organizations publicized the issue.[89] News reports of sympathetic pregnant workers who were denied simple and inexpensive accommodations garnered public support for accommodating pregnant workers.[90]

Shortly after the *Young* case was decided in March of 2015, Congress reintroduced the Pregnant Workers Fairness Act, a bill intended to provide pregnant workers with stand-alone accommodation rights.[91] The legislation makes it unlawful to deny reasonable accommodations for pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship on the business.[92] Reasonable accommodation and undue hardship are said to have the same meanings as they do under the ADA.[93] Indeed, the bill reads much like the ADA—only it is pregnant employees being given the right to accommodation. Additionally, a plethora of states have jumped on the bandwagon for pregnancy accommodations.[94]

In sum, the ADA, PDA, and FMLA do not provide an affirmative right to pregnancy accommodations. In response, advocates have argued for ADA coverage, PDA coverage, and an independent law entitling pregnant workers to accommodations. The next section will revisit, in light of these proposals, the debate regarding whether sexual equality in the workplace is best achieved by *symmetrical* or *asymmetrical* rights.[95] Examining the PDA's passage is instructive because the PDA implicated many of the

87. Widiss, *supra* note 4, at 997.

88. *Id.* at 965.

89. *E.g.*, Cox, *supra* note 34; Reese, *supra* note 34.

90. *E.g.*, Cox, *supra* note 34; Martin, *supra* note 11.

91. Pregnant Workers Fairness Act, S. 1512, 114th Cong. (2015); H.R. 2654, 114th Cong. (2015).

92. S. 1512 § 2(1).

93. *Id.* § 5(5).

94. *See supra* note 12.

95. *See* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (distinguishing between symmetrical and asymmetrical approaches as two conflicting visions of sexual equality); Williams, *supra* note 30 (explicating what unites and divides sex equality "symmetrists" from "asymmetrists").

same social issues at stake in the current discourse over pregnancy accommodations.

C. The PDA and Gender-Symmetrical Rights

History suggests that there are risks to legislating sex-based distinctions on behalf of women in the workplace. In the early 1900s, at least twenty-five states had some form of protective labor laws for female workers.[96] There were general restrictions limiting the amount of hours women could work, prohibiting night work, and excluding women from hazardous occupations.[97] There were also specific restrictions, such as those issuing from the Department of Labor's recommendation in the early 1940s that pregnant women not work six weeks before and two months after delivery;[98] many states thus adopted laws prohibiting companies from employing women for a period of time both before and after childbirth.[99] Finally, there were preferential laws that granted benefits to female workers that men did not enjoy, including special lunches and rest breaks.[100]

These measures benefited many women by improving working conditions, but these measures also came with costs: they reinforced stereotypes of women's physical weakness and, as a matter of social norms, helped tie women's worth more to home and family than to the employment sector.[101] Accentuating the physiological distinctions between male and female workers also led in some cases to outright discrimination by employers[102] and enraged many women who fought against sex-specific laws by trying to ensure women would have equal work opportunities.[103]

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96. Brief of the American Civil Liberties Union et al. as Amici Curiae at 12–13, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728369, at *12–13 [hereinafter ACLU Brief].

97. *Id*. at 13, 1986 WL 728369, at *13.

98. Williams, *supra* note 57, at 334 (citing WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULL. NO. 240, MATERNITY PROTECTION OF EMPLOYED WOMEN 7 (1952)).

99. *Id.*

100. ACLU Brief, *supra* note 96, at 13, 1986 WL 728369, at *13.

101. *See id.* at 17–18, 1986 WL 728369, at *17–18 ("The notion of biologically-based difference, so essential to protectionism, fueled a pervasive ideology which relegated women to a separate sphere of home and family.").

102. For example, historian Deborah Dinner has written about how, in the 1960s, employers routinely fired pregnant workers without regard to whether they could continue working. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 452–53 (2011).

103. *See* Widiss, *supra* note 4, at 983–84 ("[The National Organization for Women (NOW)] contended that even seemingly salutary laws hurt women by reinforcing stereotypes regarding women's need for protection and making women less attractive as employees.").

Such laws "'protected' women out of good jobs"[104] and led many employers to simply fire women who became pregnant.[105] Accordingly, some women's rights activists argued that equality of opportunity did not mean women needed special rights or paternalism to manage their reproductive and maternal needs.[106]

Certainly, this was not the only view of how conditions like pregnancy should be treated. The question of how best to treat conditions like pregnancy, which accentuate women's physical differences, provoked profound disagreement in the debates leading up to the PDA's passage.[107] Some feminist litigators and scholars argued for special treatment, or an approach that would accommodate pregnancy regardless how other workers were treated.[108] And since the ability to become pregnant is an obvious asymmetry between men and women, some took the position that an asymmetrical solution was warranted.[109] Still, this was far from the consensus view.[110]

For example, in a Supreme Court brief written almost thirty years ago, the American Civil Liberties Union, the League of Women Voters, and the National Women's Political Caucus argued that laws which extend preferential rights on the basis of pregnancy "reinforce stereotypes about women's inclinations and abilities; they deter employers from hiring women of childbearing age or funnel them into less responsible positions; and they make women *appear* to be more expensive, less reliable employees."[111] Moreover, in the wake of the PDA, women's rights activists opposed state-based measures to give pregnancy special job-protected leave. They argued this type of treatment was disadvantageous for women

104. *Id.* at 982; *see also* Williams, *supra* note 57, at 333 (noting that legislative efforts from the 1930s and '40s that supported women's "maternal function" had the adverse effect of excluding them from certain jobs).

105. Williams, *supra* note 57, at 335.

106. *See* Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 210 (1998) (describing how, by 1970, the vast majority of feminists were "on the formal equality bandwagon"); Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 3–6 (2009) (describing a steadily growing coalition of equal treatment activists in the 1960s and '70s).

107. *See* Dinner, *supra* note 49, at 518 ("In the 1970s, the campaign for the PDA had contained the tension between anti-stereotyping and neomaternal commitments."); *see also* Brake & Grossman, *supra* note 4, at 78.

108. *See, e.g.*, 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, 537–57 (1983).

109. *See id.*

110. *See* Brake & Grossman, *supra* note 4, at 78 (observing there were differing approaches for how best to achieve equality for women when it came to the issue of pregnancy).

111. ACLU Brief, *supra* note 96, at 7, 1986 WL 728369, at *7 (opposing a law which required that women temporarily incapacitated as a result of pregnancy receive up to four months unpaid leave time along with job security).

"because it spurred *ex ante* discrimination against women and reinforced stereotypes that women are only marginal workers."[112]

These types of arguments partially explain why Congress rejected pregnancy-based distinctions when it passed the PDA in 1978.[113] Of course, employers, and their resistance to measures that limit their autonomy to structure the workplace, also played a significant role.[114] Indeed, employer attitudes were explicitly accounted for through the concerns about stereotyping and were a part of why equal rights feminists opined that special treatment was not the best way to achieve sexual equality in the workplace.[115]

The PDA was passed to be a strong guarantor of negative rights (i.e., antidiscrimination)[116] as well as the same positive rights that similarly situated employees receive.[117] This means that if an employer allows some employees to leave work early to take their children to athletic competitions, an employer must likely allow pregnant employees to leave work early for pregnancy-related purposes. But if an employer is generally unaccommodating to its employees, a pregnant employee has no more rights than anyone else;[118] pregnant employees "are to be treated no worse—nor any better—than other 'similar' workers."[119] In this way, the PDA can be seen as a legislative judgment that the best way to secure sex equality is through the extension of gender-symmetrical rights.[120]

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112. Widiss, *supra* note 4, at 999–1000; *see also* ACLU Brief, *supra* note 96, at 14, 1986 WL 728369, at *14. "As a result of the stereotypes reflected in protective legislation," women were denied the right to practice law, administer estates, and bartend. *Id.* at 16–17, 1986 WL 728369, at *16–17.

113. *See* ACLU Brief, *supra* note 96, at 6–7, 11, 1986 WL *6–7, *11 ("It is not just happenstance that the PDA embraced this approach and rejected any separate or distinct legal category for pregnancy. The history of working women in America, and the legal efforts to institutionalize their differential treatment, make plain that Congress had ample reasons for legislating as it did."); Williams, *supra* note 57, at 347–48 (observing that Congress, in passing the PDA and "quite plainly requiring that pregnancy be treated under the equality model," was responding to the arguments made by women's rights advocates about how pregnancy ought to be treated).

114. Dinner, *supra* note 49, at 457 (observing the "business lobby deployed liberal individualist discourse to legitimate concepts of free contract and private ordering" during debates over the PDA); *id.* at 516 (noting that the PDA represented a statutory compromise for all sides, including the business lobby).

115. Williams, *supra* note 57, at 352.

116. The PDA was clear that pregnancy discrimination was by definition sex discrimination. 42 U.S.C. § 2000e(k) (2012). This meant that traditional employment policies requiring terminations of pregnant workers or mandatory leaves were prima facie sex discrimination and thus illegal.

117. See *supra* notes 49–75 and accompanying text for more discussion on what positive rights are guaranteed in the wake of the *Young* decision.

118. Michelle A. Travis, *The PDA's Causation Effect: Observations of an Unreasonable Woman*, 21 YALE J.L. & FEMINISM 51, 52 (2009) (arguing one deficiency of the PDA is that it does not require employers to modify exclusionary norms in the workplaces).

119. Williams, *supra* note 57, at 348.

120. ACLU Brief, *supra* note 96, at 6, 1986 WL 728369, at *6 ("The PDA embodies the legislative judgment that women will secure equality, equity and greater tangible benefits when legal distinctions based on sex and pregnancy are eliminated, and when the similarities in the rights and

The concerns regarding special treatment for women cannot now be quickly dismissed. While much has changed since the PDA's passage, pregnancy discrimination is, by all indications, still a problem.[121] This should give us pause about the proposals outlined above since, as will be explained in Part II, each has the capacity to actually increase pregnancy discrimination and weaken women's stature in the workplace.

II. THE EXPRESSIVE HARMS OF PREGNANCY ACCOMMODATION REFORM

Laws do more than secure material rights and constrain malfeasance. They reflect social values and send messages to the public about both *what* society should value and *how* the relevant subject should be valued.[122] In light of law's expressive capacity, not every approach will be acceptable in terms of the messages sent.[123] Accordingly, even though determining the expressive meaning of a particular action is complex,[124] we ought to consider the expressive potential of any proposed law or policy reform.

This part will first consider the general nature of expressive harms, and then the social meanings associated with pregnancy, disability, and workplace accommodations—and how each implicates the perceived capacity to work. These strands of inquiry, woven together, are the starting point for understanding why laws securing pregnancy-specific accommodations may have a negative expressive impact for all women.

A. Expressive Harms Generally

The expressive function of law refers to how laws affect behavior in ways other than explicit sanctions.[125] As noted above, laws do not merely affect behavior by force; they signal certain values and cause people to internalize those values.[126] Laws are pervasively expressive[127] in that laws are rife with social signals and meanings.[128]

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needs of both sexes are seen to override their differences."); Williams, *supra* note 57, at 347–48 (observing that the PDA required "pregnancy be treated under the equality model").

121. *See, e.g.*, *The Pregnancy Discrimination Act at 35*, NAT'L P'SHIP FOR WOMEN & FAMILIES, 1–2 (Oct. 2013), http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/the-pregnancy-discrimination-act-at-35.pdf ("Pregnancy discrimination complaints are actually on the rise, particularly among women in lower-wage jobs and among women of color.").

