GENDER EQUITY IN THE WORKPLACE:

A Comparative Look at Pregnancy Disability Leave Laws in California and the United States Supreme Court

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INTRODUCTION TO PREGNANCY DISCRIMINATION IN THE UNITED STATES

Pregnant women have historically faced barriers in being recognized as a special class of people in the workplace in need of greater protections. Until the last half-century, legislatures in the United States "protected" women by 1) systematically encouraging their total exclusion in the workplace except as teachers, secretaries, nurses and nannies and 2) regulating the

number of hours that pregnant women could work.[1] But this "protection" was often a pretext for preserving better jobs for men and keeping women out of certain roles.[2] The challenge we face today is how to protect women's access to the modern labor market without ignoring the difficulties and disabilities that affect women only. Many legislatures and employers do not recognize pregnancy as a valid "disability" condition that sometimes requires reasonable accommodations, temporary leave from work or other workplace protections. State and circuit courts are split regarding the idea of whether facially neutral laws violate the Pregnancy Discrimination Act (PDA) when they fail to recognize a disparate impact on pregnant women. I will discuss laws such as the PDA of Title VII of the Civil Rights Act of 1964 that was enacted to protect pregnant women, as well as California and federal case law that give women increasing protections in the workplace.

This paper will comparatively present the evolution of cases from the federal courts as well as California courts on the subject of job-protected pregnancy leave and reasonable-accommodation laws. I will also discuss how the history of cases affects women and families in their daily lives and what this means for the future of sex jurisprudence. The way that the United States Supreme Court has interpreted how the status of pregnancy fits into sex discrimination has evolved over the past forty to fifty years. Due to the Americans with Disabilities Act — which provides for reasonable accommodations in the disability rights context — groups have advocated for similar protections for women. However, the Supreme Court has been reluctant to accept this comparative approach. There are many explanations of how the law should protect pregnant women in the workplace. In this paper, I argue that when courts fail to recognize a lack of pregnancy

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[1] Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 Duke J. Gender L. & Pol'y 67, 71–72 (2013); 208 U.S. 412, 422 (1908).

[2] *See, e.g.,* Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1237–38, 1239 (1986) (observing that "[f]etal vulnerability policies excluding all fertile women have been adopted only in male-dominated industries," while "women are generally allowed to work in women's jobs without restrictions based on fetal safety"); David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality,* 34 Wm. & Mary L. Rev. 101, 115 (1992) ("Expressions of corporate concern for the plight of fetuses . . . have been highly selective. Businesses that depend heavily on women workers have been much less scrupulous about the dangers they impose on the unborn . . .").

leave or reasonable accommodations in the workplace as having a disparate impact on women, it furthers sex discrimination. It may seem obvious that lack of reasonable accommodation leads to a disparate impact for women, but surprisingly, California courts and the United States Supreme Court have been slow to make this recognition explicit. In order to establish statutorily reasonable accommodations, the courts must first recognize the disparate impact.

Lack of proper leave laws and reasonable accommodations put women at risk of losing their livelihood, medical benefits, career trajectory and sense of security. It is important that when deciding cases that interpret the PDA, our federal judiciary should act in a way that will allow pregnant women to get reasonable accommodations that are necessary in the workplace. In California, there are more protective laws than those in the federal system. However, the California judiciary also has great potential for improvement in pregnancy discrimination jurisprudence.

II. HOW TO RECONCILE TITLE VII WITH MORE ADVANCED STATE LAWS: PDA AND PREGNANCY DISCRIMINATION LAWS

A. FEDERAL STATUTORY AND CASE LAW

Pregnancy-discrimination jurisprudence in the United States made some significant strides over the past fifty years. Early cases about pregnancy decided that pregnancy discrimination was not considered sex discrimination and pregnancy was not considered a disability.[3] A brief overview of the progress that our legislature and judiciary have made will be presented.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of sex and several other protected classifications. While it seems obvious now that treating an employee differently because she is pregnant would fall within the protections of Title VII, this was not always the case. In *Geduldig v. Aiello,* in 1974, the U.S. Supreme Court held that there was no equal protection violation for denying

[3] Martinez v. NBC Inc., 49 F. Supp. 2d 305, 308 (S.D.N.Y. 1999) ("Every court to consider the question to date has ruled that pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.").

normal pregnancy disability benefits from the California state disability insurance program.[4] The four plaintiffs in *Geduldig* argued that being denied disability insurance for pregnancy although they were otherwise qualified for the program was a violation of the Equal Protection Clause because the policy adversely affected women. Regarding the Equal Protection Clause arguments, the Court reasoned that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[5] The Court was quick to dismiss the gender discrimination issue in a footnote — reasoning that the potential recipients of disability funds are either pregnant women or non-pregnant persons.[6] While the first group is all-female, the second group consists of males and females and therefore members of one sex only were not discriminated against.[7] At this time, the Supreme Court was not ready to accept pregnancy discrimination as sex discrimination but did not say so explicitly.

