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Jeannette Cox

*University of Dayton*, [jcox01@udayton.edu](mailto:jcox01@udayton.edu)

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# PREGNANCY AS “DISABILITY” AND THE AMENDED AMERICANS WITH DISABILITIES ACT

JEANNETTE COX\*

**Abstract:** The recent expansion of the Americans with Disabilities Act’s (ADA) protected class invites reexamination of the assumption that pregnant workers may not use the ADA to obtain workplace accommodations. The ADA’s scope now includes persons with minor temporary physical limitations comparable to pregnancy’s physical effects. Accordingly, the primary remaining justification for concluding that pregnant workers may not obtain ADA accommodations is that pregnancy is a physically healthy condition rather than a physiological defect. Drawing on the social model of disability, this Article challenges the assumption that medical diagnosis of “defect” must be a prerequisite to disability accommodation eligibility. The social model defines “disability” not as an impairment located within an individual’s body but as the interaction between the individual’s body and her social environment. Within this framework, workers may experience pregnancy, a healthy biological state, as a workplace “disability.” Accordingly, now that workers with temporary physical limitations comparable to pregnancy may receive ADA accommodations, courts should conclude that the ADA’s goal—to reshape the workplace to accommodate previously excluded persons—extends to pregnancy.

## INTRODUCTION

Over a decade ago, Samuel Bagenstos observed that disability law’s potential application to pregnancy “raises an exceptionally interesting

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theoretical question that requires much further study.”<sup>1</sup> Despite the passage of time, however, this Article is the first to respond to Bagenstos’s call to question the conventional assumption that the healthy nature of pregnancy prevents pregnant workers from obtaining accommodations under the Americans with Disabilities Act of 1990 (ADA).<sup>2</sup> One explanation for scholars’ silence is that the accommodation of many workers’ post-pregnancy needs under the Family and Medical Leave Act of 1993 (FMLA) has obscured the ongoing need for accommodations during pregnancy.<sup>3</sup> Another explanation is the fact that shortly after Bagenstos suggested that disability law might encompass pregnancy, the U.S. Supreme Court began to restrict disability law’s scope to include only the most severe and long-term physical limitations.<sup>4</sup> These decisions foreclosed ADA coverage for the inherently short-term and modest limitations that accompany a healthy pregnancy.<sup>5</sup>

The recently enacted ADA Amendments Act of 2008 (ADAAA) dramatically expanded the ADA’s scope, however, and thereby significantly strengthened the analogy between persons covered by the ADA and pregnant workers who need workplace accommodations.<sup>6</sup> For example, the new Equal Employment Opportunity Commission (EEOC) regulations implementing the ADAAA provide that a person with a back injury that, for a span of two to three months, “prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his or her existing job but also other jobs that would

<sup>1</sup> Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 407 (2000) (citing Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 668–716 (1999)). See generally Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193 (1993) (arguing that pregnancy should be covered under the Americans with Disabilities Act).

<sup>2</sup> Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213 and scattered sections of 29, 47 U.S.C.).

<sup>3</sup> See 29 U.S.C. § 2601 (2006) (stating the findings and purposes underlying the FMLA’s enactment).

<sup>4</sup> See, e.g., *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (noting that the ADA’s terms should be “interpreted strictly to create a demanding standard for qualifying as disabled”), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(A), 122 Stat. 3553, 3555 (2008) (“The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act . . .”).

<sup>5</sup> See, e.g., *Toyota*, 534 U.S. at 197.

<sup>6</sup> See ADA Amendments Act of 2008, § 4, 122 Stat. at 3555–56 (broadening the definition of “disability” under the ADA and clarifying that the “definition of disability . . . shall be construed in favor of broad coverage”).

similarly require heavy lifting” has an ADA disability.<sup>7</sup> This example, which appears analogous to the work-related difficulties pregnant women may experience, suggests that the fact that pregnancy imposes inherently short-term and modest limitations no longer justifies pregnancy’s exclusion from the ADA’s scope.<sup>8</sup> Instead, the primary remaining barrier to ADA pregnancy coverage is the assumption that the ADA only encompasses medically diagnosed disorders.<sup>9</sup>

Prior to the ADA, although the judicially imposed severity and long-term duration requirements were sufficient to deny pregnant workers ADA coverage, courts also frequently stated, as an alternate rationale, that pregnancy is “the natural consequence of a properly functioning reproductive system”<sup>10</sup> and that there accordingly “is no negative effect when a woman becomes pregnant.”<sup>11</sup> Because courts considered physiological defect a prerequisite for disability accommodations, they routinely held that although infertility—a condition far less likely than pregnancy to conflict with an employer’s work expecta-

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<sup>7</sup> Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,014 (Mar. 25, 2011); see 29 C.F.R. § 1630.2(j) (2011).

<sup>8</sup> Compare Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. at 16,982 (“[I]mpairments that last only a short period of time may be covered if sufficiently severe.”), and 29 C.F.R. § 1630.2(j) (iv) (“[T]he term ‘substantially limits’ shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ‘substantially limits’ applied prior to the ADA.”), with *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4 RM, 2010 WL 1568606, at \*15 (N.D. Ind. Apr. 16, 2010) (concluding that a pregnant woman fell outside the ADA’s protected class because “[s]hort-term, temporary restrictions aren’t substantially limiting and don’t render a person disabled under the ADA”), *aff’d*, 656 F.3d 540 (7th Cir. 2011).

<sup>9</sup> See *Toyota*, 534 U.S. at 194–95 (interpreting a “physical impairment” under the ADA to include “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.” (quoting 45 C.F.R. § 84.3(j)(2)(i) (2001))); Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. at 17,007 (“[C]onditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments.”).

<sup>10</sup> *Gudenkauf v. Stauffer Commc’ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996); see *id.* (“All of the physiological conditions and changes related to a pregnancy also are not impairments [under the ADA] unless they exceed normal ranges or are attributable to some disorder.”).

<sup>11</sup> *Brennan v. Nat’l Tel. Directory Corp.*, 850 F. Supp. 331, 343 (E.D. Pa. 1994).

tions—falls within the ADA’s scope, physical limitations resulting from a healthy pregnancy do not.<sup>12</sup>

Courts grounded this conclusion in the ADA’s textual requirement of a “physical or mental impairment”<sup>13</sup> and the EEOC’s position that “[b]ecause pregnancy is not the result of a physiological disorder, it is not an impairment” and therefore cannot be a disability.<sup>14</sup> Drawing on the EEOC’s position, one court further reasoned that “[i]f pregnancy itself is not an impairment for purposes of the ADA, it is counterintuitive to hold that a general condition of pregnancy [such as a need to curtail repetitive heavy lifting] is an impairment.”<sup>15</sup> Accordingly, although many pre-ADAAA courts acknowledged that the ADA covers medically diagnosed disorders that can accompany pregnancy, such as gestational diabetes,<sup>16</sup> courts consistently denied ADA coverage to

<sup>12</sup> Compare *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 326 (S.D.N.Y. 2000) (holding that infertility may qualify as an ADA disability), with *Hogan v. Ogden*, No. CV-06-5078-EFS, 2008 WL 2954245, at \*5 (E.D. Wash. July 30, 2008) (“Courts have generally held that pregnancy, and pregnancy-related complications, do not qualify as ‘disabilities’ under the Acts.”).

<sup>13</sup> See 42 U.S.C. § 12102(1)(A) (Supp. III 2009).

<sup>14</sup> See EEOC COMPLIANCE MANUAL § 902.2(c)(3) (2009) (citing 29 C.F.R. § 1630.2(h)); see also Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. at 17,007 (“[C]onditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments.”). Interestingly, however, in a 2009 “Best Practices” document expressly aimed to encourage employers to voluntarily “go beyond federal nondiscrimination requirements,” the EEOC encourages employers to “[r]eassign job duties that employees are unable to perform because of pregnancy.” See *Employer Best Practices for Workers with Caregiving Responsibilities*, EEOC, <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last modified Jan. 19, 2011). As an example, the EEOC indicates that when a pregnant worker’s “doctor recommends a 15 pound lifting restriction during her pregnancy,” an employer should respond “by reassigning her heavy lifting duties to one of her co-workers and assigning [the pregnant worker] some of the co-worker’s duties.” *Id.*

<sup>15</sup> See *Martinez v. Labelmaster, Am. Labelmark Co.*, No. 96 C 4189, 1998 WL 786391, at \*8 (N.D. Ill. Nov. 6, 1998).

<sup>16</sup> See, e.g., *Darian v. Univ. of Mass. Bos.*, 980 F. Supp. 77, 87 (D. Mass. 1997) (concluding that the plaintiff’s “severe pain and paralyzing uterine contractions” constituted a disability for ADA purposes because they were not merely “a function of normal pregnancy”); *Cerrato v. Durham*, 941 F. Supp. 388, 393 (S.D.N.Y. 1996) (holding that the plaintiff’s allegations of abnormal “spotting, leaking, cramping, dizziness, and nausea” were sufficient to survive a motion to dismiss). But see *Serednyj*, 2010 WL 1568606, at \*16 (concluding that light duty restrictions, as well as two weeks of bed rest, did not establish that the plaintiff’s pregnancy difficulties were sufficiently severe to fall within the ADA’s scope); *Kennebrew v. N.Y.C. Hous. Auth.*, No. 01 CIV 1654(JSR)(AJP), 2002 WL 265120, at \*18 n.32 (S.D.N.Y. Feb. 26, 2002) (noting that plaintiff’s gestational diabetes did not qualify as an ADA disability); *Muska v. AT&T Corp.*, No. 96C5952, 1998 WL 544407, at \*9 (N.D. Ill. Aug. 25, 1998) (holding that pregnancy-related complications resulting in temporary fetal distress did not qualify as an ADA disability); *Leahr v. Metro. Pier & Exposition Auth.*, No. 96 C

women who experienced more typical pregnancy-related physical limitations, such as severe headaches, dizziness, vomiting, extreme fatigue, and the need to curtail repetitive heavy lifting and exposure to hazardous chemicals.<sup>17</sup> They reasoned that the ADA does not require employers to accommodate pregnant employees with these physical limitations because "all of these symptoms, at some degree of severity, are part and parcel of a normal pregnancy."<sup>18</sup>

This "pregnancy limitations are normal" rationale for denying ADA accommodations to pregnant workers echoes the Supreme Court's rationale for validating policies that excluded pregnancy from work disability insurance plans in the 1970s.<sup>19</sup> Although the Supreme Court's primary (and most famous) rationale for validating these policies was the Court's strained conclusion that discrimination on the basis of pregnancy does not constitute discrimination on the basis of sex, the Court further reasoned that the healthy nature of pregnancy made it significantly different from a typical disability.<sup>20</sup> For example, in 1976, in *General Electric Co. v. Gilbert*, the Court heavily relied on the district court's finding that pregnancy "is not a 'disease' at all, and is often a voluntarily undertaken and desired condition."<sup>21</sup> This distinction between the "normal" limitations that accompany pregnancy and the

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1388, 1997 WL 414104, at \*2-4 (N.D. Ill. July 17, 1997) (holding that plaintiff's pregnancy-induced hypertension did not qualify as an ADA disability).

<sup>17</sup> See, e.g., *Farrell v. Time Serv., Inc.*, 178 F. Supp. 2d 1295, 1298 (N.D. Ga. 2001) ("At most, courts have held that pregnancy may rise to the level of a disability if there are severe complications."); *Minott v. Port Auth.*, 116 F. Supp. 2d 513, 525 (S.D.N.Y. 2000) (noting that courts have found pregnancy-related conditions to qualify as ADA-recognized disabilities "only in extremely rare circumstances"); see also Crossley, *supra* note 1, at 671-72.

By and large, the courts have followed the EEOC's rejection of pregnancy as an impairment. With the exception of a few cases seen as aberrant, courts applying the federal disability discrimination laws have been unwilling to find that pregnancy, in and of itself, is an impairment. Moreover, a number of courts have lumped "pregnancy and related medical conditions" together, finding that all such bodily changes aggregated do not constitute an impairment, at least in the absence of "unusual circumstances."

Crossley, *supra* note 1, at 671-72 (internal citations omitted).

<sup>18</sup> *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002); see also *Villarreal v. J.E. Merit Constructors, Inc.*, 895 F. Supp. 149, 152 (S.D. Tex. 1995) ("[P]regnancy and related medical conditions do not, absent unusual circumstances, constitute a 'physical impairment' under the ADA. Therefore, pregnancy and related medical conditions are not 'disabilities' as that term is defined by the ADA.")

<sup>19</sup> See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976) (noting that "pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability"); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974).

<sup>20</sup> See *Gilbert*, 429 U.S. at 136.

<sup>21</sup> See *id.*

“abnormal” limitations that accompany disability enabled the Court to conclude that the exclusion of pregnancy from work disability insurance plans was not a subterfuge for sex discrimination.<sup>22</sup>

In the over thirty-year period following the Pregnancy Discrimination Act’s reversal of the *Gilbert* decision, many feminist legal scholars have objected to ADA pregnancy coverage on grounds startlingly similar to the *Gilbert* Court’s rationale for distinguishing between pregnancy and disability.<sup>23</sup> They argue that gestation should not be characterized as a disability because it represents heightened rather than diminished biological functioning.<sup>24</sup> They further argue that ADA pregnancy coverage would reinstate the outdated view that women’s physical differences from men are deficiencies rather than merely differences.<sup>25</sup> They reason that characterizing pregnancy as disability risks resurrecting the view that male bodies are typical and normal whereas pregnant bodies

<sup>22</sup> *See id.*

<sup>23</sup> *See, e.g.,* Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender, and Discrimination*, 80 CHL.-KENT L. REV. 875, 898 (2005) (noting that “there are problems with associating a normal biological function with a disability”); *cf. Matzzie, supra* note 1, at 194 (“The claim that the rights and needs of pregnant workers should be sought under disability law doctrines, instead of under theories of gender discrimination, invites suspicion. Although many feminists wish to secure tangible benefits for pregnant workers, they fear the characterization of pregnancy as a disability.”).

<sup>24</sup> *Cf. Deborah L. Brake, The Invisible Pregnant Athlete and the Promise of Title IX*, 31 HARV. J.L. & GENDER 323, 345 (2008) (observing that “analogizing pregnancy to sickness or bodily weakness . . . focuses on the disabling rather than the enabling physical features of pregnancy” and treats pregnancy as “a physical weakness to be treated and recovered from”); Pamela Laufer-Ukeles, *Cross-Dressers with Benefits: Female Combat Soldiers in the U.S. and Israel*, 41 U. BALT. L. REV. (forthcoming 2012) (“Categorizing women’s difference as a disability fails to appreciate the reality of women’s lives. Women are not disabled when they are pregnant; they are reproducing . . .”); Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 942 (1985) (“[P]regnancy is neither a disability nor a dysfunction, but a normal moment in the human reproductive process specific to women.”).