122. It is similar to the military's distinction between "hard power" and "soft power"—with expressive theory representing soft power and the various ways that laws provide mechanisms for constraining behavior as hard power.

123. *See* Anderson & Pildes, *supra* note 17, at 1504, 1564 (noting expressive theories of law are "deeply concerned" with "the form of the law" being appropriate).

124. *Id.* at 1527 (acknowledging the complexity of determining "expressive meaning").

125. Geisinger, *supra* note 16, at 40–41; Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000).

126. *See* Lessig, *supra* note 14; Stein, *supra* note 14; Sunstein, *supra* note 14.

A law's expression may include positive or appropriate characterizations. For example, murder and manslaughter laws provide that acting in self-defense is an affirmative defense; the structure of such laws sends a message to society that self-defense—even self-defense that results in the death of another—is acceptable under certain circumstances. Similarly, the ADA signals strongly that people with disabilities should be integrated and not segregated.[129] In this way, the ADA may impact how persons with disabilities see themselves and interact with others.[130]

Conversely, a law's expression may include negative or inappropriate characterizations and, as a result, inflict expressive or stigmatic harms on an individual or group.[131] Southern laws in the 1950s and 1960s authorizing racial segregation provide an example of expressive harm. Requiring the racial segregation of public facilities inflicted expressive harms in part because doing so while providing better facilities for whites sent the message that non-whites were inferior.[132] Such a law manifested a harmful message even if, for example, black people could still find food or lodging.[133] In other words, the expressive harm resulted from the fact that the expression conveyed inappropriate or negative attitudes about the affected group.[134]

A government's expressions can send particularly strong signals about what social norms should be.[135] Indeed, "most of the purposes, beliefs, attitudes, intentions, and other mental states that individuals can have on their own can also be properly attributed to groups, including the State."[136] Expressive theories of a particular action do not depend upon the expressing agents' intentions[137] or upon the understanding of the group or individual to whom the expression pertains.[138] Instead, expressive theories depend upon the "public meanings" associated with the expression.[139] This

127. Anderson & Pildes, *supra* note 17, at 1504.

128. Geisinger, *supra* note 16, at 40–41.

129. Consider, for example, the statements of Senators Harkin and Kennedy at the time the ADA was passed that it was an "emancipation proclamation" for people with disabilities. 136 CONG. REC. 17,369 (1990) (statement of Senator Harkin); 135 CONG. REC. 19,888 (1989) (statement of Senator Kennedy).

130. *See* DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 102 (2003) (recounting the story of Barry Swygert and how the ADA transformed his self-perception and helped him "reconstitute his identity").

131. Anderson & Pildes, *supra* note 17, at 1527–28.

132. *Id.* at 1528, 1543.

133. *Id.* at 1542.

134. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (noting the expressive harms of segregation in public schools).

135. Geisinger, *supra* note 16, at 37–44.

136. Anderson & Pildes, *supra* note 17, at 1504.

137. *Id.* at 1523–24; Sunstein, *supra* note 14, at 2050.

138. Anderson & Pildes, *supra* note 17, at 1525.

139. *Id.* at 1524, 1527.

means the expressive signals mesh with and influence existing social norms.[140] The expressive meaning of a law may also have material consequences. In particular, laws may impact whether people approve of certain behaviors as well as whether they feel that others approve.[141] A law may thus set, change, or reinforce social meanings, which may in turn yield other real-world consequences.

To carefully consider any potential expressive harms or impacts associated with pregnancy accommodation proposals will first require consideration of the social norms associated with pregnancy, disability, and workplace accommodations; these subjects are most squarely implicated by pregnancy accommodation reform. Of course, space limitations preclude anything but partial narratives. With that in mind, this Article will focus on the way in which each of their respective social meanings implicate the *perceived capacity to work*. With some grasp on the social meanings of pregnancy, disability, and accommodations, this Article will then examine how pregnancy accommodation reforms are likely to influence these existing cultural norms as well as the ultimate goal of sexual equality in the workplace.

B. Social Meanings of Pregnancy (& Work)

Over the last fifty years, pregnancy has evolved from being seen as deforming and shameful to being understood as healthy and compatible with productive work.[142] Early literature portrayed pregnancy as a deformity.[143] Pregnant women stayed out of the public and were encouraged to remain indoors and get rest.[144] In the 1950s, the Federal Communications Commission and broadcast executives did not allow TV shows to even use the word "pregnant."[145] Just a few decades ago, it was

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140. *Id*. at 1525 (observing that expressive meanings are constructed by either fitting—or failing to fit with—other meaningful norms and practices in a community).

141. Geisinger, *supra* note 16, at 45.

142. *See* KELLY OLIVER, KNOCK ME UP, KNOCK ME DOWN: IMAGES OF PREGNANCY IN HOLLYWOOD FILMS 1–3, 20–22 (2012); Lauren Berlant, *America, "Fat," the Fetus*, 21 BOUNDARY 2 145, 146 (1994) ("Once a transgressive revelation of a woman's sacred and shameful carnality, the pictorial display of pregnancy is now an eroticized norm in American public culture."). While the various mechanisms for achieving pregnancy's new status are complicated and include legal, political, and media machinery, pregnancy's cultural shift over the decades is without much doubt.

This section does not contend that any positive shift in valuing pregnancy is unique only to the present moment. There has certainly been vacillation over time in how pregnancy is viewed, making future changes possible.

143. CRISTINA MAZZONI, MATERNAL IMPRESSIONS: PREGNANCY AND CHILDBIRTH IN THEORY AND LITERATURE 131–39 (2002).

144. OLIVER, *supra* note 142, at 1, 24.

145. RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA 163 (2005).

improper to use the word "pregnant" in polite company; instead, people employed various euphemisms, such as "expecting," "with child," and "a bun in the oven."[146] Part of this cultural quietness about pregnancy stemmed from modesty, as well as the notion that pregnancy advertised the fact that a woman had been sexually active.[147] For example, Adrienne Rich recounted how a school rescinded her invitation to lecture in 1955 when the headmaster discovered she was pregnant.[148] The headmaster told Rich that her pregnancy "would make it impossible for the boys to listen to [her] poetry."[149]

Consistent with these mid-twentieth century social views, early laws treated pregnancy and maternal capacity as conditions antagonistic to employment.[150] As discussed above, lawmakers sought to accommodate a woman's ability to bear children by limiting the amount that pregnant women could work and by excluding women from certain hazardous occupations.[151] With such laws and concomitant employer discrimination,[152] pregnancy increasingly became a harbinger of disengagement from the workplace.[153]

Starting in the 1960s and 1970s, social views about pregnancy and its relationship to work began to gradually shift.[154] Part of this change resulted from the publication of *Our Bodies, Ourselves*, a 1971 book featuring pictures that framed pregnant women as beautiful.[155] However, it was not until 1991, when a pregnant Demi Moore posed nude on the cover of *Vanity Fair*, that the celebration of the pregnant body reached a crescendo.[156] The media now treats pregnancy more like a chic accessory than a rite of passage in which women must recede socially.[157]

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146. OLIVER, *supra* note 142, at 26–27.

147. *Id.* at 27; SOLINGER, *supra* note 145, at 163 (observing the word "pregnant" was, in the mid-twentieth century, "apparently too strongly physical and too crudely sexual").

148. OLIVER, *supra* note 142, at 27.

149. *Id*.

150. *See* Widiss, *supra* note 4, at 981–82 (discussing the measures taken to "protect" working women and how they did not facilitate work by pregnant employees); Williams, *supra* note 57, at 333–35.

151. *See supra* notes 97–99 and accompanying text.

152. *See supra* notes 102, 112 and accompanying text.

153. Williams, *supra* note 57, at 335, 352.

154. OLIVER, *supra* note 142, at 21.

155. *Id.* at 21–22.

156. MEREDITH NASH, MAKING 'POSTMODERN' MOTHERS: PREGNANT EMBODIMENT, BABY BUMPS AND BODY IMAGE 6 (2012) ("The 1991 *Vanity Fair* cover photograph of naked and heavily-pregnant American actress Demi Moore is widely regarded as having reconfigured western cultural views of pregnancy."); OLIVER, *supra* note 142, at 22 ("With Demi Moore's nude glistening pregnant belly on the cover of *Vanity Fair* in 1991, a new era of sexy glamour pregnancy began."); *id.* at 36–37; *cf.* NASH, *supra*, at 92 (observing that up until the 1980s in the US, "pregnant women were generally perceived as asexual").

157. OLIVER, *supra* note 142, at 37.

Almost in sync with these developments was a growing acceptance of women (and pregnant women) as workers. From the 1950s onward, women "swelled the labor force,"[158] and by 1970, women had an unprecedented presence in the workforce.[159] Also, divorce rates soared in the 1970s, a time when child support was virtually nonexistent.[160] This meant more women of all classes and races needed employment to support their families.[161] Around this same time, women claimed more sexual freedom, as well as the right to determine whether a pregnancy should lead to the birth of a child.[162] In 1973, the Supreme Court handed down *Roe v. Wade*, a decision that gave women even greater autonomy as workers, because a pregnancy no longer necessitated leaving the workplace for birth and recovery.[163] There was an increasing sense that our laws should treat pregnancy "as the dignified condition of a dignified woman."[164] These changing social norms accompanied the PDA's passage in 1978, which both "reflected and protected an enormous status change for women."[165]

In the wake of more sexualized and work-compatible pregnancies, society started to view pregnancy as both healthy and natural.[166] Popular pregnancy literature now abounds with claims that the understanding of pregnancy as illness has passed.[167] For example, the popular guide *What to Expect When You're Expecting* states: "the concept of pregnancy as an illness, and of the pregnant woman as an invalid . . . is as dated as general anesthesia in routine deliveries."[168]

The evolution of social norms regarding pregnancy is certainly not all positive[169] and "maternal bias" persists.[170] The point of this section is not to fully describe the Western development of pregnancy norms. Rather, the objective is to show that pregnancy has evolved from being seen as a condition antagonistic with work to one that is now seen as compatible.

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158. SOLINGER, *supra* note 145, at 212.

159. Williams, *supra* note 57, at 335.

160. SOLINGER, *supra* note 145, at 212.

161. *Id.*

162. *Id.* at 213.

163. *Id*.

164. *Id.*

165. *Id.*

166. HARRIET GROSS & HELEN PATTISON, SANCTIONING PREGNANCY: A PSYCHOLOGICAL PERSPECTIVE ON THE PARADOXES AND CULTURE OF RESEARCH 2 (2007).

167. MAZZONI, *supra* note 143, at 132.

168. *Id.* (quoting SANDEE EISENBERG HATHAWAY, HEIDI EISENBERG MURKOFF, & ARLENE EISENBERG, WHAT TO EXPECT WHEN YOU'RE EXPECTING 189–90 (1991)).

169. For example, it appears that part of what precipitated a growing acceptance of pregnant women as employees was the ability for people to see them as objects of sexual desire. To that extent, the success of pregnant workers might be seen as trading on sexual capital.

170. Williams et al., *supra* note 2, at 102–03 & nn.22–25 (citing studies as support and defining maternal bias to include both descriptive bias ("assumptions about how mothers will behave") and prescriptive bias ("a belief that pregnant women and mothers do not belong in the workplace at all")).

Indeed, there has been steady progress over the last several decades resulting in the idea that pregnant women are capable of productive work and that pregnancy should not derail a burgeoning career. These developments are reflected in the fact that women now make up 47% of the U.S. workforce.[171] We must thus carefully consider how to preserve the perceived compatibility between pregnancy and work. Whatever we say about pregnancy accommodations, it should be with a mind toward underlining the view that pregnant women are capable of remaining productive members of the workforce.

