2005

"Has the Millennium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America

Courtni E. Molnar
University of Michigan Law School

Follow this and additional works at: http://repository.law.umich.edu/mjgl

Part of the Civil Rights and Discrimination Commons, Labor and Employment Law Commons, Law and Gender Commons, and the Legislation Commons

Recommended Citation
Available at: http://repository.law.umich.edu/mjgl/vol12/iss1/4

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlawrepository@umich.edu.
"HAS THE MILLENNIUM YET DAWNED?": A HISTORY OF ATTITUDES TOWARD PREGNANT WORKERS IN AMERICAT

Courtni E. Molnar*

I. INTRODUCTION  •  163
II. FIRST COMES WORK, THEN COMES MARRIAGE  •  167
III. THEN COMES BABY IN A BABY CARRIAGE  •  170
IV. THE EXCEPTIONS: WORKING CLASS AND BLACK WOMEN  •  176
V. ACCOMMODATION  •  179
VI. INDIVIDUAL ASSESSMENT AS AN ALTERNATIVE SOLUTION  •  183
VII. CONCLUSION  •  186

I. INTRODUCTION

In order to eradicate pregnancy discrimination, its history must be addressed.1 Although pregnancy discrimination has existed for centuries, most scholarly discussion on the subject begins with several key cases decided in the 1970s and 80s. In Geduldig v. Aiello, the Supreme Court held that discrimination on the basis of pregnancy does not violate the Constitution.2 Two years later, in General Electric Co. v. Gilbert, the Court held that discrimination on the basis of pregnancy is not sex discrimination under Title VII.3 The decision in Gilbert prompted Congress to amend Title VII of the Civil Rights Act of 1964 with the Pregnancy Discrimination Act of 1978 ("PDA").4 Title VII states that it

---

is unlawful for an employer to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin." The PDA changed the definition of the terms "because of sex" and "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions." In *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, the Supreme Court held that the PDA required equal treatment of pregnant workers. Four years later, in *California Federal Savings and Loan Association v. Guerra*, the Court held that providing pregnant workers with favorable treatment did not violate the PDA. These cases interpreting the PDA fueled the debate among feminists over whether pregnant workers should be treated the same as other workers (the equality approach) or whether they should receive special treatment (the difference approach).

Today the equality/difference debate with respect to pregnancy has been dismissed as "nonproductive," and scholarship now is focused on whether pregnancy should be covered under the Americans with Disabilities Act (the disability model). However, a new way to approach

---

5. 42 U.S.C. § 2000e-2(a)(1). The legislative history regarding the addition of "sex" is "meager," Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090 (5th Cir. 1975), and "notable primarily for its brevity." *Gilbert*, 417 U.S. at 143. See also Merit or Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) ("we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"). Supposedly, an opponent introduced the addition of sex in a last minute effort to sabotage the passage of the Civil Rights Act. *Willingham*, 507 F.2d at 1090.


7. *Newport News*, 462 U.S. at 690 ("The Congressional Record is overflowing with . . . statements by individual members of Congress expressing their intention to insure with the Pregnancy Discrimination Act that working women are not treated differently because of pregnancy. Consistent with these views, all three committee reports on the bills that led to the Pregnancy Discrimination Act expressly state that the Act would require employers to treat pregnant employees the same as 'other employees.'").


the equality/difference debate may be to consider the historical record. The history of pregnancy discrimination has been largely ignored by the courts, as Justice Brennan lamented in his dissent in *Gilbert*: "[T]he Court simply disregards a history of General Electric practices that have served to undercut the employment opportunities of women who become pregnant while employed." The PDA has been enforced "without critical evaluation of the societal attitudes producing the pregnancy exclusions the amendment sought to remedy." The history of working during pregnancy has been relatively unexplored. Part of the reason why the history of pregnancy discrimination has not been addressed may be that it has only become acceptable to discuss pregnancy openly in the past decade or two. Historical documents reflect the careful and discrete language that was used to indicate pregnancy. People discussed pregnancy using a variety of euphemisms, such as "in a family way" or "with child," and they mentioned "confinement" rather than childbirth. Even in their private journals and correspondence, women did not mention being pregnant, although they would note that a birth had occurred. In *Muller v. Oregon*, where the Court upheld a maximum hour law for women workers, the Court stated: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her." This statement can be read to refer to the state of pregnancy, although the "burdens of motherhood" certainly continue after birth. Opponents of suffrage also considered pregnancy in their arguments:

The office and duty which nature has devolved upon woman during all the active and vigourous portion of her life would often render it impossible, and still more often indelicate, for

13. "Confinement" was a rather accurate term, considering that women truly were "confined" to the home during pregnancy because it was unseemly for them to appear in public. See text accompanying notes 56-63, *infra*.
her to appear and act in caucuses, conventions or elections, or to act as a member of the Legislature or as a juror or judge.\footnote{16}

The "active and vigourous portion of her life" probably refers to the childbearing years, and the use of the term "indelicate" implies that it would be indecorous and inappropriate for a woman to make the necessary public appearances to participate in the political process while she was in a "delicate condition" during pregnancy. This particular quotation also refers explicitly to the employment context, since it contemplates women acting as members of the Legislature or as judges. Although the \textit{History of Woman Suffrage} heavily documents women's participation "in the professions,"\footnote{17} nowhere do the authors discuss how pregnancy and childbearing might have affected this participation.

This Article will focus on what might be considered the "prehistory" of the PDA in an attempt to shed new light on the equality/difference debate. Beginning as early as the nineteenth century, pregnant workers have been forced into either the equality approach or the difference approach depending mostly on race and class. This Article will show that, at times, both approaches restrained the autonomy of women and even caused harm to individual women and society by contributing to the development of the stereotypes and social attitudes that continue to permit pregnancy discrimination today.

