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## THE FOURTH TRIMESTER

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Saru M. Matambanadzo\*

### ABSTRACT

*This Article introduces a new conceptual framework to the legal literature on pregnancy and pregnancy discrimination: the fourth trimester. The concept of a fourth trimester, drawn from maternal nursing and midwifery, refers to the crucial three to six month period after birth when many of the physical, psychological, emotional, and social effects of pregnancy continue. Giving this concept legal relevance extends the scope of pregnancy beyond the narrow period defined by conception, gestation, and birth and acknowledges that pregnancy is a relational process, not an individual event. In the United States, however, antidiscrimination law has failed to acknowledge the demands of the fourth trimester; it operates from the presumption that pregnancy begins at conception and ends at birth. Without employing a fourth trimester framework, the current federal antidiscrimination regime will continue to permit pregnancy discrimination against women because employers can discriminate on the basis of activities that typify the fourth trimester of the pregnancy. Judges, administrative actors, movement lawyers, and other policy makers should recognize that the law should prohibit discrimination on the basis of fourth trimester activities like breastfeeding, caring for newborn infants, or recovery. As a matter of law and policy, discrimination arising from these activities during the fourth trimester should be regarded as pregnancy discrimination.*

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\* Associate Professor of Law, Tulane University Law School. The author presented versions of this Article at the Lutie A. Lytle Black Women Law Faculty Writing Workshop, "A Scholarly Salon at UNLV," at the New Scholar Program of the South Eastern Association of Law Schools, at LatCrit XVI, and at Southwestern Law School's ClassCrits Conference. She would like to thank participants of those workshops for helpful comments and questions. The author would also like to thank Adeno Addis, Benjamin Barton, Dan Danielsen, Martin Davies, Adam Feibelman, Bob Force, Andrea Freeman, Jim Gordley, Kristen Gresham, Catherine Hancock, Catherine Hardee, Jennifer S. Hendricks, Jancy Hoeffel, Nancy Levit, Christine Littleton, Glen Lunney, Isabel Medina, Pam Metzger, Dave Meyer, Athena Mutua, Shu-Yi Oei, Sally Richardson, Stacey Seichsneider, Amy Stein, George Strickler, Camille Walsh, and Robert Westley for their generous comments and suggestions. In addition, thanks go to Amanda Austin, Anthony Johnson, R.J. Griglio, Tracy Law, Editha Rosario, Alex Wheeden, and Sophie Melissa Woodruff for helpful research assistance and the editors and staff of the *Michigan Journal of Law Reform*, particularly Emma Lawton, Abigail Edwards, and Andrew Clopton, for excellent editing suggestions. Sheila Matambanadzo, Sikwa Matambanadzo, David Noble, and Delilah Noble deserve many thanks for providing fertile conditions for doing this work. All mistakes remain the sole responsibility of the author.

ARIA NO. 1<sup>1</sup>

*I'm indecently clad, trying to hold the front of my shoddy hospital gown closed.<sup>2</sup> The bright white light of the operating theater has given way to a*

1. This Article uses some of the conventions of opera to frame the personal narrative. These conventions reveal the relationship between the fourth trimester of pregnancy and the composing of creative work in a disciplined fashion. The modern usage of the word “opera” derives from the Latin word *opus*, which denoted “activity, effort, labour, work, a work produced . . .” *Opera Definition, Etymology*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/131729?rskey=Woj1hU&result=1&isAdvanced=false> (last visited October 22, 2013). The transition from pregnancy to separate personhood is a work of becoming for mothers and infants. Like an opera, undoing pregnancy during the fourth trimester has a creative labor of love at the center of its enterprise. And like an opera, the undoing of pregnancy and the becoming of motherhood is not natural, essential, or inevitable but is instead a work of art produced through practice and diligence.

2. Throughout this Article, I recount my personal narrative of my fourth trimester with my daughter. This use of narrative is a methodology widely employed in the diverse traditions of critical race theory, *e.g.*, Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997) (utilizing personal narrative and storytelling to develop a concept of critical race practice), feminist legal theory, *e.g.*, PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1992) (employing narrative to highlight the tensions between race and rights in the United States legal system), and queer legal theory. Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57 (2012) (employing personal narrative to deconstruct the sexed nature of mothering). In these disparate critical traditions, the specificity of personal narrative is used for its potential to reveal aspects of the universal or the general. *E.g.*, CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* (2003) (noting how the focusing on the particular experiences of women and girls as a feminist methodology has the potential to provide a foundation for a more universal notion of justice while illuminating struggle, resistance, and marginalization more generally). Feminists claim that the personal is political, ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* x (10th ed. 1986) and the collective process of consciousness-raising is a crucial method for constructing feminist knowledge. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83 (1989) (defining consciousness raising as an epistemological project that is constructed from the “collective critical reconstitution of the meaning of women’s social experience, as women live through it . . .”). While this methodology may be critiqued for its essentialist tendencies, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585-86 (1990), the critical legal tradition has widely adopted the use of narrative, particularly personal narrative, to ground the production of knowledge. Outside of the legal academy, feminists employ personal experience and personal narrative in writing about pregnancy, childbirth, and motherhood. *E.g.*, RICH, *supra* at ix (noting that she “wrote [the book] as a concrete particular person, and in it [she] used concrete and particular experiences of women, including [her] own . . .”). Feminist phenomenology has been particularly committed to using personal narrative to provide insights that start with a personal first person account of pregnancy. *See e.g.*, Iris Marion Young, *Pregnant Embodiment: Subjectivity and Alienation*, in *THROWING LIKE A GIRL: AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* 45 (1990); Sally Fischer, *Becoming Bovine: A Phenomenology of Early Motherhood and Its Practical Political Consequences*, in *PHILOSOPHICAL INQUIRIES INTO PREGNANCY, CHILD-BIRTH, AND MOTHERING* 191 (Sheila Lintott & Maureen Sander-Staudt eds., 2012). Accounts of pregnancy in feminist embodiment theory also utilize the specificity of personal narrative to ground broader general insights about the nature of language, culture, and knowledge. *E.g.*, ROBBIE PFEUFER KAHN, *BEARING MEANING: THE LANGUAGE OF BIRTH* 12 (1995) (explaining the author’s use of personal experience to construct knowledge, to illustrate the privilege and particularities of the writer, to assert agency against structural constraints, and to

*hazy golden Louisiana afternoon. I know I have already delivered Delilah, and I'm looking for her. Through a cloud of opiates I hear the magnesium sulfate pumping into me to prevent a seizure. I am suddenly in the grip of preeclampsia, and my blood pressure is soaring. In spite of it all, I'm talking on the phone and texting, telling my mother, my sister, my brother, my friends, that we are ok. The baby and I are ok.*

*After some time, the lactation nurse brings Delilah to me apologetically, telling me she came as quickly as she could. The nurse is telling me something about colostrum—liquid gold now, milk later. I need help to hold the baby, relying on my nursing pillow. My wrists, like my hips and ankles, throb from the painful dry twist that was my constant agonizing companion during the last three months of the gestation. Though modesty has never been my strong suit, I don't want to breastfeed in front of the teeming mass of people in the room. I have no choice. I suck it up as the baby sucks down colostrum.*

*Delilah is a tiny perfection, her face simultaneously familiar and new, so like me and yet different. She is cooing like a dove then growling like a puppy, rutting for milk. She latches on to my breast greedily, already expressive in her quest. I murmur sing-song words to her, "Darling dove . . . pink and gold . . . my little Piglet."*

*Even with the distraction of Delilah, I am in pain—confused and overwhelmed. Everything feels wrong. I felt lighter but still profoundly not like myself. I keep telling myself I am not pregnant. But this—sore breasts, aching hips and wrists, weeping scar, bleeding, lochia, swollen limbs, high blood pressure, weakness, and intestinal problems—this is certainly not the pre-pregnancy state my body remembers. I do not feel unpregnant.*

*The maternal nurse answers my unasked question and the grimace on my face, "You took nine months to make your baby. It may take that long to recover, that long for you to feel like yourself again. You might think of this time period, nursing and sleeping with Delilah, as the fourth trimester of your pregnancy."*

*The fourth trimester of the pregnancy. That makes sense. And I realize, in spite of my feminist theory PhD, what I thought I knew about pregnancy is wrong. What law presumes about pregnancy is wrong. It's not a nine month event, with a clear beginning, middle, and end. It does not begin with conception. It does not end at birth. Instead, pregnancy is a process of being and becoming that defies the rationalization of temporality and demands a different logic beyond conceptions of individualism, productivity, and efficiency.*

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problematize the silencing of women who are mothers). This use of personal narrative places this piece firmly in the tradition of critical race theory, women of color feminisms, and embodiment theory—scholarly projects, which strive to question the central role of objectivity in the production of knowledge and demystify the author's role in constructing the text.

## INTRODUCTION

This Article introduces the concept of the fourth trimester to legal scholarship.<sup>3</sup> The fourth trimester is a conceptual framework drawn from maternal nursing and midwifery that reconstructs pregnancy to include a three to six month period of rest, recovery, and transition after the birth of a child.<sup>4</sup> This concept, first introduced in the early 1970s,<sup>5</sup> provides an alternative paradigm for understanding the nature of pregnancy beyond the presumption that pregnancy is a “natural” event that “biology” defines. It focuses on the crucial social, emotional, and psychological transition process that occurs after the birth of an infant.

This Article argues that the fourth trimester should be used as a framework to shape the scope and meaning of pregnancy. It shows how the current antidiscrimination provisions designed to protect women from pregnancy discrimination do not adequately provide for the fourth trimester. With a focus on Title VII as amended by the Pregnancy Discrimination Act, the Family Medical Leave Act, the Fair Labor Standards Act as amended by the Affordable Care Act, and the Americans with Disabilities Act as amended by the ADA Amendments Act of 2008 (ADAAA), this Article explores how current antidiscrimination law fails to account for the challenges of

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3. Legal scholars addressing pregnancy discrimination have not directly dealt with the concept of the fourth trimester. With the exception of one article describing the Fourth Trimester, a San Francisco-based organization providing support for new mothers during the postpartum period, see Linda Joy Kattwinkel, *On Motherhood and Working*, 3 HASTINGS WOMEN'S L. J. 1, 24 n.42 (1992), the concept of the fourth trimester does not appear in the legal literature.

4. See Jill Cohen, *The Fourth Trimester*, 61 MIDWIFERY TODAY 26 (2002); see also *infra* Act I.A. In this Article, I have purposely refused to limit the temporal scope of the fourth trimester period in order to provide space for responsive individual recovery and adjustment. Although many define the fourth trimester as a three month period, see Cohen, *id.* (noting that “[m]idwives refer to the first three months following birth as ‘the fourth trimester’”), some scholars have argued that it may extend for up to six months after delivery. See Jennifer Benson & Allison Wolf, *Where did I Go? The Invisible Postpartum Mother*, in PHILOSOPHICAL INQUIRIES INTO PREGNANCY, CHILDBIRTH, AND MOTHERING 191 n.1 (Sheila Lintott & Maureen Sander-Staudt eds., 2012). There is strong evidence that six weeks is too short for over half of women to recover from the delivery and to adjust to the demands of the fourth trimester. Lorraine Tulman & Jacqueline Fawcett, *Return of Functional Ability after Childbirth*, 37 NURSING RES. 77 (1988) (arguing that the traditional six-week recovery period should be reconsidered because it fails to provide enough recovery time for many women after a vaginal delivery and for the majority of women after a cesarean delivery). Empirical research suggests, however, that most postpartum difficulties have begun to resolve within six months after the delivery. Jane F. Thompson et al., *Prevalence and Persistence of Health Problems after Childbirth: Associations with Parity and Method of Birth*, 29 BIRTH 83 (2002) (examining longitudinal data concerning women's postpartum health with a focus on both emotional and physical well-being).

5. *Infra* note 31.

the fourth trimester. The current provisions of federal law and policy related to pregnancy are woefully inadequate because they force most women to choose between retaining their place in the labor market and ensuring that the demands of the fourth trimester are met. Judges, administrative actors, movement lawyers, and other policy makers should incorporate the fourth trimester into their definition of pregnancy. For this reason, the Article also presents initial suggestions on how to incorporate the fourth trimester to shape antidiscrimination law, and to better account for the realities of pregnancy and the needs of pregnant women, infants, and families.

In introducing the fourth trimester to legal scholarship, this Article contributes to a larger feminist literature that challenges the current antidiscrimination regime by deconstructing and reconstructing the meaning of pregnancy. Some commentators in this conversation focus on expanding the meaning of pregnancy beyond biology for the purposes of antidiscrimination law. They argue the meaning of pregnancy is socially constructed, not merely the product of some natural pre-cultural truth.<sup>6</sup> These scholars also interrogate the scope and meaning of pregnancy in an effort to provide an expansive definition of pregnancy beyond narrow notions of biological essentialism.<sup>7</sup> Some challenge the notion that pregnancy is an individual endeavor, focusing on its relational aspects.<sup>8</sup> Many argue that the legal understanding of pregnancy fails to account for the social, economic, and psychological aspects of pregnancy.<sup>9</sup>

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6. See, e.g., Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1048 (1992).

7. See Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 373 (2009) (arguing feminists should not bifurcate pregnancy into its physical and social components); Dan Danielsen, *Representing Identities: Legal Treatment of Pregnancy and Homosexuality*, 26 NEW ENG. L. REV. 1453, 1453 n.3 (1992) (using pregnancy as a “metaphor for the locus of social, personal and legal relations of and to women’s biological sex, gender, reproductive desires, capacities or conditions” in order to unpack the meaning of pregnancy without reducing pregnancy to women’s reproductive capabilities).

8. Hendricks, *supra* note 7, at 362 (arguing that the relationship model of pregnancy reveals how forced pregnancy should be understood as “hijacking the body to force the creation of an intimate caretaking relationship”); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1017 (1984) (claiming even when the relationship ends after the birth of the child, pregnancy creates a “profoundly intimate relationship between the woman and the child”).

9. Reva Siegel, for example, argues that the Supreme Court adopted this presumption—that pregnancy is biological and natural—in its approach to reproductive rights. Siegel argues that the Court has adopted a presumption of what she terms “physiological naturalism,” de-emphasizing how the social costs of pregnancy are imposed upon women through social and cultural mechanisms. Reva Siegel, *Reasoning from the Body: An Historical Perspective*

This Article also contributes to a robust scholarly conversation highlighting the inadequacies of the available pregnancy discrimination protections in the United States. Some scholars argue that federal courts incorrectly interpret the antidiscrimination law of pregnancy by adopting a perspective that centers around men and male experiences with illness, not women's experiences with pregnancy.<sup>10</sup> Other scholars claim that current interpretations of the federal pregnancy discrimination law, particularly the Pregnancy Discrimination Act, rely on pregnancy blindness and require women to remain fully capable of performing all job duties during their pregnancies and permitting differential treatment if they are less than capable of doing so.<sup>11</sup> Many scholars provide evidence that these federal schemes are ineffective, in part, because the judiciary has narrowly interpreted the statutes.<sup>12</sup> Other scholars suggest the law should require employers to make reasonable accommodations for pregnant employees in the workplace.<sup>13</sup> Many scholars argue for an expansion of maternity leave and benefits to alleviate the costs of

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*on Abortion Rights and the Question of Equal Protection*, 44 STAN. L. REV. 261, 265 (1992) (arguing that the Supreme Court's abortion jurisprudence is based on a presumption of physiological naturalism which fails to account for the ways in which gender roles shape the inequalities and differences of pregnancy); see also Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 817 (2007) (arguing for increased attention to the social and cultural aspects of pregnancy); but see, Judith G. Greenburg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 229 (noting that biological processes are not easily disentangled from the social construction of pregnancy).

10. Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67 (2013) (adopting an intersectional social justice approach to focus on women who need and want to work but who face a maternal wall because of the way employers structure the workplace); Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209 (2005) (drawing from European Union law to argue that the requirement for a comparator in the Pregnancy Discrimination Act (PDA) should be eliminated).

11. Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 610 (2010) (arguing the failures of antidiscrimination law to address the realities of pregnancy with accommodations limits women's access to equal citizenship).

12. Michelle D. Deardoff, *Beyond Pregnancy: Litigating Infertility, Contraception, and Breastfeeding in the Workplace*, 32 J. WOMEN POL. & POL'Y 52 (2011) (examining how statutory interpretation has limited the expansion of pregnancy discrimination protections); Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819 (2001) (arguing that the courts narrowly interpret the PDA to deny families the protections that Congress intended with the passage of the act); see also Sally J. Kenney, *Pregnancy Discrimination: Toward Substantive Equality*, 10 WIS. WOMEN'S L.J. 351 (1995) (arguing that gaps exist between the potential promises of antidiscrimination law and the perspectives of judges and employers on accommodating pregnancy).

13. Deborah Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961 (2013) (arguing that the PDA creates a substantive accommodation right because it requires employers who accommodate employees who are limited in their ability to work to accommodate pregnant

the period after the gestation of the infant.<sup>14</sup> Some even propose that various forms of social insurance should be mobilized to spread the costs of accommodating pregnant women in the workplace.<sup>15</sup> Others suggest that public policy reasons focused on child welfare, rather than preventing workplace discrimination, should motivate the accommodation of pregnancy in the workplace.<sup>16</sup> And some scholars even argue that a more expansive understanding of pregnancy requires that scholars and policy makers conceptually disentangle pregnancy from its focus on women.<sup>17</sup> While some scholars incorporate aspects of pregnancy's fourth trimester in

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employees regardless of the reason for the accommodation); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995) (arguing that the workplace should accommodate pregnancy in order to ensure the health and well-being of children). There is some debate as to whether accommodation and antidiscrimination are two distinct concepts or if the two concepts are overlapping or complementary, see Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001) (making the claim that the two concepts are overlapping). But see Joan Williams & Nancy Segel, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 115 HARV. WOMEN'S L.J. 77 (2003) (arguing that there is a sharp distinction between accommodation and antidiscrimination principles).

14. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 417–18 (2011) (arguing that feminist activists campaigned to distribute economic and social costs of reproduction more evenly).

15. Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994) (arguing that a system similar to unemployment compensation should be employed to spread the cost of pregnancy and accommodate pregnant workers in the workplace).

16. Deborah Calloway argues, for example, that while equal employment opportunities for women are not irrelevant, “[a]ccommodating pregnancy in the workplace is a child welfare issue, not an equal employment issue.” Calloway, *supra* note 13, at 24 (arguing that the PDA and the Americans with Disabilities Act should be interpreted to require employers to accommodate pregnancy in the workplace).

17. One commentator has recently argued that feminists should adopt critical trans or masculinity study's approach to approaching the law of pregnancy discrimination, arguing that pregnancy should be conceived apart from biological notions of sex. Lara Karaian, *Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law*, 22 SOC. & LEGAL STUD. 211 (2013). See also Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57 (2012) (deploying the notion of unsexing to attack the linkage between biology and sex roles in the context of mothering). Although pregnancy is not universally a female endeavor across the animal kingdom, in mammals, only female members of a species can become pregnant. Kai N. Stöltling & Anthony B. Wilson, *Male Pregnancy in Seahorses and Pipefishes: Beyond the Mammalian Model*, 29 BIOESSAYS 884, 884 (2007) (describing how researchers who were previously hesitant to ascribe pregnancy to seahorses are now coming to understand the similarities between pregnancy in mammals and pregnancy in syngnathid fish). Perhaps for this reason, pregnancy is a process endowed with gendered meaning, and it presents complex emotional, legal, and social challenges for transgender individuals who identify as men but wish to retain and use their reproductive organs. Sam Dylan More, *The Pregnant Man—An Oxymoron?*, 7 J. GENDER STUD. 319 (1998) (describing qualitative interviews with transmen who became pregnant). For many masculine identified lesbians, pregnancy may disrupt a “masculine ableness” that is central to their identities. Maura Ryan, *The Gender of Pregnancy: Masculine Lesbians Talk about Reproduction*, 17 J. LESBIAN STUD. 119, 128–30 (2013) (describing perceptions of childless



their calls for a more responsive antidiscrimination regime,<sup>18</sup> this Article is the first to engage with the fourth trimester framework midwives and maternal nurses utilize as a tool for shaping pregnancy discrimination law in the United States.

## ARIA NO. 2

*My mind feels incredibly clear, but my body is muddled. I am deflated and defeated, still not feeling unpregnant. The parking lot illuminates my room and I lie awake. My nightly cast of haunting spirits includes residents, interns, medication nurses, and baby nurses who interrupt my sleep with care. I am desperate for Delilah to “room in” with me, but in my drug-induced condition this is impossible. When Delilah visits, she latches on, grunting and growling in an effort to coax milk from my tired body.*

*It’s been more than a week. Delilah is visiting the pediatrician for the first time. The sweet doctor, with her pretty eyes and kind voice, tells me how Delilah has lost weight as she waits for my milk to come in. In spite of the fact that I am doing my best, a few tears willfully roll down my cheeks. Delilah must have been starving. I have failed her.*

*On day fourteen, Delilah sleeps in her snuggle nest beside me. I have given up trying to sleep apart from her because we sleep better together. I wake with a start, three hours from the last feeding. I wake because she has rolled over and sighed, probably vexed over some neonatal discomfort. It will not be the first or last time that we will spend the night waking and sleeping together, our dreams flowing between us as our hearts beat toward a complementary rhythm.*

## ACT I: DEFINING THE FOURTH TRIMESTER

The fourth trimester describes a postpartum period of recovery, restoration, and re-imagination. Under this framework, pregnancy and the process of childbearing extend beyond the birth and into the first three months after delivery, and sometimes beyond.<sup>19</sup> Conceptually, the fourth trimester provides important recognition that

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masculine lesbians, androgynous lesbians, and trans-identified lesbians who use strategies of rejecting pregnancy and redefining pregnancy to negotiate their relationship to it).