C. Social Meanings of Disability (& Work)

At the outset it is worth noting that disability is a broad term, which can make it difficult to generalize. Some conditions are not very stigmatized, and some are stigmatized more than others. Further, not all conditions we think of today as disabilities have been seen that way historically. For example, dwarfism, deafness, and eating disorders all have fascinating histories where in certain cultures and at certain times these conditions were not seen as disabilities.[172] Still, the social meaning of many conditions falling within the ambit of disability has long had negative contours.[173]

Early Greeks and Romans believed people with disabilities embodied the wrath of gods and should be killed.[174] The people of the middle ages saw disability as a sign of demonic affiliation.[175] This interest, which disproportionately affected those with mental illnesses, culminated in a "witch craze" that resulted in the executions of many people.[176] During the seventeenth and eighteenth centuries, disabled persons were, perhaps less

171. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 2 (2013), http://www.bls.gov/cps/wlf-databook-2012.pdf.

172. *See generally* Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL'Y REV. 347 (2011).

173. For example, at the Society for Disability Studies 1998 annual meeting, Paul Longmore, a luminary in the field of disability studies, asked, "Does disability *ever* represent anything other than a negative image?" David T. Mitchell & Sharon L. Snyder, *Representation and Its Discontents: The Uneasy Home of Disability in Literature and Film*, *in* HANDBOOK OF DISABILITY STUDIES 195, 195 (Gary L. Albrecht, Katherine D. Seelman & Michael Bury eds., 2001); *see also The Disability Rights Movement: A Brief History*, *in* DISABILITY: THE SOCIAL, POLITICAL, AND ETHICAL DEBATE 137, 137 (Robert M. Baird, Stuart E. Rosenbaum & S. Kay Toombs eds., 2009) ("Historically, the condition of having a disability—in any society—has been viewed as tragic.").

174. David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, *in* HANDBOOK OF DISABILITY STUDIES, *supra* note 173, at 11, 12, 14–17.

175. *Id.* at 18.

176. *Id.* at 17–18.

invidiously, seen as a menace to economic wellbeing.[177] The nineteenth and twentieth centuries saw the rise and expansion of mental institutions, in which people with all sorts of disabilities were segregated from the rest of society.[178] The twentieth century oversaw a eugenics movement and concomitant sterilizations.[179] Throughout, "disability" has been frequently "equated with 'flawed' minds and bodies."[180]

Contemporary commentators have been hopeful for new laws to result in a more positive meaning for disability. From the time the Rehabilitation Act was passed in 1973 to the recent amendments to the ADA, commentators have proclaimed that such disability-specific laws were intended to foster inclusion and erase the stigmatic social norms long associated with the meaning of disability.[181]

These aspirations sometimes blend together with proclamations that the Social Model of Disability ("Social Model") has acquired or will acquire cultural resonance.[182] Here, a little background is instructive. The conventional narrative is that the Medical Model of Disability ("Medical Model")—in which disability is understood as a medical problem requiring a medical solution—has predominated for centuries.[183] The Social Model asserts that disability is culturally constructed and comprised principally of social conventions that can be remedied.[184] The most common example of

177. *Id.* at 13 ("The practices of auctioning off the care of disabled persons to the highest bidder or running them out of town with threatened or real violence reflected an intimate connection between poverty and disability in this period of history.").

178. *Id.* at 13, 29–42.

179. *Id.* at 38–40.

180. *See* COLIN BARNES & GEOF MERCER, DISABILITY 1 (2003) (observing this is true for most of the twentieth century).

181. *See, e.g.*, Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J., no. 1, 2013, at 1, 42 (arguing that, with the passage of the ADAAA, disability "is therefore not stigmatizing—at long last, it is something broadly shared"); Adrienne L. Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1452 (1994) ("The purpose of Title I of the ADA, which affects both public and private employers, is to transform the notion of what constitutes an 'able' body or a 'qualified' worker and to change the social consequences of a disability by integrating disabled workers into, rather than excluding them from, the workplace. . . . The ADA reconfigures our norms of physical capability at the same time that it revises our vision of America, guaranteeing equal political and economic rights to a population traditionally excluded from full participation in American public life."); ENGEL & MUNGER, *supra* note 130, at 116–22 (arguing the ADA challenges the history of disability stigma); *see also* Bonnie G. Smith, *Introduction*, *in* GENDERING DISABILITY 1 (Bonnie G. Smith & Beth Hutchison eds., 2004) ("Gone are the days of a simple and dominant physiological or medical definition of disability. Instead, people have come to see an art of disability . . . .").

182. *E.g.*, Rienk Prins, *Preventing Job Abandonment and Facilitating Work Reintegration in High-Income Countries*, *in* DISABILITY AND EQUITY AT WORK 242, 248 (Jody Heymann, Michael Ashley Stein & Gonzalo Moreno eds., 2014) (arguing "the social model of disability has by now been predominant for years," reflects changing attitudes toward disability, and is being increasingly integrated into policy).

183. Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 IND. L.J. 181, 183 (2008).

184. *See generally* Areheart, *supra* note 172 (discussing in depth the Social Model of Disability).

this view is the way in which stairs "disable" those with mobility impairments, whereas ramps are more accessible to all (including senior citizens and small children) and result in more people who are "able" to access such a building.[185] In this situation, a person is disabled, or made able, at least in part by factors outside of the person's own body. Exclusionary factors may, under the Social Model, include physical, institutional, and attitudinal barriers.[186] The claim then would be that the Social Model has modified the social meaning of disability.[187]

Ultimately, and notwithstanding the work of ardent disability advocates to reshape the way we think and talk about disability, it is difficult to measure whether there has been much change in disability's social meaning. Moreover, there are reasons to be skeptical that the average person now understands disability as more culturally contingent or as something other than a condition to be avoided.[188] Perhaps the best indication of social views on disability is found in statistical measures of employment[189] and media representations of people with disabilities.[190]

The expressive meaning of disability most relevant for this Article's discussion is disability's potential to signal inability to work.[191] The current employment rate for people with disabilities is a strong indication of whether society perceives disability as compatible with working.[192] This rate has always been low, but the current employment rate of less than 20%

185. *Id.* at 351 n.11.

186. Areheart, *supra* note 183, at 188.

187. *See supra* note 182 and accompanying text.

188. Almost fifteen years after the ADA had passed, there was little evidence that the major philosophical underpinnings of the ADA had taken hold in the national consciousness. Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1086 (2004).

189. *See* Stein, *supra* note 24, at 1152 ("One way to gauge whether social and economic empowerment has increased for people with disabilities after the ADA's passage is to examine their employment experiences.").

190. *See* BETH A. HALLER, REPRESENTING DISABILITY IN AN ABLEIST WORLD: ESSAYS ON MASS MEDIA iv (2010) ("Researchers can delineate the characteristics of a particular culture by investigating the content of its mass media. 'The basic assumption is that both changes and regularities in media content reliably reflect or report some feature of the social reality of the moment.'"); PAMELA J. SHOEMAKER & STEPHEN D. REESE, MEDIATING THE MESSAGE: THEORIES OF INFLUENCES ON MASS MEDIA CONTENT 24 (1991) ("If we assume that the media provide most of the 'reality' that people know outside their own personal experience, then studying media content surely helps us assess what reality it is that they consume. . . . Systematic, patterned regularities in content result from stable, underlying structural factors.").

191. Stein, *supra* note 24, at 1178 (observing the belief that people with disabilities are "inauthentic workers" is "[p]erhaps the most damaging aspect" of social conventions that equate disability with less ability).

192. Research in this area has indicated a notable "discrepancy between expressed attitude and behavior." Brigida Hernandez, Fabricio E. Balcazar & Christopher B. Keys, *Disability Rights: Attitudes of Private and Public Sector Representatives*, 70 J. REHAB. 28, 29 (2004). In particular, "employers' expressed willingness to hire workers with disabilities has been incongruent with their actual hiring." *Id.*

is, in recent history, an historic low.[193] Even if people's perceptions of disability are not responsible for this low rate, the low rate itself may perpetuate a perceived incompatibility between disability and work. Similarly, even when people with disabilities find work, it is usually low-status or low-compensation work.[194] This means that whatever compatibilities between disability and work that exist are less visible.

Mass media representations of disabled individuals have long had a strong effect on how people understand disability.[195] The media portrayal of disability is powerful. Studies have shown and commentators have claimed that media is the primary way non-disabled persons learn about disability[196] and that it even influences "brass-tack issues," such as unemployment, health care policy, and self-esteem.[197] Researchers have devoted entire books to examining media representations of disability,[198]

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193. The current employment rate of people with disabilities is historically low, with February 2016 numbers showing employment rates of 19.5% for people with disabilities, and 68.2% for people without disabilities. OFF. OF DISABILITY EMP. POL'Y, U.S. DEP'T OF LAB., http://www.dol.gov/odep/ (last visited Apr. 1, 2016). This is hard to measure exactly as different federal agencies have, over time, used different definitions of disability. S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 113TH CONG., UNFINISHED BUSINESS: MAKING EMPLOYMENT OF PEOPLE WITH DISABILITIES A NATIONAL PRIORITY 6, 30 (2012), http://www.ct.gov/dds/lib/dds/community/cms_guidance_around_sheltered_workshops.pdf [hereinafter UNFINISHED BUSINESS]; Stein et al., *supra* note 31, at 733.

194. *See* Jody Heymann, Michael Ashley Stein & Gonzalo Moreno, *Disability, Employment, and Inclusion Worldwide*, *in* DISABILITY AND EQUITY AT WORK, *supra* note 182, at 1, 5 (observing workers with disabilities are much more likely to be in part time positions and earn lower wages than their comparable colleagues without disabilities); Lauren Lindstrom & Laurie Gutmann Kahn, *Career Advancement for Young Adults with Disabilities*, *in* DISABILITY AND EQUITY AT WORK, *supra*, at 213, 216–17 (observing that career advancement for people with disabilities is burdened both by patterns of discrimination and lack of access to "specific skill training" or needed education).

195. PAUL T. JAEGER & CYNTHIA ANN BOWMAN, UNDERSTANDING DISABILITY: INCLUSION, ACCESS, DIVERSITY, AND CIVIL RIGHTS 100 (2005) (examining the influence the media's portrayal of disability has on public perception). Indeed, much of what we know about any subject comes from what we see on television or in the movies. Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223, 223 (2000); HALLER, *supra* note 190, at iv.

196. JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 35 (1998) (observing that surveys have shown that more people form attitudes about disabilities from television (telethons) than from any other source); HALLER, *supra* note 190, at iv ("I argue that most non-disabled people still learn about disability issues through the media, rather than through interactions with people with disabilities."); OTTO F. WAHL, MEDIA MADNESS: PUBLIC IMAGES OF MENTAL ILLNESS 3 (1995).