Two years later, In *General Electric v. Gilbert,* the Supreme Court addressed the issue of whether a disability policy that excluded pregnant women was a violation of Title VII.[8] In *Gilbert,* the Court stated that the *Geduldig* equal protection rationale was directly on point to the Title VII discrimination claims in the present case. The Court held that discrimination based on pregnancy was not sex discrimination, as prohibited by Title VII.[9] *Gilbert* was the first instance in which the Court held explicitly that Title VII of the Civil Rights Act did not protect women from pregnancy-based discrimination.[10]

In *Nashville Gas Co. v. Satty,* decided only one year after *Gilbert,* the Supreme Court invalidated an employer policy forcing pregnant women to take leave from work and then denying them their previously accumulated seniority when bidding for new positions thereafter.[11] As the Court reconciled this position with *Gilbert,* employers were not required to provide

4 Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

5 *Id.* at 485.

6 *Id.* at 496 n.20.

7 *Id.*

8 General Electric Co. v. Gilbert, 429 U.S. 135–36 (1976).

9 *Id.*

10 *Id.*

11 Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977).

benefits to "one sex or the other 'because of their differing roles in the scheme of human existence,"' but neither could they "burden female employees in such a way as to deprive them of employment opportunities."[12] The next year in 1978, Congress passed the Pregnancy Discrimination Act which marked a reversal of the foregoing trend in case law.

1. Pregnancy Discrimination Act

In 1978, Congress swiftly enacted the Pregnancy Discrimination Act, an amendment to Title VII, for the express purpose of repudiating *Gilbert*.[13] The purpose of the PDA was to "enable women to maintain labor-force attachments throughout pregnancy and childbirth."[14] It amended Title VII to require that women affected by pregnancy "be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[15] The Pregnancy Discrimination Act also prohibits discrimination based on pregnancy with respect to pay, job assignments, promotions, layoffs, training, fringe benefits, firing, and any other term or condition of employment.[16] The PDA applies only to workplaces with fifteen or more employees, as well as all employment agencies, apprenticeship or training programs, and labor organizations.[17]

Under the federal Pregnancy Discrimination Act (PDA), an employer that allows temporarily disabled employees to take disability leave or unpaid leave, must allow an employee who is temporarily disabled due to pregnancy to do the same. After the Court's decision in *Gilbert,* Congress endeavored to expand protections to pregnant workers statutorily.[18] The

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12 Brake & Grossman, *supra* note 1 at 73–74.

13 AT&T Corp. v. Hulteen, 556 U.S. 701, 727 (2009).

14 Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality,* 46 Harv. C.R.–C.L. L. Rev. 484 (2011).

15 42 U.S.C. § 2000e(k).

16 U.S. Equal Employment Opportunity Commission, Pregnancy Discrimination, *available at* http://www.eeoc.gov/eeoc/publications/fs-preg.cfm.

17 Legal Aid Society — Employment Law Center, Pregnancy Discrimination, Pregnancy Accommodations, and Pregnancy Disability Leave, *available at* http://las-elc.org/fact-sheets/pregnancy-discrimination-pregnancy-accommodations-and-pregnancy-disability-leave#sthash.oLjdUtZG.dpuf.

18 *See* Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the PregnancyDiscrimination Act of 1978,* 21 Yale J.L. & Feminism 1 (2009)

PDA was a fundamental turning point because it nullified the decision in *Gilbert* by providing that discrimination based on pregnancy is sex discrimination, within the meaning of Title VII.

The Pregnancy Discrimination Act contains two key provisions. First, it provides that unlawful sex discrimination under Title VII includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions."[19] Second, it 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."[20] Most of the litigation relating to the PDA centers on the second provision. Lower courts have tied the reach of the second clause to the scope of the first instead of seeing clause two as sufficient to establish a violation of the PDA standing alone.[21] Nevertheless, as Brake and Grossman argue, the text and legislative history of the PDA point to the second clause as establishing a defense to pregnancy discrimination if pregnant women are treated the same as others in their ability to work. Or it could be treated as an independent violation of the Act if pregnant workers are treated worse than those similar in their ability to work.[22] The scope of the comparative right of accommodation is not fully known but should be made more clear with the decision in *Young v. UPS*.[23]

Five years after enactment of the PDA, in *Newport News Shipbuilding v. EEOC,* the EEOC brought a discrimination claim. The EEOC made two claims: 1) the failure of the employer's health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as other medical conditions and 2) providing less favorable pregnancy benefits for spouses of male employees were both discriminatory under the PDA.[24] The Court held, "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes,

(chronicling the passage of the PDA).

19 42 U.S.C. § 2000e(k) (2012).

20 *Id*.

21 See Brake & Grossman, *supra* note 1.

22 *Id*.

23 Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. Apr. 10, 2015).

24 Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 670–71 (1983).

discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[25] In a span of ten years from the 1974 *Geduldig* ruling to *Newport News* in 1983, the United States Supreme Court began to recognize that discrimination on the basis of pregnancy is sex discrimination.[26] However, there is still a grey area with respect to the extent of reasonable accommodations that are necessary under the PDA. For example, in *Newport News,* the Court failed to link a lack of reasonable accommodations to a disparate impact on pregnant women. And they failed to link the disparate impact to a furtherance of sex discrimination against women.