18. *E.g.*, Grossman, *supra* note 11, at 578 (arguing pregnant women are subject to two contradictory presumptions—the presumption of uninterrupted capacity and the presumption of severe limitations).

19. *See* REVA RUBIN, *MATERNAL IDENTITY AND THE MATERNAL EXPERIENCE* 100 (1984) (noting delivery is the climax but not the end of the physical, social, and emotional aspects of childbearing experiences).

the transformative process of pregnancy, birth, and motherhood requires time and care during this period of adjustment.

Often the notion of the fourth trimester is adopted without any further explanation.<sup>20</sup> This Section of the Article provides a theoretical examination of the fourth trimester, tracing the concept from its origins in maternal nursing and midwifery. The fourth trimester describes two interrelated phenomena that occur during the first three to six months after the infant's birth. First, it identifies the complex social, emotional, and physical transition to recovery for mothers and provides a framework to guide midwives and maternal nurses in administering care to these women. Second, it illuminates the social, emotional, and physical vulnerability of newborn infants to aid parents.

### ARIA NO. 3

*I have begun to shed pounds of fluids, but the joint pain remains relentless. I am almost immobilized, barely able to walk, and my hips, wrists, and knees creak like the tattered pine floorboards in our house. At my check-up, I ask for more pain medication, but I don't cry. I save it for the car on the way home.<sup>21</sup>*

*Sometimes I am only food to Delilah. Our relationship is mediated through milk. I worry constantly about supply problems and other catastrophes. I talk to a La Leche League leader who has breastfed eleven children. She is smug, self-assured, and righteous. After I get off the phone, I yell at my poor husband about getting a vasectomy. He goes to sleep confused.*

*My best friend calls me while I rock in the nursery, surrounded by lovingly given gifts. I've been nursing for over thirty minutes at a time approximately every two hours. My breasts strain under the constant demand for milk, but I am thankful. They are not bleeding or cracked. The growth spurts are*

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20. *E.g.*, Margot Edwards, *The Crises of the Fourth Trimester*, 1 *BIRTH & FAMILY J.* 19 (1973) (using the fourth trimester in the title and in the article without explanation to characterize the postpartum period). This lack of theoretical explanation is common throughout the field. This occurs not only in textbooks, *see* SHANNON E. PERRY ET AL., *MATERNAL CHILD NURSING CARE* (4th ed. 2010) (using "the fourth trimester" as the title for the chapter on postpartum nursing care) but also in academic sources like dissertations. *See, e.g.*, Hatleen M. Sonnesyn, *A Study of Fourth Trimester Concerns and Resources Utilized to Meet Identified Concerns* (May 1980) (unpublished M.S. thesis, North Dakota State University of Agriculture and Applied Science); Diane C. Kruse, *Anticipatory Guidance in Fourth Trimester Adjustment* (May 1976) (unpublished M.S. thesis, Arizona State University).

21. The pain of pregnancy and birth is often a silenced or unacknowledged aspect of pregnancy even though it is a very salient aspect of the fourth trimester. *See, e.g.*, Lisa Skitolsky, *Tales from the Tit: The Moral and Political Implications of Useless Lactational Suffering*, in *PHILOSOPHICAL INQUIRIES INTO PREGNANCY, CHILDBIRTH, AND MOTHERING* 64 (Sheila Lintott & Maureen Sander-Staudt eds., 2012).

*killing me, I confess to her. When she asks how I am, I feel so ungrateful and so selfish, but I cannot hold back. I tell her I'm a horrible mother and I cannot do this. This baby nurses too much and it hurts. And while I love Delilah, I resent every minute. Why is it so hard?*

### A. The Fourth Trimester for Mothers

In 1975, Reva Rubin, one of the pioneers of maternal nursing,<sup>22</sup> argued that the most significant failure of modern obstetric care occurs during the postpartum period.<sup>23</sup> According to Rubin, the postpartum period in the United States is an especially cruel time.<sup>24</sup> It is a period of intense physical, psychological, emotional, and social changes for the mother.<sup>25</sup> In this recovery and restoration period, mothers often limp along without support, experiencing a time of profound dependency while the other family members

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22. Reva Rubin's work in maternal nursing was crucial in establishing the field, although scholars in nursing have widely criticized it. For example, some have criticized Rubin's work on the stages of maternal identity development for its lack of specificity and its use of a Freudian theoretical framework. Janice Templeton Gay & Ann Bragg Douglas, *Reva Rubin Revisited*, 17 J. OBSTETRIC GYNECOLOGICAL & NEONATAL NURSING 394, 394–95 (1988). Her conclusions about maternal behavior, observed during the period spanning the 1950s through the early 1970s, also do not reflect the changes the current consumer model of childbirth have wrought, which combines increased participation and access to delivery choices. *See id.* at 397. Rubin's work also does not necessarily account for intersectional considerations of gender, race, class, or disability status, and her theory of maternal role attainment may not apply universally to all women, *see* Katherine Ferrell Fouquier, *State of the Science: Does the Theory of Maternal Role Attainment Apply to African American Motherhood?*, 58 J. MIDWIFERY & MATERNAL HEALTH 203 (2013) (presenting empirical research that Rubin's theory of maternal role attainment does not apply to African American women) and may not be an especially useful concept for contemporary maternal nursing. Louise K. Martell, *Is Reva Rubin's "Taking-In" and "Taking-Hold" a Useful Paradigm?*, 17 HEALTH CARE FOR WOMEN INT'L 1 (1996) (arguing that Rubin's theory has only limited potential for contemporary women). However, even Rubin's critics acknowledge that Rubin's work created the field of maternal nursing, inspired empirical research in nursing focused on maternal behavior and roles, and led to changes in hospital practices related to "rooming-in" and postpartum education. *Id.*; *see also* J. Michael Elliot, *Obituary: Reva Rubin*, 76, *Nursing Expert*, N.Y. TIMES (May 17, 1995), available at <http://www.nytimes.com/1995/05/17/obituaries/reva-rubin-76-nursing-expert.html?module=Search&mabReward=relbias%3Aw%2C{%22%22%3A%22RI%3A9%22}>.

23. Reva Rubin, *Maternity Nursing Stops Too Soon*, 75 AM. J. NURSING 1680, 1684 (1975).

24. The fourth trimester has been characterized as a transitional time rife with potential crises and challenges for the new family generally and the new mother in particular. Edwards, *supra* note 20, at 19.

25. *See* ELIZABETH DAVIS, HEART & HANDS A MIDWIFE'S GUIDE TO PREGNANCY AND BIRTH 190 (2004) (noting that improper care can have long term effects on a woman's body, sexuality, and personality). Some commentators characterize this period of time as a series of dynamic processes geared toward the development of a new (ultimately) separate life and the preservation and evolution of the individual woman's life to accommodate a child. Rubin, *supra* note 23.

flounder.<sup>26</sup> For this reason, “[w]hat mothers need is a chance to recover themselves before they assume full care of a newborn and assume their other responsibilities. What mothers need is a healthy baby who has completed the transition from uterine to extrauterine living.”<sup>27</sup> According to Rubin, this transition between pregnancy and motherhood requires a recognition that physical, social, and psychological aspects of pregnancy continue beyond birth. The transitional continuation of physical, social, and psychological aspects of pregnancy requires that mothers and their families receive care and support during the postpartum period.

The fourth trimester framework emerged as a partial answer to this critique; it informs the ways in which nurses provide care, instruction, and information to women who have given birth<sup>28</sup> and to their partners.<sup>29</sup> The literature written for maternal nurses, midwives,<sup>30</sup> and educators in these professions began to outline their roles in the fourth trimester framework in the mid 1970s.<sup>31</sup> During the postpartum period—the intense period of recovery and acclimation<sup>32</sup> that the woman, her partner, and infant experience—health professionals are required to continue responsive and nurturing communication with the woman and provide continual health assessments on the basis of this communication.<sup>33</sup>

The physical, social, emotional, and psychological transitions after birth and gestation are especially difficult for mothers, infants, and families because they can exacerbate existing vulnerabilities.<sup>34</sup> Intense psychological and emotional aspects also accompany the

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26. DAVIS, *supra* note 25.

27. *Id.*

28. *See, e.g.*, PERRY, *supra* note 20 (using “the fourth trimester” as the title for the chapter on postpartum nursing care).

29. *Id.* at 533 (noting that the objective of nursing care during this period is to provide care to women and their partners). In some cases, the extension of nursing care to the family is made explicit during the fourth trimester. DEITRA LEONARD LOWDERMILK, *MATERNITY NURSING* (8th ed., 2010) (using the title “Nursing Care of the Family During the Fourth Trimester” to describe the postpartum approach to nursing care and instruction).

30. *E.g.*, Cohen, *supra* note 4.

31. The earliest article found by the author is from 1973. Edwards, *supra* note 20; *see also* Lynn George, *Lack of Preparedness: Experiences of First-Time Mothers*, 30 *AM. J. MATERNAL/CHILD NURSING* 251, 252 (2005) (tracing the concept of the fourth trimester to Reva Rubin’s 1975 work on maternal nursing).

32. *E.g.*, Edwards, *supra* note 20 (arguing that the fourth trimester is a transitional period of crisis for a family).

33. Nancy E. Donaldson, *Fourth Trimester Follow-up*, 77 *AM. J. NURSING* 1176, 1178 (1977).

34. Sheila Kitzinger, *The Fourth Trimester?*, 11 *MIDWIFE, HEALTH VISITOR & COMMUNITY NURSE* 118 (1975). According to Kitzinger, the fourth trimester is characterized not only by physical changes but also by emotional vulnerabilities and intense social and psychological growth. Often during the fourth trimester, the intense physical and emotional needs of the infant combined with physical changes, means that families in general, and women in particular, will need postpartum support during this critical time. *Id.*

physical recovery. Many women experience negative feelings about their bodies during this time period or struggle with the limitations of physical recovery.<sup>35</sup> Some women also face problems with sexual function during the postpartum period.<sup>36</sup> Research suggests that education, follow-up care, and communication can minimize the crisis that the woman and her family face during the fourth trimester.<sup>37</sup> By adopting a fourth trimester framework, maternal nurses and midwives caring for newborns and their mothers recognize that pregnancy is a process that does not necessarily end with the birth of the infant.<sup>38</sup>

The fourth trimester period includes a significant physical recovery during the first six to eight weeks after birth, often labeled the perperium.<sup>39</sup> The perperium starts with the completion of labor and ends when the woman's reproductive system returns to a "normal nonpregnant state."<sup>40</sup> This involves the involution, or shrinking, of the uterus from its post-pregnancy size to its normal pre-pregnancy size.<sup>41</sup> Involution typically occurs over a six-week period, although breastfeeding on demand can hasten the process.<sup>42</sup> During the postpartum period, physical changes also include the expulsion of lochia and vaginal bleeding that lasts for several weeks after the pregnancy ends.<sup>43</sup> Return to a "normal nonpregnant state" may also include the repositioning of internal organs that shifted to

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35. Sofia Rallis et al., *Predictors of Body Image during the First Year Postpartum: A Prospective Study*, 45 *WOMEN & HEALTH* 87 (2007) (showing how women experience greater body dissatisfaction during the postpartum period).

36. Rachel N. Pauls et al., *Effects of Pregnancy on Female Sexual Function and Body Image*, 5 *J. SEXUAL MED.* 1915 (2008) (finding that women experience poor sexual function during the postpartum period and that this lack of sexual function can continue for more than six months after birth).

37. DAVIS, *supra* note 25 (noting that improper care can have long term effects on a woman's body, sexuality and personality). In providing a model for guiding postpartum communication follow-ups during the fourth trimester, Nancy Donaldson noted that the assessments of nursing during that period made a "critical difference" to the "concerned and confused" families dealing with the challenges of a new infant. Donaldson, *supra* note 33, at 1178; see also Nancy E. Donaldson, *The Postpartum Follow-up Nurse Clinician*, 10 *J. OBSTETRICS GYNECOLOGIC & NEONATAL NURSING* 249, 250 (1981).

38. Alison Stuebe, *Establishing a Fourth Trimester*, 12 *BREASTFEEDING MED.* 45 (2013) (arguing that health care providers should take the fourth trimester of pregnancy as seriously as the preceding three).

39. Marcia Gruis, *Beyond Maternity: Postpartum Concerns of Mothers*, 2 *AM. J. MATERNAL CHILD NURSING* 182, 182 (1977).

40. *Id.*

41. DAVIS, *supra* note 25, at 192.

42. JAN RIORDAN & KAREN WAMBACH, *BREASTFEEDING AND HUMAN LACTATION* 90 (4th ed. 2010) (describing the hormonal and physical reaction to breastfeeding and illustrating the link between breastfeeding and uterine contractions, thereby speeding up the involution process).

43. World Health Organization, *The WHO Multinational Study of Breastfeeding and Lactational Amenorrhea: IV. Postpartum Bleeding and Lochia in Breastfeeding Women*, in *WORLD HEALTH*

make room for the expansion of the uterus and changes in the urinary and gastrointestinal tracks.<sup>44</sup> For most women, particularly those who delivered vaginally, the return to a “normal nonpregnant state” also involves recovery of the labia, vagina, and perineum area.<sup>45</sup> Women recovering from cesarean section may face intense recovery challenges related to the incision’s healing, including increased risk of infection.<sup>46</sup> Women who are breastfeeding may also experience physical changes of the nipples and hormonal changes related to lactation.<sup>47</sup> Many of these physical changes also come with a decrease in some pregnancy-related hormones, including progesterone and estrogen,<sup>48</sup> and an increase in hormones like prolactin that facilitate successful breastfeeding.<sup>49</sup> As a theoretical framework, the fourth trimester extends the scope of care for nurses, midwives, or other caregivers beyond gestation and birth<sup>50</sup> and describes a way for health professionals to provide assessments and continual care for women during this time period.<sup>51</sup>

In employing a fourth trimester framework, midwives, lactation consultants, and maternal nurses re-conceptualize the end of pregnancy and the beginning of motherhood as a process of gradual physical and emotional changes. The mother, after giving birth, becomes less pregnant over time. Becoming physically less pregnant also entails the evolution of separateness between mother and baby. During this transition, new mothers go through a period where they must care intensely for their own recovery and evolution into a new role, as well as the well-being and development of their infants.

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ORGANIZATION TASK FORCE ON METHODS FOR THE NATURAL REGULATION OF FERTILITY 441-47 (1999).

44. PATRICIA A. CREEHAN & KATHLEEN RICE SIMPSON, *PRENATAL NURSING* 69 (2008).

45. DIETRA LEONARD LOWDERMILK ET AL., *MATERNITY & WOMEN’S HEALTH CARE* 470 (10th ed. 2012); A.H. DECHERNEY ET AL., *CURRENT DIAGNOSIS & TREATMENT: OBSTETRICS & GYNECOLOGY* (10th ed. 2007).

46. See V. Berghella, *Cesarean Delivery: Postoperative Issues*, UPtODATE, [http://www.uptodate.com/contents/cesarean-delivery-postoperative-issues?source=search\\_result&search=caesarian+delivery+postoperative&selectedTitle=1~150](http://www.uptodate.com/contents/cesarean-delivery-postoperative-issues?source=search_result&search=caesarian+delivery+postoperative&selectedTitle=1~150) (last visited Aug. 28, 2014); P. Berens, *Overview of Postpartum Care*, UPtODATE, [http://www.uptodate.com/contents/overview-of-postpartum-care?source=search\\_result&search=overview+of+postpartum+care&selectedTitle=1~150](http://www.uptodate.com/contents/overview-of-postpartum-care?source=search_result&search=overview+of+postpartum+care&selectedTitle=1~150) (last visited Aug. 28, 2014); THE AM. CONG. OF OBSTETRICIANS & GYNECOLOGISTS, *FAQ: Cesarean Birth*, <http://www.acog.org/~/media/For%20Patients/faq006.pdf?dmc=1&ts=20140731T0351331443> (last visited Aug. 28, 2014).

47. JAN RIORDAN, *BREASTFEEDING AND HUMAN LACTATION* 75 (3rd ed. 2005).

48. Margaret C. Neville et al., *Studies in Human Lactation: Milk Volumes in Lactating Women During the Onset of Lactation and Full Lactation*, 48 AM. J. CLINICAL NUTRITION 1375, 1383 (1988).

49. RIORDAN, *supra* note 47.

50. Donaldson, *supra* note 37; Cohen, *supra* note 4.

51. E.g., Donaldson, *supra* note 33, at 1176 (providing details concerning the role and functions of a nurse after birth including the charge to “[m]ake assessments relating to the fourth trimester”).

According to veteran midwife Beth Bailey Barbeau, it takes *months* after birth, not weeks or days, for a family to return to some semblance of normalcy.<sup>52</sup> The postpartum check-up at six weeks, which often marks the medical end of the pregnancy for insurance companies and Obstetrics and Gynecology doctors, occurs only halfway into the average restoration period of the fourth trimester. Recovery from pregnancy may take up to nine months for some women.<sup>53</sup> The fourth trimester framework advises those who care for women after the birth of a child to treat these women individually and respond to their unique needs.<sup>54</sup>

The fourth trimester recognizes an interdependent mother-infant dyad in the first three to six months after birth. Mothers and newborns constitute a unit, which Rubin calls the “mother-child subsystem.”<sup>55</sup> The mother-child subsystem fosters the infant’s transition from the uterus to the outside world and effectively integrates the newborn into the family structure.<sup>56</sup> This recognizes that women who have given birth are dealing not only with an intense physical recovery, but also with the evolution of separateness between themselves and their babies.<sup>57</sup> Some medical professionals describe the fourth trimester as a time of unity and “oneness” between the mother and child.<sup>58</sup> According to Christaine Northrup, “mother and child are still very much a physical unit, [their] bodies in synchrony with each other . . .” during the fourth trimester.<sup>59</sup> Mothers recounting their experiences with this phenomenon describe being in sync with their infants, feeling that they are “wired” to their child.<sup>60</sup>

This feeling is not merely emotional. The new infant’s body is responsive to the bodies of those that hold and care for it.<sup>61</sup> Because infants are unable to self-regulate many of their basic biological functions, their bodies learn to regulate their heart rate, blood pressure, sleep cycles, skin temperature, and brain chemistry from close contact with the bodies of others.<sup>62</sup> Through physical

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52. Beth Bailey Barbeau, *Time in a Bottle*, 97 *Midwifery Today* 42, 68 (2011).

53. RUBIN, *supra* note 19, at 109 (according to Reva Rubin, women do not feel whole, functional, and intact until nine months after the birth).

54. Cohen, *supra* note 4, at 26 (noting that “[m]idwives refer to the first three months following birth as ‘the fourth trimester’”).

55. RUBIN, *supra* note 19, at 101.

56. *Id.*

57. *Id.*

58. CHRISTAINE NORTHRUP, MOTHER-DAUGHTER WISDOM CREATING A LEGACY OF PHYSICAL AND EMOTIONAL HEALTH 119 (2005).

59. RUBIN, *supra* note 19, at 101.

60. NORTHRUP, *supra* note 58, at 119–20.

61. *Id.* at 121.

62. *Id.*

contact with their mothers or other caregivers, infants obtain physiological help in self-regulating these essential cycles.

The physical, emotional, and psychological links between the infant and its primary caregiver can confuse individuals socialized to believe they are independent individuals. Lisa Catherine Harper recounts in her memoir *Double Life* the complexities mothers face as they separate themselves from the newly born infant that emerged from their bodies. She notes, “I had trouble understanding where she had come from. First she was inside me and then outside me. . . She was mine, and yet she wasn’t.”<sup>63</sup> The process of pregnancy renders a woman simultaneously an individual and a crucial part of a dyad—mother and child.<sup>64</sup> Mothers who have given birth to infants experience the separation and individuation of the infant as a process.<sup>65</sup>

The fourth trimester is a period of complex change and contradiction for mothers. Mother and infant are entangled in a web of interdependency with demanding physical and emotional elements while being separate individuals. During this period, mothers often live lives of intense beauty and disturbing ugliness, where the harsh confrontational cruelties of colic or cracking nipples can quickly undo the preciousness of miniature toes and tiny eyelashes. Fourth trimester time moves irregularly. Unforgettable moments of panic are juxtaposed against endless moments where nothing seems to happen and time stands still. Thirty minutes of nursing may last a painful and excruciating eternity while five hours of deep sleep flies by instantaneously.

