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**Gender and the Law**

**Professor Solangel Maldonado**

**April 28, 2015**

**REASONABLE PREGNANCY ACCOMMODATIONS AS A HUMAN RIGHT**

**I. INTRODUCTION**

Imagine a woman in her thirties, at the height of her career. She is a dedicated employee who has given years of service to her company. One day, she finds out some exciting news—she and her partner are going to be parents! The pregnancy progresses nicely, and she is the glowing mother-to-be. The woman, like most first-time parents, reads up on everything regarding pregnancy and birth, takes her pre-natal vitamins, and begins decorating the nursery. All is well, until one afternoon, during a routine doctor’s visit, the ultrasound technician stops smiling and quickly excuses himself from the room. The OBGYN walks in, and begins using complicated medical terms; the words that stand out are high risk, potential bed rest, concerned with the health of the child. A mother’s worst nightmare: something is wrong. The doctor tells her that for the rest of her pregnancy, she must drink water throughout the day, refrain from lifting from more than twenty pounds, and stay off her feet for extended periods of time. If the woman follows these instructions, both she and the child should be fine.

Armed with these medical instructions, she walks into her boss’s office. Tearfully she explains that she must comply with these orders, otherwise she would be putting her health and the child’s health at risk. The boss nods sympathetically, but then delivers devastating news—in their line of work, she is not permitted to carry water around during the day and she must be able to stand on her feet for the majority of the day while picking up items that weigh substantially

more than twenty pounds. Dumbfounded and indignant, she retorts that this is a violation of her rights. Her boss informs her that in fact, he is well within *his* rights as an employer to deny her requests because there is no state or federal law that requires him to grant these accommodations. Her only options are to use her vacation and sick days, which she was saving for after the baby was born, or to resign. Many questions race through the woman's mind: How will I afford to quit with a baby on the way? Can we manage on a single income? Do my years of service mean nothing? Can my government do something to help me? How is this allowed?

The scene above is unfortunate, and for many women, is a reality. The United States does not currently require employers to grant reasonable accommodations to pregnant workers.<sup>1</sup> This paper argues that reasonable accommodations for pregnant workers are a human right, and as such, all employers, on both the federal and state level should be required to make reasonable accommodations so that pregnant workers can continue to work in a way that is healthy to both the mother and baby.

Part II summarizes the current federal laws in place for pregnant women in the workplace and asserts that the current laws are inadequate and explains that most women will be affected by the current laws. It also addresses the problems that pregnant women face in the workplace without reasonable accommodations and provides an explanation of why current law is inadequate. Part III discusses a few states that have implemented their own reasonable pregnancy accommodations laws and looks at the failed federal attempts at such a law. Part IV first explains what human rights are, and then examines other countries' laws which provide reasonable accommodations for pregnant worker to demonstrate that such accommodations are (1) feasible and (2) that the international community recognizes that pregnancy accommodations

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<sup>1</sup> Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k)(2012)). *See also* Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 31, 2012, at A25. A few states do have pregnancy accommodations law in place, but no such federal law is in place.

are a human right. This Part also argues that the U.S.'s failure to guarantee pregnant workers reasonable accommodations violates international human rights norms and proposes that Congress enact legislation that would require federal and state employers to grant reasonable accommodations to pregnant workers, provided that these accommodations do not create an undue burden on the employer. Part V concludes that the United States would be acting in accordance with international human rights norms by enacting such legislation and that doing so would exemplify its dedication to human rights.

## II. HOW THE LAW HAS ADDRESSED REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS THUS FAR

Historically, employers could fire a woman once she became pregnant.<sup>2</sup> Employers could also refuse to hire a woman because she was pregnant even if she could perform as effectively as a non-pregnant employee.<sup>3</sup> Although Title VII of the Civil Rights Act of 1964 prohibits discrimination because of sex, the U.S. Supreme Court in *GE v. Gilbert* held that discrimination on the basis of pregnancy was not discrimination because of sex.<sup>4</sup> Two years later, Congress enacted the PDA which provides that discrimination on the basis of pregnancy is discrimination on the basis of sex. This Part examines the PDA and two interpretations of it, and then asserts that it is inadequate.

The PDA defines gender discrimination to include discrimination on the basis of “pregnancy, childbirth and related medical conditions.”<sup>5</sup> The PDA also “directs employers to treat pregnant workers the same as other employees with a similar ‘ability or inability to work.’”<sup>6</sup>

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<sup>2</sup> 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, 978-979 (2013) (arguing that pregnancy should fall under the ADA).

<sup>3</sup> Johanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 598 (2010).

<sup>4</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140 (1976) *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

<sup>5</sup> 42 U.S.C. § 2000e(k)(2012)).

There are generally two interpretations of the PDA. The first interpretation is to ignore pregnancy, meaning that the employer must treat pregnant employees the same as non-pregnant employees.<sup>7</sup> Judge Posner is an advocate of this interpretation, as evidenced by his opinion in *Young v. UPS*, discussed *infra*.<sup>8</sup> He notes that the majority view is that if a policy treats pregnant and non-pregnant workers alike, then the employer has complied with the PDA.<sup>9</sup> The second interpretation advocates for more favorable treatment for pregnant workers. The Equal Employment Opportunity Commission is a federal organization that investigates claims of discrimination in the U.S., and issues memoranda on issues relating to discrimination.<sup>10</sup> The EEOC is a proponent of the more favorable interpretation, and to that end, issued a Guidance Memoranda shortly after the U.S. Supreme Court granted cert in *Young*, to respond to the Fourth Circuit.<sup>11</sup> The Guidance Memorandum proposed that disabilities caused by pregnancy could fall under the amended Americans with Disabilities Act, even though they are temporary.<sup>12</sup> At least one scholar has made this argument, and advocates for pregnancy to fall under the ADA's purview.<sup>13</sup> The ADA currently does not include a section concerning pregnancy.<sup>14</sup> The scholar argues that since pregnancy is a physiological condition that can affect major life activities, like work, the accommodation mandates of the ADA should apply to pregnant workers who require some modifications or reasonable accommodations.<sup>15</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Young v. UPS*, 707 F.3d 437, 447 (4th Cir. 2013).

<sup>8</sup> *Young*, 707 F.3d at 447.

<sup>9</sup> *Id.* at 449.

<sup>10</sup> *About EEOC*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/> (last visited Mar. 14, 2015).

<sup>11</sup> *Id.*

<sup>12</sup> *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm).

<sup>13</sup> See generally Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J. L. GENDER & SOC'Y 1 (2012).

<sup>14</sup> 42 U.S.C.S. § 12101.