197. CHARLES A. RILEY II, DISABILITY AND THE MEDIA: PRESCRIPTIONS FOR CHANGE 1 (2005).

198. *See generally* MARTIN F. NORDEN, THE CINEMA OF ISOLATION: A HISTORY OF PHYSICAL DISABILITY IN THE MOVIES (1994); RILEY II, *supra* note 197; WAHL, *supra* note 196. For book chapters and articles that examine media representations of disability, see PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 131–46 (2003); Areheart, *supra* note 172; Gerard Goggin & Christopher Newell, *Fame and Disability: Christopher Reeve, Super Crips, and Infamous Celebrity*, *in* DISABILITY: THE SOCIAL, POLITICAL, AND ETHICAL DEBATE, *supra* note 173, at 105; Mitchell & Snyder, *supra* note 173; Robert Molsberry, *More Than an Inspiration*, in DISABILITY: THE SOCIAL, POLITICAL, AND ETHICAL DEBATE, *supra* note 173, at 117; William J. Peace, *Wishing for Kryptonite: A Response to Christopher Reeve's Pursuit of Cure*, *in* DISABILITY: THE SOCIAL, POLITICAL, AND ETHICAL DEBATE, *supra* note 173, at 127; John Schatzlein, *Christopher Reeve: 1952–*

and nearly all of the literature indicates these representations have been negative.[199]

In all forms of media, disability is often presented as a "defective" or inferior status.[200] It is situated as an individual, medical problem requiring an individualized, medical solution;[201] prejudice and discrimination rarely enter into such stories.[202] The media and other nonfiction typically present disability as deserving of great pity, or as a condition that is unacceptable and something that needs to be overcome by the individual or science.[203] Disability in novels and other fictional works is often intended to show malevolence, in which "deformity of body symbolizes deformity of soul."[204] Similarly, disabled characters are often isolated from their able-bodied peers and objectified through the lenses of pity, fear, and scorn.[205] Just as important is the glaring lack of positive portrayals; people with disabilities are rarely shown as independent, contented, or employed.[206] Such negative representations inform not only a collective social view but

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2004, *in* DISABILITY: THE SOCIAL, POLITICAL, AND ETHICAL DEBATE, *supra* note 173, at 131; John Williams, *Christopher Reeve's Super Bowl Ad Scored a Touchdown: But It Has Provoked a Surprisingly Negative Reaction Among Disbled Groups. Why?*, *in* DISABILITY: THE SOCIAL, POLITICAL, AND ETHICAL DEBATE, *supra* note 173, at 123.

199. *See infra* notes 200–206 and accompanying text; *see also* HALLER, *supra* note 190, at iii ("The ableism within media content presents people with disabilities as inferior to able-bodied people, as 'defective' or as having a worthless status."). However, there have been some positive portrayals in commercials that, in a commercial pitch to the disability niche, portray people with handicaps as "attractive, active, and 'with it.'" LONGMORE, *supra* note 198, at 145; HALLER, *supra* note 190, at 193–204; RILEY II, *supra* note 197, at 2. Such portrayals have been the exception—not the norm.

200. HALLER, *supra* note 190, at iii.

201. LONGMORE, *supra* note 198, at 139–40; RILEY II, *supra* note 197, at 4, 12 (observing that the distinction between the Medical and Social Models of Disability "is of paramount importance to an understanding of the media and disability").

202. LONGMORE, *supra* note 198, at 139–40.

203. There are three forms of "prefabricated stories" about disability: the supercrip (in which the person triumphs over their condition), the medical miracle (in which science triumphs over their condition), and the object of pity. RILEY II, *supra* note 198, at x, 4; LONGMORE, *supra* note 198, at 138–39 (characterizing the nonfiction presentation of handicapped individuals as a matter of "heroic overcoming"). Many of the media's characterizations of disability have traditionally coincided with emphases on pity and the need for medical treatment—notions that are at home with the Medical Model. Such characterizations, even when they are well-meaning, undercut the social understanding of people with disabilities as being capable of productive work. Areheart, *supra* note 183, at 201–04; *see also* Kevin Barry, *Gray Matters: Autism, Impairment, and the End of Binaries*, 49 SAN DIEGO L. REV. 161, 178–79 (2012) (discussing "I Am Autism" ad campaign launched by Autism Speaks, an autism advocacy organization, which relied on "[t]ime-tested pity and fear tactics").

204. LONGMORE, *supra* note 198, at 133–34 (arguing that among the most persistent uses of disability in popular entertainment and literature is "the association of disability with malevolence" and then chronicling examples); NORDEN, *supra* note 198, at 5–6 (chronicling examples); Mitchell & Snyder, *supra* note 173, at 196 (same).

205. NORDEN, *supra* note 198, at 1.

206. Mitchell & Snyder, *supra* note 173, at 196 ("Truly, literary and historical texts have rarely appeared to offer disabled characters in developed, 'positive' portraits."); *see* Areheart, *supra* note 183, at 197 (examining *Million Dollar Baby*, a movie in which the protagonist, upon becoming disabled, begs to be euthanized, comparing herself to a sick dog that needs to be taken out into the woods and shot).

also the perceptions of individual employers who must abide by the provisions of the ADA.[207]

While questions about causation may shroud the media's role in affecting social views on disability, it is probably fair to identify the relationship between disability and the media as a mutually causal one; the media simultaneously reflects and undermines the position in society of people with disabilities.[208]

Moreover, while "disability" is sometimes a term of art that means different things depending upon the legal context, the commonly understood semantics of the word "disability" communicate incapacity or lack of ability.[209] Further, the expressive contours of "disability" are more than an issue of language or semantics. Treating disability and employability as binary conditions has been an enduring distributive mechanism to sort the population into groups who are able and expected to work and those who are not able to work.[210] Indeed, this either–or construct dates back to the Elizabethan poor laws,[211] which grew out of fourteenth-century edicts intended to address vagrancy.[212] Disability thus originated as a public status that was defined by whether a person was able to work.[213] Indeed, the modern embodiment of the disability–employability distinction is found in the Social Security Administration's (SSA) definitions, which regulate who may receive benefits pursuant to Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI).[214] Here, disability is *defined* as an inability to work.[215]

The next section will explore a topic that is closely related to, but ultimately discrete from, disability: accommodations.

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207. *See* Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 217 (2000) (noting "the perceptions and expectations associated with disability and work help to shape judgments about the capacity of persons with a disability to perform adequately within specific environments").

208. NORDEN, *supra* note 198, at x. From this standpoint, disability is not just a reflection of social norms; it is a "politically charged commodity" that the media is selling to the public. *Id.*

209. *See supra* note 24.

210. Disability has long been a category in the welfare state exempting one from the labor market. DEBORAH STONE, THE DISABLED STATE 4–10 (1984). *See generally* Bradley A. Areheart & Michael Ashley Stein, *The Disability–Employability Divide: Bottlenecks to Equal Opportunity*, 113 MICH. L. REV. 877 (2015) (book review) (exploring the disability–employability divide).

211. TenBroek & Matson, *supra* note 23, at 821–22.

212. Areheart & Stein, *supra* note 210, at 883 (citing STONE, *supra* note 210, at 29).

213. STONE, *supra* note 210, at 54–55.

214. *See generally* Areheart & Stein, *supra* note 210 (exploring this administrative distinction).

215. *See Substantial Gainful Activity*, SOC. SECURITY ADMIN., https://www.ssa.gov/oact/cola/sga.html (last visited Apr. 1, 2016) ("To be eligible for disability benefits, a person must be unable to engage in substantial gainful activity (SGA).").

D. Social Meanings of Workplace Accommodations

The understanding of workplace accommodations as a legal right has only been around for the last few decades.[216] Both Title VII (religion) and the ADA (disability) provide such a right, though the ADA's provision of reasonable accommodations is more pronounced both in terms of the numbers of legal claims made (in the wake of a denial) as well as employer awareness. While costless accommodations are often prominently featured in the media, there are many accommodations (such as reassignment or job restructuring) that greatly impact the employer or co-workers.[217] There has not been much effort to theorize the social meaning of accommodations, but we can derive such meaning through harmonizing several strands of social science and legal inquiry.[218]

A first and salient indication of the social meaning of accommodations is found in the ADA's effect on employment for people with disabilities. It is difficult to disaggregate correlation from causality. At least, we can say that the employment level of people with disabilities has steadily dipped since the ADA's passage.[219] At most, we can say that the implementation of the ADA, and its concomitant requirement of reasonable accommodations, caused the dip.[220] The reasoning would be that the ADA disincentivizes employers from hiring people with disabilities since the

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216. Of course, voluntarily provided accommodations—such as allowing an employee to leave work early for a personal appointment or the purchase of an ergonomic chair—have been around much longer.

217. *E.g.*, Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1056 (2000) ("Of all the accommodations listed in the ADA, the reassignment accommodation has generated the most litigation and fueled the greatest amount of controversy."); *see also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (discussing how accommodations increase business costs); Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties"*, 68 MO. L. REV. 863, 869 (2003) ("Over time, it has become clear that the greatest potential source of conflict over reasonable accommodation involves accommodations . . . that limit the discretion of employers or adversely impact other employees.").

218. *But see* Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1109–15 (2014) (exploring the "special treatment" stigma that results from the requirement to provide special accommodations in the workplace).

219. *See* BAGENSTOS, *supra* note 31, at 117 ("Indeed, by virtually all reports the employment rate for Americans with disabilities has declined over the time the statute has been on the books."). Bagenstos then argues that factors extrinsic to the statute played a significant role in the employment decline of people with disabilities, namely, "that the 1990–1991 recession pushed an unusually large number of people with disabilities out of the workforce and onto the Social Security Disability Insurance (SSDI) rolls." *Id.*

220. *E.g.*, Porter, *supra* note 218, at 1110 ("Many argue that the reason for [the low employment level of people with disabilities following implementation of the ADA] is because employers are resistant to providing accommodations to individuals with disabilities so they simply do not hire them.").

perceived cost of accommodations is repugnant[221]—whether the cost is financial, loss of worker morale, or limits on the employer's autonomy to structure work as it sees fit. The truth on causation is likely somewhere in the middle, but these facts suggest that the social meaning of accommodations is not neutral. The meaning of accommodations has likely had *some* causal effect on the employment level of people with disabilities, which decreased following the ADA's passage and remains at an historical low.[222]

A second signal of what people think about accommodations is found in employers' resistance to the ADA. From the start, employers were antagonistic to being required to change the structure of the workplace (either physically or by policy) through accommodations. For example, the National Association of Manufacturers, the American Banking Association, and the National Federation of Businesses all voiced their opposition to the ADA's access and accommodation requirements.[223] With the more recent ADAAA, employers' resistance to expanding accommodations was overshadowed by their acceptance of broader antidiscrimination protections. Of course, the two were directly related. The ADAAA represented a political compromise in which employers agreed to a nearly universal scope of antidiscrimination protection in exchange for keeping a relatively higher threshold for accommodation claims.[224] Pure antidiscrimination protections, where the person is qualified without an accommodation, generally require only a refrain from discrimination and not a restructuring of the workplace.[225] In contrast, employers viewed any expansion of accommodations gravely, since more accommodation requests—even if the accommodations sought were all theoretically costless—would yield more indirect costs from having to determine whether and what accommodations are required as well as the real costs involved in any litigation.[226]

A social meaning of accommodations can also be deduced from the narrative concerning a public backlash to the ADA, which has been consistently advanced by public commentators. There has been book after

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221. *See, e.g.*, Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 REGULATION, no. 1, at 22–23 (2000) (documenting how the ADA's accommodation mandate has increased the cost of employing disabled workers and thus made such workers unattractive to businesses).

222. *See supra* note 193.

223. MARTA RUSSELL, BEYOND RAMPS: DISABILITY AT THE END OF THE SOCIAL CONTRACT 114 (1998).

224. Barry, *supra* note 48, at 262–64.

225. One possible exception would be if an employer is forced to change a job to reflect its essential functions. See 42 USC § 12111(8) (2012) (defining "qualified" as able to "perform the essential functions of" a job).