During the period of the fourth trimester, women often report being unprepared for the intense responsibilities of caring for an

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63. LISA CATHERINE HARPER, *A DOUBLE LIFE: DISCOVERING MOTHERHOOD* 169 (2011) (designating the “arduous” first six weeks after birth as the fourth trimester). In breastfeeding her eager and hungry infant Ella, Harper characterizes the time that she and her daughter spent breastfeeding as a “glimpse of that paradise we had lost.” *Id.* at 175.

64. Following the work of Martha Fineman, I purposely choose to designate this dyad as mother and child. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 230–33 (1995). This choice is not meant to essentialize women as mothers but to highlight the unique dependencies the biological, social, and psychological process of care and its costs created. Men or women who fulfill the intense caring roles with children, whether their bonds stem from the process of pregnancy or not, may adopt the role of mother in this dyad, and they may incur the costs and benefits of this relationship. Feminists have shown how the social role of caring for and rearing children can be disaggregated from gestation and childbirth and how this social role is not natural or inevitable for women. M.M. Slaughter, *The Legal Construction of Mother*, in *MOTHERS IN LAW FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 73–74 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

65. Cruis, *supra* note 39, at 184 (noting that “through touching and caring for the baby, [the mother] begins to identify him as a whole, separate individual”).



infant while experiencing fatigue and the pain of recovery.<sup>66</sup> Due to the intense nature of the recovery and bonding experience, it is often difficult to determine where physical changes end and emotional and psychological changes begin.<sup>67</sup> Emotional changes related to the new role of being a mother or completing a pregnancy include times of elation and intensity, and feelings of helplessness and inadequacy.<sup>68</sup> In the next section, the Article focuses on the fourth trimester and its challenges for infants.

#### ARIA NO. 4

*As weeks pass, Delilah has taken her rightful place upon the throne. She is our queen—as beautiful and terrible as a summer thunderstorm. She sleeps when she pleases, eats when she pleases, and requires constant diaper changes. Delilah is alert and curious, with strong preferences. The pediatrician says she is gaining weight well, but typical for a breastfed baby, she is always hungry. She refuses to sleep more than two hours at a time, and she nurses every ninety minutes.*

*I track her bowel movements and wet diapers obsessively, like a courtier. I cannot drink enough water, and I feel I am being slowly consumed. And between the abdominal incision and the joint pain, I'm severely limited in my capacity.*

*My partner diapers, rocks, and burps Delilah in a frenzy. He is perfect because he has to be.*

#### B. The Fourth Trimester for Infants

Although the fourth trimester began as recognition of the transitional challenges women face during the early days after the gestation and birth, recent articulations of the fourth trimester have shifted focus from the mother to the infant. The fourth trimester is also a crucial time period for infant brain development and

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66. George, *supra* note 31, at 253–54.

67. BRENDA KRAUSE EHEART, THE FOURTH TRIMESTER: ON BECOMING A MOTHER 67 (1983).

68. Circumstances may intensify these negative feelings for a variety of reasons. For example, women who have become pregnant against their will through coercion or rape may have even more difficulty negotiating the physical and emotional challenges of the fourth trimester. See A. Rachel Camp, Coercing Pregnancy (May 29, 2014) (unpublished article), available at <http://ssrn.com/abstract=2388982> (arguing that current legal frameworks of domestic violence are inadequate to deal with the circumstances of forced reproduction); see also, Khiara M. Bridges, *When Pregnancy is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457 (2013) (examining laws that punish sexual assaults resulting in pregnancy more heavily than sexual assaults that do not result in pregnancy).

stimulation.<sup>69</sup> In a book that focuses on the fourth trimester for infants, medical journalist Susan Brink presents an accessible overview of cutting-edge research on infant development from an interdisciplinary perspective, including evolutionary biology, anthropology, and epidemiology. Augmenting her research with interviews of parents and leading scholars, Brink presents a compilation of evidence that reveals how an infant's early life closely resembles the neonate's in-utero experience.<sup>70</sup> She argues that the first three months of the infant's post-gestation life should be considered an extension of the pre-birth conditions, i.e., a fourth trimester.<sup>71</sup> According to Brink, during this fourth trimester "[a] newborn human is not so much a baby as a final-phase fetus living through a time of transition."<sup>72</sup> This transition requires a close, consistent, responsive relationship between the infant and the mother or caregiver that mirrors the biologically binding closeness of the pre-birth relationship. The infant's continual development requires constant, attentive care to foster the crucial cognitive, physical, and emotional changes it is experiencing.<sup>73</sup> Although Brink leaves many specific policy recommendations unstated, she indicates that this stage requires more family support and should include paid parental leave for infant caretaking.<sup>74</sup>

The concept of the fourth trimester is often used as self-help for new parents to conceptualize typical experiences in the first three months of the postpartum period<sup>75</sup> or in memoirs recounting women's experiences of gestation, childbirth, and motherhood.<sup>76</sup> The fourth trimester has even been used humorously to frame the challenges of this transitional period.<sup>77</sup> Often when used in this

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69. See Jennifer Marshall, *Infant Neurosensory Development: Considerations for Infant Child Care*, 39 EARLY CHILDHOOD EDUC. J. 175 (2011).

70. See SUSAN BRINK, *THE FOURTH TRIMESTER: UNDERSTANDING, PROTECTING, AND NURTURING AN INFANT THROUGH THE FIRST THREE MONTHS* (2013).

71. *Id.* at 2.

72. *Id.*

73. *Id.* at 5–7.

74. *Id.* at 14.

75. E.g., GALE PRYOR & KATHLEEN HUGGINS, *NURSING MOTHER, WORKING MOTHER: THE ESSENTIAL GUIDE TO BREASTFEEDING YOUR BABY BEFORE AND AFTER YOU RETURN TO WORK* 57 (2nd ed. 2007) (employing the chapter title "Life on Leave: The Fourth Trimester" without explanation to describe the postpartum process of bonding and breastfeeding); see also Jeanne Warren Lindsay & Jean Brunelli, *YOUR PREGNANCY AND NEWBORN JOURNEY: A GUIDE FOR PREGNANT TEENS*, 132 (2004); ANNE SEMANS & CATHY WINKS, *THE MOTHER'S GUIDE TO SEX: ENJOYING YOUR SEXUALITY THROUGH ALL STAGES OF MOTHERHOOD*, 138 (2001).

76. E.g., HARPER, *supra* note 63, at 167.

77. AMY EINHORN, *THE FOURTH TRIMESTER: AND YOU THOUGHT LABOR WAS HARD . . . ADVICE, HUMOR, AND INSPIRATION FOR NEW MOMS ON SURVIVING THE FIRST SIX WEEKS—AND BEYOND* (2001).

context, the concept is not fully explained or attributed to any academic source.<sup>78</sup>

Pediatricians also use the fourth trimester framework to aid parents dealing with unexplained crying or fussiness during the first three months of life. For infants, the fourth trimester encompasses the first three to four months outside of the womb when the infant is negotiating its earliest encounters with its caregivers and the broader world.<sup>79</sup> Dr. Harvey Karp, in his self-help book for parents, claims that unexplained crying, fussiness, and colic during the first three months, occur because even after forty full weeks of gestation, human infants leave the womb “too soon.”<sup>80</sup> According to Karp, human infants, unlike other mammals, are born approximately three months before they properly mature in order to ensure that women can safely deliver them.<sup>81</sup> In recognition of the fourth trimester, many health care professionals call infants neonates<sup>82</sup> or external fetuses during the first three months.<sup>83</sup> Because human infants are all born relatively immature, Karp contends that parents should provide some of the same sensations infants enjoyed in the womb to soothe even the fussiest or most colic-prone newborns.<sup>84</sup> Although the anthropological foundations of Dr. Karp’s claims can be regarded as problematic,<sup>85</sup> this fourth trimester framework of care has worked for many parents.

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78. *Id.* at 30 (quoting one father as saying, “I liken the first three months after childbirth as “the fourth trimester . . .”).

79. Amanda Perez & Sandy Peterson, *Meeting the Needs of the Youngest Infants in Child Care*, 29 ZERO TO THREE 13, 15–17 (2009) (arguing that during the fourth trimester very young infants need a plan for responsive caregiving that incorporates the parents).

80. HARVEY KARP, *THE HAPPIEST BABY ON THE BLOCK: THE NEW WAY TO CALM CRYING AND HELP YOUR BABY SLEEP LONGER* (2002).

81. *Id.* at 64–65.

82. *E.g.*, RUBIN, *supra* note 19, at 105 (describing neonate as a transitional stage between the uterus and the outside world).

83. NORTHRUP, *supra* note 58, at 121. Breastfeeding has even been characterized as a way to extend the care and protection of the placenta in the outside world because it provides numerous immunities, antibodies, and the crucial amount of touch and sucking new infants need. *Accord id.* at 123–24. In some contexts, however, the fetus has been classified as a baby. See Nicole Isaacson, *The “Fetus-Infant”: Changing Classifications of the “In Utero” Development in Medical Texts*, 11 Soc. Forum 457, 460 (1996) (examining how medical textbooks extend childhood into the womb by collapsing the boundaries between fetuses and infants). See also Katie Oliviero, *Flaying Life and Law: Precarious Personhood in 21st Century Anti-Abortion Campaign* (unpublished manuscript).

84. KARP, *supra* note 80, at 63; 67–68.

85. Karp draws on uncited speculations from evolutionary psychology and essentializing claims that “babies do not cry” in certain “primitive” ethnic clans. Underlying what many claim is an effective paradigm for caring for fussy infants is a problematic foray into human archeology and contemporary anthropology. Karp jumps from making claims about the practices of unspecified prehistoric ancestors, KARP, *supra* note 80, at 64, to providing infant care tips gleaned from the !Kung San people of South Africa. *Id.* At 84–85.

## ARIA NO. 5

*It's been almost two months. My hunger for sleep has become starvation, a deep primal ache that never abates. I wonder if it will ever end. The lochia has finally stopped. I'm starting to feel anxious. Always the eager student, I was happy when I passed my six-week check. But my cesarean scar is still weeping. No infection, they tell me, just normal weeping. What is this? Normal weeping. I guess weeping is normal since I am awash in hormones, and I cry easily.*

*I am overwhelmed and I long for a half hour away—I can drive now. I take a wild trip to pick up a hospital grade pump at a local lactation center, delighted by the silence.*

*With silence and space to think, I realize I'm probably in trouble. I have no daycare lined up. I don't know how I will leave Delilah. Colleagues who have small babies discuss the necessity of nannies and nanny shares. Such an option seems impossible on one income, away from our mothers, fathers, and siblings. Most daycare centers have very few spots for infants under a year old. I am ok for now—it is summer, and I am an academic. Maybe my mother will come. Maybe my partner can stay home. But maybes don't take care of babies. I curse to myself. I have resources, a good job, and support. What do people with less do?*

ACT II: ANTIDISCRIMINATION LAW AND PREGNANCY:  
ON FOURTH TRIMESTER FAILURES

At the federal level, a variety of statutory schemes contain pregnancy-related law<sup>86</sup> that may be impacted by the expansion of pregnancy to include a fourth trimester; however, only some of this law addresses the problems of pregnancy discrimination in the workplace. Federal antidiscrimination protections are embodied in four interrelated statutory schemes: Title VII, as amended by the Pregnancy Discrimination Act (PDA), which defines sex discrimination to include discrimination because of pregnancy, childbirth,

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86. Some aspects of federal law provide social welfare benefits for pregnant individuals: nutrition assistance, 42 U.S.C. § 1786 (2012) (providing a special supplemental nutrition program for women, infants, and children); medical insurance, 42 U.S.C. § 1397II (2012) (authorizing “[o]ptional coverage of targeted low-income pregnant women through a State plan amendment”); or cash assistance. 42 U.S.C. § 602 (2008) (authorizing “block grants [to states] for temporary assistance for needy families”). The tax code also facilitates the federal law of pregnancy by allowing above-the-line deductions for dependents and itemized deductions for medical expenses. 26 U.S.C. § 213 (2012), or pre-tax deductions for dependent care through employer programs. 26 U.S.C. § 21 (2012).

and related medical conditions;<sup>87</sup> the Family Medical Leave Act (FMLA), which provides some employees with twelve weeks of unpaid leave for the birth of a child;<sup>88</sup> the Fair Labor Standards Act (FLSA), which addresses pregnancy discrimination through the regulation of working conditions and hours;<sup>89</sup> and the Americans with Disabilities Act as amended by the ADA Amendments Act of 2008 (ADAAA).<sup>90</sup> This Article argues that the current legal regime fails to adequately account for the fourth trimester in its scope of protections, leaving large loopholes in antidiscrimination legislation that undermine the discrimination protections for pregnant women and their families.

### A. *The Pregnancy Discrimination Act*

In 1978, Congress passed the Pregnancy Discrimination Act (PDA), expanding Title VII's prohibition against sex discrimination to include pregnancy discrimination. The PDA ensures that Title VII sex discrimination protections include, "pregnancy, childbirth, or related medical conditions;"<sup>91</sup> however, the Act does not limit the definition of sex discrimination in other areas.<sup>92</sup> Congress passed the PDA as a response not only to the Supreme Court's decision in *General Electric Company v. Gilbert*<sup>93</sup> but also to the lobbying of a coalition of labor unions, feminist groups, and church groups.<sup>94</sup>

The PDA permits courts to find violations of Title VII when the record shows that an employer treated similarly situated pregnant

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87. Pub. L. No. 95-555, 92 Stat. 2076 (1978) ("An Act to amend Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy").

88. 29 U.S.C. § 2612 (2013).

89. Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 207 (2013).

90. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; 42 U.S.C. § 12101 (2008).

91. 42 U.S.C. § 2000e(k) (2008); *Int'l Union v. Johnson Controls*, 499 U.S. 187, 198-99 (1991).

92. Pub. L. No. 95-555, 92 Stat. 2076 (1978) ("(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall 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, and nothing in section 703(h) of this title [42 USC 2000e-2] shall be interpreted to permit otherwise.")

93. *The Pregnancy Discrimination Act overturned Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that exclusion of pregnancy-related disabilities was not in itself discrimination based on sex).

94. Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 8 (1985) (citing J. GELB & M. PALLEY, *WOMEN AND PUBLIC POLICIES* 159-60 (1982)).

employees differently than similarly situated nonpregnant employees.<sup>95</sup> Under current interpretations of the PDA, an employer is not required to treat a pregnant employee better than similarly situated employees, although he may not treat her worse for the purposes of compensation, employment, and benefits.<sup>96</sup> However, the Act does not prohibit states from enacting remedial legislation to protect or provide additional benefits to pregnant women.<sup>97</sup>

Congress intended the PDA to protect women in paid positions against stereotypes about the capacities of women and their “place” in society.<sup>98</sup> While the Act’s prohibition against discrimination explicitly designates pregnancy, childbirth, and medical conditions related to pregnancy and childbirth as sex-based characteristics,<sup>99</sup> protections against pregnancy discrimination extend to both men and women.<sup>100</sup> Male plaintiffs may sue for negative employment actions taken against them because they are married to a pregnant

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95. See, e.g., *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 363–64 (3rd Cir. 2008), remand (stating that the PDA orders employers to treat pregnant employees the same as non-pregnant employees who are similarly situated in their ability to work). For this reason, some commentators claim that the PDA provides an effective shield that employers may use to discriminate against pregnant employees. Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225 (1998) (noting that the courts have interpreted the PDA to permit stereotype based discrimination). There is some disagreement about how to apply the comparator requirements of the PDA and whether, in the wake of the amended ADA’s expansion of protections and accommodations for pregnancy as a temporary as a disability, employers are required to provide reasonable accommodations to pregnant workers when they provide accommodations to non-pregnant workers who are similarly situated in their ability or inability to work. Brief of Law Professors and Women’s Rights Organizations as Amici Curiae in Support of Petitioner, *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (2013) No. 12-1226, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/07/28146-pdf-Grossman.pdf>. The Supreme Court has granted certiorari to *Young v. United Parcel Services, Inc.*, to resolve this question. 707 F.3d 437 (2013), cert. granted 134 S. Ct. 2898 (U.S. July 1, 2014) (No. 12-1226).

96. *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994).

97. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987) (affirming that California state statute, CAL. GOV’T. CODE § 12945 (West 2012), was not preempted by the PDA because it did not mandate that employers place pregnant workers in a more advantageous position over other disabled workers, but only established a base minimum of benefits to be provided to pregnant employees).

98. Pub. L. No. 95–555, 92 Stat. 2076 (1978). Courts have also acknowledged that the Pregnancy Discrimination Act was designed to combat the stereotype that pregnant women and women who become mothers belong in the home and that they are unable to participate in the workforce. *Hitchcock v. Angel Corps, Inc.*, 718 F.3d 733, 740–41 (7th Cir. 2013) (“Animus towards pregnant women may be inferred based on these comments; specifically, a belief that pregnancy disqualifies women from effectively participating in the workforce.”).

99. *Wright*, 2005 U.S. Dist. LEXIS 42366, at \*6.

100. Both men and women can also be subject to discrimination that places a “maternal wall” between an individual and employment opportunities based upon caretaking roles. Joan C. Williams & Nancy Segel, *Beyond the Maternal Wall*, 115 HARV. WOMEN’S L.J. 77, 79 (2003).

woman.<sup>101</sup> However, Title VII's application limits the PDA's scope in some significant ways. It does not cover women who work in businesses with fewer than fifteen employees.<sup>102</sup> Additionally, the PDA's protections do not require employers to treat pregnant employees equally in all circumstances. For example, bona fide seniority systems that produce different benefit plans do not constitute sex discrimination unless intent to discriminate exists, even if pregnant and non-pregnant employees are treated differently.<sup>103</sup>

The PDA's current provisions, as interpreted by the federal courts, fail to respond adequately to the types of discrimination women may face during the fourth trimester. Federal courts' interpretations of the PDA that do not provide protections for breastfeeding, infant care, and post-pregnancy recovery exemplify that failure.<sup>104</sup> The PDA fails to account for the fourth trimester of the pregnancy in three ways. First, when courts examine plaintiffs' claims of pregnancy discrimination, they adopt a rigid conception of formal equality by comparing the pregnant woman to a hypothetical, allegedly similarly situated male.<sup>105</sup> Second, courts applying the PDA often require, in contravention of the EEOC's guidelines,<sup>106</sup> that women who seek the Act's protection must be completely capable of performing all aspects of their jobs<sup>107</sup> Third, when courts examine potential pregnancy discrimination claims, they often limit the scope of their inquiry by defining pregnancy to exclude the crucial fourth trimester. In particular, courts have

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101. Nicol v. Imagematrix, Inc., 773 F. Supp. 802 (E.D. Va. 1991) (finding that a husband alleging that he was fired because he was married to a pregnant woman had standing to bring an action claiming that he had been discriminated against in violation of Title VII).

102. 42 U.S.C. § 2000e(b) (2008).

103. AT&T Corp. v. Hulteen, 556 U.S. 701, 709 (2009) (holding that an employer policy enacted prior to the PDA that gave less retirement credit for personal leave for pregnancy after six weeks than it gave for other types of medical leave did not violate the Pregnancy Discrimination Act because it constituted a bona fide seniority system).

104. These interpretations of the PDA by the courts differ from the EEOC's guidance, which expressly provides protections under the statute for a variety of pregnancy related discrimination including lactation discrimination and discrimination related to the intent to become pregnant. OFFICE OF LEGAL COUNSEL, EEOC, NO. 915.003, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (July 14, 2014), available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm) (superseding Section 626: Pregnancy, EEOC Compliance Manual, Volume II; Policy Guidance on the Supreme Court Decision in International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.) (1991)).

105. Carvey Manners, *supra* note 10 (drawing from EU law to argue that the requirement for a comparator in the PDA should be eliminated).

106. 29 C.F.R. § 1604.10; OFFICE OF LEGAL COUNSEL, EEOC, *supra* note 104.

107. Grossman, *supra* note 11, at 609–11.

failed to extend pregnancy discrimination protections to breastfeeding, pregnancy-related incapacity, and infant care.<sup>108</sup>

### 1. Fourth Trimester Failures I: Breastfeeding and the PDA

Breastfeeding has come to occupy a complex, but important, role in questions related to infant care, maternal health, and public policy.<sup>109</sup> Although the science surrounding breastfeeding is contested,<sup>110</sup> studies indicate that breastfeeding has significant benefits.<sup>111</sup> In light of this evidence, many state and federal government offices have adopted a positive public policy to encourage new mothers to breastfeed their infants for at least six months and ideally a year.<sup>112</sup> Before the passage of the Affordable Care Act,<sup>113</sup> no federal or state statutes required employers to support women who chose to breastfeed after they returned to work.<sup>114</sup> Most states have passed laws permitting women to breastfeed in public places<sup>115</sup>

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108. Although the EEOC has provided guidelines that may alter the way in which federal courts interpret the PDA, OFFICE OF LEGAL COUNSEL, EEOC, *supra* note 104, courts may not follow this guidance. *Infra* 269.