<sup>15</sup> Alemzadeh, *supra* note 13.

This paper argues that both these interpretations are inadequate. Treating pregnant workers the same as non-pregnant workers as Judge Posner advocates relegates women to a weak position, because they are forced to choose between their jobs and the health of their child. The EEOC position at first glance seems to solve the problem, because it adds temporary disabilities due to pregnancy to the protection of the ADA.<sup>16</sup> But this paper notes the negative connotation that American society places on disabilities, and argues that more needs to be done than characterize pregnancy as a disability.<sup>17</sup> The PDA is therefore inadequate legislation to protect pregnant workers.

#### **A. AN UNFAIR AND IMPOSSIBLE CHOICE**

The denial of reasonable accommodation affects many women in the United States. This Part first describes how a majority of women will become pregnant and carry at least one pregnancy to term. It then explains that a majority of those women will remain or seek to remain in the workplace while pregnant, and that doctors often advise women to slightly change their behavior at work to maintain a healthy pregnancy. Finally, this Part examines cases interpreting the PDA's provisions to demonstrate why the PDA has failed to guarantee pregnant workers the accommodations they need to continue to work to protect their health or that of their child.

Many women in the U.S. will face this impossible choice, especially women of color or women who have immigrant statuses.<sup>18</sup> Women in the United States make up 47% of the work force.<sup>19</sup> Almost 81% of women had become mother in 2010.<sup>20</sup> Pregnant women who require

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<sup>16</sup> See *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, *supra* note 12.

<sup>17</sup> See e.g. John F. Muller, Disability, Ambivalence, and the Law, 37 AM. J. L. AND MED. 469, 471

<sup>18</sup> *Accommodating Women on the Job: The Stakes for Women of Color and Immigrant Women*, National Women's Law Center, May 2014, [http://www.nwlc.org/sites/default/files/pdfs/the\\_stakes\\_for\\_woc\\_final.pdf](http://www.nwlc.org/sites/default/files/pdfs/the_stakes_for_woc_final.pdf).

<sup>19</sup> *America's Changing Labor Force*, CENSUS.GOV, [http://www.census.gov/library/infographics/labor\\_force.html](http://www.census.gov/library/infographics/labor_force.html) (last visited Mar. 17, 2015).

reasonable accommodations face an unimaginable choice when their employer denies those accommodations: the health of their child or their job.<sup>21</sup> Women of color and immigrant women disproportionately face this impossible decision because these women are more likely have jobs that are physically demanding and that are low-wage.<sup>22</sup> Another study shows that “women of color are more likely than white women to be family breadwinners, and also more likely to be low-income.”<sup>23</sup> But it is important to note that women of all races often face this impossible choice. The type of accommodations that women ask for, explained in detail below, are likely to be low-or no-cost to the employer.<sup>24</sup> It is simply unrealistic to expect a pregnant woman to choose between a job and a healthy pregnancy, since so many pregnant women and their families are dependent on the woman’s salary.<sup>25</sup>

## **B. CASE LAW SHOWING THAT THE PDA IS INADEQUATE**

Pregnancy is a physical condition, and as such, doctors often advise their patients to modify certain behavior to remain healthy. Some women have attempted to receive reasonable accommodations by using the PDA.<sup>26</sup> The cases that have been brought under this statute have not been favorable to women. Women still face the problem that the hypothetical introduction illustrated and lack the right to reasonable accommodations in the workplace. Therefore, despite pregnant women’s requests for relatively minor accommodations, employers have repeatedly refused to grant these types of requests.

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<sup>20</sup> *Current Population Survey*, Census.Gov, [https://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb12-ff08.html](https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff08.html) (last visited Apr. 2, 2015)

<sup>21</sup> Bakst, *supra* note 1.

<sup>22</sup> *See Accommodating Women on the Job: The Stakes for Women of Color and Immigrant Women*, *supra* note 18.

<sup>23</sup> *Id.*

<sup>24</sup> *The Business Case for Accommodating Pregnant Workers*, National Women’s Law Center, Dec. 2012, [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_workers\\_business\\_case\\_12.04.12.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers_business_case_12.04.12.pdf)

<sup>25</sup> Widiss, *supra* note 2.

<sup>26</sup> 42 U.S.C. § 2000e(k)(1994)) (an amendment to Title VII of the Civil Rights Act of 1964).

The Court of Appeals for the Seventh Circuit produced one of these negative opinions in the 1994 case *Troupe v. May Dep't Stores Co.*, where it held that “[t]he 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, ... to make it as easy, say, as it is for their spouses to continue working during pregnancy. Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees...”<sup>27</sup> In that case, a woman was fired for her repeated tardiness that was a result of her morning sickness, and the court would not find that the employer had to ignore her absence from work because of her pregnancy, unless it was also ignoring non-pregnant workers’ absences.<sup>28</sup> The court’s reasoning for denying the accommodation shows that it follows the Judge Posner interpretation of the PDA that states that employers need only ignore pregnancy to comply with the PDA.

Similarly, the Court of Appeals for the Third Circuit in *Rhett* relied on *Troupe* to deny a woman’s claim under the PDA.<sup>29</sup> The Court found that while pregnancy caused her absence, and her absence caused her termination, the plaintiff could not syllogize that to mean that her pregnancy caused her termination.<sup>30</sup> The Court also compared this case to a case from the Supreme Court which articulated an analysis of an age discrimination case, in which the Court found that the employer can take age into account in certain employment decisions, but not others.<sup>31</sup> This sort of indecisive analysis is a problem because it does not articulate clear and definitive rights.

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<sup>27</sup> *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

<sup>28</sup> *Troupe*, 20 F.3d at 738.

<sup>29</sup> *Rhett v. Carnegie Ctr. Assocs.* (In re Carnegie Ctr. Assocs.), 129 F.3d 290 (3d Cir. 1997).

<sup>30</sup> *Id.* at 296.

<sup>31</sup> *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993).

