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# The Pregnancy Penalty

Jennifer Bennett Shinall

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Article

The Pregnancy Penalty

Jennifer Bennett Shinall†

Introduction ..... 750

I. Accounting for the Existence of the Pregnancy Penalty ..... 754

    A. Short-Term Effects of Pregnancy ..... 755

        1. Pregnancy as Appearance Altering ..... 755

        2. Pregnancy as Disability Inducing ..... 760

    B. Long-Term Effects of Pregnancy ..... 763

        1. Pregnancy as Care Increasing ..... 763

        2. Pregnancy as Value Incompatible ..... 766

II. The Framework of Protections Against the Pregnancy Penalty ..... 768

    A. Expanding Protections Under the ADA ..... 770

    B. Expanding Protections Under the PDA ..... 774

    C. Proposals for Additional Expansions in Protections ..... 777

III. Data and Methodology for Assessing the Pregnancy Penalty ..... 781

IV. Quantifying the Pregnancy Penalty ..... 787

    A. Understanding the Pregnancy Penalty ..... 787

        1. The Persistence of the Pregnancy Penalty ..... 787

        2. The Depth of the Pregnancy Penalty ..... 789

        3. Assessing the Role of Labor Supply ..... 792

    B. The Components of the Pregnancy Penalty ..... 793

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1. Pregnancy and Motherhood .....	794
2. Pregnancy and Appearance .....	798
3. Pregnancy and Disability .....	802
V. Remedying the Pregnancy Penalty .....	803
A. The Problematic PWFA .....	803
B. Promoting Paid Leave Laws .....	809
1. Existing Paid Family Leave Laws .....	809
2. Determining the Target Population of Paid Leave Laws .....	812
3. Determining the Efficacy of Paid Leave Laws .....	818
4. Considering Family Leave Law Design .....	821
5. Constructing the Ideal Paid Family Leave Model .....	824
Conclusion .....	829
Appendix .....	831

## INTRODUCTION

It is difficult to know what to expect when you are expecting, particularly in the workplace. A woman may be delighted to share the news of her pregnancy with friends and family, yet approaching that same discussion with her boss is fraught with uncertainty. Numerous career advice websites and articles exist to help expectant mothers navigate this potentially daunting and “anxiety inducing”<sup>1</sup> discussion.<sup>2</sup> The fear, of course, is that if this discussion sours, the consequences may be dire: a strained relationship with the boss, lost future workplace opportunities, unwillingness to accommodate pregnancy-related issues, or termination.

A closer look at the existing evidence on pregnancy discrimination in the workplace, however, may lead to the suspicion that

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1. Jessica Pallay, *How to Tell Your Boss You're Pregnant*, HUFFINGTON POST: WELL ROUNDED NY (Apr. 25, 2016, 5:50 PM), [https://www.huffpost.com/entry/how-to-tell-your-boss-you\\_b\\_9774440](https://www.huffpost.com/entry/how-to-tell-your-boss-you_b_9774440).

2. See, e.g., Laura June, *How to Tell Your Boss You're Pregnant*, CUT (Mar. 9, 2016), <https://www.thecut.com/2016/03/how-to-tell-your-boss-youre-pregnant.html> (describing the discussion of pregnancy with a boss as a “collision course”); Liz Ryan, *How to Tell Your Boss You're Pregnant*, FORBES (Aug. 15, 2014), <https://www.forbes.com/sites/lizryan/2014/08/15/how-to-tell-your-boss-youre-pregnant> (providing advice and a sample script for telling a boss about pregnancy); *When and How to Tell Your Boss You're Pregnant*, WHAT TO EXPECT (Aug. 27, 2018), <https://whattoexpect.com/pregnancy/work-issues/politics-and-policies/when-to-tell-your-boss.aspx> (offering tips “to prepare and break the news” to your boss).

such apprehension is exaggerated, or even unfounded. The existing evidence on pregnancy discrimination relies on anecdote. Accounts from the media and litigated cases form the bases of popular and scholarly discussions,<sup>3</sup> making it impossible to decipher whether such accounts are singular or representative. Further undercutting claims of persistent discrimination are two longstanding federal laws that, in theory, should remedy—or at the very least quell—the problem: the 1978 Pregnancy Discrimination Act (PDA), which prohibits discrimination “on the basis of pregnancy,”<sup>4</sup> and the 1990 Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of being “substantially limit[ed in] a major life activity.”<sup>5</sup>

The prior reliance on anecdote in matters of pregnancy is not the result of disinterest in providing an empirical context for pregnancy discrimination. Rather, the major barrier to obtaining better evidence has been a lack of data.<sup>6</sup> At any given time, approximately three percent of women in the United States are pregnant.<sup>7</sup> Since most observational datasets are limited to a few thousand observations (which include men and women of all ages), the available sample of pregnant women is typically too small to draw meaningful statistical inferences about pregnancy in the labor market.<sup>8</sup> As a result, empirical research on pregnancy discrimination is almost nonexistent—leaving scholars with no choice but to rely on anecdote.<sup>9</sup>

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3. See *infra* Part II (discussing purported improvements in workplace conditions for pregnant women).

4. 42 U.S.C. § 2000e(k) (2012).

5. *Id.* § 12102(4)(E)(i).

6. See *infra* Part III (noting that the data used in this Article is the only available dataset of its kind).

7. This figure is calculated from the Centers for Disease Control and Prevention (CDC) and U.S. Census Bureau figures in 2010, which recorded 6.155 million pregnancies and 157.0 million women. This ratio is then multiplied by 40/52 since women observed in a given year were only pregnant for 40 out of 52 weeks. See Sally C. Curtin et al., *2010 Pregnancy Rates Among U.S. Women*, CENTERS FOR DISEASE CONTROL & PREVENTION (Dec. 2015), [https://www.cdc.gov/nchs/data/hestat/pregnancy/2010\\_pregnancy\\_rates.pdf](https://www.cdc.gov/nchs/data/hestat/pregnancy/2010_pregnancy_rates.pdf); *Women's History Month: March 2012*, U.S. CENSUS BUREAU (Feb. 22, 2012), [https://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb12-ff05.html](https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff05.html).

8. See *infra* note 145 and accompanying text (describing how other commonly used labor market datasets either do not identify pregnant women or are too small for the purpose of studying pregnant women in the labor market).

9. See *infra* Part III (noting the dataset analyzed in this Article is the only large sample of pregnant women).

Yet pregnancy discrimination must be contextualized. As long as accounts of pregnancy discrimination in the labor market continue to be based in anecdote, they remain easy to dismiss as not real or as the result of pregnant women making different career choices than nonpregnant women and than men.<sup>10</sup> But pregnancy discrimination cannot be dismissed. As this Article will demonstrate, it is one of the most pervasive and harmful forms of systemic discrimination in the U.S. labor market. Using the Behavioral Risk Factor Surveillance System (BRFSS)—a large, national dataset compiled each year by the CDC to assess Americans' health behaviors and health status<sup>11</sup>—this Article is the first to assess how pregnant women fare in the labor market, as compared to nonpregnant women. After all other underlying differences between pregnant and nonpregnant women are taken into account, pregnant women are 4.2 percentage points less likely to be employed than nonpregnant women. This gap in employment outcomes—a gap that cannot be explained by voluntary choice, demographics, or educational characteristics—is the pregnancy penalty.

Economists have often referred to negative employment outcomes based on other personal characteristics as penalties;<sup>12</sup> the

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10. In fact, accounts of pregnancy discrimination, and sex discrimination more generally, are frequently dismissed by commentators. See, e.g., Vanessa Brown Calder, *On the Gender Pay Gap, I'm Not with Her*, CATO INST.: CATO AT LIBERTY (Sept. 9, 2016, 2:29 PM), <https://www.cato.org/blog/gender-pay-gap-im-not-her> (“[M]en and women work in different industries with varying levels of profitability[,] and . . . men and women on average make different family, career, and lifestyle trade-offs.”); Tom Ciccotta, *“Equal Pay Day” Reminds Us that the Gender Wage Gap Myth Persists*, BREITBART (Apr. 4, 2017), <https://www.breitbart.com/economy/2017/04/04/equal-pay-day-reminds-us-gender-wage-gap-myth-persists/> (“[I]t is not America’s oppressive and discriminatory patriarchal society that is to blame for such raw wage differences, but rather the different choices that men and women make with regards to their labor such as desired fields of work, and total amount of hours worked.”). But see Olga Khazan, *The Mommy-Track Myth*, ATLANTIC (Feb. 4, 2014), <https://www.theatlantic.com/business/archive/2014/02/the-mommy-track-myth/283557/> (“We often see women returning from maternity leave who are given less work or dead end assignments,” Dina Bakst, head of the advocacy group A Better Balance, told NPR. “And this type of discrimination really drags down wages for women because they get off track, and even worse off and pushed out of the workforce.”).

11. The 1993–2016 BRFSS data is used in the estimations presented throughout the rest of this paper. Behavioral Risk Factor Surveillance Sys., *Annual Survey Data*, CENTERS FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/brfss/annual\\_data/annual\\_data.htm](https://www.cdc.gov/brfss/annual_data/annual_data.htm) (last updated Sept. 4, 2018) [hereinafter BRFSS Annual Survey Data].

12. See *infra* Part IV.A.2 (comparing employment disparities between pregnant and nonpregnant women to employment disparities between different races and ethnicities).

race penalty and the ethnicity penalty<sup>13</sup> are well known. As this Article will demonstrate, the magnitude of the pregnancy penalty rivals the magnitude of these well-documented penalties.<sup>14</sup> The pregnancy penalty also far surpasses another well-known penalty, the motherhood penalty.<sup>15</sup> Moreover, the baseline pregnancy penalty widens even more substantially for women facing other disadvantages, such as low education,<sup>16</sup> disability,<sup>17</sup> and obesity.<sup>18</sup>

Using the findings generated by this first empirical overview of pregnancy in the labor market, this Article will argue that remedying pregnancy discrimination must become a more urgent priority for civil rights advocates and scholars. Pregnant women remain among the most vulnerable workers in the labor market, even in the presence of two federal laws allegedly available, but insufficient, to protect them. Although this Article is hardly the first to point out the inadequacy of legal protections for pregnant women, it is unique in its approach to the solution. In the absence of other available evidence, prior scholars have been forced to rely on litigated cases to suggest a solution; I rely on data. Using the BRFSS data, I demonstrate why the solution favored by most scholars, the Pregnant Workers Fairness Act (PWFA), is unlikely to be effective. Instead, I argue that paid family leave, available before and after childbirth, offers the better solution. Indeed, because paid family leave is already mandated in a handful of states, I use data from these states to demonstrate how a well-crafted family leave law can ameliorate the pregnancy penalty.

In making these arguments, this Article proceeds as follows: Part I begins by considering the different components of pregnancy that may produce discriminatory behaviors among employers, and Part II reviews the current legal protections against pregnancy discrimination at the federal level. Part III introduces the data and methodology necessary for this study, which is used in Part IV to examine pregnancy discrimination empirically.

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13. See *infra* Part IV.A.2.

14. See *infra* Part IV.A.2.

15. See *infra* Part IV.B.1 (examining the connection between the motherhood penalty and the pregnancy penalty).

16. See *infra* Part V.B.2 (discussing differences in the pregnancy penalty based on socioeconomic status).

17. See *infra* Part IV.B.3 (comparing employment outcomes for disabled pregnant women and nondisabled pregnant women).

18. See *infra* Part IV.B.2 (discussing the relationship between the pregnancy penalty, weight, and appearance).

Part V continues to use these data to evaluate the most commonly proposed legislative solution, the PWFA, as well as the solution favored by this Article, paid family leave legislation. A brief conclusion follows.

## I. ACCOUNTING FOR THE EXISTENCE OF THE PREGNANCY PENALTY

Before diving into the empirical evidence regarding the frequency, the magnitude, and the form of the pregnancy penalty, it is useful to consider *why* employers may discriminate against pregnant women. After all, pregnancy ushers in a multitude of changes, both short-term and long-term, that can be difficult to separate. In the short-term, pregnancy is a medical condition that, through itself or through the development of common secondary health conditions, can have tangible and apparent physical effects on a woman's body. First, and most obviously, pregnancy is a condition that can alter a woman's appearance, principally through weight gain.<sup>19</sup> Second, pregnancy and its complications may partially or wholly incapacitate a woman for some period of time surrounding the birth of a child.<sup>20</sup>

In the long-term, even as the physical transformations of pregnancy subside postpartum, at least one life-transformational effect of pregnancy remains: a child.<sup>21</sup> Pregnancy serves as a signal of impending motherhood, which, from an employer's perspective, has two important implications. First, pregnancy implies that caretaking will likely occupy a relatively larger portion of the woman's time than it had previously.<sup>22</sup> Second, to the extent that employers, their customers, or pregnant workers

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19. See *infra* Part I.A.1 (discussing pregnancy's impact on appearance).

20. Typical complications that can restrict pregnant women to bed rest, especially towards the end of their pregnancies, include preeclampsia, gestational diabetes, and cervical incompetence. See *Bed Rest*, AM. PREGNANCY ASS'N (May 4, 2017), <http://americanpregnancy.org/pregnancy-complications/bed-rest> (reviewing bed rest causes and benefits and providing advice for how to handle the experience).

21. Of course, not all pregnancies end in live births; the miscarriage rate for known pregnancies is between fifteen and twenty percent. Because most of these miscarriages occur by the seventh week of pregnancy, pregnancies that end in live births are the most likely to have long-term effects. See *Miscarriage*, MEDLINEPLUS (Dec. 21, 2017), <https://medlineplus.gov/ency/article/001488.htm> ("Most miscarriages occur during the first 7 weeks of pregnancy.").

22. See Bureau of Labor Statistics, *Average Hours per Day Parents Spent Caring for and Helping Household Children as Their Main Activity*, U.S. DEPT LAB. (2017), <https://www.bls.gov/charts/american-time-use/activity-by-parent.htm> (showing that mothers with children under age six spend an average of 2.68 hours caring for children).



themselves believe that mothers belong at home with their children, pregnancy may threaten a woman's long-term employment.<sup>23</sup> This Part briefly explores these short- and long-term effects of pregnancy, paying close attention to the known reverberations of these effects on women's employment outcomes.

## A. SHORT-TERM EFFECTS OF PREGNANCY

### 1. Pregnancy as Appearance Altering

The nine months of pregnancy can alter a woman's appearance in many respects; changes in skin,<sup>24</sup> hair,<sup>25</sup> bra size,<sup>26</sup> and even shoe size<sup>27</sup> occur quite frequently in pregnant women. Yet the most common—and most obvious—appearance-related change in pregnancy comes with respect to a woman's size.

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23. Although prior studies have unpacked pregnancy discrimination into multiple component parts, they have generally ignored pregnancy's appearance-altering effects and focused instead on pregnancy's disability, caregiving, and status components. See, e.g., Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 575–84 (2010) (acknowledging status, caregiving, and disability components); Deborah A. Widiss, Gilbert Redux: *The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 1011–18 (2013) (focusing on pregnancy's status and disability components); Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1313–16 (2008) (focusing on caregiving).

24. See Lawrence E. Gibson, *What's the Best Way to Treat Pregnancy Acne*, MAYO CLINIC (Aug. 25, 2016), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/expert-answers/pregnancy-acne/faq-20058045> ("Some women . . . have trouble with acne during pregnancy."); *Second Trimester Pregnancy: What to Expect*, MAYO CLINIC (June 21, 2017), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/pregnancy/art-20047732> (describing a variety of skin changes that may occur during pregnancy).

25. See Terri Peters, *Why Adele Grew a Beard: Facial Hair and Other Pregnancy Symptoms Explained*, TODAY (Mar. 30, 2016), <https://www.today.com/health/why-adele-grew-beard-facial-hair-other-pregnancy-symptoms-explained-t83366> (explaining increased hair growth during pregnancy); *Pregnancy Nail and Hair Growth*, WHAT TO EXPECT, <https://www.whattoexpect.com/pregnancy/hair-growth/> (last updated July 24, 2018) (describing possible changes in hair growth and patterns during pregnancy).

26. See *Second Trimester Pregnancy: What to Expect*, *supra* note 24 (noting that breast size increases throughout pregnancy).

27. See Neil A. Segal et al., *Pregnancy Leads to Lasting Changes in Foot Structure*, 92 AM. J. PHYSICAL MED. & REHABILITATION 232, 238 (2013) ("[P]regnancy may lead to a permanent change in shoe size.").

Weight gain is a hallmark symptom of pregnancy that is necessary for growing a healthy child.<sup>28</sup> Although the recommended weight gain for a pregnant woman depends upon her baseline weight and height,<sup>29</sup> the average pregnant woman in the United States gains approximately thirty pounds over the course of her pregnancy.<sup>30</sup> Such a weight gain is relatively dramatic for most women.

Consider an American woman of average height, five feet, four inches tall, who weighs 145 pounds prior to pregnancy. A thirty-pound weight gain—which is not only the average weight gain, but also the recommended weight gain for someone of her size<sup>31</sup>—would increase her weight by more than twenty percent.<sup>32</sup> Prior scholarship has repeatedly documented how such a dramatic weight gain poses equally dramatic consequences for nonpregnant women in the labor market.<sup>33</sup> The earliest scholarship on weight gain in the labor market uniformly identified a negative association between weight, employment, and earnings.<sup>34</sup> The puzzle that challenged early empirical scholars was

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28. Nicholas P. Deputy et al., *Gestational Weight Gain—United States, 2012 and 2013*, 64 MORBIDITY & MORTALITY WKLY. REP. 1215, 1215 (2015), <https://www.cdc.gov/mmwr/pdf/wk/mm6443.pdf>.

29. *Id.*

30. Jonetta L. Johnson et al., *Trends in Gestational Weight Gain: The Pregnancy Risk Assessment Monitoring System, 2000–2009*, 212 AM. J. OBSTETRICS & GYNECOLOGISTS 806.e1, 806.e3 tbl.1 (2015).

31. Physicians recommend that normal-weight women gain between twenty-five and thirty-five pounds over the course of a pregnancy. Deputy et al., *supra* note 28.

32. It would also temporarily shift her body mass index (BMI) classification from normal-weight to obese. BMI is a ratio of weight in kilograms to height in meters squared, which physicians use to classify individuals as underweight ( $18.5 > \text{BMI}$ ), normal weight ( $18.5 \leq \text{BMI} < 25$ ), overweight ( $25 \leq \text{BMI} < 30$ ), obese ( $30 \leq \text{BMI} < 40$ ), and morbidly obese ( $\text{BMI} \geq 40$ ). *Defining Adult Overweight and Obesity*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/obesity/adult/defining.html> (last updated June 16, 2016). Note that this example woman is of average height for U.S. women twenty to twenty-nine years old and slightly less-than-average weight for women twenty to twenty-nine years old (average is 149 pounds). CHERYL D. FRYAR ET AL., ANTHROPOMETRIC REFERENCE DATA FOR CHILDREN AND ADULTS: UNITED STATES, 2007–2010 (2012), [https://www.cdc.gov/nchs/data/series/sr\\_11/sr11\\_252.pdf](https://www.cdc.gov/nchs/data/series/sr_11/sr11_252.pdf).

33. See John Cawley, *The Impact of Obesity on Wages*, 39 J. HUM. RESOURCES 451, 468 (2004) (indicating that heavier female workers earn less than their lighter-weight counterparts).

34. In other words, as weight increases, employment and earnings rates decrease. See *id.* at 451 (“Several previous studies have found, among females, a negative correlation between body weight and wages.”).

determining *why* this negative association existed.<sup>35</sup>

On one hand, worse labor market outcomes endured by heavier individuals might be due to the health problems associated with weight gain, such as heart disease, diabetes, and musculoskeletal impairments. These conditions could, in theory, reduce either the labor supply of heavier individuals—for example, heavier individuals removing themselves from the labor market—or the labor demand of heavier individuals—for example, employer willingness to hire heavier individuals diminishing because of the associated higher costs or lower productivity—or both.<sup>36</sup> On the other hand, worse labor market outcomes endured by heavier individuals might be the result of employers' own personal preferences—or the perceived preferences of their customers—favoring thinner workers over heavier workers. This idea of an employer's discriminatory preference that is unrelated to a worker's underlying productivity is typically referred to as taste-based discrimination.<sup>37</sup>

After considering both hypotheses, more recent empirical scholarship has concluded that the weight penalty is larger and more robust for women than for men and appears to be, at least in part, driven by taste-based discrimination.<sup>38</sup> Supporting these

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35. See *id.* (exploring causal and non-causal explanations for the negative correlation between weight and wages).

36. For an in-depth discussion of these competing hypotheses, see generally Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101 (2016).

37. This term was first coined by labor economist Gary Becker. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 14 (2d ed. 1971) (describing actions due to the “desire to be associated with some persons instead of others” as a “taste for discrimination”).

38. For example, a landmark 2004 study found that even after taking into account differences in education, demographics, socioeconomic status, and familial disposition towards weight gain in obese and nonobese individuals, the weight penalty persisted for obese women but disappeared for obese men. See Cawley, *supra* note 33, at 457–61 (taking familial disposition into account by comparing the outcomes of obese and nonobese siblings). Similarly, a 2016 study examined differences in the occupational characteristics of obese and nonobese workers and found that employers excluded obese women, but not obese men, from higher-paying jobs that required interaction with customers and with the public. See Shinall, *supra* note 36, at 134 (“As a woman moves up in BMI classification . . . she becomes less likely to work in a high-paying, public interaction job.”). In contrast, obese men and women were actually more likely than nonobese workers to work in lower-paying jobs requiring physical labor—despite the correlation of obesity with the development of musculoskeletal conditions. *Id.* at 133–34. Together, these findings led the author to conclude that obese women's relative exclusion from certain types of jobs appeared to force them disproportionately into some of the most undesirable jobs in the labor market—jobs that often required physical labor, had poor working conditions, and

findings are related studies from psychologists documenting the disparate social stigmatization of overweight and obese women, as compared to overweight and obese men.<sup>39</sup> Taken together, the past decade of social science literature emphatically supports the conclusion that weight is a women's issue.

A related strand of literature, both empirical and nonempirical, has developed on appearance discrimination.<sup>40</sup> Economist Daniel Hamermesh pioneered much of the empirical literature on appearance discrimination, which has consistently found the existence of an "ugliness" penalty in both observational and experimental data.<sup>41</sup> Beautiful people are more likely to be called

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were low-paying. *Id.* In fact, both the comparative burden of the weight penalty for female workers generally and the types of occupations in which the weight penalty remained most acute—made apparent by the 2016 study—called into question prior assumptions that the penalty was purely driven by employer cost concerns. *Id.*

39. For instance, a 2004 study found that obese women had a lower quality of life than obese men and reported higher levels of stigmatization in public. See Marney A. White et al., *Gender, Race, and Obesity-Related Quality of Life at Extreme Levels of Obesity*, 12 OBESITY RES. 949, 952 (2004) (illustrating the correlation between BMI and quality of life across genders and races). Another study from 2010 asked participants to evaluate political candidates and found that subjects were quite critical of obese female candidates, but not of obese male candidates. See Beth J. Miller & Jennifer D. Lundgren, *An Experimental Study of the Role of Weight Bias in Candidate Evaluation*, 18 OBESITY 712, 715 (2010) ("[O]bese female candidates were evaluated more negatively than nonobese female candidates. In contrast, obese male candidates were evaluated more positively than nonobese male candidates."). Still another study from 2011 that questioned adolescents about their attitudes on weight similarly revealed disturbing, gender-based conclusions: The male and female subjects made statements such as, "[I would] rather be a fat guy than a fat girl," and, "It's more normal for guys to be overweight." Nicole L. Taylor, *"Guys, She's Humongous!": Gender and Weight-Based Teasing in Adolescence*, 26 J. ADOLESCENT RES. 178, 187 (2011).

40. Empirical evidence suggests that higher weight is negatively correlated with assessments of beauty and appearance. See, e.g., Joni Hersch, *Skin Color, Physical Appearance, and Perceived Discriminatory Treatment*, 40 J. SOCIO-ECON. 671, 674–77 (2011) (showing that for white females, black females, and white males surveyed in the Detroit Area Study, obesity had a negative impact on how observers rated their attractiveness).

41. See, e.g., Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity, and Discrimination: Lawyers' Looks and Lucre*, 16 J. LAB. ECON. 172, 190–96 (1998) [hereinafter *Lawyers' Looks*] (finding that attorneys who were rated better looking based on their matriculation photographs earned more than their classmates); Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1190–91 (1994) [hereinafter *Labor Market*] (finding that there is both a wage penalty for plainness and a wage premium for beauty using observational data); see also DANIEL HAMERMESH, *BEAUTY PAYS: WHY ATTRACTIVE PEOPLE ARE MORE SUCCESSFUL* 39–84 (2011) (reviewing the existing evidence of a beauty premium for workers).

for an interview,<sup>42</sup> to be employed,<sup>43</sup> to earn more money,<sup>44</sup> and to receive higher occupational performance ratings.<sup>45</sup> Moreover, like weight discrimination (arguably a subcategory of appearance discrimination),<sup>46</sup> appearance discrimination in the workplace appears to be driven by more than just employers' productivity or cost concerns, and in some part by taste-based discrimination.<sup>47</sup>

Taken together, the previous scholarship on appearance discrimination indicates that, to the extent that pregnancy alters a woman's appearance—whether her weight or some other aspect—lower wage and employment rates may ensue simply by virtue of this alteration, despite no accompanying decline in the woman's capabilities or efficiency.<sup>48</sup> Well-known is the appearance-based employment penalty for nonpregnant women in the labor market; what remains unknown is whether this penalty also holds for *pregnant* women. Certainly, there are reasons to question whether the appearance penalty holds for pregnant

42. See Dan-Olof Rooth, *Obesity, Attractiveness, and Differential Treatment in Hiring: A Field Experiment*, 44 J. HUM. RESOURCES 710, 711–12, 714–16 (2009) (finding that applications sent to real job openings in Sweden with a photograph manipulated to make the male and female applicants look obese were six and eight percent less likely, respectively, to be called for an interview than identical applications sent with an unmanipulated photograph).