In 1990, the Americans with Disability Act (ADA) was enacted to provide protections against employment discrimination for qualified individuals with disabilities.[27] The ADA requires reasonable accommodations for employees with disabilities that will allow the employee to perform the essential functions of his or her job. Courts have generally concluded that a normal pregnancy does not constitute a "disability" under the ADA.[28]

Unlike the ADA, however, the Pregnancy Discrimination Act does not contain a reasonable-accommodations provision."[29] Without accommodations, some women cannot perform the essential functions of their jobs. The lack of a reasonable-accommodations provisions gives some employers the ability to deny accommodations to pregnant workers and therefore to force them out of their jobs. For example, Peggy Young is a UPS worker who was initially denied accommodations to lift less-heavy packages due to her pregnancy. The *Young* case will be discussed in greater depth later in this paper.

In 2009, the Supreme Court heard *AT&T v. Hulteen*.[30] The issue was whether AT&T violated the PDA by paying retired female employees lower pensions because they took unpaid pregnancy-related leaves between 1968 and 1974, before passage of the PDA. The majority sided with AT&T, ruling that the service credit system was not the product of intent to discriminate,

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25 *Id*. at 669, 684.

26 *Young,* 707 F.3d 437.

27 42 U.S.C. §§ 12111–12117.

28 *Id*.

29 John Ashby, *EEOC Enforcement Guidance Expands Protections Against Pregnancy Discrimination,* 58 Advocate 31, 31–32 (2015).

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

since the system was not unlawful at the time and therefore was a "bona fide seniority system," a defense to Title VII claims.[31] As Justice Ginsburg points out in her dissent, however, this ruling extends the effects of *Gilbert* into another millennium, despite the clear intent of Congress to repudiate it.[32] In *Gilbert,* the Court reasoned that policies that are "facially nondiscriminatory" and do not have "any gender-based discriminatory effect" are permissible.[33] In the same vein, in *AT&T,* the Court reasoned that the retired female employees in receipt of lower pensions were analogous to the disadvantageous treatment described in *Gilbert*: "facially nondiscriminatory," and without "any gender-based discriminatory effect."[34] However, the *AT&T* ruling does not serve to cease disadvantageous treatment for "all employment-related purposes on the basis of pregnancy, childbirth, or related medical conditions," as required by the PDA.[35] Instead the ruling serves to further discriminate against women for their pregnant status by paying them lower pensions, when compared to other similar employees, for the rest of their lives.

The language of the PDA indicating that pregnant women should be treated the same for all employment-related purposes implicitly suggests that any workplace policy that creates an invidious adverse impact for pregnant women should be re-examined. In the *AT&T* case, the adverse impact was a lower pension benefit for female employees who took unpaid pregnancy-related leaves during a certain timeframe. Ideally, the text of the PDA should read, "shall be treated the same for all employment-related purposes and shall not suffer a disparate impact due to employment policies. . . . " Since the PDA is not explicit in its language to indicate that adverse or "disparate" impacts on pregnant women are a violation of the statute, this can be realized only by the Supreme Court through its rulings or by Congress in amending Title VII to include the disparate impact language.

Over the years, gender-discrimination jurisprudence in the Supreme Court has evolved to include pregnancy discrimination. However, pregnant women continue to experience adverse implications both during

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31 *Id.* at 707–15.

32 *Id.* at 719.

33 *General Elec. Co.,* 429 U.S. at 136–38.

34 *AT&T Corp.,* 556 U.S. at 701, 721.

35 42 U.S.C. § 2000e(k).

pregnancy and even afterward. The Supreme Court must explicitly address the idea of disparate impact on child-bearing women, to show women that they will not be punished for choosing to have a baby and raise a family while maintaining a career.

2. What is the best way to secure reasonable accommodations for pregnant workers?

a. Equal Employment Opportunity Commission (EEOC) Guidance Document calls for reasonable accommodations

The Equal Employment Opportunity Commission (EEOC) has created a guidance document for how the Pregnancy Discrimination Act should be interpreted. The EEOC Guidance document is meant to summarize the law, as opposed to advocating for a change in the law.[36] Nevertheless, the most controversial part of the EEOC guidance document advocates for a change in the law — providing reasonable accommodations for pregnant women. The document states that even if they do not have a disability under the ADA, pregnant employees may be entitled to "workplace adjustments similar to accommodations provided to individuals with disabilities."[37] In accordance with the PDA, the EEOC guidance lists actions of the employer that may occur — current pregnancy, past pregnancy, potential pregnancy and related medical conditions — as examples of conduct that would be deemed discriminatory. However, the courts have rejected the notion that reasonable accommodations are required under the PDA.[38]

Although the PDA makes great strides by outlining employer actions that are discriminatory, there is still no legislation or case law that declares lack of adequate leave laws or reasonable accommodations to have a disparate impact on pregnant women. The jurisprudence in the field of pregnancy discrimination needs work. In order to secure statutorily reasonable accommodations for pregnant workers, the courts would first need to acknowledge the disparate impact.

Members of Congress have introduced the Pregnant Workers Fairness Act, which would expand the Pregnancy Discrimination Act to require that

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[36] Ashby, supra note 29 at 32.

