
PANEL IV: RESHAPING PUBLIC AND PRIVATE SPACE: EDUCATION, THE WORKPLACE, AND THE MILITARY

ON *NOT* “HAVING IT BOTH WAYS” AND STILL LOSING: REFLECTIONS ON FIFTY YEARS OF PREGNANCY LITIGATION UNDER TITLE VII

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INTRODUCTION

I am sitting with my hands folded in my lap to keep myself from pulling my hair out while reading the transcript of the argument in *Young v. UPS*.¹ Peggy Young’s case against UPS landed in the Supreme Court after the Fourth Circuit upheld UPS’s policy of denying light-duty accommodations to pregnant workers, despite granting such accommodations to employees with on-the-job injuries, employees with disabilities covered by the Americans with Disabilities Act (“ADA”), and employees who lost their driver’s certifications for any reason.² It should have been an easy win for Ms. Young under clause two of the Pregnancy Discrimination Act (“PDA”), which requires employers to treat pregnant workers “the same . . . as other persons not so affected but

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¹ Transcript of Oral Argument, *Young v. UPS*, 135 S. Ct. 1338 (2015) (No. 12-1226).

² See *Young v. UPS, Inc.*, 707 F.3d 437, 450 (4th Cir. 2013).

similar in their ability or inability to work.”³ The Justices’ questions posed a dizzying array of possibilities for reading the PDA more narrowly. Justice Scalia was quick to charge plaintiff’s counsel with seeking “most favored nation” status for pregnancy.⁴ I lost count of how many times that derisive phrase appeared in the transcript; even Justice Breyer referred to “the most favored nation problem.”⁵ Since when did pregnancy become a “nation,” rather than a condition most women experience at some point during their work lives?⁶ Several of the Justices suggested that employers could treat pregnancy worse than other conditions if the more favorable treatment were idiosyncratic or confined to a small class of workers.⁷ Justice Breyer suggested the case should have been brought as a disparate impact claim—a suggestion seized upon by UPS’s attorney, even though she added that it likely would have lost.⁸ Justice Alito floated reasonableness as a potential justification for treating pregnancy differently,⁹ and Justice Kagan suggested that source of condition might be a legitimate nondiscriminatory reason for treating pregnancy worse than other conditions limiting work ability.¹⁰ Justice Sotomayor cautioned Young’s counsel not to turn the Act into an affirmative entitlement for pregnant employees.¹¹ Throughout the argument, the Justices appeared resistant to reading clause two to mean what it says.¹²

After fifty years of experience with Title VII, why are the Justices still so baffled by pregnancy?¹³

³ 42 U.S.C. § 2000e(k) (2012).

⁴ Transcript of Oral Argument, *supra* note 1, at 5.

⁵ *Id.* at 7, 16.

⁶ See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 372 n.28 (3d ed. 2013) (citing census data showing that only 18% of women will not have given birth to a child by the time they reach the age of 44).

⁷ See Transcript of Oral Argument, *supra* note 1, at 7-8, 11, 38.

⁸ *Id.* at 8-9, 29.

⁹ See *id.* at 9-10.

¹⁰ See *id.* at 11, 35, 43.

¹¹ *Id.* at 17.

¹² The exception—by my reading—was Justice Ginsburg, who calmly noted that the alternative to what Young sought was least favored nation status for pregnancy. *Id.* at 37, 46.

¹³ As this article was going to press, the Supreme Court decided the *Young* case. *Young v. UPS*, No. 12-1226 (Slip Op. Mar. 25, 2015). Although the Court ruled in favor of Peggy Young, the narrowness of the victory, and the cumbersome framework that the Court crafted for clause two PDA claims, reveal the Justices’ continuing consternation over what to do with pregnancy. See Joanna L. Grossman & Deborah L. Brake, *Afterbirth: The Supreme Court’s Ruling in Young v. UPS Leaves Many Questions Unanswered*, VERDICT, Apr. 20, 2015, <https://verdict.justia.com/2015/04/20/afterbirth-the-supreme-courts-ruling-in-young-v-ups-leaves-many-questions-unanswered>, archived at <http://perma.cc/8MDL-4U84>; Joanna L. Grossman & Deborah L. Brake, *Forceps Delivery: The Supreme Court Narrowly Saves the Pregnancy Discrimination Act in Young v. UPS*, VERDICT, Mar. 31, 2015,

This Article reflects on the past half-century's struggle for gender equality in the realm of work and pregnancy, and offers some thoughts on why the road has been so difficult. It concludes by considering the path for moving forward, both in the legal framework and in the feminist discourses surrounding pregnancy and work.

I. THE EARLY YEARS

The early Title VII litigation on pregnancy is rightly viewed as a fiasco. The Supreme Court's first crack at pregnancy discrimination was in the notorious *Geduldig v. Aiello*¹⁴ case, which rejected an equal protection challenge to a disability insurance plan's exclusion of pregnancy, viewing it as a distinction between pregnant persons and non-pregnant persons instead of sex-based discrimination.¹⁵ The Court soon followed up with *General Electric Co. v. Gilbert*,¹⁶ which replicated the debacle in the Title VII context.¹⁷ Women's groups and Congress sprang into action, and law professor Sylvia Law famously observed that the Court's approach to pregnancy had spawned a "cottage industry" of academic criticism.¹⁸

The few wins that plaintiffs managed to eke out during the *Gilbert* and *Geduldig* era were tainted by the Court's narrow understanding of pregnancy discrimination. The early case law carved out a benefit-burden distinction that, at best, protected only those pregnant women who could work unencumbered by pregnancy, effectively protecting workers from being punished for the status of pregnancy but not the effects.¹⁹ Even *Phillips v. Martin Marietta Corp.*,²⁰ an important early victory challenging discrimination against mothers, was still a limited win. Since the plaintiff had challenged a policy facially discriminating between women and men with young children, the Court did not require a similarly situated comparator in order to establish the violation,²¹ a hurdle which now confronts plaintiffs in the absence of what courts recognize as facially discriminatory policies.²² In vacating the Court of

<https://verdict.justia.com/2015/03/31/forceps-delivery-the-supreme-court-narrowly-saves-the-pregnancy-discrimination-act-in-young-v-ups>, archived at <http://perma.cc/BTJ9-NTBA>.

¹⁴ 417 U.S. 484 (1974).