<sup>25</sup> *See, e.g.,* Judith A. Greenberg, 50 ME. L. REV. 225, 250 (1998) (noting that “bringing pregnancy under the ADA would reinvigorate the stereotype of pregnant women as disabled and not fit for work”); Matzzie, *supra* note 1, at 194–95 (positing that many feminists fear the characterization of pregnancy as disability in light of disability’s “negative connotations of permanence and misfortune”). Perhaps because of these concerns, no women’s organizations advocated for ADA coverage of pregnancy in the EEOC’s rulemaking proceedings for the original ADA. Matzzie, *supra* note 1, at 195. In the more recent regulatory process following the ADAAA’s enactment, only one women’s organization submitted comments in relation to pregnancy. *See* Letter from Legal Momentum, to Stephen Llewellyn, EEOC Executive Officer (Nov. 19, 2009) (on file with author). That organization appeared to implicitly concede that pregnancy falls outside the ADA’s scope by advocating only that the EEOC make more explicit its conclusion that the ADA covers pregnancy-related impairments. *See id.* at 2.

(which are exclusively female) are aberrant and defective.<sup>26</sup> This reluctance to associate pregnancy with disability, however, has resulted in a legal regime in which many pregnant workers currently have less legal standing to workplace accommodations than other persons with comparable physical limitations.<sup>27</sup>

In an effort to resolve this inequity, this Article challenges the prevailing assumption that characterizing pregnancy as “disability” for ADA purposes is inappropriate, unwise, and harmful to women. Focusing on the social model of disability, which animated the disability rights movement that produced the ADA, this Article contends that feminists and the courts have improperly assumed that medical defect is a prerequisite to ADA accommodations.<sup>28</sup> The social model of disability, which rejects the traditional “defect” approach to disability, aims to reform work policies and practices to account for the broad range of

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<sup>26</sup> See Maria O’Brien Hylton, “Parental” Leaves and Poor Women: Paying the Price for Time Off, 52 U. PITT. L. REV. 475, 513–14 (1991) (“[O]ne danger of analogizing pregnancy to other disabilities is that this has the effect of preserving male characteristics as the norm. Pregnancy, the argument goes, is only ‘unique’ or ‘special’ if men are the reference point for determining what is unusual and what is typical.” (citing Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1152–59 (1986))).

<sup>27</sup> See *infra* notes 50–63 and accompanying text (explaining why pregnant workers need accommodations); *infra* notes 140–204 and accompanying text (explaining why the ADA undermines several objections to characterizing pregnancy as disability under the ADA). To be fair, many feminists who have resisted associating pregnancy with disability have done so from the perspective that pregnancy’s social value justifies pregnancy accommodations significantly beyond the accommodations available for persons with disabilities. See, e.g., Finley, *supra* note 26, at 1150 n.140 (“[The PDA] is limited because it only requires employers to make available to pregnant women only what they make available to men for other conditions.”). Many of these objections predate the ADA, however, and thus do not anticipate the current situation in which persons with disabilities have (1) significantly greater accommodation rights than in the 1980s and (2) in much of the country, have significantly greater accommodation rights than pregnant workers. See, e.g., *id.* (“The approach of comparing pregnancy with disabilities . . . has been one of the reasons why the United States lags so far behind the rest of the industrialized world in its maternity and parenting policies.”); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1299 (1987) (noting that “recognizing pregnancy as ‘different’ from other causes of disability . . . supports efforts to equalize the position of working women and men with respect to th[e] fundamental right [of reproduction]”); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1370–71 (2009) (“When evaluating pregnancy discrimination claims, courts often rely explicitly on the absence of a reasonable accommodation theory. . . . [W]ere the physical limitations at issue caused by a disability rather than pregnancy, these would be straightforward nonaccommodation claims.”).

<sup>28</sup> See *infra* notes 105–237 and accompanying text.



physical variation within the human population.<sup>29</sup> Rather than regarding bodies that differ from the dominant workplace norm as defective, the social model aims to reshape workplace architecture and culture to achieve the inclusiveness that would have naturally occurred had human culture historically viewed physically variant persons as legitimate workforce participants.<sup>30</sup>

The social model, because it focuses on policies and practices that exclude physically variant persons, does not require characterizing physical variation as defect.<sup>31</sup> In fact, many proponents of the social model argue for reenvisioning the term “disability” to refer not to a medical condition inherent in an individual’s body but to the negative interaction between the individual’s body and the individual’s social environment.<sup>32</sup> As the pregnancy example demonstrates, these negative interactions can occur even when the source of the individual’s bodily difference is a healthy one.<sup>33</sup> Accordingly, within the social model framework, the ADA’s goal to reshape the workplace to accommodate historically excluded persons may encompass pregnancy.<sup>34</sup>

This argument proceeds as follows. Part I briefly outlines the ongoing need for pregnancy accommodations, particularly in low-income work.<sup>35</sup> It also suggests that women’s low entry rates into physically demanding occupations may result, in part, from knowledge that employers may not provide pregnancy accommodations.<sup>36</sup> Part II demonstrates that the FMLA does little to accommodate pregnancy because it

<sup>29</sup> See MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 11 (1990).

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> MICHAEL OLIVER, *SOCIAL WORK WITH DISABLED PEOPLE* 23 (1983); Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 *BERKELEY WOMEN’S L.J.* 81, 105 (1998).

Because it attributes the dysfunctions of people with physical, sensory, and cognitive impairments to their being situated in hostilely built and organized environments, the model construes the isolation of people with disabilities as the correctable product of how such individuals interact with stigmatizing social values and debilitating social arrangements rather than as the unavoidable outcome of their impairments.

Silvers, *supra*, at 105; see also CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* 12 (1988) (arguing that disability should be “regard[ed] . . . as a transactional product of handicapped people and their social environments”).

<sup>33</sup> See OLIVER, *supra* note 32, at 23.

<sup>34</sup> See Pub. L. No. 101-336, § 2, 104 Stat. 327, 328–29 (1990); OLIVER, *supra* note 32, at 23.

<sup>35</sup> See *infra* notes 50–63 and accompanying text.

<sup>36</sup> See *infra* notes 50–63 and accompanying text.

enables employers to force pregnant workers onto unpaid leave even when temporary job modifications could enable them to continue working.<sup>37</sup> It then contrasts the FMLA with the ADA, which requires employers to reasonably modify job tasks and work policies.<sup>38</sup> Turning to the ADA Amendments Act, Part III argues that the ADAAA's expansion of the ADA's disability definition to include many short-term and relatively minor physical limitations sweeps aside many standard objections to characterizing pregnancy as an ADA disability.<sup>39</sup> Part IV then argues that the ADA's expanded scope undermines several additional objections to pregnancy's inclusion within disability law.<sup>40</sup> Most obviously, the ADA's inclusion of relatively minor and short-term physical limitations ameliorates feminist concerns that characterizing pregnancy as a disability might revive exaggerated stereotypes about the physical limitations that accompany pregnancy.<sup>41</sup> Relatedly, the ADA's coverage of low-stigma conditions suggests that pregnancy's relatively positive social position is no longer a viable justification for excluding pregnancy from the ADA's scope.<sup>42</sup> Furthermore, the ADAAA's expanded protected class shifts the ADA's relationship to the Pregnancy Discrimination Act (PDA) in ways that significantly undermine courts' pre-ADAAA assumptions that ADA pregnancy coverage would be redundant.<sup>43</sup> In fact, current judicial interpretations of the PDA indicate that without ADA pregnancy coverage, the ADAAA may inadvertently frustrate pregnant workers' efforts to obtain workplace accommodations via the PDA.<sup>44</sup> This unexpected result provides an additional reason to challenge the standard view that the ADA excludes pregnancy. Finally,

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<sup>37</sup> See *infra* notes 64–96 and accompanying text.

<sup>38</sup> See *infra* notes 97–104 and accompanying text.

<sup>39</sup> See *infra* notes 105–140 and accompanying text; see also ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3555–56 (2008) (amending the ADA's definition of "disability").

<sup>40</sup> See *infra* notes 141–204 and accompanying text; see also 42 U.S.C. § 12102 (Supp. III 2009).

<sup>41</sup> See *infra* notes 105–140 and accompanying text.

<sup>42</sup> See *infra* notes 169–179 and accompanying text.

<sup>43</sup> See *infra* notes 143–168 and accompanying text; see also 42 U.S.C. § 12102 (defining "disability" post-ADAAA more broadly than pre-ADAAA); Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (amending Title VII of the Civil Rights Act of 1964 to prohibit discrimination on the basis of pregnancy).

<sup>44</sup> See, e.g., *Young v. United Parcel Serv., Inc.*, No. DKC 08-2586, 2011 WL 665321, at \*7, \*13 (D. Md. Feb. 14, 2011) (holding that plaintiff's PDA claim failed as a matter of law because nonpregnant employees who received light duty assignments were members of the ADA's protected class and plaintiff was not, and as a result, workers with ADA-covered disabilities were not appropriate comparators for establishing a PDA violation); *infra* notes 144–168 and accompanying text.

Part V argues that the social model of disability undermines the largest remaining objection to ADA pregnancy coverage: the view that because pregnancy is “the natural consequence of a properly functioning reproductive system,”<sup>45</sup> there “is no negative effect when a woman becomes pregnant.”<sup>46</sup> By focusing on socially imposed barriers, the social model of disability challenges the assumption that “there is no negative effect when a woman becomes pregnant.”<sup>47</sup> It suggests that the social and economic disadvantages that accompany pregnancy align with the ADA’s mission to reshape the workplace to accommodate historically excluded persons.<sup>48</sup> The Article concludes with suggestions for how the social model approach might enable courts and the EEOC to reinterpret existing statutory language and regulations to conclude that the ADA’s accommodation requirement extends to pregnancy.<sup>49</sup>

### I. PREGNANT WORKERS’ NEED FOR ACCOMMODATIONS

Although many workers enjoy relatively sedentary and flexible jobs that are compatible with pregnancy, women in more physically demanding jobs may experience conflicts between the biological effects of their pregnancies and their employers’ work expectations.<sup>50</sup> When this occurs, these workers frequently lose their jobs, despite their capacity to continue engaging in productive work.<sup>51</sup> For example, Heather Wiseman, a retail sales associate, lost her job because consuming water while working—an activity necessary to maintain a healthy pregnancy—violated store policy.<sup>52</sup> Similarly, Jane Doe, a police officer, lost her position because her department imposed vigorous physical requirements

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<sup>45</sup> *Gudenkauf*, 922 F. Supp. at 473.

<sup>46</sup> *Brennan*, 850 F. Supp. at 343; see Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,007 (Mar. 25, 2011) (“[C]onditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments.”); see also EEOC COMPLIANCE MANUAL, *supra* note 14, § 902.2(c)(3) (stating that “[b]ecause pregnancy is not the result of a physiological disorder, it is not an impairment” and therefore cannot be a disability).

<sup>47</sup> *Brennan*, 850 F. Supp. at 343; see OLIVER, *supra* note 29, at 11.

<sup>48</sup> See *infra* notes 180–204 and accompanying text.

<sup>49</sup> See *infra* notes 205–237 and accompanying text.

<sup>50</sup> See Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1, 24–25 (1985) (“Pregnant women may be advised to follow a certain diet, to abstain from ingesting particular substances, to avoid identified toxic environments, and to engage in or refrain from specified conduct in order to maximize their chances of delivering a healthy child.” (footnotes omitted)).

<sup>51</sup> See, e.g., *Serednyj*, 2010 WL 1568606, at \*1–4 (noting that the plaintiff was fired because she could not move tables, a task that consumed only five to ten minutes of her day).

<sup>52</sup> See *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669, at \*1 (D. Kan. June 9, 2009).

incompatible with pregnancy and gave temporary light duty assignments only to officers injured on duty.<sup>53</sup>

Even though reasonable adjustments to work rules or job duties might have enabled these women to continue working during their pregnancies, their employers were able to terminate their employment because the law provided them no right to pregnancy-related accommodations.<sup>54</sup> Although a handful of state statutes provide pregnancy accommodations, in most of the country, a worker who experiences a conflict between her pregnancy and her job faces two unappealing options.<sup>55</sup> One option is to attempt to continue performing her job responsibilities in the manner her employer demands, despite risks to her health and the health of her unborn child. The second option is to leave her job. As described below, if she is among the approximately sixty-two percent of workers covered by the FMLA, she may have the right to be reinstated in a similar job if she is able to resume all her job duties within a twelve-week period.<sup>56</sup> Her use of FMLA leave, however, will eliminate her income during pregnancy and reduce the leave time available for childbirth, recovery, and care for her newborn child.<sup>57</sup>

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<sup>53</sup> See Karen J. Kruger, *Pregnancy and Policing: Are They Compatible? Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 Wis. WOMEN'S L.J. 61, 68–69 (2007) (explaining that although Doe was entitled to FMLA leave and reinstatement rights, her department placed her on leave so early in her pregnancy that she exhausted the twelve weeks of FMLA leave long before her pregnancy ended). Doe later rejoined the police force, but did not regain the seniority and pension benefits she had accumulated prior to her pregnancy. See *id.*

<sup>54</sup> See *id.* at 68.

<sup>55</sup> See, e.g., CAL. GOV'T CODE § 12945(b)(1)–(3) (West 2005) (requiring accommodations for pregnant workers); CONN. GEN. STAT. ANN. § 46a-60(a)(7)(E) (West 2009) (same); LA. REV. STAT. ANN. § 23:342(3)–(4) (2010) (same); see also 775 ILL. COMP. STAT. 5/2-102(H) (2008) (requiring accommodation for pregnant law enforcement officers and firefighters); TEX. GOV'T CODE ANN. § 411.0079 (West 2005) (requiring accommodation for pregnant law enforcement officers); cf. S06273, 2012 Leg., S. Sess. (N.Y. 2012) ("An Act to amend executive law, in relation to requiring the provisions of reasonable accommodations for pregnant women") (proposed legislation).

<sup>56</sup> See 29 U.S.C. § 2614(a)(1) (2006) (providing for reinstatement). Only fifty-seven to sixty-six percent of employees are eligible for FMLA leave because the FMLA does not apply to employers who have fewer than fifty employees in a seventy-five-mile radius and employees who have worked for their current employer less than one year or who have worked fewer than 1250 hours (approximately twenty-five hours per week) in the past year. See *id.* § 2611 (4)(A) (defining "employer" under FMLA); DAVID CANTOR ET AL., U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE § 3.2.1 (2004).

<sup>57</sup> Many workers eligible for FMLA leave say they do not take it because they cannot afford it. CANTOR, *supra* note 56, § 2.2.4 ("In the 2000 survey, the most commonly noted reason for not taking leave was being unable to afford it, reported by 77.6% of leave-needers.")