43. See, e.g., *Labor Market*, *supra* note 41, at 1188 (“[There is] some evidence that women select themselves out of the labor force if they are particularly unattractive.”).

44. See *id.* at 1190–91 (finding that there is both a wage penalty for plainness and a wage premium for beauty); *Lawyers' Looks*, *supra* note 41, at 193–95 (finding that attorneys rated better looking based on their matriculation photographs earn more than their worse looking classmates).

45. See Daniel Hamermesh & Amy Parker, *Beauty in the Classroom: Instructors' Pulchritude and Putative Pedagogical Productivity*, 24 ECON. EDUC. REV. 369, 372–73 (2005) (finding that better looking university instructors receive higher student ratings).

46. Cf. Hersch, *supra* note 40, at 671 (“[E]xcess weight is considered less attractive.”).

47. See, e.g., Rooth, *supra* note 42, at 714–16 (finding that employers are less likely to interview candidates who appear obese, even if they have the same qualifications as a non-obese candidate).

48. While this alteration in appearance and/or weight is likely to be temporary, pregnancy may have long-term effects on a woman's appearance. For example, up to three-quarters of women may be heavier one year postpartum than pre-pregnancy. Loraine K. Endres et al., *Postpartum Weight Retention Risk Factors and Relationship to Obesity at One Year*, 125 OBSTETRICS & GYNECOLOGY 144, 144 (2015). Fifteen percent of women may experience “major” pregnancy-related weight retention two years postpartum. Leah M. Lipsky et al., *Maternal Weight Change Between One and Two Years Postpartum: The Importance of One Year Weight Retention*, 20 OBESITY 1496, 1498 (2012).

women since, unlike many others who gain weight, pregnant women's weight gain (or other appearance changes) are more likely to be viewed both as having a sound basis and as nonpermanent. To the extent that the appearance penalty carries forward to pregnant women, however, it would contribute to the pregnancy penalty since almost all pregnant women gain weight. Of course, pregnancy's effects on appearance may not be the sole driver of poor labor market outcomes; the next Section explores other short-term consequences of pregnancy with possible workplace implications.

## 2. Pregnancy as Disability Inducing

As discussed in the prior Section, weight gain is an expected and necessary part of pregnancy for almost all women.<sup>49</sup> But for many women, pregnancy additionally leads to the development of secondary health conditions, including diabetes,<sup>50</sup> high blood pressure,<sup>51</sup> and musculoskeletal disorders.<sup>52</sup> Developing a secondary condition related to pregnancy is quite common; for example, as many as fourteen percent of pregnant women will develop gestational diabetes,<sup>53</sup> six to ten percent will suffer from gestational high blood pressure,<sup>54</sup> and fifty percent will be afflicted with lower back pain.<sup>55</sup> Such conditions have the potential to substantially limit a major life activity, including working. In other words, pregnancy may induce a disability—albeit a temporary one—that may affect a woman's ability to work. Thus, to the extent that a pregnancy penalty exists in the labor market, it may be at least partially driven by employers' reactions to pregnancy-induced disability.

Being disabled at work, at least in the absence of pregnancy, is associated with its own wage and employment penalty. Well-documented is the fact that disabled individuals continue to fare

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49. See Deputy et al., *supra* note 28 (“The weight a woman gains during pregnancy, known as gestational weight gain . . . , has important health implications for both mother and child.”).

50. Shin Y. Kim et al., *Percentage of Gestational Diabetes Mellitus Attributable to Overweight and Obesity*, 100 AM. J. PUB. HEALTH 1047, 1047 (2010).

51. Evangelia Kintiraki et al., *Pregnancy-Induced Hypertension*, 14 HORMONES 211, 212 (2015).

52. E.g., P. Katonis et al., *Pregnancy-Related Low Back Pain*, 15 HIPPOKRATIA 205, 209 (2011) (discussing back problems as “one of the most common musculoskeletal complaints of pregnant women”).

53. Kim et al., *supra* note 50.

54. Kintiraki et al., *supra* note 51.

55. Katonis et al., *supra* note 52, at 205.

worse than nondisabled individuals in the labor market; depending on the nature of their condition, disabled individuals are between twenty and thirty percentage points less likely to be employed than are nondisabled individuals.<sup>56</sup> Even when disabled individuals find employment, they earn fifteen to twenty percent less than similarly qualified, nondisabled individuals.<sup>57</sup> Less than half of the disability wage and employment penalty is attributable to actual productivity differences between the disabled and nondisabled; similar to weight and appearance, the rest of the penalty appears to be driven by taste-based discrimination.<sup>58</sup> Furthermore, some evidence suggests that this penalty exists not only for individuals with actual disabilities but also for individuals with perceived disabilities.<sup>59</sup>

The disability penalty is long-standing,<sup>60</sup> persisting—and by some accounts, even worsening<sup>61</sup>—in the decades since the passage of the ADA. Moreover, a growing body of empirical evidence suggests that the disability penalty in the labor market may be

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56. See Marjorie L. Baldwin & William G. Johnson, *Labor Market Discrimination Against Men with Disabilities in the Year of the ADA*, 66 S. ECON. J. 548, 559 (2000) [hereinafter *Year of the ADA*] (finding an employment differential between eighteen and thirty-one percentage points in the year of the ADA); Marjorie L. Baldwin & William G. Johnson, *Labor Market Discrimination Against Women with Disabilities*, 34 INDUS. REL. 555, 575 (1995) [hereinafter *Women with Disabilities*] (finding an employment differential of twenty-seven percentage points for women).

57. See *Year of the ADA*, *supra* note 56, at 557 (finding a wage differential between nineteen and twenty-eight percent for men); *Women with Disabilities*, *supra* note 56, at 571 (finding a wage differential of 11.7% for women).

58. *Year of the ADA*, *supra* note 56, at 558; *Women with Disabilities*, *supra* note 56, at 571. This calculation of the magnitude of taste-based discrimination is made even after the authors take into account the possible supply-side effects of disabled workers.

59. For a discussion of protections based on perceived disability, as opposed to actual disability, see Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (analogizing discrimination on the basis of perceived physical disability to discrimination on the basis of sex and color, which was justified at one time on the basis of perceived physical differences).

60. See *Year of the ADA*, *supra* note 56 (finding an employment differential between eighteen and thirty-one percentage points in the year of the ADA).

61. See Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 929–33 (2001) (finding that the ADA likely caused decreased employment rates of disabled workers); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 701 (2000) (finding a decline in employment of disabled men following the passage of the ADA).

more severe for disabled women than for disabled men.<sup>62</sup> Although some of the disability penalty may be driven by supply-side effects—that is, disabled individuals’ unwillingness (or inability) to work in certain types of jobs—available evidence indicates that at least some of the penalty is driven by demand-side effects—that is, employers’ unwillingness to employ disabled workers in certain types of jobs.<sup>63</sup> Such demand-side effects may be driven by a multitude of employer concerns, including the costs, productivity, appearance, and abilities of disabled workers.<sup>64</sup>

As a result, if pregnancy limits a woman’s physical activities and induces disability (or even creates the perception of disability),<sup>65</sup> then prior empirical scholarship suggests her wages and employment outcomes may suffer.<sup>66</sup> Similar to the weight penalty and appearance penalty, there are reasons to question whether the disability penalty, widely documented in the non-pregnant population, would extend to the pregnant population. Pregnancy-related limitations, whether actual or perceived, are

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62. See Acemoglu & Angrist, *supra* note 61, at 932 (finding that the ADA had more positive employment effects for disabled men than for disabled women); Kathleen Beegle & Wendy A. Stock, *The Labor Market Effects of Disability Discrimination Laws*, 38 J. HUM. RESOURCES 806, 857 (2003) (finding a small negative effect of discrimination laws on female employment rates but not on male employment rates); Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099, 1119 (2017) (noting that the number of ADA charges filed per female worker are consistently higher than the number of ADA charges filed per male worker).

63. See Acemoglu & Angrist, *supra* note 61, at 941 (discussing data “show[ing] a sizable decline in the hiring rates of [certain] disabled workers”).

64. See, e.g., *id.* at 922 (describing how “firms can ‘accommodate’ disabled workers at [a certain] cost . . . per worker . . . by purchasing special equipment” in order to “increase[] the marginal productivity of disabled workers”); Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1164 (2016) (discussing the perception that a “disability status expresses an inability to work”); *c.f.* Marjorie L. Baldwin & Chung Choe, *Wage Discrimination Against Workers with Sensory Disabilities*, 53 INDUS. REL. 101, 122 (2014) (concluding that individuals with sensory disabilities are particularly disadvantaged in employment because of their appearances, given “the high visibility of the conditions”).

65. Note that the ADA prohibits discrimination on the basis of both actual limitation and perceived limitation. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(3)(a) (2012) (“An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment.”).

66. See *Year of the ADA*, *supra* note 56, at 557 (finding a wage differential between nineteen and twenty-eight percent for men); *Women with Disabilities*, *supra* note 56, at 571 (finding a wage differential of 11.7% for women).



more likely to be nonpermanent.<sup>67</sup> Nonetheless, if the disability penalty does extend to the pregnant population, it could be quite problematic since pregnancy-related activity limitations remain common. Although concerns regarding pregnancy's short-term inducement of disability and appearance changes likely grow as a woman approaches full term, they typically subside postpartum. Nonetheless, pregnancy also has significant long-term effects, which is the focus of the next Section.

## B. LONG-TERM EFFECTS OF PREGNANCY

### 1. Pregnancy as Care Increasing

A well-known saying proclaims that a parent's work is never done.<sup>68</sup> While the amount of work required to raise children may ebb and flow, having a dependent is, by definition, more time-consuming than not having a dependent,<sup>69</sup> and a household's caretaking responsibilities must inevitably increase with the arrival of a new child. Pregnancy then becomes a signal that an expectant mother's household responsibilities will soon increase. How these new responsibilities are divided among members of the expectant mother's household is not necessarily a foregone conclusion. Although once the norm, mothers now need not stay home to care for their children, nor must they even be the primary caregivers of their children. Indeed, more than half of children under the age of five have mothers who remain employed.<sup>70</sup> Nannies, day care centers, fathers, and other relatives commonly alleviate at least some parental caretaking responsibilities.<sup>71</sup>

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67. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES NO. 915.003 (2015), [https://www.eeoc.gov/laws/guidance/upload/pregnancy\\_guidance.pdf](https://www.eeoc.gov/laws/guidance/upload/pregnancy_guidance.pdf) ("[It] is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary.").

68. See Marcie Pitt-Catsoupes, *A Family's Work Is Never Done*, AGENDA (Dec. 14, 2011), <http://agingandwork.bc.edu/blog/a-familys-work-is-never-done>.

69. See *Dependent*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dependent> (last updated Sept. 14, 2018) (defining "dependent" as "a person who relies on another for support").

70. LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2011 3 tbl.2 (2013), <https://www.census.gov/prod/2013pubs/p70-135.pdf>.

71. *Id.* at 3–4.

And yet, as much as the traditional norm of mothers staying at home with their children has eroded over the past half century,<sup>72</sup> it remains prevalent.<sup>73</sup> In 2012, 10.4 million mothers stayed home with their children—a number that trounces the mere two million fathers who stayed home.<sup>74</sup> Furthermore, in 2011, just twenty-one percent of fathers served as their children's primary caretaker.<sup>75</sup> An employer's assumption that the primary caretaking burden of a new child will fall on the woman<sup>76</sup> will, more often than not, have some validity.<sup>77</sup>

The persistent intertwining of gender and care responsibilities has led both scholars and advocates to characterize caretaker discrimination as a form of impermissible sex discrimination under Title VII.<sup>78</sup> A number of courts have agreed that caretaker discrimination can be a form of illegal sex stereotyping,<sup>79</sup> and in 2007, the Equal Employment Opportunity Commission (EEOC) issued Title VII enforcement guidance aimed at curtailing discrimination on the basis of family responsibilities.<sup>80</sup> Despite this recent legal push to reduce employer discrimination on the basis of caretaking responsibilities, empirical scholars have estimated that, on average, mothers still earn at least three percent less than nonmothers in similar jobs.<sup>81</sup> This so-called

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72. See Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 57 (2016) ("At the time of passage of the 1964 Civil Rights Act . . . employment of mothers of young children was rare. Now it is entirely the norm.").

73. See *id.* at 56.

74. *Id.*

75. LAUGHLIN, *supra* note 70, at 21.

76. See Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1298 (2007) (finding that "women with children [are] viewed as less competent and less committed to work").

77. This is often referred to as "statistical discrimination." *Id.* at 1302 n.2 (explaining that "statistical discrimination theories assume rational actors relying on biased information").

78. Hersch & Shinall, *supra* note 72, at 63 ("[D]iscrimination on the basis of a sex stereotype is discrimination on the basis of sex. As such, sex stereotyping claims are cognizable under Title VII.").

79. See Williams & Bornstein, *supra* note 23, at 1318 nn.52 & 55, 1319 n.65.

80. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES NO. 915.002 (2007), <http://www.eeoc.gov/policy/docs/caregiving.pdf>.

81. See, e.g., Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 291 (2003) (finding a three to five percent wage penalty for mothers); Correll et al., *supra* note 76, at 1297 ("[T]he audit data show that mothers are disadvantaged when actual employers make hiring decisions.").

“motherhood penalty”<sup>82</sup> may have several potential causes, including perceptions that mothers have greater demands at home (thus constraining their abilities to give into work demands),<sup>83</sup> beliefs that mothers take their careers less seriously, notions that mothers have different personality traits,<sup>84</sup> and personal views that mothers should be at home with their children.<sup>85</sup> Note that these views, notions, beliefs, and perceptions may or may not be grounded in fact.

Certainly, the causes of the pregnancy penalty must overlap to some extent with the causes of the motherhood penalty, but the two penalties should not perfectly overlap. Since a pregnant woman’s child has not been born, pregnancy signals potential near-future changes—changes that have not presently arrived. More concretely, to the extent that the motherhood penalty is driven by *actual* increases in a woman’s housework and caretaking responsibilities,<sup>86</sup> it would not explain the pregnancy penalty, as such greater responsibilities would have not yet begun. Still, to the extent that motherhood induces concern in employers regarding a female worker’s current workplace productivity because of household demands, pregnancy will unavoidably induce concern in employers regarding a female worker’s anticipated future workplace productivity because of future household demands.

In sum, the pregnancy penalty may be an extension of the well-known and previously explored motherhood penalty in the

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82. Social scientists have repeatedly documented both a motherhood penalty and a fatherhood premium in the labor market; that is, mothers have worse wage and employment outcomes than nonmothers, while fathers have better wage and employment outcomes than nonfathers. See, e.g., *id.* at 1332 (documenting employer discrimination against mothers, but not fathers); Rebecca Glauber, *Race and Gender in Families and at Work: The Fatherhood Wage Premium*, 22 GENDER & SOC’Y 8 (2008) (exploring differences in wage premiums for fathers of diverse races and ethnicities).

83. Correll et al., *supra* note 76, at 1306 (explaining that because modern society “assumes that the ‘good mother’ will direct her time and emotional energy to her children . . . [she] must give less effort and priority to work demands”).

84. Amy J. C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 J. SOC. ISSUES 701, 709–10 (2004) (finding that subjects view mothers as having more warmth, but less competence).

85. See *infra* Part I.B.2; cf. Hersch & Shinall, *supra* note 72, at 56 (suggesting that traditional beliefs about the importance of women in raising children persist).

86. Cf. Joni Hersch, *Home Production and Wages: Evidence from the American Time Use Survey*, 7 REV. ECON. HOUSEHOLD 159, 166 (2009) (documenting that the average married woman spends 28.76 minutes on childcare every day, but the average married man spends only 15.67 minutes).

labor market. To the extent that the pregnancy penalty is related to the motherhood penalty, it may be based upon employer concerns about the long-term caretaking constraints that accompany the birth of a child, as explored in this Section. Alternatively, the pregnancy penalty may be bound up with value judgments about the role of women and motherhood, which are briefly explored in the next Section.

## 2. Pregnancy as Value Incompatible

Employers may make value judgments about a working woman's decision to become a parent given her life situation; they may view this decision as irresponsible, immoral, or simply the wrong choice.<sup>87</sup> Such value judgments may be based in a range of beliefs about morals, ethics, religion, politics, and gender norms. To the extent that pregnant women fail to conform to their employers' ideas about appropriate behavior, this value-incompatibility could provide another source of the pregnancy penalty that would not go away after childbirth.<sup>88</sup> This value-incompatibility could be based on disapproval of mothers in the workplace generally; disapproval of a woman's marital or relationship status, financial status, or age; or disapproval of the sex, race, or ethnicity of the woman's partner.

Moreover, value-incompatibility may influence both the employer and the worker. An employer's values might conflict with a working mother's decision to become pregnant, which would create a labor demand-side issue, and potentially, an employment discrimination issue. A pregnant worker's own values might also conflict with mothers remaining in the workforce, which would create a labor supply-side issue.

The idea that employers or workers may maintain restrictive value judgments regarding pregnancy—and its natural successor, motherhood—may seem outmoded. Yet a multitude of popular examples reveal the prevalence of the value judgments that continue to surround motherhood, including the “Mommy

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87. Widiss, *supra* note 23, at 1036 (explaining that those who opposed the PWFA believed that it would allow pregnant women “to ‘shift the burdens’ of their ‘lifestyle choice’ to others”).

88. Some evidence from the psychology literature supports the idea that inherent biases accompany the status of being pregnant. See, e.g., *id.* at 965, 972–73 (discussing the “prevalent misconceptions regarding pregnant women’s capacity and commitment to work”).

Wars,”<sup>89</sup> the “abstinence movement,”<sup>90</sup> the defense of marriage as between one man and one woman,<sup>91</sup> and criticisms of so-called “welfare queens.”<sup>92</sup> Compounding these conflicting values is the unmistakable and unavoidable nature of pregnancy as a woman progresses to term. A visibly pregnant woman who continues to work makes a statement—and in a sense, advertises to the world—as to the side of these public debates on which she falls.<sup>93</sup>

Despite the prevalence of such value judgments, employers’ and employees’ beliefs on these issues may not be discussed openly and, thus, may remain ambiguous within the workplace. This ambiguity has been, in many ways, exacerbated by employment discrimination laws and the EEOC’s guidance surrounding these laws.<sup>94</sup> In an effort to protect women from caretaking-related discrimination in the workplace, the agency’s guidance discourages employers and employees from having honest conversations about family responsibilities and family values.<sup>95</sup>

89. See *Mommy vs. Mommy*, NEWSWEEK (June 3, 1990), <https://www.newsweek.com/mommy-vs-mommy-206132> (describing the “Mommy Wars” as a conflict of “[t]ension between mothers” who go to work and mothers who stay home); Brandy Zadrozny, *Yes, ‘Stay-at-Home Mom’ Is a Job: The Return of the ‘Mommy Wars’*, DAILY BEAST (Mar. 17, 2015), <https://www.thedailybeast.com/yes-stay-at-home-mom-is-a-job-the-return-of-the-mommy-wars> (debating whether being a stay-at-home mom is a job).

90. See generally Jean Calterone Williams, *Battling a ‘Sex-Saturated Society’: The Abstinence Movement and the Politics of Sex Education*, 14 SEXUALITIES 416 (2011) (discussing the sector of the Christian Right that advocates for abstinence before marriage).

91. See Ryan T. Anderson, *In Defense of Marriage*, HERITAGE FOUND. (Mar. 20, 2013), <http://www.heritage.org/marriage-and-family/commentary/defense-marriage> (arguing that marriage should be between one man and one woman).

92. See Rachel Black & Aleta Sprague, *The Welfare Queen’ Is a Lie*, ATLANTIC (Sept. 28, 2016), <https://www.theatlantic.com/business/archive/2016/09/welfare-queen-myth/501470> (arguing that the perception that there are individuals getting rich off of public benefits is a myth).

93. The importance of a health condition’s visibility has been well explored in the disability literature, which consistently finds that more visible health conditions have more negative employment effects. See Baldwin & Choe, *supra* note 64 (concluding that individuals with sensory disabilities are particularly disadvantaged in employment because of “the high visibility of the conditions”); Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, 15 POLY STUD. J. 551, 560–61 (1987) (finding that visible conditions have particularly negative effects on women’s outcomes because of societal pressures with respect to women’s appearances).

94. See Hersch & Shinall, *supra* note 72, at 61–70 (explaining that while the U.S. Supreme Court has never directly addressed whether family-status inquiries are discriminatory, some federal courts have recognized that they can be considered as sex-stereotyping and sex-plus discrimination).

95. See, e.g., *Pre-Employment Inquiries and Marital Status or Number of Children*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/>

Although well-intentioned, the guidance promotes an atmosphere in which pregnant women have no insight into employers' views towards working mothers (and often assume the worst), and employers are left guessing about a pregnant woman's true intentions postpartum (and often assume the worst).<sup>96</sup>

In sum, pregnancy may negatively impact labor market outcomes for at least four separate reasons: changes in appearance, changes in physical ability, value judgments about the decision to become pregnant, and actual or perceived increases in household caretaking demands. Some or all of these short- and long-term factors may work in combination to produce a pregnancy penalty for women in the labor market. To the extent that women actually experience discrimination on the basis of pregnancy by employers, the next Part briefly reviews the framework of federal remedies against such discrimination as well as scholarly assessments of their adequacy.

## II. THE FRAMEWORK OF PROTECTIONS AGAINST THE PREGNANCY PENALTY

By all accounts, legal protections for pregnant women in the workplace have come a long way. Only a few decades ago, laying off, demoting, and firing women due to pregnancy was not only legal, it was socially acceptable.<sup>97</sup> Indeed, pregnant women lacked any workplace protections at the federal level until 1978, when Congress passed the PDA.<sup>98</sup> The PDA amended Title VII

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laws/practices/inquiries\_marital\_status.cfm (last visited Oct. 30, 2018) ("Questions about marital status and number and ages of children are frequently used to discriminate against women and may violate Title VII if used to deny or limit employment opportunities. It is clearly discriminatory to ask such questions only of women and not men (or vice-versa). Even if asked of both men and women, such questions may be seen as evidence of intent to discriminate against, for example, women with children.").

96. *Id.*

97. Indeed, employers commonly viewed pregnancy as a condition to be avoided in the workplace—not only because of the motherhood caregiving responsibilities that would directly ensue (and could potentially interfere with a woman's availability for work), but also because the mere sight of a working pregnant woman was socially taboo. Accord Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1360 (2012) ("Historically, women's capacity to become pregnant and their status as mothers have served as central justifications for their exclusion from the workforce.").

98. The PDA was a direct reaction by Congress to overturn *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Supreme Court had concluded that pregnancy discrimination was *not* a form of impermissible sex discrimina-

by adding supplemental definitional language to the statute, specifying that the phrase "discrimination . . . because of sex" signifies discrimination

on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.<sup>99</sup>

Today, although the PDA remains the only federal statute that explicitly protects pregnant women from employment discrimination, a second employment discrimination law is available, in theory, to at least some pregnant women. Title I of the ADA, passed in 1990, requires employers to provide "reasonable accommodation" for disabled workers, unless such accommodation will create an "undue hardship"<sup>100</sup> for the employer.<sup>101</sup> The definition of disability for the purposes of the ADA is at once broad and particular; anyone who is "substantially limit[ed] in one or more major life activities," who is "regarded as" substantially limited, or who has "a record of such an impairment" is disabled for the purposes of the Act.<sup>102</sup> Thus, in order to qualify for coverage under the ADA, an expectant mother would have to prove that her pregnancy (or related health condition) substantially limited her in a major life activity or caused others to perceive her as substantially limited.

In reviewing the state of protections for pregnancy under federal law, Part II.A begins by reviewing recent coverage expansions in the ADA that may be extended to an increasing num-

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tion under Title VII. According to the Court, discrimination because of pregnancy was not discrimination because of sex under Title VII because pregnancy discrimination classified workers "into two groups—pregnant women and non-pregnant persons. While the first group [wa]s exclusively female, the second include[d] members of both sexes." *Id.* at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).

99. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012).

100. Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(9)–(10) (2012).

101. The Rehabilitation Act of 1973 is interpreted analogously to the ADA for the purposes of determining a reasonable accommodation. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794(d) (2012) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . ."). However, the Rehabilitation Act of 1973 applies to disabled workers employed by the federal government or a federal contractor whereas the ADA applies to all other workers, public and private. *See id.* § 794(a); *see generally* 42 U.S.C. § 12101.

102. 42 U.S.C. § 12102(1).

ber of pregnant women. Part II.B reviews even more recent coverage expansions in the PDA, and Part II.C reviews proposals for future expansions in federal employment laws to protect pregnant women.

#### A. EXPANDING PROTECTIONS UNDER THE ADA

Over the past decade, the reach of both the PDA and the ADA has expanded to protect additional pregnant women—at least in theory. For the first fifteen years of the ADA's existence, few courts found any pregnant women (even those with pregnancy-related complications) disabled for the purposes of the Act, mirroring a larger trend among federal courts of taking an exceptionally narrow view of the term “disability” with respect to all health conditions.<sup>103</sup> Courts were able to take this narrow view of the Act's coverage because Congress had failed to define several key terms within the statutory definition of disability—including the terms “substantially limited” and “regarded as”—and Congress had also failed to provide rules of construction within the 1990 version of the ADA.<sup>104</sup> In turn, federal courts typically rejected the notion of pregnancy as a disability because

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103. This limiting case law culminated with the Supreme Court's decisions in the *Sutton* trilogy of cases in 1999 and *Toyota* in 2002. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 185 (2002) (holding that ADA disabilities must be “long[-]term” in nature); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999) (holding that corrective and mitigating measures taken by an individual should be considered when determining if he or she is disabled under the ADA); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566–67 (1999) (holding that disability under the ADA must be proven on a case-by-case basis with individualized evidence of a substantial limitation on a major life activity); *Murphy v. United Parcel Serv.*, 527 U.S. 516, 525 (1999) (requiring ADA plaintiffs to demonstrate they were “unable to perform a class of jobs”); see also Jennifer Bennett Shinall, *What Happens When the Definition of Disability Changes? The Case of Obesity*, 5 IZA J. LAB. ECON. 1, 2 (2016) (discussing “decisions by the US Supreme Court and federal appellate courts that had severely limited coverage under the ADA” in the context of coverage for obesity).