There are several more examples of employers denying reasonable accommodations to pregnant workers. In *Wiseman*, a pregnant woman requested to be able to carry a water bottle throughout the day in order to stay hydrated and lessen her risk for infection.<sup>32</sup> Her request was denied.<sup>33</sup> The employer explained that it was allowed to change company policy to forbid non-cashier employees from carrying water bottles, and that the employee was fired for insubordination because she did not abide by the new rule.<sup>34</sup> Similarly, in *Ensley-Gaines*, a pregnant employee asked her employer to grant her temporary light duty, meaning that she would not have to lift more than 15 pounds and would not be required to stand more than four hours each day.<sup>35</sup> The employer granted her request, but for only four hours each day, meaning that for the other four hours, she was on regular duty.<sup>36</sup> The employer relied on the company's policy of discretion to grant or deny accommodations, as well as explained that the union agreement in place would leave him liable if he granted the plaintiff's request.<sup>37</sup> Another pregnant worker requested that she be put on modified duty because of her high risk pregnancy, but her employer denied her request, explaining that company policy did not allow for modified work without an on-the-job injury.<sup>38</sup>

Most recently, in *Young v. UPS*, a pregnant woman sued her employer for not granting her reasonable accommodations, forcing her to take a leave of absence, and led to her termination.<sup>39</sup> She argued that her employer granted similar accommodation to other employees who were injured on the job, or who lost their driver's license due to a criminal charge.<sup>40</sup> Her

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<sup>32</sup> *Wiseman v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48020, 2 (D. Kan. June 9, 2009).

<sup>33</sup> *Wiseman*, 2009 U.S. Dist. LEXIS 48020, at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1222-23 (6th Cir. 1996).

<sup>36</sup> *Ensley-Gaines*, 100 F.3d at 1223.

<sup>37</sup> *Id.* at 1222, 1227.

<sup>38</sup> *Serednyj v. Beverly Healthcare LLC*, 2010 U.S. Dist. LEXIS 38221, 8-11 (N.D. Ind. Apr. 16, 2010)

<sup>39</sup> *Young v. UPS, Inc.*, 2015 U.S. LEXIS 2121, 9-10 (U.S. Mar. 25, 2015)

<sup>40</sup> *Id.* at 10-11

employer denied her request by saying that she did qualify for any of the modified duty exceptions, and so he was merely treating her as any other employee.<sup>41</sup> The Supreme Court recently heard this case on appeal, and vacated the lower court's summary judgment in favor of the employer, and remanded the case to allow the employee an opportunity to present her case that the company's policies were intentionally discriminatory to pregnant workers.<sup>42</sup> While the Supreme Court's ruling is positive because it give the woman an opportunity to present her case, these cases demonstrate that the current laws in place are failing pregnant workers who need a reasonable accommodation to maintain a healthy pregnancy.

The current laws illustrate that the United States does not have a good policy when it comes to pregnant workers' reasonable accommodations. The employer's denial, and subsequent win in court, means that women across this nation continue to risk the health of themselves and their fetuses in order to keep jobs that they cannot afford to lose.

### **III. FAILED FEDERAL ATTEMPTS AND SUCCESSFUL STATE LAWS: THE PREGNANT WORKERS FAIRNESS ACT**

There have been several attempts to pass a federal law that would require employers to grant reasonable accommodations requests from pregnant women, but, to date, it has not been a fruitful attempt.<sup>43</sup> This Part first discusses the proposed bill that has failed to become law, and examines the reasoning behind the bill. Then, this Part explains how a few states have implemented their own version of the proposed bill to protect pregnant workers. Third, this Part examines in detail the Illinois Pregnant Workers Fairness Act. Finally, this Part compares the universal aspect of Illinois act to a federal law, the Family Medical Leave Act, and argues that a

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<sup>41</sup> *Young*, 2015 U.S. LEXIS 2121, at 9.

<sup>42</sup> *Id.*

<sup>43</sup> The bill's status remains on Congress.gov as "introduced" See Pregnant Workers Fairness Act, S. 942, 113th Cong. (2013) available at <https://www.congress.gov/bill/113th-congress/senate-bill/942>.

federal PWFA is inadequate because Congress has been known to place restrictions on the eligibility of employees to get protection from laws, as shown with the FMLA.

A proposed federal bill, known as the Pregnant Workers Fairness Act (PWFA)<sup>44</sup> has the stated purpose to “eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for worker whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”<sup>45</sup> This bill, if passed, would make require employers to make reasonable accommodations unless doing so would impose an undue hardship on the business.<sup>46</sup> The proposed bill also prevents employers from denying employment opportunities to women who may require a reasonable accommodation in the workplace.<sup>47</sup> It also charges the Equal Employment Opportunity Commission to create regulations that would explain in detail examples of reasonable accommodations as well as to articulate known limitations related to pregnancy.<sup>48</sup> The proposed PWFA also utilizes the ADA—it states that the terms “reasonable accommodation” and “undue hardship” have the same definition in this bill as they do in the ADA.<sup>49</sup> Thus, there would already be case law that courts could rely on when challenges about what constitutes a “reasonable accommodation” or “undue hardship” were made to the PWFA.

The bill has been introduced twice, first in 2012 and again in 2014.<sup>50</sup> Congresswoman Carolyn B. Maloney, one of the first to introduce the Bill issued a press release explaining the

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<sup>44</sup> S. 942 § 1.

<sup>45</sup> *See generally* S. 942

<sup>46</sup> *Id.* § 2.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 5

<sup>49</sup> *Id.* § 5(5).

<sup>50</sup> S. 942 § 2; Two representatives who were co-sponsors of the Bill issued press releases about the PWFA, both times it was introduced: Press Release, Congresswoman Carolyn B. Maloney, House of Representatives (D-NY), Reps. Nadler, Maloney, Speier, Davis & Advocates Announce Legislation Protecting Pregnant Workers from Discrimination (May 8, 2012), <http://maloney.house.gov/media-center/press-releases/reps-nadler-maloney-speier-davis-advocates-announce-legislation-protecting-pregnant>; Press Release, Congressman Jerrold Nadler, House of

impetus behind the introduction of the PWFA.<sup>51</sup> Each representative spoke to their personal reasons for supporting the bill in the press release.<sup>52</sup> The press release explains that a main reason for the legislation is to pregnant workers to continue to work and support their families while still maintaining a healthy pregnancy.<sup>53</sup> The PWFA plans to do that by requiring employers to make reasonable accommodations and to prevent employers from forcing women out of their job or onto leave, when the woman could continue working with a reasonable accommodation.<sup>54</sup> The proponents of the bill stressed the importance of ensuring that American families could afford the new child being brought into the home, and argued that the PWFA would help society create strong and stable families.<sup>55</sup> Thus, one reason for this bill is to protect families.