¹⁵ See *id.* at 496-97.

¹⁶ 429 U.S. 125 (1976).

¹⁷ See *id.* at 136 ("The Court of Appeals was . . . wrong in concluding that the reasoning in *Geduldig* was not applicable to an action under Title VII.").

¹⁸ See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984).

¹⁹ See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 643-44 (1974) (calling "the [objective] of keeping physically unfit teachers out of the classroom" "perfectly legitimate").

²⁰ 400 U.S. 542 (1971).

²¹ *Id.* at 543-44.

²² See Ruth Colker, *Pregnancy, Parenting and Capitalism*, 58 OHIO ST. L.J. 61, 79-81

Appeals' reading of Title VII, which would have upheld Martin Marietta's policy, the Court vindicated the rights of mothers to work on the same terms as men with young children.²³ It did nothing to ease the conflicts that parents of young children face in the workplace—conflicts that still disproportionately burden women.²⁴ The Court went on to opine that the differential treatment of mothers might meet the statutory bona fide occupational qualification (“BFOQ”) defense if the employer proved that the child care conflicts of its female employees impaired their work performance more than those of its male workers.²⁵

Into this morass entered the PDA. It consists of two clauses in an amendment to Title VII's definitional section. The first clause defines discrimination because of sex to include discrimination “because of or on the basis of pregnancy;” the second clause instructs 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.”²⁶ The Act was a direct response to the *Geduldig* and *Gilbert* approach to pregnancy.²⁷

In both the struggle to craft the PDA and to subsequently interpret it, controversy centered on the question of whether to require the accommodation of pregnancy in its own right, labeled “special treatment” by critics of this approach, or to mandate the equal treatment of pregnancy as compared to other conditions with a similar effect on work, which critics called “formal equality.”²⁸ The labels marked normative judgments, and the fact that both were simultaneously descriptive and pejorative reflects the strength of the

(1997) (finding the equal treatment approach to pregnancy discrimination problematic in that it “forces plaintiffs to engage in an impossible comparison with nonpregnant persons who face similar problems”).

²³ See *Phillips*, 400 U.S. at 544.

²⁴ See Rona Kaufman Kitchen, *Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously*, 26 WIS. J. L. GENDER & SOC'Y 167, 197-99 (2011) (relaying statistics showing working mothers spent significantly more time performing “household and childcare activities” than working fathers).

²⁵ *Phillips*, 400 U.S. at 544; see also Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337, 342-47 (1999) (suggesting that the BFOQ language was included to assuage Chief Justice Burger's concern that, otherwise, the law might require judges to hire female law clerks). The Court's later cases took a stricter approach to the BFOQ defense. See *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 203-04 (1991) (rebuking Johnson Controls and Justice White for their attempts to “expand what is now the narrow BFOQ defense” and explaining the limited applicability of that defense).

²⁶ 42 U.S.C. § 2000e(k) (2012).

²⁷ See *Cal. Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 284 (1987) (“It is well established that the PDA was passed in reaction to this Court's decision in *General Electric Co. v. Gilbert*.”).

²⁸ For a review of this history, see CHAMALLAS, *supra* note 6, at 52-55.

double bind.

In the end, with one exception,²⁹ the law took the path of equal treatment, following the caution of law professor (and influential advocate for the PDA) Wendy W. Williams, when she proclaimed, “[i]f we can’t have it both ways, we need to think carefully about which way we want to have it.”³⁰ The PDA largely tracks the equal treatment model, setting a floor for pregnancy based on the treatment of workers with similar work capacity.³¹ The equal treatment model promised to avoid the backlash that would ensue if pregnancy were singled out for more favorable treatment. Proponents of equal treatment framed their approach as taking the long view, ensuring that as the boats of other workers rose, so too would those of pregnant workers.³²

II. THE CONTINUING JUDICIAL RESISTANCE TO THE PDA AND THE RESILIENCE OF STEREOTYPING

In the intervening years, this prediction has not panned out. Courts have continued to wrestle with pregnancy; and the *Gilbert* decision, despite its quick repudiation by Congress in the 1978 PDA, still haunts Title VII. As recently as 2009, the Court declined to remedy pregnancy discrimination in pension payments caused by an employer’s pre-PDA differential treatment of pregnancy in calculating employee leave and seniority, thereby prolonging the effects of *Gilbert*’s approach.³³ More significantly, lower courts have found reasons to avoid applying the PDA as written, reading the law in ways that undercut its impact. Judicial resistance to the PDA had reached a crescendo in the lower courts by the time the Supreme Court took up *Young*, despite the fact that the major selling point of the equal treatment model was to avoid such resistance.

The path of the PDA was troubled from the outset. Since the law did not require any set level of treatment for pregnant workers, it could be aptly described as extending the right to be treated as badly as non-pregnant workers, as Judge Posner characterized it in the notorious *Troupe* case.³⁴ Setting aside the limits of the equal treatment model itself, proof of worse treatment was hard to come by, bumping up against the comparator problem,

²⁹ The exception is that the PDA permits, though does not require, accommodations for pregnant workers tailored to the physically disabling condition of pregnancy. *Guerra*, 479 U.S. 272, 284-90 (1987).

³⁰ Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 196 (1982).

³¹ See 42 U.S.C. § 2000e(k) (“[W]omen affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work.”).

³² See Williams, *supra* note 30, at 194 (“The degree to which [the PDA] assisted women depended on the generosity of their particular employers’ sick leave or disability policy, but anything at all was better than what most pregnant women had had before.”).

³³ *AT&T Corp. v. Hulteen*, 556 U.S. 701, 708 (2009).