104. Accord Shinall, *supra* note 103, at 2 (“Congress failed to define what the terms ‘impairment,’ ‘substantially limits,’ ‘major life activities,’ and ‘regarded as’ precisely meant. Nor did Congress provide any rules of construction for the undefined terms in the ADA. As a result, years of litigation ensued over the meanings of these terms . . .”).



pregnancy was neither “permanent”<sup>105</sup> nor a “disorder”<sup>106</sup>—despite the fact that these qualifiers were not included within the statutory language of the ADA,<sup>107</sup> and despite the fact that the

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105. From the ADA's inception, lower courts consistently asserted that “temporary” conditions could not be disabilities for the purposes of the ADA. *See, e.g.,* Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999) (“Disability does not include temporary medical conditions.”); Hamm v. Runyon, 51 F.3d 721, 725 (7th Cir. 1995) (“Under the ADA, ‘[i]ntermittent, episodic impairments are not disabilities.’” (quoting Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (alteration in original))); Gorman v. Wells Mfg. Corp., 209 F. Supp. 2d 970, 975 (S.D. Iowa 2002) (“The Court regards as common knowledge that all of these symptoms, at some degree of severity, are . . . too short-term to qualify as a disability under the ADA.”). Such holdings often relied on EEOC regulations stating as much. *See* Americans with Disabilities Act of 1990, 29 C.F.R. app. § 1630.2(j) (1992) (“[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.”). These early interpretations were further solidified by the 2002 Supreme Court decision, *Toyota Motor Manufacturing, Kentucky, Inc.*, 534 U.S. at 185, which confirmed that an “impairment’s impact must also be permanent or long term” in order to be a disability under the Act.

106. Pre-ADA Amendments Act, courts were hesitant to classify any nondisordered health status as a disability, regardless of its actual effects on an individual’s abilities. Again, this interpretation of the ADA relied on restrictive EEOC regulations that linked disability to “disorder,” and even went on to use pregnancy as a specific example of health conditions that would generally not qualify as a disability for the purposes of the Act. *See* Americans with Disabilities Act of 1990, 29 C.F.R. app. § 1630.2(h) (1996) (“[C]onditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments.”). Courts pigeonholed pregnancy as a “normal” health condition and, as a result, dismissed it as a possible disability under the ADA, often without considering its actual limiting effects. *See, e.g.,* Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 980 (N.D. Ill. 1998) (“[M]any courts have held that pregnancy, absent abnormal or unusual circumstances, is not a disability.”); Hernandez v. City of Hartford, 959 F. Supp. 125, 130 (D. Conn. 1997) (“Pregnancy and related medical conditions have been held not to be physical impairments.”); Cerrato v. Durham, 941 F. Supp. 388, 392 (S.D.N.Y. 1996) (“[C]ourts have distinguished between a normal, uncomplicated pregnancy itself and a complication or condition arising out of the pregnancy and have found that, under particular circumstances, the pregnancy-related condition can constitute a ‘disability’ within the meaning of the ADA.”).

107. One issue that did not arise under the ADA with respect to pregnancy is its voluntary nature. From the beginning, the ADA has never distinguished between voluntary and involuntary disabilities, perhaps because the inquiry into whether or how much an individual contributed to their disability is often a complex one. *See, e.g.,* U.S. DEP’T OF JUSTICE, QUESTIONS AND ANSWERS: THE AMERICANS WITH DISABILITIES ACT AND HIRING POLICE OFFICERS (1997), <https://www.ada.gov/copsq7a.pdf> (“An alcoholic is a person with a disability and is protected by the ADA if he or she is qualified to perform the essential functions of the job.”).

activities of expectant mothers could be severely restricted, albeit temporarily.<sup>108</sup> The result of these restrictive judicial interpretations was that only the most troublesome pregnancies, which altered a woman's abilities even beyond the gestation period, were able to present a colorable claim of disability during the first two decades of the Act.<sup>109</sup>

Much to the elation of pregnancy advocates and disability advocates more generally, these prior judicial decisions were soundly overturned in 2008 by Congress's passage of the ADA Amendments Act (ADAAA). Indeed, the preamble to the ADAAA specifically states that its key purposes were to "reject" federal courts' prior restrictive reasoning<sup>110</sup> and, in its place, to foster judicial construction of the ADA "in favor of broad coverage of individuals under th[e Act], to the maximum extent permitted."<sup>111</sup> In light of the ADAAA, subsequent decisions from lower federal courts have been more generous towards pregnant women,<sup>112</sup> recognizing rights to reasonable accommodation in

108. Accord Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 460 (2012) ("These courts reasoned that pregnancy imposed functional limitations that are too minor and short-term to constitute an ADA disability."); Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 109 (2013) ("Prior to the ADAAA, many courts held that pregnancy-related impairments that subsided shortly after the termination of pregnancy and left no lasting harm were not substantially limiting.")

109. See, e.g., *Gabriel*, 9 F. Supp. 2d at 980 (suggesting that only pregnancies in danger of complications like "premature rupture of membranes, vaginal bleeding, . . . [and] risk of premature [birth]" could be considered disabilities under the ADA (quoting *Hernandez*, 959 F. Supp. 2d at 130) (second alteration in original)); *Patterson ex rel. Patterson v. Xerox Corp.*, 901 F. Supp. 274, 278 (N.D. Ill. 1995) (holding that the plaintiff's pregnancy-related back pain was a disability under the ADA because her "back pain was also attributable in part to the aggravation of a prior back injury"); *Tsetseranos v. Tech Prototype, Inc.*, 893 F. Supp. 109, 119 (D.N.H. 1995) ("Although plaintiff's pregnancy was clearly complicated by her ovarian cysts, and these complications required her to be out of work for a period of time, the court finds that plaintiff's pregnancy was not a 'disability' under the ADA."), *abrogated by Navarro v. Pfizer Corp.*, 261 F.3d 90 (1st Cir. 2001); see also Williams et al., *supra* note 108, at 110 ("Under this [former] interpretation, a pregnant woman seeking ADA protection had to prove that her limitations stemmed from a medical condition that predated her pregnancy and was exacerbated by it.")

110. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101(b)(3) (2012)) (enumerating that one of the stated purposes of the ADAAA was to "reject the Supreme Court's reasoning in *Toyota* and the *Sutton* trilogy).

111. 42 U.S.C. § 12102(4)(a) (2012).

112. See, e.g., *Alexander v. Trilogy Health Servs., LLC*, No. 1:11-cv-295, 2012 WL 5268701, at \*11-12 (S.D. Ohio Oct. 23, 2012) (holding that the plaintiff's "pregnancy-related hypertension" was a disability under the ADA).

the workplace as a result of pregnancy-related complications, including lifting and activity restrictions,<sup>113</sup> breaks,<sup>114</sup> and time away from the office due to mandatory bed rest.<sup>115</sup> The EEOC's post-ADAAA amended guidance, issued in 2015, reflects this apparent broadening of the ADA's availability to pregnant women. It asserts that "some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA," and "[a] pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related conditions."<sup>116</sup> Similar to the ADA, the PDA

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113. See, e.g., *Khan v. Midwestern Univ.*, 147 F. Supp. 3d 718, 722–23 (N.D. Ill. 2015) (holding that a pregnant "plaintiff's medical note, which stated that she should only engage in light duty and refrain from heavy lifting, was sufficient evidence to create an issue of fact as to whether her pregnancy qualified her as disabled under the ADA"); *Heatherly v. Portillo's Hot Dogs, Inc.*, 958 F. Supp. 2d 913, 920–21 (N.D. Ill. 2013) (finding evidence that plaintiff's high-risk pregnancy limited her ability to work long hours and lift heavy objects was sufficient "to create a triable issue of fact as to whether [she was] disabled under the ADAAA").

114. See, e.g., *Varone v. Great Wolf Lodge of the Poconos, LLC*, No. 3:15-CV-304, 2016 WL 1393393, at \*3 (M.D. Pa. Apr. 8, 2016) (denying a motion to dismiss an ADA claim based on an employer's decision not to provide medically prescribed work breaks to a pregnant massage therapist).

115. See, e.g., *Meachem v. Memphis Light, Gas & Water Div.*, 119 F. Supp. 3d 807, 818 (W.D. Tenn. 2015) (finding a genuine issue of material fact regarding whether allowing a pregnant plaintiff to work remotely due to physician-mandated bed rest would cause her employer an undue hardship); *Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc.*, No. 1:12-cv-0817-RLY-MJD, 2013 WL 121838, at \*3 (S.D. Ind. Jan. 9, 2013) (finding that the plaintiff who was ordered to bed rest for twelve days during her pregnancy had pled a plausible claim for disability discrimination).

116. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 67 ("Prior to the enactment of the ADAAA, some courts held that medical conditions related to pregnancy generally were not impairments within the meaning of the ADA, and so could not be disabilities. Although pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended. An impairment's cause is not relevant in determining whether the impairment is a disability. Moreover, under the amended ADA, it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary."); see also *Discrimination on the Basis of Sex*, 81 Fed. Reg. 39,108, 39,108 (June 15, 2016) (codified at 41 C.F.R. pt. 60-20) (issuing revised, stronger Department of Labor regulations on pregnancy discrimination, including pregnancy accommodation requirements, for federal contractors). In contrast, the EEOC guidance prior to the 2008 ADAAA held that pregnancy was not a disability for the purposes of the ADA unless it caused or exacerbated "a physiological disorder." Americans with Disabilities Act of 1990, 29 C.F.R. § 1630.2(h) (1996).

has also undergone an expansion in recent years, as reviewed in the next Section.

## B. EXPANDING PROTECTIONS UNDER THE PDA

As with the ADA, judicial interpretations of the PDA have recently shifted towards broader coverage. Historically, a great deal of pregnancy-related litigation has turned on what it means for “women affected by pregnancy . . . [to] be treated the same . . . as other persons . . . similar in their ability or inability to work.”<sup>117</sup> This phrase, on its face, invites a comparison between a pregnant worker and a nonpregnant worker.<sup>118</sup> Even though courts widely rely on such comparator evidence<sup>119</sup> in employment discrimination cases, whether the cases are pregnancy-related or not, courts continue to struggle with such evidence.<sup>120</sup> In all employment discrimination cases that rely on comparator evidence to prove discrimination, a comparator may not exist because an employer is too small to have more than one

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117. Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k) (2012).

118. *Cf. Williams et al.*, *supra* note 108, at 105 (“While not specifically requiring the accommodation of pregnancy-related conditions, the plain statutory language thus requires that employers place pregnant women with impairments on the same footing as nonpregnant workers with similar impairments.”).

119. In the absence of any direct or smoking-gun statements from the employer, proving an employment discrimination case is often attempted via a similarly situated comparator—that is, providing evidence of another employee who is similarly situated to the plaintiff in all respects except membership in a protected class, but was treated better by the employer. *Accord* Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1491 (2009) (“The most common method is to show that similarly situated employees of a different race or sex received more favorable treatment.”).

120. For a discussion of the problems created by the widespread judicial reliance on similarly situated comparators in employment discrimination law generally, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011). For a discussion of the problems specific to pregnancy cases, see Widiss, *supra* note 23, at 1016 (“Theoretically, a plaintiff should be able to present other kinds of evidence that would suggest bias, such as evidence that a decision-maker believed pregnant employees were generally incompetent or unreliable, and some courts have held that discrimination claims can succeed even in the absence of comparators. As a practical matter, however, courts often require comparators and will dismiss a case or grant summary judgment if a plaintiff lacks them.”). For an example of a court that required such a comparator, to the plaintiff’s detriment, in a pregnancy case, see *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738–39 (7th Cir. 1994) (holding that “[the plaintiff’s] failure to present any comparison evidence doomed her case”).

person with a similar job. Even within a larger employer, a discrimination plaintiff may have a unique job title and, consequently, lack a good comparator.<sup>121</sup>

While problems such as finding a suitable comparator are not unique to pregnancy discrimination cases, the nature of pregnancy introduces additional complications. The appropriate comparator, according to the statutory language of the PDA, is a nonpregnant person whose capabilities at work are similar to the pregnant woman.<sup>122</sup> Yet two problems stand in the way of using such a coworker as a comparator. As an initial matter, such a coworker may not exist; the pregnant woman may not have any nonpregnant coworkers who have ever faced similar health-related or physical restrictions but have been treated better by the employer.<sup>123</sup> Moreover, even if such a coworker does exist, many courts have previously made a distinction between coworkers whose restrictions stem from on-the-job injury versus coworkers whose restrictions stem from off-the-job injury.

In the past, federal courts often analogized pregnancy to an off-the-job injury (since the employer is not responsible for the pregnancy) and held that a coworker with an on-the-job injury cannot serve as a comparator—thus restricting a pregnant woman's pool of potential comparators in a manner potentially fatal to her case.<sup>124</sup> Consequently, when the Supreme Court dis-

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121. Franklin, *supra* note 97, at 1368 (“This requirement sharply curtails plaintiffs’ ability to prove they have been discriminated against ‘because of sex.’ People who work in small or sex-segregated workplaces or who are uniquely situated in their jobs will often be unable to produce comparators, meaning that they effectively reside outside the scope of Title VII’s protection.”).

122. See 42 U.S.C. § 2000e(k).

123. An appropriate comparator under the PDA must not be pregnant, must be similar in ability or inability to work, and must have been treated better by the employer. If the employer treats everyone with work restrictions poorly—pregnant or not—it would not violate the PDA (unless a pregnant woman could otherwise prove discriminatory intent). See *id.*; *Troupe*, 20 F.3d at 738 (“The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars, . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work.”). Note, however, that it might violate other antidiscrimination statutes, such as the ADA or the Family and Medical Leave Act (FMLA).

124. See, e.g., *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 446–49 (4<sup>th</sup> Cir. 2013), *vacated*, 135 S. Ct. 1338 (2015); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7<sup>th</sup> Cir. 2011), *abrogated by* 135 S. Ct. 1338 (2015); *Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637, 641 (6<sup>th</sup> Cir. 2006), *abrogated by* 135 S. Ct. 1338 (2015); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312–13 (11<sup>th</sup> Cir. 1999), *abrogated by* 135 S. Ct. 1338 (2015); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 206 (5<sup>th</sup> Cir. 1998), *abrogated by* 135 S. Ct. 1338

credited this distinction between off-the-job and on-the-job injuries in its 2015 case, *Young v. United Parcel Service, Inc.*,<sup>125</sup> the Court enlarged the pool of potential comparators, which, in turn, should allow more pregnancy discrimination cases to move forward successfully. In place of a strict place-of-injury distinction, the Court settled on a test in which an accommodation policy violates the PDA if it “impose[s] a significant burden on pregnant workers,” and “the employer’s ‘legitimate, nondiscriminatory’ reasons [for the policy] are not sufficiently strong to justify the burden.”<sup>126</sup> How significant the burden on pregnant workers must be in order for a workplace accommodation policy to violate the PDA remains a subject for debate.<sup>127</sup> Still, *Young* has expanded the pool of potential comparators by allowing pregnant women, at least in some cases, to compare the employer’s more favorable treatment of another, nonpregnant worker whose underlying injury occurred at work.<sup>128</sup> Even with these recent expansions in the coverage of the PDA and ADA, however, widely

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(2015). Such cases have been widely criticized by scholars. See, e.g., Cox, *supra* note 108, at 470–71 (“[E]mployers’ post-ADAAA obligation to accommodate most nonpregnant employees with physical limitations will make it far more difficult for a PDA plaintiff to identify the type of comparator the *Young* court demands.”); Joanna Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 41 (2009) (“The comparative right of accommodation under the PDA is already minimal; permitting employers to undermine it . . . contravenes Congress’ clear intent to focus on the actual effects of pregnancy on working capacity when defining discrimination.”); Grossman, *supra* note 23, at 615 (“These 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. Yet, courts have been surprisingly tacit in evaluating these policies.”); Widiss, *supra* note 23, at 963–64 (“The problem stems from determining who ‘counts’ as a comparator for PDA analysis. Several circuits have held that employees who receive light duty assignments after workplace injuries cannot be used as comparators for PDA analysis. More recently, a handful of courts have suggested that employees accommodated pursuant to the Americans with Disabilities Act (‘ADA’) are also not appropriate comparators for PDA analysis.”).

125. 135 S. Ct. 1338, 1353–55 (2015).

126. *Id.* at 1354.

127. See Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After Young v. UPS*, 50 U.C. DAVIS L. REV. 1423, 1438 (2017) (“But, once an employer has provided an accommodation to at least some other employees, it is clear that the cost is not inherently prohibitive, and evidence that the employer routinely provides such benefits to many employees makes this all the more apparent.”).

128. Note that *Young* makes clear that nonpregnant workers injured on the job will not *always* serve as appropriate comparators for pregnant women, for

supported proposals exist for even further expansions, as reviewed in the next Section.

### C. PROPOSALS FOR ADDITIONAL EXPANSIONS IN PROTECTIONS

Among pregnancy advocates and scholars, reactions to the ADAAA and *Young* decision have been generally positive, albeit cautious. Given that less than a decade ago, remarkably few pregnant women could expect to gain relief under either the ADA or the PDA—whether due to dismissive characterizations of their condition as temporary and normal or due to the lack of relevant comparators within their workplace—recent case law reveals a shift in judicial attitudes towards pregnant workers' rights.<sup>129</sup> Nonetheless, while recognizing the developments of the last decade as key steps in pregnant women becoming “a full and integrated part of the workforce,”<sup>130</sup> these same advocates and scholars universally agree that pregnant women have yet to arrive at full integration into the workforce.<sup>131</sup>

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to do so would grant pregnant women “most-favored-nation status,” such that employers who provide one or two workers with an accommodation must provide similar accommodations to *all* pregnant workers, irrespective of any other criteria.” *Young*, 135 S. Ct. at 1342. Thus, even in the post-*Young* regime, pregnant women, through no fault of their own, may be unable to produce a comparator satisfactory to a court.

129. See Widiss, *supra* note 127, at 1424 (“The legal landscape has changed dramatically.”); see also Areheart, *supra* note 64, at 1138 (“Here, *Young* departs dramatically from previous case law in that having a pregnancy-blind accommodation policy is no longer an absolute defense against a disparate treatment claim.”); Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 560–61 (2017) (arguing that *Young* broadened the class of employees to which pregnant women may be compared, thus expanding the availability of PDA claims); Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 860 (2016) (“*Young* was an important ruling, breaking up a disturbing pattern in which courts were refusing to give the PDA its intended scope. It set the stage for courts to look more closely at denials of accommodation, and the early evidence suggests that they are doing just that. But it didn’t, and couldn’t, extend the scope of the PDA, which is the obvious next step.”); Williams et al., *supra* note 108, at 101 (“These cases suggest that, despite an initial period of confusion, courts have begun to recognize that the ADA now offers accommodations for many pregnant women.”).

130. Grossman, *supra* note 129, at 866.

131. See, e.g., *id.* at 860 (“*Young* was an important ruling, breaking up a disturbing pattern in which courts were refusing to give the PDA its intended scope. It set the stage for courts to look more closely at denials of accommodation, and the early evidence suggests that they are doing just that. But it didn’t, and couldn’t, extend the scope of the PDA, which is the obvious next step.”); see also Danielle Boyd, *Unmasking the Flaws in the Pregnancy Discrimination Act: The Fight for Equal Treatment for Pregnant Workers*, 37 WHITTIER L. REV. 53,

The particular impediment to pregnant, working women most often identified by scholars is that, even in the post-ADAAA, post-*Young* regime, these women are not guaranteed the right to reasonable accommodation in the workplace.<sup>132</sup> At best, the post-Amendments' understanding of the ADA mandates reasonable accommodation solely for women who are substantially limited by their pregnancies, not for all pregnant women.<sup>133</sup> Similarly, the post-*Young* understanding of the PDA contemplates reasonable accommodation for pregnant workers only to the extent that such accommodations are provided for nonpregnant workers.<sup>134</sup> The straightforward solution to this alleged, remaining impediment for pregnant women in the workplace—and the solution arrived at by most pregnancy scholars—is to pass new legislation.

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53 (2015) ("In the workforce today, pregnant employees still encounter discrimination, gender bias, and other barriers to equal employment opportunities."); Thelma L. Harmon, *Young v. United Parcel Service, Inc.: The Equal Treatment Fallacy*, 20 J. GENDER RACE & JUST. 97, 99 (2017) ("[W]omen of childbearing years have remained disadvantaged in the face of ostensibly fair and neutral laws and policies."); Stephanie A. Pisko, *Towards Reasonable: The Rise of State Pregnancy Accommodation Laws*, 23 MICH. J. GENDER & L. 147, 152 (2016) ("Although *Young* is a positive step and might provide great benefits to pregnant workers whose employers provide accommodation to other workers, its holding is limited."); Sarah Czypinski, Note, *Pregnant Laborers Should Expect Better: The Broken Pregnancy Discrimination Standard and How the Pregnant Workers Fairness Act Can Repair It*, 76 U. PITT. L. REV. 303, 323 (2014) ("Pregnant employees have little recourse for discrimination in the workplace.").

132. See Areheart, *supra* note 64, at 1138 ("However, the holding is still a far cry from what *Young* and most amici sought: a guaranteed right to pregnancy accommodations.").

133. See *id.* at 1134 ("For example, pregnancy may cause discrete physiological conditions such as gestational diabetes or carpal tunnel syndrome, which may constitute a disability under the ADA, entitling a pregnant worker to reasonable accommodations. But limitations intrinsically associated with a typical pregnancy, such as the need for more rest or more frequent bathroom breaks, would not generally entitle one to accommodations under the ADA.").

134. Famously, Judge Posner once wrote that under the PDA, "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees." *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994). See also Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1113 (2015) ("[A]s in other areas of Title VII law, the PDA does not require employers to create jobs or employment benefits, but only to distribute existing ones equally.").



With little exception,<sup>135</sup> scholars have enthusiastically endorsed the PWFA,<sup>136</sup> a bill introduced in both houses of the 114th and 115th Congresses, which would “prohibit[] employment practices that discriminate against making reasonable accommodations for job applicants or employees affected by pregnancy, childbirth, or related medical conditions.”<sup>137</sup> Modeled on the framework of disability law, the PWFA explicitly extends the guarantees of the ADA to all pregnant women.<sup>138</sup> This bill, which is also widely supported by multiple women’s organizations,<sup>139</sup>

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135. Bradley Areheart and Vicki Schultz stand out as the lone prior scholars to call into question the approach of the PWFA. While not the sole focus of her 2015 article on the successes and failures of the 1964 Civil Rights Act for women, Schultz considered the issues that pregnancy continued to impose for women in the workplace. Instead of championing the PWFA like everyone else, she expressed concern regarding any proposed legislation that would single out pregnant women because “most pregnant women do not want special treatment.” Schultz, *supra* note 134, at 1096. The following year, Bradley Areheart considered the otherwise widespread endorsement of the PWFA more thoroughly, raising concerns that the “expressive harms” resulting from the PWFA’s approach of singling out pregnant women for special treatment and of “equating pregnancy and disability” would ultimately cause more harm than good for pregnant women in the workplace. Areheart, *supra* note 64, at 1158–66.

136. See, e.g., Grossman, *supra* note 129, at 860 (“If passed [the PWFA] would provide important protections . . .”). Deborah Widiss has also endorsed the PWFA over the course of two articles, one pre-*Young* and one post-*Young*. See Widiss, *supra* note 23, at 1035; Widiss, *supra* note 127, at 1427. Note that numerous proposals exist to pass state-level pregnancy accommodation laws similar to the proposed PWFA; thus far, four states have successfully passed such legislation. See CAL. GOV’T CODE § 12945 (West 2011 & Supp. 2016); DEL. CODE ANN. tit. 19, § 711 (West 2013 & Supp. 2014); N.J. STAT. ANN. § 10:5-12s (West 2013 & Supp. 2015); W. VA. CODE ANN. § 5-11B-2 (West 2013 & Supp. 2015).

137. Cong. Research Serv., *Summary: H.R.2417 – Pregnant Workers Fairness Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/2417> (last visited Oct. 30, 2018); see Pregnant Workers Fairness Act, H.R. 2417, 115th Cong. (2017); Pregnant Workers Fairness Act, S. 1101, 115th Cong. (2017); Pregnant Workers Fairness Act, H.R. 2654, 114th Cong. § 2 (2015); Pregnant Workers Fairness Act, S. 1512, 114th Cong. § 2 (2015). The current versions of both the House and Senate bills remain in committee.

138. See H.R. 2417.

139. Supporting national organizations include A Better Balance, the National Partnership for Women & Families, and the National Women’s Law Center. See *Pregnant Workers Fairness*, A BETTER BALANCE, <https://www.abetterbalance.org/our-campaigns/pregnant-workers-fairness> (last visited Oct. 30, 2018); *The Pregnant Workers Fairness Act*, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES (May 2017), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/fact-sheet-pwfa.pdf>; *The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job*, NAT’L WOMEN’S LAW CTR. (May 11, 2017), <https://nwlc.org/resources/pregnant-workers-fairness-act-making-room-pregnancy-job>.

has been praised by leading pregnancy scholars as a “clear directive that employers provide reasonable support to their employees to make it possible to work safely and productively through a pregnancy,”<sup>140</sup> as well as an “improve[ment] upon the PDA . . . rooted in substantive equality and a goal of ensuring that women who reproduce have the same opportunity to succeed at work as men who reproduce.”<sup>141</sup>

On its face, advocating for the PWFA may seem appealing, as an intuitive way to increase protections for pregnant women in the workplace. Yet, such advocacy for the PWFA is arguably premature. Neither scholars nor women’s organizations have a good sense for whether pregnant women actually *need* additional protections in the workplace—due to lack of data, almost no market-level evidence, empirical or otherwise, has existed to support passing additional laws.<sup>142</sup> Even to the extent that litigation and anecdotal accounts indicate that pregnant women need additional legal protections, the absence of data has rendered advocates unable to articulate how great the need is, or how the need has changed since the ADAAA and *Young*.<sup>143</sup> Moreover, the lack

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140. Widiss, *supra* note 127, at 1453; *see also* Widiss, *supra* note 23, at 1035 (describing the PWFA as “an important step forward” for pregnancy-based discrimination).