The proponents of the bill emphasized that their efforts would help to elevate women. Congresswoman Maloney stated that women must not be penalized for making the choice to have a child, and argued that the PWFA would fight against what she called “maternal profiling,” which would include employers punishing women for being pregnant.<sup>56</sup> Congresswoman Jackie Speier, one of the cosponsors of the bill, stressed that women are not disposable workers who can be cast of if they become pregnant.<sup>57</sup> The Congresswoman’s support for the PWFA was driven by a desire for employers to welcome women completely into

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Representatives (D-NY), Pres. Obama Calls On Congress to Pass Rep. Nadler’s Pregnant Workers Fairness Act (Jun. 23, 2014), <https://nadler.house.gov/press-release/pres-obama-calls-congress-pass-rep-nadler%E2%80%99s-pregnant-workers-fairness-act>

<sup>51</sup> Press Release, Congresswoman Carolyn B. Maloney, House of Representatives (D-NY), Reps. Nadler, Maloney, Speier, Davis & Advocates Announce Legislation Protecting Pregnant Workers from Discrimination (May 8, 2012), <http://maloney.house.gov/media-center/press-releases/rep-nadler-maloney-speier-davis-advocates-announce-legislation-protecting-pregnant>.

<sup>52</sup> *Id.*; See Press Release, Congressman Jerrold Nadler, *supra* note 50.

<sup>53</sup> See Press Release, Congresswoman Carolyn B. Maloney, *supra* note 50.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

the workforce, which includes women who are pregnant.<sup>58</sup> Congressman Jerrold Nadler remarked after Congress's 2013 attempt to pass the PWFA that "it is unconscionable that, nearly 35 years after passage of the Pregnancy Discrimination Act of 1978, women are still being forced to leave jobs, being denied basic and reasonable accommodations that would allow them to continue to work during pregnancy."<sup>59</sup> Another proponent, Congresswoman Susan Davis' comments on the issue align with this author's thoughts, because the Congresswoman questions why Congress still needs to address the issue of reasonable accommodations for pregnant workers because any reasonable person would "consider it inconceivable to fire a pregnant woman for trying to care for the health of herself and her baby."<sup>60</sup> Arguably, these remarks suggest a belief that employers do not have the right to deny pregnancy accommodations because the pregnant worker has a right that overrides that of the employer.

In a practical sense, some states have fixed the immediate problems facing women who lack reasonable accommodations by implementing legislation that requires employers to provide these accommodations. Such immediate problems include women being denied reasonable accommodations, and therefore being forced on leave or out of a job. One of these states is New Jersey, which issued its law because the Legislature found "that pregnant women are vulnerable to discrimination in the workplace in New Jersey; as indicated in reports that women who request an accommodation that will allow them to maintain a healthy pregnancy...are being removed from their positions, placed on unpaid leave, or fired."<sup>61</sup> New Jersey thus was responding to reports of discrimination. It is important to note though, that these state-issued laws are not applicable to federal employers: the New Jersey Pregnant Fairness Worker's

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<sup>58</sup> See Press Release, Congresswoman Carolyn B. Maloney, *supra* note 50.

<sup>59</sup> See Press Release, Congressman Jerrold Nadler, *supra* note 50.

<sup>60</sup> See Press Release, Congresswoman Carolyn B. Maloney, *supra* note 50.

<sup>61</sup> Findings, declarations relative to discrimination based on pregnancy, childbirth, related medical conditions, N.J. STAT. § 10:5-3.1 (Lexis 2014).

Fairness Act is an amendment to the New Jersey Law Against Discrimination (NJLAD) and does not reach to federal employers, so federal employees still face the discrimination that New Jersey sought to end.<sup>62</sup> New Jersey's PFWA has no minimum employee requirement, so all state employers must comply regardless of how many workers they employ.<sup>63</sup>

Delaware's accommodations include a similarly situated comparator provision that other state laws do not have, but the PDA does have, as noted above.<sup>64</sup> The provisions says that the employer must treat a pregnant employee or applicant (even if the employer did not know about the pregnancy) "as well as the employer treats or would treat any other employee or applicant not so affected but similar in the ability or inability to work, without regard to the source of any condition affecting the other employee's or applicant's ability or inability to work."<sup>65</sup> Again, this may fix the problem, but it is not the right solution. Under this law, it is possible that an employer who does not give *any* accommodations to *any* employee could deny a pregnant worker her accommodations.

One state has created a pregnancy accommodations law and passed it through as human rights legislation. Illinois is the only state who has placed its reasonable accommodations mandate within the human rights context.<sup>66</sup> This law creates a rebuttable presumption that the accommodation is not an undue hardship if the employer provides similar accommodations to

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<sup>62</sup> James P. Walsh, Jr. & Sean P. Lynch, *NJ's New Pregnancy Law and How It Affects Employers*, Law 360, Jan 18, 2014

<sup>63</sup> *Id.*

<sup>64</sup> DEL. CODE. ANN. tit. 19, § 711 (2014).

<sup>65</sup> *Id.*

<sup>66</sup> 775 ILL. COMP. STAT. ANN. 5/2-101. (Lexis 2015). ("If after a job applicant or employee, including a part-time, full-time, or probationary employee, requests a reasonable accommodation, for an employer to not make reasonable accommodations for any medical or common condition of a job applicant or employee related to pregnancy or childbirth, unless the employer can demonstrate that the accommodation would impose an undue hardship on the ordinary operation of the business of the employer. The employer may request documentation from the employee's health care provider concerning the need for the requested reasonable accommodation or accommodations to the same extent documentation is requested for conditions related to disability if the employer's request for documentation is job-related and consistent with business necessity.") *Id.* at 2-101(j)(1).

other non-pregnant employees, “regardless of the reason.”<sup>67</sup> Therefore, if an employer gives a non-pregnant employee a reasonable accommodation and denies a pregnant employee similar accommodation, there would be a rebuttable presumption against the employer that its defense claiming undue hardship is not valid.<sup>68</sup> The employer would lose because it cannot claim that an accommodation for a pregnant worker is an undue hardship if it grants similar accommodations to non-pregnant employees.

Illinois attorneys have discussed the purpose of the bill in a few articles (since those articles were published, the bill has been passed into law). One attorney notes that the bill amended the Illinois Human Rights act and included pregnant women as one of the protected classes.<sup>69</sup> Supporters of the recent amendment have praised the benefits of adding pregnancy to the protected class. First, by enabling women to continue working while pregnant, the law may benefit businesses by potentially bolstering “morale, productivity, even company loyalty.”<sup>70</sup> Second, keeping employees at their jobs saves businesses the monetary costs of training new employees to replace pregnant workers.<sup>71</sup> By pointing out the interconnectedness between female pregnant workers and the entire state, supporters argue that by denying reasonable accommodations everyone in Illinois suffers, even the employers who terminated the pregnant workers in the first place on grounds that the employer would not grant reasonable accommodations.<sup>72</sup> Illinois’ reasonable accommodations law ensures that *all* workers, regardless of status at the company or their length of time at the business would be given this right of

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<sup>67</sup> *Compliance Alert: New Illinois Pregnancy Accommodation Law Goes into Effect Jan. 1, 2015*, LABOR AND EMPLOYMENT UPDATE (Vedder Price, Chi., Ill.), Dec. 2014, at 2.