[37] *Id.*

[38] *Id.*

pregnant employees be granted reasonable accommodations.[39] In addition, many states such as California have more protective laws than the PDA.[40] No federal court of appeal has adopted the position that failure to provide light duty or reasonable accommodations to pregnant women is a violation of the PDA. Doing so would be an important step in the federal scheme for women to gain the necessary accommodations in the workplace.

b. A limitation to the PDA is "no similarly situated" employees

Even if women are granted reasonable accommodations in line with the PDA, it is unclear how pregnant women will be accommodated in relation to others similar in their ability to work and how the various conditions related to reproduction will be handled. The PDA has been extremely useful in reshaping pregnancy-discrimination jurisprudence in the Supreme Court. However, the language of the statute does include some limitations. For example, the PDA states that pregnant women, "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 . . . ."[41] This language is not helpful because it is not clear what constitutes employees who are similar in their ability to work. The experience of pregnancy is unique to each woman. All pregnancies to some degree involve an enlarged abdomen, hormonal changes, weight gain, fetal movement and increased blood volume.[42] A woman dealing with complications due to pregnancy may experience depression, gestational diabetes, and severe, persistent nausea and vomiting.[43] In some cases women experience persistent nausea and vomiting throughout the entire pregnancy due to a condition called hyperemesis gravidarum (HG).[44] Hospitalization may be required in order to "be fed fluids and nutrients through a tube in their veins."[45] Additionally, some women may experience complications pre-pregnancy with fertility treatments and post-pregnancy with breastfeeding and postpartum depression.

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39 *See* Ashby, *supra* note 29; Pregnant Worker's Fairness Act, S. 942, 113th Cong. (2014).

40 Cal. Gov. Code § 12945; Cal. Gov. Code 12945.2 (a).

41 42 U.S.C. § 2000e(k).

42 Stages of Pregnancy, Women's Health, *available at* http://womenshealth.gov/pregnancy/you-are-pregnant/stages-of-pregnancy.cfm (last visited May 19, 2015).

43 *Id.*

44 *Id. See* Pregnancy Complications.

45 *Id.*

Every woman's body copes with pregnancy in a different way and comparing the symptoms of pregnancy with those of others "similar in their ability to work" is not always practical or fair for women.

For example, in 1994 in *Troupe v. May Department Stores Company,* a pregnant worker was terminated because of excessive tardiness due to abnormal morning sickness.[46] The plaintiff brought suit under the PDA but was unsuccessful in her claim. The U.S. District Court for the Northern District of Illinois granted summary judgment for the employer.[47] On appeal, the Seventh Circuit held that because the worker could not provide evidence of a non-pregnant employee with similar tardiness that was treated better, she could not bring a claim for pregnancy discrimination.[48] Instead, the Court noted that her tardiness demonstrated that she could not meet the employer's requirements for her job and therefore her termination was not due to a pretext.[49] In *Troupe,* the plaintiff's recovery depended upon proving more favorable treatment of a non-pregnant but similarly situated employee. If such a person does not exist, then pregnant workers are limited in their recovery, and discrimination can occur without remedy. This case might have been decided differently if there had been a specific accommodations provision for pregnant workers rather than an approach demanding comparison with other similarly situated employees.

Due to the wide range of experiences with pregnancy, pregnant women cannot adequately be compared to other employees who do not share the highly-individualized experience of pregnancy.[50] The only effective way to accommodate women for whatever symptoms are manifested during pregnancy is to realize the unique experiences that pregnancy presents to each individual and provide reasonable accommodations accordingly. The PDA could be strengthened if it added language in line with this understanding.

As Maryn Oyoung suggests, a reasonable-accommodations provision in the PDA could be modeled after California law. Such provisions could

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46 Troupe v. May Department Stores Company, 20 F.3d 734, 735 (7th Cir. 1994).

47 *Id. a*t 734.

48 *Id.* at 734, 736–37.

49 *Id.*

50 Maryn Oyoung, *Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities,* 44 McGeorge L. Rev. 515, 535 (2013).

include "job restructuring, modified work schedules, reassignment, modifications to examinations, policies, and other similar adaptations for individuals experiencing pregnancy or conditions related to the unique female reproductive capacity."[51] The exceptions to such accommodations would depend on whether such accommodations would cause an undue hardship on the employer, and the employer would be responsible for proving that the proposed accommodations would impose "significant difficulty or expense."[52] Instead, the reasonableness of the accommodations would be determined by the court based on the totality of circumstances. This test would include factors such as size, financial resources, nature, or structure of the employer's business.[53] When female employees file complaints with the EEOC claiming a violation of the PDA they often are not able to recover for discrimination or lack of reasonable accommodations claims. Adding specific provisions relating to reasonable accommodations and the totality of circumstances test would give teeth to the PDA and allow it to fulfill its mission to eliminate sex discrimination in the workplace due to pregnancy related conditions.

B. CALIFORNIA STATUTORY AND CASE LAW

In California, the Fair Employment and Housing Act and, more recently, the Pregnancy Disability Leave Law protect pregnant workers from discrimination in the workplace. These laws have generally been successful for securing greater protections for pregnant workers in California than provided by federal law. Nevertheless, the jurisprudence in California does not explicitly recognize a disparate impact due to lack of proper leave and reasonable accommodations.

1. Fair Employment and Housing Act (FEHA) and Pregnancy Disability Leave Law (PDLL)

Under the California Fair Employment and Housing Act, there is a prohibition against employment discrimination on the basis of sex.[54] The definition of the term "sex," includes, but is not limited to, pregnancy, childbirth,

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[51] *Id.* at 515, 540.