Workers not covered by the FMLA or whose work limitations exceed twelve weeks may simply lose their jobs.<sup>58</sup>

These “gaps in the law for pregnant women”<sup>59</sup> frequently fall most harshly on women in historically male professions like firefighting, construction work, and law enforcement.<sup>60</sup> They also frequently affect women in low-income work, where rigid work rules restrict workers’ ability to consume water, vary their working positions, and curtail repetitive, physically demanding activities.<sup>61</sup> In these industries, women able to fully conform to employer expectations oriented around male norms during the rest of their work lives predictably lose their jobs when they become pregnant.<sup>62</sup> This job loss not only directly reduces the number of women in predominately male occupations but also indirectly contributes to occupational sex segregation by discouraging other women from pursuing jobs they risk losing when they become pregnant.<sup>63</sup>

## II. THE LIMITATIONS OF THE FAMILY AND MEDICAL LEAVE ACT

The FMLA falls short of the ADA’s accommodation requirement because it enables employers to exclude pregnant women from the workplace even when temporary job modifications could enable them to continue working.<sup>64</sup> The FMLA provides eligible workers up to twelve weeks of unpaid leave when their pregnancy, another “serious health

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<sup>58</sup> See Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 372 (1984) (observing that involuntary job loss during pregnancy “forces a woman to experience the economic distress of unemployment at a time not only when economic security and employment stability are particularly important to her, but also when her reemployment possibilities are diminished as potential employers contemplate the real or imagined work consequences of impending motherhood”).

<sup>59</sup> *Serednyj*, 2010 WL 1568606, at \*13.

<sup>60</sup> See generally Kruger, *supra* note 53 (examining the difficulties faced by pregnant women in the police workforce).

<sup>61</sup> See Laura Schlichtmann, Comment, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335, 338 (1994) (observing that “women in more physically demanding and lower-wage occupations—disproportionately women of color—are especially likely to need on-the-job accommodation to avoid unplanned and costly leave during pregnancy”).

<sup>62</sup> See, e.g., Kruger, *supra* note 53, at 68–69 (describing how many pregnant police officers lose their jobs because they are ineligible for mandatory workplace accommodation).

<sup>63</sup> *Cf. id.* at 67 (noting the low employment of women in law enforcement and that many women leave the profession for childbirth reasons).

<sup>64</sup> Compare 29 U.S.C. § 2601(b)(2) (2006) (explaining that the FMLA is intended “to entitle employees to take reasonable leave”), with 42 U.S.C. §§ 12111, 12112 (Supp. III 2009) (prohibiting employers under the ADA from discriminating against “qualified individual[s] with disabilities” who can be “reasonably accommodat[ed]”).

condition,” or the need to care for a newborn child or ill family member makes them unable to conform to all of their employer’s work rules.<sup>65</sup> Because FMLA leave is unpaid, the primary benefit is job security: if the worker is able to fully conform to her employer’s work expectations at the conclusion of the FMLA leave, the employer must reinstate the worker in the same or similar job.<sup>66</sup> So long as an employee’s total leave time does not exceed twelve weeks in a twelve-month period, an employee may use FMLA leave in a continuous period or intermittently.<sup>67</sup>

During pregnancy, the intermittent feature of FMLA leave may function similarly to an ADA accommodation by enabling some employees to continue working during their pregnancies with a reduced schedule.<sup>68</sup> For example, in the 2001 case *Whitaker v. Bosch Braking Systems Division of Robert Bosch Corp.*, decided by the U.S. District Court for the Western District of Michigan, the plaintiff’s job “consisted of standing on her feet at all times”<sup>69</sup> and regular mandatory overtime.<sup>70</sup> Because Whitaker’s doctor advised her that if she “spent too much time on her feet at work she would risk hypertension and premature delivery,”<sup>71</sup> Whitaker requested FMLA leave in order to limit her work time to eight hours per day, five days per week.<sup>72</sup> When Whitaker’s employer responded to this request by forcing her to leave work altogether, Whitaker sued and won a judgment holding that the FMLA required her employer to provide a reduced schedule.<sup>73</sup> Although ADA coverage would have required Whitaker’s employer to also consider the feasibility of accommodations that would have enabled Whitaker to continue

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<sup>65</sup> See 29 U.S.C. § 2601(b)(4) (explaining that the FMLA is intended to “[ensure] generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons”); *id.* § 2612(a) (providing for twelve weeks of leave for eligible employees).

<sup>66</sup> 29 U.S.C. § 2614(a)(1). Another important benefit is that employment benefits—such as health insurance—continue during the leave so long as the employee continues to make her required contributions. *Id.* § 2611(a)(2).

<sup>67</sup> See 29 U.S.C. § 2612(a)–(b) (providing for continuous or intermittent leave); 29 C.F.R. § 825.200(a) (2010) (allowing up to twelve weeks of leave during a twelve-month period).

<sup>68</sup> See 29 U.S.C. § 2612(b) (allowing eligible employees to take intermittent FMLA leave); 42 U.S.C. § 12111(8) (Supp. III 2009) (defining a “[q]ualified individual” under the ADA to include “an individual who, with or without reasonable accommodation, can perform the essential functions of [his or her] employment position”).

<sup>69</sup> 180 F. Supp. 2d 922, 924 (W.D. Mich. 2001).

<sup>70</sup> *Id.* at 924, 933.

<sup>71</sup> *Id.* at 924.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 924–25, 933. The court awarded her the difference between the amount she would have earned working a forty-hour week and the amount paid to her through the company’s short term disability program. *Id.* at 925, 933.

working her usual hours (such as permitting Whitaker to use a stool), the FMLA's reduced schedule feature enabled Whitaker to continue working, albeit at reduced hours and pay.<sup>74</sup>

The FMLA permits employers to entirely exclude workers whose work-pregnancy conflicts cannot be resolved with a reduced schedule.<sup>75</sup> Such conflicts may include difficulties conforming to an employer's lifting requirements and prohibitions against carrying water bottles.<sup>76</sup> It may also involve exposure to workplace environmental hazards such as carbon monoxide fumes, chemicals harmful to fetal development, and extremely high heat.<sup>77</sup> Rather than requiring employers to consider the feasibility of making even minor adjustments to accommodate these workers, the FMLA empowers employers to exclude employees who experience these pregnancy-related job difficulties from the workplace.<sup>78</sup> For example, early in her pregnancy, Suzanne Harvender, a lab technician, requested a change in her job duties to avoid exposure to chemicals harmful to fetal development.<sup>79</sup> Rather than requiring Harvender's employer to consider the feasibility of providing this accommodation, the FMLA enabled Harvender's employer to place Harvender on involuntary unpaid leave.<sup>80</sup> Had Harvender not suffered a miscarriage that enabled her to resume her usual job duties before the conclusion of the twelve weeks of FMLA leave, she would have lost her right to be reinstated.<sup>81</sup>

In short, although FMLA leave is quite helpful for workers who can reserve the majority of the twelve-week period for childbirth, recovery, and care of their newborn child, persons unable to conform to

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<sup>74</sup> 29 U.S.C. § 2612(b) (2006); 42 U.S.C. § 12112(b)(5)(A)–(B) (Supp. III 2009).

<sup>75</sup> See, e.g., *Harvender v. Norton Co.*, No. 96-CV-653 (LEK/RWS), 1997 WL 793085, at \*7 (N.D.N.Y. Dec. 15, 1997) (upholding the employer's decision to require the pregnant employee to take FMLA leave even though she requested accommodations).

<sup>76</sup> See *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4 RM, 2010 WL 1568606, at \*3 (N.D. Ind. Apr. 16, 2010), *aff'd*, 656 F.3d 540 (7th Cir. 2011); *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669, at \*1 (D. Kan. June 9, 2009).

<sup>77</sup> See *Treadaway v. Big Red Powersports, LLC*, 611 F. Supp. 2d 768, 776 (E.D. Tenn. 2009) (holding that FMLA leave was appropriate when dangerous levels of carbon monoxide were present in the pregnant plaintiff's office at the all-terrain vehicle factory and showroom where she worked).

<sup>78</sup> See, e.g., *Harvender*, 1997 WL 793085, at \*7 (upholding the employer's decision to force the pregnant employee onto unpaid FMLA leave after she requested accommodations).

<sup>79</sup> See *id.* at \*1.

<sup>80</sup> See *id.* at \*1, \*7 (noting that the employer "was under no obligation under the FMLA to provide alternative employment within the company to accommodate Harvender").

<sup>81</sup> *Id.* at \*1 (noting that Harvender's employer informed her that "if she were unable to return to her job [by] the end of her twelve week unpaid leave," her employment would be terminated).

their employer’s standard work rules during pregnancy itself frequently experience the FMLA as “a means by which an employer can move a woman out of the workplace.”<sup>82</sup> Unlike workers covered by the ADA who, because of ADA accommodations, can reserve their use of FMLA leave for situations when a medical emergency truly necessitates time away from work, an employer can force a pregnant worker to use FMLA leave whenever she is unable to conform to all of the employer’s work expectations.<sup>83</sup> The FMLA deems such a worker “incapacitated”<sup>84</sup> and “unable to work”<sup>85</sup> even when it is the employer’s inflexible work rules, rather than the pregnancy itself, that prevents her continued employment.<sup>86</sup> In this way, the FMLA permits workplace policies and practices that exclude pregnant workers to remain unchallenged.

The FMLA’s coverage exclusions further exacerbate the FMLA’s limited ability to ameliorate work-pregnancy conflicts.<sup>87</sup> Because only large employers must provide FMLA leave and they need not provide it to certain part-time employees or employees with less than a year’s tenure with the company, only fifty-seven to sixty-six percent of American workers are FMLA-eligible.<sup>88</sup> Workers who are ineligible—because they

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<sup>82</sup> Kruger, *supra* note 53, at 77–78; *see also* Catherine Albiston, *Institutional Inequality*, 2009 Wis. L. Rev. 1093, 1160 (“[A]lthough the FMLA may provide pregnancy disability leave, it does not require employers to structure work so that pregnant women can continue working during their pregnancies.”); Greenberg, *supra* note 25, at 247–48, 250 (arguing that the FMLA “reinforces the stereotyped image of pregnant women as unfit for work”); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 612 (2010) (observing that “the FMLA is of little use for pregnant women with only partial incapacity”).

<sup>83</sup> *See* 29 C.F.R. § 825.123 (2011) (defining when an employee is “unable to perform the functions of the position”); *see, e.g., Harvender*, 1997 WL 793085, at \*8.

While it may be true that Harvender wished to continue working as a laboratory technician, the fact remains that she could not perform an essential element of that job and therefore could not perform her job satisfactorily. In short, the plaintiff’s medical condition prevented her from doing her job. As a result, [her employer] was permitted to characterize Harvender’s time away from her job as FMLA leave.

*Harvender*, 1997 WL 793085, at \*8.

<sup>84</sup> *See* 29 C.F.R. § 825.113(b); 825.120(a)(4).

<sup>85</sup> *See id.* § 825.120(a)(4).

<sup>86</sup> *See, e.g., Harvender*, 1997 WL 793085, at \*1, \*7 (observing that the plaintiff could have continued working if her employer adjusted her work assignment to avoid hazardous chemical exposure (as the employer had done during the plaintiff’s prior pregnancy) but concluding that the employer could instead force the plaintiff to take FMLA leave).

<sup>87</sup> *See* 29 U.S.C. § 2611(4) (2006).

<sup>88</sup> *See id.* § 2611(4)(A)(i). The FMLA does not apply to employers who have fewer than fifty employees in a seventy-five-mile radius and employees who have worked for their cur-



are employed by a small business, have started a new job in the past year, or work one or more part-time jobs—are disproportionately low-income workers<sup>89</sup> and have significantly less education than workers covered by the FMLA.<sup>90</sup> Workers who lack FMLA coverage are also disproportionately female.<sup>91</sup> Accordingly, the workers most likely to experience work-pregnancy conflicts are least likely to be eligible for FMLA leave.<sup>92</sup>

Although legal records rarely capture the stories of low-income workers because attorneys frequently lack sufficient financial incentive to litigate their claims, middle-income workers' lawsuits illustrate the particularly dire circumstances that may arise for individuals who lack both ADA and FMLA coverage.<sup>93</sup> For example, Victoria Serednyj, a nursing home activity director, lacked FMLA coverage because she had worked for her employer for less than a year when her pregnancy began to interfere with her ability to independently move the heavy tables in the nursing home's activity room.<sup>94</sup> Even though moving tables "took up a small part—roughly five to ten minutes—of Ms. Serednyj's day," and Serednyj's coworkers had routinely volunteered to assist her prior to her pregnancy (and were willing to continue), her employer terminated her

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rent employer less than one year or who have worked fewer than 1250 hours (approximately twenty-five hours per week) in the past year. *Id.*; CANTOR, *supra* note 56, § 3.2.1.

<sup>89</sup> Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 45 (2007) (collecting studies, and concluding that "the restrictions on employer and employee coverage disproportionately fall on the low-wage workforce"); *see* CANTOR, *supra* note 56, § 3.2.2 (observing that workers covered by the FMLA "have significantly more annual family income than do other employees").

<sup>90</sup> CANTOR, *supra* note 56, § 3.2.2 (observing that workers covered by the FMLA are "significantly more likely to have graduated from college or to have attended graduate school").

<sup>91</sup> Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 442 (2011) ("The majority of ineligible workers are women." (citing O'Leary, *supra* note 89, at 43–44)).

<sup>92</sup> Schlichtmann, *supra* note 61, at 338 (observing that "women in more physically demanding and lower-wage occupations—disproportionately women of color—are especially likely to need on-the-job accommodation to avoid unplanned and costly leave during pregnancy"). The current trend toward disaggregation of business enterprise into smaller and smaller units may increase the number of workers ineligible for FMLA. *See* 29 U.S.C. § 2611(4) (defining "[e]mployer" under the FMLA); Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Aggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 201 (2011) (describing the trend toward "disaggregation of business enterprises into smaller, independent parts" and noting "there is evidence that the recession has accelerated this trend").

<sup>93</sup> *See* 29 U.S.C. § 2611(2), (4) (2006) (defining the scope of FMLA coverage); 42 U.S.C. § 12111(4), (5) (Supp. III 2009) (defining the scope of ADA coverage).