109. Corey Silberstein Shdaimah, *Why Breastfeeding Is (Also) a Legal Issue*, 10 HASTINGS WOMEN'S L.J. 409 (1999).

110. RIORDAN & WAMBACH, *supra* note 42; *see also infra* note 111.

111. Some commentators, however, claim that the benefits of breastfeeding have been oversold and that the benefits some studies indicated may actually result from a constellation of complementary factors. *See* Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formula*, 10 NEV. L.J. 29, 45-49 (2009).

112. United States (42 U.S.C. § 1790 (2006)), California (CAL HEALTH & SAFETY CODE § 123366 (West 2014)), Colorado (COLO. REV. STAT. § 8-13.5-102 (2013)), Connecticut (CONN. GEN. STAT. § 31-40w (2013)), D.C. (D.C. CODE § 2-1402.81 (2001)), Florida (FLA. STAT. § 383.015 (2014)), Illinois (§ 740 ILL. COMP. STAT. 137/5 (2004)), Kansas (KAN. STAT. ANN. § 65-1,248 (2013)), Louisiana (LA. REV. STAT. ANN. § 51:2247.1 and § 47:305.67 (exempting breastfeeding items from sales and use taxes)), Montana (MONT. CODE ANN. § 50-19-501 (2012)), New York (N.Y. PUB. HEALTH LAW § 2505-a (McKinney 2012)), Pennsylvania (35 P.S. § 636.2), Puerto Rico (P.R. LAWS ANN. tit.1, § 5165 (2008)).

113. 29 U.S.C. 207(r) (2012).

114. Fentiman, *supra* note 111, at 58.

115. Alabama (CODE OF ALA. § 13A-12-130), Arkansas (A.C.A. § 20-27-2001), California (CAL. CIV. CODE § 43.3 (WEST 2014)), D.C. (D.C. CODE § 2-1402.82 (2001)), Florida (FLA. STAT. § 847.001 (2008)), Illinois (§ 740 ILL. COMP. STAT. 137/10 (2004)), Indiana (BURNS IND. CODE ANN. § 16-35-6-1), Kansas (KAN. STAT. ANN. § 65-1,248 (2013)), Louisiana (LA. REV. STAT. 51:2247.1), Massachusetts (MASS. GEN. LAWS ch. 111, § 221 (2014)), Michigan (MICH. COMP. LAWS ANN. § 117.5h (2006)), Montana (MONT. CODE ANN. § 50-19-501 (2012)), New York (N.Y. PUB. HEALTH LAW § 2505-a (McKinney 2012)), Pennsylvania (35 P.S. § 636.4), Puerto Rico (P.R. LAWS ANN. tit. 24, § 3518 and P.R. LAWS ANN. tit. 21, § 4567c (2005)), Rhode Island (R.I. GEN. LAWS § 23-13.5-1 (2008)), South Carolina (S.C. CODE ANN. § 63-5-40 (2010)), Tennessee (TENN. CODE ANN. § 68-58-102 (2013)), Vermont (VT. STAT. ANN. tit. 9 § 4502(j) (2006)), Washington (WASH. REV. CODE ANN. § 49.60.215 (West 2008)), and Wisconsin (Wis. STAT. ANN. § 944.17 (West 2005)).



as well as an array of other laws designed to take breastfeeding into consideration.<sup>116</sup> In a 1981 decision finding constitutional protections for breastfeeding,<sup>117</sup> Judge Godbold of the Fifth Circuit Court of Appeals described breastfeeding as “the most elemental form of parental care. It is a communion between mother and child that, like marriage, is ‘intimate to the degree of being sacred.’”<sup>118</sup> Because it provides numerous immunities, antibodies, and the crucial amount of touch and sucking new infants require, some have characterized breastfeeding as an “extension of the placenta.”<sup>119</sup> Courts have permitted employers to discriminate under the PDA against working women who take part in breastfeeding and breast milk pumping because courts often do not regard milk expression or lactation as part of pregnancy, childbirth, or a related medical condition.<sup>120</sup> Courts have interpreted pregnancy-related medical conditions narrowly,<sup>121</sup> implicitly permitting fourth trimester discrimination.

In spite of evidence that Congress intended to include lactation within the scope of the PDA in 1978,<sup>122</sup> some federal courts have placed discrimination because of lactation, breastfeeding, and milk expression beyond the scope of the PDA. In most of these cases,<sup>123</sup>

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116. Fentiman, *supra* note 111, at 61–62.

117. *Dike v. Sch. Bd.*, 650 F.2d 783 (5th Cir. Unit B, July 1981) (applying strict scrutiny to the government as an employer), *overruled by* *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (permitting the attorney general of Georgia to withdraw a job offer to a woman because she went through a marriage ceremony with another woman). Recent constitutional decisions concerning intimate association for same sex couples may problematize *Shahar*, requiring a more exacting form of scrutiny for government actions which discriminate against gays and lesbians. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003) (the constitution protects a liberty interest for same sex conduct between consenting adults in the privacy of their home); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating a provision of the Defense of Marriage Act that limited the federal recognition of marriage only to heterosexual couples).

118. *Dike*, 650 F.2d at 787 (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

119. *NORTHROP*, *supra* note 58, at 123–24.

120. *See* *Falk v. City of Glendale*, No. 12-cv-00925-JLK 2012 U.S. Dist. LEXIS 87278, at \*10 (D. Colo. June 25, 2012) (“The language of the PDA focuses solely on the conditions experienced by the mother. While lactation is not *per se* excluded, Title VII does not extend to breast-feeding as a child care concern.”).

121. *E.g., id.*

122. The Breastfeeding Promotion Act of 2011, S. 1463, 112th Cong. (2011), would amend Section 101 of the Civil Rights Act of 1964 to include information about breastfeeding. It would explicitly state that in passing the Pregnancy Discrimination Act in 1978, Congress intended to include breastfeeding and expressing milk as protected conduct.

123. *But see* *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013) (holding that breastfeeding is a medical condition related to pregnancy for the purposes of the PDA); *Martin v. Canon Bus. Solutions*, No. 11 C 2565-WJM-KMT, 2013 U.S. Dist. LEXIS 129008, at \*21 n.3 (D. Colo. Sept. 10, 2013) (finding that “accommodation of the need to express breast milk readily fits into a reasonable definition of pregnancy, childbirth, or related medical conditions” (internal quotation marks and citation omitted)); *contra*, *Wallace v. Pyro Mining Co.*,

courts determined that the PDA does not prohibit discrimination related to breastfeeding, expressing breast milk, and weaning.<sup>124</sup> The Fourth Circuit Court of Appeals, in particular, narrowly interpreted the scope of the Act. The Court found that the incapacitation and illness of pregnancy and related medical conditions are not similar in kind to the limitations placed upon mothers nursing infants.<sup>125</sup> Although lactation may be associated with women and pregnancy, some courts have failed to view breastfeeding and lactation as medically related to pregnancy.<sup>126</sup>

A minority of courts, however, have begun to recognize what many commentators argue:<sup>127</sup> discrimination on the basis of breastfeeding, milk expression, or lactation is pregnancy discrimination. For example, in *EEOC v. Houston Funding II, Ltd.*, the Fifth Circuit Court of Appeals determined that terminating a female employee because she is lactating or expressing milk constitutes

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789 F. Supp. 867, 869 (W.D. Ky. 1990) (“While it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not ‘medical conditions’ related thereto.”), *aff’d* Wallace v. Pyro Mining Co., No. 90-6259, 1991 U.S. App. LEXIS 30157 (6th Cir. 1991).

124. *Puente v. Ridge*, 324 F. App’x 423 (5th Cir. 2009) (holding that the PDA did not require the employer to make the accommodation of extra-long breaks for breastfeeding mother to pump milk); *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988) (determining employer’s denial of breast-feeding leave did not give rise to a disparate impact claim); *Falk*, 2012 U.S. Dist. LEXIS 87278 (finding that employer who denied breastfeeding plaintiff private space to express milk and breaks from work to do so did not violate the PDA because Title VII does not prohibit lactation discrimination); *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999) (finding breastfeeding is not a protected status); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997) (“[B]reast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA.”); *Wallace*, 789 F. Supp. at 869 (determining that although breastfeeding is a uniquely female attribute, employer who denied employee unpaid leave to breastfeed her infant did not engage in discrimination because of pregnancy and sex).

125. *Barrash*, 846 F.2d at 931–32. The Fourth Circuit’s failure to acknowledge the potential similarities between limitations placed upon mothers nursing young infants and those individuals recovering from pregnancy because it regards breastfeeding as a purely volitional act. The Court distinguished recovering pregnant persons from “young mothers *wishing* to nurse little babies.” *Id.* at 932 (emphasis added). Clearly, the Court regards breastfeeding not as an imperative aspect of childbirth and pregnancy but as a lifestyle choice.

126. For example, in *Wallace*, 789 F. Supp. at 868, Judge Simpson of the United States District Court of the Western District of Kentucky rejected a breastfeeding plaintiff’s claim that an employer’s refusal to grant personal leave because the employee’s six week old infant refused to wean or take a bottle constituted impermissible discrimination based upon pregnancy, childbirth, or a related medical condition.

127. E.g., Jendi B. Reiter, *Accommodating Breastfeeding and Pregnancy in the Workplace: Beyond the Civil Rights Paradigm*, 9 TEX. J. WOMEN & L. 1 (1999) (arguing that an equality-based civil rights model is inadequate to deal with pregnancy discrimination); Heather M. Kolinsky, *Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States*, 17 DUKE. J. GENDER L. & POL’Y 333 (2010) (arguing that federal legislation should consolidate the protections provided by private employers and states in order to recognize, value, and encourage breastfeeding).

impermissible sex discrimination under Title VII.<sup>128</sup> Finding for the EEOC, the Fifth Circuit determined that negative employment actions on the basis of lactation or milk expression can give rise to an actionable claim of sex discrimination under Title VII and that lactation is a medical condition related to pregnancy for the purposes of the PDA.<sup>129</sup> Noting that the PDA does not define “medical conditions” in its prohibition against discrimination for “pregnancy, childbirth, and related medical conditions,” the Court focused on the “plain meaning” of the words in the statute and reasoned that this included any physiological condition.<sup>130</sup> The Court stated that “[i]t is undisputed in this appeal that lactation is a physiological result of being pregnant and bearing a child.”<sup>131</sup> As such, discrimination because of lactation, like discrimination because of menstruation, would be included in the scope of the pregnancy discrimination within the “reasonable definition of ‘pregnancy, childbirth, or related medical conditions.’”<sup>132</sup> In spite of this decision, the PDA, as the majority of federal courts have interpreted it, does not mandate special accommodations for pregnant employees who are nursing.<sup>133</sup>

## 2. Fourth Trimester Failures II: Accommodations for Pregnancy-Related Incapacity

One reason the PDA may not provide adequate antidiscrimination protection during the fourth trimester is that it does not require employers to accommodate pregnant employees’ incapacities.<sup>134</sup> The PDA does not require preferential treatment for pregnant employees.<sup>135</sup> While employers *may* provide additional benefits or preferential treatment to pregnant employees,<sup>136</sup> employers are not *required* to do so.<sup>137</sup> For this reason, the PDA may not protect many pregnant women from discrimination.<sup>138</sup> Some commentators have argued that the Americans with Disabilities Act’s

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128. EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 428–30 (5th Cir. 2013).

129. *Id.* at 428–29.

130. *Id.*

131. *Id.* at 428.

132. *Id.* at 430.

133. Urbano v. Cont’l Airlines, Inc., 138 F.3d 204 (5th Cir. 1998); see *Houston Funding II, Ltd.*, 717 F.3d at 430 (Jones, J., concurring).

134. Troupe v. May Dep’t Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

135. *Id.*

136. Cal Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272 (1987).

137. Troupe, 20 F.3d at 738; Armstrong v. Flowers Hospital Inc., 33 F.3d 1308, 1317 (11th Cir. 1994).

138. Grossman, *supra* note 11, at 570.

requirement that employers make “reasonable accommodations” should be available to pregnant employees;<sup>139</sup> remedies for discrimination, however, are available only to employees who are able to work at their full capacity.<sup>140</sup> According to Judge Conway:

. . . [t]o the extent that a pregnant employee is able and willing to work . . . the PDA protects her right to remain in the workplace. The language of the statute simply does not address the right of a pregnant employee, fully able to work, to receive benefits that are different from, and arguably superior to, the benefits available to other workers.<sup>141</sup>

In interpreting the PDA, the courts have adopted a comparator model that makes it exceedingly difficult for pregnant women seeking reasonable accommodations to receive relief. For the purposes of the Act, employers may treat pregnant employees differently than other employees if a similarly situated individual, even if only hypothetical, would be treated in a similar fashion. The federal circuits have defined comparators in reference to similarly situated male employees even though the PDA was passed to address the unique challenges that women face because of their role in procreation.<sup>142</sup> Violations of the PDA can be found in cases where the record has shown that similarly situated pregnant employees were

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139. Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012) (arguing that in the workplace women may experience the healthy state of pregnancy as a disability); D’Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411 (1996) (arguing that due to the historical link between pregnancy and disability Congress should amend the PDA to mirror the ADA’s requirement for reasonable accommodation); Colette G. Matzkie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy under the Americans with Disabilities Act*, 82 GEO L.J. 193 (1993) (arguing that the pregnancy should be considered a disability under the ADA). The interaction between the PDA and the Americans with Disabilities Act may have the potential to provide a foundation for arguing that reasonable accommodations should be made for pregnant employees. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 407 (2000) (noting that the interaction between pregnancy and disability provides fertile ground for further inquiry). Examining the overlap between the ADA and the PDA, some commentators have argued that the law may require employers to make accommodations for pregnancy if they provide accommodations for other employees who are similarly limited in their ability to work. Widiss, *supra* note 13. Some commentators have argued that the explicit disaggregation of the ADA from the PDA emerges from the wariness of feminists to embrace the ADA as a tool for advancing the protection of pregnant workers. Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA’s Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC’Y 1 (2012) (arguing that it is time to expand the right to reasonable accommodations under the ADA to pregnant employees).

140. *Armstrong*, 33 F.3d at 1316.

141. *Id.*

142. See Carvey Manners, *supra* note 10, at 214–24.

treated differently than comparators, i.e., similarly situated non-pregnant employees who are generally men.<sup>143</sup> However, if no similarly situated workers are granted sick leave or light duty, then an employer need not grant a hypothetical pregnant worker sick leave or light duty.<sup>144</sup> Courts apply this comparator approach by requiring that women seeking the protections of the Act for absences and illnesses related to pregnancy compare themselves to men who are not pregnant.<sup>145</sup> Even when employees are granted relief for pregnancy discrimination under the Act, the point of reference continues to be the male employee who is treated more favorably than his similarly situated pregnant female counterpart.<sup>146</sup> This comparator-based analysis also applies to claims of discrimination from pregnancy-related illnesses.<sup>147</sup>

Judge Posner's decision in *Troupe v. May Department Stores* is the classic example of this analysis.<sup>148</sup> In *Troupe*,<sup>149</sup> the Seventh Circuit Court of Appeals examined a case where an employer terminated a department store employee, who was suffering from morning sickness, before her maternity leave. Judge Posner noted that the PDA does not require employers to provide maternity leave or to make any other accommodations to ensure that pregnant women are able to work.<sup>150</sup> Accordingly, "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees

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143. See, e.g., *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008) (stating that the PDA orders employers to treat pregnant employees the same as non-pregnant employees who are similarly situated in their ability to work).

144. See, e.g., *Walker v. Fred Nesbit Distrib. Co.*, 356 F. Supp. 2d 964 (S.D. Iowa 2005). The court found that the plaintiff failed to provide any evidence that showed she was treated differently than the second group of employees who were injured off the job. The defendant claimed that there was a change of policy as to reassignment to light duty for off the job injury after September 2001 and provided employee testimony which supported their claim. The court found that due to the plaintiff's failure to show that the alleged policy change was pretext to discriminate against her pregnancy-related status, it could not disturb the jury's verdict.

145. See *Jirak v. Fed. Express Corp.*, 805 F. Supp. 193 (S.D.N.Y. 1992) (noting that plaintiff produced evidence that the company's policy of termination was applied differently to males and females).

146. See *Somers v. Aldine Indep. Sch. Dist.*, 464 F. Supp. 900 (S.D. Tex. 1979) (finding school district violated Title VII's prohibition against sex discrimination when it required a pregnant female employee to take mandatory unpaid leave or face termination while male employees suffering from temporary physical disabilities were not required to take mandatory, unpaid sick leave).

147. E.g., *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1511–12 (9th Cir. 1989) (noting that "the implementation of a policy or practice under which pregnant employees were treated differently from other temporarily-disabled employees with similar capacity for work would still be a violation of both the letter and spirit of Title VII's prohibition against pregnancy discrimination.").

148. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994).

149. *Id.* at 735.

150. *Id.* at 737.

. . .”<sup>151</sup> Furthermore, the PDA does not protect employees from adverse employer action because of morning sickness or pregnancy-related illness, and “[i]f an employee who . . . does not have an employment contract cannot work because of illness, nothing in Title VII requires the employer to keep the employee on the payroll.”<sup>152</sup> The result of the comparator approach is that illness arising from morning sickness, even when severe, may not be treated as a related medical condition for the purposes of the Act, so long as a similarly situated sickly Mr. Troupe (hypothetical or not) would have been treated in a similar fashion.

Cases like *Troupe* have led some commentators to claim that the law of sex discrimination for pregnant workers conforms to a capacity-based model in its application.<sup>153</sup> This model results in an improperly narrow interpretation of the PDA.<sup>154</sup> A capacity-based interpretation of the PDA only protects a pregnant woman if she is capable of performing the various duties of their job as if she were not pregnant.<sup>155</sup> As a result, employers can freely discriminate against employees recovering from pregnancy, engaging in infant care, or breastfeeding because these employees are required to meet a standard that compares them to people who are not and have not been pregnant. In light of this, commentators argue that courts should read the Act to require that employers make some reasonable accommodations for pregnant employees. Herma Hill Kay, for example, has argued that for women to realize equal opportunity in employment, some accommodation or compensation is necessary to address the different cultural and physiological roles that women play in reproduction.<sup>156</sup>

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151. *Id.* at 738.

152. *Id.* at 737. In order to recover for pregnancy discrimination a pregnant employee like Troupe would have to show that if all the relevant facts were identical except for her pregnancy, she would have been treated more favorably. *Id.* at 738. Effectively this would mean that she would have to show that her tardiness was treated differently than the tardiness of other similarly situated nonpregnant employees. *Id.* at 738–39. Numerous commentators have criticized the opinion, noting that the Court’s requirements still adhere to an ideal worker who is more likely to be male than not.

153. See Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 *YALE J.L. & FEMINISM* 15 (2009). According to Ruth Colker, these failures may arise from the reality that courts generally employ a laissez-faire economic perspective in making determinations about the scope of antidiscrimination protections for pregnant workers. Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 *OHIO ST. L. J.* 61, 63–65 (1997).

154. *Id.*

155. *Id.*

156. Kay, *supra* note 94, at 22–28.

### 3. Fourth Trimester Failures III: Infant Care

Courts have interpreted the Pregnancy Discrimination Act narrowly so that its prohibitions against discrimination do not include discrimination because of the need to care for young infants<sup>157</sup> or infants with special needs.<sup>158</sup> The PDA does not require employers to grant paid or unpaid leave to employees for recovery from pregnancy. So long as the employer has no policy for granting paid or unpaid leave to similarly situated employees during their recovery from illness or disability, pregnant women can be required to return to work quickly after giving birth. Courts have repeatedly rejected claims against employers denying parental leave to individuals caring for their young infants.<sup>159</sup> For the purposes of Title VII and the PDA, courts have repeatedly held that sex discrimination does not prohibit an employer from refusing to grant parental leave.<sup>160</sup> Furthermore, when courts do grant relief, they insist that the justification for this relief stems solely from a desire to support the pregnant woman's physical recovery alone without regard to the important psychological and social aspects of the fourth trimester.<sup>161</sup> Such a perspective not only disregards the importance of bonding but also discounts the importance of this crucial transition period for primary care-givers who have not given birth, like fathers,<sup>162</sup> non-gestational mothers, or adoptive

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157. *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1491–93 (D. Colo. 1997) (stating that the needs or conditions of a child requiring the mother's presence are not within the purview of the PDA) (citing *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867 (W.D. Ky. 1990), *aff'd without opinion*, 951 F.2d 351 (6th Cir. 1991)); see also *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988); *Barnes v. Hewlett-Packard Co.*, 846 F. Supp. 442 (D. Md. 1994).

158. *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 997 (6th Cir. 1991).

159. See *Guglietta v. Meredith Corp.*, 301 F. Supp. 2d 209 (D. Conn. 2004) (holding that a childcare issue is not a sex-plus characteristic recognized by Title VII); *Fejes*, 960 F. Supp. at 1491–93; *Barrash*, 846 F.2d 927; *Barnes*, 846 F. Supp. 442; but see *Roberts v. U.S. Postmaster Gen.*, 947 F. Supp. 282 (E.D. Tex. 1996) (recognizing that a disparate impact claim may be possible in circumstances where women are forced to resign more often than men because employers are denying them parental leave).