141. Grossman, *supra* note 129, at 860.

142. *See infra* Part III.

143. To the extent that empirical research on pregnancy (as distinct from motherhood) exists, it focuses on the labor supply response when maternity or motherhood-related policies change. For example, a 2015 article by a group of health economists found that expansions in Medicaid eligibility for pregnant women during the 1990s decreased labor supply of women who had given birth in the past year by more than ten percent. The article concluded that most of this reduction was due to pregnant women no longer having to work in order to maintain a benefit of particular importance to them: health insurance. *See* Dhaival M. Dave et al., *The Effect of Medicaid Expansions in the Late 1980s and Early 1990s on the Labor Supply of Pregnant Women*, 1 AM. J. HEALTH ECON. 165, 167 (2015). On the other hand, a 2012 article found that the passage of the 1978 PDA increased labor supply of pregnant women by more than eight percentage points because, according to the author, the Act removed perceived barriers to remaining in a job both during and after pregnancy. Sankar Mukhopadhyay, *The Effects of the 1978 Pregnancy Discrimination Act on Female Labor Supply*, 53 INT’L ECON. REV. 1133, 1133–36 (2012). Similarly, a more recent article reviewing prior studies on workplace maternity leave policies concluded that maternity leaves of less than one year after the birth of a child increase female workers’ long-term labor supply. Maya Rossin-Slater, *Maternity and Family Leave Policy* 3–4 (Nat’l Bureau of Econ. Research, Working Paper No. 23069, 2017). Still, pregnancy discrimination in the workplace—or the pregnancy penalty, as it is deemed here—is a labor *demand* issue. Pregnancy discrimination, by definition, occurs when an employer takes an adverse employment action against a woman due to her pregnancy.

of market-level evidence also makes it impossible to answer questions regarding the relative prevalence of pregnancy discrimination (as opposed to discrimination against other historically disadvantaged groups) and the heterogeneity of pregnancy discrimination (that is, whether the severity of pregnancy discrimination may depend upon her disability status, socioeconomic status, or other demographics).

The inability to answer these basic questions undercuts scholars' and advocates' ability to make arguments regarding the necessity, the relative priority, and the required content of additional pregnancy legislation. In their defense, a paucity of data on labor-market outcomes of pregnant women has left them with very little evidence from which to draw, besides anecdotal evidence from recently litigated cases and popular media accounts.<sup>144</sup> In the next Part, I consider why this lack of labor-market evidence on pregnant women has persisted for so long; I then introduce the one data source that can begin to shed light on these fundamental, yet unanswered, questions about pregnancy discrimination from a system-wide perspective. Such data are critical to inform debates regarding both the need for and the composition of novel pregnancy legislation.

### III. DATA AND METHODOLOGY FOR ASSESSING THE PREGNANCY PENALTY

The lack of empirical studies on discrimination against pregnant women in the workplace is surprising at first but, at bottom, largely results from insufficient data. To illustrate the difficulty with obtaining relevant data on pregnant women, consider what is necessary for the study presented in this Article. At minimum, a study like the present one requires data that both identify pregnant women and contain enough pregnant women in the sample to make statistical inferences regarding them. Quantifying labor market disparities for pregnant women further requires at least some information on labor market status. Moreover, to investigate the motivations behind the pregnancy penalty, additional data relevant to the different aspects

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144. See, e.g., Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Sues Siskind Group for Pregnancy Discrimination (July 10, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/7-10-17.cfm> (discussing an EEOC lawsuit against an apparel company for pregnancy discrimination); see also Patrick Dorrian, *Bob Evans Discriminated Against Pregnant Server, Judge Rules*, BLOOMBERG (Aug. 18, 2017), <https://www.bna.com/bob-evans-discriminated-n73014463369> (discussing the EEOC's victory in a pregnancy discrimination suit against a restaurant).

of pregnancy—particularly data that could provide insight into pregnancy’s ability to disable, alter appearances, and increase caretaking responsibilities—would be useful. Finally, to separate out the effects of pregnancy from other potentially correlated effects, data that report at least some relevant demographics and educational background would be ideal.

Although none of the major observational datasets focused on the labor market meet these demanding requirements,<sup>145</sup> one health-focused dataset emerges as a suitable candidate. The BRFSS is an annual telephone survey compiled by the CDC to assess Americans’ health since 1984.<sup>146</sup> Today, more than 400,000 people eighteen years of age or older respond to the BRFSS each year.<sup>147</sup> Because the BRFSS’s focus is health status

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145. U.S. Census long-form data and American Community Survey data, which could theoretically provide huge samples of pregnant women, do not identify pregnant women. *See, e.g.,* Am. Fact Finder, *Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Oct. 30, 2018). The Survey of Income and Program Participation (SIPP) is another large observational dataset run by the U.S. Census Bureau that does identify respondents who are pregnant and their labor market characteristics. The SIPP, however, fails to provide other characteristics relevant to the pregnancy penalty, such as pregnancy’s effect on appearance. *See* U.S. CENSUS BUREAU, 2014 SIPP PRODUCTION: SIPP PUBLIC USE METADATA REPORT 2164–70 (2017), [http://www.nber.org/sipp/2014/2014SIPP\\_Metadata\\_AllSections.pdf](http://www.nber.org/sipp/2014/2014SIPP_Metadata_AllSections.pdf) (showing that pregnancy was offered as a response for some questions, but only in relation to why the respondent had to take unpaid leave from work). The U.S. Bureau of Labor Statistics’ (BLS) Current Population Survey identifies pregnancy, labor market status, demographic and educational characteristics, and appearance details (in the form of weight and height data) for a small subsample of respondents who have taken a follow-up survey called the Eating and Health Module. But there is just six years’ worth of data in the Module and it contains only about thirty pregnant women per year, making it difficult to identify effects of both pregnancy and its related short- and long-term effects in a statistically meaningful way. *See* Bureau of Labor Statistics, *American Time Use Survey (ATUS) Eating & Health Module Microdata Files*, U.S. DEP’T LAB., <https://www.bls.gov/tus/ehdatafiles.htm> (last updated Dec. 7, 2017) (providing the available datasets for each of the six years); Bureau of Labor Statistics, *American Time Use Survey: Eating & Health Module 2014–16 Questionnaire*, U.S. DEP’T LAB. (Dec. 2017), <https://www.bls.gov/tus/ehmquestionnaire1416.pdf> (factoring pregnancy into a respondent’s weight). The BLS’s National Longitudinal Survey of Youth is similarly limited by sample size problems. *See* NLS INVESTIGATOR, <https://www.nlsinfo.org/investigator/pages/search.jsp?s=NLSY97> (last visited Oct. 30, 2018) (providing the datasets from both the 1979 and 1997 cohorts).

146. *About the Behavioral Risk Factor Surveillance System (BRFSS)*, CENTERS FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/brfss/about/about\\_brfss.htm](https://www.cdc.gov/brfss/about/about_brfss.htm) (last updated July 31, 2014).

147. *See 2017 BRFSS Annual Survey Data and Documentation*, CENTERS FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/brfss/annual\\_data/annual\\_2017.html](https://www.cdc.gov/brfss/annual_data/annual_2017.html) (last updated Sept. 10, 2018).

and health behaviors, the BRFSS has been widely used by scholars focusing on health outcomes; it has been used more sparsely, however, by scholars focusing on employment outcomes, which may explain why it has not yet been used to study pregnancy in the labor market.<sup>148</sup>

While the majority of questions focus on health conditions, the BRFSS additionally asks respondents about labor market status, household income, disability status, health conditions, weight, height, education, and demographic background.<sup>149</sup> As the BRFSS is the only observational dataset well suited to the present study, this Article will take advantage of its long time span, relying on the last quarter-century of BRFSS data, from 1993 (the year Title I of the ADA went into effect) to 2016 (the last year of available data), whenever possible. Note, however, that because the availability of some questions may vary from year to year within the BRFSS, a few analyses will necessarily be limited to a shorter time span. For the most part, however, this time period allows for comparisons pre- and post-ADAAA as well as pre- and post-*Young*.<sup>150</sup>

Using these data, the analysis will focus on the employment status of labor market participants.<sup>151</sup> Because this analysis

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148. In fact, the labor market studies that have previously used the BRFSS have examined the effects of health status on labor market outcomes, much like the present paper. See, e.g., Christopher S. Carpenter, *The Effects of Employment Protection for Obese People*, 45 INDUS. REL. 393 (2006) (examining the impact of disability discrimination laws and litigation on the labor market outcomes of obese individuals); Shinall, *supra* note 103, at 11–20.

149. See 2018 BRFSS Questionnaire, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan. 18, 2018), [https://www.cdc.gov/brfss/questionnaires/pdf-ques/2018\\_BRFSS\\_English\\_Questionnaire.pdf](https://www.cdc.gov/brfss/questionnaires/pdf-ques/2018_BRFSS_English_Questionnaire.pdf). Even though supervised and compiled by the CDC at the national level, the BRFSS is actually administered on the ground at the state level. Consequently, some variation exists in the optional questions that states choose to ask respondents; nonetheless, every state asks the above questions. See, e.g., 2017 Modules by State by Data Set & Weight, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/brfss/questionnaires/modules/state2017.htm> (last updated Sept. 4, 2018) (listing the BRFSS module used by each state).

150. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

151. The BRFSS does not report individual earnings—instead reporting only household income in ranges—which is why this analysis focuses on employment of labor market participants. See CTRS. FOR DISEASE CONTROL & PREVENTION, BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM 2015 CODEBOOK REPORT (2016), [https://www.cdc.gov/brfss/annual\\_data/2015/pdf/codebook15\\_llcp.pdf](https://www.cdc.gov/brfss/annual_data/2015/pdf/codebook15_llcp.pdf). Because the analysis seeks to gain insight into pregnancy discrimination in employment (a labor demand issue), it focuses on pregnant women whose labor supply decisions have remained the same, or at least similar to, their prepregnancy decisions by eliminating women who have exited the labor market (and have chosen to significantly alter their labor supply) from the sample.

seeks to gain insight into pregnancy discrimination (a labor demand issue), the analysis eliminates women who have exited the labor market (and have chosen to significantly alter their labor supply) from the sample.<sup>152</sup> Consequently, for the analysis presented in the next two Parts, I define both labor market participation and employment to match as closely as possible to the definitions used by the Bureau of Labor Statistics (BLS).<sup>153</sup> I define labor market participants as respondents who are employed for wages, self-employed, or out of work as participating in the labor market.<sup>154</sup> I define homemakers, students, and individuals who are retired or unable to work as non-labor market participants.<sup>155</sup> Among labor market participants, I count respondents who are employed for wages or self-employed as employed, and I count respondents who are out of work as unemployed. Because the majority of this analysis focuses on *employment of labor market participants*, I concentrate on respondents who are employed or looking for work; non-labor market participants (i.e. self-identified homemakers, students, retirees, and individuals unable to work) are dropped from the sample. Sharpening the focus to respondents who are in the labor market (as opposed to all respondents) eliminates respondents who cannot work and who voluntarily choose not to work. This focus, in turn, eliminates at least some confounding labor supply issues—issues which are particularly salient when studying women who are about to have children.<sup>156</sup>

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152. The role of pregnant women's labor supply will be further explored, however. See *infra* Part IV.A.3.

153. Technically, the BLS defines employed as doing any work for pay or profit during a given week and defines unemployed as not having a job but actively looking for one during the past four weeks. Bureau of Labor Statistics, *How the Government Measures Unemployment*, U.S. CENSUS BUREAU, [https://www.bls.gov/cps/cps\\_htgm.htm](https://www.bls.gov/cps/cps_htgm.htm) (last updated Oct. 8, 2015).

154. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 151, at 25 (coding whether respondents are employed for wages, self-employed, out of work, homemakers, students, retired, or unable to work).

155. See *id.*

156. Note that labor market participation is not a perfect measure of labor supply since a woman may pull herself out of the labor market as a result of low labor market demand for her services. Along these lines, a woman may become a homemaker or a student temporarily while she looks for work. Nonetheless, if we assume any reduction in pregnant women's labor market participation is solely the result of their own voluntary choices to reduce their labor supply (and has nothing to do with reduced employer demand for their services), the estimates can then be viewed as an upper bound on the number of women who voluntarily choose to leave the labor market as a result of childbearing.

The primary focus of the analysis will be comparing the employment outcomes of 53,031 pregnant adult women, ages eighteen to forty-four, to the outcomes of 1,272,995 nonpregnant adult women of childbearing age (defined in the BRFSS as women ages eighteen to forty-four).<sup>157</sup> The analysis will further take advantage of the additional information on respondents contained within the BRFSS; to the extent that pregnant and nonpregnant women are systematically different from each other in ways beyond expecting a child, these differences should be accounted for and held constant. Examples of such relevant information, which will serve as control variables in this study, include year of survey, age,<sup>158</sup> educational attainment, race, ethnicity, and marital status. Moreover, because some states have more robust legal regimes for protecting pregnant women,<sup>159</sup> these differences will be accounted for through state-level control variables.<sup>160</sup>

Finally, the analysis will utilize the rich health-related data contained within the BRFSS, which can provide insight into the role of the short- and long-term components of the pregnancy penalty. For example, the BRFSS reports whether respondents have activity limitations<sup>161</sup> and/or require accommodating equipment.<sup>162</sup> Both indicators can increase the understanding of

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157. The BRFSS only asks women within this age range about their pregnancy status. See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 151, at 27.

158. Regression analyses all include a control for age as well as an age-squared term.

159. For a map documenting state-by-state availability of pregnancy discrimination/support laws, see *State by State Map – Pregnancy Discrimination Laws, Breastfeeding and Leave Rights*, LEGAL MOMENTUM, <https://www.legalmomentum.org/state-state-map-pregnancy-discrimination-laws-breastfeeding-and-leave-rights> (last visited Oct. 30, 2018). Adding state fixed effects into a regression means adding indicator variables for each state (minus one to prevent multicollinearity). These indicator variables will be equal to one for a respondent's state of residence, and otherwise equal to zero. Note also that time fixed effects (i.e. indicator variables equal to one for the year the respondent is observed) are also included in every regression presented here.

160. These controls, commonly known as state fixed effects, are indicator variables equal to one when a resident lives in that state.

161. Respondents were asked if they are "limited in any way in any activities because of physical, mental, or emotional problems." See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 151, at 28.

162. Respondents were classified as needing accommodation if they reported having "any health problem that require[d] [them] to use special equipment, such as a cane, a wheelchair, a special bed, or a special telephone," even if that use is only "occasional" or "in certain circumstances." See *id.*

the comparative disability statuses<sup>163</sup> of pregnant and nonpregnant women, as well as the understanding of disability's relative effects on the employment outcomes of these two populations. The BRFSS also reports respondents' current weight and height,<sup>164</sup> which can provide insight into the appearance-altering effects of pregnancy. To address the care-increasing aspects of pregnancy, the analysis will take advantage of BRFSS data reporting whether respondents already have minor children.<sup>165</sup> These data will allow for additional comparisons of pregnant women having their first child (for whom caretaking responsibilities may increase most dramatically after childbirth) to pregnant women who already have other children, to nonpregnant women who have children, and to nonpregnant women without children.

In the following Part, the empirical analysis first compares the employment of women, by childbearing status, graphically over time. The graphs and analyses document the persistent, raw gaps in employment between pregnant and nonpregnant women over the last quarter-century. The next Part further relays the regression-adjusted estimates of these gaps, which take into account how the average pregnant woman differs from the average nonpregnant woman in other ways that may matter for employment outcomes, such as in demographics and education.<sup>166</sup> A regression analysis allows empirical researchers to examine the mean outcome for a group of interest, holding all other sources of potential variation constant.<sup>167</sup> The regression-aggression results tell much the same story as do the graphical results

163. Throughout the analysis, a respondent is defined as disabled if she reports having an activity limitation and/or needing accommodating equipment.

164. *Id.* at 27.

165. *Id.* at 25.

166. As seen in Appendix Table 2, column one of the regression analysis just controls for pregnancy status, race, ethnicity, age (and age-squared), marital status, and the presence of children. Column two additionally controls for BMI classification (overweight, obese, and morbidly obese) and interactions of these classifications with pregnancy as well as disability status and interaction of disability status with pregnancy. Column three further controls for the interaction of education level with pregnancy.

167. More formally, the regression model used to gain insight into the components of the pregnancy penalty is

$$Y = X_{ist}\beta + Z_{ist}\gamma_1 + P_t\gamma_2 + (Z_{ist} * P_t)\gamma_3 + S\sigma_1 + T_t\sigma_2 + \varepsilon_{ist},$$

where  $Y$  is the outcome variable of interest,  $X$  is a vector of individual characteristics (including age, age squared, race, ethnicity, highest level of education, marital status, and presence of a child),  $P$  is an indicator variable equal to one if the respondent is pregnant,  $Z$  is a vector of components that may contribute to pregnancy's labor market effects (including BMI classification and disability),



regarding the pregnancy penalty: The penalty is large and enduring, especially when compared to other well-documented penalties against historically disadvantaged groups in the labor market.

#### IV. QUANTIFYING THE PREGNANCY PENALTY

This Part takes an initial step towards answering the many questions that remain about systematic pregnancy discrimination in the labor market. Understanding the how much, how often, when, and why of pregnancy discrimination is an essential prerequisite to making policy arguments regarding the inadequacy of current legislation and the necessity of future legislation, for without answers to these basic questions, such arguments remain threadbare. Part IV.A begins by documenting and contextualizing the magnitude of gaps in employment that exist for pregnant women. Part IV.A also considers whether these persistent gaps in employment of pregnant women are driven by employers through labor demand, or pregnant women themselves through labor supply. Part IV.B tackles the question of why the pregnancy penalty exists, examining the role of both the short- and long-term effects of pregnancy.

##### A. UNDERSTANDING THE PREGNANCY PENALTY

###### 1. The Persistence of the Pregnancy Penalty

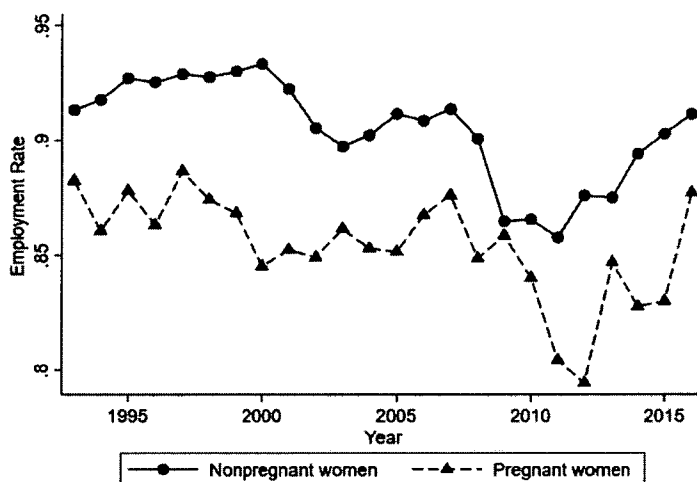
Using the 1993 to 2016 BRFSS data, Figure 1 graphs the employment rate of nonpregnant female labor-market participants, ages eighteen to forty-four (circle line), against the employment rate of pregnant labor-market participants within the same age range (triangle line). As the graph makes clear, the employment rates of pregnant women have remained substantially below the employment rates of nonpregnant women during the past quarter-century. Nor does this employment gap appear to have closed much over time. In fact, the gap in employment rates of pregnant women seems to have remained just as robust after the passage of the 2008 Amendments to the ADA as before

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P\*Z is an interaction term (which will be statistically different from zero if the effects of BMI classification and disability are different for pregnant women than for nonpregnant women), S are state fixed effects, and T are year fixed effects. All regressions are estimated using a linear probability model since the outcome variables of interest are binary—equal to one if in the labor market (employed), and equal to zero if not in the labor market (unemployed).

the Amendments.<sup>168</sup> Some visual evidence does exist to suggest that employment outcomes for pregnant women may have improved somewhat in the single year of data available following the 2015 *Young*<sup>169</sup> decision; time will reveal whether this improvement is lasting.<sup>170</sup>

**Figure 1. 1993–2016 BRFSS Employment Rates of Nonpregnant and Pregnant Women, Ages 18–44, in the Labor Market**



When averaged over the twenty-four-year time period, the raw gap in employment rates of pregnant women is 5.0 percentage points; that is, pregnant women participating in the labor market were 5.0 percentage points less likely to be employed than were nonpregnant women in the labor market between 1993 and 2016.<sup>171</sup> The regression-adjusted gap in pregnant and

168. See also Appendix Table 5 (confirming through regression analysis that pregnant women's employment outcomes did not meaningfully improve after the ADAAA).

169. 135 S. Ct. 1338 (2015).

170. Appendix Table 6, which uses regression analysis to compare employment outcomes of pregnant women before and after *Young*, does not find a statistically significant improvement in employment rates when comparing the eighteen months immediately before the decision to the eighteen months immediately after the decision. This statistical insignificance may be an artifact of lack of data, given the recency of the *Young* decision. More years of data are necessary to evaluate fully the impact of *Young*.

171. The raw employment-gap summary statistics numbers are provided in Appendix Table 1.

nonpregnant women's employment rates—which, as described in Part III, takes into account other differences in demographics and education<sup>172</sup>—is slightly smaller, at 4.2 percentage points.<sup>173</sup> In sum, even though scholars and advocates may have been generally optimistic about the pregnancy-related legal developments over the past decade,<sup>174</sup> the labor-market data lends far fewer reasons to be optimistic in terms of systematic outcomes.

## 2. The Depth of the Pregnancy Penalty

The persistence of a gap in employment rates for pregnant women for more than two decades, in spite of supposed expansions in legal protections,<sup>175</sup> may alone be a source for concern. But what does a 4.2 percentage point gap in employment for pregnant women mean in context? In an environment of limited resources, especially when it comes to civil rights protections, it is difficult to discern from Figure 1 alone how relatively large the pregnancy employment gap is when compared to other well-documented employment gaps for historically disadvantaged groups.<sup>176</sup> Figures 2 and 3 are useful to place the pregnancy gap in context and clarify its significance.

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172. For a detailed description of regression control variables, see *supra* note 166.

173. This estimate is derived from the coefficient on pregnancy in column two of Appendix Table 2.

174. See *supra* Parts II.B–C.

175. See *supra* Parts II.B–C.

176. The economics literature on the persistent and robust wage and employment gaps faced by historically disadvantaged groups is broad. See, e.g., Dan Black et al., *Why Do Minority Men Earn Less? A Study of Wage Differentials Among the Highly Educated*, 88 REV. ECON. & STAT. 300 (2006) (finding that only about one-quarter of the wage gap between highly educated white men and highly educated black men is explained by premarket factors); Joni Hersch, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height*, 26 J. LAB. ECON. 345 (2008) (finding that skin color and height affect wages among new lawful immigrants to the United States); Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q. J. ECON. 835 (1998) (finding that the racial composition of an establishment's customers impacts the race of who gets hired and the relative wages of employees by race).