<sup>94</sup> *Serednyj*, 2010 WL 1568606, at \*3.

employment.<sup>95</sup> Because Serednyj had worked for her employer less than a year, her pregnancy’s interference with a small fraction of her job duties led her to not only lose her income for the duration of her pregnancy but to entirely lose her position with the company.<sup>96</sup>

Unlike the FMLA, the ADA covers all employees and job applicants, regardless of their length of service with their current employer.<sup>97</sup> The ADA’s accommodation requirement also applies to relatively small employers.<sup>98</sup> More fundamentally, the ADA provides more accommodations than leave time and a reduced schedule.<sup>99</sup> If a worker enjoys ADA coverage, an employer may not force her to take FMLA leave if she wishes to continue working and can do so with reasonable accommodations.<sup>100</sup> The ADA requires employers to make “change[s] in the work environment or in the way things are customarily done [in order to] enable[] an individual with a disability to enjoy equal employment opportunities.”<sup>101</sup> This duty may include job restructuring or reassignment to a vacant position.<sup>102</sup> In these ways, ADA coverage of pregnancy would spur employers to restructure work to accommodate

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<sup>95</sup> *Id.* at \*1–4.

<sup>96</sup> *Id.*

<sup>97</sup> Compare 42 U.S.C. § 12111(4) (defining “employee” under the ADA to include “an individual employed by an employer”), with 29 U.S.C. § 2611 (defining “eligible employee” under the FMLA to include “an employee who has been employed . . . for at least 12 months by the employer” from whom leave is requested).

<sup>98</sup> Compare 29 U.S.C. § 2611 (4)(A)(i) (limiting FMLA coverage to employers with fifty or more employees), with 42 U.S.C. § 12111(5)(A) (limiting ADA coverage to employers with fifteen or more employees).

<sup>99</sup> See 42 U.S.C. § 12111(8)–(9).

<sup>100</sup> See 29 C.F.R. § 825.702(d)(1) (2011) (“If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. The ADA, however, may require that an employer offer an employee the opportunity to take such a position.”); *Id.* § 1630.2(h)(1) (providing, under the ADA, that employers cannot, inter alia, refuse to hire, demote, place on involuntary leave, or terminate an employee with a protected disability); *Timmons v. Gen. Motors Corp.*, 469 F.3d 1122, 1128 (7th Cir. 2006) (concluding that placing an individual “involuntarily on disability leave was an adverse employment action” prohibited under the ADA); *Clark v. Germantown Hosp. & Med. Ctr.*, No. CIV. A. 00-3862, 2001 WL 122221, at \*3 (E.D. Pa. Feb. 13, 2001) (“Defendant contends that its statutory duty to reasonably accommodate Plaintiff’s disability was satisfied when, upon receiving a note from Plaintiff’s physician requesting an accommodation, Defendant instead placed Plaintiff on unpaid leave under the FMLA. The court does not agree.” (footnote omitted)).

<sup>101</sup> Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,013 (Mar. 25, 2011); see 29 C.F.R. § 1630.2(o) (defining “[r]easonable accommodation”).

<sup>102</sup> 42 U.S.C. § 12111(9)(B) (defining “reasonable accommodation”).

pregnancy to a far greater extent than the FMLA requires.<sup>103</sup> Unlike the FMLA, which responds to pregnancy-work conflicts by removing pregnancy from the workplace, ADA coverage would require employers to reasonably restructure the workplace to accommodate pregnancy.<sup>104</sup>

### III. THE AMENDED ADA'S EXPANDED SCOPE

The assumption that the ADA excludes pregnancy appears anomalous after the ADAAA expanded the ADA's protected class.<sup>105</sup> Prior to the ADAAA, most courts that denied ADA accommodations to pregnant workers relied on the conventional understanding that the ADA's disability definition should "be interpreted strictly to create a demanding standard for qualifying as disabled."<sup>106</sup> These courts reasoned that pregnancy imposed functional limitations that are too minor and short-term to constitute an ADA disability.<sup>107</sup> The ADAAA, however, brings into the ADA's protected class persons with relatively modest and temporary limitations similar to the functional limitations pregnant workers experience.<sup>108</sup>

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<sup>103</sup> Compare 42 U.S.C. § 12111(8)–(9) (defining reasonable accommodations for qualified employees under the ADA), with *Harvender*, 1997 WL 793085, at \*7 (holding that the FMLA does not obligate an employer to make accommodations).

<sup>104</sup> See 42 U.S.C. § 12111(9).

<sup>105</sup> See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008).

<sup>106</sup> *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

<sup>107</sup> See, e.g., *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4 RM, 2010 WL 1568606, at \*15 (N.D. Ind. Apr. 16, 2010) (concluding that a pregnant woman fell outside the ADA's protected class because "[s]hort-term, temporary restrictions aren't substantially limiting and don't render a person disabled under the ADA"), *aff'd*, 656 F.3d 540 (7th Cir. 2011); *Jessie v. Carter Health Care Ctr., Inc.*, 926 F. Supp. 613, 616 (E.D. Ky. 1996) (dismissing the plaintiff's claim on the rationale that her pregnancy was a "temporary non-chronic condition of short duration"); see also *Saffer v. Town of Whitman*, Civ. A. No. 85-4470-Z, 1986 WL 14090, at \*1 (D. Mass. Dec. 2, 1986) ("Plaintiff cannot base her § 1983 claim on § 504 of the Rehabilitation Act of 1973 . . . since a temporary condition, such as pregnancy, is not a disability under that statute." (internal citations omitted)).

<sup>108</sup> See ADA Amendments Act, § 4(a), 122 Stat. at 3555–56 (amending the ADA's definition of "disability"); *infra* notes 109–140 and accompanying text; see also Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 96 (2010) (noting that the ADAAA embodies Congress's conclusion "that Congress's expectation of broad coverage under the [ADA] 'ha[d] not been fulfilled,' and that the Supreme Court ha[d] too narrowly construed the meaning of the term 'disability'" (citing ADA Amendments Act of 2008, §§ 1, 2(a)(3), 122 Stat. 3553, 3553 (2008))).

### A. Relaxation of the Severity Threshold for ADA Coverage

Although the ADAAA retains the ADA’s disability definition—“a physical or mental impairment that substantially limits one or more major life activities”<sup>109</sup>—it shifts the meaning of this definition in several ways that undermine the pre-ADAAA assumption that the definition excludes the physical limitations that accompany a healthy pregnancy. First, the ADAAA expands the definition of “major life activity” beyond “activities that are of central importance to most people’s daily lives”<sup>110</sup> to include work-related tasks such as “standing, lifting, [and] bending.”<sup>111</sup> Similarly, the ADAAA emphatically rejects the Supreme Court’s conclusion that the term “substantially limits” means that an impairment must “prevent[] or severely restrict[]” the individual from performing a major life activity.<sup>112</sup> The ADAAA also rejects the EEOC’s slightly broader conclusion that an impairment must “significantly” restrict a major life activity.<sup>113</sup> In place of these narrow interpretations of the ADA’s scope, the ADAAA provides that the ADA’s disability definition “shall be construed in favor of broad coverage.”<sup>114</sup> The text of the ADAAA also expressly states that the Supreme Court’s interpretations

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<sup>109</sup> 42 U.S.C. § 12102(1)(A) (Supp. III 2009).

<sup>110</sup> *Id.* § 12102(2)(A).

<sup>111</sup> *Id.* The ADAAA’s expanded definition of “major life activity” also includes “the operation of a major bodily function.” *Id.* § 12102(2)(B).

<sup>112</sup> Findings and Purposes of ADA Amendments Act of 2008, *id.* § 12101 note.

The purposes of this Act are . . . (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) . . . that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives” . . . .

*Id.*

<sup>113</sup> *Id.* (“The purposes of this Act are . . . (6) to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act, including the amendments made by this Act.”); Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,008 (Mar. 25, 2011) (“It is clear in the text and legislative history of the ADAAA that Congress concluded the courts had incorrectly construed ‘substantially limits,’ and disapproved of the EEOC’s now-superseded 1991 regulation defining the term to mean ‘significantly restricts.’”).

<sup>114</sup> 42 U.S.C. § 12102(4)(A); see 154 CONG. REC. S8840, S8840 (Sept. 16, 2008) (statement of the Managers) (explaining that the ADAAA creates a “generous and inclusive definition of disability”).

of the ADA's disability definition had previously "created an inappropriately high level of limitation necessary to obtain coverage."<sup>115</sup>

Accordingly, new EEOC regulations implementing the ADAAA conclude that in order to fall within the ADA's scope, "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity" as compared to "most people in the general population."<sup>116</sup> As an example of the breadth of the ADAAA's new disability definition, the EEOC's new interpretive guidance indicates that a person who has an impairment resulting in a "20-pound lifting restriction that lasts or is expected to last for several months" is a person with an ADA disability.<sup>117</sup> Even a more common fifty-pound lifting restriction may qualify an individual for ADA coverage if it limits the individual's ability to perform her own job as well as other jobs that require heavy lifting.<sup>118</sup>

### B. *Erosion of the Durational Requirements for ADA Coverage*

The ADAAA also relaxes the durational requirements courts had previously imposed on ADA disabilities.<sup>119</sup> Prior to the ADAAA, many courts considered a condition's "permanent or long term impact" an absolute requirement for ADA coverage.<sup>120</sup> Courts frequently denied

<sup>115</sup> 42 U.S.C. § 12101 note; *see also* 29 C.F.R. § 1630.1(c)(4) (2011) ("The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA . . .").

<sup>116</sup> 29 C.F.R. § 1630.2(j)(1)(ii).

<sup>117</sup> *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. at 17,011.

[S]omeone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting. . . . [I]f an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability.

*Id.*

<sup>118</sup> *Id.* at 17,014.

<sup>119</sup> *See Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008*, EEOC, [http://www.eeoc.gov/laws/regulations/adaaa\\_qa\\_small\\_business.cfm](http://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm) (last visited Feb. 12, 2012) [hereinafter *Questions and Answers for Small Businesses*] (stating that the regulations do not "require that an impairment last a particular length of time to be considered substantially limiting" and that "[e]ven a short-term impairment may be a disability if it is substantially limiting").

<sup>120</sup> *See, e.g., Williams*, 534 U.S. at 198 ("The impairment's impact must . . . be permanent or long term."); *McDonald v. Pennsylvania*, 62 F.3d 92, 94, 97 (3d Cir. 1995) (concluding that "a disabling, but transitory, physical or mental condition" will not trigger the protections of the ADA).

ADA class membership to persons whose physical or mental impairments caused substantial limitations that lasted less than six months.<sup>121</sup>

Although the ADAAA’s text does not expressly address whether employers must accommodate persons with temporary limitations, the EEOC’s interpretation of the ADAAA strongly suggests that the ADA now covers short-term conditions.<sup>122</sup> Most saliently, the EEOC has adopted a formal regulation providing that “an impairment may qualify as an ADA disability even if it “last[s] or [is] expected to last for six months or less.”<sup>123</sup> This statement underscores the EEOC’s conclusion that the six-month durational limitation the ADAAA placed on the ADA’s unique “regarded as” provision does not put a temporal limitation on the ADA’s other coverage provisions.<sup>124</sup> The EEOC has further

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<sup>121</sup> See, e.g., *Hamm v. Runyon*, 51 F.3d 721, 726 (7th Cir. 1995) (holding that the plaintiff was ineligible for protection under the ADA because he failed to prove his arthritis was “especially severe or that its impact on his walking would be long term”); *Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799, 804–05 (M.D.N.C. 1999) (determining that a plaintiff who alleged, despite his numerous medical ailments, he could return to work within three months was not protected because “‘temporary’ or ‘transitory’ condition[s] [do] not implicate the protections set forth by the ADA”). Courts also held that the ADA excluded persons with conditions that imposed substantial limitations episodically, such as dysthymia, a chronic depressive disorder characterized by intermittent bouts of depression. See, e.g., *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997) (“[Plaintiff] has failed to adduce any evidence that his impairment—the acute, episodic depression—will be long-term.”). In response, the ADAAA expressly provides that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4)(D) (Supp. III 2009). Accordingly, “[t]he fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity.” Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. at 17,011; see also *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EEOC, [http://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm) (last visited Feb. 11, 2012) [hereinafter *EEOC Questions and Answers*] (“An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form will . . . be a disability under the ADAAA . . .”).

<sup>122</sup> *Questions and Answers for Small Businesses*, *supra* note 119.

<sup>123</sup> 29 C.F.R. § 1630.2(j)(1)(ix) (2011).

<sup>124</sup> See *id.*; Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48,431, 48,440 (proposed Sept. 23, 2009) (“The ‘transitory and minor’ exception in . . . the ‘regarded as’ prong of the definition of ‘disability’ . . . does not establish a durational minimum for the definition of ‘disability’ under § 1630.2(g)(1) (actual disability) or § 1630.2(g)(2) (record of a disability).”). The “regarded as” provision permits a person with an actual or perceived “minor” impairment that would not otherwise qualify for ADA coverage to sue for certain forms of disability discrimination, so long as the impairment lasts—or is expected to last—six months or more. See 42 U.S.C. § 12102(3)(B) (Supp. III 2009). By no longer requiring plaintiffs to prove that their employer regarded them as having a “substantial limitation,” the ADAAA significantly broadens the scope of “regarded as” coverage. See *id.* The six-

signaled that impairments may qualify for ADA coverage even if they last significantly less than six months. In a recent American Bar Association webcast designed to explain the EEOC's new regulations, EEOC Commissioner Chai Feldblum emphasized that a substantial limitation that lasts for just a "moment" may be sufficient to establish ADA coverage.<sup>125</sup> More formally, the EEOC has deleted from its interpretive guidance its longstanding statement that "[t]emporary, nonchronic impairments that do not last for a long time and that have little or no long term impact . . . are usually not disabilities."<sup>126</sup> The EEOC has also deleted from its formal regulations the recommendation that courts should consider an impairment's "duration"<sup>127</sup> and its "permanent or long term impact"<sup>128</sup> when determining whether an impairment is substantially limiting.<sup>129</sup> Although the EEOC's statement introducing its new regulations suggests that "the duration of an impairment" continues to remain "one factor in determining whether the impairment sub-

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month durational limitation is the ADAAA's attempt to cabin the scope of this otherwise dramatic expansion of "regarded as" coverage. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, ADA AMENDMENTS ACT OF 2008, at 1 (2008), available at <http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/110-2/saphr3195-r.pdf> (suggesting that the ADAAA's changes to the ADA's "regarded as" prong extend ADA coverage to "a mild seasonal allergy"). Persons who establish membership in the ADA's protected class solely via "regarded as" coverage are not eligible for ADA accommodations. See 42 U.S.C. §§ 12201(h), 12102(1)(C).

<sup>125</sup> Chai Feldblum, *EEOC Commissioners Explain Final ADAAA Regulations*, AM. BAR ASS'N (May 4, 2011), <http://apps.americanbar.org/cle/programs/t11eeff1.html> (available for purchase from the American Bar Association website); see also *id.* (emphasizing that the amended ADA simply requires that a person's major life activity be substantially limited "in that moment, in that moment" (repetition for emphasis)); accord Chai R. Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 LAB. LAW. 11, 21 (1991) ("If an impairment substantially limits a life activity, such an impairment would meet the statutory requirements, regardless of the duration of the impairment.").