160. *Barnes*, 846 F. Supp. at 443 (finding denial of leave request in order to care for infant's medical problems is not gender based sex discrimination for the purposes of the Pregnancy Discrimination Act); *Record v. Mill Neck Manor Lutheran Sch. for the Deaf*, 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (finding that the prohibition against sex discrimination embodied in Title VII does not extend to protecting women wishing to take parental leave for childrearing).

161. See *Barnes*, 846 F. Supp. at 444–45; see also *Grossman & Thomas*, *supra* note 153.

162. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290–92 (1987) (noting that Title VII permits women and men to be treated differently for the purposes of pregnancy leave policies so long as the policies “cover only the period of *actual physical disability* on account of pregnancy”); *Schafer v. Bd. of Pub. Educ. of the Sch. Dist. Of Pittsburgh, Pa.*, 903 F.2d 243, 248 (3d Cir. 1990) (holding that year-long childrearing policy for women but not for men without a showing of disability contravenes the purpose of Title VII); *Matter of Chavkin v.*

parents.<sup>163</sup> Even though there has been a persistent push in feminist legal scholarship and pressure from government agencies to expand the scope of antidiscrimination to include discrimination based on caretaking,<sup>164</sup> courts interpret PDA to exclude the compelling fourth trimester concerns of infants.<sup>165</sup>

Current interpretations of the PDA fail to prohibit pregnancy discrimination during the fourth trimester in two interrelated ways. First, the courts interpret the PDA in ways that do not require extending accommodations to women workers because of pregnancy. Second, pregnancy jurisprudence adopts a narrow definition that ends with the birth of the infant. It refuses to regard discrimination because of breastfeeding or infant care, which are crucial aspects of the fourth trimester. The PDA, however, is not the only statutory scheme which fails to account for the fourth trimester. The next section will shift the Article's focus to address the fourth trimester failures of the Family Medical Leave Act.

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Santaella, 81 N.Y.S.2d 654, 657 (N.Y. App. Div. 1981) (characterizing disability as the main reason for paid sick leave after pregnancy). While the Supreme Court continues to recognize the roles that fathers play in their children's lives for constitutional purposes, *Weinberger v. Wiesenfeld*, 420 U.S. 626, 652 (1975) (noting that "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of [his] children" (citation omitted)), the PDA is still interpreted narrowly to exclude the concerns of infants, fathers and non-gestational caregivers. *Falk v. City of Glendale*, No. 12-cv-00925-JLK, 2012 U.S. Dist. LEXIS 87278, at \*10 (D. Colo. June 25, 2012) ("The language of the PDA focuses solely on the conditions experienced by the mother.").

163. Some employers operate with a presumption that fathers are not the primary caregivers of young children. *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 996 (6th Cir. 1991) (holding that employer's decision to terminate employee because her new infant's medical conditions would create higher insurance costs is not connected to her gender or her pregnancy and not prohibited by Title VII); *Knussman v. Maryland*, 16 F. Supp. 2d 601, 606 (D. Md. 1998) (in which plaintiff challenged a supervisor's claim that "the 'primary care giver' was presumed to be the mother").

164. Employees have increasingly been seeking relief from discrimination related to caretaking responsibilities and family obligations. Joan C. Williams & Stephanie Bornstein, *The Jack Pemberton Lecture Series: Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171 (2006) (examining the "rapidly expanding" field of family responsibility discrimination). There are some circumstances under which EEOC regards discrimination against caretakers as unlawful under Title VII, particularly when such discrimination is based on stereotypes or impacts male workers. OFFICE OF LEGAL COUNSEL, EEOC, NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES, (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>. In spite of these interpretative guidelines, such discrimination against caregivers seems to persist in the workplace. Press Release, EEOC, Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities Widespread Problem, Panelists Tell EEOC (Feb. 15, 2012), available at <http://www.eeoc.gov/newsroom/release/2-15-12.cfm>; *Written Testimony of Joan C. Williams*, EEOC (Feb. 15, 2012), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm>.

165. *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997) (determining "the PDA only provides protection based on the condition of the mother—not the condition of the child").



*B. The Family Medical Leave Act*

In 1993, Congress passed the Family Medical Leave Act (“FMLA”)<sup>166</sup> to address the universal vulnerabilities that arise from care-giving and illness. While the PDA does not explicitly require employers to provide maternity leave or sick leave for recovery from pregnancy, the FMLA provides twelve weeks of legally protected leave while an employee cares for his or her family.<sup>167</sup> The Act provides that employees may take:

reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered service member with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a military member on covered active duty. . .<sup>168</sup>

Although the FMLA allows for some women to have access to unpaid leave after giving birth, it does not adequately account for the demands of the fourth trimester. This failure stems in part from the FMLA’s attempts to balance the interests of employees and employers.<sup>169</sup> Before its passage, many regarded the FMLA as a “modest” and “moderate” exercise of federal protection designed to balance the interests of employees and employers through unpaid family leave.<sup>170</sup> In an effort to “balance the needs of the workplace with the needs of families” and to “address the demands and needs of the workforce,”<sup>171</sup> the FMLA provides only low cost unpaid leave and makes provisions for protecting the interests of businesses regarding scheduling, administration, absenteeism, and retention.<sup>172</sup>

The FMLA does not provide maternity leave to a large number of women workers. According to a 2012 Department of Labor report,

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166. 29 U.S.C. §§ 2601–2654 (2013).

167. 29 U.S.C. § 2601 (2013).

168. 29 C.F.R. § 825.101(a) (2013).

169. Shay Ellen Zeemer, Note, *FMLA Notice Requirements and the Chevron Test: Maintaining a Hard-Fought Balance*, 55 VAND. L. REV. 261, 278 (2002).

170. E.g., *Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism. of the S. Comm. on Labor and Human Res.*, 102d Cong. 22–24 (1991) (statement of Lawrence Perlman, President and Chief Executive Officer, Control Data).

171. 29 U.S.C. § 2601(b)(1) (2012).

172. *Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism. of the S. Comm. on Labor and Human Res.*, 102d Cong. 34–36 (1991) (statement of Sen. Claiborne Pell, Member, S. Comm. on Labor and Human Res.).

only seventeen percent of job sites qualify for FMLA, and within those qualifying sites, only fifty-nine percent of workers are eligible for FMLA leave.<sup>173</sup> The Department of Labor also reported that FMLA does not cover eighty-nine percent of all employers,<sup>174</sup> and 80.3% of non-covered worksites have fewer than ten employees.<sup>175</sup>

To be eligible for FMLA leave, an employee must be employed by an employer that has at least fifty employees on site<sup>176</sup> or has at least fifty employees within seventy-five miles of the site.<sup>177</sup> Covered workers must be employed for twelve months before FMLA leave becomes available.<sup>178</sup> During that time, the employee must work at least 1250 hours.<sup>179</sup> These requirements prevent many employees from taking advantage of the FMLA.<sup>180</sup> New employees, part-time employees, and employees that work in “high turn-over fields” are generally not eligible for FMLA leave.<sup>181</sup> As a matter of percentage, a larger share of women than men engage in part-time work,<sup>182</sup> often to meet both their caretaker responsibilities at home and the demands of an economy that increasingly requires more than one income to make ends meet.<sup>183</sup> In the current economic climate, the number of workers who would prefer full-time work, but have been

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173. U.S. DEP'T OF LABOR, FAMILY AND MEDICAL LEAVE IN 2012: EXECUTIVE SUMMARY I (2013), available at <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Executive-Summary.pdf>.

174. *The 2000 Survey Report: Impact of Family and Medical Leave on Non-Covered Establishments*, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., <http://www.dol.gov/whd/fmla/chapter7.htm> (last visited Aug. 28, 2014).

175. *Id.*

176. 29 U.S.C. § 2611(4)(A)(i) (2012) (defining an eligible employer as “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”).

177. 29 U.S.C. § 2611(2)(B)(ii) (2012) (excluding an employee who “is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.”).

178. 29 C.F.R. § 825.110 (2013).

179. 29 U.S.C. § 2611(2)(A)(ii) (2012) (requiring eligible employees to have “at least 1,250 hours of service with such employer during the previous 12-month period.”).

180. Megan E. Blomquist, *A Shield, Not A Sword: Involuntary Leave Under the Family and Medical Leave Act*, 76 WASH. L. REV. 509 (2001).

181. Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels* 16 COLUM. J. GENDER & L. 429, 454 (2007).

182. *Persons at Work in Nonagricultural Industries by Age, Sex, Race, Hispanic or Latino Ethnicity, Marital Status, and Usual Full- or Part-Time Status*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, available at <http://www.bls.gov/web/empstat/cpseea27.pdf> (last visited Aug. 28, 2014).

183. ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2004).

forced to work part-time on an involuntary basis, is currently on the rise.<sup>184</sup>

Employees who work in a small business or as part of a widely distributed workforce, which sometimes happens in rural regions of the United States, are not eligible to take FMLA leave.<sup>185</sup> The Act's failure to cover employees in small businesses<sup>186</sup> and part time employees<sup>187</sup> has been highlighted by scholars who are critical of the act.<sup>188</sup> Members of the House of Representatives attempted to alleviate some of the FMLA's omissions with two unsuccessful pieces of legislation: the Family Medical Leave Enhancement Act of 2009,<sup>189</sup> which would have extended FMLA coverage to employees at businesses with at least twenty-five employees, and the Family Fairness Act of 2009, which would have extended FMLA coverage to part-time employees.<sup>190</sup>

Workers covered by the FMLA may still be unable to take their crucial fourth trimester leave. Although the Act allows twelve weeks of leave, it is unpaid. The FMLA specifically fails to acknowledge the economic vulnerabilities that might make taking unpaid leave impossible for some employees. Many workers, particularly in the current economy, cannot afford to take unpaid leave for any amount of time, let alone twelve weeks. While some states have moved toward requiring employers to provide paid family leave,<sup>191</sup>

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184. U.S. Dept. of Labor, Bureau of Labor Statistics, *Involuntary Part-time Work on the Rise*, ISSUES IN LABOR STATISTICS (2008), available at <http://www.bls.gov/opub/ils/pdf/opbils71.pdf>.

185. Palazzari, *supra* note 181, at 454.

186. 29 C.F.R. § 825.110(a)(3) (2013).

187. *Id.* § 825.110(a)(2).

188. Jessica Monroe, Note, *Ohio's "Pregnancy-Blind" Leave Policy: The Public Policy Ramifications of Mcfee v. Nursing Care Management of America*, 80 U. CIN. L. REV. 229, 234 (2011).

189. H.R. 824, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bills/111/hr824/text> (last visited Aug. 28, 2014).

190. See H.R. 389, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bills/111/hr389/text> (last visited Aug. 28, 2014).

191. Some of the states have offered more financially responsive forms of paid family leave. In 2002, building on the state's robust disability insurance scheme, California became the first state to enact paid family leave. California provides up to twelve weeks of paid leave to employees who request leave due to "the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee." CAL. GOV'T CODE § 12945.2(c)(3)(A) (West 2012). The state of Washington joined California in 2007, offering a less expansive paid family leave program. WASH. REV. CODE ANN. § 49.86.020 (West 2008). New Jersey, New York, and Massachusetts currently have paid family leave bills pending. Assemb. Bill No. 430, 216th Leg., Reg. Sess. (N.J. 2014) (proposed bill); Assemb. Bill No. 6289, 234th Leg., Reg. Sess. (N.Y. 2011) (proposed bill); H.R. 79, 188th Gen. Ct. (Mass. 2013) (proposed bill). Minnesota and New Mexico offer some paid leave to low income working parents through their providing grants and subsidies to low income parents who wish to live at home with infant children. MINN. STAT. ANN. § 119B.21 (West 2008); H.R. 198, 50th Leg., 2d Sess. (N.M. 2012).

most states lack robust paid parental leave policies. In 2001, the Department of Labor found that eighty-eight percent of persons eligible for family leave under the FMLA do not take the full amount of time off from work because they cannot afford it.<sup>192</sup> Lower- and middle-income workers are less likely to take the leave.<sup>193</sup> The fact that this leave is unpaid hits these workers especially hard because their positions often lack paid sick leave and vacation time that they could use to substitute for unpaid leave.<sup>194</sup> This lack in the FMLA reinscribes socioeconomic class-based marginalization in ways that exacerbate the vulnerabilities of the fourth trimester. As the economic costs of giving birth<sup>195</sup> and raising an infant<sup>196</sup> increase, the possibility that workers may be able to enjoy a fourth trimester period without a significant drop in their income decreases.

The FMLA also reinscribes identity-based inequalities for families that fail to fit the normative ideal of two married, heterosexual parents. Unpaid leave fails to take into account the vulnerabilities of single-parent families that often lack sufficient savings to support an

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192. Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 86 (2004).

193. Palazzari, *supra* note 181, at 460.

194. *Id.*

195. The current cost of prenatal care and delivery in the United States has become impossible for most families to pay for without some form of health insurance. The total charges for a vaginal delivery and a cesarean delivery were \$32,093 and \$51,125 respectively in 2010. TRUVEN HEALTH ANALYTICS, *THE COSTS OF HAVING A BABY IN THE UNITED STATES: EXECUTIVE STUDY* (2013), available at <http://transform.childbirthconnection.org/wp-content/uploads/2013/01/Cost-of-Having-a-Baby-Executive-Summary.pdf>. Even though women in the United States are discharged from the hospital quickly in comparison to their European counterparts and receive similar services, they pay significantly more for prenatal care and childbirth. Elisabeth Rosenthal, *American Way of Birth, Costliest in the World* N.Y. TIMES (June 30, 2013), [http://www.nytimes.com/2013/07/01/health/american-way-of-birth-costliest-in-the-world.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/01/health/american-way-of-birth-costliest-in-the-world.html?pagewanted=all&_r=0). And in comparison to other global north OECD nations, the United States has high rates of infant mortality, see *Recent Trends in Infant Mortality in the United States*, CTR. FOR DISEASE CONTROL AND PREVENTION, (Oct. 2008), <http://www.cdc.gov/nchs/data/databriefs/db09.htm>, and maternal death, see *Country Comparisons, Maternal Mortality Rate*, CIA WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2223rank.html> (last visited Aug. 28, 2014). These high costs do not include the price many families pay for reproductive technology assistance. See, e.g., DEBORAH SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* (2006) (discussing the rising costs of in vitro and surrogacy); Rebecca B. Russell et al., *Cost of Hospitalization for Preterm and Low Birth Weight Infants in the United States*, 120 PEDIATRICS NO. 1 (July 1, 2007) (discussing the rising costs associated with preterm and low birth weight infants); Elizabeth L. Shearer, *Cesarean Section: Medical Benefits and Costs*, 37 SOC. SCI. MED. 1223 (1993) (discussing the rising costs associated with unnecessary cesarean sections).

196. Press Release, USDA, Parents Projected to Spend \$241,080 to Raise a Child Born in 2012, According to USDA Report (August 15, 2013), available at <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2013/08/0160.xml>.

extended period of unpaid leave.<sup>197</sup> While *United States v. Windsor*<sup>198</sup> expanded the scope of the FMLA to include married gay and lesbian persons,<sup>199</sup> employees in unmarried partnerships and non-traditional plural relationships may be excluded, as the Act provides leave only to care for “spouses” and children.<sup>200</sup>

The neutral, seemingly universal nature of the leave, which includes addressing the needs vulnerabilities of families, also entrenches traditional gender-based care norms. While the statute’s language is gender neutral and Congress passed it to help women and men, women are far more likely to take their leave for care responsibilities than men. Although only thirteen percent of the FMLA leave was taken for childbirth or childcare, fifty-eight percent of those taking leave were women.<sup>201</sup> Men were more likely to use their leave for their own qualifying illnesses than for family caretaking responsibilities.<sup>202</sup> This is likely related to the socialized understanding and belief that only women experience pregnancy and its related medical conditions. In actuality, pregnancy is a medical condition that both the pregnant woman and her partner experience as the responsibilities of childcare—particularly after birth: supervising, changing diapers, and feeding—are ideally shared. Men generally experience the social devaluation of their contribution during their partner’s pregnancy and later may be limited in providing the care needed during the fourth trimester due to social expectations and inflexible employment leave policies.

The legal protections for pregnancy in antidiscrimination law do not adequately support the fourth trimester for the majority of women. The FMLA is only a viable fourth trimester alternative for mothers and fathers who are full-time workers with a significant degree of attachment to the labor market, who work for larger

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197. The legal landscape for single mothers, including changes to the bankruptcy code and the elimination of Aid to Dependent Families with children, have made it difficult for single mothers to raise their families and save for retirement. Pamela Gershuny, *The Combined Impact of the PRWORA, FMLA, IRC, FRD, DPPA, And BAPCPA on Single Mothers and their Children*, 18 WM. & MARY J. WOMEN & L. 475, 476 (2012).

198. 133 S. Ct. 2675 (2013).

199. *Guidance to Employee Benefit Plans on the Definition of “Spouse” and “Marriage” under ERISA and the Supreme Court’s Decision in United States v. Windsor*, U.S. DEP’T OF LABOR (Sept. 18, 2013), available at <http://www.dol.gov/ebsa/newsroom/tr13-04.html>.

200. To conform to the Supreme Court’s decision in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), the Department of Labor has issued notice that it would look to state law of the jurisdiction where the couple married in its interpretation of the term “spouse.” This change, which adopts a “place of celebration” rule, ensures that legally married same-sex couples now “have consistent FMLA rights regardless of where they live.” The Family Medical Leave Act, 79 Fed. Reg. 36,445, 36,448 (proposed June 27, 2014) (to be codified at 29 C.F.R. pt. 825).

201. Palazzari, *supra* note 181, at 456.

202. *Id.* at 457.

companies, and who can also afford to take twelve weeks of unpaid leave. Although there is empirical evidence that family leave coverage has a positive impact on keeping women in the workforce even after they give birth,<sup>203</sup> federal and state laws in the United States provide only limited access to this much-needed leave for most employees. While the FMLA provides up to twelve weeks of unpaid leave for women who have given birth,<sup>204</sup> most individuals cannot afford to forgo wages for three months.<sup>205</sup> Even though some states have required that women who have given birth receive some paid leave, employees receive only a certain percentage of their typical earnings.<sup>206</sup> Most employers provide no paid maternity leave.<sup>207</sup> Some firms that do provide paid maternity provide only four to six weeks of leave,<sup>208</sup> which covers only half of the intense period of the fourth trimester. Even employers with the most generous leave policies in the United States, which provide up to nine months of paid maternity leave,<sup>209</sup> fail to approximate the amount of paid leave provided to working women who give birth in most other global

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203. MASAHIRO ABE ET AL., MATERNITY LEAVE POLICIES AND WOMEN'S EMPLOYMENT AFTER CHILDBIRTH: EVIDENCE FROM THE UNITED STATES, BRITAIN, AND JAPAN (1998), available at <http://sticerd.lse.ac.uk/dps/case/cp/Paper3.pdf>. Some scholars have even found that maternity leave led to some positive health outcomes for infants. Maya Rosin, *The Effects of Maternity Leave on Children's Birth and Infant Health Outcomes in the United States*, 30 J. HEALTH ECON. 221 (2011).

204. 29 U.S.C. § 2612(a)(1)(A) (2013).

205. This reality of unpaid leave will tend to reinforce marginalization and inequalities across the labor market and across identity positions. Because recent immigrants, women, and people of color have always populated a more contingent place in the labor market (i.e. often named part of the precariat). The precariat encompasses those individuals who lack stable occupational identities, existing in spaces of economic vulnerability characterized by short-term work, unstable social welfare protections, and limited access to legal protections. See generally GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (Bloomsbury Academic, 2011). For this reason, women of color, recent immigrants, and poor women, for example, will be disproportionately impacted when policies lack fourth trimester protections and payment. Starting from recognition that the fourth trimester is a period of dependency stemming from a universal embodied need, necessarily requires more robust coverage to be paid. It also requires that we provide the means for individuals to be uncoupled from work and the logic of productivism during this period.

206. California (CAL. UNEMP. INS. CODE § 3301 (West 2014); New Jersey (N.J. STAT. ANN. §3 4:11B-4 (West 2011)), New York, Rhode Island, Hawaii

207. Only twelve percent of workers have some access to paid family leave. U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2012 108 (2012), available at <http://www.bls.gov/ncs/ebs/benefits/2012/ebbl0050.pdf>; see also Cynthia L. Remmers, *Pregnancy Discrimination and Parental Leave*, 11 INDUS. REL. L.J. 377 (1989).

208. Maureen E. Lally-Green, *The Implications of Inadequate Maternity Leave Policies Under Title VII*, 16 VT. L. REV. 223, 232 (1991).