226. Barry, *supra* note 48, at 221, 259.

article after op-ed attempting to explicate this backlash.[227] The heart of the backlash, or controversy, is Title I's accommodation mandate,[228] which requires employers "to do something that no federal employment rights statute had ever done before: . . . engage with a disabled employee or applicant in a good faith interactive process to find ways to accommodate the employee's disability and enable him to work."[229] Studies show that employers resist accommodations by preventing employees from requesting accommodations or by failing to grant their employees' requests.[230] The most obvious reason for resistance is potential cost, but part of the pushback is also because the accommodation requirement dramatically shifted the balance of power between employers and employees.[231] Another reason is that effective accommodations often require restructuring parts of the workforce or workplace.[232]

Synthesizing these several strands of analysis, we see employer opposition to accommodations from the inception of the ADA through its recent amendment.[233] That opposition has infiltrated public views about accommodation, culminating in something that is consistently labeled a backlash to the ADA.[234] And beyond all of the argumentation about whether the ADA and its concomitant requirement of workplace accommodations is a good idea is the unassailable fact that employment outcomes for people with disabilities have worsened in the twenty-five years following the ADA's passage.[235] Even though employers make

227. For example, an entire symposium took place under the umbrella of "Backlash Against the ADA" in 2000. It was held by the *Berkeley Journal of Labor and Employment Law* and featured twenty-one distinguished contributors. Symposium, *Backlash Against the ADA*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000); s*ee also, e.g.*, BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003); RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 96–125 (2005); SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT 48–58 (2005).

228. Richard V. Burkhauser, *An Economic Perspective on ADA Backlash: Comments from the BJELL Symposium on the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 367, 367–68 (2000) (suggesting that ADA backlash is constituted by various constituencies wrestling with the ADA's requirement of reasonable accommodation); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000) (observing the ADA's requirement of reasonable accommodations rests on the controversial idea of treating people differently to achieve equality).

229. Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 4 (2000).

230. *E.g.*, Sharon L. Harlan & Pamela M. Robert, *The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodation*, 25 WORK & OCCUPATIONS 397 (1998).

231. Krieger, *supra* note 229, at 4.

232. *Id*.

233. *See supra* notes 223–226 and accompanying text.

234. *See supra* notes 227–232 and accompanying text.

235. *See supra* notes 219–222 and accompanying text.

accommodations for employees all the time,[236] there is evidence employers are less willing to do so once an employee makes a request that could denote a legal obligation.[237] The bottom line is that the social meaning of accommodations among the constituency that matters most when it comes to work (employers) is seemingly negative.

The next two sections argue that the reform efforts to secure pregnancy accommodations discussed above have the potential to revitalize paternalistic attitudes toward pregnant employees, signal incapacity to work, and increase sex discrimination. Section E considers the expressive harms associated with treating pregnancy specially.

E. The Expressive Harms of Special Accommodations for Pregnancy

Each of the proposals for pregnancy accommodations has the potential to create new social meanings about pregnant identity. Understanding the expressive meaning of such measures is critical since they stand to impact all women. The Pregnant Workers Fairness Act (PWFA), for example, is not a niche law protecting a "discrete and insular minority."[238] About 80% of women will bear a child at some point in their lifetime.[239] And the group of women who will actually become pregnant, but not bear a child, is larger. Moreover, while the law only implicates those who become pregnant, the group who is *perceived* as able to become pregnant is likely larger still. The result is that any signals about pregnant workers stand to impact all women.

All of these proposals are potentially problematic in that they single out pregnancy as a condition uniquely in need of accommodation.[240] The ADA proposal is doubly problematic, as it equates pregnancy with disability and yields its own discrete set of expressive harms that are discussed in Section F. This section focuses on the PWFA and its state analogues. These statutes and bills treat pregnancy specially and in the most conspicuous way

236. SAMUEL R. BAGENSTOS, DISABILITY RIGHTS LAW 83 (2010) ("Employers accommodate (nondisabled) employees all the time. A supervisor may, for example, give an employee time off to attend a child's little league championship or to play in the finals of a club golf tournament."). This goes hand in glove with the observation that the workplace is always already structured to accommodate some, but not other, potential employees. In particular, workplace environments and equipment have been historically built or structured with a certain type of employee in mind—namely able-bodied, heterosexual, Protestant white males with help at home.

237. Porter, *supra* note 218, at 1109–10.

238. This language was included in the original preamble to the ADA, 42 U.S.C. § 12101(a)(7) (1992), and more famously in *United States v. Carolene Products Co*., 304 U.S. 144, 152 n.4 (1938).

239. *See* GRETCHEN LIVINGSTON & D'VERA COHN, PEW RESEARCH CTR., CHILDLESSNESS UP AMONG ALL WOMEN; DOWN AMONG WOMEN WITH ADVANCED DEGREES 1 (2010), http://www.pewsocialtrends.org/files/2010/11/758-childless.pdf (observing that one in five American women ends her childbearing years without bearing a child).

240. *See supra* Part I.A–B.

possible: by giving pregnant workers a stand-alone law that entitles them to accommodations. Such laws indicate that women need special treatment in order to be productive workers.

There are a myriad of expressive signals associated with treating pregnancy specially. The most obvious signal is a positive one: that denying accommodations for pregnant workers is wrong. This signal would likely result in many employers, as a prophylactic matter, providing accommodations to pregnant workers.[241] But such gendered, protective measures always carry "concealed costs,"[242] which are revealed by an expressive analysis. This section discusses the expressive harm, as constituted through *signals* (the statements a law makes) and *consequences* (the results of those statements), associated with treating pregnancy specially.

i. Signal: Women as More Costly Employees

One signal resulting from special treatment would be that women are more costly employees. Women of childbearing age must already contend with potentially being seen as more costly employees.[243] These costs are primarily those associated with leave for childbearing, but also include the cost of continued benefits during maternity leave.[244] An accommodation right thus compounds these costs. As explained above, accommodations are not seen as costless. The cost may be financial, a loss of workplace morale, or a reduction in the employer's autonomy to structure jobs and the workplace as it sees fit. There have been many pieces written in a seeming effort to de-stigmatize accommodations; the primary arguments are that accommodation is in essence antidiscrimination,[245] most accommodations are costless or inexpensive,[246] and accommodations benefit everyone.[247]

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241. This signal would be compelling since the PWFA has the potential to add a transactional cost, namely lawsuits, that would reduce the utility in exercising a preference to not accommodate and potentially exclude pregnant workers.

242. ACLU Brief, *supra* note 96, at 22, 1986 WL 728369, at *22.

243. Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2157 (1994).

244. *Id.*; *see also* Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 290–300 (2000) (arguing that the FMLA likely has a negative effect on the wages of female workers because employers can predict that women are more likely to take FMLA leave).

245. *See, e.g.*, Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643, 645 (2001) (asserting that accommodations resemble and sometimes overlap with antidiscrimination measures); Michael Ashley Stein, *supra* note 14, at 583 (arguing that accommodations are antidiscrimination remedies).

246. *See, e.g.*, Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 321 (2009) ("[E]mpirical research has found that the costs of most accommodations are minimal or may even provide employers net long-term economic gains."); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 469 (2000) (similar proposition).

Yet the need for accommodations appears to have retained a stigmatic value, at least in the eyes of employers. As explicated in Part II, there has been consistent opposition from employers toward Title I of the ADA and its principal requirement of reasonable accommodation.[248] Consistent with that, employment levels for people with disabilities have worsened in the twenty-five years since the ADA's passage, which is further evidence that employers view accommodations as costly. Moreover, there is compelling evidence that co-workers resent accommodations that allow any deviation from normal workplace rules or provide any other type of special treatment.[249] Such resentment further influences and affirms employers' natural aversion to legally required accommodations.[250]

ii. Signal: Women as Less Fit for Work

A second signal from special treatment would be that pregnancy is incompatible with work. As explained above, laws that have historically protected women by targeting the challenges of pregnancy and motherhood have reified stereotypes about women's limitations as workers, as well as stereotypes about their most appropriate domain (home).[251] This impact is subtle, but significant; much of the ongoing fight for women's equality is constituted in challenging implicit bias.[252] And singling out pregnancy for special treatment may reinforce unconscious biases regarding women's innate capabilities and their capacity to maintain productive careers.[253] Said differently, emphasizing biological differences between the sexes has the very real capacity to logicize the differential treatment of male and female employees.[254]

The Supreme Court has written, "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."[255] Laws that provide special benefits for

247. *See, e.g.*, Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008) (arguing courts and agencies fail to recognize the benefits of ADA accommodations to third parties); Travis, *supra* note 246 (same).

248. *See supra* notes 227–232 and accompanying text.

249. Porter, *supra* note 218, at 1111–14.

250. *Id.* at 1113.

251. ACLU Brief, *supra* note 96, at 7, 1986 WL 728369, at *7; *see supra* notes 97–99.

252. *See generally* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999).

253. ACLU Brief, *supra* note 96, at 18–19, 1986 WL 728369, at *18–19; GEORGIA WARNKE, AFTER IDENTITY: RETHINKING RACE, SEX, AND GENDER 184 (2007) ("By singling certain job holders out as women and by allowing them to be treated differently than others, the law suggests that women require special rights and accommodations in order to hold jobs others can hold without them.").

254. ACLU Brief, *supra* note 96, at 20, 1986 WL 728369, at 20.

255. *Id.* at 21, 1986 WL 728369, at *21 (quoting Orr v. Orr, 440 U.S. 268, 283 (1979)).

women may also make female employees appear less reliable.[256] These types of measures have a very real tendency to marginalize women's role as workers.[257]

While expanding accommodations is a protective measure intended to be compatible with work, highlighting pregnancy as in special need of accommodation emphasizes that the thing about a woman which most view as essentially different (i.e., the capacity to reproduce) is also the thing that makes her less capable of doing a job according to how it is structured by the employer. It is a small leap then to see, either consciously or unconsciously, women as essentially less capable of doing jobs as structured—to see women as less constitutionally suited for work.[258]

iii. Consequence: Increase Discrimination

There are always risks to treatment that is seen as "special," and singling out pregnancy as uniquely in need of workplace accommodation is no exception. While measures that protected pregnancy in the workplace have historically improved conditions,[259] such measures have also typecast women as physically weaker and connected their worth more with the home than with work.[260] These measures resulted in increased discrimination.[261] During debates surrounding the PDA's enactment, reformers argued that the measure should not give special treatment to pregnancy.[262] They warned that if it did, "it could increase other forms of sex discrimination or harassment."[263] Current efforts to secure pregnancy accommodation reform similarly have the potential to increase pregnancy and sex discrimination.[264]

256. *Id.* at 7, 1986 WL 728369, at *7.

257. *Id.* at 9, 1986 WL 728369, at *9.

258. WARNKE, *supra* note 253, at 184 (arguing that special rights for women, can cause employers to view women as "constitutionally unsuited to responsible working lives"); Porter, *supra* note 218, at 1109 ("Employers often see proposals for special treatment as evidence that those employees 'just can't cut it' in the workplace.").

259. *See supra* notes 96–99, 150–153 and accompanying text.

260. ACLU Brief, *supra* note 96, at 17–18, 1986 WL 728369, at *17–18; *see supra* note 101.

261. *Supra* notes 102–112 and accompanying text.

262. Widiss, *supra* note 4, at 969. Senator Brooke thus stated, "[Reformers] have not demanded, nor asked, for [special] benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men." ACLU Brief, *supra* note 96, at 39–40, 1986 WL 728369, at *39–40.

263. Widiss, *supra* note 4, at 969.

264. *Id*. at 976 (acknowledging that mandating employers provide accommodations may increase discrimination when it comes to hiring and termination decisions); Porter, *supra* note 218, at 1099 (observing the need for accommodation results in "employers' reluctance to hire these employees because of the real or perceived costs of employing such individuals"), *id.* at 1110–11 ("[A]nything that arguably increases the costs of employing an individual or makes it more difficult for an employer to fire an employee might incentivize an employer to not hire the individual in the first place.").