[52] Cal. Gov. Code § 12926(u).

[53] *See, e.g.,* 29 U.S.C. § 207(r)(3) and Cal. Gov. Code § 12926(u)(2).

[54] Cal. Gov. Code 12940(a).

or medical conditions related to pregnancy or childbirth.[55] The California Fair Employment and Housing Act applies only to workplaces with five or more employees, as well as all employment agencies, labor organizations, state licensing boards, and state and local governments.[56]

The Pregnancy Disability Leave Law (PDLL) is a part of California's FEHA. It explicitly prohibits employers from harassing, demoting, terminating, or otherwise discriminating against any employee for becoming pregnant, or for requesting or taking pregnancy leave.[57] It also requires employers with five or more employees to provide reasonable accommodations and job-protected disability leave of up to four months for pregnancy, childbirth, and related conditions.[58] The PDLL is meant to provide a reasonable period of leave to workers disabled by their pregnancy, not to exceed four months.[59] An employee who is disabled by her pregnancy and entitled to PDLL leave may take the leave all at once, or in increments. An employer is not required to pay wages to an employee taking PDLL leave, unless it has a policy of paying wages for other types of temporary disability leaves. Furthermore, the employer must know the employee is pregnant in order for the employee to make a prima facie case of discrimination based on pregnancy.[60]

In California, there are considerably more protective laws for pregnant women such as the Paid Family Leave Act (PFL) and California Family Rights Act (CFRA). Certain employees have additional leave-and-return rights for health reasons or child bonding under the Family Medical Leave Act and the California Family Rights Act. CFRA allows new mothers and fathers to take up to twelve weeks to bond with a new baby or adopted child or to care for a family member or for their own medical condition. This means that a pregnant worker could take four months of PDLL leave and an additional leave for up to twelve weeks.[61] However these laws often do not meet the needs of all pregnant women because the female employee must be employed for twelve months with the employer and complete at least 1,250 hours of work

55 Cal. Gov. Code § 12926, (p).

56 Legal Aid Society, *supra* note 17.

57 CCR § 7291.3 and CCR § 7291.6.

58 CCR § 7291.2(h).

59 Cal. Gov. Code § 12945(b)(2); 2 Cal. Regs 7291.7(a).

60 Trop v. Sony Pictures Entertainment Inc., 129 Cal. App. 4th 1133 (2005).

61 Cal. Gov. Code § 12945.2(a).

within the preceding twelve months to be eligible for leave under FMLA.[62] The FMLA also leaves employees of smaller businesses unprotected because the protections only apply to employers with fifty or more employees.[63]

2. The delicate dance between Title VII and more protective state laws: PDA should be considered a floor beneath which protections cannot drop

In *California Federal Savings & Loan Association v. Guerra,* the U.S. Supreme Court was faced with the issue of whether a pregnant worker had a qualified right to reinstatement after a pregnancy leave of no more than four months.[64] This type of preferential treatment was not provided for employees who experienced other workplace disabilities.[65] The Court upheld the preferential treatment under the more protective California pregnancy leave laws and ruled that Title VII was intended as a floor beneath which pregnancy protection could not drop.[66] The Court in *California Federal Savings* held that Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, does not pre-empt a California statute (PDLL) that requires employers to provide leave and reinstatement to pregnant workers who are disabled. Congress was aware of state laws similar to the PDLL in California and did not consider them to be in conflict with the federal laws. Therefore, the Court in *California Federal Savings* held that the California statute was an acceptable expansion of pregnant workers' rights. Despite the favorable ruling for pregnant workers, the reasoning regarding disparate impact that the Supreme Court adopted in reaching its conclusion is problematic, as will be discussed later.

Courts are split over the idea of whether facially neutral laws violate the PDA when they have a disparate impact on pregnant employees. As Melissa Feinberg points out, the D.C. Circuit Court of Appeals and the Fourth Circuit Court of Appeals have held that a lack of adequate leave and disability benefits

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62 26 U.S. Code § 2611(2)(A)(i).

63 26 U.S. Code § 2611(2)(B)(ii).

64 California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987).

65 *Id.*

66 *Id.* at 562, 565.

for pregnancy violates the PDA due to a disparate impact on women.[67] For example, in *Abraham v. Graphic Arts International Union,* the plaintiff brought an action because as a full-time temporary worker, she was only given ten days sick leave; the normal pregnancy leave is six weeks.[68] The D.C. Circuit held that insufficient leave time could not lawfully lead to termination of an employee under the PDA.[69] In *Abraham,* the Court recognized that insufficient leave has a disparate impact on pregnant women because it almost inevitably leads to their dismissal from work.[70] Similarly, the Fourth Circuit in *Brown v. Porcher*[71] held that denying unemployment compensation to women because they left their previous employment due to pregnancy violates federal law regardless of how non-pregnant disabled employees are treated.[72] As will be discussed below, the *California Federal Savings* case gives more insight into how the Court would rule on the issue of whether preferential treatment due to a disparate impact may be required under the PDA.