**Figure 2. 1993–2016 BRFSS Employment Rates of White Women, Black Women, and Pregnant Women, Ages 18–44, in the Labor Market**

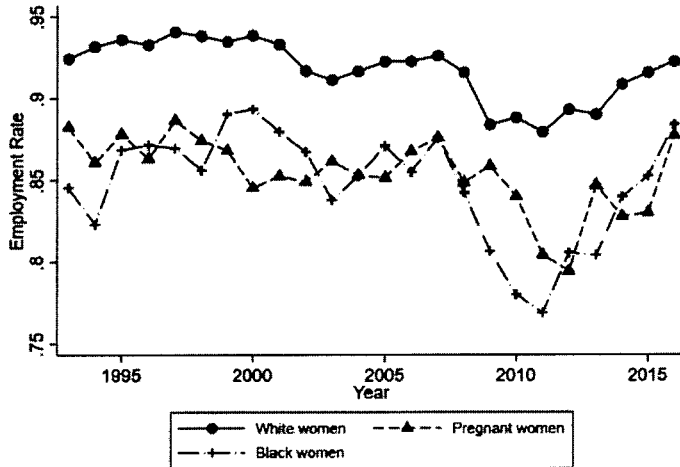


Figure 2 plots the employment rate of white female labor-market participants, ages eighteen to forty-four (circle line), against the employment rate of pregnant labor-market participants within the same age range (triangle line).<sup>177</sup>

Figure 2 additionally plots the employment rate of *black* female labor-market participants, ages eighteen to forty-four (plus line). Figure 2 is intended to compare the magnitude of the well-known black-white employment gap to the less-understood pregnancy gap. The visual evidence from Figure 2 is striking—pregnant women in the labor market do about as poorly, in terms of finding and maintaining employment, as black women in the labor market. This visual observation holds in both the estimates of the raw and of the regression-adjusted average employment gaps for pregnant women between 1993 and 2016. Although black women’s employment rate remained slightly lower than pregnant women’s employment rate over this time period, the raw employment gap between pregnant women and black

177. Note that the calculated white and black employment rates in Figure 2 are calculated for all women, regardless of their pregnancy status. If instead these race-based employment rates were calculated using only the nonpregnant women in the sample, the circle and plus lines would shift upwards, leaving the triangle pregnancy line clearly below. Thus, Figure 2 if anything understates the relative disadvantage of pregnant women in employment.

women is just 0.7 percentage points; the adjusted employment rate gap is merely 0.2 percentage points.<sup>178</sup>

**Figure 3. 1993–2016 BRFSS Employment Rates of White Women, Hispanic Women, and Pregnant Women, Ages 18–44, in the Labor Market**

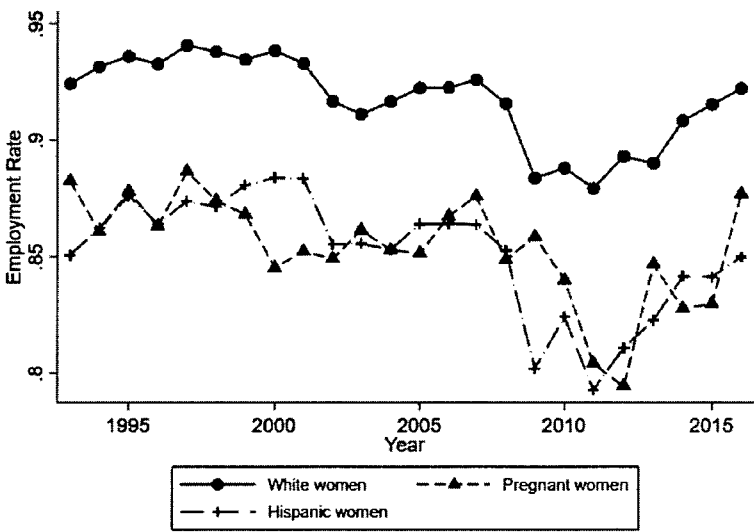


Figure 3 is very similar to Figure 2, except in Figure 3, the plus line designates employment rate of *Hispanic* female labor-market participants, ages eighteen to forty-four.<sup>179</sup> The visual evidence from Figure 3 suggests that pregnant women in the labor market may do slightly better, in terms of finding and maintaining employment, as Hispanic women in the labor market. Here, this visual observation holds only in the estimate of the raw average employment gap. Even though the raw average employment gap of 0.3 percentage points between pregnant women and Hispanic women suggests that Hispanic women have slightly worse outcomes, the adjusted employment rate gap yields the opposite conclusion. According to the regression-adjusted estimate of the gap, pregnant women in the labor market

178. See column two of Appendix Table 2.  
179. As in Figure 2, the employment rates of white women and Hispanic women are calculated using all women in the sample, regardless of pregnancy status. This choice arguably understates the depth of the pregnancy penalty. See *supra* note 177.

have a 3.1 percentage point lower employment rate than Hispanic women's employment rate in the labor market.<sup>180</sup>

Taken together, the data presented in Figures 1, 2, and 3 indicate that pregnant women in the labor market fare both absolutely and relatively poorly. Over the last twenty-four years, their employment rates have remained consistently below average, at rates similar to those of minority women. These findings alone may suggest that pregnant women should be a relative priority for advocates of increased civil rights' protections. Still, pregnancy is different than race or ethnicity—not only is pregnancy more voluntary and mutable,<sup>181</sup> but also it may send a signal about future labor supply, which is considered in the next Section.

### 3. Assessing the Role of Labor Supply

Before further exploring the BRFSS data, it is important to step back and consider whether the pregnancy gap documented in the prior two Sections is equivalent to pregnancy discrimination. In other words, is the 4.2 percentage point lower employment rate for pregnant women, discussed in Part IV.A.1, entirely due to employer discrimination against pregnant women? Or is it due to something else? The principal concern is that, instead of the employment gap for pregnant women being driven by employers' preference against employing pregnant women (i.e. labor demand), the gap may instead be driven by pregnant women's own preferences (i.e. labor supply). As previously discussed in Part I.B, both the novel caretaking demands and personal values associated with motherhood may leave a new mother unwilling to be employed.

Although limitations in the BRFSS data render it impossible to parse out precisely how much of the employment gap is due to pregnant women's labor supply, two significant clues suggest that the gap is not principally due to labor supply. First,

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180. See column two of Appendix Table 2. The regression-adjusted gap can change in magnitude or direction from the raw gap whenever the two groups being compared differ in other respects. Here, it might be the case that the differences in the raw and adjusted gaps seen between pregnant women and Hispanic women may be driven by differences in average age or education between these two groups of women.

181. Although voluntariness and mutability were once the hallmarks of defining a protected class under civil rights law, recent extensions in civil rights law to protect individuals on the basis of disability, sexual orientation, credit history, and criminal history have been increasingly in tension with these concepts. See generally Jessica A. Clarke, *Against Immutability*, 125 YALE L. J. 2 (2015) (putting forth a critique of continued reliance on the mutability doctrine).

recall that the employment rates presented in this Article are the *employment rates of labor market participants*. Thus, any woman who has completely removed herself from the labor market, identifying instead as a homemaker, student, retired, or unable to work, is excluded from the data analysis presented throughout this text. By excluding women from the analysis who are not looking for employment, the employment gap presented in the prior two Sections cannot be blamed on women who voluntarily and completely choose to stop working.<sup>182</sup>

As a second test of the effect of pregnancy on the labor supply of pregnant women, I examine the effect of pregnancy on a woman's presence in the labor market. Although the raw gap in labor market participation rates of nonpregnant and pregnant women is 6.0 percentage points,<sup>183</sup> the regression-adjusted gap in participation rates is not statistically different from zero.<sup>184</sup> In other words, pregnant women are just as likely to participate in the labor market as are their nonpregnant peers, once all other differences between these two groups are taken into account. While this finding cannot completely rule out the hypothesis that the pregnancy employment gap is due in part to other changes in labor supply (for instance, willingness to work certain hours or in certain locations), it does strongly suggest that the pregnancy employment gap documented in the prior two Sections is not entirely a labor supply story. Instead, this finding suggests that the source of the gap is at least somewhat driven by the labor demand side—through the mechanism of employer discrimination.

## B. THE COMPONENTS OF THE PREGNANCY PENALTY

If employer discrimination is at least partially to blame for the low employment rates of pregnant women, then the question of *why* employers continue to discriminate against pregnant women—in the presence of two relevant, federal antidiscrimination laws—naturally follows. The following three Sections consider the potential drivers of the pregnancy penalty, both long-term and short-term. To the extent that pregnancy signals a

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182. Admittedly, one of the limitations in the BRFSS data with respect to labor supply is the inability to discern the length of time worked (e.g., from full-time to part-time) since willingness to work longer hours may change with pregnancy and motherhood. Thus, the BRFSS is less helpful with respect to women who may reduce, but not completely eliminate, their labor supply because of pregnancy.

183. See Appendix Table 1.

184. See column three of Appendix Table 3.

long-term change in caretaking responsibilities or triggers employers' value judgments regarding motherhood, the pregnancy penalty may be an extension of the previously discussed motherhood penalty.<sup>185</sup> The relationship between the pregnancy and motherhood penalties are considered in Part IV.B.1. On the other hand, Part IV.B.2 and Part IV.B.3 explore the role of short-term changes that accompany the nine months of pregnancy in the form of appearance changes and disability. Understanding both the long- and short-term drivers of the pregnancy penalty is essential before making any future recommendations regarding pregnancy policy.

### 1. Pregnancy and Motherhood

As discussed in Part I.B, empirical scholars have long documented a wage and employment penalty for being a mother in the labor market. The penalty is robust and persistent, even after other observable differences between mothers and nonmothers are taken into account. Indeed, studies on mothers using more extensive data than the BRFSS—which can take into account not only differences in demographics, marital status, and education, but also differences in the hours worked, years of experience, occupations, and industries of mothers versus nonmothers—still find evidence of a motherhood penalty in both wages<sup>186</sup> and employment.<sup>187</sup>

In light of the motherhood penalty, it is natural to question its relationship to the pregnancy penalty. If employers penalize existing mothers, they may also penalize expectant mothers. To the extent that the pregnancy penalty is related to the motherhood penalty, the relationship must be clarified. The pregnancy penalty may be fully coextensive with the motherhood penalty; it may instead be smaller or larger. Indeed, the pregnancy penalty could be partially or wholly the result of employers' anticipating the long-term changes that come with a female employee's motherhood in terms of caretaking and status. Clarifying the relationship between the motherhood and preg-

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185. See *supra* Part I.B.1.

186. See, e.g., Anderson et al., *supra* note 81, at 282 (finding a three to five percent wage penalty for mothers); Michelle Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 213 (2001) (finding a five to seven percent wage penalty per child for mothers).

187. See, e.g., Correll et al., *supra* note 76, at 1330 (finding that employers were less likely to call a mother back through an experimental audit study).



nancy penalties is essential to clarifying the appropriate remedial policy. To the extent that the pregnancy penalty is the same as the motherhood penalty, then any legal policy meant to reduce the motherhood penalty—for example, a policy that encourages employers to keep mothers on their payroll, such as government-subsidized paid family leave<sup>188</sup>—should also reduce the pregnancy penalty. To the extent that the pregnancy penalty differs from the motherhood penalty, however, then such mother-directed policies will fail to fully close the employment gap between pregnant and nonpregnant women.

To examine the relationship between the motherhood and pregnancy penalties, Figure 4 graphs the employment rates of nonpregnant nonmothers (circle line), nonpregnant mothers of minor children (plus line),<sup>189</sup> and pregnant women (triangle line) in the years between 1993 and 2016, inclusive. The difference between the circle line and the plus line is the motherhood penalty, and the difference between the circle line and the triangle line is the pregnancy penalty. As Figure 4 makes clear, the triangle line consistently falls below the plus line, indicating that the pregnancy penalty has remained consistently greater than the motherhood penalty. Employment rates of pregnant women fell consistently below employment rates of mothers throughout this twenty-four-year time period. Between 1993 and 2016, the raw estimated gap in employment rates between pregnant women and nonpregnant mothers is 4.1 percentage points; the regression-adjusted gap is 1.6 percentage points.<sup>190</sup> The adjusted estimates further indicate that employment outcomes are especially poor for pregnant women who are already mothers. Pregnant women having their first child have employment rates that are 4.2 percentage points below nonpregnant nonmothers<sup>191</sup> and 0.8 percentage points below nonpregnant mothers.<sup>192</sup> Pregnant women who already have children, however, have employment rates that are 6.8 percentage points below nonpregnant

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188. See *infra* note 324 and accompanying text (discussing prior studies that show positive effects of paid family leave on women's post-childbirth employment).

189. Mothers are defined in the BRFSS as women who have one or more minor children living in their household. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 151, at 25.

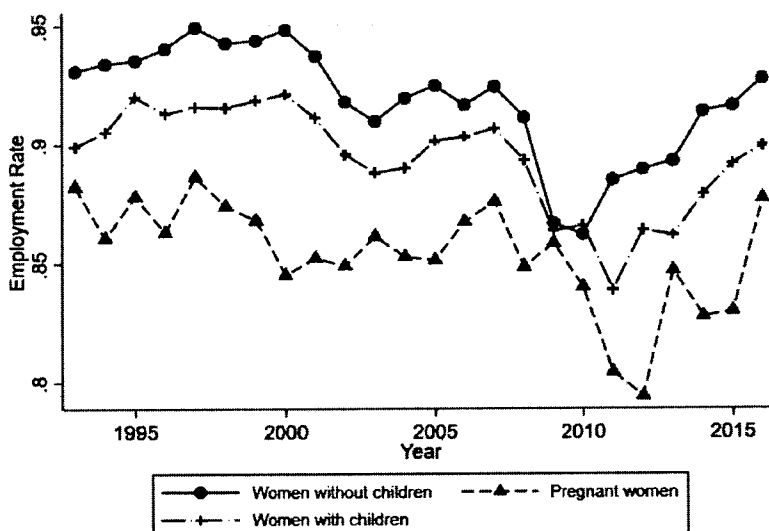
190. See column two of Appendix Table 2.

191. See column two of Appendix Table 2.

192. See column one of Appendix Table 4 (limiting the regression sample to pregnant women and existing mothers).

nonmothers<sup>193</sup> and 3.8 percentage points below nonpregnant mothers.<sup>194</sup>

**Figure 4. 1993–2016 BRFSS Employment Rates of Women without Children, Women with Children, and Pregnant Women, Ages 18–44, in the Labor Market**



Because motherhood is defined broadly in the BRFSS—as having a minor child under eighteen years old living in the household<sup>195</sup>—one potential pushback to drawing inferences regarding the motherhood penalty from Figure 4 relates to the age of children. To the extent that the motherhood penalty is driven by increased caretaking responsibilities, these caretaking responsibilities are typically highest (or at least, perceived to be highest) when a child is young.<sup>196</sup> Along these lines, since a preg-

193. See column two of Appendix Table 2.

194. See column one of Appendix Table 4.

195. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 151, at 25.

196. The EEOC recognizes the common perception that mothers of young children have more extensive caretaking responsibilities than do mothers of older children in its guidance on caretaker status. See *Employer Best Practices for Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last updated Jan. 19, 2011) (“Ensure that job openings, acting positions, and

nant woman is about to have a *young* child, comparing the employment rates of pregnant women and of mothers *with young children* offers a potentially better comparison of the pregnancy penalty and the motherhood penalty. Figure 5 makes precisely this comparison. The BRFSS does not contain information on age of a respondent's children in every available year, just the years 1994–2000 (inclusive). For these years, the BRFSS asks respondents whether they have children ages zero to four. Using this additional data, Figure 5 graphs the employment rates of all mothers (circle line), mothers of children ages zero to four (plus line), and pregnant women (triangle line). Although the employment rate of mothers of young children falls below the employment rate of mothers generally, it remains consistently higher than the employment rate of pregnant women. This visual observation from Figure 5 holds in the raw and adjusted employment gap estimates. Between 1994 and 2000, the raw estimated gap in employment rates between pregnant women and mothers of young children is 4.3 percentage points;<sup>197</sup> the regression-adjusted gap is 0.6 percentage points.<sup>198</sup>

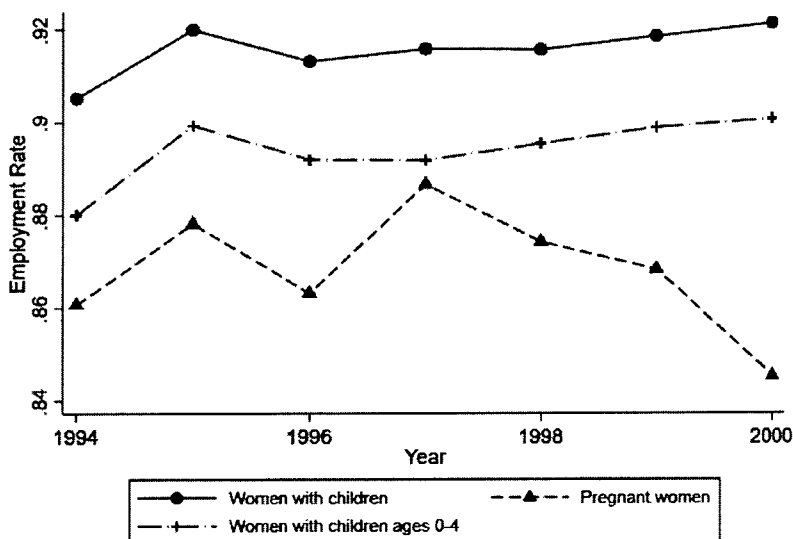
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promotions are communicated to all eligible employees regardless of caregiving responsibilities. Do not assume that certain employees (for example, mothers of young children or single parents) will not be interested in positions that require significant travel or working long or unusual hours.”).

197. See Figure 5.

198. See column two of Appendix Table 4 (limiting the regression sample to pregnant women and existing mothers of young children).

**Figure 5. 1994–2000 BRFSS Employment Rates of Women with Children, Women with Children Ages 0–4, and Pregnant Women, Ages 18–44, in the Labor Market**



In sum, Figures 4 and 5 demonstrate that the pregnancy penalty is more severe than the motherhood penalty. Although the pregnancy penalty may be partially explained by the well-known penalty experienced by all mothers in the workplace, it cannot be fully explained by the anticipated long-term effects of becoming a mother. Thus, the next two Sections consider whether the pregnancy penalty can be further explained by the short-term appearance changes and activity limitations that often accompany the condition.

## 2. Pregnancy and Appearance

As discussed in Part I.A, pregnancy can transform a woman's appearance in many respects. Although some of these changes may be considered appearance-improving, such as the famed "pregnancy glow,"<sup>199</sup> other changes may not be as favorably viewed by employers. The most obvious—and from an employment-outcomes perspective, most concerning—aspect of the

199. Yvonne Butler Tobah, *Is Pregnancy Glow Real?* MAYO CLINIC (Mar. 15, 2018), <http://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/expert-answers/pregnancy-glow/faq-20115104>.

appearance transformation that accompanies pregnancy is weight gain. In light of the prior research documenting a weight penalty for nonpregnant women in the labor market, the question arises whether the weight penalty forms a component of the pregnancy penalty.<sup>200</sup>

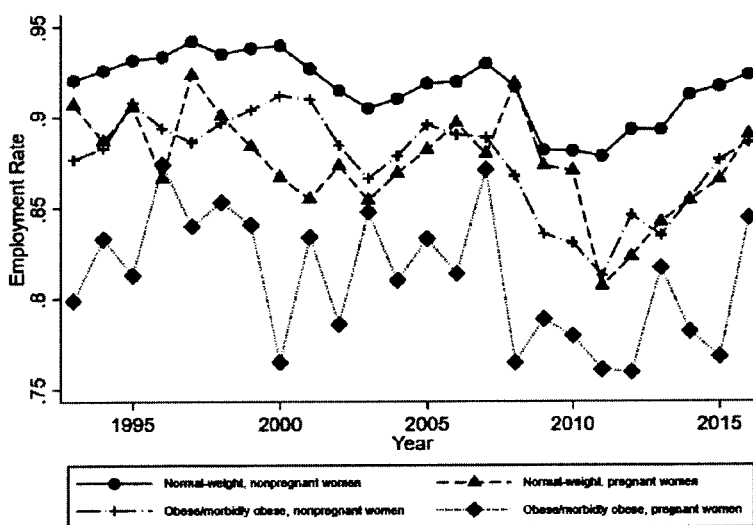
Figure 6 explores the relationship between pregnancy and weight, graphing, for comparison, the employment rates of the following groups: nonpregnant, normal-weight women (circle line); pregnant, normal-weight women (triangle line); nonpregnant obese and morbidly obese women (plus line); and pregnant obese and morbidly obese women (diamond line). This graph suggests that heavier women, regardless of pregnancy status, have lower employment rates than thinner women. The regression-adjusted gaps in employment are particularly informative here. They suggest that a woman is penalized for gaining weight, even if she has a good reason, like pregnancy, for doing so. Compared to a nonpregnant, normal-weight woman, a nonpregnant, obese woman is 1.2 percentage points less likely to be employed; a pregnant, obese woman is 8.3 percentage points less likely to be employed.<sup>201</sup> In other words, even if a woman has a very good reason to have a higher BMI, and even if the higher BMI is non-permanent—as in the case of pregnancy—the weight penalty appears to hold for women's employment outcomes.

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200. Alternatively, weight might be treated differently (or more sympathetically) in pregnant women than in nonpregnant women. See *supra* Part I.A.1.

201. See column 2 of Appendix Table 2.

Figure 6. 1993–2016 BRFSS Employment Rates of Normal-Weight Women (by Pregnancy Status) and Obese/Morbidly Obese Women (by Pregnancy Status), Ages 18–44, in the Labor Market



This finding may be surprising, given that pregnant women are encouraged to gain weight (and are certainly difficult to blame for doing so).<sup>202</sup> Nonetheless, two possible reasons may explain why weight is just as injurious to employment outcomes for pregnant women as for nonpregnant women. The 1993–2016 BRFSS data do not contain information on a woman's due date.<sup>203</sup> As such, a pregnant woman with a higher BMI classification may be closer to giving birth than a pregnant woman with a lower BMI classification. A sooner due date potentially may

202. This idea of individual blame has been particularly prevalent throughout the legal literature on obesity. See Lindsay F. Wiley, *Shame, Blame, and the Emerging Law of Obesity Control*, 47 U.C. DAVIS L. REV. 121, 142 (2013) ("As a legal and public policy issue, obesity has now been almost completely co-opted by public health. It is increasingly viewed as a behavior or 'lifestyle' choice that is dangerous for the individual's health and costly for society, akin to smoking, illicit drug use, or risky sexual behavior.").

203. See generally BRFSS Annual Survey Data, *supra* note 11 (asking questions about children in the home, income, number of dependents, and health, but not due dates).

signal a rapidly approaching leave of absence from work, especially for women whose jobs allow access to such leaves.<sup>204</sup> If employers are more likely to terminate, or less likely to hire, pregnant women who are close to going out on maternity leave—even though such an adverse employment action may violate FMLA<sup>205</sup>—it could explain the lower employment rates of heavier, pregnant women.

Yet perhaps the more compelling explanation for the lower employment rates of heavier pregnant women derives from the already existing theories behind weight and appearance discrimination, formed outside the context of pregnancy. As legal scholar Deborah Rhode has noted in her work on appearance discrimination:

For some goods and services, . . . employees' attractiveness can be an effective selling point, and part of a strategy to "brand" the seller through a certain look. According to a spokesperson for the Borgata Hotel Casino and Spa, its weight limits and periodic "weigh-in" requirements for "Borgata Babes" cocktail waitresses responded to market demands: "Our customers like being served by an attractive cocktail server." Analogous assumptions evidently underpinned the order by a L'Oreal cosmetic store manager to "[g]et me somebody hot" for a sales position; Abercrombie and Fitch's notorious policy of hiring sexually attractive, "classic American," white salespersons; and the preference by certain bars and restaurants for staff that are "young" and "trendy" or not "too ethnic." . . . "So You Want to Hire the Beautiful," ran the title of a *Business Week* column. "Well, Why Not?"<sup>206</sup>

In other words, the weight/appearance penalty against women is driven by employers' desire to sell sex, based on a perception that their customers will be more responsive to a woman whom they find sexually appealing. This idea that appearance discrimination in the workplace is driven by employers' desire to sell sex is supported by empirical evidence: A 2016 study found the weight penalty for women was most severe in customer-facing jobs.<sup>207</sup> To the extent that the weight penalty in the workplace is

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204. Pregnant working women in the United States do not automatically have access to maternity leave, either paid or unpaid. Currently, the only federal protection available to working women who give birth is FMLA, which provides twelve weeks of unpaid leave to women who work full time for large employers (defined statutorily as fifty or more employees) and have done so for at least the past twelve months. See 29 U.S.C. § 2611(2)(A)–(B) (2012).

205. *Id.* § 2601.

206. DEBORAH RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 106 (2010) (citations omitted).

207. See Shinall, *supra* note 36, at 132 ("[O]bese and morbidly obese women working in public-interaction jobs are paid less than normal-weight women working in precisely the same jobs.").

derived from a reduced ability to sell sex, then weight gain because of pregnancy would arguably be just as injurious to a woman's perceived sex appeal as would weight gain for any other reason.<sup>208</sup> As such, part of the pregnancy penalty appears to derive from an appearance-based component, but as seen in the next Section, it is further exacerbated by an ability-based component.

### 3. Pregnancy and Disability

As the prior two Sections have described, the pregnancy penalty appears to be derived only partially from the motherhood penalty and exacerbated by the weight gain that generally accompanies the condition. This Section examines another potential driver of the pregnancy penalty: pregnancy's ability to limit a woman's activities. As discussed in Part I.A, developing an activity limitation during pregnancy is common; the plaintiff in *Young v. United Parcel Service, Inc.* was herself a woman whose activities were reduced by pregnancy.<sup>209</sup> Well-documented is the fact that developing such a limitation outside of pregnancy is harmful to wage and employment outcomes, which is known as the disability penalty. Still unknown is how the disability penalty interacts with the pregnancy penalty.

To shed light on this issue, the BRFSS identifies women who are pregnant and either "limited in any way in any activities" or "require[] . . . use [of] special equipment."<sup>210</sup> Similar to weight, being disabled in the above manner seems to have an exacerbating effect on the pregnancy penalty. Disabled, pregnant women are 5.8 percentage points less likely to be employed than non-disabled, pregnant women according to the raw estimate, and 4.2 percentage points less likely to be employed according to the

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208. Cf. RHODE, *supra* note 206, at 13, 91–116 (discussing employers' arguments in favor of selling sex appeal as a job requirement based on customer preferences).

209. Peggy Young was the plaintiff in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015). After becoming pregnant, Young's doctor told her "that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter." *Id.* at 1344.

210. The full BRFSS questions ask if respondents are "limited in any way in any activities because of physical, mental, or emotional problems" or have "any health problem that requires you to use special equipment, such as a cane, a wheelchair, a special bed, or a special telephone," even if that use is only "occasional" or "in certain circumstances." Individuals who responded 'yes' to one or more of these questions are classified as disabled for the purposes of this Article. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 151, at 28.



regression-adjusted estimate.<sup>211</sup> More concerning, comparing these disabled, pregnant women to nondisabled, nonpregnant women reveals a tremendous gap in employment rates: a raw gap of 11.0 percentage points and an adjusted gap of 8.4 percentage points.<sup>212</sup> The result is that women who are both disabled and pregnant endure shockingly high rates of unemployment. Considered together with the other findings from the BRFSS, pregnant, disabled women appear to be a subgroup particularly in need of increased legal protection. The next Part considers how best to increase such protection.

## V. REMEDYING THE PREGNANCY PENALTY

The prior Part utilized data from the only available large sample of pregnant women to quantify the pregnancy penalty, at least in terms of employment outcomes. This Part builds on that work and considers what policymakers can learn from that exercise. I begin in Part V.A by considering the legislation favored by most pregnancy scholars and advocates, the PWFA,<sup>213</sup> and demonstrate why evidence from the BRFSS casts doubt on the Act's projected efficacy. In place of the PWFA, I advocate in Part V.B for the passage of federal paid family leave legislation that covers pregnant mothers prior to birth and both parents after birth. Because similar legislation has already passed in a handful of states, Part V.B uses the BRFSS data from these states to discern the critical features of family leave legislation. Part V.B additionally documents the efficacy of well-designed family leave legislation in remedying the pregnancy penalty.