Part II examines the pervasive idea that motherhood is women's natural role, and how childbearing was long considered a marital duty. Part III discusses the social mores and health concerns that forced pregnant women out of the work place. Part IV looks at women who, instead of being forced out of the work force, were forced to continue working through their pregnancies. In Part V, I consider several cases that predate the Civil Rights Act of 1964 and how they can inform recent arguments supporting workplace accommodation of pregnancy using a disability model.\footnote{18} In Part VI, I argue that pregnant workers should not be forced into either a difference model or an equality model, but rather should be treated on an individual basis taking into account their capabilities and preferences. The Article concludes with references to the present day situation of pregnant workers and how the history of pregnancy discrimination can be used to reform the societal attitudes that have permitted this injustice for so long.

\footnote{16} 4 \textit{History of Woman Suffrage} 51 (quoting Hon. Luke P. Poland).
\footnote{17} \textit{See, e.g.,} 3 \textit{History of Woman Suffrage} 305.
\footnote{18} For the sake of brevity as well as my desire not to repeat the extensive literature that already exists on pregnancy discrimination cases dating from the 1970s onward, I have limited my discussion to cases that were brought prior to 1964.
II. FIRST COMES WORK, THEN COMES MARRIAGE

Traditionally, motherhood was seen as woman’s calling and duty. In 1873, Justice Bradley stated,

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator.19

Seventy-five years later, Michigan Supreme Court Justice Butzel said that,

where a woman quits work because of pregnancy, it is difficult to determine when if ever, she will want to return to work. It becomes her first desire to remain at home and care for her child, and in only a few cases, where for economic reasons she must return to work, will she delegate her maternal duties to someone else.20

Women’s biological capacity to become pregnant has been the basis for the belief that women are unfit for employment in the public sphere.21 Employers commonly argued that they should not have to bear the cost by paying women benefits when they choose their natural role over their job.22 Getting married or becoming pregnant signaled that women “were ready to assume their ‘natural’ role.”23

Married women have been especially vulnerable to employment discrimination because of society’s expectation that she fulfill her marital duty by bearing children.24 A recent article suggested that today, “the

20. Packard Motor Car Co. v. Mich. Unemployment Comp. Comm., 31 N.W.2d 83, 88 (Mich. 1948) (Butzel, J., dissenting). The majority in this case allowed a woman who left work due to pregnancy to receive unemployment benefits, reasoning that “she is no longer pregnant and meets all other eligibility requirements.” Id. at 85.
22. Id. at 1136.
23. Id. at 1122.
24. In the 19th century, a wife’s duty to bear children was owed both to her husband out of marital obligation, as well as to the community. Siegel, Reasoning From the Body, supra note 12, at 293, 297.
maternal wall typically arises at one of three points: when a woman gets pregnant; when she becomes a mother; or when she begins working either part-time or on a flexible work arrangement."25 This list neglects to mention an important point preceding any of those—when a woman becomes a wife.26 In the 1860s, the commonly held belief was that "marriage appropriately terminated wage work."27 In the 1880s, married women were expected to stay home if their husbands earned a sufficient income.28 In the nineteenth and early twentieth century, "doctors openly denounced the concept of two-career marriage," of course meaning that a wife belonged in the home.29 In fact, between 1890 and 1920, "[t]he acceptance of gainful employment of women was predicated to a great extent on the belief that they would and should retire to the home after marriage."30 From 1910 to 1940, the societal understanding was that women would work in low-end jobs without advancement, and then leave the workforce after marriage.31 General Electric's explanation of why the disability benefits plan it implemented in 1926 excluded female employees provides an illustration of this attitude: "women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company."32 Until the mid-1960s, married women stood little chance of being hired.33

While white, middle-class, American-born women were expected not to work after marriage, working-class women and black women were not judged if they continued working after they married. As historian Lois Scharf observes, "[c]lass distinctions also marked the opposition to working wives."34 It was more acceptable for working-class women to work out of economic necessity, than for business and profes-

25. Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated Against on the Job, 26 HArv. WOMEn's L.J. 77, 78 (2003).
26. A wedding ring itself can be a signal that a woman plans to have children. This connection still exists, causing women to contemplate removing their wedding rings before job interviews to avoid "bias on the basis of maternity." See Felice N. Schwartz, Breaking with Tradition 9–26 (1992).
27. Alice Kessler-Harris, Out to Work 71 (1982) (hereinafter Kessler-Harris, Out to Work). It also reflected poorly on a husband if his wife worked, because it was assumed that he was incapable of supporting his family himself. This assumption no doubt contributed to some men's discriminatory attitudes toward working women.
28. Id. at 98.
29. Siegel, Reasoning From the Body, supra note 12, at 310.
30. Lois Scharf, To Work and To Wed 17 (1980).
31. Kessler-Harris, Out to Work, supra note 27, at 249.
32. Quoted in Gilbert, 429 U.S. at 150, n.1 (Brennan, dissenting).
33. Finley, supra note 21, at 1123.
34. Scharf, supra note 30, at 38.
sional women "who supposedly worked because they desired an outlet for their energies and talents, needed the psychological gratification, and deserved the enhanced status that derived from paid work."\(^{35}\)

Married black women have historically had high work rates. In the decades after the Civil War, the number of African-American women participating in the work force rose dramatically, including married women.\(^{36}\) Part of the reason for this phenomenon was the lack of job opportunities for black men after the Civil War, coupled with a steady demand for black women to work as private household servants, especially in the South.\(^{37}\) But this high rate of participation in the workforce was not necessarily a voluntary choice: "For the most part, black wives and mothers throughout this nation's history have been forced to labor outside their homes—forced first by slaveholders and then by the threat of starvation and homelessness that plagued their families after emancipation."\(^{38}\) But "[e]ven where family income, husband's employment, and demographic factors are held constant, black women were still far more likely to work than white women."\(^{39}\) The fact that black women are an exception to the rule of leaving employment upon marriage also suggests that for them, "[p]regnancy is to receive no special status in the workplace."\(^{40}\)