³⁴ *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

as Ruth Colker memorably explained in pointing out the futility of the search for a Mr. Troupe.³⁵ The model has also stubbornly resisted disparate impact claims, partly for reasons not specific to pregnancy (many have aptly criticized the limits of the disparate impact model), in addition to mounting distinctive hurdles for proving pregnancy-based disparate impact claims.³⁶ Among them, the comparator problem reappears, with courts seemingly holding plaintiffs to whichever comparison group most obscures the impact (men vs. women, pregnant vs. non-pregnant, pregnant women vs. men, etc.).³⁷ Even when impact is discernable, courts often attribute it to the overarching structures of the workplace—such as long hours, no-leave policies, and inflexible work structures—which do not register as the kind of employment practices that are amenable to disparate impact challenge. Instead, courts classify such structures as the failure to do more to help pregnant workers, a passive failure to act that does not lend itself to disparate impact claims.³⁸

But the travails of the PDA did not end there. Even in those instances where the level of treatment afforded other workers has risen—whether by force of law (such as with the ADA), through collective bargaining agreements, in response to legally imposed incentives (such as worker’s compensation schemes that make light-duty accommodations for on-the-job injuries more desirable), or by virtue of the employer’s generosity—the boats of pregnant workers have not ridden the same wave.³⁹

The current spate of bad PDA case law began with challenges to light-duty accommodation policies in the 1990s. Courts upheld employer policies granting light-duty work to employees with on-the-job injuries, reasoning that such policies treat pregnancy the same as other conditions originating outside the workplace. Courts viewed the off-the-job distinction as pregnancy-neutral, even as they acknowledged that this criterion necessarily excludes pregnancy from the more favorable treatment. Only if plaintiffs identified inconsistencies in how an employer applied a light-duty policy, showing that some off-the-job conditions were in fact accommodated, did they win these cases.⁴⁰

³⁵ Colker, *supra* note 22, at 79-81. See also Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 240-47 (1998) (discussing the comparator problem for proving differential treatment on the basis of pregnancy).

³⁶ See Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 615-19 (2010).

³⁷ See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 415-16 (2001).

³⁸ *Id.* at 413-15.

³⁹ See 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, 964-65 (2013) (describing courts reading the PDA and ADA together to limit the population available to pregnant workers as comparators under PDA jurisprudence).

⁴⁰ See Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy*

More recently, lower courts have extended this line of reasoning to permit employers to accommodate an even broader class of workers under light-duty policies, while still excluding pregnancy. As long as the line between inclusion and exclusion can be described in a pregnancy-neutral fashion—and even the policy in *Gilbert* could be, by simply naming the favored conditions—lower courts have upheld policies granting light-duty work for other conditions but not for pregnancy. The Fourth Circuit’s decision in *Young v. UPS* is among the cases following this approach.⁴¹ For example, like the court in *Young*, the Seventh Circuit, in *Serednyj v. Beverly Healthcare, LLC*,⁴² reasoned that, because the employer’s policy of accommodating conditions besides pregnancy corresponded to externally imposed obligations—such as the ADA or a collective bargaining agreement—the employer acted without anti-pregnancy animus.⁴³ In this way, lower courts turned clause two of the PDA into a search for anti-pregnancy animus. The fact that this approach took hold in the lower courts, despite the textual mandate of clause two to treat pregnancy like other conditions with a similar effect on work, reveals the extent of judicial resistance to even the equal treatment model.

My reading of this history is that the problem lies not with the equal treatment model per se, but with the resilience of cultural norms about gender, work, and maternity. Pregnancy, despite its discrete physical and episodic dimension, was never an easy win. Nor is it discrete from the broader genre of discrimination against women as mothers and potential mothers. The ideologies supporting pregnancy discrimination are at the core of the gender ideologies that subordinate women in the workplace. Like the maternal wall litigation, plaintiffs in PDA cases have had to confront the gendered construction of the category of mother and the category of worker.⁴⁴ These categories are both descriptively and prescriptively gendered, with caretaking gendered female and the ideal worker gendered male.⁴⁵

Discrimination Act at 35, 21 DUKE J. GENDER L. & POL’Y 67, 87-90 (2013) (discussing these developments and citing illustrative cases).

⁴¹ See *Young v. UPS*, 707 F.3d 437, 446 (4th Cir. 2013) (upholding UPS’s policy “limiting [light duty] accommodations to those employees injured on the job” as it represents “a pregnancy-blind policy”); *Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698, 702-03 (7th Cir. 2012); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011).

⁴² 656 F.3d 540, 548-49 (7th Cir. 2011).

⁴³ See *Young*, 707 F.3d at 439 (observing that UPS’s policy of providing light-duty work to employees with on-the-job injuries complies with its collective bargaining agreement as well as the ADA); *Serednyj*, 656 F.3d at 548 (“Beverly’s modified work policy provides accommodations to qualified individuals with a disability under the ADA or to those employees who sustain work-related injuries.”).

⁴⁴ Cf. CHAMALLAS, *supra* note 28, at 259-60 (describing “the widespread belief that women cannot simultaneously be good mothers and good workers,” and the implicit bias that distorts perceptions of women as workers through stereotyped filters of mothers).

⁴⁵ See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO.

The prevailing ideologies about women, work, and maternity trace back to separate spheres ideology in which the ideal feminine role is caring for hearth and home.⁴⁶ Motherhood is elevated as woman's primary role, rendering other aspects of women's lives, such as paid work, subordinate. Of course, this is and always has been an implicitly racialized and class-specific ideology. Race and class define culturally valued maternity, and it is predominantly a privileged group of white women with husbands who earn a family wage whose maternal roles are highly valued.⁴⁷ Women of color, poor women, and single women trigger very different sets of stereotypes and ideologies.⁴⁸ Black women, for example, were never protected from work in order to safeguard an idealized maternal role. Historically, black women have been compelled to work through pregnancy—often brutally—and legacies of this remain today in welfare “reform” requiring recipients with young children to work outside the home.⁴⁹

Although the confluence of race, class, and gender takes these ideologies in different directions in terms of the valuing or devaluing of women's maternity, the effect on workplace accommodations is strikingly one-directional. That is, the varied racialized and class-specific iterations of maternal stereotyping all cut against accommodating pregnancy in the workplace. White, married women of means, whose mothering roles have historically been highly valued, are subject to cultural norms asserting the primacy of motherhood; their roles as mothers trump their identities as workers. Their requests for accommodation trigger stereotypes, both descriptive and prescriptive, that their impending maternity signals a detachment from paid work. Women who are less privileged along lines of race, class, or marital status, and whose maternal roles are less culturally valued, fare no better in navigating cultural norms. The devaluation of their maternity generates a hostility to accommodating pregnancy. Stephanie Bornstein's survey of pregnancy discrimination claims found that requests by pregnant women of color for accommodations were met with outright hostility by employers.⁵⁰ This hostility reflects the resilience of racist ideologies, such as the legacy from slavery of requiring black women to work through pregnancy and bear children with no relief from hard labor. The

L.J. 2227, 2239 (1994) (discussing the gendering of the ideal worker as male, who can commit to 9-12 hours of work a day because he is unencumbered by the demands of household labor and childcare).