### A. THE PROBLEMATIC PWFA

As discussed in Part II.C, both legal scholars and advocates have broadly supported the proposed PWFA legislation as a needed and assured advancement for pregnant women in the workplace. Using data from the BRFSS, the empirical analysis presented in Part IV of this Article has bolstered prior arguments that pregnant women need additional legislative support: As a group, pregnant women in the labor market have a great deal of catching up to do in terms of finding and maintaining employment. Yet at the same time, empirical analysis casts

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211. See column two of Appendix Table 2.

212. See column two of Appendix Table 2.

213. Pregnant Workers Fairness Act, H.R. 2417, 115th Cong. (2017); Pregnant Workers Fairness Act, S. 1101, 115th Cong. (2017).

doubt on the PWFA's ability to help these women catch up and to improve their employment rates.

As drafted, the PWFA is based entirely upon the ADA model. The PWFA would provide "reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition"<sup>214</sup>—much in the same way that the ADA guarantees "reasonable accommodation"<sup>215</sup> to individuals "substantially limit[ed in] one or more major life activities."<sup>216</sup> The only limitation placed upon the guarantee of reasonable accommodation under either the PWFA or the ADA is a showing that provision of such an accommodation would "impose an undue hardship" on the employer.<sup>217</sup>

Although such protections sound good in theory, a great deal of empirical evidence exists to suggest that the ADA model does not work; it does not improve employment outcomes either specifically in terms of pregnancy or, more broadly, in terms of *any* covered health condition.<sup>218</sup> To see the evidence specific to pregnancy, return to Figure 1, presented in Part IV.A.1. Recall that, in theory, the 2008 Amendments to the ADA expanded the Act's coverage to include pregnant women whose condition substantially limited them in a major life activity or caused them to be regarded as such.<sup>219</sup> These Amendments went so far as to convince the EEOC to reverse its ADA guidance on pregnancy—from a pre-ADAAA position of no coverage unless pregnancy exacerbated an underlying "physiological disorder"<sup>220</sup> to a post-ADAAA position that "likely . . . a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary."<sup>221</sup> Yet in spite of this supposedly increased protection for pregnant women in the workplace, the visual evidence in Figure 1 indicates that pregnant women have seen no improvement in employment rates in the post-ADAAA regime. Regression analyses confirm this visual evidence,<sup>222</sup> demonstrating that employment

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214. S. 1101.

215. 42 U.S.C. § 12111(9) (2012).

216. *Id.* § 12102(1)(A).

217. *Id.* § 12112(5)(A); S. 1101 § 2(1).

218. *See supra* notes 61–62 and accompanying text.

219. 42 U.S.C. § 12101.

220. 29 C.F.R. § 1630.2(h) (1992).

221. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 67.

222. *See* column one of Appendix Table 5.

rates of pregnant women during the seven years following the 2008 ADA Amendments were not statistically different from the employment rates of pregnant women during the seven years prior to the Amendments.<sup>223</sup> Nor have pregnant women's employment rates improved in a statistically meaningful way since the EEOC released its pregnancy guidance under the ADA in 2015.<sup>224</sup>

These findings with respect to pregnant women are not anomalous in terms of evaluating the ADA model's performance. A vast economics literature already exists on the underperformance of the ADA<sup>225</sup> and on other laws based upon the ADA.<sup>226</sup>

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223. The regression methodology of comparing differences in an outcome of interest before and after a relevant event is known as difference-in-differences. More formally, I follow the difference-in-differences model below:

$$Y = X_{ist}\beta + L_{ist}\gamma_1 + P_t\gamma_2 + (L_{ist} * P_t)\gamma_3 + S\sigma_1 + T_t\sigma_2 + \varepsilon_{ist},$$

where Y is the outcome variable of interest (employment), X is a vector of individual characteristics (including age, age squared, race, ethnicity, highest level of education, marital status, and presence of a child), P is an indicator variable equal to one if the respondent is pregnant, L is an indicator variable equal to one for observations that postdate the relevant legal event outcomes (for the ADA, after the 2008 Amendments), P\*Z is an interaction term (whose statistical significance will indicate whether the legislative event affected employment-outcomes of pregnant women), S is state fixed effects, and T is year fixed effects. All regressions are estimated using a linear probability model since the outcome variable of interest is binary. The difference-in-differences model compares pre-event outcomes with post-event outcomes, holding constant other relevant differences in respondents. In Appendix Table 5, I present difference-in-differences regression results, comparing employment outcomes of pregnant women from 2002 to 2008 to the outcomes from 2009 to 2015. Note that I do not include the 2016 data in this analysis because of the potentially confounding effects of the *Young* decision.

224. A second differences-in-differences estimation, presented in Appendix Table 6, demonstrates that employment rates of pregnant women have not improved in a statistically significant manner since 2015, in which both the EEOC issued its inclusive pregnancy guidance and the Supreme Court issued the *Young* decision.

225. See, e.g., Acemoglu & Angrist, *supra* note 61 (examining the ADA's impact on employment rates of disabled workers); John Bound & Timothy Waidmann, *Accounting for Recent Declines in Employment Rates Among the Working-Aged Men and Women with Disabilities*, 37 J. HUM. RESOURCES 231, 246–48 (2002) (analyzing the relationship between disability insurance and employment rates for the disabled); DeLeire, *supra* note 61, at 708–11 (examining the impact of the ADA on employment and wages of disabled men); Julie L. Hotchkiss, *A Closer Look at the Employment Impact of the Americans with Disabilities Act*, 39 J. HUM. RESOURCES 887, 907–09 (2004) (examining the effect of the ADA on the unconditional employment probability among the disabled); Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 INDUS. REL. 31, 60–62 (2003) (measuring the employment effects of the ADA with an alternative disability variable).

226. See, e.g., Beegle & Stock, *supra* note 62, at 856–57 (finding a decline in

These empirical evaluations of the ADA model consistently conclude that the ADA has failed to improve—and may have actually harmed—wage and employment outcomes of the disabled.<sup>227</sup> Although the majority of these evaluations have studied the pre-Amendments version of the ADA, at least one empirical study has examined the post-Amendments version and found that employment outcomes of affected individuals still failed to improve.<sup>228</sup>

Although scholars both in law and in economics have previously issued valid critiques of the ADA model, their primary concerns have diverged based on discipline. Economics scholars have been principally concerned with the ADA's reasonable accommodation model, which shifts both the determination of eligibility and the costs of compliance entirely onto employers.<sup>229</sup> Unless an employee later sues, which remains a relatively rare occurrence,<sup>230</sup> the employer serves, in the majority of cases, as the final decisionmaker on whether and what type of accommodation is required by the ADA for a disabled worker.<sup>231</sup> Moreover, given that the statutory guiding principles for employers are vague on their face—"reasonable" without imposing "undue hardship"<sup>232</sup>—the ambiguity inherent in the statute may enable

labor market outcomes of the disabled after the passage of state disability laws based on the ADA model).

227. Compare Acemoglu & Angrist, *supra* note 61, at 917, and DeLeire, *supra* note 61, at 701 (finding a decline in labor market outcomes of the disabled after the passage of the ADA), with Bound & Waidmann, *supra* note 225, at 245–46, Hotchkiss, *supra* note 225, at 907–09, and Kruse & Schur, *supra* note 225, at 61 (finding no improvement in labor market outcomes of the disabled after the passage of the ADA).

228. See Shinall, *supra* note 103, at 11–20 (demonstrating that employment for at least one disabled group—the morbidly obese—has not improved since the passage of the 2008 ADA Amendments, which was intended to remedy the shortcomings of the original Act).

229. See, e.g., Acemoglu & Angrist, *supra* note 61, at 950 (blaming accommodation costs (and costs arising from disputes over what constitutes a reasonable accommodation) for their finding that disabled men and women worked between one and four fewer weeks per year after passage of the 1990 version of the ADA); DeLeire, *supra* note 61, at 711 (concluding that the increased costs to firms arising from the ADA's accommodation mandate was responsible for a 7.2 percentage point decline in employment of disabled men after 1990).

230. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 433 (2004) ("[B]arely one in nine employment discrimination cases arise under the ADA or FMLA.").

231. *Id.* at 440 (describing how most discrimination complaints do not proceed to some sort of adjudication).

232. See 42 U.S.C. § 12112(5)(A) (2012).

and embolden employers not to comply.<sup>233</sup> According to economic theory, an employer will refuse to accommodate a disabled worker as long as the employer perceives that the cost associated with ADA compliance (i.e. the expected cost of accommodating a disabled worker) is greater than the cost associated with ADA noncompliance (i.e. the expected probability of being sued times the expected cost of a lawsuit).<sup>234</sup> Some economists have blamed the underperformance of the ADA on compliance costs that are too high;<sup>235</sup> others have blamed noncompliance costs that are too temptingly low.<sup>236</sup> Nonetheless, virtually all economists agree that the *relatively* higher cost of compliance, when compared to the cost of noncompliance, that results from the reasonable accommodation model is responsible for disabled workers' lack of progress since the passage of the ADA.<sup>237</sup>

In contrast, legal scholars have primarily criticized the expressive harms that inadvertently result from the ADA model. Vicki Schultz, for example, has argued that laws singling out certain individuals for additional protections in the workplace may "lead to increased stereotyping, discrimination, and resentment against them. . . generally."<sup>238</sup> Unlike the Title VII model, the ADA model selects some individuals for protection, but not others, because it does not recognize reverse discrimination claims.<sup>239</sup> Along these lines, Bradley Areheart has raised more

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233. For a discussion of economists' critiques of the reasonable accommodation model, see Shinall, *supra* note 103, at 4.

234. *See id.*

235. *See, e.g.,* Acemoglu & Angrist, *supra* note 61, at 950 (arguing that compliance costs are too high since employers must bear the entirety of the accommodation costs, which may be uncertain in terms of both monetary and time cost); DeLeire, *supra* note 61, at 696 (same).

236. *See, e.g.,* Clermont & Schwab, *supra* note 230, at 451–56 (illustrating the difficulty for employment discrimination plaintiffs of succeeding during litigation); Shinall, *supra* note 103, at 4 (arguing that noncompliance costs are too low because employees are so unlikely to win employment discrimination lawsuits).

237. *See* DeLeire, *supra* note 61, at 694 ("[A]lthough the ADA may increase job accommodation for disabled workers, the costs of complying with the act may reduce the demand for their labor and undo its intended effects.").

238. Schultz, *supra* note 134, at 1080.

239. *Compare* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) (recognizing reverse discrimination claims under Title VII), *with* Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110–325, § 6(a), 122 Stat. 3553 (codified at 42 U.S.C. § 12201 (2012)) ("Nothing in [the ADA] shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability."), *and* H.R. REP. NO. 110-730, pt. 1, at 17 (2008) ("The bill prohibits

extensive concerns with the ADA model for its unintended labeling effects. According to Areheart,

the expressive impact that labeling . . . as a disability has on perceived work capability . . . expresses an inability to work. This signal is selected in and further constructed by . . . the structure of public disability benefits that define disability as an inability to work, and the very semantics of the word disability.<sup>240</sup>

In other words, the stigma that results from singling certain individuals out as needing additional help to do their jobs may ultimately cause them more harm than good in the labor market.

Both economists' and legal scholars' criticisms hold not just for the ADA, but for any law based on the ADA model, including the PWFA. Like the ADA, the PWFA would shift both the determination and the costs of reasonable accommodation compliance entirely onto employers. Furthermore, the PWFA would inflict precisely the same expressive harms as the ADA by singling out pregnant women for special treatment and arguably (albeit unintentionally) stigmatizing them as less able to work.<sup>241</sup> These two issues, if left unaddressed, are likely to render any new pregnancy legislation ineffective, just as they have already rendered the ADA ineffective for disabled workers.<sup>242</sup> One potential method of addressing these issues is to reform the ADA model entirely—as it affects pregnant women specifically and disabled workers more generally. In light of the ADA's continual failure on the labor-market level, developing such a reform must become a priority for disability scholars<sup>243</sup> and remains an issue I intend to confront in future work.

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reverse discrimination claims by disallowing claims based on the lack of disability . . .").

240. Areheart, *supra* note 64, at 1164; see also Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 737 (2014) (arguing that workplace accommodations should be provided based on "effectiveness in elevating functionality, instead of on recipients' group-identity status").

241. See Areheart, *supra* note 64, at 1164.

242. See *supra* notes 61–62 and accompanying text.

243. Several legal scholars have previously suggested reforming the ADA model by making accommodations more readily available to all. The idea behind such proposals is that the stigma of needing, asking for, and using an accommodation in the workplace will diminish if everyone is entitled to one. Although these proposals would likely go far in reducing the expressive harms of the ADA model, they would do so at the expense of shifting additional and inherently uncertain costs onto employers, which make them unlikely to pass on the federal level in the near future. See, e.g., Areheart, *supra* note 64, at 1169 ("Decoupling accommodations from protected classes would have little or no expressive harms for pregnant workers and would yield economic, hedonic, and structural benefits."); Jessica L. Roberts & Elizabeth Weeks Leonard, *What Is (and Isn't)*

In the meantime, however, a more straightforward solution than revolutionizing disability law exists to remedy the pregnancy penalty: paid family leave legislation. A well-designed family leave law can address much of the concern inherent in the ADA model. More crucially, empirical evidence suggests that a well-designed law can go far in remedying the pregnancy penalty in employment. The next Section explores this evidence in detail.

## B. PROMOTING PAID LEAVE LAWS

Even though the PWFA, as currently designed, is unlikely to ameliorate the pregnancy penalty, an alternative solution can bring meaningful change to the employment outcomes of pregnant women. When implemented correctly, paid family leave laws can close the gap between pregnant and nonpregnant workers. In this Section, I turn back to the BRFSS data to consider what lessons can be gleaned from the paid leave laws that already exist in a handful of states.

### 1. Existing Paid Family Leave Laws

Although the term paid family leave may be often tossed around by policymakers and the media, the term can encompass a variety of different concepts and, without further definitional precision, can be ambiguous in meaning.<sup>244</sup> For instance, paid family leave might signify compensated leave time for one parent or for both parents.<sup>245</sup> It may signify leave before childbirth, or it may begin at the birth of the child.<sup>246</sup> It may provide a small percentage of a parent's normal pay, or it may provide full pay during the leave period.<sup>247</sup> It may be funded by the employer, by employees themselves, or the cost may be shared.<sup>248</sup>

Currently, laws mandating paid family leave in the United States exist only at the state and local level, and they remain

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*Healthism?*, 50 GA. L. REV. 833 (2016) (arguing for “accommodations to individuals with health conditions more generally, not just individuals with ‘disabilities’”); see also Stein et al., *supra* note 240, at 737–44 (arguing that “reasonable accommodations should be liberally available to all workers who need them and without reference to one’s identity”).

244. See Rossin-Slater, *supra* note 143, at 5 (“[T]here is wide variation in four key policy levers: duration, rights to payment during leave, job protection entitlement, and the financing of benefits.”).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

rare.<sup>249</sup> They are principally funded through governmental disability insurance programs,<sup>250</sup> which compensate individuals unable to work due to a non-job-related injury.<sup>251</sup> The family leave provisions of these disability insurance programs take one of two general forms. The first form, referred to here as *pre-family leave*, provides leave to pregnant women due to complications from pregnancy and childbirth. That is, to the extent that pregnancy disables a mother, whether before or after giving birth, laws in two states and one U.S. territory mandate that she receive some weekly compensation from the state disability insurance program while unable to work, up to half a year.<sup>252</sup>

Disabled expectant and new mothers in Hawaii receive fifty-eight percent of their weekly earnings (capped at \$594),<sup>253</sup> while similarly situated mothers in New York receive fifty percent of their weekly earnings (capped at \$653).<sup>254</sup> Puerto Rico, the only territory to mandate paid family leave, may at first appear to have the most generous compensation policy, providing sixty-five percent of weekly pay to disabled new and expectant mothers.<sup>255</sup> Puerto Rico imposes such low caps (\$55 for agricultural workers, \$113 for nonagricultural workers), however, that the program is actually the least generous of the three.<sup>256</sup> Even though paid leave of any kind may seem a modern concept, these

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249. See *State Family and Medical Leave Laws*, NAT'L CONF. ST. LEGISLATURES (July 19, 2016), <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> (noting that only a few states offer paid family and medical leave).

250. *Id.* (noting that existing state programs "are funded through employee-paid payroll taxes and administered through their respective disability programs").

251. Compensation to individuals unable to work due to a *job-related* injury, in contrast, is provided through state workers' compensation programs. See Widiss, *supra* note 23, at 984.

252. *State Paid Family and Medical Leave Insurance Laws*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES 1–2 (July 2018), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/state-paid-family-leave-laws.pdf>.

253. HAW. DEPT OF LABOR & INDUS. RELATIONS, HAWAII FAMILY LEAVE LAW (HFL) AND THE FAMILY AND MEDICAL LEAVE ACT (FMLA) COMPARISON CHART (2013), <http://labor.hawaii.gov/wsd/files/2013/10/Family-Leave-Comparison-Chart-rev-10-29-2013.pdf>.

254. *Paid Family Leave: Information for Employees*, N.Y. ST., <https://paidfamilyleave.ny.gov/paid-family-leave-information-employees> (last visited Oct. 30, 2018).

255. *DI 52135.215 Puerto Rico Public Disability Benefits (PDB)*, U.S. SOC. SECURITY ADMIN. (Sept. 25, 2008), <https://secure.ssa.gov/poms.nsf/lnx/0452135215>.

256. *Id.* (citing the Puerto Rico benefits law).



three laws, which provide benefits to disabled mothers and disabled workers more generally within the covered jurisdiction, have all been in place for half a century.<sup>257</sup>

The second form, referred to here as *full-family leave*, provides the complete benefits of disability-related pre-family leave for the pregnant parent as well as caretaking-related leave for both parents after the birth of the child. Although more extensive than pre-family leave programs, full-family leave programs are also exclusively funded through state disability insurance programs in the three states where they currently exist.<sup>258</sup> In 2004, California became the first state to mandate full-family leave, providing fifty-five percent of weekly pay (capped at \$1173) for up to six weeks of caretaking leave for both parents and compensating birth mothers disabled by pregnancy at the same rate for up to one year.<sup>259</sup> Note that the generosity of the California law ratcheted up on January 1, 2018 to seventy percent of weekly pay for low-wage workers.<sup>260</sup>

New Jersey followed suit in 2009, providing two-thirds of weekly compensation (capped at \$633) to both parents for six weeks of caretaking leave, and the same rate of compensation to the birth mother for up to half a year of disability leave.<sup>261</sup> Rhode Island, the most recently enacted law, passed in 2014, provides sixty percent of weekly pay (capped at \$1173) to both parents for up to four weeks of caretaking leave and to the birth mother for up to thirty weeks of disability leave.<sup>262</sup> Note, however, that the scope of full-family leave laws is rapidly expanding; in addition to the increased generosity of the California law beginning in 2018, similar, new laws will go into effect in New York, the state

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257. The New York law passed in 1949; the Puerto Rico law passed in 1968; and the Hawaii law passed in 1969. See HAW. REV. STAT. ANN. § 392-1; N.Y. COMP. CODES R. & REGS. tit. 12, § 356.3; 11 L.P.R.A. § 203.

258. *State Family and Medical Leave Laws*, *supra* note 249 (noting that California, New Jersey, and Rhode Island's leave programs are funded through state disability programs and employee payroll taxes).

259. CAL. EMP'T DEV. DEP'T, PAID FAMILY LEAVE MARKET RESEARCH 14 (2015), [http://www.edd.ca.gov/Disability/pdf/Paid\\_Family\\_Leave\\_Market\\_Research\\_Report\\_2015.pdf](http://www.edd.ca.gov/Disability/pdf/Paid_Family_Leave_Market_Research_Report_2015.pdf).

260. See *Major Paid Family Leave Expansion Signed by Governor*, CAL. ST. ASSEMBLY DEMOCRATIC CAUCUS (Apr. 11, 2016), <http://caucus.asmdc.org/press-release/major-paid-family-leave-expansion-signed-governor> (discussing California Assembly Bill 908).

261. *Family Leave Insurance*, N.J. DEP'T LAB. & WORKFORCE DEV., <https://www.nj.gov/labor/fli/fliindex.html> (last visited Oct. 30, 2018).

262. *Temporary Disability Insurance/Temporary Caregiver Insurance*, R.I. DEP'T LAB. & TRAINING, <http://www.dlt.ri.gov/tdi> (last visited Oct. 30, 2018).

of Washington, and Washington D.C. within the next three years.<sup>263</sup>

Because these laws—regardless of whether they provide pre-family or full-family leave—are funded through governmental disability insurance programs, the programs need not be funded solely by employer contributions. In fact, the existing programs in California and Rhode Island are entirely funded by *employee* payroll tax contributions; the programs in the remaining states are jointly funded by employers and employees.<sup>264</sup> Moreover, the programs in all three states contain explicit weekly caps.<sup>265</sup> As such, even though high-income workers may receive an absolutely greater amount during leave than low-income workers, high-income workers receive a relatively lower percentage of their average weekly income than do low-income workers.

The fact that all states consistently tier leave compensation by average weekly income—but other aspects of the state laws, including wage replacement rate and cap amount, vary widely—raises questions regarding family leave program design. Have any of these family leave programs successfully ameliorated the pregnancy penalty within the jurisdiction? If so, what design elements of a family leave law are critical to its success? Yet before tackling these questions, the next Section steps back to assess whether family leave laws should target all pregnant women equally or, instead, specifically target certain subgroups of pregnant women.

## 2. Determining the Target Population of Paid Leave Laws

Thus far, this Article has considered pregnant women as a whole, demonstrating that the employment penalty encountered by pregnant women generally is both considerable and difficult to overcome. This Section, on the other hand, asks whether pregnancy has heterogeneous effects on distinct subpopulations of pregnant women. Asking such a question is critical to designing any legislative solution. If certain populations of pregnant women need more labor market support than others, then an ideal family paid leave law should specifically target these women.

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263 *State Paid Family and Medical Leave Insurance Laws*, *supra* note 252, at 1, <http://www.nationalpartnership.org/research-library/work-family/paid-leave/state-paid-family-leave-laws.pdf>.

264. *Id.* at 5.

265. *Id.* at 7–9.

One subpopulation that immediately comes to mind are pregnant women of lower socioeconomic status. Some prior research has suggested that pregnant women with lower education and lower incomes encounter the greatest roadblocks when trying to take family leave from their jobs. A 2014 report by the Department of Labor, for example, concluded that low-income individuals were least likely to have access to *any* kind of family leave, let alone paid family leave.<sup>266</sup> Similarly, a 2017 report by the AEI-Brookings Working Group suggested that paid family leave voluntarily offered by employers was a fringe benefit disproportionately enjoyed by higher-level employees.<sup>267</sup>

The existing research on availability of family leave has solely focused on the effects of family leave policies on *post-child-birth* employment.<sup>268</sup> Yet leave policies may also have significant effects on *pre-childbirth* employment. Pregnant women with access to paid family leave or temporary disability leave prior to childbirth are protected in the event that they develop activity limitations. Without access to paid leave, a pregnant woman with an activity limitation faces the difficult choice of either ceasing to work<sup>269</sup> (and facing potentially dire economic consequences) or attempting to continue work in order to obtain a paycheck, even though continuing work might subject her to discipline for diminished job performance, termination,<sup>270</sup> or worse, endanger her health or her baby's health. Such difficult decisions are rendered even more difficult when a pregnant woman resides in an economically insecure household. Losing a paycheck or a job may devastate a household with few resources on which to fall back.<sup>271</sup>

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266. JACOB ALEX KLERMAN ET AL., ABT ASSOCS., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 130 (2012), <https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf> (finding that low-income workers were least likely to have access to unpaid FMLA leave).

267. See AEI-BROOKINGS WORKING GRP. ON PAID FAMILY LEAVE, PAID FAMILY AND MEDICAL LEAVE: AN ISSUE WHOSE TIME HAS COME, at v (2017), <http://www.aei.org/wp-content/uploads/2017/06/Paid-Family-and-Medical-Leave-An-Issue-Whose-Time-Has-Come.pdf> (“[E]mployer-provided paid leave is concentrated among high-income workers; a majority of those below median income received no pay while on leave.”).

268. See *infra* note 324 and accompanying text.

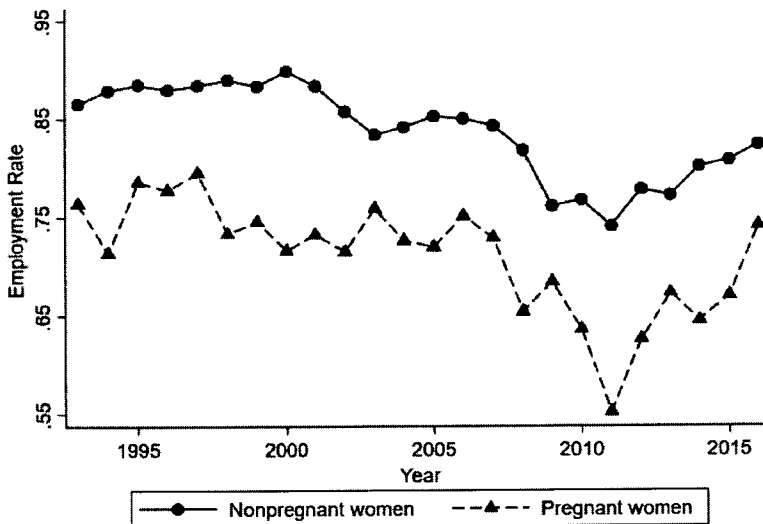
269. Indeed, this is the story of Peggy Young in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).

270. If a pregnant woman was severely activity limited, discipline or termination might be legal under the PDA if the employer treated other non-pregnant, similarly limited employees in the same manner. See *supra* note 134 and accompanying text.