<sup>126</sup> See 29 C.F.R. § 1630.2(j) (2010) (version in effect prior to May 24, 2011). Although the EEOC's Notice of Proposed Rulemaking had contained a list of conditions that would normally not qualify for ADA coverage due to their temporary nature, the EEOC declined, in the final regulations, to state that any particular condition would not be covered due to its short duration. See *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended*, 76 Fed. Reg. 16,978, 16,982 (Mar. 25, 2011) ("[T]he Commission has not in the final regulations specified any specific minimum duration that an impairment's effects must last in order to be deemed substantially limiting.").

<sup>127</sup> 29 C.F.R. § 1630.2(j)(2).

<sup>128</sup> *Id.*

<sup>129</sup> See *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended*, 76 Fed. Reg. at 17,013 (noting that "the Commission's regulations . . . no longer include the additional list of 'substantial limitation' factors contained in the previous version of the regulations (i.e., the nature and severity of the impairment, duration or expected duration of the impairment, and actual or expected permanent or long-term impact of or resulting from the impairment)").

stantially limits a major life activity,”<sup>130</sup> all of the EEOC’s revisions, taken together, strongly suggest that the EEOC no longer regards a condition’s short-term duration as an inherent barrier to ADA coverage.

### C. Coverage of Work Limitations Similar to Pregnancy

The combined effect of the relaxation of the ADA’s severity and durational requirements is that the ADAAA brings into the ADA’s protected class persons whose work limitations parallel the functional limitations pregnant workers may experience.<sup>131</sup> For example, in the appendix to the new regulations, the EEOC twice refers to a person who has an impairment resulting in a “20-pound lifting restriction that lasts or is expected to last for several months”<sup>132</sup> as a person with an ADA disability.<sup>133</sup> Similarly, the EEOC concludes that persons have ADA disabilities if their physical impairments cause them to experience “shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects.”<sup>134</sup>

The EEOC further provides that less significant difficulties with lifting, walking, and other physical activities may establish ADA class membership by limiting the major life activity of working.<sup>135</sup> As defined by the EEOC, an individual is substantially limited in the major life activity of working, and thereby covered by the ADA, if a physiological condition substantially limits the person’s ability to do his or her current job and “substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most peo-

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<sup>130</sup> Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. at 16,982.

<sup>131</sup> *See id.*

<sup>132</sup> *See id.* at 17,011.

[S]omeone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting . . . [I]f an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability.

*Id.*

<sup>133</sup> *See id.*

<sup>134</sup> *Id.* at 17,012 (concluding that an individual “whose back or leg impairment precludes him or her from standing for more than two hours without significant pain” has an ADA disability). The EEOC also indicates that relevant considerations include “the difficulty, effort, or time required to perform a major life activity” as well as “pain experienced when performing a major life activity.” *Id.* at 17,001.

<sup>135</sup> *See id.* at 17,013–14.



ple having comparable training, skills, and abilities.”<sup>136</sup> By way of illustration, the EEOC provides an example with a strong facial similarity to pregnancy:

[I]f a person whose job requires heavy lifting develops a disability that prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his or her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in working because he or she is substantially limited in performing the class of jobs that require heavy lifting.<sup>137</sup>

Many of the EEOC’s other examples of “class[es] of jobs,”<sup>138</sup> the exclusion from which constitutes an ADA disability, are also similar to the classes of jobs that, as traditionally structured, are potentially incompatible with pregnancy.<sup>139</sup> The EEOC lists “jobs requiring repetitive bending, reaching, or manual tasks, jobs requiring repetitive or heavy lifting, prolonged sitting or standing, extensive walking, driving, or working under [extreme] conditions such as high temperatures.”<sup>140</sup>

#### IV. THE ADA AAA UNDERMINES SEVERAL OBJECTIONS TO CHARACTERIZING PREGNANCY AS “DISABILITY”

The foregoing discussion has argued that the ADA AAA invites reexamination of the assumption that pregnant workers may not obtain ADA accommodations.<sup>141</sup> The ADA AAA removes two objections to ADA pregnancy coverage by bringing relatively modest and short-term conditions within the ADA’s scope.<sup>142</sup> This Part argues that the ADA AAA further supports ADA pregnancy coverage by undermining several other

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<sup>136</sup> *Id.* at 17,013; *see also EEOC Questions and Answers*, *supra* note 121 (“In certain situations, an impairment may limit someone’s ability to perform some aspect of his or her job, but otherwise not substantially limit any other major life activity. In these situations, the individual may be substantially limited in working.”).

<sup>137</sup> 76 Fed. Reg. at 17,014.

<sup>138</sup> *Id.*

<sup>139</sup> *See id.*

<sup>140</sup> *Id.* The EEOC indicates that other classes of jobs include “commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs.” *Id.* This interpretation of the amended ADA will enable many low income workers with physical limitations to obtain ADA accommodations for the first time. *See id.*

<sup>141</sup> *See supra* notes 105–140 and accompanying text.

<sup>142</sup> *See supra* notes 105–140 and accompanying text.

pre-ADAAA justifications for pregnancy’s exclusion from the ADA’s protected class.<sup>143</sup>

A. *The ADAAA Changes the ADA’s Relationship to the Pregnancy Discrimination Act*

First, the ADAAA’s expansion of the ADA’s protected class changes the ADA’s relationship with the Pregnancy Discrimination Act (PDA).<sup>144</sup> Prior to the ADAAA, many courts concluded that the existence of the PDA “obviates the need for pregnancy-related discrimination to also be covered under the ADA.”<sup>145</sup> They reasoned that “nothing but redundancy would be gained by holding that discrimination in employment because of pregnancy or related conditions [is] actionable under the ADA.”<sup>146</sup> The ADAAA, however, changes the ADA’s relationship with the PDA in two ways that significantly undermine the assumption that ADA coverage of pregnancy-related impairments is unnecessary and inappropriate.

First, by bringing short-term and relatively modest physical limitations into the ADA’s scope, the ADAAA undermines the pre-ADAAA assumption that ADA coverage of pregnancy limitations would simply duplicate PDA coverage.<sup>147</sup> Prior to the ADAAA, the short-term and modest nature of pregnancy limitations meant that a healthy pregnant worker’s only route to ADA coverage was through the ADA’s “regarded

<sup>143</sup> See *infra* notes 144–168 and accompanying text (arguing that the ADA coverage of pregnancy would not duplicate protection under the PDA and that the ADAAA actually frustrates pregnant plaintiffs’ claims under the PDA); *infra* notes 169–173 and accompanying text (asserting that pregnancy should be covered under the ADA because disabilities covered by the ADA need not be rare); *infra* notes 174–179 and accompanying text (arguing that ADA coverage of pregnancy would not revive negative attitudes regarding pregnancy); *infra* notes 180–204 (explaining that ADA coverage of pregnancy is consistent with the ADA’s broad purpose).

<sup>144</sup> See 42 U.S.C. § 12102 (Supp. III 2009).

<sup>145</sup> *Tsetseranos v. Tech Prototype, Inc.*, 893 F. Supp. 109, 119 (D.N.H. 1995).

<sup>146</sup> *Walsh v. Food Supply, Inc.*, 96-677-CIV-ORL-18, 1997 WL 401594, at \*2 (M.D. Fla. Mar. 19, 1997); see *Johnson v. A.P. Prods., Ltd.*, 934 F. Supp. 625, 627 (S.D.N.Y. 1996) (“Title VII and the PDA specifically covered employment discrimination on the basis of pregnancy, thereby obviating the need to extend the coverage of the ADA to protect pregnancy and related medical conditions.”); *Villarreal v. J.E. Merit Constructors, Inc.*, 895 F. Supp. 149, 152 (S.D. Tex. 1995) (“The existence of both Title VII and the Pregnancy Discrimination Act obviate the need to extend the coverage of the ADA to protect pregnancy and related medical conditions.”).

<sup>147</sup> Compare Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,011 (Mar. 25, 2011) (declining to require strict durational standards for an ADA disability), with *Walsh*, 1997 WL 401594, at \*2, and *Johnson*, 934 F. Supp. at 627, and *Villarreal*, 895 F. Supp. at 152.

as disabled” prong, which allowed a plaintiff to argue that although her limitations did not rise to the level of an ADA disability, her employer terminated her based on an inaccurate belief that they did.<sup>148</sup> Because many jurisdictions had concluded that “regarded as” plaintiffs may not receive ADA accommodations,<sup>149</sup> a pregnant plaintiff’s “regarded as disabled” claim was functionally quite similar to a pregnancy discrimination claim under the PDA and thus arguably simply duplicated the PDA’s coverage.<sup>150</sup> Post-ADAAA, however, short-term and modest physical limitations fall within the ADA’s “actual” disability prong.<sup>151</sup> Accordingly, ADA pregnancy coverage would now give pregnant workers rea-

<sup>148</sup> See 42 U.S.C. § 12102(1)(C) (Supp. III 2009). The ADAAA significantly changed the ADA’s “regarded as” provision. This provision now permits any individual with an impairment—real or perceived—to bring a “regarded as” claim, regardless of whether the impairment substantially limits (or is perceived to substantially limit) a major life activity. See *id.* § 12102(3). The ADAAA expressly provides, however, that persons who establish ADA coverage solely through the “regarded as” prong are not entitled to reasonable accommodations. See *id.* § 12201(h).

<sup>149</sup> See, e.g., *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 2003) (holding that the ADA does not require accommodation for “regarded as” plaintiffs and acknowledging that most other circuit courts had held the same); *Weber v. Stripit, Inc.*, 186 F.3d 907, 916–17 (8th Cir. 1999) (noting that “[t]he reasonable accommodation requirement makes considerably less sense in the perceived disability context” and holding that “regarded as” plaintiffs are not entitled to reasonable accommodation under the ADA); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999) (noting that a jury finding that plaintiff was “regarded as” having a disability “would obviate the [employer’s] obligation to reasonably accommodate [plaintiff]”); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998) (“[A]n employer need not provide reasonable accommodation to an employee . . . merely because the employer thinks the employee has [a substantially limiting] impairment.”). But see *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005) (“Because a review of the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense, we . . . hold[] that regarded-as disabled individuals are also entitled to *reasonable accommodations* under the ADA.”); *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 676 (10th Cir. 2005) (holding that “an employer must reasonably accommodate employees regarded or perceived as disabled”); *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 772–76 (3d Cir. 2004) (examining the ADA’s plain text and legislative history, Supreme Court precedent, and equitable considerations and holding that regarded-as disabled individuals are entitled to reasonable accommodation); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (“[B]oth the language and the policy of the [ADA] seem to us to offer [reasonable accommodation] protection . . . to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so.”).

<sup>150</sup> See *Kaplan*, 323 F.3d at 1231–33; *Weber*, 186 F.3d at 916–17; *Workman*, 165 F.3d at 467. The protections the two statutes provide were not identical, however. Persons “regarded as” having a disability under the ADA may be excused from performing the nonessential functions of their job. See 42 U.S.C. § 12111(8) (Supp. III 2009). The PDA extends similar protection only when the employer has provided it to similarly situated nonpregnant workers. See 42 U.S.C. § 2000e(k) (2006).

<sup>151</sup> See 42 U.S.C. § 12102.

sonable accommodations, a protection the PDA’s “comparative accommodation” provision grants only when an employer accommodates similarly situated workers.<sup>152</sup>

In addition to providing rights unavailable under the PDA, the ADAAA also bolsters the argument for ADA pregnancy coverage by inadvertently frustrating some PDA plaintiffs’ “comparative accommodation” claims.<sup>153</sup> The PDA’s “comparative accommodation” provision requires employers to treat pregnant workers “the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”<sup>154</sup> If courts consistently read this provision literally, the ADAAA’s requirement that employers must now accommodate persons with modest short-term limitations (i.e., persons “similar [to pregnant women] in their ability or inability to work”) would significantly help PDA plaintiffs.<sup>155</sup> Rather than reading the PDA literally, however, many courts have instead required PDA plaintiffs to prove not only that their work capacity is comparable to workers who receive accommodations but also that they have comparable legal standing to those accommodations under relevant laws, including the ADA.<sup>156</sup> Operating within this approach to the PDA, it appears likely that courts will conclude that employers may deny accommodations to

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<sup>152</sup> Compare 42 U.S.C. § 12111(8)–(9) (prohibiting employers under the ADA from discriminating against “qualified individual[s] with disabilities” who can be “reasonably accommodat[ed]”), with 42 U.S.C. § 2000e(k) (2006) (“[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . .”). The PDA does not provide pregnant workers an independent right to workplace accommodations. Although it instructs employers to treat pregnant workers “the same” as other individuals with similar work capacities, PDA plaintiffs have had limited success convincing courts that they are similarly situated to other workers who have received accommodations. See 42 U.S.C. § 2000e(k).

<sup>153</sup> See 42 U.S.C. § 2000e(k).

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*; 42 U.S.C. § 12102; *EEOC Questions and Answers for Small Businesses*, *supra* note 119 (providing guidance that “[e]ven a short-term impairment may be a disability if it is substantially limiting”); see also Matzkie, *supra* note 1, at 222 (“[T]he legislative history of the PDA suggests that Congress intended to incorporate a flexible standard that . . . would expand in scope according to the employer’s accommodation of disabilities.”).

<sup>156</sup> See, e.g., *Young v. United Parcel Serv., Inc.*, No. DKC 08-2586, 2011 WL 665321, at \*17 (D. Md. Feb. 14, 2011); *Serednyj v. Beverly Healthcare LLC*, No. 2:08-CV-4 RM, 2010 WL 1568606, at \*7 (N.D. Ind. Apr. 16, 2010), *aff’d*, 656 F.3d 540 (7th Cir. 2011). Similarly, many courts have concluded that employer policies that provide light-duty work assignments to employees who experience on-the-job injuries need not provide light-duty work assignments to pregnant workers with comparable work limitations. See *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 640–41 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1314 (11th Cir. 1999); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998).

pregnant workers even though the employer provides those accommodations to ADA-eligible employees with comparable physical limitations.<sup>157</sup>

A pre-ADAAA case illustrates this possibility. In *Young v. United Parcel Service, Inc.*, a case decided by the U.S. District Court for the District of Maryland in 2011, the United Parcel Service (UPS) refused a pregnant delivery driver's request for a temporary light duty assignment to accommodate her doctor's recommendation that she not repeatedly lift items that weigh more than twenty pounds.<sup>158</sup> Young attempted to prove that UPS's refusal violated the PDA by showing that UPS had provided light duty assignments to employees with high blood pressure and diabetes.<sup>159</sup> The court held, however, that Young's PDA claim failed as a matter of law because the nonpregnant employees who received light duty assignments were members of the ADA's protected class and Young was not.<sup>160</sup> The court reasoned that workers with ADA-covered disabilities "are not appropriate comparators"<sup>161</sup> to establish a PDA violation "because Young was ineligible for ADA accommodation."<sup>162</sup>

If the court had believed—as many courts did prior to the ADAAA—that the ADA's scope excluded most individuals with high blood pressure and diabetes,<sup>163</sup> Young's argument that UPS violated the PDA by failing to similarly accommodate her pregnancy-related work limitations might have prevailed. UPS's refusal to provide Young the same accommodations it provided other workers who lacked ADA coverage would have violated the PDA.<sup>164</sup> By contrast, employers' post-ADAAA obligation to accommodate most nonpregnant employees with physical limitations will make it far more difficult for a PDA plaintiff to

<sup>157</sup> See *Young*, 2011 WL 665321, at \*17; *Serednyj*, 2010 WL 1568606, at \*7.