A case arising in Ohio in 1953, *Neff v. Board of Review, Bureau of Unemployment Compensation*,\(^{41}\) illustrates the deeply entrenched belief that pregnancy was a natural part of the marital role. *Neff* interpreted an unemployment statute that stated: "... no individual may ... be paid benefits for the duration of any period of unemployment with respect to which the administrator finds that such individual quit work to marry or because of marital, parental, filial or other domestic obligations."\(^{42}\) In 1952, this statute was amended with the addition of the words "or became unemployed because of pregnancy."\(^{43}\) The *Neff* court held that "[t]he pregnancy of a married woman is clearly a condition arising out of 'marital, parental, filial or other domestic obligations.' To hold otherwise would disregard established laws and customs involving the

---

35. *Id.* at 37–38.
36. *Kessler-Harris, Out to Work*, *supra* note 27, at 123.
38. *Id.* at 323.
42. *Id.*
43. *Id.*
family. Insofar as a married woman is concerned, the amendment . . .
did not change existing laws.\footnote{44} This same view was echoed by
courts in other parts of the country some years later.\footnote{45}

III. THEN COMES BABY IN A BABY CARRIAGE

If women did not leave employment upon marriage, they left upon
pregnancy.\footnote{46} Some left voluntarily, while others left because they knew
they would be discharged once the pregnancy was revealed.\footnote{47} Many em-
ployers required women to leave upon learning of the pregnancy, and
would not rehire them for a year or two following the birth, if at all.\footnote{48}
Some women were fired outright, and others were relegated to lower
ranking jobs.\footnote{49} However, the absence of maternity leave policies usually
forced women to quit work without any other options.\footnote{50}

The common assumption was that pregnant women were disen-
gaged from the workplace, and so they belonged at home.\footnote{51} One woman
who became pregnant in 1947 explained that she “quit her job without
even bothering to ask her boss for permission to continue working, since
it was mutually understood that women would stop working when they
became pregnant.”\footnote{52} In the 1950s and 60s, many employers had manda-
tory leave policies requiring women to leave work upon reaching a
certain month of pregnancy, regardless of whether they were able and
willing to continue working.\footnote{53} As late as 1960, women were still com-

\footnote{44} Id.
\footnote{45} \textit{See}, \textit{e.g.}, Luke v. Mississippi Employment Sec. Comm., 123 So.2d 231, 234 (Miss.
1960) ("It is clear therefore that pregnancy of a married woman is clearly a condition
arising out of ‘marital, filial, and domestic circumstances and obligations.’ To hold
otherwise would destroy established laws and customs involving the family.").
\footnote{46} Scharf, \textit{supra} note 30, at 107. By the 1940s, labor statistics “indicat[ed] that young
women were increasingly less likely to retire upon marriage . . . but waited until the
birth of their first child.”
\footnote{47} Sheila B. Kamerman, Alfred J. Kahn, & Paul Kingston, Maternity Policies
\footnote{48} Elizabeth D. Koontz, \textit{Childbirth and Childrearing Leave: Job-Related Benefits},
N.Y.L.F. 480 (1971).
\footnote{49} Finley, \textit{supra} note 21, at 1123.
\footnote{50} Id.
\footnote{51} Wendy Williams, \textit{Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treat-
\footnote{52} Kamerman \textit{et al.}, \textit{supra} note 47, at 1–2.
\footnote{53} Id. at 35. It was not until 1974 that the Supreme Court struck down mandatory
maternity leaves imposed regardless of a woman’s ability or desire to work. \textit{See}
monly fired if they became pregnant. In 1964, pregnancy was the most frequently reported reason why married women under age thirty-five quit work.

Policies requiring mandatory leaves of absence during pregnancy were an outgrowth of the Victorian view that it was obscene for a pregnant woman to be seen in public. Having an obviously pregnant woman present in the workplace caused embarrassment and discomfort for other employees. This view derived from the fact that “pregnancy is an obvious manifestation of one kind of female sexuality.” Perhaps some women simply quit their jobs upon pregnancy to avoid an uncomfortable conversation with their employers. As late as the 1950s, pregnant women consciously avoided appearing in public places. It was not until after the 1952–53 television season, when Lucille Ball appeared on “I Love Lucy” during her pregnancy, that views began to change. However, the courts continued to consider the issue of public contact when deciding cases involving a pregnant woman working. In 1957, a New York court reversed a decision denying unemployment compensation to a woman who had been discharged due to pregnancy. The court stated that:

the claimant’s pregnancy did not interfere with her ability to perform the kind of work in which she had been engaged. Her work was primarily of a research character and did not require contact with the public, so that her advanced stage of pregnancy did not of itself disqualify her from such employment. The claimant’s doctor had certified that she was capable of working until delivery. The Board based its decision [denying compensation] upon its holding in another case that a woman in an advanced stage of pregnancy was not available for work.

54. Williams, supra note 51, at 335.
55. Finley, supra note 21, at n.18, citing a Bureau of Labor Statistics Study.
56. Koontz, supra note 48, at 481.
57. KAMERMAN ET AL., supra note 47, at 38.
58. Finley, supra note 21, at 1134.
59. See Degler, supra note 14, at 59.
60. See Geoffrey P. Miller, Custody and Couvade: The Importance of Paternal Bonding in the Law of Family Relations, 33 IND. L. REV. 694–97 (2000) for a detailed discussion of how Lucy’s pregnancy was handled on the television program. As an actress on a popular television program, Ball was certainly the most visible woman working during pregnancy; see also Marc Mory & Lia Pistilli, The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families, 18 Hofstra Lab. & Emp. L.J. 689, 691 n.15 (2001).
as a saleswoman requiring contact with the public. That holding was obviously irrelevant in this case.\textsuperscript{62}

Presumably, if the claimant's work had involved contact with the public, the court would have reached the opposite result. In a 1962 Ohio case, an waitress was forced to apply for a leave of absence when, after revealing her early stage of pregnancy, her employer told her "that she could not continue working because her appearance was unseemly."\textsuperscript{63}

Women faced a double bind because pregnancy forced them out of jobs, and at the same time made them ineligible for unemployment compensation. In the 1930s, legislation in four states disqualified women from receiving unemployment insurance benefits if their employers' discriminatory policies forced them to leave the workplace upon marriage.\textsuperscript{64} In 1960, thirty-five states excluded pregnant women from unemployment insurance benefits.\textsuperscript{65} These laws indicate that while working after marriage was frowned upon, working after pregnancy was much worse.