While some might perceive a qualitative difference between measures giving pregnant women the selective right to invoke accommodations and paternalistic measures that limit the type of work that women can do, both measures spring from the same implicit principle: that pregnant women, by their very constitution, are different from men in their capacity to work.

The two signals discussed above may increase discrimination. First, signaling that pregnant women need special measures to succeed in the workplace may indicate that they are not generally fit for work. To the extent this impacts employers' perceptions regarding pregnant employees, there is a risk for all women who are seen as likely to become pregnant.[265] There may be a variety of subtle or even unconscious responses, such as giving such employees less responsibility or slotting them into positions more traditionally assigned to women. Such responses may have serious long-term consequences—even if they stop short of legally defined discrimination.

Second, signaling that one needs special measures to succeed in the workplace might indicate that it is costly to hire employees who are likely to become pregnant or retain those who already are.[266] If so, this might yield a preference for hiring men. Employers already overestimate the cost of accommodations for people with disabilities,[267] and there is little reason to suggest this overestimation would not occur in the context of pregnancy.

F. The Expressive Harms of Equating Pregnancy and Disability

This section will now turn to the proposal to treat pregnancy like a disability. Here, there are numerous potential signals that have the capacity to alter the social meaning of pregnancy and inflict expressive harms. At the outset, it is worth noting that pregnancy may be viewed in broad strokes as a normal developmental state or as an illness.[268] In the context of working, there is a "catch-22" to these alternate characterizations. If pregnancy is a normal state, then perhaps employers should ignore it (hence, its current lack of entitlement to accommodations under the ADA).[269] If pregnancy is viewed as a disability requiring workplace accommodations, however, employers may see pregnant women as

265. *See supra* Part II.E.

266. Travis, *supra* note 246, at 321; *see supra* note 264.

267. This can be deduced from the fact that accommodations are typically costless or inexpensive, Bagenstos, *supra* note 246, at 469; Travis, *supra* note 246, at 321, and yet employers discriminate to avoid hiring those with an entitlement to accommodation. *See supra* notes 219–222 and accompanying text.

268. Sheila Taylor Myers & Harold G. Grasmick, *The Social Rights and Responsibilities of Pregnant Women: An Application of Parsons's Sick Role Model*, 26 J. APPLIED BEHAV. SCI. 157, 158 (1990).

269. GROSS & PATTISON, *supra* note 166, at 60; Widiss, *supra* note 4, at 976.

disabled and less fit for work.[270] The decision to treat pregnancy as a normal state or as a disability is thus not without consequence.

It should be noted at the outset that all of the previous critiques in Section E apply with equal force because treating pregnancy like a disability is still an approach that privileges pregnancy. Thus the expressions below are in addition to the potential harms outlined in Section E.

i. Signal: Women as Disabled

One potential signal resulting from treating pregnancy as a disability is that employers see pregnant employees as disabled. That connection is simple enough, but its expressive dimensions are less so. As I have endeavored to show, the label "disability" is chock-full of social meaning—and much of it is lamentably negative.[271] People with disabilities have been seen for centuries as defective, abnormal, and inferior.[272] The media has reflected and furthered such stigma by consistently presenting disability as deserving of pity or scorn.[273] These social views are straightforwardly stigmatic.

Prescribing the label of disability is a calculated risk, because expressions of normality are powerful. Consider the vigor with which homosexual rights advocates fought for exclusion from the ADA and the *Diagnostic and Statistical Manual of Mental Disorders*, the authoritative manual of the American Psychiatric Association. There was a view in both instances that pathologizing homosexuality would set back efforts to achieve social equality.[274] Transgender activists have similarly fought gender identity disorder's inclusion under the ADA.[275] These episodes reveal how important it is for legal expressions to foster inclusion and normality, rather than exclusion and pathology. All of this, combined with pregnancy's current social status of being seen as healthy, natural, and

270. Widiss, *supra* note 4, at 961–62; *see supra* note 269.

271. *See supra* Part II.C.

272. *See supra* notes 173–180 and accompanying text.

273. *See supra* notes 200–207 and accompanying text.

274. *See* HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS 18, 55–99 (1997) (explaining how protests by gay activists led to the elimination of homosexuality from the *DSM-II* in 1974); Barry, *supra* note 181, at 3 n.9 (noting that the lesbian and gay community supported exclusion of homosexuality and bisexuality from the ADA).

275. Barry, *supra* note 181, at 41–42 (discussing transgender activists' opposition to ADA's coverage of gender identity disorder on grounds that it implies that transgender people are "not normal"); Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 105 (2006) (discussing some transgender activists' "aversion to being included within the stigmatized community of disability").

compatible with productive work, should give us significant pause before we underline the connection between pregnancy and disability.[276]

One might agree with all of the observations about disability stigma, but counter that part of how we can normalize disability is through equating it with something just like pregnancy, which is typically considered normal and healthy. One might thus argue that treating pregnancy as a disability has the potential to reform disability stigma.

My response is that the social meaning of disability has been constructed over centuries, is more deeply entrenched, and is unlikely to be modified by pregnancy's mere coverage under the ADA.[277] The social meaning of disability is sticky. In contrast, the social meaning of pregnancy has proved mutable and more susceptible to expressive swings.[278] If the ADA were amended to protect pregnancy, the more likely result would be expressive harms to working women—not a meaningful change in the social meaning of disability.

ii. Signal: Women as Less Fit for Work

A second potential signal from pregnancy's treatment as a disability is that pregnancy is incompatible with work. As an initial matter, all of the observations in Section E about how special treatment for pregnancy undermines women's perceived fitness to work apply here. But we must also consider the expressive impact that labeling pregnancy as a disability has on perceived work capability.

As explained above, disability status expresses an inability to work. This signal is reflected in and further constructed by a 20% employment level for people with disabilities,[279] the structure of public disability benefits that define disability as an inability to work,[280] and the very semantics of the word disability.[281] Indeed, some feminists have previously argued that pregnancy should not be characterized as a disability given the negative signals that might attach to pregnancy—most notably, a lack of fitness to work.[282] Even if the public does not consciously believe such

276. I write "underlining" since, as noted above, there is already a connection in that pregnancy sometimes leads to complications that qualify as ADA-sanctioned disabilities. *See supra* note 44 and accompanying text.

277. *See supra* Part II.C.

278. *See supra* Part II.B.

279. *See supra* notes 192–194 and accompanying text.

280. *See supra* notes 210–215 and accompanying text; *see also* Areheart & Stein, *supra* note 210 (discussing in depth this binary administrative distinction).

281. *See supra* notes 24, 209 and accompanying text.

282. *See, e.g.*, Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 250 (1998) (noting that "bringing pregnancy under the ADA would reinvigorate the stereotype of pregnant women as

stereotypes, there is still an implicit message about relative ability that is found in the very word.

The complicated association between disability and sickness is another way in which the linkage to disability might signal pregnant employees are less fit for work. Of course, disability and sickness are not the same.[283] And people with disabilities have fought the characterization of disability as an illness.[284] There is nevertheless a close association between disability and illness.[285] Moreover, there are many pregnancy symptoms that are only narrowly removed from being considered sickness. Labeling pregnancy a disability would only quicken the association. Ultimately, treating pregnancy as a disability may cause people to see pregnancy more like a sickness than a normal, healthy state.[286]

The result of strengthening the association between pregnancy and sickness is not a good one. Empirical studies demonstrate that the more closely employers and co-workers associate pregnancy with sickness, the more they expect or assume inferior performance from pregnant employees.[287] While some association between pregnancy and sickness may naturally exist,[288] explicitly linking pregnancy and sickness vis-à-vis

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disabled and not fit for work"); *see also* Maria O'Brien Hylton, *"Parental" Leaves and Poor Women: Paying the Price for Time Off*, 52 U. PITT. L. REV. 475, 513–14 (1991) ("[O]ne danger of analogizing pregnancy to other disabilities is that this has the effect of preserving male characteristics as the norm."); Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 942 (1985) ("[P]regnancy is neither a disability nor a dysfunction, but a normal moment in the human reproductive process specific to women.")

283. Except possibly in the technical sense that health is sometimes said to be the absence of disease and few would say someone disabled is in perfect health. Ron Amundson, *Disability, Handicap, and the Environment*, J. SOC. PHIL., March 1992, at 105, 106. However, this type of reasoning is tautological. For example, many people with disabilities have no identifiable illness or sickness. Moreover, many ill people would not, by any measure, be considered disabled. *See generally* Susan Wendell, *Unhealthy Disabled: Treating Chronic Illnesses as Disabilities*, *in* THE DISABILITY STUDIES READER 161 (Lennard J. Davis ed., 4th ed. 2013).

284. *E.g.*, Amundson, *supra* note 283, at 106 (arguing disabilities are not per se diseases); *see* Wendell, *supra* note 283, at 161–62 (observing many have fought the problematic association given its tendency to imply disability is simply a medical problem in need of a medical solution).

285. Entire chapters have been written on this phenomenon. *See, e.g.*, Amundson, *supra* note 283, at 106; *see also* AMA STANDARD NOMENCLATURE OF DISEASES AND OPERATIONS (Richard J. Plunkett and Aladine C. Hayden, eds., 4th ed. 1952) (listing under his definition of disease muscle paralysis, color blindness, scars, missing limbs, and stab wounds).

286. *See also supra* notes 269–270 and accompanying text.

287. *See, e.g.*, GROSS & PATTISON, *supra* note 166, at 56–58 (summarizing empirical work on pregnancy stereotyping and noting such studies suggest that one explanation for such "negative attitudes may stem from the linking of pregnancy with illness"); Helen M. Pattison, Harriet Gross & Charlotte Cast, *Pregnancy and Employment: The Perceptions and Beliefs of Fellow Workers*, 15 J. REPROD. & INFANT PSYCHOL. 303, 310 (1997) (finding "a clear gender effect in the nature of people's perceptions and beliefs about pregnancy and work"), *id.* at 312 ("There is some evidence in our results that negative views of pregnancy and employment may arise from the negative stereotype of pregnant women as invalids.").

288. *See* Myers & Grasmick, *supra* note 268, at 170 ("An overwhelming majority of the respondents in our sample held expectations for pregnant women that are analogous to expectations for sick people.").

coverage under the ADA may consolidate any association and, in turn, cause pregnant women to be seen as less capable workers. The association of pregnancy with sickness may also affect women's own views of themselves as competent workers, which may lead to poorer work performance.[289]

iii. Consequence: Increase Discrimination

Equality for pregnant women in the workplace requires employers to see pregnancy as a normal and manageable condition. Proposals that highlight pregnancy as a condition analogous to disability will likely cause employers to see pregnancy as abnormal and difficult to manage. Such proposals may also accentuate the idea that pregnancy imposes costs on businesses, thus increasing discrimination against pregnant employees.

Treating pregnancy as a disability may increase discrimination for reasons that are unique to disability's social meaning. There is evidence that employers often choose not to hire or promote workers that they perceive as disabled.[290] Disability has long been stigmatic and, notwithstanding some progress, the label still engenders a lot of stigma in 2016. If we consider pregnancy a per se disability, it may send the message that pregnancy is a type of deficiency, and something that makes pregnant women less fit for work. An employer, moreover, might choose not to hire a worker it sees as less fit to work, due to the multiple and intersecting associations with accommodations, disability, sickness, and special treatment.[291] The result is that there are risks to hitching pregnancy to disability.