<sup>68</sup> *Id.*

<sup>69</sup> Jennifer B. Wagner, *Illinois Pregnancy Accommodation Act*, THE CATALYST, vol. 20, no. 2 (Illinois State Bar Association Standing Committee on Women and the Law), Aug. 2014.

<sup>70</sup> Wagner, *supra* note 69.

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

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

reasonable accommodations.<sup>73</sup> For example, this law defines unpaid interns as employees.<sup>74</sup> Thus, even workers not on the payroll receive the protection of this law.

Some federal laws (that address issues other than reasonable accommodations) can serve to show how the government places restrictions on which employees are eligible for protection. One example is the Federal Medical Leave Act (FMLA) which places restrictions on which employees are protected.<sup>75</sup> Again, while the FMLA addresses unpaid leave for employees and not pregnancy accommodations, it is important to note that this law passed through Congress with restrictions on who is considered an eligible employee.<sup>76</sup> This demonstrates that Congress is comfortable denying rights to employees who do not meet certain criteria, for example, under the FMLA, only employees who have worked for at least 12 months for the employer for a minimum of 1,250 hours are eligible for the protections of the FMLA.<sup>77</sup> The FMLA creates a legal right, but only for some. Illinois' reasonable accommodations law differs because it applies to all employees, regardless how many months or hours they have worked for their employer.<sup>78</sup> While the FMLA addresses another issues, family leave, it can show that the federal laws that are in place to protect families come with restrictions.

#### **IV. A BETTER WAY: HUMAN RIGHTS**

This paper argues that a better way to frame reasonable accommodation rights is to recognize those rights as human rights. This Part first defines what a human right is, and examines the sources of human rights. Second, this Part describes how other nations have implemented laws to protect pregnant workers by granting reasonable accommodations. Third, this Part proposes a

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<sup>73</sup> Wagner, *supra* note 69. (“Who would be eligible to request? Applicants, probationary, part-time and full-time employees who are pregnant or returning to the workforce after children.”). *Id.*

<sup>74</sup> 775 ILL. COMP. STAT. ANN. 5/2-102(j)(1). (Lexis 2015).

<sup>75</sup> The Family Medical Leave Act 29 U.S.C.S. §§ 2601-2619 (1994); specifically § 2611 (2)(A).

<sup>76</sup> 29 U.S.C § 2611

<sup>77</sup> *Id.*

<sup>78</sup> Wagner, *supra* note 69.

federal law that is similar to Illinois's law, in that it characterizes reasonable accommodations as a human right.

#### A. DEFINITION AND SOURCES OF HUMAN RIGHTS

Reasonable pregnancy accommodations in the workplace are a human right. This section relies on two human rights treaties, one of which the United States is a signatory, to support this assertion. The Treaty on the Inter-American Commission Declaration of Human Rights was signed in 1969, and the United States joined in 1977.<sup>79</sup> There are two provisions which can be interpreted to protect women's rights to reasonable accommodations. Article 7, Section 1 states that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."<sup>80</sup> Arguably, children are an important aspect of the family, and it would appear that the drafters were concerned with the importance of society in general. If people stopped having children, society would end as the only way to create children is through pregnancy. This paper argues that the protection afforded to the family as a whole also includes ensuring that the people responsible for creating healthy citizens remain healthy as well. Article 7, Section 4 focuses on the amount of responsibilities on the parents of children.<sup>81</sup> It states that "The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution."<sup>82</sup> This protects women because it arguably puts the impetus on spouses to play an equal role in the marriage, meaning that both spouses would have equal roles both at home and at work. This equality can arguably be extended to the workplace—meaning that pregnant

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<sup>79</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 144 (entered into force July 18, 1978)[hereinafter The Pact of San Jose].

<sup>80</sup> *Id.* at Art.7 § 1.

<sup>81</sup> The Pact of San Jose, *supra* note 79, at Art. 7 § 4 (this author notes the heteronormative and traditional family values that are inherent in this section, but uses the exact language and then attempts to broaden the meaning to include all types of families).

<sup>82</sup> *Id.* at Art. 7 § 4.

workers and their spouses or significant other will both equally be allowed to earn a living. This understanding is even more important for single mothers, who need to work to provide for the family.<sup>83</sup> Since pregnant women are understood to be equal to their non-pregnant partners, then reasonable accommodations must be made because some pregnant women cannot continue to do their jobs without reasonable accommodations.<sup>84</sup> Arguably, in order to follow the Pact of San Jose's mandate, it is necessary to change the law, and recognize the human right to have a healthy pregnancy and work.

Although the United States has not ratified the UN's Convention to End All Discrimination Against Women (CEDAW),<sup>85</sup> scholars have argued that certain CEDAW provisions reflect *jus cogens* norms.<sup>86</sup> The Third Restatement of the Law of Foreign Relations explains that there are three ways that an international human right law can become binding law in the United States—first is a treaty law, second is customary law, and third is *jus cogens* principles.<sup>87</sup> The Vienna Convention on the Law of Treaties defines a *jus cogen* (or “preemptory norm”) as a norm that is “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>88</sup> Thus, the United States (and all countries) are bound by *jus cogens* norms even if they have not ratified a treaty that codifies this

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<sup>83</sup> Widiss, *supra* note 2.

<sup>84</sup> The Pact of San Jose, *supra* note 79, at Art. 7 § 4

<sup>85</sup> Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981)[hereinafter CEDAW].

<sup>86</sup> See generally Hilary Hammel, *The International Human Right to Safe and Humane Treatment during Pregnancy and a Theory for its application in U.S. Courts*, 33 WOMEN'S RIGHTS L. REP. 244, 253 (2012)

<sup>87</sup> *Id.* (citing Restatement (Third) of Foreign Relations Law §§ 701-02, 102(1) (1987)). See also *Ware v. Hylton*, 3 U.S. 199, 279 (1796) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”).

<sup>88</sup> *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 702 (9th Cir. 1992) (citing Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 332).

norm.<sup>89</sup> *Jus cogen* means that even though it has not been signed into law, the principles are so universal that there does not need to be consent from the government to ensure that these rights are considered human rights.<sup>90</sup>

CEDAW Article 11, Sections 1, provides that “Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular.”<sup>91</sup> This section of CEDAW aims to end discrimination against women in the workplace and guarantees women the right to be treated equally in the workplace. Article 11, section 1, subsection (f) is even more direct when describing the rights a woman has at the workplace with regards to her pregnancy: “The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.”<sup>92</sup> Here, women are given the right to be protected at work while pregnant, thus keeping women and their fetuses healthy. Reasonable accommodations would fall under this umbrella of rights because they would ensure that women are able to safeguard their function of reproduction while also protecting their right to be in the workforce.