Most of the pregnancy discrimination cases brought before 1964 dealt with unemployment compensation. Pregnant women were considered unavailable for work for a set period of time before and after childbirth, whether or not they were willing to work. If they were unable to find work after this period had expired, they were still ineligible for benefits because they had left work without "good cause." For example, a South Dakota court denied benefits to a woman who had resigned

\textsuperscript{62} Id.
\textsuperscript{64} SCHARF, supra note 30, at 129.
\textsuperscript{65} KAMERMAN ET AL., supra note 47, at 37. See also Siegel, Employment Equality, supra note 1, at n.63. ("Pregnancy was excluded from state unemployment insurance coverage, on the presumption that the pregnant woman was no longer an active candidate in the labor market—a statutory presumption that prevailed until prohibited by federal law." See Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (1982) (no person shall be denied unemployment compensation by state law solely on the basis of pregnancy"). In Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511, 512-13 (1987), the Supreme Court affirmed the denial of unemployment benefits to a woman who had taken a leave of absence from work because of her pregnancy, and was told that no openings were available when she was ready to return to work. The Court held that § 3304(a)(12) only prohibits discrimination and does not mandate preferential treatment for pregnant women, and it was not relevant that she left work due to pregnancy. Wimberly, 479 U.S. at 517. For criticism of this decision, see Mary F. Radford, Wimberly and Beyond: Analyzing the Refusal to Award Unemployment Compensation to Women Who Terminate Prior Employment Due to Pregnancy, 63 N.Y.U.L. Rev. 532 (1988); Elizabeth F. Thompson, Unemployment Compensation: Women and Children—The Denials, 46 U. Miami L. Rev. 751 (1992).
due to pregnancy on March 26, 1941.66 She had the baby on July 19, 1941.67 After recovering from “her confinement,” as the court put it, she applied for reinstatement and was rejected.68 The court said that she “was justified in leaving her employment, but it does not follow that she was entitled to unemployment benefits.”69 The court refused to hold that she “voluntarily” left her position, but at the same time decided she left her employment “without good cause.”70

In addition to the social mores that deemed it inappropriate for pregnant women to appear in public, common medical beliefs were thought to justify the exclusion of women from the workplace. Not only did women harm themselves and their future offspring by working, they also threatened the stability of American society. In 1905, a member of the American Federation of Labor stated that “if women labor in factories and similar institutions they bring forth weak children who are not educated to become strong and good citizens.”71

The dominant medical theory in the nineteenth and early twentieth century advised that pregnancy should be a period of “intense mental vacuity” to avoid “prenatal impressions.”72 It was believed that the brain and the uterus competed for energy and nutrients, and, therefore, the pregnant woman must avoid mental efforts or risk insanity.73 In order to prevent deformity, pregnant women were to avoid intellectual stimulation and all “shocking, painful or unbeautiful sights.”74 Pregnant women were also advised to avoid lust, anger, aggression, and mental or physical overexertion.75 Women who did not comport themselves properly under these theories would be judged negatively by society.

Women’s employment, particularly overwork, was blamed for a whole host of detriments to health, including pelvic and uterine disease, infant mortality, miscarriage, and premature births. Working prolonged hours supposedly caused inflammation in the pelvis and rendered women sterile or permanently invalid.76 One New York medical inspector said

67. Id. at 499.
68. Id. at 500.
69. Id.
70. Id.
71. KESSLER-HARRIS, OUT TO WORK, supra note 27, at 154.
72. BARBARA EHRENFREICH & DEIRDRE ENGLISH, FOR HER OWN GOOD 114 (1978).
73. Id.
74. Id. at 100.
75. MARY P. RYAN, WOMANHOOD IN AMERICA 267 (1975).
76. LOUIS D. BRANDEIS & JOSEPHINE GOLDBLATT, WOMEN IN INDUSTRY 37 (1908).
that overwork of the expectant mother was known to cause evil effects.\textsuperscript{77} Overwork at any time in a woman’s life, even before marriage and pregnancy, was said to have a disastrous effect upon childbirth.\textsuperscript{78}

The famous “Brandeis brief” of 1907 catalogued many undesirable consequences affecting women’s health and childbearing capabilities.\textsuperscript{79} Among the problems caused by working conditions that required standing and exposure to heat were “displacement, flexions, and versions of the uterus,” pelvic disease, and difficulty in childbirth.\textsuperscript{80} Brandeis blamed an increase in the need for “instrumental delivery” on the numbers of women working during pregnancy.\textsuperscript{81}

Wage labor was believed to increase the rate of infant mortality. The evidence that infant mortality was caused by the mother’s employment was simply that “infant mortality is highest in towns where women are employed in large numbers.”\textsuperscript{82} This evidence ignores the many other causes of infant mortality that could be present, particularly in densely populated areas. The children born to mothers who worked during pregnancy were said to be more susceptible to disease.\textsuperscript{83} The closer to delivery that the pregnant woman worked, the greater the supposed harm:

An occupation requiring a woman to stand during the greater part of the day when continued up to within a few days or even hours of the time of parturition, must act to the detriment of the offspring, and there is less chance of the latter coming into the world fully grown, well formed, and in good health.\textsuperscript{84}