<sup>158</sup> See *Young*, 2011 WL 665321, at \*5.

<sup>159</sup> See *id.* at \*13.

<sup>160</sup> See *id.*; see also *Serednyj*, 2010 WL 1568606, at \*7.

[T]he company doesn't provide restricted or limited duty to employees with non-work related injuries or conditions unless the employee was a qualified individual with a disability under the Americans with Disabilities Act. This policy is pregnancy-blind, which is all that the PDA and Title VII require, and so is lawful on its face.

*Serednyj*, 2010 WL 1568606, at \*7.

<sup>161</sup> See *Young*, 2011 WL 665321, at \*13.

<sup>162</sup> See *id.*; see also 42 U.S.C. § 12111(9) (Supp. III 2009).

<sup>163</sup> See, e.g., *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999) (concluding, prior to the ADAAA, that the plaintiff's hypertension was not a disability while plaintiff was medicated); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002) (concluding, prior to the ADAAA, that the plaintiff's diabetes was not a disability).

<sup>164</sup> See 42 U.S.C. § 2000e(k) (2006).

identify the type of comparator the *Young* court demands (a non-ADA-eligible worker who received a comparable accommodation).<sup>165</sup>

This unexpected negative interaction between the ADA and PDA provides additional justification for ADA pregnancy coverage. Unless the courts, following the recommendations of Joanna Grossman and Gillian Thomas,<sup>166</sup> revise their approach to PDA claims, the ADA's dramatic increase of the number of persons entitled to workplace accommodations may inadvertently decrease the number of pregnant women who receive them via the PDA.<sup>167</sup> Accordingly, ADA

<sup>165</sup> In a future case arising after the ADA's effective date, a plaintiff might attempt to distinguish *Young* because *Young*'s proposed comparators had permanent, rather than temporary, ADA disabilities. See 2011 WL 665321, at \*13. The PDA's legislative history has led many commentators to conclude that its purpose is to equalize employer treatment of pregnancy and other *temporary* physical conditions. See, e.g., Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 273, 273 n.299 (2004).

<sup>166</sup> See Grossman, *supra* note 82, at 615.

These [PDA] cases, in my view, are wrongly decided, in part because they ignore the PDA's mandate that pregnant women be treated as well as others "similar in their ability or inability to work"; the PDA does not delegate to employers the right to select *any* neutral comparison group for the purpose of granting workplace accommodations. It specifically directs them to focus on capacity alone.

*Id.*; Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 41 (2009).

By permitting the employer to pick and choose among temporarily disabled workers, the court fundamentally misconstrues the structure of the PDA. Under such an analysis, the *employer* gets to choose the relevant comparison group on which to premise pregnant women's "neutral" treatment, as long as the choice is not animated by discriminatory intent. The PDA, however, does not delegate to employers the right to define appropriate analogues to workers temporarily disabled by pregnancy—it provides one in the statute itself: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."

Grossman & Thomas, *supra*, at 41 (quoting 42 U.S.C. § 2000e(k)).

<sup>167</sup> See 42 U.S.C. § 12101 (Supp. III 2009). Ideally, the disparate impact theory of discrimination should enable PDA plaintiffs to obtain workplace accommodations without identifying a nonpregnant worker that their employer treated more favorably. It should force employers to justify the business necessity of employment practices (such as inflexible lifting requirements) that disadvantage pregnant workers more than others. See, e.g., *Young*, 2011 WL 665321, at \*1–6 (describing a pregnant employee forced to take unpaid leave because she could not satisfy her employer's rigid lifting requirements and her employer only offered light-duty assignments to employees with ADA-recognized disabilities). In practice, however, few PDA plaintiffs have successfully used the disparate impact theory of discrimination to reshape their workplaces to be more hospitable to pregnancy. See Grossman, *supra* note 82, at 618 (observing that "[g]iven . . . the incredibly small number of cases in which pregnant workers have prevailed on disparate impact claims, it seems fair

coverage of pregnancy will fill an important gap in the law rather than, as some pre-ADAAA courts assumed, simply duplicate the PDA.<sup>168</sup>

### B. *ADA Disabilities Need Not Be Rare*

The ADAAA's expanded protected class also undermines many other pre-ADAAA rationales for excluding pregnancy from the ADA's scope.<sup>169</sup> For example, the fact that a condition occurs at extremely high rates in the population no longer appears to be a viable justification for excluding it from the ADA's protected class.<sup>170</sup> The ADA now includes virtually all persons diagnosed with diabetes, 8.3 percent of the U.S. population<sup>171</sup> and also likely includes many persons with hypertension, who comprise up to 31.3 percent of the U.S. population.<sup>172</sup> By way of comparison, whereas over 40 percent of the population will become pregnant at some point in their lives, less than 2 percent of the population is pregnant each year.<sup>173</sup> Accordingly, in any given year, the number of persons with diabetes and hypertension (as well as the probably larger number of persons with back problems) eligible for ADA accommodations will likely eclipse the number of eligible pregnant workers.

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to conclude that the theory provides little meaningful protection for pregnant workers"); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 662–63 (2001) ("It is almost as if the very existence of the disparate impact branch of liability under Title VII is being ignored . . ."); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 751 (2006) ("[P]regnancy cases typically fail under the disparate impact approach.").

<sup>168</sup> See, e.g., *Tsetseranos*, 893 F. Supp. at 119.

<sup>169</sup> See 42 U.S.C. § 12102.

<sup>170</sup> See, e.g., 29 C.F.R. § 1630.2(j)(3)(ii)–(iii) (2011) (including diabetes in a list of impairments that "will, in virtually all cases, result in a determination of coverage"); EEOC Notice of Proposed Rulemaking, 74 Fed. Reg. 48,431, 48,442 (proposed Sept. 23, 2009) (listing high blood pressure among "Examples of Impairments That May Be Disabling for Some Individuals But Not For Others").

<sup>171</sup> 29 C.F.R. § 1630.2(j)(3)(ii)–(iii); *Statistics*, AM. DIABETES ASS'N, <http://www.diabetes.org/diabetes-basics/diabetes-statistics/> (last visited Feb. 12, 2012) (stating that "25.8 million children and adults in the United States—8.3% of the population—have diabetes").

<sup>172</sup> See EEOC Notice of Proposed Rulemaking, 74 Fed. Reg. at 48,442; *High Blood Pressure Frequently Asked Questions (FAQs)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/bloodpressure/faqs.htm#4> (last updated Feb. 1, 2010).

<sup>173</sup> *Statistics*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/main/statistics.html> (last visited Feb. 28, 2012).

### C. ADA Coverage Would Not Require Exaggerating Pregnancy’s Physical Effects

Relatedly, the ADA’s expanded protected class significantly ameliorates feminists’ concerns that permitting healthy pregnant workers to argue they have ADA disabilities would revive exclusionary and paternalistic attitudes toward pregnancy.<sup>174</sup> Prior to the ADAAA, the severity and durational thresholds courts imposed on the ADA’s disability definition were so stringent that a 2007 study suggested that the population of persons eligible for ADA coverage was roughly comparable to the population of persons the Social Security Administration deems unable to engage in substantial gainful employment.<sup>175</sup> Within this framework for interpreting the ADA’s scope, women’s rights advocates understandably resisted characterizing pregnancy as an ADA disability because doing so might have revived exaggerated stereotypes about the physical limitations that accompany pregnancy.<sup>176</sup> For example, one commentator who supports pregnancy accommodations in principle suggested, prior to the ADAAA, that “bringing pregnancy under the ADA would reinvigorate the stereotype of pregnant women as disabled and not fit for work.”<sup>177</sup> Now that the ADA’s scope encompasses diabetes, arthritis, asthma, and back problems that impose short-term lifting restrictions, however, there is considerably less danger that characterizing pregnancy as an ADA disability will revive assumptions that preg-

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<sup>174</sup> See Matzzie, *supra* note 1, at 194 (“The claim that the rights and needs of pregnant workers should be sought under disability law doctrines, instead of under theories of gender discrimination, invites suspicion. Although many feminists wish to secure tangible benefits for pregnant workers, they fear the characterization of pregnancy as a disability.”); see also ADA Amendments Act, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3555–56 (2008) (expanding the ADA’s protected class).

<sup>175</sup> Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 7, 10 (2007) (using Social Security Administration and Census Bureau data to conclude that “the approach chosen by the [U.S. Supreme] Court only results in about 13.5 million Americans receiving statutory coverage, with those individuals typically being so disabled that they are not qualified to work even with reasonable accommodations”); see *supra* notes 4–5 and accompanying text (discussing the Court-imposed severity and durational requirements).

<sup>176</sup> See, e.g., Greenberg, *supra* note 25, at 250; Schlichtmann, *supra* note 61, at 358 n.167 (“[D]efining pregnancy itself as a disability would reverse years of argument and pressure by many women against traditional stereotypes of this natural function.”).

<sup>177</sup> Greenberg, *supra* note 25, at 250; see also Schlichtmann, *supra* note 61, at 358 n.167; Jennifer Gottschalk, Comment, *Accommodating Pregnancy on the Job*, 45 U. KAN. L. REV. 241, 264 (1996) (“[F]inding pregnancy to be a disability under the ADA could create several adverse policy implications for female workers. . . . [It] may effectively codify the concept of the workplace as a male environment in which women can participate only if assisted.”).



nancy precludes labor force participation.<sup>178</sup> Instead, pregnancy would be just one additional physical condition that may, for certain types of jobs, necessitate accommodation.<sup>179</sup>

#### D. *Pregnant Workers Fit Within the ADA's Expanded Minority Group*

Another related explanation for judicial assumptions that the ADA excludes healthy pregnancy is that pregnancy does not easily fit within a traditional “disability minority group” model.<sup>180</sup> Although pregnant women have experienced significant disadvantages throughout history, these disadvantages differ from the disadvantages experienced by persons with certain historically demonized disabilities.<sup>181</sup> For example, in the 1930s, many state governments institutionalized and sterilized persons with intellectual disabilities.<sup>182</sup> By contrast, absent another socially devalued trait, such as unwed motherhood or poverty, state governments rarely viewed pregnancy as a reason to so forcibly undermine an individual’s personhood.<sup>183</sup> Accordingly, prior to the ADA, pregnancy’s relatively positive social position appeared to distinguish it from the more traditional disabilities clearly within the ADA’s scope.<sup>184</sup> After the ADA, however, the ADA’s expanded protected class suggests that

<sup>178</sup> See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,001, 17,007, 17,011 (Mar. 25, 2011).

<sup>179</sup> See 42 U.S.C. § 12111(9) (Supp. III 2009).

<sup>180</sup> See, e.g., *Gudenauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996); *Brennan v. Nat'l Tel. Directory Corp.*, 850 F. Supp. 331, 343 (E.D. Pa. 1994).

<sup>181</sup> Cf. *Gudenauf*, 922 F. Supp. at 473 (reasoning that pregnancy is “the natural consequence of a properly functioning reproductive system”).

<sup>182</sup> See, e.g., *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding a state compulsory sterilization law from constitutional attack, concluding that “[i]t is better for all the world . . . [for] society [to] prevent those who are manifestly unfit from continuing their kind”); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461–63 (1985) (Marshall, J., dissenting in part) (describing legislation arising from the early-twentieth-century eugenics movement as embodying a “virulence and bigotry” against persons with developmental disabilities that “rivaled, and indeed paralleled, the worst excesses of Jim Crow”); S. REP. NO. 101-116, at 105 (1989) (citing a case in which “a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance ‘produced a nauseating effect’ on his classmates” (internal quotation marks omitted) (citing 117 CONG. REC. 45,974 (1971))); *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1297, 1297–98 n.13 (1980) (noting that twenty-seven states enacted compulsory sterilization targeted at people with disabilities between 1907 and 1931 and that such laws remained on the books into the 1980s in at least four states).

<sup>183</sup> See *Developments in the Law: The Constitution and the Family*, *supra* note 182, at 1305–06, 1373–76 (describing how state governments have mistreated pregnant women).

<sup>184</sup> See 42 U.S.C. § 12102 (2006) (current version at 42 U.S.C. § 12101 (Supp. III 2009)).

pregnancy’s comparatively positive social position is no longer a viable justification for excluding pregnancy from the ADA’s scope.<sup>185</sup> The amendments extend the ADA’s scope beyond persons with conditions linked to high levels of social stigma, such as intellectual disabilities, to include persons with asthma, carpal tunnel syndrome, and osteoporosis<sup>186</sup> as well as “people with arthritis or cardiovascular disease [who] . . . are generally viewed positively.”<sup>187</sup>

Furthermore, the ambivalent mixture of social reactions to pregnancy is not entirely dissimilar to the mixture of pity, paternalism, and antipathy directed toward persons with more traditional disabilities. For example, just as historical “ugly laws” prohibited persons with many traditional disabilities from appearing in public view,<sup>188</sup> historical social norms required pregnant women to hide indoors during the late stages of their pregnancies because of the societal belief that “it was obscene for a pregnant woman to be seen in public.”<sup>189</sup> “As late as the 1950s,” this social norm led some “pregnant women [to] consciously avoid[] appearing in public places.”<sup>190</sup> Although modern American culture more frequently celebrates the pregnant form, women in the late stages of pregnancy continue to encounter exclusionary beliefs that they are, in the words of one employer, “too fat to be working.”<sup>191</sup>

<sup>185</sup> See Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. (forthcoming 2012) (“Extending nondiscrimination coverage to nearly everyone with a mental or physical impairment will of course encompass groups that are not stigmatized, not subordinated, and have not endured a history of discrimination.” (citing Sharona Hoffman, *The Importance of Immutability*, 52 WM. & MARY L. REV. 1483, 1501–03 (2011))).