⁴⁶ See Brake & Grossman, *supra* note 40, at 102-09 (elaborating upon the gender ideologies at the root of pregnancy discrimination).

⁴⁷ See generally Linda C. McClain, “Irresponsible” Reproduction, 47 HASTINGS L.J. 339 (1996) (highlighting the problematic nature of the “irresponsible reproduction” rhetoric, including its targeting women of color, unmarried women, and poor women).

⁴⁸ See KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 10, 16-18 (2011); McClain, *supra* note 47.

⁴⁹ See Kessler, *supra* note 37, at 390.

⁵⁰ Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. POVERTY L. & POL'Y 1, 5 (2012).

social construction of black women as “work horses” and not “real” women, in contrast to idealized notions of white femininity, ideologically supports the denial of accommodations for pregnancy or childbearing.⁵¹

Although the stereotypes track differently for different women, they converge in ideologically supporting the denial of workplace accommodations for pregnancy. The failures of the PDA are not so much a product of selecting the wrong model of equality as a reflection of the sticky norms surrounding women, work, and maternity.

III. CHARTING A PATH FORWARD FOR LAW: EQUAL TREATMENT, SPECIAL TREATMENT, OR POST-SEX EQUALITY RIGHTS?

Reflecting on the equal treatment/special treatment divide from years past leads me to question how much the choice of model really matters. As Martha Chamallas has observed, the split between legal feminists over how to treat pregnancy has been overstated as a dispute over grand theory, when it is just as much a disagreement about the most effective strategy under existing conditions.⁵² Both sides wanted to transform the structures of the workplace but parted ways over how to accomplish this. The equal treatment proponents sought to change the rigid structures of the workplace for all workers simultaneously. The special treatment advocates singled out pregnancy, but as a starting point for broader reforms.⁵³ Their strategy had roots in the progressive labor movement, which began with the case for protecting women workers because it was the most strategically viable, with the long-term goal of extending minimum wage and overtime protections to all workers.

The primary lesson from the brief recounting of PDA history above is that, despite its major selling point, the equal treatment model did not avoid backlash. Indeed, the Fourth Circuit’s decision in *Young* is a case study in backlash. Because the court refused to see an equivalence between pregnant workers and other workers with conditions similarly restricting work ability, it stubbornly construed the plaintiff’s claim as a demand for special treatment.⁵⁴ Like Justice Scalia,⁵⁵ the court derisively characterized it as a demand for “most favored nation status.”⁵⁶ In a move that cunningly turned liberal

⁵¹ See Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 437 (2011).

⁵² CHAMALLAS, *supra* note 28, at 55-56.

⁵³ *See id.*

⁵⁴ *Young v. UPS, Inc.*, 707 F.3d 437, 446-48 (4th Cir. 2013) (describing *Young*’s claim as seeking “preferential” treatment for pregnancy); *see also* *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 643 (6th Cir. 2006) (rejecting plaintiff’s challenge to employer’s light-duty policy for work-related injuries and describing plaintiff’s position as asking for “preferential treatment”); *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1312 (11th Cir. 1999) (same); *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) (same).

⁵⁵ *See supra* note 4 and accompanying text.

⁵⁶ *Young*, 707 F.3d at 446-48.

feminism against itself, the court drew on gender-blind discourse to make the point that Peggy Young sought something extra and undeserved. The court gave the examples of a *father* who injures his back picking up his infant child, and a *female* volunteer firefighter injured while doing voluntary firefighting to show that accommodating Young's pregnancy, but not the conditions in the examples, would give pregnancy unjust special treatment.⁵⁷

The Fourth Circuit's carefully crafted, gender-anomalous examples obscure the deeply gendered structures of work that leave pregnant workers in the position of having to compare pregnancy to the conditions favored by the employer. The court's contrived examples paint the plaintiff's quest for accommodating pregnancy as an outlier in an otherwise gender-neutral structure. Of course, the court did not acknowledge the reality that fire departments are overwhelmingly male, or that mothers, rather than fathers, perform the greatest share of infant care.⁵⁸ More subtly, the court's examples obscure the structural bias in how pregnancy is treated, such as the way on-the-job injury policies cater to the demands of workers doing the kinds of physically vigorous work that has historically belonged to men.⁵⁹ The court's craftiness in picking gender-anomalous examples bolstered its portrayal of the employer's policy as compatible with the equal treatment model. In contrast, the court depicted the plaintiff's request for accommodating pregnancy as incompatible with that model. The court's wiliness reflects an increasingly common move in backlash discourses to appropriate reductionist versions of feminism in defense of the gendered status quo.⁶⁰

That the self-consciously cautious equal treatment model is vulnerable to this kind of gender backlash demonstrates that neither model can avoid the clash of gender ideologies inherent in pregnant workers' rights claims. Accordingly, advocates for pregnant workers should use whatever tools are available to challenge and subvert the gender stereotypes underlying pregnancy discrimination.

Despite its lackluster record, the equal treatment model may yet have potential in challenging the gender status quo. Now that light-duty policies and other accommodations for non-pregnant workers are more common than they used to be—whether because of the 2008 expansion of ADA rights, the incentives of worker's compensation, or collective bargaining demands—there is more to be gained from a comparative approach. Cases challenging

⁵⁷ *Id.*

⁵⁸ See CHAMALLAS, *supra* note 28, at 253-54 (discussing literature documenting women's greater share of household work); Ann C. McGinley, Ricci v. DeStefano: *A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 592-95 (2010) (discussing male dominance in fire departments).

⁵⁹ See Widiss, *supra* note 39, at 984-89.