A 1915 report stated: “The variations in still birth rates and the mortality from early infancy in relation to the interval of rest before confinement indicate the importance of the mother’s ceasing her employment outside the home at least two weeks before her

\textsuperscript{77} ELIZABETH F. BAKER, PROTECTIVE LABOR LEGISLATION 256 (1925).
\textsuperscript{78} Brandaes, supra note 76, at 36.
\textsuperscript{79} Id. Before becoming a Supreme Court justice himself, Louis Brandeis wrote a brief to the Court using social science data to support the maximum hour law for women workers at issue in Muller v. Oregon, 208 U.S. 412 (1908). Since then, briefs that rely on social science data have been called “Brandeis briefs.”
\textsuperscript{80} Id. at 38.
\textsuperscript{81} Id. at 38–39.
\textsuperscript{82} BAKER, supra note 77, at 254.
\textsuperscript{83} Brandaes, supra note 76, at 38.
\textsuperscript{84} Id. at 42.
confinement." The Factory Investigating Commission also found factory labor responsible for prematurity and infant mortality.

In the 1920s and 30s, supporters of protective labor legislation for women cited these types of harm to support the passage of maximum hour laws and prohibitions against night work. Ideas began to change during World War II when women were needed in industry while the men were abroad. In 1942, the Women's Bureau issued "Standards for Maternity Care and Employment of Mothers in Industry," saying a pregnant woman should give first consideration to her own health and the health of the child, but may find it necessary to work.

During World War II, record numbers of women began working outside of the home as part of the war effort. Although women were recruited to work during the war through media efforts glorifying "Rosie the Riveter," for example, the war did not change general attitudes about the employment of married women and mothers. The Manpower Commission stated that: "The first responsibility of women with young children, in war as in peace, is to give suitable care in their own homes to their children." The Women's Bureau of the U.S. Department of Labor was still recommending that pregnant women leave work six weeks before delivery and remain on leave for two months after childbirth. In 1942-43, women were still commonly fired when they became pregnant, or required to take an unpaid leave of absence. During this period, however, working during pregnancy was probably not as much of a concern since most of the men were abroad.

Many women left their jobs (voluntarily and involuntarily) when the war ended. Young women who had been employed continued to

85. Baker, supra note 77, at 256 (quoting a study in Baltimore on births in 1915).
86. Id. at 257.
87. Protecting Women 347 (Ulla Wikander et al. eds., 1995). Such a law does not account for women who would prefer to work evening shifts when their husband or other family members are available to provide childcare.
88. Kamerman et al., supra note 47, at 34.
89. Ryan, supra note 75, at 316-17 ("8 million women entered the work force during WWII . . . seventy-five percent of the new workers were married").
90. Alice Kessler-Harris, Women Have Always Worked 142 (1981).
92. Finley, supra note 21, at n.20. See also Williams, supra note 51, at 334.
93. Kamerman et al., supra note 47, at 35.
94. See Degler, supra note 14, at 421 (noting the "fall in the birth rate consequent upon the husband's absence").
95. Ryan, supra note 75, at 319 (by the end of the war, many women were fired and employers resumed old discriminatory policies). See also U.S. History As Women's History 299 (Linda K. Kerber et al. eds., 1995) (economic and employment gains made during WWII were "snatched away in the postwar period").
leave their jobs at marriage. Women resumed their “natural roles” as wives and mothers despite their experiences during World War II.96 However, it is often reported that the number of women in the workforce continued to grow every year following the war.97 This is because the largest age group of women entering the workforce in the 1950s and 60s was women over age 45—women who had already reared their children.98

IV. The Exceptions: Working Class and Black Women

While the majority of white, middle-class, American-born women were being forced out of the workplace when they became pregnant, some women were being forced to work during their pregnancies. In both groups, it is easy to imagine that some women wanted to work, while some would have chosen not to work if they had been given a choice. As in other areas of the law, blanket provisions either forcing women to work or forcing them out of the workplace infringe upon individual rights and the availability of and opportunity to make choices.

In Colonial America, some women worked as indentured servants, providing labor for a period of years. If a female indentured servant became pregnant, the man responsible could buy out her remaining term.99 Otherwise, her term would be extended to make up for her reduced services during the pregnancy and recovery after the birth, as well as while she cared for the infant.100 The fact that these women continued working while providing reduced services foreshadows the part-time and flex-time work arrangements that some working mothers desire today. However, these indentured servants were not given the right to choose this arrangement. Perhaps not all of them were limited in the services they were able to provide during the pregnancy, and if they had a choice they might have preferred not to lengthen their term of service. An inquiry into whether the term of service was extended automatically and

96. Degler, supra note 14, at 430.
97. Ryan, supra note 75, at 319 (“the bulk of American women would never again revert to the low level of participation in the labor force that was maintained before the war.”); see also Weiner, supra note 91, at 111 (citing 1944 Women’s Bureau survey that found that 80% of women working in war industries wanted to continue after the war’s end), and 112 (stating that the employment rate of women increased along with the fertility rate).
98. Degler, supra note 14, at 432 (“The women who were entering the work force were older women; it was the young women who were having the children”).
100. Id. This extension of service was also intended as a punitive measure.
consistently to indentured servants who became pregnant and were unable to have their remaining terms bought out is beyond the scope of this Article.