271. See J. Michael Collins & Leah Gjertson, *Emergency Savings for Low-*

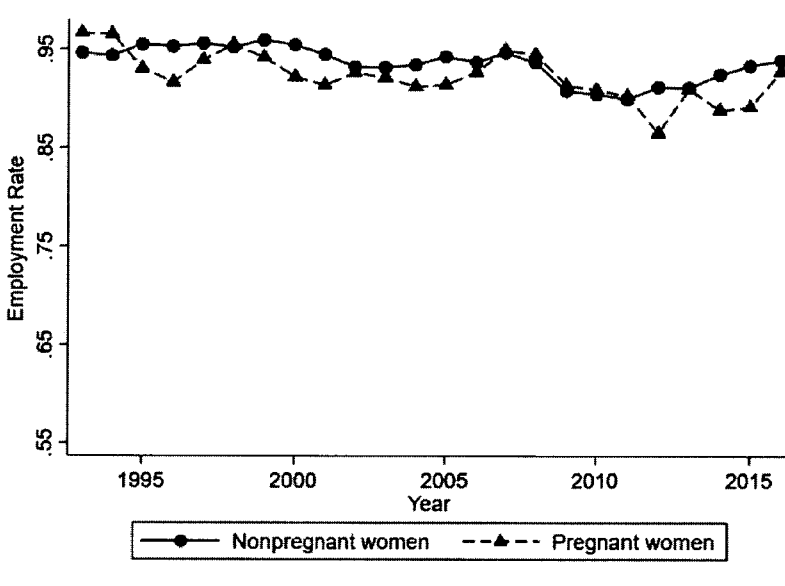
With these issues in mind, Figures 7 through 9 question whether employment outcomes of pregnant women differ by socioeconomic status. Initially, Figures 7 and 8 examine the pregnancy penalty for low-education workers, defined as having a high-school education or less, as compared to the penalty for high-education workers, defined as having at least some college education. In both figures, the vertical distance between the circle (nonpregnant) and triangle (pregnant) lines represents the raw employment gap between these workers.

**Figure 7. 1993–2016 BRFSS Employment Rates of Women with a High School Diploma or Less (by Pregnancy Status), Ages 18–44, in the Labor Market**



*Income Consumers*, 30 FOCUS 12, 15 (2013), <https://www.irp.wisc.edu/publications/focus/pdfs/foc301c.pdf> ("Saving can be exceptionally difficult for the low-income population, because basic living expenses use a large proportion of available resources, leaving little or nothing left over to save.").

Figure 8. 1993–2016 BRFSS Employment Rates of Women with at Least Some College (by Pregnancy Status), Ages 18–44, in the Labor Market



Together, Figures 7 and 8 indicate that the pregnancy penalty falls disproportionately on women of lower educational levels. Indeed, the average raw gap between the employment rates of pregnant and nonpregnant high-education women over the 1993 to 2016 period is only 1.3 percentage points.<sup>272</sup> Over the same period, the average raw gap between the employment rates of pregnant and nonpregnant low-education women is 12.7 percentage points—nearly tenfold the rate gap for high-education women.<sup>273</sup>

Besides allowing for comparison of the pregnancy penalty along educational lines, the BRFSS also allows for comparison of the penalty across household income lines. BRFSS respondents report their household income in ranges.<sup>274</sup> Using this information, Figure 9 compares employment rates of pregnant and

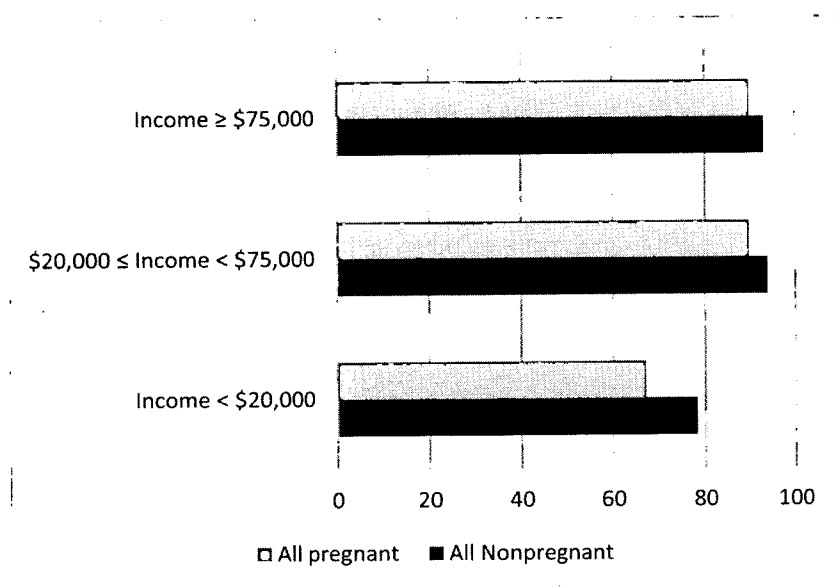
272. The regression-adjusted employment gap over this period is 1.5 percentage points.

273. The regression-adjusted employment gap over this period is 8.8 percentage points.

274. The BRFSS ranges are less than \$10,000, \$10,000 to \$14,999, \$15,0000

nonpregnant women in the labor market, based on income level.<sup>275</sup> The low-income range (less than \$20,000) reflects women whose households live close to the federal poverty line.<sup>276</sup> The high-income range (\$75,000 or more) reflects women who selected the highest household income range available in the BRFSS.

**Figure 9. 1993–2016 BRFSS Employment Rates of Women in the Labor Market, Ages 18–44, by Household Income Level**



As visible in Figure 9, over the 1993 to 2016 period, the raw employment gaps faced by pregnant women in the labor market living in middle- and high-income households are similar and relatively small: 4.0 and 3.1 percentage points, respectively.<sup>277</sup>

to \$19,999, \$20,000 to \$24,999, \$25,000 to \$34,999, \$35,000 to \$49,999, \$50,000 to \$74,999, and \$75,000 or more. Note that the top category was \$50,000 or more in 1993.

275. Note that the top earners in 1993 (\$50,000 or more) are included in the top income category in Figure 9.

276. During the 1993 to 2016 period, the federal poverty line for a household of four ranged from \$14,350 to \$24,300. See ASPE, *Prior HHS Poverty Guidelines and Federal Register References*, U.S. DEPT HEALTH & HUM. SERVICES, <https://aspe.hhs.gov/prior-hhs-poverty-guidelines-and-federal-register-references> (last visited Oct. 30, 2018).

277. The regression-adjusted employment gaps over this period are 2.9 and 2.8 percentage points, respectively.

For pregnant women living in low-income households, however, the raw employment gap is substantially greater: 11.1 percentage points.<sup>278</sup>

Together, Figures 7 through 9 make clear that the pregnancy penalty disproportionately falls on women whose socioeconomic status is already disadvantaged. Regardless of how disadvantaged status is defined—through educational level or household income level—pregnant women in the labor market who fall on the low end of the distribution face employment gaps that are many times higher than pregnant women with advantaged socioeconomic status.

Moreover, the relatively higher employment penalty experienced by socioeconomically disadvantaged pregnant women compounds with the already lower rates of employment faced by *all* socioeconomically disadvantaged women, regardless of pregnancy status. Notice in Figures 7 through 9 that the baseline employment rates for *nonpregnant* women who are socioeconomically disadvantaged are much lower than the rates for advantaged nonpregnant women. The combined result is employment rates that are startlingly low for socioeconomically disadvantaged pregnant women. The raw employment rates of low-education pregnant women in the labor market are 22.5 percentage points lower than those of high-education nonpregnant women in the labor market, and 21.3 percentage points lower than those of high-education pregnant women. Similarly, the raw employment rates of low-income pregnant women in the labor market are 25.9 percentage points lower than those of high-income nonpregnant women in the labor market, and 22.8 percentage points lower than those of high-income pregnant women.

Given the employment gaps faced by all pregnant women in the labor market—gaps that are particularly immense for socioeconomically disadvantaged pregnant women in the labor market—the question arises whether family leave laws can ameliorate *any* of the pregnancy penalty. The next Section turns to this question, examining how existing state family leave laws have affected the employment rates of pregnant women, paying particular attention to the employment rates of disadvantaged pregnant women.

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278. The regression-adjusted employment gap over this period is 10.3 percentage points.

### 3. Determining the Efficacy of Paid Leave Laws

In the prior Parts, this Article has made the case that the pregnancy penalty is a serious problem for women in the labor market, and particularly women in the labor market with low levels of education and household income. Yet still uncertain is whether family leave laws offer the appropriate solution. Fortunately, since leave laws of various forms already exist in several states (as discussed in Part IV.B.1), their performance can provide insight regarding both their efficacy in reducing the pregnancy penalty and the critical components of a leave law.<sup>279</sup> Figure 10 begins to examine these laws' performance more critically, graphing the raw employment rates of women in the labor market by pregnancy status in states with family leave laws. Note that women who were taking paid family leave from their job at the time of responding to the BRFSS would still show up in the data as employed.<sup>280</sup> For comparison, the final column in Figure 10 graphs average employment rates by pregnancy status in the remaining states without family leave laws.

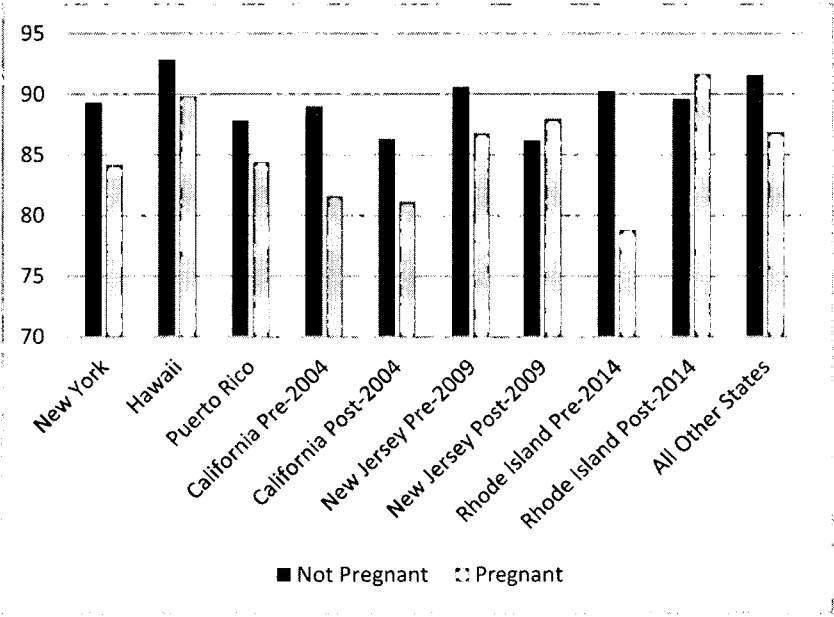
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279. Family leave laws might plausibly have other employment effects than on pregnant women's employment—for instance, mothers' and fathers' employment after childbirth. See Charles L. Baum & Christopher J. Ruhm, *The Effects of Paid Family Leave in California on Labor Market Outcomes*, 35 J. POL'Y ANALYSIS & MGMT. 333, 352 (2016) (arguing that increased leave-taking leads to higher post-birth employment rates).

280. Recall from Part V.B.1 that state paid family leave laws allow a woman to remain employed even while she is taking a pregnancy-related leave of absence.



**Figure 10. BRFSS Employment Rates of Women in the Labor Market, Ages 18–44, by Pregnancy Status and State of Residence**



Turning initially to the three states with pre-family leave laws—New York, Hawaii, and Puerto Rico (the first three columns on the left in Figure 10)—the gap in employment rates by pregnancy status look similar to the gap for states without a leave law (the last column on the right). In raw numerical terms, pregnant women in states without a leave law are 4.7 percentage points less likely to be employed than nonpregnant women; the raw gaps in New York, Hawaii, and Puerto Rico are 5.1, 3.0, and 3.4 percentage points, respectively. Even in Hawaii and Puerto Rico, the pre-family leave jurisdictions with smaller employment gaps, the gaps remain present and are not much smaller than the gaps in states without a law. These remaining gaps suggest that pre-family leave laws do little, if anything, to reduce the pregnancy penalty.

In order to examine the raw gaps in states with full-family leave laws, Figure 10 breaks up the data by pre- and post-passage date.<sup>281</sup> Note that California, New Jersey, and Rhode Island

281. Because the passage of the pre-family leave laws all predate the BRFSS data, I am not able to make the pre- and post-comparison for the pre-family

had notable employment gaps between pregnant and nonpregnant women in the labor market prior to passing a leave law (equal to 7.4, 3.8, and 11.4 percentage points, respectively). In these three states, these gaps reduced after full-family leave law passage. Note that the gap declined only slightly in California to 5.2 percentage points, which is still above the average gap in states without a law. In New Jersey and Rhode Island, however, the gap not only reduced, but flip-flopped after passage such that pregnant women in these states actually had slightly higher employment rates than did nonpregnant women.

Indeed, regression analyses confirm that New Jersey particularly has seen a meaningful improvement in pregnant women's employment rates in the labor market since the passage of its family leave law. In Appendix Table 7, I compare the before- and after-employment rates of pregnant women in California, New Jersey, and Rhode Island to the employment rates of nonpregnant women in those states, as well as the employment rates of women in surrounding states.<sup>282</sup> This type of regression analysis, known as difference-in-differences regression, takes into account other underlying trends in employment in order to identify the effect of a law of interest—here, passing a state family leave law.<sup>283</sup>

According to the analysis in Appendix Table 7, New Jersey alone has seen a statistically significant 6.6 percentage point increase in employment rates of pregnant women since the passage of its family leave law (see Column 2). California, on the other hand, has seen no improvement in employment rates of pregnant women since the passage of its law (see Column 1). The effects of the Rhode Island law in this analysis are still uncertain (see Column 3), as the coefficient on pregnancy is positive, but statistically insignificant. Because of the recency of the Rhode Island law and Rhode Island's small population, it is difficult to discern whether this statistical insignificance is due to insufficient data or lack of effects. Still, the effects of the New Jersey law have been quite clearly positive for pregnant women. Moreover, a follow-up analysis in Appendix Table 8 demonstrates that the largest gains in New Jersey have been concentrated among

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leave laws.

282. I am able to compare pre- and post-outcomes for the three full-family leave laws because these laws are more recent and, as such, the BRFSS data contains observations both before and after these laws' passage.

283. This type of regression was previously used to evaluate the effect of the ADAAA and *Young*. See *supra* note 223.

precisely the group most in need of legal protection—pregnant women living in low-income households.<sup>284</sup>

In sum, more sophisticated regression analyses confirm the visual evidence in Figure 10, which indicates that family leave laws have reduced, if not fully eliminated, the pregnancy penalty in some jurisdictions, but not in others. This Figure both makes clear that family leave laws are not a guaranteed fix for the pregnancy penalty and suggests that legislative design matters a great deal. The next Section considers which of the elements specifically have made the law in New Jersey more successful than the others.

#### 4. Considering Family Leave Law Design

The quantitative analysis presented in the prior Section is useful to distinguish effective laws from ineffective ones, but a more qualitative analysis is necessary to understand *why* certain laws are more effective. To begin, consider the most obvious distinction in current leave law design: pre-family leave versus full-family leave. Figure 10 suggests that pre-family leave laws have not closed the gap in pregnant women's employment outcomes. While pre-family leave laws may have other desirable effects, pre-family leave laws seem to have done little good in terms of remedying the pregnancy penalty.<sup>285</sup> One plausible explanation for the lack of effects might be that existing pre-family leave laws solely provide leave to women *disabled* by pregnancy and childbirth, rather than pregnant women more generally.<sup>286</sup>

The analysis in the prior Section points towards full-family leave laws as a better solution to the pregnancy penalty. Yet less clear from the empirical analysis is why New Jersey's law has been an obvious success, while California's law has been an obvious failure.<sup>287</sup> Answering this question requires reconsidering the design of these laws. Recall that during leave—whether pre- or post-childbirth—parents in California are reimbursed at the

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284. Appendix Table 8 employs difference-in-difference-in-difference regression to compare employment outcomes of low-education/low-income pregnant women in the state of interest to those of higher education/income pregnant women in the state, nonpregnant women in the state, and women of all pregnancy statuses in surrounding states.

285. See *supra* Figure 10 and accompanying text.

286. See *supra* Part V.B.1.

287. See *supra* Figure 10 and accompanying text.

lowest rate of all leave laws: fifty-five percent of weekly earnings.<sup>288</sup> Parents in New Jersey, on the other hand, are reimbursed at the highest rate: sixty-six percent of weekly earnings.<sup>289</sup> For comparison, in Rhode Island, where the results are less clear, parents are reimbursed at sixty percent of weekly earnings.<sup>290</sup> This fundamental difference in structure between state laws, which otherwise seem quite similar, provides the first clue that generosity of paid leave may be responsible for differences in effectiveness.

Another clue that generosity of pay may be the secret to closing the pregnancy employment gap comes from relevant legislative history in the state of California. As mentioned previously, California has passed new legislation that goes into effect in 2018, raising the wage replacement rate from fifty-five percent to seventy percent of weekly earnings for workers who earn one-third or less of the state's average income.<sup>291</sup> For everyone else, the rate will increase to sixty percent of weekly earnings.<sup>292</sup> The reason for this significant increase in replacement rate, according to the legislation's author and sponsor in the California Assembly, Jimmy Gomez, is due to the following:

Paid Family Leave is a lifeline for countless families in our state. However, workers already living paycheck to paycheck on 100 percent of their salary simply could not afford to use a program for 6 weeks at nearly half of their wages. That's why I authored [the legislation], to fix this inequity and ensure all who pay into this vital program can afford to use it, regardless of their income.<sup>293</sup>

In other words, Gomez authored and sponsored the bill because he believed that paid leave was particularly critical for workers of lower socioeconomic status. This belief was bolstered not only by his own personal experience,<sup>294</sup> but also by his knowledge that in the decade since passage, less than one-sixth of covered Californians had taken advantage of the state's paid leave program.<sup>295</sup>

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288. See *supra* note 259 and accompanying text.

289. See *supra* note 261 and accompanying text.

290. See *supra* note 262 and accompanying text.

291. See *supra* note 260 and accompanying text.

292. CAL. UNEMP. INS. CODE § 2655 (West 2016).

293. *Major Paid Family Leave Expansion Signed by Governor*, *supra* note 260.

294. Patrick McGreevy, *Brown Signs California Law Boosting Paid Family Leave Benefits*, L.A. TIMES (Apr. 11, 2016), <http://www.latimes.com/politics/la-pol-sac-paid-family-leave-california-20160411-story.html>.

295. See *id.* ("EDD says that more than 2 million claims had been paid, although about 13.1 million Californians were covered by the program.").

Similarly, a 2011 Center for Economic and Policy Research survey found that “[n]early a third of respondents who were aware of [the California law] but did not apply for it when they needed a family leave . . . reported that they felt the level of wage replacement was too low.”<sup>296</sup> Still another study by the U.S. Department of Health and Human Services found that less than ten percent of “lowest-income mothers” took advantage of paid leave in California.<sup>297</sup> When conducting focus groups interviews to understand these numbers, the researchers repeatedly heard mothers who took advantage of the program complain that “they struggled to make ends meet” with such low wage replacement.<sup>298</sup>

In sum, wage replacement rate matters in paid family leave legislation. Without a sufficiently high rate of wage replacement, pregnant women are financially constrained in their ability to take advantage of paid leave. This constraint becomes particularly binding for pregnant women living in low-income households, for whom the pregnancy penalty is already most acute,<sup>299</sup> and who are more likely to live from paycheck to paycheck with little emergency savings.<sup>300</sup> As seen in California, the result of a low wage replacement rate is a low take-up rate of paid family leave. And if an insufficient number of people are taking advantage of family leave laws, it becomes difficult for such laws to

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296. EILEEN APPELBAUM & RUTH MILKMAN, *LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA* 4 (2011), <http://cepr.net/documents/publications/paid-family-leave-1-2011.pdf>.

297. Lowest-income in this study was defined as a household income of \$12,000 per year or less. PAMELA WINSTON ET AL., U.S. DEPT OF HEALTH & HUMAN SERVS., *EXPLORING THE RELATIONSHIP BETWEEN PAID FAMILY LEAVE AND THE WELL-BEING OF LOW-INCOME FAMILIES: LESSONS FROM CALIFORNIA* 4 (2017), <https://aspe.hhs.gov/system/files/pdf/255486/PFL.pdf>; *see also* RONA LEVINE SHERRIFF, CAL. SENATE OFFICE OF RESEARCH, *BALANCING WORK AND FAMILY* (2007), <http://sor.senate.ca.gov/sites/sor.senate.ca.gov/files/Balancing%20Work%20and%20Family%20Two-and-a-Half%20Years%20Ago%2C%20California%20Became%20the%20First%20State%20in%20the%20Nation.pdf> (finding disproportionately low leave take-up rates for low-income workers).

298. WINSTON ET AL., *supra* note 297, at 16.

299. *See supra* Part V.B.2.

300. Although this problem is certainly most acute for low-income households, the financial constraints that impede pregnant women from taking leave may extend far beyond low-income households. A 2017 survey, for example, found that more than half of women were living paycheck to paycheck, and less than a third had enough savings to cover six months of living expenses. Sydney Champion, *Survey Finds Great Recession Aftershocks Are Still Rattling Americans*, GOBANKINGRATES (June 26, 2017), <https://www.gobankingrates.com/making-money/survey-finds-great-recession-aftershocks-still-rattling-americans>.

have any meaningful labor market effects, including effects on the pregnancy penalty. Given that these last two Sections have argued that the current model in New Jersey of paid family leave legislation is most successful, particularly because of its relatively high wage replacement rate, the next Section considers additional improvements on the New Jersey model.

##### 5. Constructing the Ideal Paid Family Leave Model

As discussed in Part V.B.3, pregnant women in New Jersey (and particularly low-income pregnant women in New Jersey) have seen a meaningful improvement in their employment fortunes since the passage of the state's 2009 family leave law. The natural follow-up question then becomes whether the New Jersey law should serve as the ideal model for future paid family leave legislation, or whether room still exists for improvement. One way to approach this question is to step back and consider the two principal criticisms levied at the PWFA—high employer costs and expressive harms—since family leave legislation may be susceptible to similar weaknesses. Assessing how current leave legislation performs in terms of these two potential pitfalls will not only highlight the advantages of full-family leave legislation as compared to other alternatives, but also flag areas that need further improvement.

Recall from Part V.A that economics scholars in particular have expressed concerns with the cost burden that the PWFA (or any law modeled after the ADA) may impose on employers since it shifts both the determination of eligibility and the costs of compliance entirely onto employers. Full-family paid leave laws need not do either. Because all existing state laws are operated through the state disability insurance program, it is the state—not the employer—who determines eligibility for paid leave. Applicants apply to the state,<sup>301</sup> not to the employer, to take paid leave, which (1) diminishes the burden on employer human resources staff to make leave coverage determinations, and (2) eliminates concerns about the employer having perverse incentives to deny leave coverage, which is inherent to the PWFA and the ADA model.

Moreover, once the state deems an applicant is eligible for paid leave, the wage replacement comes from the *state fund*, not

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301. For an example of the New Jersey application process, see *Family Leave Insurance*, N.J. DEPT LAB. & WORKFORCE DEV., <http://lwd.dol.state.nj.us/labor/fli/fliindex.html> (last visited Oct. 30, 2018).

the employer.<sup>302</sup> In states like California and Rhode Island (although not New Jersey),<sup>303</sup> this state fund is entirely financed by required employee payroll contributions, meaning that the employer bears no direct cost of paid family leave.<sup>304</sup> Indeed, the only costs full-family leave laws impose on employers are indirect ones, such as needing other employees to take on extra tasks and fill in while a worker is out on leave. Thus, current models of family paid leave laws—especially models financed entirely by employee contributions—already minimize concerns about overly burdening employers from a cost perspective.

Even though employer costs are indirect and can be minimized under paid full-family leave laws, recall that legal scholars have raised a second concern with the PWFA (and the ADA model) that may be applicable to family leave: expressive harms. The concern is that any law singling out women for special treatment because of pregnancy and childbirth risks labeling these women as less able, or unable, to be productive at work.<sup>305</sup> To the extent that full-family leave laws potentially provide more leave to women than to men because of pregnancy-related disability provisions,<sup>306</sup> some expressive harms may be unavoidable. It is unavoidable that women, but not men, experience the physical effects of pregnancy and consequently may require disability-related leave that men do not need.

The key, then, must be to minimize the expressive harms of family leave laws on women. One significant advantage of full-family leave laws over pre-family leave laws (besides their greater efficacy in reducing the pregnancy penalty, as documented in Figure 10) is that they provide leave to both men and women.<sup>307</sup> Pre-family leave laws send the message that only women require leave surrounding the birth of a child; full-family

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302. See *supra* Part V.B.1.

303. The New Jersey fund is financed jointly by employers and employees, which could be an area for reforming the New Jersey law, depending upon how onerous the cost burden of leave remains on employers. *State Paid Family and Medical Leave Insurance Laws*, *supra* note 252, at 5.

304. *Id.*

305. See *supra* Part V.A.

306. Since all full-family leave laws are operated through the state disability insurance program, a woman who has medical complications of pregnancy that prevent her from working will unavoidably be entitled to more leave than her nonpregnant spouse. See *supra* Part V.B.1.

307. See *supra* Part V.B.1.

leave laws send the message that all parents, regardless of gender or pregnancy status, require leave. To that end, full-family leave laws are designed to inflict fewer expressive harms.<sup>308</sup>

Still, expressive harms may result under full-family leave laws if, despite the entitlement to leave by parents of both genders, only women take advantage of the leave provided by law. Male parents may not take any family leave—or they may take less than their full entitlement—for financial reasons or for stigmatization reasons.<sup>309</sup> Anytime the wage replacement rate is less than one hundred percent, taking family leave may cause financial strain, especially since the family is, by definition, gaining a new (and costly) member. This strain may cause some families to decide that one parent will not take any leave, or at least take less leave than the other parent, surrounding the birth of a child. Because of the physical realities surrounding the birth of a child—pregnancy complications, childbirth recovery, and breastfeeding—families making this financially-motivated choice may favor a female parent taking more leave. This choice is further solidified by the fact that, on average, men earn more than women, and thus, losing the male's full paycheck would often hurt the family more.<sup>310</sup> Indeed, evidence exists to support the idea that families make precisely this choice to forego or limit male parental leave when facing financial constraints.<sup>311</sup>

On the other hand, families may choose to have a female parent take more leave because of social, not financial, pressures. Women continue to be the primary household caregivers in the United States, thus perpetuating the stereotype that women will take primary responsibility for raising a new child

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308. Cf. APPELBAUM & MILKMAN, *supra* note 296, at 18 (finding “an increase in use of parental leave by fathers since the state program began” in California).