⁶⁰ See Deborah L. Brake, *Wrestling with Gender: Constructing Masculinity by Refusing to Wrestle Women*, 13 NEV. J.L. 486, 509-12 (2013) (analyzing "the strategic appropriation of feminism" as a feature of gender backlash).

employer policies like that of UPS provide a vehicle for contesting a key backlash discourse: the belief that pregnancy marks a woman's declining value as an employee since mothers prioritize their children over paid employment. The refusal of employers to invest in accommodations for pregnant workers, despite doing so for other workers, reflects the lower value placed on pregnant workers as marginal employees. Telling the stories of real workers whose pregnancies conflict with work can refute this simplistic backlash narrative. Their stories can expose the false assumptions of privilege that underlie the backlash storyline that women's under-employment and stalled careers reflect women's choices. The kinds of conflicts giving rise to PDA claims typically occur in lower wage jobs held by women who cannot afford to choose to work for fewer hours or lower pay, or to subordinate paid employment to motherhood. Stories like those of Peggy Young and Svetlana Arizanovska,⁶¹ another plaintiff in a PDA case, expose the myth of choice for the stereotype that it is, and help "unerase" less privileged women from the dominant discourses on women and maternity.⁶²

While the PDA's equal treatment model may yet have legs, a desire for consistency should not block the pursuit of alternative models if the PDA remains mired in judicial resistance. If Peggy Young loses in the Supreme Court, or even if she wins with a narrow ruling that will not help most other pregnant workers, those who support workplace equality for pregnant workers should explore alternative approaches.⁶³ One alternative, the Pregnant Worker's Fairness Act ("PWFA"), was introduced in Congress in response to the deplorable record of PDA cases; it would require employers to provide reasonable accommodations for pregnancy, absent undue hardship, regardless of the employer's record of providing them to other workers.⁶⁴ It represents the kind of "special treatment" Wendy Williams cautioned against.⁶⁵ As explained above, however, the equal treatment model has neither averted backlash nor quelled judicial resistance. As Frances Olsen remarked in response to Williams' caution about having it "both ways,"⁶⁶ "antifeminists have long had it 'both ways.'"⁶⁷ As Olsen explained, equal treatment is not a

⁶¹ See *Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698, 700-01 (7th Cir. 2012) (presenting the case of a pregnant employee who worked multiple part-time jobs and was denied light-duty work under employer policy that provided light duty accommodations for other conditions).

⁶² Kessler, *supra* note 37, at 383 n.47.

⁶³ Even with a plaintiff victory in *Young*, the PWFA would still be needed to secure accommodations to protect a pregnant worker's health where the job would otherwise pose health risks to the fetus. See Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012).

⁶⁴ *Id.* § 2.

⁶⁵ See Williams, *supra* note 30, at 196-97 (enumerating the social costs which follow from adherence to the special treatment model).

⁶⁶ *Id.* at 196.

⁶⁷ Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L.

stable or self-defining concept since what counts as “equal” depends on the baseline norms accepted as neutral.⁶⁸

Beyond the equal treatment/special treatment divide, the larger question is whether to discard a sex equality framework in favor of an approach that is not gender-specific. Recent scholarship has called for treating pregnancy as a disability under the ADA. Jeannette Cox, for example, has convincingly argued that the ADA’s exclusion of normal pregnancy stems from an impoverished understanding of disability.⁶⁹ She draws lessons from the disability rights movement to support a social model of disability that is broad enough to encompass pregnancy.⁷⁰ Broader still are calls for eschewing social group identity frameworks in favor of a universal approach to protecting human vulnerabilities.⁷¹ A vulnerabilities approach would fold pregnancy into a movement for workers’ rights challenging inflexible workplace structures for all workers. Many of the pregnancy accommodation cases resonate with appeals to human dignity, such as employer refusals to let retail workers carry water bottles for hydration or to allow a cashier to sit on a stool while checking out customers.⁷² A universal approach to such conflicts would demand reasonable accommodations of workers’ basic needs as an aspect of human dignity, regardless of membership in a social identity group. Although not a new strategy for addressing social inequality, the “universal turn” is having a renaissance of late.⁷³

Both ADA inclusion and a universal workers’ rights agenda are worthy projects, but we should hesitate before substituting either of these entirely for a gender justice framework. It would be a mistake to believe that any alternative to sex equality will avoid a backlash. The battle over contraceptive access in the Patient Protection and Affordable Care Act (“ACA”) demonstrates that folding gender conflicts into universal frameworks does nothing to avoid the gender culture wars. Securing mandatory contraceptive coverage using the

REV. 387, 398-99 (1984).

⁶⁸ *See id.*

⁶⁹ Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 445-50 (2012).

⁷⁰ *Id.* at 478-79; *see also* Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA’s Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC’Y 1, 3-4 (2012) (arguing that “understanding pregnancy as a physical impairment could provide an avenue to reasonable accommodations for pregnant workers”).

⁷¹ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1-2, 23 (2008) (advocating for a conceptualization of “the promise of equality” not as the property of certain identity groups, but as a “universal resource”).

⁷² *See* Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodations After the ADA Amendments Act*, 32 YALE L. & POL’Y REV. 97, 98-99 (2013).

⁷³ *See* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2843-47 (2014) (describing historical and more recent examples of arguments favoring universalistic approaches to civil rights issues).

ACA, instead of treating contraceptive access as a sex equality right under Title VII, did not avoid the backlash against contraceptive equity.⁷⁴ Although universal approaches may gain temporary political cover by wearing the garb of post-feminism, that comfort lasts only as long as the gender implications lie dormant. Once a universal measure actually does something to disrupt contested meanings of gender, as the ACA did in mandating insurance reimbursement for contraception, the gender culture wars are ignited.

Moreover, ceding pregnancy's demise as a women's equality right would have broader ramifications. Pregnancy is at the epicenter of the sex discrimination and economic subordination women experience in the workplace.⁷⁵ Its consequences are not limited to the relatively short duration of pregnancy itself; stereotypes about pregnancy and maternity affect women at all points in their work lives, whether they are mothers, pregnant, or merely "potentially pregnant."⁷⁶ It is not just the physical condition of pregnancy, embedded in social relations, that produces pregnancy discrimination, but the normative prescriptions associated with pregnancy, distinct from the physical condition itself.⁷⁷

History teaches that gender-neutral frames often reinscribe implicit bias and fail to disrupt gender inequality.⁷⁸ A recent example reinforcing this theme comes from the Supreme Court's 2012 decision in *Coleman v. Court of Appeals of Maryland*.⁷⁹ The Court invalidated the Family and Medical Leave Act's ("FMLA") self-care provision⁸⁰ as applied to damages claims against States, holding that Congress lacked the power to pass the measure under Section Five of the Fourteenth Amendment to the Constitution.⁸¹ The Court found that the self-care provision swept too broadly in its coverage of all employee conditions to be congruent and proportionate to the equal protection guarantee against sex discrimination it was meant to enforce.⁸² The provision exemplifies targeted universalism; it guarantees leave for pregnancy by folding

⁷⁴ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁷⁵ See Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1328-29, 1360 (2012) ("Historically, women's capacity to become pregnant and their status as mothers have served as central justifications for their exclusion from the workforce.").