Before the Civil War, slave owners accounted for pregnancies among slave women in various ways. One reason women were used as field laborers was because masters did not want to invest in training them for skilled occupations since “their work lives were frequently interrupted by childbearing and nursing.”101 Whereas generally working women were thought to endanger their own health as well as that of their future offspring, some slave owners felt that “‘labor is conducive to health; a healthy woman will rear most children.’”102 Therefore, they were willing to allow temporary lapses in productivity due to pregnancy and nursing.103 Part of their motivation was that the children had financial value and helped to increase the master’s wealth.104 This became especially important to the slave owners after the importation of slaves was banned in 1808 and natural reproduction was the only way to replenish and increase the slave population.105 Female slaves also wanted to enhance their value in this way, because their fertility made it less likely that they would be sold and separated from their families.106 Slave women also received rewards for pregnancy, varying from new dresses or hair ribbons to relief from work in the fields and extra weekly rations.107 Some slave women were given work relief during the final months of pregnancy on account of their condition, but only after the fifth month of pregnancy.108

Not all slave owners were willing to sacrifice immediate profit returns while women were pregnant—they “extracted physical labor from the pregnant and nonpregnant alike.”109 Some slave owners “forced women to work in the fields during and after their “confinement”—a period of time that might last as long as four to six weeks, or might be considerably shortened by masters who had women deliver their children

101. Jones, supra note 37, at 18.
102. Id. at 19.
103. Id.
105. Davis, supra note 104, at 6; Roberts, supra note 104, at 26.
107. DeGler, supra note 14, at 118; Roberts, supra note 104, at 25.
109. More Than Chattel 148 (David Barry Gaspar & Darlene Clark Hine eds., 1996); see also Davis, supra note 104, at 9.
between the cotton rows." In a perversion of the modern notion of accommodation, masters commonly whipped pregnant slaves by having them lay face down over a hole that had been dug to provide space for the protruding belly.

In the early twentieth century, many black families participated in sharecropping. Black women often worked in the fields during pregnancy. A 1918 Children's Bureau report stated that "to some extent, the amount of rest a mother can have before and after confinement is determined by the time of year or by the stage of [the] cotton crop." Jones attributes low fertility rates among black women during this period to "involuntary constraints on normal, healthy childbearing," especially the demands of heavy labor in laundries and households where they worked as domestic servants. In 1896, a black physician observed that the great number of stillbirths among black women should not be a surprise:

since they do most of the work that is liable to produce this state of things[]. They do the cooking, the sweeping, the lifting of heavy pots; they carry the coal, the wood, the water; they carry heavy burdens on their heads; they do heavy washing, make beds, turn heavy mattresses, and climb the stairs several times during the day, while their more favored white sister is seated in her big armchair, and not allowed to move, even if she wanted to.

This observation astutely points out the lack of autonomy for both black and white women—while black women were forced to work, white women were forced not to.

In the early decades of the twentieth century, many working class women were employed in factories. Working class women were not

110. Jones, supra note 37, at 19.
111. Id. at 20. See also Roberts, supra note 104, at 39–40, 167; More than Chattel, supra note 109, at 27–28; Davis, supra note 104, at 9.
112. Jones, supra note 37, at 87.
113. Id. at 123.
114. Id.
115. Although the timing might lead one to believe that World War I impacted women's participation in the workforce, this was not the case. While the war did give women some opportunity to work in areas where they had previously been shut out, less than five percent of the women employed during the war were new to the workforce. Kessler-Harris, Out to Work, supra note 27, at 219. World War I did not have as much of an effect as World War II (discussed supra) because it did not last as long, and a much smaller number of men were drafted for World War I. Degler, supra note 14, at 419.
given time off when they became pregnant, nor for recovery after childbirth. The Brooklyn Pediatric Society advocated a law that would restrict pregnant workers from employment in factories for a period immediately before and after childbirth, but the factory commission passed a bill prohibiting work after childbirth only. Even still, this law was not enforced. Baker reports that women did not complain about working after childbirth, but in fact protested if they were not given work during the prohibited period. One woman reported that her “working life was interrupted only by the birth of six children, several of whom she took to the factory to nurse after a brief confinement.” For these women, economic necessity forced them to work.

V. Accommodation

Many legal scholars propose that pregnancy should be accommodated in the workplace under a disability model. This is not a new idea. As early as 1951, a Pennsylvania court stated that “pregnancy must be treated as a temporary disability, the continuance of which varies with different individuals.” The Americans with Disabilities Act of 1990 (“ADA”) prohibits discrimination against a “qualified individual with a disability,” who “with or without reasonable accommodation, can perform the essential functions of the employment positions that such

116. EHRENREICH & ENGLISH, supra note 72, at 102.
117. BAKER, supra note 77, at 257.
118. Id.
119. Id.
individual holds or desires."¹²² "Reasonable accommodation" includes anything from making facilities accessible, to permitting part-time or modified work schedules.¹²³ Like other disabled persons, pregnant women should be entitled to reasonable accommodation. The cases discussed below show that many women quit their jobs, not because they became pregnant, but because of inflexible working conditions during pregnancy.¹²⁴

One such case was brought in Iowa in 1948. The appellant was denied unemployment benefits after she left her job because of sickness and discomfort due to pregnancy.¹²⁵ Although the opinion does not specify exactly what the woman's complaints were, she may have been able to continue to work if accommodations had been available. The Iowa court affirmed the decision, going so far as to state that the "[c]laimant's case has some analogy to that of one who deliberately maimed himself to unfit himself for work."¹²⁶ Any pregnant woman would face a difficult challenge going before a court with that view.

A woman who brought suit in Connecticut several years later faced a similar challenge. After becoming pregnant, Lillian Curry left a job where she had to climb stairs, but was unable to find other employment.¹²⁷ The court stated:

A pregnant woman, although not ill in the ordinary sense of the word and not physically unable to work, is in a distinct category of workers. Her condition generally requires that she be treated with greater care than the ordinary employee. Her dependability as to attendance on the job generally may be doubtful. Her ability to work is always temporary for the reason that it will terminated on a predetermined date, unlike the ordinary employee . . . It is doubtful whether a person in such physical condition is genuinely attached to the industrial labor market whether her loss of income when unemployed is due to the lack of available employment in the market place.¹²⁸

¹²³. 42 U.S.C. § 12111 (9) (A) & (B) (2000).
¹²⁴. Schlichtmann, supra note 120, at 357.
¹²⁶. Id.
¹²⁸. Id. at 808. The court continued that, "The solution of her problem lies in the field of maternity benefits, which the unemployment compensation act does not provide." Note that federal legislation providing maternity benefits was not enacted until 36
The plaintiff's problem in this case was simply climbing stairs, an activity that could have perhaps been shared with a more able-bodied co-worker, if installing an elevator proved to be cost-prohibitive. Instead of addressing the needs of this particular plaintiff, the court decided to take a broad view and express its opinion that employers are justified in firing pregnant women who do not quit.