CEDAW has been ratified by 188 nations, and the United States is one of only two nations that has signed, but not ratified.<sup>93</sup> As a major world power and a leading Western nation, it seems inconceivable that the United States has refused to ratify this treaty. However, the United States’ failure to ratify does not relieve it of its duty to enforce the principles in the treaty —the

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<sup>89</sup> *Siderman de Blake*, 965 F.2d at 715 (citing Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT’L L. 332, 351 (1988) (“*jus cogens*” embraces customary laws considered binding on all nations,” *id.* at 350-51, and “is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations,” *id.* at 351. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent...). *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> CEDAW, *supra* note 85, at Art. 11 § 1.

<sup>92</sup> *Id.* at Art. 11 § 1(f).

<sup>93</sup> CEDAW, *supra* note 85, available at

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last visited Mar. 19th, 2015).

nation is still bound by it because the doctrine of *jus cogen*.<sup>94</sup> While the treaty does not specifically mention pregnancy accommodations, some scholars argue that it is because the nations who ratified already have laws in place to protect women workers—“Pregnancy accommodations have yet to be mentioned in the CEDAW Committee’s report, indicating that Canada’s own initiatives have been sufficient to protect the rights of pregnant women.”<sup>95</sup> Given that the U.S. lacks such initiatives, it could be argued that the CEDAW indirectly requires such protections for women and should be used to promote this human right. As one scholar interprets the CEDAW, “Article 11(2) protects pregnant, child-rearing and married women (who may be discriminated against because employers assume they will become pregnant) from dismissal...Protection for pregnant workers is vital.”<sup>96</sup> Thus, it can be argued that pregnant women deserve reasonable accommodations in the workplace, as it is their human right to be protected while doing the one thing that only women are capable of doing: bearing children.

## **B. HOW OTHER NATIONS ADDRESS REASONABLE ACCOMMODATIONS**

Several nations have already addresses reasonable accommodations for pregnant workers, and this section discusses the reasonable accommodations laws in place in those nations. The International Labor Organization issued a report in which it found that 84 countries provide pregnancy accommodations.<sup>97</sup> Most of these other countries’ policies are surprising to people living in the United States because of their breadth.<sup>98</sup> For example, in Germany, the

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<sup>94</sup> Klein, *supra* note 88.

<sup>95</sup> Jessica Riggan, *The Potential Impact of CEDAW Ratification on US Employment Discrimination Laws: Lessons from Canada*, 42 COLUM. HUMAN RIGHTS L. REV. 541, 586 (2011).

<sup>96</sup> Jo Lynn Southard, *Protection of Women’s Humans Rights Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 PACE INT’L L. REV. 1, 56-57.

<sup>97</sup> Brigid Schulte, *What’s Fair Treatment For Pregnant Workers? The U.S. Isn’t Sure. Other Countries Are*, THE WASHINGTON POST, (Dec. 5, 2014), <http://www.washingtonpost.com/blogs/local/wp/2014/12/05/whats-fair-treatment-for-pregnant-workers-the-u-s-isnt-sure-other-countries-are/>.

<sup>98</sup> GERMAN MISSIONS IN THE UNITED STATES, [http://www.germany.info/Vertretung/usa/en/04\\_\\_W\\_\\_t\\_\\_G/02/05/Feature\\_\\_5.html](http://www.germany.info/Vertretung/usa/en/04__W__t__G/02/05/Feature__5.html) (last visited Mar. 18, 2015).

*Mutterschutz Gesetz*, (Maternity Protection Act) has been law since 1968, and was put in place to ensure that women were not targeted in the workplace for their pregnancy and goes into effect as soon as the employer is made aware of the pregnancy.<sup>99</sup> The pregnant worker tells her employer she is expecting, and then the employer automatically (meaning there is no need for a doctor's note) modifies the woman's duties to allow her to work without causing harm to herself or the fetus; desk duty and lifting restrictions are common as well and the woman cannot be fired during the pregnancy and up to four months after delivery.<sup>100</sup> Some other countries that provide accommodations include Iceland, France, Ethiopia, the Islamic Republic of Iran and Afghanistan.<sup>101</sup>

The International Labor Organization (ILO), an agency of the United Nations, published in 2014 a Report ("ILO Report") that surveys the laws around the world with regards to pregnancy and the workplace.<sup>102</sup> The ILO Report compares the international laws to the Maternity Protection Convention, which the ILO held in 2000.<sup>103</sup> The 2014 ILO Report states in relevant part that one important goal of the Maternity Protection Convention, 2000 is to enforce the "right of all women not to be treated less favourably in a work situation—including access to

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<sup>99</sup> See GERMAN MISSIONS IN THE UNITED STATES, *supra* note 97.

<sup>100</sup> Brigid Schulte, *What's Fair Treatment For Pregnant Workers? The U.S. Isn't Sure. Other Countries Are*, WASH. POST, (Dec. 5, 2014), <http://www.washingtonpost.com/blogs/local/wp/2014/12/05/whats-fair-treatment-for-pregnant-workers-the-u-s-isnt-sure-other-countries-are/>.

<sup>101</sup> *Id.* citing Laura Addati, ET AL., THE INT'L LABOUR ORG, GENDER, EQUALITY AND DIVERSITY (GED) BRANCH OF THE CONDITIONS OF WORK AND EQUALITY DEPARTMENT, *Maternity and Paternity at Work: Law and Practices Around the World*, (2014). (In Bulgaria and Brazil, pregnant workers are transferred if their jobs are deemed to pose a risk to their health. And in Belarus, Bolivia, Bosnia and Herzegovina, Burkina Faso, Chile, Gabon, Italy, Seychelles, South Africa, Uzbekistan and Vietnam, pregnant women who are transferred to lighter duty for medical reasons should not entail a loss in benefits or pay. Luxembourg and Portugal give pregnant workers their full pay if no work medically necessary alternatives or accommodations exist and they must go on leave. "In the Dominican Republic and the United States," the report says, "any such leave is unpaid.") *Id.* available at <http://www.ilo.org/global/topics/equality-and-discrimination/maternity-protection/publications/maternity-paternity-at-work-2014/lang--en/index.htm>

<sup>102</sup> See generally Addati, Et Al., *supra* note 101.