⁷⁶ David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1894 (1995) (quoting *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)).

⁷⁷ *Id.* at 1900-02 (urging courts to carefully scrutinize "denial of pregnancy related disability" and "forced maternity leave" to the extent such policies are justified by stereotypes departing from the actual physical condition of pregnancy).

⁷⁸ See Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1223, 1235-36 (2011).

⁷⁹ 132 S. Ct. 1327 (2012).

⁸⁰ 29 U.S.C. § 2612(a)(1) (2012).

⁸¹ *Coleman*, 132 S. Ct. at 1338.

⁸² See *id.* at 1334.

it into a broader entitlement for medical leave for any condition.⁸³ The provision's relationship to pregnancy and sex discrimination was utterly lost on the Court, however—perhaps because the provision in practice did so little for pregnant workers. In the compromise required to enact the FMLA, Congress made the leave unpaid and limited it to the largest of employers.⁸⁴ The evidence before Congress indicated that men would be as likely as women to need the FMLA's self-care leave.⁸⁵ The self-care leave guarantee fell so far short of remedying the inequalities faced by pregnant women in the workplace that the Court saw no discernible relationship between that goal and the broadly inclusive leave guarantee.⁸⁶

Instead of submerging pregnancy into a universal framework, we might flip the strategy and start with stronger sex equality rights for pregnant workers as an opening move in a broader workers' rights movement. This suggestion has echoes of the Muller/Adkins⁸⁷ protective labor history, in which labor reforms for women were first steps in a march toward more general maximum hours and minimum wage provisions.⁸⁸ The pregnancy accommodation cases highlight the harsh conditions experienced by low-wage workers and workers in rigidly structured work environments.⁸⁹ To be sure, the work conflicts at issue in the PDA cases reflect the lingering gender ideologies about work and maternity that have proven resistant to change. But they also reflect the low regard for workers in advanced global capitalism and the expendability of low-wage employees. There are gendered dimensions to these realities, too. Part-

⁸³ See 29 U.S.C. § 2612(a)(1) (entitling employees to take unpaid leave for a variety of reasons including "serious health condition[s]" and "the birth of a son or daughter").

⁸⁴ Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 36-37 (2004).

⁸⁵ See *Coleman*, 132 S. Ct. at 1334.

⁸⁶ See *id.* at 1335 (finding that, while admittedly allowing some women "to take leave for pregnancy-related illness . . . the provision [was] not congruent and proportional to any identified constitutional violations"); Grossman, *supra* note 84, at 18-19 ("The FMLA's failure to account for the fact that men do not tend to take time away from work for parenting or other caretaking tasks precludes it from making a meaningful contribution to gender equality.").

⁸⁷ See *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908) (considering the differences between sexes, namely women's delicate physique and maternal function, to justify a law capping the number of hours a woman may work in certain industries); *Adkins v. Children's Hosp.*, 261 U.S. 525, 552-53 (1923) (rejecting the reasoning applied in *Muller* as outdated to invalidate a law providing minimum wages for women on freedom of contract grounds).

⁸⁸ See Ruth Bader Ginsburg, *Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 366-69 (2009) (describing how legislation framed to protect women gave way to legislation designed to protect all workers).

⁸⁹ See, e.g., *Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698, 703-04 (7th Cir. 2012) (providing background concerning plaintiff, a part-time employee working three days a week as a stocker on the overnight shift in addition to working at another job, who experienced sporadic bleeding during her pregnancies and suffered two miscarriages).

time workers are among the most vulnerable to exploitative labor practices, and women comprise nearly three-quarters of part-time workers.⁹⁰ Contingent and temporary workers are mostly women as well;⁹¹ all of these workers are paid less, have less job stability, and have fewer job benefits than employees in the full-time, permanent labor force.⁹² Pregnancy discrimination claims could mobilize broader efforts to promote fair treatment for low-wage workers, a goal that both complements and reinforces the goal of gender justice in the workplace.

Of course, moving from a gender justice framework to universal workers' rights is no easy feat, and the Progressive era contains cautionary lessons. For instance, the wage and hour protections ultimately adopted left out many of the most vulnerable workers, including many women of color.⁹³ However, this is more of an indictment of the Progressive labor movement's focus on privileged women and its resulting failure to recognize the desirability of a progression from identity-specific rights for women to broader classes of workers. Had the sex equality lens of the protective labor laws during the Progressive era been widened to include a more diverse group of women, unmoored from the separate spheres ideal of an (implicitly) white femininity, the labor movement's gains may have spread more broadly.

Whether framed as a comparative equal treatment right or an accommodation guarantee specific to pregnancy, getting somewhere on pregnancy will require dislodging the gender ideology at the root of the problem. Neither the consistency of grand theory nor a switch from gender equality rights to a universal rights framework will avoid that challenge.

IV. A DICHOTOMY IN THE DISCOURSE? SUPPORTING MOTHERHOOD VS. FIGHTING STEREOTYPES IN MAKING THE FEMINIST CASE AGAINST PREGNANCY DISCRIMINATION

At the level of legal scholarship, the heated debates in the 1970s and 1980s over equal versus special treatment gave way to difference fatigue. The most recent scholarship on pregnancy has turned away from debating the models to explore the history of the social movement that produced the PDA and the theory behind it. The new pregnancy scholarship, including works by Deborah Dinner, Cary Franklin, Joanna Grossman, and Deborah Widiss, offers an enriched understanding of what the PDA was all about from studying the

⁹⁰ Kessler, *supra* note 37, at 385.

⁹¹ *Id.*

⁹² *Id.* at 386-87; *see also* CHAMALLAS, *supra* note 28, at 252-53.