209. *100 Best Companies 2013*, WORKING MOTHER, available at <http://www.workingmother.com/best-company-list/146788> (last visited Aug. 28, 2014).

north industrial nations.<sup>210</sup> For this reason, a significant number of women who have given birth return to work within days or weeks of giving birth—long before the fourth trimester and its demands end.<sup>211</sup> When women do choose to take the full amount of parental leave available to them after giving birth, they not only forgo much needed income but also suffer negative consequences in terms of career advancement or perceptions that they are not committed to the workplace.<sup>212</sup>

### C. Fair Labor Standards Act

To a limited extent, antidiscrimination-like fourth trimester protections have seeped into other areas through laws and policies. For example, breastfeeding mothers have gained increased protections at the federal<sup>213</sup> and state level.<sup>214</sup> The Fair Labor Standards Act (FLSA), which regulates workplace conditions,<sup>215</sup> provides only the most minimal protections for working women during the fourth trimester. The FLSA, through its regulations, omissions, and permissions, has shaped the divide between family and market

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210. Tara Siegel Bernard, *In Paid Family Leave, U.S. Trails Most of the Globe*, N.Y. TIMES (Feb. 22, 2013), <http://www.nytimes.com/2013/02/23/your-money/us-trails-much-of-the-world-in-providing-paid-family-leave.html?pagewanted=all&r=0>.

211. Lally-Green, *supra* note 208, at 232.

212. *Id.* at 232–33.

213. In some ways, the federal government has adopted a pro-breastfeeding stance. *E.g.*, U.S. DEPT. OF HEALTH & HUMAN SERVS., OFFICE OF THE SURGEON GEN., THE SURGEON GENERAL'S CALL TO ACTION TO SUPPORT BREASTFEEDING (2011), available at <http://www.surgeongeneral.gov/library/calls/breastfeeding/calltoactiontosupportbreastfeeding.pdf> (calling for education, medical care, community support and paid leave to support breastfeeding). Breastfeeding mothers received some measure of protection when the Patient Protection and Affordable Care Act amended the Fair Labor Standards Act to require that employers make provisions to support breastfeeding mothers at work. *Section 7(r) of the Fair Labor Standards Act – Break Time for Nursing Mothers Provision*, U.S. DEPT. OF LABOR, WAGE & HOUR DIV., [http://www.dol.gov/whd/nursingmothers/Sec7rFLSA\\_btm.htm](http://www.dol.gov/whd/nursingmothers/Sec7rFLSA_btm.htm) (last visited Aug. 28, 2014). It amends Section 7 of the FAIR LABOR STANDARDS ACT OF 1938 (codified at 29 U.S.C. § 207) to require that employers provide reasonable break time for mothers expressing milk for one year after the child's birth and a place shielded from view and intrusion to express milk that is not a bathroom. *See* 29 U.S.C. § 207(r)(1)(B) (2012). These law and policy changes correlate with an increasing number of mothers starting to breastfeed in the hospital and continuing to breast feed until six months. According to data gathered by the CDC, seventy-seven percent of women who give birth now begin breastfeeding in the hospital and forty-nine percent continue to breastfeed for six months. NAT'L CTR FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, BREASTFEEDING REPORT CARD 2 (2013), available at <http://www.cdc.gov/breastfeeding/pdf/2013BreastfeedingReportCard.pdf>.

214. *Breastfeeding Laws*, NAT'L CONFERENCE OF STATE LEGISLATORS (June 11, 2014), <http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx#State>.

215. 29 U.S.C. § 202 (2012).

work.<sup>216</sup> In 2010, Congress amended FLSA with provisions in the Patient Protection and Affordable Care Act (ACA).<sup>217</sup> The ACA amendments to the FLSA require employers to support nursing mothers in the workplace.<sup>218</sup> For one year after the birth of a child, an employer must provide reasonable break time for nursing employees<sup>219</sup> and a private place, other than a bathroom, to pump breast milk.<sup>220</sup> Many employers would avoid this requirement, however, through the limited exemption for employers with fewer than fifty employees.<sup>221</sup> These employers are not required to provide breaks or private places to nurse if doing so would, “impose undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.”<sup>222</sup> Employers are also not required to pay employees during the breaks they take to pump.<sup>223</sup>

Forcing women to choose between breastfeeding their infants and paid employment can cause hardship during the fourth trimester.<sup>224</sup> Because of the workplace’s rigid demands, many mothers wean their infants before they would like to and long before the American Pediatric Society recommends doing so.<sup>225</sup> While employees may receive some protections and reasonable accommodations for breastfeeding from the FLSA’s provisions protecting the expression of milk, it is not clear that employers are complying.<sup>226</sup> Some courts have determined that there may not be mechanisms to enforce the FLSA’s breastfeeding provisions.<sup>227</sup> Legal relief might be limited to petitioning the Department of Labor for an injunction.<sup>228</sup>

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216. Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119, 150 (2012) (arguing that the history of the FLSA provides a vision of work and family).

217. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

218. 29 U.S.C. § 207(r) (2012).

219. § 207(r)(1)(A).

220. § 207(r)(1)(B).

221. § 207(r)(3).

222. *Id.*

223. § 207(r)(2).

224. Gabriela Steier, *Womenomics for Nursing Growth: Making the Case for Work Time Flexibility and Mother-Friendlier Workplaces*, 21 BUFF. J. GENDER L. & SOC. POL’Y 119, 126–28 (2012) (arguing for more workplace flexibility in order to support breastfeeding).

225. *Id.* at 127–28.

226. See *Falk v. City of Glendale*, No. 12-cv-00925-JLK, 2012 U.S. Dist. LEXIS 87278, at \*15 n.8 (D. Colo. June 25, 2012) (noting that FLSA requires that employer make accommodations for employee to express milk).

227. *Salz v. Casey’s Mktg. Co.*, No. 11-CV-3055-DEO, 2012 U.S. Dist. LEXIS 100399, at \*7 (N.D. Iowa July 19, 2012).

228. *Id.*



Furthermore, vigorous disputes over the reasonableness of accommodations and break times may come to mirror the pattern of current employer resistance to providing reasonable accommodations to disabled employees under the ADA.

Embracing a fourth trimester framework would also augment the pro-breastfeeding policies embodied in the FLSA by making breastfeeding part of a pregnancy continuum that lacks a clear starting or ending point. When employers discriminate against women because they are expressing milk or breastfeeding, it is pregnancy discrimination because breastfeeding is often part of the unwinding process of pregnancy.

#### *D. Amended Americans with Disabilities Act*

For pregnant workers, the Amended Americans with Disabilities Act<sup>229</sup> may provide some protection for the fourth trimester by protecting employees experiencing temporary physical limitations arising from pregnancy. The product of a sophisticated coalition of individuals from the disability rights movement,<sup>230</sup> Congress passed the ADA to eliminate discrimination against people with disabilities. This was achieved by providing comprehensive federal intervention and clear enforcement standards.<sup>231</sup> Although the ADA was not the first legislative effort to provide legal protections against discrimination for people with disabilities, the Act was designed to provide “uniform, national protections” that previous efforts did not achieve.<sup>232</sup> The ADA includes broad protections for those that have a “disability.”<sup>233</sup> This includes individuals who have, “(A) a physical or mental impairment that substantially limits one

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229. 42 U.S.C. §§ 12101–12213 (2008).

230. Chai Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 32 MCGEORGE L. REV. 785 (2003) (using author’s experience working on the ADA to illustrate the principles of what she terms “legislative lawyering”).

231. 42 U.S.C. § 12102(b) (2008).

232. Chai R. Feldblum et al., *The ADA Amendments of 2008*, 13 TEX. J. C. L. & C. R. 187, 188 (2008).

233. The classification of who “counts” as disabled for the purposes of the ADA is often the central issue for plaintiffs seeking the protections of the act. Chai R. Feldblum, *Definition of a Disability Under the Federal Anti-Discrimination Law: What Happened? Why? And What Can we Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 134–39 (2000). Limitations on who counts as disabled have led to what Bradley Areheart has called a “*Goldilocks dilemma*”—in which a person’s disability has to fit the court’s notion of “just right” in order to qualify for the protections of the ADA. Bradley A. Areheart, *When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 181 (2008). As such, many physical and mental impairments that substantially limit major life activities were excluded from the protections of the ADA before its 2008 Amendment. Feldblum et al., *supra* note 232, at 192–95.

or more major life activities. . . (B) a record of such an impairment[,] or (C) [are] regarded as having such an impairment.”<sup>234</sup> The ADA provides protections against discrimination for disabled persons in three separate areas: private employment;<sup>235</sup> government provided benefits, services, programs, and activities;<sup>236</sup> and places of “public accommodation.”<sup>237</sup>

The ADA’s protections against employment discrimination mirror those provided by Title VII in many ways. It provides that employers covered by the Act cannot “discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>238</sup> Although the ADA’s employment discrimination protections follow the model of Title VII’s prohibition against discrimination because of race, sex, or national origin,<sup>239</sup> they provide additional protections for disabled employees that go beyond the scope of Title VII. This aspect of the ADA fundamentally changed the meaning and scope of discrimination by providing disabled people with the right to ask employers for differential treatment to accommodate their disabilities.<sup>240</sup> For the purposes of the ADA, “qualified individuals” with a disability include not only those who can perform all of the functions of the job, but also those who can perform the “essential functions” of the job but require some reasonable accommodation to do so.<sup>241</sup>

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234. 42 U.S.C. § 12102(2) (2008).

235. 42 U.S.C. § 12111(2) (2008).

236. 42 U.S.C. § 12132 (2008).

237. 42 U.S.C. § 12182 (2008).

238. 42 U.S.C. § 12112(a) (2008).

239. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 5 (1996).

240. *Id.* at 2–3.

241. 42 U.S.C. § 12111(8) (2008) (defining “qualified individual” as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”). The ADA provides significant protection for employers. The statute provides that an employer need not make reasonable accommodations for its employees if the employer “can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.” 42 U.S.C. § 12112(b)(5)(A) (2008). This means that, in some circumstances, employers are required to alter the job to meet the abilities of the disabled worker. Karlan & Rutherglen, *supra* note 239, at 9. The Supreme Court has narrowly interpreted the ADA, ruling consistently against plaintiffs. Samuel R. Bagenstos, *US Airways v. Barnett and the Limits of Disability Accommodation*, in *CIVIL RIGHTS STORIES* (Myriam Gilles & Risa Goluboff eds. 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=953759](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953759) (discussing the “Disabilities Act Term” in which the Supreme Court ruled against plaintiffs in four ADA cases). Federal courts have also been increasingly resistant to the expansion of reasonable accommodations for disabled individuals. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 173–75 (2007). Some commentators have even argued that the ADA seems

Before 2008, courts refused to recognize pregnancy as a disability. Because pregnancy was regarded as a healthy state, neither the Supreme Court,<sup>242</sup> nor the EEOC<sup>243</sup> interpreted the ADA to require employers to make reasonable accommodations for women who faced substantial physical limitations and disabilities during their pregnancies. Courts determined that pregnancy is not a disability because it reflects the healthy functioning of the reproductive system and not a physiological disorder.<sup>244</sup> However, other courts have included pregnancy-related impairments under the protections of the ADA when the pregnancy creates unusual or atypical limitations or impairments.<sup>245</sup> To many, this is unsurprising. Although the ADA has inspired many feminists to argue that pregnancy should receive reasonable accommodations in the workplace,<sup>246</sup> feminist commentators have hesitated to base pregnancy accommodations in a disability context.<sup>247</sup>

In response to the Supreme Court's narrow interpretation of the ADA,<sup>248</sup> which made it increasingly difficult for people with a wide

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to "grant one class of employees a right to seek exemption from the general rules that their fellow workers must follow." *Id.* Many believe that this is the reason the ADA has triggered a backlash in the courts and in public opinion. See Stephen F. Befort, *Let's Try this Again: The ADA Amendments Act of 2008 Attempts to Reinvent the "Regard As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993 (2010) (noting that the uptick in the number of employment discrimination cases might have led to a backlash).

242. The Supreme Court left open the possibility that pregnancy could be a disability in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976). However, for purposes of the ADA, many courts have determined that it does not constitute a disability. See, e.g., *Villarreal v. J.E. Merit Constructors* 895 F. Supp. 149, 152 (1995) (citing EEOC guidance to determine that pregnancy is not a disability for the purposes of the ADA).

243. OFFICE OF LEGAL COUNSEL, EEOC, NO. 915.002, ENFORCEMENT GUIDANCE: DISABILITY RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (July 27, 2000), available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> ("Pregnancy is not a disability for purposes of the ADA. 29 C.F.R. pt. 1630, app. § 1630.2(h) (1998).").

244. *Hernandez v. City of Hartford*, 959 F. Supp. 125, 130 (D. Conn. 1997) ("Pregnancy and related medical conditions have been held not to be physical impairments."); see also *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465 (D. Kan. 1996); *Byerly v. Herr Foods*, No. CIV. A. 92-7382, 1993 WL 101196, at \*4 (E.D. Pa. Apr. 6, 1993).

245. *Gabriel v. City of Chicago*, 9 F. Supp. 2d 974, 980 (N.D. Ill. 1998); *Jessie v. Carter Health Care Ctr., Inc.*, 926 F. Supp. 613, 616 (E.D. Ky. 1996); *Villarreal v. J.E. Merit Constructors, Inc.* 895 F. Supp. 149, 152 (S.D. Tex. 1995).

246. See, e.g., *Alemzadeh*, *supra* note 139 (arguing that pregnancy discrimination should be prohibited by the ADA because pregnancy substantially limits major life activities).

247. See Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 329-33 (1984); but see *Cox*, *supra* note 139, at 449 (challenging "the prevailing assumption that characterizing pregnancy as a 'disability' for ADA purposes is inappropriate, unwise, and harmful to women" as incompatible with a social model of disability).

248. See Befort, *supra* note 241, at 1013 (noting that the ADAAA "explicitly disavows" the narrow Supreme Court interpretation of the ADA). As Jill C. Anderson notes, commentators heavily criticized the post-1990 interpretations of the ADA. She notes that disability rights

array of physical and mental impairments to obtain protections under the Act,<sup>249</sup> Congress passed the ADA Amendments Act of 2008 (ADAAA).<sup>250</sup> These amendments were designed to expand the definition of disability and ensure that the Act protects more individuals.<sup>251</sup> The 2008 ADA Amendments Act provides that pregnancy-related impairments may be defined as disabilities.<sup>252</sup> According to the EEOC's interpretation of the Amended ADA, workers who are temporarily disabled by pregnancy must be treated like other temporarily disabled workers for the purposes of accommodations.<sup>253</sup> If an employer accommodates temporarily disabled employees who are not pregnant, perhaps with light duty, unpaid leave, temporary reassignments, or disability leave, it must provide

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advocates and commentators regard the pre-ADAAA jurisprudence of the ADA as “[a]bsurd], bizarre, [and] counterintuitive.” Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 *YALE L.J.* 992, 994 (2008) (internal quotation marks and citation omitted) (applying a formal linguistics lens to the statutory interpretation of the ADA).

249. The Supreme Court's jurisprudence in the Sutton trilogy, *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), and *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999), limited the definition of disability by determining that mitigating treatments should be taken into consideration in defining whether or not a person is disabled for the purposes of the ADA. EMILY A. BENFER, *THE ADA AMENDMENTS ACT: AN OVERVIEW OF RECENT CHANGES TO THE AMERICANS WITH DISABILITIES ACT* (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2341414](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341414). In some circumstances, this means that individuals who were substantially limited in a major life activity, yet had access to mitigating treatments, might not be protected as persons with disabilities under the act. For example, some commentators have noted that it became increasingly “difficult for people with epilepsy, diabetes, psychiatric disabilities, multiple sclerosis, muscular dystrophy, arthritis, hypertension, and other disabilities to prevail in court.” Feldblum et al., *supra* note 232, at 193.

250. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

251. *Id.* § 2.

252. 29 C.F.R. pt. 1630 app. 1630.2(h) (2014) (defining disability such that “a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a ‘record of’ a substantially limiting impairment, or may be covered under the ‘regarded as’ prong if it is the basis for a prohibited employment action and is not ‘transitory and minor.’”).

253. 29 C.F.R. § 1604.10 (“Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment.”); EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (July 14, 2014), available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm). On July 1, 2014, the United States Supreme Court granted certiorari in *Young v. United Parcel Service* in order to determine whether the Pregnancy Discrimination Act requires an employer to provide reasonable accommodations for pregnant employees who are limited in their ability to work if it provides reasonable accommodations to other temporarily disabled employees who are similarly limited in their ability to work. 707 F.3d 437 (4th Cir. 2013), *cert. granted*, U.S., No. 12-1226 (July 1, 2014); see also Brief of Law Professors and Women's Rights Organizations as Amici Curiae in Support of Petitioner, *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (2013) No. 12-1226, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/07/28146-pdf-Grossman.pdf>.

access to similar accommodations for employees who are temporarily disabled by pregnancy.<sup>254</sup>

The ADA as amended by the 2008 Act might provide some additional protections to pregnant women in the workplace.<sup>255</sup> First, although there is some controversy concerning the expansion of temporary disability to cover pregnancy, pregnant women may be able to access the protections of the ADA as amended by the 2008 Act more readily than before.<sup>256</sup> Second, the ADAAA amended the definition of disability to include a broad array of conditions, including those arising from temporary disability, within the scope of the Act's protections.<sup>257</sup> Furthermore, the ADA as expanded included a list of major life activities; among that list are "certain bodily functions" including "reproductive functions."<sup>258</sup> These changes however, may provide only the elusive illusion of protection without having a practical impact on the ground. The potential protection for pregnant employees in the Amended Americans with Disabilities Act has not yet materialized. In spite of Congressional efforts to expand the protections provided by the ADA through the 2008 Amendments,<sup>259</sup> this expansion has had a limited impact for women seeking protection against pregnancy discrimination. Even if they do succeed, such protections may not be broad enough to provide robust support for the fourth trimester. While these changes in the ADA may seem promising, it is not clear that they will provide protection to women whose pregnancy is characterized by "normal" limitations. Furthermore, it is not clear that the expansion of reasonable accommodations to pregnant workers under the ADA will include the physiological, emotional, psychological, social, and relational limitations arising from the challenges of the fourth trimester.

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254. *Pregnancy Discrimination*, EEOC, <http://www.eeoc.gov/laws/types/pregnancy.cfm> (last visited April 29, 2014).

255. Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97 (2013) (arguing that the changes wrought by the ADAAA will ensure that women are entitled to more accommodations for pregnancy-related conditions under federal law).

256. 29 C.F.R. pt. 1630 app. 1630.2(h) (2014) (noting that while pregnancy is not an impairment, conditions arising from pregnancy that substantially limit major life activities and create a pregnancy-related impairment are disabilities).

257. Cox, *supra* note 139, at 444–45 (arguing that this represented one of the primary justifications for excluding pregnancy from the scope of the ADA's disabilities).

258. 42 U.S.C. § 12102(2)(B) (2008).

259. Alemzadeh, *supra* note 139, at 4 (arguing that the ADA should prevent pregnancy discrimination because pregnancy substantially limits major life activities).

*E. Conclusion*

Congress designed the antidiscrimination protections of the PDA, FMLA, FLSA, and the ADAAA to intervene in the workplace in ways that recognize the demands of work but also “address the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”<sup>260</sup> This body of pregnancy discrimination protections recognizes that there are many individuals who are dependent upon working family members for care and it strives to reassure workers that they “will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.”<sup>261</sup> Although the statutes protect employees as individuals, the social aspects of the collective (both the workplace and the family) and the inevitable requirements of vulnerability (for medical reasons, the birth or adoption of a child, the care of a child, spouse, or parent, or the care of a covered service member, etc.) are squarely at the heart of this matter. Efforts by Congress recognize not only the vulnerability of families related to illness, medical issues, or the birth of a new child, but also families’ economic vulnerabilities and the vulnerability of employers. These schemes recognize that protecting workers who may be vulnerable to job loss promotes “equal employment opportunity for men and women.”<sup>262</sup>

In spite of these explicit purposes, courts interpreting these provisions have determined that their protections do not extend to the demands of the fourth trimester. The current pregnancy antidiscrimination jurisprudence arising from federal law inadequately addresses the fourth trimester’s demands. The next Sections present initial thoughts on how and why the fourth trimester should be incorporated into antidiscrimination law to address the inadequacies of the current regime.

## ARIA NO. 6

*Three months have ended. Daily, I remind myself how lucky I am. My life differs wildly from the experiences of my grandmothers and from other women in the United States. My current class privilege in the United States and my privilege as a woman in the global north mean continued access to health*

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260. 29 U.S.C. § 2601(b)(1) (2013).

261. 29 C.F.R. § 825.101(b) (2013).

262. 29 C.F.R. § 825.101(a).