III. DISPARATE IMPACT STANDARD

A. RECOGNIZING THAT THE DISPARATE IMPACT STANDARD IS ESSENTIAL TO ENSURE GENDER EQUALITY FOR PREGNANT WORKERS

1. What is "disparate impact?"

Courts and lawmakers prioritize gender equality in the workplace as an important theme in the modern labor market. Facially neutral laws that treat men and women the same would appear to give both sexes equal opportunity. However, women are unique in their ability to bear children and often deal with complications and disability due to this unique characteristic. Therefore, laws such as the PDA and California's PDLL aim to create equality

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[67] Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir. 1981); *see also* Melissa Feinberg, *After California Federal Savings and Loan Association v. Guerra: The Parameters of the Pregnancy Discrimination Act,* 31 Ariz. L. Rev. 141, 150–51 (1989).

[68] *Abraham,* 660 F.2d 811.

[69] *Id.* at 819.

[70] *Id.* at 819 n.64.

[71] Brown v. Porcher, 660 F.2d 1003–04. (1981).

[72] *See* Feinberg, *supra* note 67.

by giving women the opportunity to have children while maintaining their livelihood and career trajectory. Disparate impact in the arena of pregnancy discrimination is the concept that a lack of proper leave or reasonable accommodations disadvantages women by forcing women to choose between maintaining a career and having a family. Courts differ in how they reach conclusions regarding reasonable accommodations, disability benefits, and pregnancy leave for pregnant women. Courts that explicitly recognize a lack of certain minimum benefits as a "disparate impact" serve to close the gender gap while those courts that fail to make such recognition are furthering implicit gender discrimination in the workplace.

2. California and federal courts are slow to recognize disparate impact on pregnant women

The jurisprudence in California is more favorable toward pregnant employees due to more progressive state laws. However, both California and federal courts could do a better job of explicitly recognizing the disparate impact that pregnant women face in the workplace. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* in 1983, the Court stated that the 1978 PDA makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.[73] However, *Newport News* failed to link pregnancy discrimination to the disparate impact standard and furthermore to the need to have reasonable accommodations.

In *California Federal Savings & Loan Association v. Guerra,* in 1987, the Court ruled that Title VII does not preempt state statutes that accord preferential treatment to pregnancy.[74] The Court rejected the argument that the PDA prohibits all differentiation on the basis of pregnancy, and upheld a California statute that required employers to provide pregnancy leave for employees.[75] Even though the rulings in *Newport News* and *California Federal Savings* are favorable for pregnant employees, they failed to articulate specific limits on the scope of preferential treatment. As the Harvard Law Review Association notes, "Because the Court did not base its interpretation of the PDA on a finding that a lack of pregnancy leave has a disparate impact on women, *California Federal Savings* may create

[73] Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 684 (1983).
[74] California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 683, 693 (1987).
[75] *Id.*

the impression that pregnancy leave is merely a gratuitous dispensation to women, thereby reinforcing paternalistic stereotypes that traditionally have disadvantaged women in the workforce."[76] In order for pregnancy leave and reasonable accommodations to be deemed necessary, the Courts must get serious about recognizing the disparate impact of pregnancy discrimination and they must be serious about reversing the current trend. In addition, Congress and state legislatures must also take seriously the need to provide more statutory protections for pregnant employees that explicitly address the disparate impact that pregnancy employees currently face.

In *California Federal Savings,* the Court held that states might provide more protections than federal law under the PDA. However, it has not yet ruled on whether preferential treatment for pregnant employees is *required* under the PDA. Both the majority opinion in *California Federal Savings* and legislative history point to the proposition that the PDA does not require a disparate impact analysis to determine whether leave and benefit policies for pregnant employees are required.[77] However, Justice Stevens in the concurring opinion in *California Federal Savings* links the PDA with the broader agenda of Title VII. As Feinberg aptly notes, "Title VII case law recognizes discrimination claims grounded in disparate impact."[78] In a landmark Title VII case, *Griggs v. Duke Power,* the Court held that Title VII does not allow either overt or implicit discrimination.[79] As the EEOC Guidance document points out, when interpreting the PDA in line with other Title VII case law, courts should recognize disparate impact claims as a valid cause of action for pregnancy discrimination.[80] As noted above, pregnant women are a unique class of individuals and should be treated as such. Complications and disabilities that arise from pregnancy cannot adequately be compared to a group of non-pregnant, similarly situated employees without leading to disparate impacts for women. If there is no appropriate comparator, then women like the plaintiff in *Troupe* will have to deal with the harsh consequences of implicit discrimination in the workplace.

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76 Title VII-Pregnancy Discrimination, 101 Harv. L. Rev. 320, 320–21 (1987).

77 California Federal Savings, 479 U.S. at 286–88.

78 Griggs v. Duke Power, 401 U.S. 424.

79 *Id.* at 431.

80 29 C.F.R. § 1404.10(c) (1988).

What will it take for the Supreme Court and California courts to recognize that pregnancy discrimination has a disparate impact on women? No matter what the answer is to this question, lawyers and legal advocates should champion the voice of pregnant employees who have experienced disparate impacts in the workplace. Through telling stories and raising awareness, we may be able to see gradual change in the legal system.