<sup>186</sup> See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,007 (Mar. 25, 2011) (noting that “various medical conditions commonly associated with age, such as . . . osteoporosis[] or arthritis would constitute impairments within the meaning” of the ADA); EEOC Notice of Proposed Rulemaking, 74 Fed. Reg. 48,431, 48,442 (proposed Sept. 23, 2009) (listing carpal tunnel syndrome and asthma among “Examples of Impairments that May Be Disabling for Some Individuals But Not For Others”).

<sup>187</sup> Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1240 (2003); see also Hoffman, *supra*, at 124 (“[N]ot all individuals with ‘disabilities,’ as they are currently defined, have been subjected to a history of discrimination, nor are they consistently singled out for negative treatment by contemporary society.”).

<sup>188</sup> See, e.g., CHI., ILL., MUN. CODE § 36-34 (1966) (repealed 1974) (“No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view.”).

<sup>189</sup> Courtnei E. Molnar, “Has the Millennium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America, 12 MICH. J. GENDER & L. 163, 171–72 (2005).

<sup>190</sup> See *id.* at 171 (citing CARL N. DEGLER, AT ODDS 59 (1980)).

<sup>191</sup> EEOC v. W&O, Inc., 213 F.3d 600, 608 (11th Cir. 2000) (internal quotation marks omitted); see also Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974) (report-

Similarly, pregnancy, like traditional disabilities, has often led to paternalistic policies excluding pregnant women from paid work and other aspects of public life.<sup>192</sup> Up until the 1970s, many employers had rigid rules requiring women to leave work at a certain stage in their pregnancies.<sup>193</sup> Like similar exclusionary practices for persons with disabilities, these policies embodied “an irrebuttable presumption of physical incompetency”<sup>194</sup> and a presumption that pregnant women should rely on others for financial support rather than expect the workplace to accommodate their physical needs.<sup>195</sup> Earlier in history, of course, cultural beliefs surrounding women’s childbearing role even more strictly

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ing that “[o]ne member of the school board thought that it was ‘not good for the school system’ for students to view pregnant teachers, ‘because some of the kids say, my teacher swallowed a water melon [sic], things like that’”); *EEOC v. Fin. Assurance, Inc.*, 624 F. Supp. 686, 691–92 (W.D. Mo. 1985) (reporting that the employer fired an executive secretary because “[w]e can’t have you running around the office with your belly sticking out to here”); *Leach v. Bd. of Review, Bureau of Unemployment Comp.*, 88 Ohio Law Abs. 483, 485 (Com. Pleas 1962) (reporting that employer told pregnant worker “that she could not continue working because her appearance was unseemly”).

[A] disability theorist might ask, if an employer (or other actor covered by the ADA) discriminates against a woman based on her pregnancy and related conditions, isn’t that discrimination likely to be based on the deviation of the pregnant woman’s body from cultural ideals of what the body should look like and how it should perform? And, if that is the case, how much does discrimination based on pregnancy really differ from discrimination based on disability?

Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 675 (1999).

<sup>192</sup> See Matzzie, *supra* note 1, at 229 (“The assumption that pregnant women, and others with legally cognizable disabilities, are in danger of hurting themselves and that their very bodies are incompatible with safe and efficient work is more than a coincidental similarity.”).

<sup>193</sup> See Grossman, *supra* note 82, at 578 (“Historically, women ‘with child’ were presumed incapable of work, particularly in the later stages of pregnancy. Doctors routinely told working women that they had to leave work three months before an expected delivery (if their employers had not already excluded them from the workplace at that point).”).

In the early 1940’s, the Women’s Bureau of the U.S. Department of Labor recommended that pregnant women not work for six weeks before . . . delivery. Some states adopted laws prohibiting employers from employing women for a period of time before and after childbirth . . . . Where leaves were not accompanied by a guarantee of job security or wage replacement, they “protected” pregnant women right out of their jobs, as the Women’s Bureau conceded.

Williams, *supra* note 58, at 334 (footnotes omitted) (citing WOMEN’S BUREAU, MATERNITY PROTECTION OF EMPLOYED WOMEN 7 (1952) (Bull. No. 240)); *see id.* at 335 (noting that “[b]y 1960 . . . many employers simply fired women who became pregnant”).

<sup>194</sup> *LaFleur*, 414 U.S. at 644.

<sup>195</sup> See Finley, *supra* note 26, at 1122 (noting the tendency of employment frameworks to treat women as mothers who stay home rather than as workers).

cabined women’s employment opportunities.<sup>196</sup> Today, although most women continue working during their pregnancies, some employers continue to regard pregnant women as unfit for work, or at least not fit for certain types of work.<sup>197</sup> As one scholar notes, “For some employers, the prospect of a pregnant worker still induces the fears more familiarly evoked if ill or impaired employees are in question.”<sup>198</sup> She suggests that many of the cultural assumptions the ADA targets—such as the belief that it is “inconvenient” or “awkward” to employ persons with disabilities—parallel attitudes toward pregnant workers.<sup>199</sup>

Furthermore, some employers continue to effectively tell pregnant workers they are “not fit for work” by excluding them from the workplace when the physical effects of their pregnancies prevent them from performing just a small fraction of their usual job duties.<sup>200</sup> For example, as described above, Victoria Serednyj’s employer terminated her employment because she was unable to independently move heavy tables, a task that “took up a small part—roughly five to ten minutes per day—of Ms. Serednyj’s day.”<sup>201</sup> Although some employers may claim that such a refusal to adjust job duties during a worker’s pregnancy is merely a cost-saving measure, many employers’ provision of light duty assignments and other accommodations to nonpregnant workers belie

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<sup>196</sup> See, e.g., Kay, *supra* note 50, at 37.

The biological fact that only women have the capacity to become pregnant has been used historically to define women as different from men along social, psychological, and emotional dimensions. Those asserted differences, in turn, have served to justify the legal, political, and economic exclusion of women from men’s public world. Even now, when the barriers that separate women and men in the work force are breaking down, the uniqueness of pregnancy remains an obstacle to equal opportunity for women.

*Id.*

Before being liberated by the early struggles of the women’s movement, women, regardless of their personal competence, were disabled from voting, owning property, and obtaining custody of their children. Such limitations were justified by characterizing women as belonging to a group of persons whom nature made too weak and stupid, too physically and morally frail, to execute business and head households successfully.

Silvers, *supra* note 32, at 93.

<sup>197</sup> See Silvers, *supra* note 32, at 94.

<sup>198</sup> See *id.*

<sup>199</sup> See *id.*

<sup>200</sup> See, e.g., Serednyj, 2010 WL 1568606, at \*1.

<sup>201</sup> *Id.* at \*1, \*3–4.

this claim.<sup>202</sup> This continued disparate treatment of pregnant workers strongly suggests that some employers believe, perhaps unconsciously, that childbearing women have less claim to work opportunities than workers who do not bear children. In this way, even though the social history of pregnancy is different than the social history of more traditional disabilities, employers' historical and continued treatment of pregnant workers significantly parallels the social problems that prompted the ADA's enactment.<sup>203</sup> Now that the ADA's expanded scope encompasses a broad and diverse range of physical limitations that have resulted in varying degrees of social exclusion, pregnancy appears to fit within the ADA's broad purpose.<sup>204</sup>

#### V. THE SOCIAL MODEL OF DISABILITY UNDERMINES REMAINING OBJECTIONS TO CHARACTERIZING PREGNANCY AS "DISABILITY"

The social model of disability undermines other objections to characterizing pregnancy as "disability."<sup>205</sup> The social model of disability, which animated the disability rights movement that produced the ADA, defines "disability" not as a physical condition inherent in an individual's body but as an interaction between the individual's physical condi-

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<sup>202</sup> See, e.g., *Reeves*, 446 F.3d at 638–39 (finding legitimate an employer policy of offering light-duty assignments to workers injured on-the-job but not to pregnant workers with similar physical limitations); *Spivey*, 196 F.3d at 1314 (same); *Urbano*, 138 F.3d at 205 (finding that assigning light-duty assignments only for employees with an "occupational injury" did not violate the PDA); *Young*, 2011 WL 665321, at \*2 (validating an employer policy of offering light-duty assignments only to "disabled" employees under the ADA who could not perform an aspect of their job); *Serednyj*, 2010 WL 1568606, at \*7 (validating an employer policy of offering light-duty assignments only to employees injured on the job or considered "disabled" under the ADA); cf. *Kruger*, *supra* note 53, at 84–85 ("Almost no law enforcement agencies provide maternity uniforms.").

<sup>203</sup> *Silvers*, *supra* note 32, at 94.

For some employers, the prospect of a pregnant worker still induces the fears more familiarly evoked if ill or impaired employees are in question. Such a pretext for exclusion—namely, that an individual's fleshly functioning is disruptive because divergent from what is typical in the workplace—also is routinely invoked against people with physical or cognitive impairments, whose personal, civic, and commercial flourishing is chronically compromised by others regarding their presence as unsuitable, inconvenient, and awkward.

*Id.*

<sup>204</sup> ADA Amendments Act, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3554–55 (2008) (amending section 2 of the ADA); Americans with Disabilities Act, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328–29 (1990).

<sup>205</sup> See, e.g., *OLIVER*, *supra* note 29, at 11.

tion and the individual’s social environment.<sup>206</sup> Within this framework, a wheelchair user’s “disability” is located not in her body but in the interaction between her body and the stairs her body cannot traverse.<sup>207</sup> Accordingly, if a wheelchair user were to inhabit a fully accessible community, her “disability” would significantly diminish even though, from a medical perspective, her physical condition would not change.<sup>208</sup>

The social model has two primary political implications. The first is that many disadvantages physically variant persons experience are not inevitable. Instead, for example, decisions to solely provide worksite access by means of stairs (rather than ramps or another accessible design) reflect the historical assumption that wheelchair users are not legitimate workforce participants.<sup>209</sup> Had wheelchair users historically been considered legitimate workforce participants, employers and architects would not have so frequently designed worksites that exclude them. Second, the social model further reveals that many taken-for-granted features of the modern workplace are concessions to physically typical workers’ biological frailties analogous to the accommodations less physically typical workers require.<sup>210</sup> For example, the eight-hour workday, lunch breaks, rest breaks, indoor lighting, heat, air conditioning, furniture, and convenient sanitary restrooms are all accommoda-

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<sup>206</sup> LIACHOWITZ, *supra* note 32, at 12 (arguing that disability should be “regard[ed] . . . as a transactional product of handicapped people and their social environments”); OLIVER, *supra* note 32, at 23; Silvers, *supra* note 32, at 105.

Because [the social model of disability] attributes the dysfunctions of people with physical, sensory, and cognitive impairments to their being situated in hostilely built and organized environments, the model construes the isolation of people with disabilities as the correctable product of how such individuals interact with stigmatizing social values and debilitating social arrangements rather than as the unavoidable outcome of their impairments.

Silvers, *supra* note 32, at 105.

<sup>207</sup> See OLIVER, *supra* note 29, at 11 (noting that this characterization “locates the causes of disability squarely within society and social organization” rather than “to the individual and attributable to biological pathology”).

<sup>208</sup> See *id.*

<sup>209</sup> See Anita Silvers, *Reconciling Equality to Difference: Caring (f)or Justice for People with Disabilities*, HYPATIA, Winter 1995, at 30, 48 (“By hypothesizing what social arrangements would be in place were persons with disabilities dominant rather than suppressed, it becomes evident that systematic exclusion of the disabled is a consequence not of their natural inferiority but of their minority social status.”).

<sup>210</sup> See Robert L. Burgdorf Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 530 (1997) (“The often ignored fact is that, in almost all circumstances, employers, businesses and government agencies put a great deal of money and energy into ‘accommodating’ the users of their services, facilities and programs without denominating it as such.”).

tions without which many physically typical workers would experience “disability.”<sup>211</sup> Had wheelchair users been historically dominant rather than marginalized, ramps and elevators likely would have also been part of the set of standard accommodations employers provide.

### A. *Pregnancy Fits Within the Social Model of Disability*

Efforts to restructure work practices that reflect the historical assumption that pregnant women are illegitimate workforce participants fit fairly comfortably within the social model of disability.<sup>212</sup> Like more traditional “disabilities,” the interaction between pregnancy and many work environments constricts women’s employment opportunities. It also reflects the historical workforce marginalization of childbearing women: had American culture always regarded pregnant women as legitimate wage earners, employers would presumably be far less likely to exclude them from light duty policies and other temporary work accommodations. Work policies also would likely already accommodate the physical effects of pregnancy.<sup>213</sup> For example, work policies might more often permit employees to trade job duties as their physical capacities change.<sup>214</sup>

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<sup>211</sup> See *id.* at 530–32.

<sup>212</sup> Compare MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 179 (2004) (“[P]arity, given different gendered realities, is only possible through different treatment . . .”), with Rosemarie Garland Thomson, *Seeing the Disabled: Visual Rhetorics of Disability in Popular Photography*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 335, 372 (Paul K. Longmore & Lauri Umansky eds., 2001) (“Imagining disability as ordinary, as the typical rather [than] the atypical human experience, can promote practices of equality and inclusion that begin to fulfill the promise of a democratic order.”).

<sup>213</sup> Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1306–07 (1987) (“It is not impossible to imagine . . . a workplace setting in which pregnancy would not be disabling.”).

<sup>214</sup> In many industries, inflexible worker-specific job assignments arguably reflect a male-centered assumption that workers’ physical capacities will remain relatively static over time. See Williams, *supra* note 58, at 364.

Schemes set up on a male model are likely to be misconfigured from a woman’s perspective. To grasp this point one need only envision what workplace rules would look like if the entire workforce were composed of women of childbearing years. The present scheme of things is thus unlikely to account for the needs and characteristics of women workers to the same extent that it accounts for the needs and characteristics of men.

B. *The Social Model Accounts for the Objection That Pregnancy Is “Voluntary”*

The social model of disability also undermines potential “pregnancy is voluntary” objections to ADA coverage. Although the courts have not raised this objection as a rationale for excluding pregnancy from the ADA’s scope, the existence of medical means to prevent pregnancies appears to have led some employers to believe that pregnant women ought to bear the current social and economic costs that accompany pregnancy.<sup>215</sup> Although pregnancy’s essential role in species survival is the most obvious response to the argument that medical means to avoid pregnancy should reduce employer’s accommodation obligation, the social model’s emphasis on cultural change also cautions against asking persons to bear the current social and economic costs of pregnancy simply because pregnancy may be avoidable.<sup>216</sup> The social model aims to change workplace norms to accommodate a wider range of physiological variation.<sup>217</sup> Acknowledging that physical variation naturally occurs, the social model challenges the assumption that physically variant persons should use medical technology to conform their bodies to dominant norms. It suggests that socially constructed

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<sup>215</sup> See, e.g., *Stanton v. Tower Ambulance Serv., Inc.*, No. 93 C 7495, 1994 WL 424127, at \*2 (N.D. Ill. Aug. 11, 1994) (reporting employer’s argument that he did not need to accommodate a pregnant employee “because she had become pregnant ‘on her own[.]’”); D’Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1447 (1996) (suggesting that “because pregnancy is usually considered a voluntary condition, some courts might conclude that a voluntarily assumed condition is not a disability”); see also *id.* at 1420 (suggesting that some might consider pregnancy analogous to the physical effects of “getting breast implants because it is voluntary” or “a hangover because it is the result of a personal choice”).