⁹³ *See* Kristin Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 *UCLA WOMEN'S L.J.* 131, 189 (2010) (describing the third-party domestic workers exempt from protection under the Fair Labor Standards Act ("FLSA") as performing difficult work and consisting mostly of "female heads of household, members of racial minorit[ies] . . . [the] poor," and uneducated).

activists and ideas that produced it.⁹⁴

As this scholarship has shown, the feminist project of engaging and transforming the cultural understanding of women, maternity and work has a history of its own. Deborah Dinner's work, in particular, offers a comprehensive account of the discourses and debates surrounding the PDA.⁹⁵ She contends that women's rights advocates strategically blended neomaterialism (supporting women's ability to become mothers by shifting some of the costs of reproduction) and liberal individualism (challenging the stereotypes that restrict women's work opportunities) in supporting the PDA.⁹⁶ In Dinner's reckoning, neomaterialist discourses place a primary value on women's maternity that is in tension with the anti-stereotyping bent of individual liberalism. While neomaterialism supported spreading the costs of reproduction so that they do not fall entirely on women, Dinner argues, it simultaneously reinforced the "normative primacy of motherhood."⁹⁷ When the dust settled and the PDA was enacted, Dinner concludes that the contradictions in these two discourses ultimately led to the PDA's limitations.⁹⁸ She posits an unresolved tension that continues today in modern feminist discourse in which neomaterialism (promoting and supporting maternity) clashes with individual liberalism (resisting the gender stereotypes that limit women's career paths).⁹⁹

The dialogue between legal scholars Katherine Franke and Mary Becker could be viewed as a legacy of this tension.¹⁰⁰ Franke questioned how far maternal supports should extend, arguing provocatively that pronatalism is

⁹⁴ See, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011) (using historical sources to inform contemporary debates concerning reproduction and sex equality); Deborah Dinner, *Recovering the LaFleur Doctrine*, 22 YALE J.L. & FEMINISM 343 (2010) (looking to the activist history preceding the *LaFleur* decision to argue for the shedding of "rigid doctrinal categories" preventing women from realizing both "equal employment" and "reproductive freedom"); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (upending the accepted narrative of 1970s sex discrimination cases to reveal "a richer set of claims" with "powerful implications for current controversies"); Grossman, *supra* note 36, at 568-70 (describing the expectations of equal employment opportunities that motivated women involved in social movements preceding passage of the PDA to highlight the modern PDA's failure to achieve equality); Widiss, *supra* note 39 (placing the PDA in historical context to make a case for interpreting its operative clause according to its plain meaning).

⁹⁵ Deborah Dinner, *Strange Bedfellows at Work: Neomaterialism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453 (2014).

⁹⁶ *Id.* at 456-58.

⁹⁷ *Id.* at 458.

⁹⁸ *Id.* at 515-17.

⁹⁹ *Id.* at 461, 525-30.

¹⁰⁰ See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495 (2001); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

heteronormative, shifts costs to other (often less privileged) women, and rests on nationalistic and racially subordinating preferences for American-born population replenishment over immigration.¹⁰¹ Mary Becker took issue with this argument, sharply defending supports for childbearing and childrearing and attacking individualistic discourses that deny support for caretaking.¹⁰²

Indeed, much feminist legal scholarship on the themes of women, work, and maternity could be situated on one side or the other of this divide. For example, Laura Kessler's argument for placing a higher value on women's caregiving resonates with what Dinner calls neomaternalism.¹⁰³ Kessler is among those scholars who have critiqued the liberal foundations of the U.S. legal system—individual autonomy and rational choice—as obstacles to supporting mothers as caretakers.¹⁰⁴ On the other hand, scholars focused on dismantling the gender stereotypes that link women and caretaking could be placed on the other side of the line. By prioritizing equality for women in paid work, this genre of scholarship implicitly contests the normative primacy of motherhood.¹⁰⁵

While it is tempting to align contemporary feminist legal scholarship on motherhood within these oppositional frames, doing so reinstates an updated version of the mutually exclusive choice Williams posed to feminists decades ago.¹⁰⁶ As with the choice of the equal treatment/special treatment strategy, we should question the starkness of the dichotomy. Surely the goals of neomaternalism and anti-stereotyping are not only compatible but are ultimately reinforcing.

When employers provide accommodations to non-pregnant workers, the gender stereotyping behind the refusal to accommodate pregnancy comes into sharper focus. The different treatment of pregnancy reflects the prediction or prescription that mothers lessen their attachments to paid work and are not worth the investment. In challenging this ideology, the anti-stereotyping principle is in full harmony with the neomaternalist justification for supporting pregnancy. They are only in tension if we understand neomaternalism to include a normative case for channeling women into caretaking and away from paid work. But there is no reason why neomaternalism has to embrace such a gendered model of caretaking.

Whatever tension exists between the anti-stereotyping and pro-maternity discourses in support of pregnant workers, greater attention to masculinities and caretaking could help reconcile them. Historically, the anti-stereotyping

¹⁰¹ Franke, *supra* note 100, at 183-97.

¹⁰² Becker, *supra* note 100, at 1521-27.

¹⁰³ See Kessler, *supra* note 37, at 371.

¹⁰⁴ *Id.* at 375.

¹⁰⁵ See, e.g., Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (championing women's participation in a working life on equal footing with men, to which "special family obligations" are inimical).

¹⁰⁶ Williams, *supra* note 30, at 196.

rationale in support of the PDA addressed stereotypes about pregnant women and working mothers. But there is a masculinity at work here, too. Men's primary contributions to society have never been framed in terms of caretaking, and in fact, have been constructed as oppositional to caretaking. In a revealing remark, Teddy Roosevelt once proclaimed that he would consider it a failure if any daughter of his did not have children, just as he would consider it a failure if any son of his failed to go to war for his country.¹⁰⁷ This juxtaposition of men's and women's contributions as citizens has deep cultural roots. Not only is caretaking gendered feminine, men's citizenship is constructed around fighting, the opposite of nurturing. In this way, women's and men's civic contributions, caretaking and fighting, have been polarized.

The gendering of caretaking as feminine contributes to the subordination of women in the workforce. Maternity and work have historically been embroiled in conflict, and resistance to fully embracing mothers as paid workers continues to derail the PDA. In contrast to courts' refusal to fully enforce the PDA, courts have embraced employment preferences for military service members without disparaging charges of special treatment or most favored nation status.¹⁰⁸ Indeed, despite the absence of a record of workplace exclusion like that experienced by pregnant workers and mothers, public support for military service members' employment secured passage of the Uniformed Service Employees Rights and Responsibilities Act ("USERRA").¹⁰⁹ Under USERRA, employers must treat military leave as favorably as other kinds of leaves that employers permit.¹¹⁰ Rather than seeing this as special treatment for military service members, or a most favored nation status for military leave, courts view it as equal treatment and nothing more.¹¹¹ In contrast, courts continue to fight the PDA's analogizing of pregnancy to other conditions that are accommodated in the workplace, and deride claims by pregnant workers seeking equivalent accommodations as demands for special treatment.