Similarly, two cases from 1961 show instances where a simple accommodation could have helped a pregnant woman stay on the job. In Gearhart v. Unemployment Compensation Board of Review, a Pennsylvania court held that "a claimant who was advanced in pregnancy [4 1/2 mo.] and left her work on advice of her physician that she perform no work which required her to stand while performing it was properly disqualified for benefits as being unavailable for work within the meaning of the statute." Providing a chair or a stool for her to use was apparently never considered. In Medwick v. Board of Review, the plaintiff's employer permitted her to work until the end of the sixth month of pregnancy. However, she left work in her fifth month of pregnancy years after this case, when the Family Medical Leave Act was passed in 1993. But see Mory & Pistilli, supra note 60, at n.15 (arguing that the FMLA does not provide real solutions for women); Greenberg, supra note 9, at 247-49 (discussing the benefits and limitations of the FMLA for pregnant women).

Connecticut followed the holding of this case in Janello v. Administrator, Unemployment Compensation Act. There, the court dismissed an appeal for a decision denying unemployment benefits to a woman who had been fired when she informed her supervisor that she was pregnant. Her anticipated due date was October 27, 1961. She was fired on March 10, 1961. The court decided the employer was justified because "the availability of the claimant as an employee had become uncertain and indefinite. Depending on her physical condition, she might have been compelled or might have chosen to terminate her employment at an early date. Her employer, because of this condition and situation, determined that it was to its interest to end the uncertainty . . . and to train the replacement of its pregnant employee before its busy season began. There is no finding that this action was not in good faith. It appears based on valid economic considerations. A pregnant woman, although not ill in the ordinary sense of the word and not physically unable to work, is in a distinct category of workers. Her condition generally requires that she be treated with greater care than the ordinary employee. Her dependability as to attendance on the job generally may be doubtful. Her ability to work is always temporary, for the reason that it will terminate on a predetermined date, unlike the ordinary employee's ability to work." Janello, 178 A.2d 282, 283 (Conn. Super. Ct. 1961).

129. Under the ADA, employers may not have to provide an accommodation if it is found to create an "undue hardship," for instance, by requiring significant expense. See 42 U.S.C. § 12111 (10)(A).
"because of warm and uncomfortable working conditions." The court
determined that she was ineligible for unemployment benefits because
she left work voluntarily and without good cause. Yet, had she been
provided with a fan, she may have been able to continue working.

One possible reason why accommodation of pregnancy-related dis-
abilities was not considered during this time was because the position of
the medical profession was that women should not work beyond the
sixth month of pregnancy. This conception remained in place until
1984, when the American Medical Association's Council on Scientific
Affairs recognized that:

> Few of our standard medical beliefs about the physical and emotional
characteristics of pregnancy have any scientific basis . . . the advice given by
generations of physicians regarding work during normal pregnancy has historically been more the
result of social and cultural beliefs about the nature of pregnancy (and of pregnant women) than the result of any
documented medical experience with pregnancy and work . . . [women with uncomplicated pregnancies] should be able . . .
to continue productive work until the onset of labor.

One scholar points out that disabilities associated with pregnancy
should be easier to accommodate, since the common symptoms are pre-
dictable. Some of the most commonly reported conditions (nausea
and vomiting, headache, backache, fatigue, frequent urination, and in-
creasing size) could be easily accommodated by providing breaks and
flexible schedules.

Another reason women will be better off with the right to reason-
able accommodation is that if their employers accommodate their needs
during pregnancy, they will be more likely to return to work after the
child is born. They will base their expectations of their employers’ atti-
dutes toward working parents in part on how the employers responded
to their needs during pregnancy. At the same time, it is important to
recognize that some women would prefer to leave their jobs during

---

132. Id. at 252.
133. Id. at 255.
134. Schlichtmann, supra note 120, at 350. See also Finley, supra note 21, at 1133 (criticiz-
ing the “tendency to overgeneralize and to overreact to the supposed frailties of
pregnancy”).
135. Quoted in Schlichtmann, supra note 120, at 350.
136. Calloway, supra note 120, at 34.
137. Id. at 7.
138. Schwartz, supra note 26, at 58.
pregnancy, whether or not accommodation was available. Congress specifically considered this fact: "if a woman wants to stay home to take care of the child, no benefit must be paid because this is not a medically determined condition related to pregnancy."\(^{139}\) Although the Supreme Court has interpreted the PDA to be an equality statute, it is interesting to note that Congress contemplated something like accommodation in its conception of the equal treatment of pregnant women: "The ‘same treatment’ may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work.\(^{140}\)

VI. INDIVIDUAL ASSESSMENT AS AN ALTERNATIVE SOLUTION

The best solution to the equality/difference debate may be to abandon both strict models in favor of individualized assessment of a pregnant woman’s capabilities and preferences. This approach would allow women to choose equal treatment in some instances, while also allowing them the right to reasonable accommodation when needed. As early as 1949, an Alabama court noted that “a valid public policy exists to support a separate classification of employees who are expectant mothers.”\(^{141}\) Other courts also recognized this fact in a number of cases discussed below.

In 1957, a New Jersey court overruled a collective bargaining agreement that stated that “[i]n no case shall an expectant mother be permitted to work beyond the end of the fifth month of pregnancy.”\(^{142}\) The plaintiff was employed “as an assembler, solderer and wire stripper, [which] called merely for the use of her hands while she was seated.”\(^{143}\) The court noted:

[T]here is ‘no convincing evidence that employment up to the time of delivery is harmful provided the physical condition of the woman is satisfactory and the work is suitable.’ The ‘better

\(^{139}\) Legislative History, supra note 4, at 151 (Senator Perkins, Report No. 95-948 Prohibition of Sex Discrimination Based on Pregnancy at 5).