*insurance and a responsive supportive employer who accommodated my need to recover and my desire to breastfeed.*

*And yet, I feel overwhelmed to be back at work. I exist day to day, at the mercy of a relentless schedule where market work bleeds into care work and housework for more than fourteen hours a day. Breastfeeding occupies my nights and the sleeplessness drags on and on as medical fatigue sets in. I'm starving—not just from sleep, but also from the hunger that arises from Delilah's reliance on breastfeeding. We're in another growth spurt. What if there is not enough milk while I am at work? What if Delilah cries and will not be comforted?*

### ACT III: INCORPORATING THE FOURTH TRIMESTER

This Article proposes a conceptual shift in the way antidiscrimination law understands pregnancy. Focusing on the insights of professionals who care for and educate new mothers during the early postpartum period, including midwives and maternal nurses, it argues that judges, policymakers, and movement lawyers should incorporate the fourth trimester into their understanding of pregnancy. To this end, it also proposes concrete ways to facilitate this conceptual shift. The fourth trimester framework offers a “radical tweak”<sup>263</sup> to our current understanding of pregnancy and antidiscrimination law that has the potential to destabilize the status quo and provide a firmer foundation for antidiscrimination protection for pregnant women.

This Section argues that judges, policy makers, and advocates should adopt a fourth trimester framework and begins to discuss how they could do so. It provides the initial sketch for reshaping the scope and meaning of pregnancy in antidiscrimination law. Currently, policymakers' conceptualization of pregnancy fails to provide support during the fourth trimester. This perspective reduces pregnancy to the time between conception and the birth of the infant, and treats pregnancy as an essentially biological state that has a universally applicable beginning, middle, and end. While this approach has some benefits as a limiting principle, it ultimately fails to produce adequate protections against the multiple dimensions of pregnancy discrimination that women face. It also fails to provide clarity as to which conditions are medically related to pregnancy. As the fourth trimester framework reveals, the duration and

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263. See Elizabeth A. Reilly, *Radical Tweak—Relocating the Power to Assign Sex: From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality*, 12 *CARDOZO J.L. & GENDER* 297 (2005) (arguing for the removal of legal sex from birth certificates).

end of pregnancy is physically, socially, and psychologically more complicated than current understanding allows.

The fourth trimester framework that maternal nurses, midwives, and lactation consultants routinely employ<sup>264</sup> adopts a radical reconceptualization of pregnancy that is useful for shaping law and policy. For policymakers and judges, incorporating the fourth trimester ensures that discrimination arising from animus toward breastfeeding or infant care is prohibited and potentially provides much needed consistency to the law of pregnancy discrimination.

The current statutory scheme does not need amending to incorporate the fourth trimester into the legal conception of pregnancy. While some may argue that considering the fourth trimester requires a legislative solution,<sup>265</sup> the current congressional impasse makes it unlikely that amendments will expand the current protections for pregnancy discrimination.<sup>266</sup>

Courts, administrative agencies, and movement lawyers have the potential to address the challenges of continuing pregnancy discrimination during the postpartum period by adopting a more expansive understanding of the nature of pregnancy that includes the fourth trimester. Incorporating the fourth trimester without making changes to the current statutory framework can be accomplished in the following ways:

*Incorporation through practice.* In arguing for the expansion and enforcement of antidiscrimination protections for their clients, lawyers should adopt an understanding of pregnancy that embraces the fourth trimester.<sup>267</sup> Those who practice employment discrimination law on behalf of pregnant plaintiffs, particularly movement lawyers, should reframe pregnancy to

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264. *E.g.*, DAVIS, *supra* note 25.

265. *E.g.* Issacharoff & Rosenblum, *supra* note 15.

266. See Ezra Klein, *Goodbye and Good Riddance, 112th Congress*, WASH. POST (Jan. 4, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/04/goodbye-and-good-riddance-112th-congress/>; *Pregnancy and Employment Rights Posters*, NYC COMM'N ON HUMAN RIGHTS, <http://www.nyc.gov/html/cchr/html/publications/pregnancy-employment-poster.shtml> (last visited Aug. 28, 2014). As a part of a new law in New York that came into effect on January 30, 2014, requiring employers to inform employees of their rights related to pregnancy discrimination, the NYC Commission on Human Rights has created posters in seven different languages that highlight the state's new laws.

267. This is not a novel strategy. See, e.g., Joan C. Williams & Elizabeth Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Careers" in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31 (2006) (examining strategies that plaintiff's lawyers could use to redevelop the case law). While impact litigation has its limitations, this strategy can help to educate the judiciary and invigorate grassroots organizing. Jill Maxwell, *Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of the Family-Wage Work Structures and Women's Role as Wage Earner and Primary Caregiver*, 20 DUKE J. GENDER L. & POL'Y 127, 130 (2012).



include a fourth trimester. Such a conceptual shift takes seriously the reality that pregnancy discrimination continues after the birth of the infant. Furthermore, lawyers should employ the fourth trimester's framework to argue that discrimination related to breastfeeding, infant care, and recovery is more than just discrimination related to pregnancy: it is pregnancy discrimination. These lawyers should also introduce the expertise of midwives and maternal nurses on the challenges and requirements of the fourth trimester.

*Incorporation through adjudication.* Judges should understand that pregnancy is not merely a physiological process of gestation that ends with the birth of an infant. In adjudicating these claims, judges should consider drawing on the expertise of those who spend their lives caring for pregnant women, particularly experts in maternal nursing and midwifery. The courts should incorporate the perspective of these caregivers, particularly midwives and maternal nurses, into its understanding of pregnancy. This will reflect a more responsive and realistic perspective on pregnancy.

*Incorporation through agency guidelines.* Agency actors can also expand the legal understanding of pregnancy to include the fourth trimester. For example, the Equal Employment Opportunity Commission may adopt guidelines clarifying that the scope of pregnancy,<sup>268</sup> for the purposes of Title VII, should not be defined in a "one-size-fits-all" biological fashion. Instead,

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268. The EEOC, like other administrative agencies, may adopt guidelines to help courts interpret federal statutes. Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures 44 Fed. Reg. 43 (March 2, 1979), available at [http://www.eeoc.gov/policy/docs/qanda\\_clarify\\_procedures.html](http://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html). This agency guidance is designed to aid in the day to day administration of the statute, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984), and the agency may "fill in the gaps" of the statute that Congress left open. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Although these guidelines are not binding, they are persuasive. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). Although these legislative regulations agencies provide are presumed binding, *Chevron*, 467 U.S. at 844 (noting that agency regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"), in practice courts do not always take these guidelines into consideration in their analyses. William N. Eskridge, Jr., & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2007); Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533 (1999). Judges do not consistently treat agency guidance as binding or precedential in their interpretations of statutes. Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not as a Precedent: An Empirical Study of What Motivates Judges in Agency Deference Cases*, 110 COLUMBIA L. REV. 1727 (2010) (providing empirical evidence that judges do not give agency interpretations the weight of stare decisis).

the agency may consider offering the fourth trimester framework as an understanding of how pregnancy discrimination continues after the birth of an infant. The EEOC could also explicitly clarify the law by adopting guidelines that expand the definition of pregnancy to include the fourth trimester.

Although adopting a fourth trimester framework alone may not give rise to objective reinterpretations of antidiscrimination law, an antidiscrimination law that starts from the presumption that pregnancy entails a fourth trimester has the potential to change the way judges and policymakers think about pregnancy, pregnancy discrimination, and work.

Extending the definition of pregnancy beyond forty weeks and into the postpartum recovery period suggests to courts that, when an employer discriminates against an employee who is recovering from pregnancy, its actions constitute sex discrimination and are prohibited. The fourth trimester reveals how complex and individual pregnancy can be for those who experience it. Universal notions of one-size-fits-all pregnancy, which adopt presumptions about capacities and incapacities in the workplace,<sup>269</sup> fail to account for how varied women's experiences are during the fourth trimester. The impact, effects, and expenses of pregnancy as a culturally mediated process do not have an objective physiological endpoint that is universally applicable to all individuals. The discrimination that potentially accompanies pregnancy is not categorically different just because it occurs after the infant is born. While a fourth trimester framework does not alleviate the valid concern that employers should accommodate the physical limitations of pregnancy, women who face discrimination during the recovery period of their pregnancy may receive some relief if pregnancy includes a fourth trimester. It also means that courts and legal actors will begin to recognize that pregnancy is relational and that the protections for pregnancy discrimination benefit men and women with caretaking obligations and their children, as well as the women who are pregnant.<sup>270</sup>

Finally, starting from a fourth trimester framework, which con-  
founds requirements for individualistic capacity and productivity  
with notions of relational recovery and reproductivity, contributes

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269. Grossman, *supra* note 11, at 578.

270. Calloway, *supra* note 13 (arguing that the obligation to accommodate pregnancy in the workplace should be a legal obligation to ensure the health and well-being of children); *see also* Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L. J. 61 (1997) (arguing that law should take account of the needs and interests of young children).

to a larger project of challenging the ideal worker norm that pervades employer expectations and courts' determinations.<sup>271</sup> An explicit acknowledgement of how relational, emotional, and psychological aspects of pregnancy impact the lives of women and men in the workforce has the potential to push judges and policy makers beyond their presumptions about pregnant workers and the nature of work itself.

#### ACT IV: JUSTIFICATIONS FOR EMBRACING THE FOURTH TRIMESTER

Although there are substantial policy benefits for expanding the scope of pregnancy to recognize a fourth trimester, those who adopt the fourth trimester framework may face a variety of compelling objections from various stakeholders, commentators, judges, employers, and even feminist scholars. This Section addresses the costs and benefits of adopting a fourth trimester framework in order to aid the efforts of commentators, judges, feminists, and employers. It also engages with arguments against adopting a fourth trimester framework, particularly from the perspective of employers and feminist theorists.

##### A. *The Theoretical Benefits of Adopting a Fourth Trimester Framework*

Adopting a fourth trimester framework provides some novel theoretical benefits for those seeking to reconceptualize pregnancy in legal theory and philosophy. The fourth trimester framework reconceptualizes pregnancy, not as a highly individualized controlled event, but as a process in which individuals interact in relational units. Recognizing a fourth trimester framework challenges the presumption that pregnancy is a purely individual endeavor. Recognizing the relational nature of pregnancy has the potential to provide a foundation for arguing that the costs of pregnancy need to be distributed across society and not merely imposed on individual pregnant women.

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271. The ideal worker is an individual who works forty-hours throughout the year and has no childbearing or caretaking responsibilities. JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2000). According to Williams, most women in the United States remain economically marginalized because the best jobs, in both blue-collar and white collar settings require workers to adhere to a masculine norm which requires that one be available for extended periods of time without childbearing or caretaking responsibilities. *Id.* at 113.

A fourth trimester framework regards pregnancy as both individual and relational. Women, as individuals, suffer many of the physical, economic, social, and psychological costs of pregnancy and the costs of the discrimination that arise from it.<sup>272</sup> However, pregnancies and births occur within the social matrices of individual women's relationships with others. Successful pregnancies are often the product of a series of relational interactions between pregnant women and their partners, their medical professionals, their family members, their infants and children, their employers, and their communities. An inflexible presumption of individualism in the application of pregnancy discrimination law obscures the relational realities of pregnancy in favor of the myth of the perfectly pregnant individual, whose condition is freely chosen and easily maintained. The costs of the fourth trimester in terms of time, physical energy, and absence from the workplace are not evenly distributed. Current law requires that this perfectly pregnant individual, with her unflagging ability to act and choose, be completely capable of performing all of her workplace duties.

The fourth trimester concept provides a framework for understanding pregnancy consciously. It re-imagines pregnancy beyond gestation and birth to de-center the physiological nature of pregnancy by acknowledging the importance of pregnancy's social, emotional, and psychological aspects. A pregnancy discrimination policy that expands the conception of pregnancy to include a fourth trimester would also force courts to move beyond a merely biological or physiological notion of pregnancy. Currently, courts that examine pregnancy discrimination are often concerned with the biological and physiological aspects of pregnancy, particularly the limitations of pregnancy and its impacts on productivity and capacity in the workplace. The fourth trimester framework conceptualizes pregnancy as a process that entails not only biological natural elements, but also social, emotional, and psychological elements. Lactation consultants, nurses, and midwives use the concept of the "fourth trimester" as a guiding clinical framework to designate the important social, physical, and emotional transition away from pregnancy and into the role of caregiver for a new infant.<sup>273</sup> Such a conceptual framework, which recognizes social, emotional, and psychological aspects of pregnancy, pushes courts to expand

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272. Dinner, *supra* note 14. The costs of pregnancy could be distributed in other ways. See e.g., Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1329 (1987) (comparing the similarity between the cultural valuation of warriors and the cultural valuation of mothers).

273. Eheart, *supra* note 67, at xiii.

the scope of pregnancy discrimination protections to include protections against employers who discriminate against women in relationship to infant care—one of the social and psychological aspects of the fourth trimester.

Defining the fourth trimester period's dual nature as particular and universal complicates it. Pregnancy is universal in nature because each individual has a connection to at least one pregnancy: the one that gave him or her life.<sup>274</sup> Pregnancy is particular and specific because the experiences of women and their infants are often profoundly individualized. While some generalities and average commonalities can characterize pregnancy, the lived experiences of pregnant women are unique and specific to the individual. For example, all individuals who give birth require a fourth trimester period of recovery and restoration to guarantee a healthy transition to motherhood. The particular elements of recovery and restoration differ for each individual due to a diversity of circumstances. The woman who has a cesarean delivery may require a longer recovery than a woman who gave birth in a vaginal delivery.<sup>275</sup> However, not all vaginal deliveries are alike.<sup>276</sup> Those women who have had an episiotomy or severe tearing may require more time to recover than women who did not. Similarly, individual circumstances of the fourth trimester can create profound inequalities in the quality of recovery and transition. The working mother who must return to employment immediately will have different fourth trimester challenges related to breastfeeding and fatigue than the working mother on maternity leave or the stay-at-home mother. While those women may struggle and experience a lack of sleeplessness, the working mother's additional responsibilities, combined

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274. See Jennifer S. Hendricks, *Not of Woman Born: A Scientific Fantasy*, 62 CASE W. RES. L. REV. 399, 445 (2012) (noting that "it is not only women who experience the connection and dependency of gestation; it is everyone, at least so far"). While this gestating individual may have a masculine or feminine gender presentation, or may be legally designated as a male or a female, he or she must possess a womb capable of sustaining a fetus from conception through birth.

275. Tulman & Fawcett, *supra* note 4 (finding differences in recovery times between women who deliver vaginally and those who deliver via cesarean section).

276. For example, while many women have only minor problems during vaginal delivery, some women who attempt vaginal delivery experience severe pelvic floor trauma that has long-term consequences for pelvic organ prolapse, bowel dysfunction, and urinary incontinence. Hans Peter Dietz, *Pelvic Floor Trauma Following Vaginal Delivery*, 18 CURRENT OPINION IN OBSTETRICS & GYNECOLOGY 528 (2006), available at [http://sydney.edu.au/medicine/nepean/research/obstetrics/pelvic-floor-assessment/Pelvic\\_Floor\\_Assessment/Publications\\_files/Curr%20Opin%20OG%202006.pdf](http://sydney.edu.au/medicine/nepean/research/obstetrics/pelvic-floor-assessment/Pelvic_Floor_Assessment/Publications_files/Curr%20Opin%20OG%202006.pdf) (arguing that further research is needed to determine whether planned cesarean section delivery is preferable in some women who have a high risk of severe pelvic floor trauma).

with a lack of time to rest and recover, will create different challenges. Similarly, different circumstances and motivations among women will shape their experience of the child's birth. An affluent college student who is surrendering her child for adoption will have a different set of emotional concerns and challenges than a disabled woman on Medicare who is pressured by social services to surrender her infant. A surrogate mother who surrenders the infant she carried because she has signed a contract will experience yet a different set of emotional and financial challenges. The fourth trimester recognizes these differences and has the potential to facilitate a responsive antidiscrimination law related to pregnancy. Undermining the dominance of physiological naturalism can denaturalize family creation and pregnancy, highlighting how individuals forge family bonds through social and emotional processes.

Adopting a perspective on pregnancy that includes the fourth trimester may also contribute to the anti-essentialist project by defining the legal understanding of pregnancy beyond the boundaries of biological and physiological naturalism. Feminist perspectives that regard pregnancy discrimination as sex discrimination reinscribe presumptions that pregnancy is a biological phenomenon that is particularly female, which has the potential to obscure and marginalize adoptive parents, same sex couples, and transgender individuals.<sup>277</sup> Defining pregnancy to incorporate the fourth trimester has the potential to provide an additional foundation for policy solutions that spread the risk and costs of reproduction beyond the individual women who become pregnant.

More expansive antidiscrimination protections will ensure that women and their families are protected during a critical time period for the health and well-being of human beings. This care during the early period of the fourth trimester can be crucial to support women who have just given birth. In providing a model for guiding postpartum communication follow-ups during the fourth trimester, Nancy Donaldson noted that the assessments of nursing during that period made a "critical difference" to the "concerned and confused" families dealing with the challenges of a new infant.<sup>278</sup> During the fourth trimester, establishing an infant/caretaker bond lays a crucial foundation for health and well-being throughout an individual's life. Such fourth trimester frameworks also provide adequate support for breastfeeding and bonding,

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277. Karaian, *supra* note 17, at 222–26 (arguing for a perspective that unsexes pregnancy).

278. Donaldson, *supra* note 33.

which pays dividends in terms of the health and recovery of mothers and the health and well-being of infants.

*B. Feminist Arguments Against the Fourth Trimester*

One of the major challenges to the adoption of the fourth trimester framework may come from feminist commentators and scholars. These individuals may challenge the fourth trimester on the grounds that it has the potential to perpetuate an essentialist view of women that centers on the perspectives and experiences of the most privileged women while marginalizing the experiences of those whose life paths and choices differ. This woman worker is essentially defined as a mother and by her biological role in reproduction. She is reduced to the fact that she has given birth to an infant. Women who are mothers are also presumed to be the biological parent of the child, which marginalizes the experiences of adoptive mothers and non-gestational mothers in same sex couples. This concept of the fourth trimester, some feminists might argue, also perpetuates essentialism because it has the potential to center the experience of mothers who are white, able-bodied, and economically privileged, particularly those who can afford the luxury of a long period of recovery and bonding without performing market work. It also centers the experiences of women who are partnered or embedded in a family, obscuring the special fourth trimester difficulties that single mothers or mothers away from their homes and communities might face.

This critique is to be expected, given the historical progress of the feminist legal project. An antidiscrimination law that treats pregnancy and pregnant women solely as individuals, without regard to their relational roles in the home, has its benefits. Treating pregnant women as individuals and not as members of a group burdened by stereotypes and presumptions of incapacity has been a crucial aspect of achieving more equality in the workplace. Furthermore, public policies that place the interests of women workers above those of nonexistent, but potential, children have been crucial in eroding the restrictions of repronormativity that presume that a woman's place is in the home and not in the world of market work.

It is certainly true that adopting a fourth trimester framework centers the lives and experiences of women who can conceive and give birth to infants. During an intellectual moment when many

scholars focus, rightfully, on masculinity and its influence on law,<sup>279</sup> and other scholars, drawing on a critical trans\* tradition which decenters cissexual perspectives, argue for de-feminizing pregnancy and centering on the experiences of pregnant men,<sup>280</sup> a paradigm that centers on women's experiences might seem slightly retrograde. A focus on women who have given birth and the predominantly female professionals who care for them may seem too linked to identity politics, "second wave" notions of the feminine, and essentialized notions of repronormativity.<sup>281</sup> In the circumstances that are described as optimal for infants during the first three months of life, the bodies of women who have given birth serve what some doctors, midwives, and maternal nurses, characterize as a unique and necessary site of responsive constant care. The woman's body, constructed as an essentially maternal body, is characterized as "naturally" capable of and made for the intense embodied around-the-clock care that neonates require. For example, Christaine Northrup argues that the woman's maternal body "continues to serve a placental function. Designed by nature to support and nurture her newborn optimally, her body now sends nutrients to the baby through her milk, her touch, and her physical presence."<sup>282</sup>

However, an understanding of the fourth trimester framework need not be considered a throwback to essentialist notions of cultural feminism.<sup>283</sup> In fact, adopting a fourth trimester framework could be considered a form of strategic essentialism<sup>284</sup>—a discursive tactic that redefines and fixes the meaning of pregnancy in order to rupture current presumptions and remake future perspectives. Adopting a fourth trimester framework also begins to address the intersectional inequalities between women by recognizing the importance of the support and protections that all women require

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279. FRANK RUDY COOPER & ANNE MCGINLEY, *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* (2012).

280. Karaian, *supra* note 17.

281. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law & Desire*, 101 COLUM. L. REV. 181, 183–87 (2001) (arguing that feminist legal theory should move beyond danger and repronormativity in its analysis of sexuality).

282. NORTHTRUP, *supra* note 58, at 121.

283. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 835–38 (1990); William J. Turnier et al., *Redistributive Justice and Cultural Feminism*, 45 AM. U. L. REV. 1275, 1277 (1996).