<sup>103</sup> Maternity Protection Convention, 2000, adopted June 15, 2000, 40 I.L.M. 2 (entered into force Feb. 7, 2002).

employment—because of their reproduction function.”<sup>104</sup> The report also includes examples of the tactics that some countries’ employers use to pressure pregnant women to quit, and denounces these practices.<sup>105</sup> Surprisingly, some of the Western nations that the United States would assume would be at the forefront of women’s rights for reasonable accommodations actually report that women are pressured into quitting or face some financial loss because of their pregnancies.<sup>106</sup>

This paper asserts that the ILO Report’s language can be read to advocate for reasonable accommodations as a human right. The Report discusses the accommodations issue by framing it in an arguably human rights context: “Workplaces have to be safe for all men and women workers, at all stages of their life cycle.”<sup>107</sup> By initially removing the issue of pregnancy or gender, the International Labor Organization lays out a solid argument for why it is necessary for women to be safe in their work environment no matter what. This argument is bolstered by the Committee Experts on the Application of Conventions and Recommendations (CEACR)’s 2012 report in which “the Committee wishes to emphasize that maternity requires differential treatment to achieve genuine equality.”<sup>108</sup> Of 160 countries for which information was available, 78 (49 per cent) set out explicit prohibitions against such work.”<sup>109</sup> That means that almost half

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<sup>104</sup> Addati, ET AL., *supra* note 101, at 73.

<sup>105</sup> *Id.* at 74 (“The study refers to reports of pressure tactics used by employers to compel pregnant workers or new mothers to resign in Romania, Spain and Lithuania... In Croatia, Greece, Italy and Portugal, there are reports of widespread use of “blank resignations” – undated resignation letters that workers are forced to sign upon hiring, which are used to dismiss them if they become pregnant.”). *Id.* at 74.

<sup>106</sup> *Id.* (In the United Kingdom, a study by the Equality and Human Rights Commission (EHRC) reported that around 7 per cent of pregnant women (approximately 30,000 per year) lose their jobs due to pregnancy. Many more (approximately 45 per cent) suffer some sort of financial loss or are pressured into quitting their jobs (EHRC, 2005)).

<sup>107</sup> *Id.* at 90.

<sup>108</sup> International Labor Conference, 101st Session, 2012, May 30-June 14, 2012, General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for Fair Globalization, 2008, at 348 I.L.C.101/III/B.

<sup>109</sup> *See generally* Addati, Et Al., *supra* note 101, at 94.

the countries recognize the importance of keeping pregnant women and their fetuses healthy and value that right so much that they have codified legislation to that end.

The Report quickly points out another reasoning for this policy<sup>110</sup> though, one which is less helpful to women overall: “On the surface this may seem laudable; however, it may contribute to gender-based employment discrimination, ignoring working conditions that may pose dangers to male workers and failing to make them safe for all workers and/or denying women equal opportunity to access certain types of jobs.”<sup>111</sup> This observation shows that the reasoning why is just as important as the outcome—while some of these nations offer protections, they do it for the wrong reasons. This paper argues that these observations seems to provide that some countries disallow pregnant workers to do certain jobs, but not because reasonable accommodations is a human right—those countries do it because they do not think that women are capable of doing certain jobs.<sup>112</sup> Many of the nations studied have similar solutions as the states and cities who have implemented some sort of Pregnant Fairness Workers Act.<sup>113</sup> The nations offer modification of tasks, temporary transfers to a different position and offering temporary paid leave if the worker cannot be in the workplace.<sup>114</sup> This Report shows that many countries have joined the ranks of a few states and cities in the United States that offer reasonable accommodations for pregnant workers. The next Part explains how the United States can implement reasonable accommodations.

### **C. A MODEL STATE: ILLINOIS**

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<sup>110</sup>Addati, Et Al., *supra* note 101 (“Among the 78 countries with provisions forbidding hazardous work, around half (40) impose blanket prohibitions against employing all women in certain types of positions classified as dangerous out of concern for women’s reproductive health or more general safety and health concerns.”) *Id.* at 95.

<sup>111</sup>*Id.* at 95.

<sup>112</sup> *Id.*

<sup>113</sup> (“Such measures typically include a modification of the tasks involved to make them safer and more suitable for the woman’s needs, a temporary transfer to a safer position or, in the absence of other possibilities, placing a worker on temporary leave.”) *Id.* at 97.

<sup>114</sup> *Id.*

This Part examines how the United States can follow Illinois' model reasonable accommodations law. First, it reiterates what Illinois' law provides for pregnant workers. Second, it explains how, through comments made about the PWFA, members of Congress arguably already use language that suggests that reasonable accommodations are a human right. Third, this Part provides reasons why the United States should adopt a law like Illinois's reasonable accommodations law.

Illinois passed its reasonable accommodation law as amendments to its Human Rights Act.<sup>115</sup> Under the law, if an employee brings a claim against her employer for violating this law, there is a rebuttable presumption against the employer that its defense of "undue hardship" is invalid if the employer provides similar accommodations for non-pregnant employees; thus, the employer had the burden.<sup>116</sup> Illinois's law also applies to all employees, no matter how long they have worked for the employer or how many hours they have put in at the job, or if they are even paid employees.<sup>117</sup> Thus, Illinois has cemented reasonable accommodations for pregnant workers as a human right.

Congresswoman Davis spoke of her support for the proposed federal PWFA in terms that suggest that the law is protecting a human right. She questioned why Congress still needs to address the issue of reasonable accommodations for pregnant workers because any reasonable person would "consider it inconceivable to fire a pregnant woman for trying to care for the health of herself and her baby."<sup>118</sup> Arguably, the right that Congresswoman Davis's remarks imply trumps that of the employer could be a human right, because it goes to the core of the person as a human, and not as a woman. This paper argues that a federal law like the PWFA would be a step

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<sup>115</sup> 775 ILL. COMP. STAT. ANN. 5/2-101. (Lexis 2015).

<sup>116</sup> *Compliance Alert: New Illinois Pregnancy Accommodation Law Goes into Effect Jan. 1, 2015*, supra note 60 at 3.

<sup>117</sup> Wagner, supra note 69.