\(^{140}\) Id. (Senator Perkins, Report No. 95-948 Prohibition of Sex Discrimination Based on Pregnancy at 5).


\(^{143}\) Id.
opinion,'... is to allow the matter to be determined in each case as it arises, not according to a rigid rule (such as the five months' rule here) but according to the nature of the work, the woman's physical condition and the other circumstances presented by the case. Only five states prohibit employment of pregnant women in factories and other specified establishments, and then only for the following periods prior to childbirth [ranging from two weeks to four months]... The former statutes provide, generally speaking, for noticeably shorter periods than the [New Jersey] Unemployment [Compensation] Laws, and it may perhaps be deduced from that fact that the Unemployment Laws in this respect take into account something other than society's concern in the worker's health.144

The court held that her layoff was not voluntary and so she was entitled to unemployment benefits.145

Two Pennsylvania opinions emphasized that the decision to continue working should be made by the individual woman, not the employer. In 1955, beauty shop employee Minnie Niebauer was fired after disclosing to her employer that she was six weeks pregnant.146 The employer admitted Niebauer was fired solely because of her pregnancy.147 The employer testified that "she and her partner 'didn't want anything to happen to her' and added, 'if she slipped and fell, that wouldn't be good.'"148 Niebauer argued that "her pregnancy did not affect her work, that she opened up the shop every morning, was at the shop every day, took care of her customers the same as she did before her pregnancy and was 'never sick.'"149 The court found that:

We have here a claimant in the early stage of pregnancy, capable of performing her usual work, who is discharged because of real or assumed concern for her welfare on the part of her employers... [T]here is nothing more substantial than unreasonable and formless concern for claimant's safety on the part of the employers. She was willing and able to perform her

144. Id. at 19.
145. Id. at 15, 17–20.
147. Id. at 453.
148. Id.
149. Id.
usual work but was prevented from doing so by her employers.150

In a similar fact situation five years later, the same court reached a different result when the claimant and not the employer raised the concern over the possibility of a slip and fall. In Novak v. Unemployment Compensation Board of Review, the claimant worked as a general office clerk for a publishing company.151 The court explained that “one of her duties was to take readings off of the presses, which she did every two hours. She claims that because of her pregnancy she was afraid that while making these readings she might fall because the floor around the presses was slippery.”152 The court denied her benefits, holding that “[i]f she is to be eligible for unemployment benefits, her conduct must be consistent with a genuine desire to work, when she is pregnant as well as when she is not.”153 These two cases show that courts did take women’s individualized choices into account when determining willingness to work.

The equality model demands that pregnant women continue working without any accommodation. Equality feminists during the second women’s rights movement were “profoundly opposed to traditional conceptions of how families should be organized.”154 These feminists did not support women who chose to leave the work force upon marriage and/or pregnancy because they thought this occurrence would weaken their position. This attitude contributes to the general hostility to the idea of women balancing children with a career.155 Furthermore, this view ignores the fact that even during a “normal” pregnancy, many women will have different needs than before they became pregnant.156 If those needs are not met, the women will be unable to do their jobs as well as before. This result subverts the interests of the equality feminists by perpetuating the idea that women do not belong in the workplace during pregnancy.

Women should have the ability to make the choices that men have traditionally made to advance their careers, without facing skepticism that they will fall prey to stereotypes based on women’s “natural role.” Likewise, women who choose to leave the workforce when they have

---

150. *Id.* at 454.
152. *Id.* at 19.
153. *Id.* at 20.
156. *See* Schlichtmann, *supra* note 120, at 357.
children should be able to make that choice freely, and not because gender inequities give women who earn less than their husbands an incentive to leave the workplace. Individualized assessment of pregnant workers achieved through open communication between women and employers would allow women to make whatever choices they feel are necessary to help them achieve their goals.

VII. CONCLUSION

This Article has shown that negative attitudes toward pregnant women working are long entrenched in our history. These attitudes are still demonstrated today when pregnant litigators face discriminatory comments from judges in the courtroom, and female firefighters and EMS workers are advised to have abortions should they become pregnant, or they will be fired. The only way to eliminate these problems is to change underlying attitudes.

Current legislation has had questionable success. The PDA is not divorced from long-standing negative attitudes toward pregnant women. It hurts both men and women by symbolically precluding men from taking full responsibility for pregnancy, and reinforcing the traditional model that women alone have a duty to bear and rear children. Studies have shown that "once it is clear that paid parenting leave can be taken by both men and women . . . discrimination against married women in the childbearing years becomes much less likely." It must be acknowledged that changing societal attitudes will be a painfully slow process. But it is a process that must be undertaken to achieve any real success with company policies that have been established voluntarily, as well as through legislative efforts. Analyzing the history of these attitudes is the first step in reforming the way people

157. See Hewlett, supra note 155, at 287.
158. See Sandy Mastro, Note, Courtroom Bias: Gender Discrimination Against Pregnant Litigators, 8 Wm. & Mary J. Women & L. 155, 164-65 (2001) (citing comments such as, "you are too pregnant to prosecute" and "if your husband had kept his hands to himself you wouldn't be in the condition you are in" (quoting Elizabeth A. Delfs, Foul Play in the Courtroom: Persistence, Cause, and Remedies, 17 Woman's Rts. L. Rep. 309, 317 (1996)).
160. Hewlett, supra note 155, at 279.
161. For instance, when Sweden introduced paid parenting leave for both genders, it took more than twenty years for the percentage of fathers taking leave to increase from 3% to 80%. See id. at 279-80.
think about women's roles. Once that happens, women will be more likely to achieve full participation in the work force instead of being held back by discrimination. §