III. ALTERNATIVE APPROACHES

We must be more attentive to how we frame pregnancy rights, and more specifically, how best to achieve broader workplace accommodations. Rights—even those that might confer substantial benefits—are not without costs. Protected class-based rights do more than simply provide a form of legal recourse; they convey value judgments and influence social norms with respect to the underlying identity groups.[292]

289. GROSS & PATTISON, *supra* note 166, at 53; *see* REBECCA KUKLA, MASS HYSTERIA: MEDICINE, CULTURE, AND MOTHERS' BODIES 132 (2005) (observing that pregnant women's self-understandings are constituted in part by popular, public narratives).

290. *See supra* Part I.C.

291. *See also* James Hanlon, *The 'Sick' Woman: Pregnancy Discrimination in Employment*, 4 J. GENDER STUD. 315, 322 (1995) (noting that in the UK "[t]he comparison of a pregnant woman with a sick man has reinforced stereotypes of the position of women in society"), *id.* at 323 ("equat[ing] pregnancy with sickness is to debase women's [working] role in our society").

292. *See supra* Part II.A.

A skeptical reader may protest that while the expressive consequences outlined above are problematic, it is not worth abandoning the push for pregnancy accommodations. After all, many of the stories evincing a need for pregnancy accommodations induce great sympathy. One might further argue that it is impossible to know exactly what expressive consequences will result from pregnancy accommodation proposals. However, we do know that lack of pregnancy accommodations is inhibiting the progress of women in the workplace.

Expressive theories "are regulative theories that provide principled constraints on how we go about pursuing various ends."[293] Accordingly, we ought to consider alternatives to the pregnancy accommodation proposals outlined above. The strong case for the *end* of pregnancy accommodations must not be conflated with the question of whether the ADA—or some other pregnancy-specific entitlement—is the most appropriate *means* to achieve that end.[294] The more critical question is not whether—but *how*—we achieve pregnancy accommodations.

We might ask whether pregnancy creates needs in the workplace that are similar to or different from those arising from causes other than pregnancy.[295] The question is not whether pregnancy is unique or different from other states of being, but whether it is different in ways that require fundamentally different workplace solutions.[296] As several commentators have observed, the problems and discomforts that pregnant women face are *not* inherently unique. They are "the result of poor work practices that affect the whole workforce and may reflect a poor attitude to work design and conditions."[297] In this way, pregnancy highlights the structural problem of unaccommodating workplaces[298] as well as "the myth that efficiency and profit demand one-size-fits-all workplaces and workers."[299] But to try and achieve pregnancy accommodations only with recourse to sex pays homage to "the time-honored tendency to use sex-based distinctions in the place of

293. Anderson & Pildes, *supra* note 17, at 1512; *see also supra* note 30 and accompanying text.

294. *See* Anderson & Pildes, *supra* note 17, at 1561.

295. Williams, *supra* note 57, at 326. This recalls a line from a brief submitted by the American Civil Liberties Union, the League of Women Voters of the United States, and the National Women's Political Caucus years ago: "The task here is to recognize the real needs of pregnant workers without at the same time destroying their right to equality in the workplace and perpetuating stereotypes which have, for generations, cast women "into an apologetic place in relation to work." ACLU Brief, *supra* note 96, at 8–9, 1986 WL 728369, at *8–9.

296. Williams, *supra* note 57, at 357–59.

297. GROSS & PATTISON, *supra* note 166, at 63.

298. *See* Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1297, 1297–98 (2008) (arguing work environments are structured around the "male ideal worker").

299. Stein et al., *supra* note 31, at 693.

other more functional categories, and the view of pregnancy as a uniquely incapacitating 'delicate condition.'"[300]

Over the last twenty years, there has been a steady stream of esteemed scholars who have advocated for broader or universal workplace protections.[301] For example, scholars have sought expansion of sexual harassment jurisprudence to cover nonsexual forms of harassment.[302] Scholars have also proposed expanding leave policies to extend beyond family responsibilities.[303] Similarly, Martha Fineman has argued that vulnerability is a universal part of the human experience and the state should develop structures to address the disadvantage that accompanies vulnerability.[304] She claims that disadvantage, which includes discrimination, is best addressed by moving past identity categories.[305]

This Article's suggested means of reform fits within this general turn toward broader protections. The first alternative of universal accommodations transcends identity categories to generally address disadvantage. The second alternative broadens the identity categories that exist to more robustly address vulnerabilities associated with parenting.

A. Universal Accommodations

One alternative would be to accommodate pregnancy through a universal accommodations scheme. I have previously argued that

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300. ACLU Brief, *supra* note 96, at 30–31, 1986 WL 728369, at *30–31.

301. *See infra* notes 302–304. *But see* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1219–20 (2011) (arguing that more universal forms of workplace protection minimize issues imperiling sexual equality and "dilute feminist workplace gains").

302. *See, e.g.*, Brady Coleman, *Shame, Rage and Freedom of Speech: Should the United States Adopt European "Mobbing" Laws?*, 35 GA. J. INT'L & COMP. L. 53 (2006); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91 (2003); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001); Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250 (2010); David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251 (2010).

303. *See, e.g.*, Arnow-Richman, *supra* note 31; Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001); Chai R. Feldblum, *Policy Challenges and Opportunities for Workplace Flexibility: The State of Play*, *in* WORK-LIFE POLICIES 251, 270 (Ann C. Crouter & Alan Booth eds., 2009); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 835 (2002); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

304. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1, 19–22 (2008); *see also* Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination Law*, 83 WASH. L. REV. 513 (2008) (applying Fineman's theory to disability).

305. Fineman, *supra* note 304, at 4, 17.

reasonable accommodations should be liberally available to all workers who need them and without reference to one's identity.[306] Decoupling accommodations from protected classes would have little or no expressive harms for pregnant workers and would yield economic, hedonic, and structural benefits.[307] My article-length explication of universal accommodations maps out in detail how such a measure would work.[308]

A universal right to accommodation would cause employers who value efficiency to "prophylactically implement changes in policy so as to make the workplace more accessible for everyone. This could involve employers publicizing, and implementing standard protocols for, common accommodations" such as work breaks or modified schedules.[309] Such a policy could ultimately incentivize employers to remake organizational cultures to accommodate workers more naturally.[310] In contrast, treating pregnancy as a disability or as a status in special need of accommodation would likely perpetuate the pattern of accommodation claims under the ADA, in which "individuals advance individual claims and, when successful, those claims result in employers granting one-time exceptions to otherwise standard rules and policies."[311]

There are also prudential reasons to universalize the right to accommodations, including that it avoids arbitrary judgments about who is and who is not worthy of accommodations.[312] It also fosters the continued work of aging employees who might need an accommodation but do not satisfy the definition of disability.[313] Keeping aging employees in the workforce is critical as the potential insolvency of both Social Security and Medicare looms ominously.[314] An expansion of accommodations would result in more accommodating environments for all employees, which would positively impact workplace norms.

Universal accommodations allow us to target the root problem—workplaces that are structured to exclude non-ideal workers—rather than just symptoms of the problem (e.g., that an employer does not

306. Stein et al., *supra* note 31, at 737–44.

307. *Id.* at 749–55.

308. *See id.* at 737–44 (arguing for an ADA-type reasonable accommodation mandate to apply to all work-capable members of the general population for whom accommodation is necessary to enable their ability to work).

309. *Id.* at 751.

310. *Id.*

311. *Id.* at 752.

312. *Id.* at 728 (arguing that tying "accommodation to the degree of an individual's disability presupposes that the line that marks the necessary level of dysfunction is sufficiently bright to serve as a sustainable, steady, and objective standard" and that "the extensive history of disability policy suggests that there is no reliably bright line").

313. *Id.* at 704 (arguing one partial solution to rising dependency costs is to incentivize and support aging workers through the right to accommodation).

314. *Id.*

accommodate a pregnant employee's schedule). In the long run, women will gain more from strategies that disallow privileging the "ideal worker" than from those that require preferential treatment or reinforce stereotypes that may be a detriment to women's success in the workplace.[315]

B. Parental Accommodations

A second alternative would be to accommodate pregnancy through a parental accommodations scheme. Though some have previously argued for parental accommodations, none have outlined an approach that would be broad enough to encompass pregnancy. One could in essence, though, create a hybrid scheme that accommodates both pregnancy and parental caregiving under the broad umbrella of "parental accommodations."

Several commentators have claimed that employers should be required to accommodate the work of parenting.[316] Professor Peggie Smith, for example, argues employers should accommodate routine parental obligations that conflict with work obligations when employers can achieve the accommodation without incurring an undue hardship.[317] She writes that in a society that values parental responsibility and lauds children, employees should be able to meet compelling childcare obligations even when those obligations clash with workplace norms.[318] The cabining principle would be that the accommodation sought must, as under the ADA, be "reasonable" and not present the employer with an "undue hardship."[319] Such a proposal could be expanded to begin with, and include, pregnancy as the start of parental coverage.

Under a pregnancy-inclusive parental accommodations model, the employee would need to show that she (1) has a pregnancy need or compelling parental obligation that conflicts with an employment requirement; (2) informed the employer about the conflict if possible; and (3) was discharged or disciplined for failing to comply with the conflicting employment requirement.[320] If the employee stated a prima facie case based on the above criteria, the employer would then have the burden of establishing (1) that it made a good faith effort to accommodate the

315. *Cf.* ACLU Brief, *supra* note 96, at 35, 1986 WL 728369, at *35 ("In the long run women will benefit more from laws which prohibit *any* discrimination on the basis of sex than those which require preferential treatment and reinforce invidious stereotypes.").

316. Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 306–09 (2004); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1446 (2001).

317. Smith, *supra* note 316, at 1446.

318. *Id.*

319. *Id.* at 1465–66.

320. This is a slight modification of Professor Smith's criteria. *Id.* at 1466.

employee's parental obligations, or (2) that it was unable to reasonably accommodate the employee without experiencing an undue hardship.[321]

A parental accommodations approach would of course protect both men and women in their roles as parents and should thus aid with the potential expressive harms outlined above. Yet it is possible that a parental accommodations law would be seen largely as a law that protects mothers.[322] This especially might be the case if men do not willingly participate in the accommodations afforded by such a law. Ultimately, "elimination of the incentive-to-discriminate problem" for this proposal would require "the degenderization of caregiving."[323] If women both remain the primary caregivers and primarily partake of parental accommodations, such a proposal could actually worsen the expressive consequences by extending the perceived costs of accommodations for as long as the employee has parental obligations.

C. Addressing Potential Objections

In this section, I address three possible objections. The first objection attacks the political viability of universal accommodations, while the second and third objections address my claims about the transfer of disability-related stereotypes to pregnant employees.

i. Political Pragmatism

One potential objection is that universal accommodations are not politically pragmatic.[324] Admittedly, this argument carries some force. Employers resist any circumscription of their autonomy to structure the workplace and jobs as they see fit. One would reasonably expect strong opposition to any proposal that gives workers more rights at the expense of business owners.

Any proposal to improve the workplace must be framed properly to build political consensus. Any expansion of accommodations involves various political constituencies and requires attention to the mechanics of achieving political will.[325] Those who are politically liberal have the same

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321. *Id.*

322. *See* Clarke, *supra* note 301, at 1273–78 (arguing that universal accommodations would fail to address the gendered division of labor in which women are expected to provide caretaking and men are expected to engage in market work).

323. Smith, *supra* note 316, at 1486.

324. *See* Clarke, *supra* note 301, at 1278–79 (arguing a push for universal accommodations is politically utopian and risks diluting the political will for accommodations for caretaking).