<sup>118</sup> See Press Release, Congresswoman Carolyn B. Maloney, supra note 50.

in the right direction, because it would solve the problems that pregnant workers face in the workplace when they require a reasonable accommodation. However, this paper also argues that in order to globalize and strengthen the rights of pregnant workers, a law like the PWFA should be characterized as a human rights law. Deeming reasonable accommodations a human rights makes the problems that pregnant workers face a *human* problem that all people must combat, rather than a *women's* issue, that only affect women. As a human right, arguably all people would be inclined to combat the inequality that pregnant worker's face in the workplace.<sup>119</sup>

There are also policy reasons why the United States should recognize reasonable accommodations as a human right. Deeming pregnancy accommodations a human right would end the disparity between the state and federal government, because it would make it difficult for lawmakers to protect only federal employers or only state employees, since all employees are humans and thus have this human right. Pregnant workers would be entitled to the human right of reasonable accommodations, because of their status as human, and not as a worker who meets certain time and hour requirements, or who work for the state or the federal government. A better and more inclusive law than the PWFA looks like Illinois' reasonable accommodations law because it grants a right to employees regardless of their status at their job. Arguably, because Illinois's law does not have restrictions on who is protected, it recognizes that pregnant workers are granted protections because of their status as human beings.<sup>120</sup>

Although other states like New Jersey and Delaware have some protections for pregnant workers in place, if these states and cities followed Illinois' approach, and correctly found that reasonable accommodations are human rights, then there would be no restrictions on employees, thus an employer could not deny a pregnant worker reasonable accommodations as long as the

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<sup>119</sup> The Leadership Conference, <http://www.civilrights.org/humanrights/care.html>.

<sup>120</sup> Wagner, *supra* note 69.

accommodations did not impose undue hardship.<sup>121</sup> Moreover, since 2001, the courts of the United States have paid out a total of \$150 million dollars in damages in pregnancy discrimination cases.<sup>122</sup> Employers would be better served if the United States recognized that reasonable accommodations were a human right and accordingly structured its laws around that premise

## V. CONCLUSION

The introduction of this paper provided a hypothetical in which the pregnant employee faced an impossible choice after her employer denied her request for reasonable accommodations. This scenario happens far too often in the United States. Forcing a woman to choose between the health of her child and her job is a violation of human rights.

The laws that the United States has to protect pregnant workers are inadequate. The PDA does not require that employers grant reasonable accommodations to pregnant workers to allow them to keep working throughout the pregnancy.<sup>123</sup> Both interpretations of the PDA also fail to do enough—ignoring pregnancy hurts women because it forces them out of a job, and calling pregnancy a disability denotes the negative connotation that society has for disabilities.<sup>124</sup> A majority of women will become pregnant and carry a child to term.<sup>125</sup> Women currently make up almost half of the workforce in the United States.<sup>126</sup> This means that denying reasonable accommodations is likely to hurt women. Doctors often advise their pregnant patients to modify their behavior for the sake of their own health and for the sake of the baby's health. There are

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<sup>121</sup> tit. 19, § 711.

<sup>122</sup> *Id.* at 75.

<sup>123</sup> 42 U.S.C. § 2000e(k)(2012)).

<sup>124</sup> *Young*, 707 F.3d at 447; *See Enforcement Guidance: Pregnancy Discrimination and Related*, *supra* note 12.

<sup>125</sup> *See Current Population Survey*, *supra* note 20.

<sup>126</sup> *See America's Changing Labor Force*, *supra* note 19.

numerous cases that prove that women often need accommodations to continue working and are denied them: *Troupe*, *Rhett*, *Wiseman*, *Hazen Paper*, *Einsley-Gaines*, and *Young*.<sup>127</sup>

Attempts at a federal law that would protect pregnant workers have failed.<sup>128</sup> The PWFA is not law, despite it being introduced to Congress twice, and its support from many representatives.<sup>129</sup> A few states, including New Jersey and Delaware, have implemented their own version of the PWFA.<sup>130</sup> But only Illinois has implemented a state version of the PWFA as an amendment to their Human Rights Act.<sup>131</sup> Successful federal laws like the FMLA demonstrate that Congress is willing to place restrictions like time requirements on legislation that affects the family.<sup>132</sup> Given Congress's likelihood to place certain restrictions on who is protected under a federal PWFA-like law, it would be more inclusive to categorize reasonable accommodations as a human right.

The treaties and conventions on international human rights create *jus cogens* principles.<sup>133</sup> Thus, the United States is bound by the rights put forth in these treaties and conventions.<sup>134</sup> The United States falls below other Western nations in terms of laws protecting pregnant workers.<sup>135</sup> The United States should recognize reasonable accommodations as a human right, and implement federal legislation that mirrors the law in place in the state of Illinois.<sup>136</sup> Illinois' law applies to all workers, regardless of how long they have worked at their

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<sup>127</sup> See *Troupe*, 20 F.3d at 738; *Rhett*, 29 F.3d at 290; *Wiseman* 2009 U.S. Dist. LEXIS 48020 at 2; *Hazen Paper Co.*, 507 U.S. 612; *Ensley-Gaines*, 100 F.3d at 1220, 1222-23; *Young*, 707 F.3d at 447.

<sup>128</sup> S. 942

<sup>129</sup> *Id.*

<sup>130</sup> N.J. STAT. § 10:5-3.1; tit. 19, § 711 (2014);

<sup>131</sup> 775 ILL. COMP. STAT. ANN. 5/2-101. (Lexis 2015).

<sup>132</sup> 29 U.S.C § 2611

<sup>133</sup> See *The Pact of San Jose*, *supra* note 79; CEDAW, *supra* note 85; *Siderman de Blake*, 965 F.2d 699.

<sup>134</sup> See *The Pact of San Jose*, *supra* note 79; CEDAW, *supra* note 85; *Siderman de Blake*, 965 F.2d 699.

<sup>135</sup> See *Addati, Et Al.*, *supra* note 101.

<sup>136</sup> See *Wagner*, *supra* note 69.

job, or how many hours they have put in there.<sup>137</sup> A federal law like this would give all pregnant workers the same rights.

As a society, it is imperative that the United States rise to the standards that other Western nations have put in place. In order to rise to the level of meeting what human rights demand, the United States needs to implement a law on both the state and federal level that gives pregnant workers reasonable accommodations at all stages of their career. Such a law would offer reasonable accommodations to these pregnant workers. An employer would have a defense if it denied the accommodations—it would be able to show that granting the accommodation would create an undue hardship on the employer. The employer would have the burden to show undue hardship. Women would be free to decide what to do what they want with their family planning this way, since work concerns would no longer be a problem. It would also lessen the stereotypes surrounding women, especially pregnant women, because pregnancy would no longer be an excuse to say a woman can no longer do her job. Bearing children is something only women can do—it is time for the United States to put a law in place to protect this special status. The United States must start bringing pregnant women back into the workforce as valuable members of society. After all, they are the ones creating the future society.

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<sup>137</sup> Wagner, *supra* note 69.