¹⁰⁷ See *The Roosevelts: An Intimate History* (PBS broadcast Sept. 14, 2014).

¹⁰⁸ See, e.g., *Pers. Adm'r v. Feeney*, 442 U.S. 256, 280-81 (1979) (upholding absolute veteran's preference against equal protection challenge).

¹⁰⁹ 38 U.S.C. § 4316(b)(1) (2012).

¹¹⁰ *Id.*

¹¹¹ See, e.g., *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1189 (2011) (finding that supervisor's resentment at having to schedule around plaintiff's military obligations, with "everyone else having to bend over backwards to cover [his] schedule for the Reserves," was a discriminatory motive under USERRA); *DeLee v. City of Plymouth*, 77 F.3d 172, 173 (7th Cir. 2014) (city violated USERRA by excluding military leave from length of service benefits); *Brill v. AK Steel Corp.*, 2012 U.S. Dist. LEXIS 35251, at *10-23 (S.D. Ohio, Mar. 14, 2012) (holding that an employee on military leave is entitled to the same benefits employer provides to persons on leave for jury duty, and interpreting USERRA to require military service to be treated as well as the most favorably treated employee leaves); *Benetiz v. City of Montebello*, 2010 U.S. Dist. LEXIS 102288, at *3 (C.D. Cal. Sept. 27, 2010) (holding that USERRA requires employer to treat military leave as well as the most favorably treated leave).

That there is a normative masculinity that is interconnected to the gender ideologies surrounding women, work, and maternity should come as no surprise. Masculinities scholars have demonstrated the need to ask “the man question,” and some important work has taken up that call in the area of masculinities and fatherhood.¹¹² In relation to pregnancy discrimination in particular, assumptions about men and masculinity tie in to the supporting gender ideologies in two respects.

First, assumptions about male breadwinners support employer policies that push pregnant employees out of their jobs. The normative masculinity lurking behind pregnancy discrimination is a breadwinning masculinity—and one that is implicitly race and class-specific. The dismissal of pregnant workers’ claims to equal accommodation is supported by an implicit assumption that the pregnant worker is or should be supported by the prospective father’s paycheck and can afford to be (at least temporarily) out of the workforce. Male partners who do not fit this masculinity, who do not earn a family wage, are marginalized, along with those women without breadwinning partners. As it so often turns out, the foregrounded masculinity does not describe most men’s lives. It is culturally aspirational—and hegemonic, in that sense—and yet describes only a small minority of privileged men.¹¹³

Second, assumptions about men and caretaking underlie the gender ideology behind pregnancy discrimination. At the heart of the resistance to accommodating pregnant workers is a judgment that pregnant workers are less valued than other workers whose conditions are accommodated. It is not the temporary limitations of pregnancy that trigger this judgment—in this respect, a pregnant worker is no less valuable than other workers whose conditions limit their ability to work. Rather, the animating stereotype is the assumption that pregnancy marks the beginning of a woman’s lessened commitment to paid work or lower reliability as an employee. That stereotype depends on an assumption that the care work that follows pregnancy will not be equally shared with the pregnant woman’s partner. The gender stereotypes at play help explain the phenomenon that fathers experience a bump in wages after having children, while mothers are hit with a wage penalty.¹¹⁴

Disrupting the gendered expectations and realities of caretaking would also disrupt the stereotyping of pregnant workers. If men were expected to equally

¹¹² See, e.g., NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* (2010); NANCY E. DOWD, *REDEFINING FATHERHOOD*, 13 (2000) (examining contemporary cultural construction of fatherhood and proposing a “redefinition of fatherhood centered on nurturing”); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2010).

¹¹³ Kessler, *supra* note 37, at 384 (pointing out the decline in men’s “real wages” and explaining that the wages of the men’s partners are necessary to meet basic needs).

¹¹⁴ Michelle J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, 1 *THIRD WAY NEXT* (Sept. 2, 2014), available at http://content.thirdway.org/publications/853/NEXT_-_Fatherhood_Motherhood.pdf, archived at <http://perma.cc/C5CN-K23C>.

care for children, the bias against pregnant workers that stems from predictions about their future labor force attachment as mothers would dissipate. Supporting more egalitarian masculinities in fatherhood would thus help reconcile the neomaternalism and anti-stereotyping discourses. Promoting motherhood need not privilege women's maternal roles over participation in paid work if having children does not inexorably lead to a gendered division of labor in who cares for them.

None of this is to deny the obvious, that the labor of caring for children is still disproportionately done by mothers and not fathers.¹¹⁵ The point, rather, is that feminist discourses on pregnancy should do more to engage and resist the masculinity that underlies the gendered structure of caring for children, and hence the gender ideology behind pregnancy discrimination.

Recently, some scholars, including Cary Franklin and Reva Siegel, have revisited the feminism of the 1970s and found a richer and more transformative anti-stereotyping project than is commonly recognized.¹¹⁶ The feminists toiling in that era saw no conflict between shifting the costs of maternity and supporting women in their decisions to be mothers, while simultaneously resisting the gender stereotyping that pegs women as mothers (and potential mothers) rather than workers. To the extent that today's neomaternalism reinforces the gendering of caretaking and the primacy of motherhood, these developments were not inevitable. Further attention to cultivating egalitarian masculinities and caretaking fathers could help reconnect today's neomaternalism and anti-stereotyping projects.

CONCLUSION

The past fifty years of grappling with pregnancy under the civil rights laws show reason for skepticism of false conflicts that present stark and mutually exclusive choices. More important than the choice between equal treatment and special treatment is the mobilization of a revitalized social movement to challenge the cultural norms and workplace realities for women who become pregnant. Advocates for pregnant workers can be both pro-maternity in supporting women's decisions to have children and anti-stereotyping in resisting the gendered discourses and stereotypes that limit women's work lives.

¹¹⁵ Rona Kaufman Kitchen, *Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously*, 26 WIS. J.L. GENDER & SOC'Y 167, 197-99 (2011).

¹¹⁶ See Franklin, *supra* note 94, at 83; Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010).