325. *Cf.* David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 603–04 (2008) (exploring the politics of assembling consensus in the context of antipoverty law).

reasons to support universal accommodations that they have had for nearly all civil rights legislation. Accommodations, when administered on the basis of need, enable all to participate fully in the workforce—where some would otherwise be excluded entirely.[326] Accommodations are about antisubordination and empowerment for the needy; these are principles that most liberals ought to support.

Conservatives will be the more important constituency to assuage. Here, it may make sense to emphasize how universal accommodations would drive down dependency costs. There is a mounting economic crisis in the area of public benefits, such as Social Security, Medicare, and SSDI.[327] The costs for these programs are unsustainable.[328] Moreover, the aging and disabled populations are employed at lamentably low rates.[329] A broad accommodations mandate would help individuals experiencing normal deficits of aging, or people with work-limiting impairments that do not rise to the level of an ADA-defined "disability,"[330] remain work qualified and productive.[331] Keeping aging employees in the workforce is at least a partial solution to the impending public benefit crisis.[332]

A related key to capturing the support of economic conservatives is designing programs that aid the economy but do not distort individual market-based incentives.[333] U.S. public opinion has, largely on this basis, been hostile to providing cash assistance to low-income people.[334] Providing further incentives and support for needy people to work, in lieu of cash assistance, should thus be the type of proposal that the public as well as conservatives can get behind.

Moreover, the pursuit of major social change in the marketplace—whether racial equality or equal pay—is always going to be seen as a less politically pragmatic approach than other measures that are designed to achieve less and which protect business interests. The Civil Rights Act of 1964, for example, was not by any measure politically pragmatic. Even if there are questions surrounding the odds of success, women are better served to pursue a broader strategy, given the expressive harms outlined in

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326. *See generally* Stein et al., *supra* note 31.

327. *Id.* at 753–54.

328. *Id.* at 704–07.

329. *Id.* at 707–08.

330. *Id.* at 713–14 (describing this phenomenon); *see also supra* note 48 (explaining that the ADA kept a high bar in place for accommodation claims).

331. *Id.* at 753–54.

332. For example, empirical data shows that an employee who receives a workplace accommodation is less likely to apply for SSDI benefits. Richard V. Burkhauser, Lauren H. Nicholas & Maximilian D. Schmeiser, *The Importance of State Anti-Discrimination Laws on Employer Accommodation and the Movement of Their Employees onto Social Security Disability Insurance* (Mich. Ret. Research Ctr., Research Paper No. 2011-251, 2015), http://ssrn.com/abstract=1961705.

333. Super, *supra* note 325, at 604, 609.

334. *Id*. at 607.

Part II. If universal accommodations are politically unwieldy, some other gender-symmetrical scheme, such as the parental accommodations model outlined above, is still preferable and would perhaps present an intermediate approach.

ii. The ADAAA's Breadth

Professor Jeannette Cox has argued that the ADA's inclusion of minor physical limitations "obviously . . . ameliorates feminist concerns that characterizing pregnancy as a disability might revive exaggerated stereotypes about the physical limitations that accompany pregnancy."[335] She later writes that since the ADA now covers arthritis, asthma, and back pain, "there is considerably less danger that characterizing pregnancy as an ADA disability will revive assumptions that pregnancy precludes labor force participation."[336] Instead, pregnancy would be just one additional physical condition that sometimes necessitates accommodation.[337] Cox's argument requires three assumptions: (1) the main "expression" associated with pregnancy's inclusion under the ADA would be coverage; (2) all conditions covered under the ADA are comparable for purposes of stereotyping; and (3) coverage under the ADA is no longer stigmatizing. I take issue with all three of these assumptions, which I will address in turn.

First, the expression associated with pregnancy's inclusion would not simply be coverage. To ensure pregnancy's coverage under the ADA would require at least one of two things: another amendment to the ADA, or a decision by the Supreme Court or several federal courts of appeal. If any of those occur, the message that pregnancy is now considered a disability will reverberate around the country as law firms advise their clients on the far-reaching implications. Pregnancy is more common than conditions like asthma or arthritis; four-fifths of all women in the U.S. will become pregnant in their lifetime.[338] More importantly, employers are likely to believe they can tell which employees are capable of becoming pregnant. It is more difficult to determine who has or will develop, for example, significant back pain. Accordingly, legislating that pregnancy is a disability under the ADA would, for the reasons discussed above, have major expressive implications.[339]

Second, pregnancy is not comparable to asthma, arthritis, or a bad back when it comes to the potential for stereotyping. For example, none of these

335. Cox, *supra* note 2, at 451.
336. *Id.* at 473–74.
337. *Id.* at 474.
338. LIVINGSTON & COHN, *supra* note 239, at 1.
339. *See supra* Part II.E–F.

groups have, within recent history, been stereotyped as incapable of work. Yet pregnancy was widely viewed as incompatible with work just a few decades ago.[340] Even today, pregnancy discrimination persists,[341] and not necessarily because of animus toward pregnancy or women;[342] rather some employers still see inherent tension between pregnancy and work.[343] Further, pregnancy is more visible and thus more susceptible to discrimination than the other conditions Professor Cox lists. In short, pregnancy's history of stigma is qualitatively different from many of the "minor conditions" now covered under the ADA.

Third, there is no evidence that expansion of the ADA's protected class has caused a change in people's normative views about disability or accommodation. Disability's social meaning has been relatively static for centuries[344] and is unlikely to change simply due to broader coverage under the ADA. The stigmatic harms associated with being labeled as disabled will likely persist. Stigma may indeed be less severe for those with the minor conditions Professor Cox highlights. However, those conditions are distinguishable from pregnancy, which has long dealt with stereotypes that implicate capacity.[345] In short, a major and media-amplifying statement that pregnancy is a disability may stigmatize and reinscribe stereotypes that have long impacted pregnant workers and women generally.

iii. The Social Model of Disability

Professor Cox makes one other argument that merits response. She enlists the Social Model of disability, discussed above,[346] to argue that pregnancy's inclusion within disability accommodations law should not require characterizing pregnancy as a defect.[347] This is due to the way in which the Social Model reveals that "much of the disadvantage associated with physiological variation is attributable to contingent social realities rather than biological defect."[348] She also claims the fact that social realities may disable a person "undermines the assumption that all physical conditions that bear a 'disability' label are inherently tragic."[349]

340. *See supra* notes 96–99, 150–153 and accompanying text.

341. *See supra* note 121 and accompanying text.

342. Jolls, *supra* note 245, at 686.

343. One reason for this is that employers may see a pregnant applicant or employee as more costly. *Id*. Pregnancy discrimination is, in this respect, statistical discrimination. *Id*.

344. *See supra* Part II.C.

345. *See supra* Part II.B.

346. *See supra* notes 182–186 and accompanying text.

347. Cox, *supra* note 2, at 450.

348. *Id.* at 484.

349. *Id.* at 482.

My response is threefold. First, and most fundamentally, the force of this objection lies primarily at the aspirational—and not descriptive—level. Professor Cox is right about her characterizations of the Social Model and that equating pregnancy with disability does not require characterizing pregnancy as a defect. But these statements are aspirational—not descriptive. Social views on a subject like pregnancy are not a matter of what is required, but what is *perceived*. As I argue above, there are good reasons to be skeptical that the average person now understands disability as more culturally contingent or as something other than a condition to be avoided.[350] Similarly, even though some sub-groups of people with disabilities (such as deaf communities) have strenuously claimed they do not experience their physiological variation as defect or illness, there is not little evidence these claims have taken root in popular culture, or transformed the way that the average person or employer thinks about disability. Disability is not something commonly understood as socially constructed or existing along a continuum. The social meaning of disability (especially with a view toward work) is better appreciated through history, media depictions, and the employment rate of people with disabilities than through an academic theory hatched by advocates and intended to reconceptualize the plight and rights of people with disabilities.[351]

Second, pregnancy is a poor fit within the Social Model. The strongest fits are conditions that can be seen as mostly or entirely constructed.[352] For example, anorexia nervosa is a condition that has flourished at specific times and in specific places.[353] It may thus be seen as a cultural construct, no matter the biological mechanisms it provokes.[354] Similarly, mental retardation may be understood as "a historically contingent *way of talking* about people who appear to be in need of assistance and who are not very good at IQ tests."[355] Or consider learning disabilities. The diagnostic label was invented in 1963 by a psychologist attempting to expand the number of students who could be diagnosed as "disabled" and thus receive federal funding.[356]

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350. *See supra* note 188 and accompanying text.

351. *See generally* Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251 (2007) (describing how the Social Model was designed by advocates, which explains why its account of disability causation is so closely associated with progressive policies).

352. *See generally* Areheart, *supra* note 172 (arguing that disability is even more socially constructed than social modelists claim and making the case in part by showing how the very creation of diagnoses is often spurred along by political, social, and financial incentives).

353. *Id.* at 368.

354. Joan Jacobs Brumberg, *From Psychiatric Syndrome to "Communicable" Disease: The Case of Anorexia Nervosa*, *in* FRAMING DISEASE: STUDIES IN CULTURAL HISTORY 134 (Charles E. Rosenberg & Janet Golden eds., 1992).

355. Mark Rapley, THE SOCIAL CONSTRUCTION OF INTELLECTUAL DISABILITY 42 (2004).

356. Craig S. Lerner, *"Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?*, 57 VAND. L. REV. 1043, 1058 (2004).

Pregnancy cannot get the same payoff from the Social Model. In particular, it is much harder to argue that pregnancy does not entail some sort of biological essence or that any pregnancy disadvantage is all constructed. The capacity to reproduce is the thing about women which most view as essentially different from men.

Third, the claim that disability is not inherently negative (as a philosophical matter or as a particularized lived experience) does not tell us how society, in aggregate, perceives its meaning. If others perceive disability as indicating a lack of ability or deficiency, then ascribing disability to pregnancy will stigmatize pregnant workers. For example, some deaf communities resist cochlear implants[357] because they do not perceive that they have a disability—even though the general public does. Another example is the neurodiversity movement, which argues autism and bipolar disorder are the result of natural human variation;[358] in contrast, most of the public views autism or bipolar disorder as a defect, or worse, disease.

CONCLUSION

This Article has argued that current pregnancy accommodation proposals, which treat pregnancy as in special need of accommodation or characterize pregnancy as a disability, are fraught with expressive peril. The risks of signaling that pregnant women are less capable of productive work, and regressing from current social norms in which pregnancy is generally seen as compatible with work, are too great to ignore.[359] The best way to address structural barriers in the workplace and create an egalitarian society is through a gender-symmetrical approach.[360] There are both gender- and disability-neutral ways to achieve pregnancy accommodations, and this Article has considered two of them. A universal or parental accommodations scheme is no panacea, and there are risks with any approach. Still, this Article has contended such protected class-neutral

357. Cox, *supra* note 2, at 483–84.

358. *See* Barry, *supra* note 203, at 186–88 (discussing neurodiversity movement's claim "that autism is not a disorder but a way of being or, more specifically, a 'different' way of being, of thinking, of behaving"); Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483, 495 (2010) (discussing the neurodiversity movement).

359. Williams, *supra* note 57, at 380.

360. Supreme Court litigator on pregnancy issues and, later, Professor Wendy Williams made a similar argument over thirty years ago:

> I continue to believe that the course upon which feminists litigators set out at the beginning of the 1970's—the "equal treatment" approach to pregnancy—is the one best able to reduce structural barriers to full workforce participation of women, produce just results for individuals, and support a more egalitarian social structure.

Id. at 351–52.

approaches are better long-term solutions for addressing the structural workplace norms that act as impediments to gender equality.[361]

361. Stein et al., *supra* note 31, at 750–52 (explaining how universal accommodations would reshape structural norms in the workplace).