The EEOC has consistently held that whether an individual’s physical limitations have resulted from the individual’s voluntary conduct is not relevant to their membership in the ADA’s protected class. See EEOC COMPLIANCE MANUAL, *supra* note 14, § 902.2(e) (stating that “[v]oluntariness is irrelevant”). This tracks language in the House Judiciary Report for the original ADA providing that “[t]he cause of a disability is always irrelevant to the determination of disability.” See H.R. REP. NO. 101-485, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 452. The ADA covers physical limitations that result from self-inflicted injuries and high-risk behavior such as smoking and drug addiction (so long as the individual is not currently using illegal drugs). See 42 U.S.C. § 12114 (Supp. III 2009); see also *id.* § 12211 (excluding from the definition of “disability” “disorders resulting from current illegal use of drugs”).

<sup>216</sup> See generally Jeannette Cox, “Corrective” Surgery and the Americans with Disabilities Act, 46 SAN DIEGO L. REV. 113 (2009) (arguing that the social model of disability permits a deaf individual to request social change via ADA accommodations even when cochlear implants or another medical procedure might obviate the need for accommodations).

<sup>217</sup> See *id.* at 118–21.



work policies, rather than naturally occurring human bodies, should change.<sup>218</sup>

*C. The Social Model of Disability Does Not Require “Defect”*

Finally, the social model’s emphasis on socially-imposed barriers suggests that pregnancy’s inclusion within disability accommodations law should not require characterizing pregnancy as a defect.<sup>219</sup> Instead, the social model dovetails with feminist observations that it is “the structure of work,” rather than the inherent physiology of pregnancy, that makes pregnancy function as a disability.<sup>220</sup> The “disability” of pregnancy flows not from a bodily defect (which is absent) but from the interaction between pregnancy and contingent social attitudes and work structures. In this way, many feminist claims about pregnancy—even claims that object to characterizing pregnancy as disability—resonate with the social model’s observation that contingent social attitudes and work structures impose disadvantages wholly separate from (and even in the absence of) medically diagnosed disorder.

The social model also suggests that the enthusiasm with which many women embrace the physical experience of pregnancy need not exclude pregnancy from the scope of disability law. By emphasizing that the disabling consequences of physical variation frequently flow from contingent social structures rather than inherent physiology, the social model undermines the assumption that all physical conditions that bear a “disability” label are inherently tragic. The social model suggests that negative social structures (such as rigid work rules that do not

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<sup>218</sup> See, e.g., *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the H. Comm. on Education and Labor*, 101st Cong. 79 (1989) (statement of Gary May, Comm’r, Ind. Dep’t of Veterans’ Affairs).

The general thrust and motivation for adaptive behavior by persons with disabilities has been from the “disability as liability” perspective. From this perspective, the existence of a disability is a totally negative phenomenon which must be conquered. This perspective does not fully embrace the concept of individual differences and pushes for standardization and homogenization in a society which operates from the same premise. This process is commonly understood as fitting the square peg into the round hole. The intractability of the round hole is accepted as a given.

*Id.*

<sup>219</sup> See 42 U.S.C. § 12101(a)(1) (“[P]hysical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination.”).

<sup>220</sup> Littleton, *supra* note 27, at 1299 (“[W]hat makes pregnancy a *disability* rather than, say, an additional ability, is the structure of work, not reproduction.”).

permit pregnant workers to trade marginal job duties with their co-workers) can cause an individual to experience an otherwise desirable physiological condition as a significant disadvantage. The social model further posits that reformed social attitudes and social structures (including the availability of workplace accommodations) can significantly reduce the extent to which an individual experiences a particular physical condition as a tragedy.

Some social model adherents take this argument a step further by celebrating some physical variations traditionally understood as "defect" as desirable physiological diversity.<sup>221</sup> For example, some members of the Deaf culture movement have refused cochlear implants because they value their physiological variation as a crucial component of their identity.<sup>222</sup> Strenuously objecting to the assumption that they should be cured, they explain that "[w]e're fine how we are"<sup>223</sup> and analogize the assumption that they are defective to the irrational belief that dark skin is disease.<sup>224</sup> They also point to left-hand dominant persons whose refusal to shed their physical variation served to transform previous beliefs that left-handed persons must conform to right-hand dominant norms.<sup>225</sup> Although members of the Deaf culture and neurodiversity

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<sup>221</sup> Cf. Joe Griffith, *Disability Studies Chairman Chosen*, INDEP. COLLEGIAN (Apr. 14, 2008), <http://www.independentcollegian.com/2.10034/1.1322671-1.1322671> ("The medical field tends to view physical disabilities as a negative condition needing to be fixed, Wilkins said. 'In our world, we believe the disability is part of us,' he said. 'We're fine how we are.'" (quoting Dan Wilkins, manager of public relations for the Ability Center of Greater Toledo)).

<sup>222</sup> See, e.g., Amy Harmon, *How About Not "Curing" Us, Some Autistics Are Pleading*, N.Y. TIMES, Dec. 20, 2004, at A1 ("'We don't have a disease,' said Jack, echoing the opinion of the other 15 boys at the experimental [school for autistic teenagers]. 'So we can't be "cured." This is just the way we are.'").

<sup>223</sup> See Griffith, *supra* note 221 (quoting Dan Wilkins, manager of public relations for the Ability Center of Greater Toledo).

<sup>224</sup> See Marie Arana-Ward, *As Technology Advances, a Bitter Debate Divides the Deaf*, WASH. POST, May 11, 1997, at A1 ("'Let me put it this way,' [Judith Coryell, head of the deaf education program at Western Maryland College has explained]. 'Say you were black. Do you think you'd be considering surgery to make yourself white?'""); see also BERNARD BRAGG, LESSONS IN LAUGHTER: THE AUTOBIOGRAPHY OF A DEAF ACTOR 4 (Eugene Bergman trans., 1989) ("I thought deafness was a way of life and never linked it with sickness, defectiveness, or a handicapped condition. I thought, and I still do, that my deafness is just part of who I am.").

<sup>225</sup> Left-handed individuals currently make up approximately twelve percent of the population in Western societies because parents, educators, and other persons who influence children have become more permissive in allowing left-handed children to remain left-handed. See *Korea Still Rough Place for the Left-Handed*, CHOSUNILBO (Eng. Edition) (Oct. 22, 2004), [http://english.chosun.com/site/data/html\\_dir/2004/10/22/2004102261027.html](http://english.chosun.com/site/data/html_dir/2004/10/22/2004102261027.html). By contrast, in countries that continue to view left-handedness as a problem, the incidence of left-handedness is less than five percent. See *id.*; see also MARTIN GARDNER, THE AMBIDEX-

movements have made this claim most strenuously, persons with disabilities as diverse as paraplegia, reduced vision, bipolar disorder, and Down syndrome have made analogous claims that they do not experience their physiological variation as defect or illness.<sup>226</sup> They argue instead that they experience their physiological variation primarily as a source of social disadvantage because the dominant culture routinely overestimates their limitations and fails to accommodate their needs at the level it accommodates the needs of physically typical individuals.<sup>227</sup>

It is not necessary, however, to agree that traditional disabilities are desirable sources of physiological diversity in order to apply the social model of disability to pregnancy. The primary insight of the social model is that much of the disadvantage associated with physiological variation is attributable to contingent social realities rather than biological defect. This framework, which locates “disability” in the interaction between an individual’s body and her social environment, does not require that the individual’s body be defective. Within the social model of disability, negative interactions between a worker’s pregnancy and her employer’s work expectations may constitute a “disability” even though the pregnancy itself represents heightened, rather than diminished, biological functioning.

#### D. *Situating the Social Model Approach Within Existing Statutory Text and Agency Regulations*

The foregoing discussion has used the social model of disability to argue that pregnant workers should qualify for ADA accommodations even though pregnancy is not a “physiological disorder.” This Section briefly outlines two arguments that advocates for ADA pregnancy accommodations might employ in order to graft this social model approach to disability onto existing ADA doctrine. Both arguments involve

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TROUS UNIVERSE: LEFT, RIGHT, AND THE FALL OF PARITY 77 (1964) (“Many authorities estimate that about 25 per cent are born left-handed . . .”).

<sup>226</sup> See Robert L. Burgdorf Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. ON C.L. & C.R. 241, 327–28 (2008); see also *id.* at 328.

While deafness and autism have been the focus of the lion’s share of discussions of people wishing not to have their conditions eliminated or “cured,” some individuals with various other kinds of impairments have voiced similar sentiments. Examples include individuals with such conditions as vision impairments, bipolar disease, and Down syndrome, and people who use wheelchairs.

*Id.* (footnotes omitted).

<sup>227</sup> See *id.*

convincing courts and the EEOC that the physical limitations that flow from a healthy pregnancy are, at least in certain work contexts, “impairments” for purposes of the ADA, even though they are not medically diagnosed defects.<sup>228</sup>

First, advocates may argue that reading the word “impairment” to encompass the physical limitations that accompany pregnancy is consistent with the longstanding regulatory definition of “impairment,” which “directly track[s] the definition of ‘impairment’ in the Rehabilitation Act regulations, which Congress incorporated by reference in the ADA.”<sup>229</sup> That definition provides that “physical impairment,” for ADA purposes, is “[a]ny physiological disorder *or condition*, cosmetic disfigurement, or anatomical loss affecting one or more body systems.”<sup>230</sup> This language, particularly when accompanied by the “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant,”<sup>231</sup> undercuts the EEOC’s assumption that “conditions, such as pregnancy, that are not the result of physiological disorders are . . . not impairments.”<sup>232</sup> In order for the word “condition” to have meaning independent of the term “physiological disorder,” it should encompass physical limitations that result from conditions medical science does not recognize as a “physiological disorder.”<sup>233</sup>

<sup>228</sup> See 42 U.S.C. § 12102 (Supp. III 2009).

<sup>229</sup> Bagenstos, *supra* note 1, at 407 n.29 (internal citations omitted); see 42 U.S.C. § 12201(a) (1994) (current version at 42 U.S.C. § 12201 (Supp. III 2009)); 45 C.F.R. § 84.3(j)(2) (1977) (current version at 45 C.F.R. § 84.3(j)(2) (2011)).

<sup>230</sup> 29 C.F.R. § 1630.2(h) (2011) (emphasis added).

<sup>231</sup> *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion); see also Crossley, *supra* note 1, at 670–71 (noting that the EEOC’s approach to pregnancy “apparently ignor[es] the disjunctive between ‘disorder’ and ‘condition’”).

<sup>232</sup> See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,007 (Mar. 25, 2011); see *Lamb v. Thompson*, 265 F.3d 1038, 1052 n.16 (10th Cir. 2001).

Even if we were to assume the statute is ambiguous, we would conclude in the second step of *Chevron* that the [agency]’s interpretation of § 1604(m)(2) cannot stand because it renders words in the statute “mere surplusage.” “Although we afford deference to the [agency]’s interpretation of a statute under [its] purview, we cannot overlook an interpretation that flies in the face of the statutory language.”

*Lamb*, 265 F.3d at 1052 n. 16 (quoting *Sundance Assocs. v. Reno*, 139 F.3d 804, 810 (10th Cir. 1998)).

<sup>233</sup> *But see* *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (“An administrative rule may receive substantial deference if it interprets the issuing agency’s own ambiguous regulation.” (citing *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997))); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (holding that an agency’s interpretations of its own regulations are “controlling” unless they are “plainly erroneous or inconsistent with the regulation” (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

Second, in the event the EEOC is unwilling to revisit its conclusion that pregnancy is not an impairment, advocates may argue that this conclusion does not bar courts and the EEOC from characterizing the physical limitations that accompany pregnancy as impairments. Even if pregnancy itself is not an ADA impairment, the physical limitations of pregnancy (which are present to varying degrees in different pregnancies) could be characterized as “impairments” for ADA purposes.<sup>234</sup> Admittedly, this position conflicts with judicial assumptions that “[i]f pregnancy itself is not an impairment for purposes of the ADA, it is counterintuitive to hold that a general condition of pregnancy [such as a need to curtail repetitive heavy lifting] is an impairment.”<sup>235</sup> Drawing an ADA coverage distinction between pregnancy itself and the physical limitations resulting from pregnancy, however, makes sense within a legal regime that has a national pregnancy discrimination law—which addresses discrimination based on pregnancy status—as well as a disability discrimination law—which addresses discrimination based on physical limitations. Furthermore, the EEOC’s conclusion that the ADA covers “pregnancy-related impairment[s]” also fits with this approach.<sup>236</sup> Although the only example the EEOC has provided of a “pregnancy-related impairment” is a medically diagnosed disorder (gestational diabetes),<sup>237</sup> the EEOC has not foreclosed the possibility that more common pregnancy-related physical limitations may constitute ADA impairments.

### CONCLUSION

This Article argues that the assumption that healthy pregnant workers may not receive ADA accommodations inappropriately makes impaired biological functioning the test for ADA class membership. For ADA purposes, the relevant question should not be whether medical science regards a particular physical condition as a defect but instead whether unnecessary workplace policies effectively transform a naturally occurring physical condition into a workplace “disability.” Accordingly, now that workers with temporary physical limitations comparable

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<sup>234</sup> Cf. *Martinez v. Labelmaster, Am. Labelmark Co.*, No. 96 C 4189, 1998 WL 786391, at \*8 (N.D. Ill. Nov. 6, 1998) (describing how the plaintiff argued that a general condition of pregnancy was an ADA impairment).

<sup>235</sup> *Id.*

<sup>236</sup> See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. at 16,980.

<sup>237</sup> See *EEOC Questions and Answers*, *supra* note 121; *EEOC Questions and Answers for Small Businesses*, *supra* note 119.

to pregnancy may receive ADA-mandated accommodations, the ADA's goal to reshape the workplace to accommodate previously excluded persons should extend to pregnancy. Far from reviving exaggerated stereotypes about the physical effects of pregnancy, enabling pregnant workers to continue working alongside other workers with temporary disabilities will erode the occupational gender segregation that is the lingering effect of historical policies excluding pregnant women from paid work.