IV. THE FUTURE OF SEX JURISPRUDENCE

A. OUTCOME OF *YOUNG* CASE COULD SHAPE PREGNANCY AND SEX JURISPRUDENCE GOING FORWARD

The Fourth Circuit on remand from the Supreme Court made a ruling that widely affects sex jurisprudence in the United States. As discussed above, Peggy Young brought an action as a pregnant UPS worker who was expected to lift packages as heavy as seventy pounds on her job. She asked for an accommodation to be put on light duty and be required to lift no more than twenty pounds. However, UPS would not grant the accommodation. UPS's policy limits light duty work to (1) employees who have been injured on the job and (2) employees who have a disability as defined by the ADA. Ms. Young did not fit into either of these categories. Her only alternative was to take unpaid leave with no medical benefits. Although the leave would be far beyond what is given through the Family and Medical Leave Act (FMLA), Ms. Young argued that she should be able to receive light-duty assignments just like a worker injured on the job or a worker who had a qualifying disability under the ADA. UPS made accommodations for "on-the-job injuries, for disabilities entitled to accommodation under the Americans with Disabilities Act (ADA), and for conditions, medical or otherwise, leading to the loss of driving certification."[81] Nevertheless, at the federal appeals level, the Fourth Circuit Court of Appeals ruled for UPS, holding that Young did not experience pregnancy discrimination and that allowing her to go on "light duty" would give pregnant employees an advantage over other employees. Surprisingly, courts have found ways

[81] Young v. United Parcel Service, Inc., 707 F.3d 437 (4th Cir. 2013), petition for cert. filed, No. 12-1226, 2013 WL 1462041 (U.S. Apr. 8, 2013).

to discount analogies to workers who are "similarly situated" to pregnant women as a way to deny reasonable accommodations.[82]

Many women's advocacy groups, law professors and other organizations submitted briefs in support of Young stating that ruling against her would have devastating impacts for women most harmed by pregnancy discrimination — those in low-wage jobs who are most likely to experience conflict between maintaining a healthy pregnancy and meeting their job requirements. The EEOC guidance document however, reaches the opposite conclusion to that of the Fourth Circuit — it states that under the PDA, employers are required to provide light duty assignments to pregnant workers if the employer has a policy limiting to light duty workers injured on the job and/or employees with qualifying disabilities under the ADA.[83]

The Supreme Court ruled that Young should have the opportunity to make her case at the very least and remanded the case to the Fourth Circuit. Although this was not a groundbreaking decision for pregnancy discrimination, the Court, in a 6–3 decision, said Young could further her case using the framework of a disparate-impact claim, "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under [the relevant civil rights law]."[84] As a result, the burden then shifted to UPS to show nondiscriminatory reasons why pregnant women were not included among the classes of workers accommodated.[85] The majority held that pregnant women do not have to be accommodated in a manner similar to non-pregnant employees with similar conditions as long as there is a legitimate reason.[86] Such an accommodation would be too broad and would turn an anti-discrimination statute into "a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, non-pregnant employees."[87] The employee could, however, show

82 Brake & Grossman, *supra* note 1 at 109.

83 *See* Ashby, *supra* note 29.

84 Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354 (2015).

85 *Id.* at 1338, 1341.

86 Young v. United Parcel Serv., Inc., 707 F.3d 437, 446-47 (4th Cir. 2013) *cert. granted,* 134 S. Ct. 2898, 189 L. Ed. 2d 853 (2014) and *vacated and remanded,* 135 S. Ct. 1338 (2015) and *opinion amended and superseded,* No. 11-2078, 2015 WL 1600406 (4th Cir. Apr. 10, 2015).

87 *Id.* at 448.

that she faced "disparate treatment" from her employer — if the employer's actions were more likely than not based on discriminatory motivation, and the employer's reasons for doing so were a pretext.[88] An approach that analyzes "disparate treatment" focuses on the employer's actions and motivations to discriminate. By contrast, the "disparate impact" analysis asks how the policy adversely affected the woman.

Justice Kennedy in his dissent aptly points out that the majority in *Young* conflated "disparate treatment" and "disparate impact" and only addressed disparate treatment.[89] As Kennedy notes, "[t]he PDA forbids not only disparate treatment but also disparate impact, the latter of which prohibits 'practices that are not intended to discriminate but in fact have a disproportionate adverse effect.'"[90] Confusing these two concepts in the *Young* case likely contributed to the unfavorable ruling for Ms. Young. Although the Supreme Court dances around the idea, they have not yet definitively ruled on whether employees are required to receive reasonable accommodations under the PDA. Nonetheless, it is promising that the Court was at least willing to hear Young's discrimination case."[91]

UPS recently announced since Young's lawsuit that it would change its policy going forward and allow pregnant workers to stay on the job performing light-duty work.[92] This gives hope to many women that perhaps the greatest tool for pregnancy-related accommodations is increasing awareness among the public that companies are discriminating against pregnant employees. Public shaming of such companies can be a useful mechanism to change policy and enforce a larger agenda of equitable workplace conditions for women. It will also be telling whether other employers change their policies as UPS did to follow the EEOC guidelines or whether they follow the strict interpretation of the PDA.

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88 *Id.* at 442.

89 Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1368 (2015).

90 *Id.* at 1367.