284. Strategic essentialism has often been attributed to Gayatri Spivak. See STEPHEN MORTON, *GAYATRI SPIVAK: ETHICS, SUBALTERNITY, AND THE CRITIQUE OF POSTCOLONIAL REASON* 127 (2007). However, some commentators associate strategic essentialism with Stuart Hall and Kwame Anthony Appiah. CHRIS BARKER, *CULTURAL STUDIES: THEORY AND PRACTICE* 250 (2012).



before, during, and after the birth of an infant. While the fourth trimester framework may start from the experiences of women as mothers and professionals, it need not end there. Gleaned from the experiences of women during pregnancy and the wisdom of those who care for women during this time, the fourth trimester framework should inform policy prescriptions that may answer the post-identitarian demands of scholars concerned with the creation of law and policies that are responsive to the universal vulnerability of human beings. The concept of the fourth trimester stems from recognition of the potential dependency that women and infants experience during and in the first months after the pregnancy. This period of dependency stems from a potential for embodied vulnerability that is universally shared among human beings. As scholars like Martha Fineman,<sup>285</sup> Peadar Kirby,<sup>286</sup> and Bryan Turner<sup>287</sup> have pointed out, every individual human being is vulnerable to dependency, illness, and disability. Every human being has the potential, through accident, illness, or chance, to become profoundly dependent upon other individuals for the basic necessities of life and sustained care. In spite of the promises of science fiction, every human being who exists at this time spends the beginning of his or her life cycle completely dependent upon the body of another—specifically, a woman’s body. As Jennifer S. Hendricks notes, “it is not only women who experience the connection and dependency of gestation; it is everyone, at least so far.”<sup>288</sup> Every human being, whether they are reared by two parents of the same sex, two parents of opposite sexes, three parents, or more is born from the body of a woman. After the birth, all human beings are incredibly dependent and require intensive attentive care to ensure their survival. Whether one is a boss or worker, a mother or father, a tycoon or pauper, we human beings start our lives in extreme dependency and require the care of another individual.

One might also respond to charges of essentialism by illustrating how the fourth trimester framework represents a paradigmatic example of the type of embodied dependency that a responsive state

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285. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13 (2000).

286. Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POL’Y 45, 74 (2012).

287. Bryan S. Turner, *The End(s) of Humanity: Vulnerability and the Metaphors of Membership*, 3 HEDGEHOG REV. 7 (2001).

288. Hendricks, *supra* note 274, at 445. Hendricks continues: “Rather than looking at pregnancy and concluding that *women* are especially connected to others, we could conclude that everyone begins in a fundamental state of connected dependence.” *Id.*

must take into consideration if it is to facilitate justice in outcomes and fairness in opportunities. The intense requirements for physical recovery, social reimagination, and psychological adjustment during the unwinding of the pregnancy during the fourth trimester mandate supportive, responsive mechanisms for ensuring that all parents of young infants receive not only antidiscrimination protections during this period but economic protections as well. The universal nature of this embodied vulnerability is not wholly unresponsive to individual difference, however. There is no reason to presume that the physical aspects of this dependency will adhere to a rigid time frame. The key to providing for the dependency that arises from vulnerability is to recognize the unique and individual nature of each person's dependency and the type of responsiveness that this dependency requires.

An underlying commitment to taking account of the fourth trimester would necessarily highlight the inequalities that create different outcomes and choices for different women along lines of race and class. A commitment to ensuring fourth trimester protections for all women would also spur increased recognition that many workers lack sufficient means to take unpaid leave to recover and bond with their infants and are positioned in the labor market in such a way that they are unable to negotiate more flexible and responsive employment options during the fourth trimester period. Arguing that policymakers should take greater care to account for the challenges of the fourth trimester, further has the potential to provide a starting ground for providing more consideration to the needs of women who lack the economic means and social status to negotiate their own fourth trimester space.

Women who belong to the upper middle class or the upper class have the economic means to opt into the fourth trimester in ways that women who are middle class, working class, or poor do not. Individuals who do not have the financial means to purchase assistance must rely on their family members or friends for help or must make the recovery and transition of the fourth trimester alone. Women in the upper-middle class or upper class may have employers who are more willing or able to accommodate the fourth trimester period of recovery through paid leave and a flexible transition in returning to work, or even through telecommuting. Perhaps responding to increasing need and demographic shifts,<sup>289</sup>

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289. Ellen Ernst Kossek & Jesse S. Michel, *Flexible Work Schedules*, 1 APA HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY (S. Zececk ed., 2011), available at <http://ellen.kossek.lir.msu.edu/documents/finalsept8newdoc.pdf>.

many companies in the United States employ mechanisms for flexible work schedules.<sup>290</sup>

Most employers in the United States do not provide paid maternity or paternity leave for workers. If they do, they often have managed to limit this leave to only highly skilled high wage workers in their firms through a combination of subcontracting out low wage tasks, like mailroom work, secretarial work, or food services, and excluding part-time workers. If these women work in professions that are perceived to be highly skilled, they may be considered valuable or even irreplaceable members of the team, and therefore have more access to paid parental leave. Lower wage workers, who are perceived as interchangeable or “low skill,” may lack the leverage to request part-time work or may lose much needed family benefits or wages if they request flexible schedules. So-called “low-skill,” low-wage workers, who may lack control over which days of the week they work and which shifts they are scheduled for, are also less likely to have the ability to have a flexible schedule or telecommute.

One might also respond to the charge of essentialism by illustrating how the fourth trimester reconstructs pregnancy as a process that is not only biological and physiological, but also social, emotional, and psychological. Policies that take account of the fourth trimester must recognize not only the physiological and biological changes that some caregivers who have given birth experience, but also the complex social, emotional, and psychological aspects that all caregivers of new infants must acclimate to. Instead of reducing pregnancy to its biological and physiological aspects, a perspective on pregnancy that incorporates the fourth trimester expands the meaning and scope of pregnancy to account for psychological, emotional, and social aspects of adjusting to birth. Such an account of pregnancy has the potential to erode the dominance of physiological naturalism in law and policy conversations about pregnancy and infant care.

While a fourth trimester framework may increase understanding about the individualized diversity of pregnancy and pregnancy’s relational nature, it may also provide a foundation for thinking about pregnancy as a relational process. Feminist scholars have argued that pregnancy illustrates the ways in which identity is not solely

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290. Kathleen Christensen, *Flexible Staffing and Scheduling in U.S. Corporations*, 240 RESEARCH BULLETIN 1 (1989); Terence M. McMnamin, *A Time to Work: Recent Trends in Shift Work and Flexible Schedules*, 130 MONTHLY LAB. REV. 3 (2007).

individual but is instead constituted through connections and relationships.<sup>291</sup> The fourth trimester framework can be adapted to recognize how the first three to six months of bonding and family adjustment are crucial for infants and their caregivers, not just individual women who have given birth and their infants. For all that a fourth trimester framework feels like difference feminism and biological essentialism, it is a profoundly social concept. It is, in fact, a reaction and deconstruction of presumptions about pregnancy and a reconstruction of the concept around a more responsive social concept.

### *C. Pro-Employer Arguments Against the Fourth Trimester*

Commentators or legal actors who wish to adopt the fourth trimester framework may face arguments that an antidiscrimination regime incorporating the fourth trimester will inevitably lead to a slippery slope where it is impossible to distinguish illegal pregnancy discrimination from the reasonable expectations and actions of employers. The fourth trimester, due to its complex nature as a social, emotional, psychological, and physiological framework, does not lend itself to easily discerned limits. Requiring that the concept of pregnancy be expanded to include the fourth trimester fosters an imprecise conception of pregnancy that could lead to inefficiency. Because the fourth trimester lacks an inherent limiting principle, it would require fact-rich determinations that would utilize judicial resources and create uncertainty for employers. Opening the concept of pregnancy to recognize its complex diverse nature and the reality that it is more than a physiological process, however, is a necessary measure to expand legal understandings of pregnancy to reflect women's complex and diverse experiences with pregnancy. The courts currently place arbitrary limits on the concept of pregnancy, reduce pregnancy to its physiological and biological aspects,<sup>292</sup> and narrow its temporal scope to the narrow forty-week period between conception and birth. The current regime, which requires that individuals be completely able to perform most aspects of their jobs or to leave the workforce during the fourth

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291. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987) (arguing that women's subjectivity is defined by connection and not separation or individualism); *supra* note 257; Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB POL'Y 889, 942 (2011) (arguing that in a world where the dignity of human beings was appreciated, "[p]regnancy would be valued – and cherished – for the gift it is").

292. *See supra* note 9.

trimester, wastes human capital as pregnant women are forced to choose between the temporary demands of the fourth trimester and their long-term careers.<sup>293</sup>

Others may argue that incorporating the fourth trimester will create the potential for women who are not recovering or bonding with their infants to abuse antidiscrimination protections. These critics may also argue that incorporating the fourth trimester will be administratively unworkable, due to its attention to the diverse and unique individual circumstances of pregnancy. Those who would seek to game the antidiscrimination can easily abuse this inefficiency. The potential for abuse and inefficiency in the current regime, which arbitrarily marginalizes potentially productive women workers who are only briefly hindered by dependency, however, dwarfs the potential to abuse the fourth trimester.<sup>294</sup> For example, with a PDA that permits employers to treat pregnant employees just as badly as they would treat similarly situated nonpregnant employees<sup>295</sup> and an FMLA that explicitly excludes part-time workers,<sup>296</sup> employers have some incentive to “race to the bottom” by treating all employees badly and making most of them part-time workers. Furthermore, under the current antidiscrimination regime, which creates a lacuna of legal protection for women during the fourth trimester, courts have interpreted current antidiscrimination “protections” in ways that facilitate employer abuse, inequality, and exclusion. The current regime tacitly permits some types of pregnancy discrimination, such as discrimination against individuals because of lactation and newborn infant care, which seems intuitively pregnancy-related, deeming them to be outside of the scope of discrimination the statute prohibits.<sup>297</sup> Even

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293. Grossman, *supra* note 11.

294. *See id.*

295. Although the PDA was intended to be a floor and not a ceiling for antidiscrimination protections, *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), it has often been interpreted as permitting employers to treat pregnant employees poorly so long as a similarly situated nonpregnant employee would be treated in the same fashion. *See discussion supra* pp. 128–31.

296. U.S. DEP'T OF LABOR *supra* note 174.

297. *E.g.*, *Puente v. Ridge*, 324 Fed. App'x 423 (5th Cir. 2009) (holding that employer was not required by PDA to make the accommodation of extra-long breaks for breastfeeding mother to pump milk); *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988) (determining employer's denial of breast-feeding leave did not give rise to a disparate impact claim); *Falk v. City of Glendale*, No. 12-cv-00925-JLK, 2012 U.S. Dist. LEXIS 87278 (D. Colo. June 25, 2012) (finding employer who denied breastfeeding plaintiff private space to express milk and breaks from work to do so did not violate the PDA because Title VII does not prohibit lactation discrimination); *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999) (finding that breastfeeding is not a protected status); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997) (“[B]reast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA.”);

where employers must take affirmative steps to accommodate employees' fourth trimester needs, the current regime lacks appropriate enforcement measures.<sup>298</sup>

Many may argue that the adoption of the fourth trimester will not alleviate current antidiscrimination laws' inadequacy and that the current frameworks must be explicitly revised to accommodate pregnancy and provide paid maternity leave. Furthermore, some commentators will claim, the current pro-employer biases of courts in the adjudication of antidiscrimination law would require a more robust legislative response to facilitate the statutes' objectives.<sup>299</sup> Judges have shown great deference to employer preferences and an unwillingness to require that the terms or conditions of work be altered to accommodate difference and diversity.<sup>300</sup> Some commentators may even argue that the conceptual frameworks of antidiscrimination law, which stem from an equality/identity oriented perspective, cannot actually address the complexity and nuance of difference and dependency that pregnancy discrimination embodies.<sup>301</sup> This expansion of antidiscrimination law is not likely to be realized in the short term. While the intervention of this Article has its limits, the fourth trimester framework has the potential to redefine and reframe the nature and scope of pregnancy for the purposes of law and policymaking. It provides a crucial starting point for expanding the meaning and scope of pregnancy discrimination protections to recognize the complex interaction between social, physiological, and psychological challenges during the fourth trimester.

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Wallace v. Pyro Mining Co., 789 F. Supp. 867 (W.D. Ky. 1990) (determining that although breastfeeding is a uniquely female attribute, employer who denied employee unpaid leave to breastfeed her infant did not engage in discrimination because of pregnancy and sex).

298. While § 207(r) of the FLSA may permit the Department of Labor to seek injunctive relief for failure to accommodate employee requests for lactation breaks, *see* Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80,073 (Dec. 10, 2010), some courts have found that there is no way to enforce the requirement. *See, e.g.,* Salz v. Casey's Marketing Co., No. 11-CV-3055, 2012 WL 2952998, at \*2 (2012). Even if there were a private right of action, because § 207(r) does not require employees to be paid for lactation breaks, there is no lost compensation for the employee to recover. *Id.* at 3; *see also*, EEOC v. Vamco Sheet Metals, Inc., 2014 WL 2619812, at \*6 (2014).

299. Trina Jones, *Response: Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423 (2010) (discussing the increasing difficulty of bringing a successful discrimination claim).

300. Michelle Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3 (2005) (arguing that workplace essentialism shapes the deferential way in which judges adjudicate antidiscrimination cases).

301. *See* Martha A. Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713 (2012) (arguing that an identity based antidiscrimination regime cannot adequately address existing social and economic vulnerabilities).

*D. Administrative Arguments Against the Fourth Trimester*

This Article is committed to an articulation of the fourth trimester that reflects the permeable boundaries of self and other that exist for caregivers and infants during the fourth trimester. It has explicitly rejected the impulse to reduce the fourth trimester to a rigid, rule-bound collection of physiological symptoms. Instead, the fourth trimester must be understood from a perspective that regards its amorphous nature as its foundational strength. Part of the conceptual power of the fourth trimester is that it provides ways to think about how caregivers (particularly mothers) and infants transition away from pregnancy and toward recovery and reconceptualization, while also recognizing that interdependency and vulnerability remain a salient reality for many months after gestation ends. This move also defers, appropriately, to the fields of maternal nursing and midwifery where recovery and transitional processes are regarded as individualized.

By definition and design, the fourth trimester is as flexible, responsive, and highly individualized as the women and infants who transition through it. For this reason, one of the most compelling challenges to incorporating the fourth trimester into various aspects of law comes from the reality that legal actors, particularly judges and legislators, may prefer bright line rules for inclusion and exclusion. Such bright line frameworks, which clearly determine who is “in” and who is “out,” are easily applied to all similarly situated individuals in the context of antidiscrimination protections. For individuals who prefer “bright line” tests, the responsive, highly individualized nature of the fourth trimester presents an “administrative nightmare.” For example, judges attempting to expand the boundaries of pregnancy discrimination by adopting the fourth trimester may have a difficult time distinguishing between individuals seeking antidiscrimination protections for fourth trimester-related discrimination, which the PDA would hypothetically cover,<sup>302</sup> those seeking antidiscrimination protections for a temporary disability caused by pregnancy, which is covered under the ADAAA,<sup>303</sup> or those seeking antidiscrimination protections for caregiver discrimination, which is covered by Title VII only in limited circumstances.<sup>304</sup>

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302. 42 U.S.C.S. § 2000e(k).

303. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

304. OFFICE OF LEGAL COUNSEL, EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES, No. 915.002 (May 23, 2007) (noting that while “Title VII does not prohibit discrimination based solely on parental or other

These individuals also claim that adopting the fourth trimester in pregnancy discrimination has the potential to lead down a slippery slope where all types of differential treatment of employees with children would become verboten. While this Article adopts a more agnostic notion of the fourth trimester, which is defined by its relational and individualized nature, it is possible that policymakers can incorporate the fourth trimester into existing legal frameworks to provide bright lines for rule making.

The fourth trimester can be adopted in ways that provide more administrative certainty. How the fourth trimester would be incorporated into current legal frameworks depends considerably upon whether it is adopted through judicial incorporation, agency interpretation, or statutory amendment. However, there are some ways that the fourth trimester can be incorporated to limit its scope and yet maintain the essential essence of the concept. Adopting the fourth trimester for ease of administration may be accomplished, for example, by using the three-month “trimester” time period as a guideline for coverage. While this may mean that women with extraordinary fourth trimester circumstances are forced to seek antidiscrimination protections for their own limitations under the ADAAA, for their care responsibilities under the FMLA, or the evolving “caregiver” protections of Title VII, it would provide a bright line limit to the scope of pregnancy that more accurately reflects the ways in which women gradually transition from pregnant to nonpregnant. Another mechanism for adopting the fourth trimester framework could be to create a rebuttable presumption protecting individuals from pregnancy discrimination during the three to six months after birth. Individual plaintiffs bringing antidiscrimination claims who articulate their injuries as pregnancy discrimination during the fourth trimester would receive the protections of a rebuttable presumption. The employer would have the burden of articulating a legitimate, non-discriminatory, non-fourth trimester related reason for the action taken against the employee.

While the counter arguments against adopting the fourth trimester approach may seem persuasive to many, they must be weighed against equally strong arguments for adopting a concept that has the potential to augment the effectiveness of protections for pregnant workers. Some may argue that incorporating the fourth trimester into antidiscrimination law may create inefficiencies by shifting the social and economic costs of pregnancy to employers.

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caregiver status,” some forms of caregiver discrimination that are based on sex are prohibited), *available* <http://www.eeoc.gov/policy/docs/caregiving.html#caregive> (last visited May 19, 2014).



This cost-shifting, these critics argue, might create incentives not to hire women in the workplace<sup>305</sup> and exacerbate existing cognitive biases against women and pregnant workers.<sup>306</sup> While expanding the scope of pregnancy in law to include the fourth trimester may entail a certain amount of cost-shifting and impose additional burdens on employers who are willing to hire women, incorporating the fourth trimester has positive social value because it spreads the risks and costs of pregnancy more equitably. Under the current antidiscrimination regime, the costs and risks of pregnancy are individualized and privatized so that women internalize these costs even as employers and childless individuals may reap the social benefits arising from childrearing.<sup>307</sup> Without incorporating the fourth trimester, individual pregnant women will internalize the costs and risks of proper recovery, bonding, and care immediately following the birth of an infant, while others enjoy the future benefits.

#### ARIA NO. 7

*Month four arrives like the dawn. Delilah smiles at me with recognition. She is now interacting, a real separate person. So am I. Delilah and I were intimately intertwined. As part of the lucky minority of working women who are able to take some leave after the birth of their children, I slept when she slept, ate when I could, fed her constantly, and continued to feel as if my pregnancy never ended. I was not alone. Many women spend the first three months after gestation in a state of physical, emotional, and social flux, crying through hormones in new strangely changed bodies with what looks to many like a tiny aged alien attached them for more hours of the day than they could have imagined. These experiences are typical during the postpartum months of "the fourth trimester." Drawing on the notion of the fourth trimester, I gave myself permission to sleep when she slept, to recover slowly, to let the housework go, to learn parameters of motherhood, and to become a separate person. The ebb and flow of becoming unpregnant was like the tide, flowing in and out at its own pace. The high tide of my pregnancy did not begin with one wave, but with a series of tiny waves flowing in and out until it revealed the sand and tide pools of my individual self. When it ultimately receded, the physical, social, and psychological work of pregnancy was complete, and the work of motherhood had begun.*

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305. See Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 197 (1989).

306. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

307. Dinner, *supra* note 14.

## CONCLUSION

The fourth trimester challenges the pervasive presumptions that pregnancy can be reduced to its biological aspects and temporarily confined to the period between conception, gestation, and birth. It adopts an interdisciplinary understanding of pregnancy that accounts for its physiological and biological nature while also considering its emotional, psychological, and social aspects. Adopting an understanding of pregnancy that includes the fourth trimester challenges the perception that pregnancy's biological aspects and its physiological duration define pregnancy. The fourth trimester framework recognizes that the scope of pregnancy does not necessarily begin with conception and end with the birth of the child. Pregnancy, as the fourth trimester reveals, is not necessarily a linear event with rigid notions of a beginning, middle, and end.

Incorporating a fourth trimester framework into existing antidiscrimination protections will aid in building an antidiscrimination regime that is more responsive to pregnancy discrimination because it redefines the scope of pregnancy beyond gestation and birth and into the period of recovery and transition. By extending the scope of the pregnancy, the fourth trimester framework conceptualizes pregnancy not as an event of a fixed forty week time period, but as a process. To quote Reva Rubin, while the birth of the infant may be the highlight of the pregnancy, it is "not the end of the childbearing experience."<sup>308</sup> This notion that pregnancy is a process and not a fixed temporal event has the potential to shift the boundaries of federal antidiscrimination protections.

The current protections against pregnancy discrimination policy in the workplace should be amended to recognize the complications and needs of the fourth trimester. Judges and policymakers should consider the fourth trimester framework as a lens for understanding the scope of pregnancy and the costs it imposes upon women. While recognizing the fourth trimester is an imperfect and incomplete answer to the various problems of pregnancy discrimination in the workplace, it starts the process of constructing a more responsive, complex, and accurate understanding of pregnancy in law. Without the recognition of the fourth trimester and the social, psychological, and physiological realities it entails, federal antidiscrimination protections will continue to fall short.

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308. RUBIN, *supra* 19.