309. Evidence exists from California to suggest that male paid family leave take-up rates are half as large as female take-up rates. *See id.* (“Our survey found a gender gap[:] . . . 25 percent of male respondents, but 49 percent of females, had made use of the program.”); *see also* Dianna Douglas, *How to Get Dads to Take Parental Leave? Seeing Other Dads Do It*, NPR (Feb. 8, 2016), <https://www.npr.org/2016/02/08/465726445/how-to-get-dads-to-take-parental-leave-seeing-other-dads-do-it> (reporting that ninety-six percent of American men are back to work within two weeks after the birth of a child).

310. *See* JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 134 (2003) (“Because men tend to have higher wages than women, in the absence of full wage replacement it often makes economic sense for couples to decide that the mother should withdraw from the labor market.”).

311. *See* WINSTON ET AL., *supra* note 297, at 9 (“Some of the mothers in our focus groups said that the wage replacement rate was too low for the fathers also to take it—the hit to the family’s wages was too large.”).



and should take more childbirth-related leave than men.<sup>312</sup> Because of the prevalence of this stereotype, many men feel stigmatized against taking their full leave entitlement, believing that doing so might put their current job or future career in jeopardy because their coworkers will view them as doing women's work.<sup>313</sup> Although some empirical evidence validates this current perception of a workplace stigma against men taking too much family leave,<sup>314</sup> empirical evidence also suggests that the best way to reduce the stigma is to make it more commonplace for men to take family leave. For example, one study from Norway found that men who saw a male coworker take family leave were eleven percentage points more likely to take it themselves.<sup>315</sup>

Consequently, the key to minimizing expressive harms in family leave laws is to incentivize a critical mass of men to overlook any social or financial pressures and to take their *entire* leave entitlement. One way to nudge men into overlooking financial pressures may be to simply reduce such pressures altogether by offering high wage replacement rates during family leave.<sup>316</sup> Full-family leave laws with high wage replacement rates are already the most effective at reducing the pregnancy penalty, as

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312. Only one in five fathers with preschool aged children assume primary caregiving responsibility. Press Release, U.S. Census Bureau, *One-Third of Fathers with Working Wives Regularly Care for Their Children*, Census Bureau Reports (Dec. 5, 2011), <https://www.census.gov/newsroom/releases/archives/children/cb11-198.html>.

313. See, e.g., *Deloitte Survey: Less than Half of People Surveyed Feel Their Organization Helps Men Feel Comfortable Taking Parental Leave*, PR NEWswire (Jun 15, 2016), <https://www.prnewswire.com/news-releases/deloitte-survey-less-than-half-of-people-surveyed-feel-their-organization-helps-men-feel-comfortable-taking-parental-leave-300284822.html> (reporting that "fewer than half of the respondents fe[lt] their company foster[ed] an environment in which men are comfortable taking parental leave").

314. See, e.g., *id.* ("Not only do more than one-third of respondents feel that taking parental leave would jeopardize their position, but more than half . . . feel that it would be perceived as a lack of commitment to the job . . ."); see also Claire Cain Miller, *Paternity Leave: The Rewards and the Remaining Stigma*, N.Y. TIMES (Nov. 7, 2014), <https://www.nytimes.com/2014/11/09/upshot/paternity-leave-the-rewards-and-the-remaining-stigma.html> (arguing that there is still some stigma associated with paternity leave).

315. Gordon B. Dahl et al., *Peer Effects in Program Participation*, 104 AM. ECON. REV. 2049, 2050 (2014).

316. See GORNICK & MEYERS, *supra* note 310, at 134 ("Although none of the countries in our study have achieved gender equality, several are taking steps to increase fathers' use of leave benefits. . . . High wage-replacement rates are the most straightforward instrument.").

seen in the prior Section with New Jersey. If high wage replacement rates successfully encourage more men to take advantage of their entire family leave entitlement by reducing financial burdens, in the long run, high rates of replacement can also render men's leave-taking less disproportionate to women's leave-taking and, in turn, reduce expressive harms.<sup>317</sup>

To the extent that financial incentives are not enough to overcome social pressures, other countries have introduced additional provisions into their family leave legislation to nudge men into taking their entire family leave entitlement. One incentive that has been particularly successful is the use-it-or-lose-it provision, which conditions the generosity of family leave time on both parents taking it.<sup>318</sup> In its most draconian version, such a provision would require both parents to take equally long paid leave from work or risk forfeiting it entirely. In Denmark, Norway, and Sweden, however, the use-it-or-lose-it provision is softer. These countries grant paid leave on a family basis, instead of an individual one. If the father fails to take paid family leave, the family gets less total paid leave time.<sup>319</sup> For example, if the mother alone takes family leave, the family might only get four weeks of paid leave, but that time would double if the father also takes leave. Predictably, men's take-up of family leave has significantly increased in Scandinavia since these laws passed.<sup>320</sup>

Presently, none of the state and local family leave laws within the United States have any kind of use-it-or-lose-it provision, despite these provisions' effectiveness in other countries. Domestic laws could easily add such a provision without increasing costs to the system by conditioning the length of one parent's paid leave on the length of the other parent's paid leave. For instance, if the father only takes two weeks of post-childbirth paid leave, even though entitled to more, then the mother can only take two weeks of post-childbirth paid leave. Naturally, this model only works for households in which both parents are present and both parents work. Nonetheless, these dual-parent,

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317. Indeed, research from Scandinavian countries with full-family paid leave laws has found that high-wage replacement rates are critical for fathers to take advantage of leave. For a review of this literature, see *id.* at 133–38.

318. See *POLITICISING PARENTHOOD IN SCANDINAVIA: GENDER RELATIONS IN WELFARE STATES* 38–40 (Anne Lise Ellingsaeter & Arnlaug Leira eds., 2006).

319. For a chart comparing the family leave laws in several European countries, see *id.* at 19–23.

320. For a review of the Scandinavian family leave laws and analyses of their effects, see *id.* at 1–51, 265–77.

dual-earner households may be the most likely to have inequitable leave take-up along gender lines.<sup>321</sup> In sum, even the most successful current family leave laws, such as the one in New Jersey, and future leave laws can benefit from a use-it-or-lose-it provision. Such a provision can advance the progress towards gender equality in take-up of family leave and, in turn, reduce the expressive harms that continue to fall on women surrounding pregnancy- and childbirth-related leave.

### CONCLUSION

Despite the renaissance of pregnancy-related scholarship over the past decade,<sup>322</sup> very little has been documented empirically regarding the status of pregnant women in the labor market. As such, scholars and advocates have been constrained in their ability to assess both the adequacy of current legislation and the relative urgency for new legislation. Furthermore, in the absence of labor market data, they have been limited in their ability to propose reform measures that can target the pregnant women most in need of assistance. This Article has taken an initial step towards filling these critical gaps in the literature, utilizing a health behaviors dataset with a sufficiently large sample of pregnant women to examine their welfare, in terms of employment, over the past quarter-century. Using these data, this Article has argued that, in light of the stark employment gaps faced by pregnant women—gaps that widen tremendously for heavier women, disabled women, women with low educational attainment, and women living in low-income households—improving legislative protections surrounding pregnancy should be a priority for civil rights' advocates.

This Article has also identified full-family paid leave legislation as an important measure in closing the employment gap between pregnant women and nonpregnant women. This Article is hardly the first to advocate for paid family leave,<sup>323</sup> yet most prior arguments for leave have examined its influence on post-childbirth outcomes for women who work outside the home.<sup>324</sup>

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321. See, e.g., Hersch, *supra* note 86 (finding that married women spend almost twice as much time on childcare as married men).

322. See *supra* Part II.

323. For a recent, bipartisan report that comprehensively reviews research on family leave, see AEI-BROOKINGS WORKING GRP. ON PAID FAMILY LEAVE, *supra* note 267.

324. See, e.g., Baum & Ruhm, *supra* note 279, at 334 (finding that mothers with paid leave were more likely to be employed nine to twelve months post-birth); LINDA HOUSER & THOMAS P. VARTANIAN, RUTGERS CTR. FOR WOMEN

Using New Jersey as an example, this Article has demonstrated that a well-constructed family leave policy with high wage replacement can also improve pre-childbirth outcomes for women who work outside the home—and particularly women of lower socioeconomic status who work outside the home. Moreover, by financing paid family leave through employee payroll contributions, administering leave entitlement through the state, and including provisions that sufficiently encourage men to take leave, full-family paid leave policies can ameliorate the pregnancy penalty in a way that has few direct costs for employers and that minimizes expressive harms to women.

Women are an integral part of the labor market, and pregnancy is an integral part of most women's lives. Women comprise roughly forty-seven percent of the U.S. labor force,<sup>325</sup> and more than eighty percent of women will likely be pregnant at least once in their lifetimes.<sup>326</sup> The U.S. labor market cannot function even in the short-term without women, and it cannot survive in the long-term without pregnancy. In spite of the labor market's dependency on them, pregnant women continue to face an employment penalty that rivals any penalty faced by other historically disadvantaged groups. A financially feasible legislative model already exists to remedy the pregnancy penalty. Broadening the reach of this paid full-family leave model beyond a handful of U.S. states remains in the hands of legislators.

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AND WORK, PAY MATTERS: THE POSITIVE ECONOMIC IMPACTS OF PAID FAMILY LEAVE FOR FAMILIES, BUSINESSES AND THE PUBLIC 2 (2012), <http://www.nationalpartnership.org/research-library/work-family/other/pay-matters.pdf> (finding that women with access to paid leave are much less likely to be on food stamps or other forms of public assistance in the year after childbirth); Rossin-Slater, *supra* note 143, at 4 (finding that leaves of less than one year improve mothers' employment outcomes several years after birth).

325. These statistics come from 2015. See BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 2 (2017), <https://www.bls.gov/opub/reports/womens-databook/2016/home.htm>.

326. Gretchen Livingston, *Childlessness*, PEW RES. CTR. (May 7, 2015), <http://www.pewsocialtrends.org/2015/05/07/childlessness>.

APPENDIX

Appendix Table 1.

Summary Statistics for Women, Ages 18–44, 1993–2016 BRFSS, by  
Pregnancy Status

	All Women	Pregnant Women	Nonpregnant Women
<b>In the Labor Market</b>	0.72	0.66	0.72
Employed	0.91	0.86	0.91
Unemployed	0.09	0.14	0.09
<b>Demographics</b>			
Age	31.61	27.98	31.78
White	0.77	0.77	0.77
Black	0.12	0.11	0.12
Asian	0.03	0.03	0.03
Other Race	0.08	0.09	0.08
Hispanic	0.16	0.18	0.15
Child Present	0.67	0.68	0.67
Married	0.55	0.70	0.55
Disabled	0.08	0.08	0.08
Underweight/ Normal Weight	0.57	0.50	0.58
Overweight	0.24	0.29	0.24
Obese	0.16	0.18	0.15
Morbidly Obese	0.03	0.03	0.03
Household Income	\$49,370.09	\$49,103.72	\$49,382.93
<b>Educational Attainment</b>			
Less than High School	0.09	0.13	0.10
High School Graduate	0.28	0.27	0.28
Some College	0.31	0.26	0.31
College Graduate	0.32	0.34	0.31
N	1,326,026	53,031	1,272,995

Notes: Estimated means come from 1993–2016 BRFSS, using sample design weights. Household income is reported in 2017 U.S. dollars.

Appendix Table 2.

**The Relationship Between Pregnancy, Weight, and Disability and  
Employment for Women in the Labor Market, Ages 18–44, 1993–2016**

	(1)	(2)	(3)
Pregnant	-0.050*** (0.003)	-0.042*** (0.005)	-0.155*** (0.018)
Obese	—	-0.012*** (0.003)	-0.012*** (0.003)
Pregnant* Obese	—	-0.029*** (0.009)	-0.020** (0.009)
Morbidly Obese	—	-0.033*** (0.004)	-0.033*** (0.004)
Pregnant* Morbidly Obese	—	-0.010 (0.014)	0.004 (0.015)
Disabled	—	-0.089*** (0.003)	-0.089*** (0.003)
Pregnant* Disabled	—	0.047** (0.018)	0.045** (0.017)
Black	-0.045*** (0.005)	-0.044*** (0.005)	-0.044*** (0.005)
Asian	-0.030*** (0.004)	-0.034*** (0.004)	-0.034*** (0.004)
Hispanic	-0.009*** (0.003)	-0.011*** (0.003)	-0.010*** (0.003)
Child Pre- sent	-0.025*** (0.002)	-0.026*** (0.002)	-0.026*** (0.002)
Married	0.043*** (0.002)	0.041*** (0.002)	0.040*** (0.002)
High School Graduate	0.096*** (0.005)	0.094*** (0.005)	0.090*** (0.005)
Pregnant* High School Graduate	—	—	0.073*** (0.024)
Some Col- lege	0.142*** (0.005)	0.141*** (0.005)	0.134*** (0.005)
Pregnant* Some Col- lege	—	—	0.135*** (0.018)
College Graduate	0.162*** (0.006)	0.157*** (0.005)	0.150*** (0.005)

Pregnant*	—	—	0.142***
College			(0.018)
Graduate			
<i>R</i> <sup>2</sup>	0.07	0.07	0.07

\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%

Notes: Linear probability estimates come from 1993–2016 BRFSS, using sample design weights, and contain 986,227 observations of women ages 18 to 44. Heteroskedasticity-robust standard errors, clustered at the state level, are in parentheses underneath the estimated coefficient. Dependent variable is an indicator equal to one if the respondent is employed for wages or self-employed, and equal to zero if the respondent is out of work. All estimates include controls for age and age squared, other nonwhite race, state fixed effects, and year. Specifications (2) and (3) also include an indicator variable equal to one if the respondent is overweight and an interaction term between pregnancy and being overweight.

**Appendix Table 3.**  
**The Relationship Between Pregnancy, Weight, and Disability and**  
**Participation in the Labor Market, Ages 18–44, 1993–2016**

	(1)	(2)	(3)
Pregnant	-0.023*** (0.005)	-0.016* (0.009)	-0.016 (0.012)
Obese	—	0.027*** (0.004)	0.027*** (0.004)
Pregnant* Obese	—	-0.033*** (0.009)	-0.033*** (0.009)
Morbidly Obese	—	-0.007* (0.004)	-0.007* (0.004)
Pregnant* Morbidly Obese	—	-0.053* (0.027)	-0.053* (0.026)
Disabled	—	-0.160*** (0.006)	-0.160*** (0.006)
Pregnant* Disabled	—	0.102*** (0.014)	0.102*** (0.014)
Black	0.059*** (0.004)	0.052*** (0.004)	0.052*** (0.004)
Asian	-0.063*** (0.013)	-0.066*** (0.013)	-0.066*** (0.013)
Hispanic	-0.015*** (0.004)	-0.023*** (0.004)	-0.023*** (0.004)
Child Present	-0.089*** (0.003)	-0.092*** (0.003)	-0.092*** (0.003)
Married	-0.085*** (0.005)	-0.091*** (0.005)	-0.091*** (0.005)
High School Graduate	0.135*** (0.006)	0.132*** (0.006)	0.133*** (0.006)
Pregnant* High School Graduate	—	—	-0.015 (0.011)
Some College	0.118*** (0.007)	0.115*** (0.008)	0.114*** (0.008)
Pregnant* Some College	—	—	0.016 (0.014)
College Gradu- ate	0.191*** (0.009)	0.184*** (0.010)	0.184*** (0.009)



Pregnant* Col-	—	—	0.001
lege Graduate			(0.018)
<i>R</i> <sup>2</sup>	0.06	0.08	0.08

\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%

Notes: Linear probability estimates come from 1993–2016 BRFSS, using sample design weights, and contain 1,326,026 observations of women ages 18 to 44. Heteroskedasticity-robust standard errors, clustered at the state level, are in parentheses underneath the estimated coefficient. Dependent variable is an indicator equal to one if the respondent is employed for wages, self-employed, or out of work, and equal to zero if the respondent is a homemaker, student, retired, or unable to work. All estimates include controls for age and age squared, other nonwhite race, state fixed effects, and year. Specifications (2) and (3) also include an indicator variable equal to one if the respondent is overweight and an interaction term between pregnancy and being overweight.

Appendix Table 4.

**The Relationship Between Pregnancy, Weight, and Disability and  
Employment for Mothers in the Labor Market, Ages 18-44**

	Sample: Mothers and Pregnant Women, 1993-2016	Sample: Mothers of Children Ages 0-4 and Pregnant Women, 1994-2000
	(1)	(2)
Pregnant	-0.038*** (0.008)	-0.070*** (0.024)
Obese	-0.013*** (0.003)	-0.003 (0.007)
Pregnant* Obese	-0.021* (0.011)	-0.039 (0.033)
Morbidly Obese	-0.019*** (0.005)	-0.015 (0.023)
Pregnant* Morbidly Obese	-0.015 (0.016)	-0.133 (0.082)
Disabled	-0.088*** (0.005)	-0.032 (0.045)
Pregnant* Disabled	0.042** (0.017)	0.009 (0.068)
Black	-0.044*** (0.005)	-0.023** (0.009)
Asian	-0.049*** (0.005)	-0.054** (0.027)
Hispanic	-0.011*** (0.004)	-0.030*** (0.010)
Child Present	-0.030*** (0.010)	-0.064** (0.026)
Married	0.041*** (0.003)	0.054*** (0.007)
High School Graduate	0.087*** (0.009)	0.097*** (0.016)
Some College	0.141*** (0.008)	0.155*** (0.011)
College Graduate	0.159*** (0.009)	0.151*** (0.012)
$R^2$	0.08	0.08
N	490,825	20,630

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\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%

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Notes: Linear probability estimates come from BRFSS, using sample design weights. Heteroskedasticity-robust standard errors, clustered at the state level, are in parentheses underneath the estimated coefficient. Dependent variable is an indicator equal to one if the respondent is employed for wages or self-employed, and equal to zero if the respondent is out of work. All estimates include controls for age and age squared, other nonwhite race, an indicator variable equal to one if the respondent is overweight, an interaction term between pregnancy and being overweight, state fixed effects, and year.

Appendix Table 5.

**Difference-in-Difference Estimates of the Effect of the ADA Amendments Act of 2008 (ADAAA) on Employment of Pregnant Women**

	Double-Difference: The Effect of the ADAAA on Pregnant Women	Triple Difference: The Effect of the ADAAA on Pregnant, Disabled Women
	(1)	(2)
Pregnant	-0.041*** (0.006)	-0.042*** (0.006)
Post-2008	0.026 (0.017)	0.030* (0.016)
Disabled	-0.093*** (0.003)	-0.086*** (0.004)
Pregnant* Disabled	0.044** (0.019)	0.053** (0.023)
Post-2008* Preg- nant	0.009 (0.006)	0.013** (0.006)
Post-2008* Disabled	—	-0.020*** (0.006)
Post-2008* Pregnant* Disabled	—	-0.033 (0.036)
$R^2$	0.07	0.07
N	718,799	718,799

\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%

Notes: Linear probability estimates come from 18- to 44-year-old female respondents to the 2002–2016 BRFSS, using sample design weights. Heteroskedasticity-robust standard errors, clustered at the state level, are in parentheses underneath the estimated coefficient. Dependent variable is an indicator equal to one if the respondent is employed for wages or self-employed, and equal to zero if the respondent is out of work. All estimates include controls for age and age squared; race and ethnicity; presence of a child; married; highest level of education; indicator variables equal to one if the respondent is overweight, obese, or morbidly obese; interaction terms between pregnancy and being overweight, obese, or morbidly obese; state fixed effects; and year.

Appendix Table 6.  
Difference-in-Difference Estimates of the Effect of the March 2015  
*Young v. United Parcel Service, Inc.* Decision on Employment of  
Pregnant Women

	(1)
Pregnant	-0.044*** (0.012)
Post-March 2015	0.001 (0.004)
Post-March 2015* Pregnant	0.012 (0.022)
Disabled	-0.108*** (0.006)
Pregnant* Disabled	-0.098* (0.052)
R <sup>2</sup>	0.07
N	127,657

\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%

Notes: Linear probability estimates come from 18- to 44-year-old female respondents to the 2014–2016 BRFSS, using sample design weights. Heteroskedasticity-robust standard errors, clustered at the state level, are in parentheses underneath the estimated coefficient. Dependent variable is an indicator equal to one if the respondent is employed for wages or self-employed, and equal to zero if the respondent is out of work. All estimates include controls for age and age squared; race and ethnicity; presence of a child; married; highest level of education; indicator variables equal to one if the respondent is overweight, obese, or morbidly obese; interaction terms between pregnancy and being overweight, obese, or morbidly obese; state fixed effects; and year.

Appendix Table 7.

**Difference-in-Difference Estimates of the Effect of Full-Family Leave Laws on Employment of Pregnant Women**

	2004 California Law	2009 New Jer- sey Law	2014 Rhode Is- land Law
	(1)	(2)	(3)
Pregnant	-0.071*** (0.026)	-0.019 (0.018)	0.015 (0.019)
Post-Family Leave Law	0.007 (0.010)	-0.006 (0.011)	0.006 (0.014)
Pregnant* Post- Family Leave Law	0.002 (0.035)	0.066** (0.030)	0.033 (0.052)
$R^2$	0.051	0.068	0.082
N	50,213	50,409	17,949

\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%

Notes: Linear probability estimates come from 18- to 44-year-old female respondents to the BRFSS, using sample design weights. Heteroskedasticity-robust standard errors, clustered at the state level, are in parentheses underneath the estimated coefficient. Dependent variable is an indicator equal to one if the respondent is employed for wages or self-employed, and equal to zero if the respondent is out of work. All estimates include controls for age and age squared; race and ethnicity; presence of a child; married; highest level of education; indicator variables equal to one if the respondent is overweight, obese, or morbidly obese; interaction terms between pregnancy and being overweight, obese, or morbidly obese; and year. California sample includes 1993–2016 data from the states of California, Nevada, and Oregon; additional state fixed effects for Nevada and Oregon are included in the estimation. New Jersey sample includes 2002–2016 data from the states of New Jersey, Pennsylvania, and Delaware; additional state fixed effects for Pennsylvania and Delaware are included in the estimation. Rhode Island sample includes 2011–2016 data from the states of Rhode Island, Connecticut, and Massachusetts; additional state fixed effects for Connecticut and Massachusetts are included in the estimation.

Appendix Table 8.

**Difference-in-Difference-in-Difference Estimates of the Effect of Full-Family Leave Laws on Employment of Low-Education and Low-Household-Income Pregnant Women**

<i>Low-Education Women</i>			
	2004 California Law	2009 New Jersey Law	2014 Rhode Island Law
	(1)	(2)	(3)
Pregnant	-0.046** (0.023)	0.001 (0.019)	0.024 (0.018)
Post-Family Leave Law	0.011 (0.010)	0.003 (0.011)	0.003 (0.014)
Pregnant* Post-Family Leave Law	0.002 (0.030)	0.034 (0.029)	0.027 (0.053)
Pregnant* Low Education	-0.073* (0.043)	-0.080* (0.043)	-0.072 (0.057)
Pregnant* Post-Family Leave Law* Low Education	-0.007 (0.084)	0.107 (0.097)	0.034 (0.160)
R <sup>2</sup>	0.048	0.062	0.078
N	50,213	50,409	17,949
<i>Low-Household-Income Women</i>			
	2004 California Law	2009 New Jersey Law	2014 Rhode Island Law
	(4)	(5)	(6)
Pregnant	-0.047** (0.023)	0.007 (0.016)	0.015 (0.020)
Post-Family Leave Law	0.004 (0.010)	-0.003 (0.011)	0.005 (0.013)
Low Household Income	-0.114*** (0.011)	-0.115*** (0.011)	-0.137*** (0.013)
Pregnant* Post-Family Leave Law	-0.004 (0.031)	0.030 (0.028)	0.001 (0.061)
Pregnant* Low Household Income	-0.058 (0.054)	-0.207*** (0.060)	0.011 (0.056)
Pregnant* Post-Family Leave Law* Low Household Income	0.022 (0.095)	0.228** (0.104)	0.136 (0.121)
R <sup>2</sup>	0.070	0.088	0.103
N	50,213	50,409	17,949

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\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%

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Notes: Linear probability estimates come from 18- to 44-year-old female respondents to the BRFSS, using sample design weights. Heteroskedasticity-robust standard errors, clustered at the state level, are in parentheses underneath the estimated coefficient. Dependent variable is an indicator equal to one if the respondent is employed for wages or self-employed, and equal to zero if the respondent is out of work. All estimates include controls for age and age squared; race and ethnicity; presence of a child; married; highest level of education; indicator variables equal to one if the respondent is overweight, obese, or morbidly obese; interaction terms between pregnancy and being overweight, obese, or morbidly obese; and year. Low-income is defined as earning less than \$20,000 per year; low-education is defined as having a high school degree or less. California sample includes 1993–2016 data from the states of California, Nevada, and Oregon; additional state fixed effects for Nevada and Oregon are included in the estimation. New Jersey sample includes 2002–2016 data from the states of New Jersey, Pennsylvania, and Delaware; additional state fixed effects for Pennsylvania and Delaware are included in the estimation. Rhode Island sample includes 2011–2016 data from the states of Rhode Island, Connecticut, and Massachusetts; additional state fixed effects for Connecticut and Massachusetts are included in the estimation.