91 Nicole Flatow, U.S. Supreme Court sides with Pregnant Worker in Major Discrimination Case *available at* http://www.usnews.com/news/articles/2015/03/25/supreme-court-rules-against-ups-in-pregnancy-discrimination-case (last visited May 4, 2015).

92 *Id.*

V. PREGNANCY DISCRIMINATION IN THE FEMINIST CONTEXT

A. HOW TO ADDRESS THE PARTICULAR CONCERN OF WOMEN IN LOW-WAGE JOBS WHO EXPERIENCE PREGNANCY DISCRIMINATION

1. Pregnant women working in low-wage jobs, in lower socio-economic statuses, are more likely to suffer from pregnancy discrimination in the workplace

The women in low-wage jobs are at the highest risk when it comes to pregnancy discrimination. When women are paid less and are working in male-dominated jobs it becomes difficult to gain traction when they experience discrimination in any context. The PDA does not provide for additional protections for low-wage workers whose only comparators are employees who are treated just as badly as pregnant employees. If a minimum-wage employee needs leave or accommodations due to pregnancy but her "stingy" employer does not provide accommodations for any workers, the pregnant employee will receive the same poor treatment under the PDA.[93] This example again belies the assertion made earlier that pregnant women should be treated as a separate and unique class of employees who need varying accommodations in the workplace. Women in low-wage jobs with unforgiving bosses should not be punished for their socio-economic status.

As Brake and Grossman note,

> The women who lose the most under the courts' cramped readings of the PDA are the least privileged and most economically vulnerable women. The PDA is failing the women who need it most — those who work inflexible hours or in rigidly structured work settings or who perform physically demanding tasks. Cases like the one brought by a pregnant fitting room attendant at Wal-Mart who claimed that she was fired for carrying a water bottle at work (per doctor's orders) illustrate the problem. Professional women

[93] National Women's Law Center, It Shouldn't be a Heavy Lift: Fair Treatment for Pregnant Workers (2013) at 6–7, *available at* http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (noting the inflexibility of employers in low-wage jobs).

> in more flexible work settings may still lose their cases, but they have a better chance of finding at least some protection under the Act, if they can prove that their opportunities were limited based on stereotyped and untrue assumptions about how pregnancy affects their work capacity or commitment. And they have a greater chance of reconciling the effects of pregnancy with work obligations without needing to resort to litigation. In short, while the PDA still offers some protection from animus-based discrimination, it has become increasingly unhelpful to those women whose pregnancies are most likely to harm their economic security.[94]

Furthermore, women in low-wage jobs with pregnancy complications may request reasonable accommodations such as temporary alternative duties, light duty or reassignment. These are all accommodations that may in some cases be required by the ADA.[95] For example, in *Arizanovska v. Wal-Mart Stores, Inc.*,[96] Ms. Arizanovska asked Wal-Mart for an accommodation when her doctor told her she could lift no more than ten pounds.[97] Wal-Mart denied the accommodation and placed her on an involuntary leave of absence.[98] The Court held that this Wal-Mart policy, which treats pregnancy different from disabilities accommodated by the ADA, was permissible.[99] Such disparate treatment of workers who are not treated the same as other non-pregnant employees similar in their ability to work is a violation of the PDA.

2. Recognizing the realities of childbirth rather than penalizing women for choosing to have a family

While the PDA may not leave room to provide benefits or incentives for women to have children, it does provide a floor for minimum protections. As Feinberg notes, "[i]nevitably, childbirth involves a period of disability.

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94 Brake & Grossman, *supra* note 1 at 69–70.

95 *See, e.g.,* Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (holding that the ADA requires reasonable accommodation of an employee with a disability to a vacant position to which he seeks to transfer).

96 Arizanovska v. Wal-Mart Stores, Inc., 682 F.3d 698 (7th Cir. 2012).

97 *Id.* at 5.

98 *Id.* at 5–6.

99 *Id.* at 702.

Failure to consider this fact in fashioning a leave policy constitutes discrimination on the basis of pregnancy. Under the PDA, this constitutes gender-based discrimination and is therefore prohibited."[100] Despite the progress in statutory law, pregnant women need extra protections so they do not have to face the disparate impacts that men would never have to encounter in the workplace.[101] The disparate impact analysis takes into account the realities of childbirth and the need for women to have adequate leave, disability benefits, and reinstatement in the same or similar role as before her pregnancy leave. Employers who fail to take into account the needs of pregnant women implicitly further gender discrimination and continue to force women to make the difficult and unnecessary choice between career and family.

VI. CONCLUSION

Throughout modern history, pregnant women have faced considerable obstacles in entering the workforce, maintaining a successful career trajectory, and making a decent living while often dealing with disabilities and complications arising from pregnancy. In this scheme, women at lower socio-economic levels are the most at-risk population; the PDA does little to protect poorer women from harsh workplace policies. At this time, the law can be exercised as a powerful tool to secure rights for pregnant women. The California and federal judiciary can expressly tackle the ideas of disparate impact, reasonable accommodations, and proper leave laws. In addition, state and federal legislatures can address the same ideas through legislation that will allow women to maintain dignity in their jobs, raise a family, and maintain a career without unnecessary complications.

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100 Feinberg, *supra* note 67 at 151; 42 U.S.C. § 2000e(k).

101 *Abraham, supra* note 67 at 819.