The PDA's Causation Effect: Observations of an Unreasonable Woman

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ABSTRACT: While many scholars have rightfully critiqued the Pregnancy Discrimination Act (PDA) as falling short of achieving the ultimate goal of equal employment opportunities for women, this Article reveals one of the PDA's most important successes. By recognizing pregnant women as a "given" in the workplace, the PDA launched a quiet revolution in the way that judges make causal attributions for adverse employment outcomes. Specifically, the PDA provided judges with the conceptual tools that were needed to help shift causal attributions to an employer, rather than attributing a pregnant woman's struggles in the workplace to her own decision to become a mother. Because our notions of responsibility follow our notions of causation, this shift in causal attribution enabled judges to more easily identify employers as legally responsible for the misfit between the conventional workplace and working women's lives. While this causal attribution shift has been incomplete, it at least laid the foundation for ongoing conversations about how the law might achieve even deeper structural and organizational transformations in the workplace looking forward. By revealing the PDA's causation transformation story, this Article seeks to shore up that foundation for future efforts at designing workplaces more fully around a caregiving worker norm.

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INTRODUCTION

The reasonable [wo]man adapts [her]self to the world: the unreasonable one persists in trying to adapt the world to [her]self. Therefore all progress depends on the unreasonable [wo]man.

– George Bernard Shaw

With the benefit of perfect hindsight, it is not difficult to identify ways in which the Pregnancy Discrimination Act (PDA) has fallen short of providing women equal employment opportunities. Although the PDA prohibits discrimination against pregnant women who can fully perform their employers’ demands, the PDA does not directly dismantle inflexible workplace policies, procedures, and norms that continue to exclude pregnant women who are unable to do so, as long as the employer treats pregnant women “the same” as other employees who are similarly limited in their ability to work. Although the disparate impact theory has the potential to transform some of these exclusionary practices, the PDA’s protection ends when the pregnancy and any “related medical conditions” end. As a result, the PDA does not require employers to modify the workplace to allow women with caregiving responsibilities, including breastfeeding needs, to compete on level ground. Many scholars, myself included, have devoted much of our academic careers to revealing these and other ways in which the conventional workplace discriminates against women who combine caregiving work with labor force participation.


3. See 42 U.S.C. § 2000e(k) (2000) (requiring that pregnant women “be treated the same for all employment-related purposes... as other persons not so affected but similar in their ability or inability to work”).

4. See infra Part I.B.

5. See 42 U.S.C. § 2000e(k) (2000) (defining the protected category of “sex” to include “pregnancy, childbirth, or related medical conditions”).

6. See, e.g., Piantanida v. Wyman Ctr. Inc., 116 F.3d 340, 342 (8th Cir. 1997) (holding that the PDA does not protect a woman from discrimination because of her childcare responsibilities); Fejes v. Gilpin Ventures Inc., 960 F. Supp. 1487, 1491-92 (D. Colo. 1997) (holding that the PDA does not protect a woman from discrimination because she is breastfeeding or because she has childcare responsibilities); Wallace v. Pyro Mining, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990) (holding that the PDA does not protect a woman from discrimination because she is breastfeeding), aff’d, 951 F.2d 351 (6th Cir. 1991).

7. See generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2003) (revealing the range of structural and organizational workplace norms that are incompatible with a non-ideal worker with caregiving needs); Nancy E. Dowd, Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace, 24 HARV. C.R.-C.L. L. REV. 79 (1989) (describing the conflicts between occupational and family life cycles and the role of gender, race, and class in work/family conflict); Mary Joe Frug,
Rather than adding to this wealth of important scholarship, this Article will use the PDA’s thirtieth anniversary as an opportunity to highlight one of the PDA’s most important successes. By legislatively recognizing the economic and social reality that pregnant women are a given in the workplace, the PDA fueled a quiet revolution in the way that courts (and potentially employers and the public more generally) make causal attributions for adverse employment outcomes. Specifically, the PDA provided judges with the conceptual tools to shift their causal attributions to an employer, rather than attribute a pregnant woman’s struggles in the workplace to her own decision to become a mother. Because our notions of responsibility follow our notions of causation, this shift in causal attribution helped begin to reinforce the feminist view that employers may be legally responsible for the misfit between the conventional workplace and working women’s lives.

In this way the PDA was a victory, albeit an incomplete one, for all of us who aspire to George Bernard Shaw’s conception of unreasonableness, as viewed through my own gendered lens in the slightly-modified introductory quote above. For all of us “unreasonable women” in the workforce who persist in believing that equality requires adapting the workplace to the life patterns of women rather than the other way around, the PDA represents progress. More broadly, the PDA’s effect on causal attributions in legal analysis represents a foundational step in all of the ongoing conversations about how the law might achieve even deeper structural and organizational transformations going forward. By revealing the PDA’s effect on causation, this Article seeks to shore up that foundation for future efforts at using the law to design workplaces more fully around a caregiving worker norm.

I. CAUSAL ATTRIBUTION THEORY AND THE PDA

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate “because of” sex. This “because of” language brings causation to center stage in discrimination claims. The causation issue often is formally framed around a determination of whether the protected status was or was not a motivating factor in an employment decision. However, finding causation

Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U. L. REV. 55 (1979) (identifying the barriers that working mothers face in the waged labor market); Michelle A. Travis, Equality in the Virtual Workplace, 24 BERKELEY J. EMP. & LAB. L. 283 (2003) [hereinafter Travis, Virtual Workplace] (explaining how technological innovation, such as the telecommuting revolution, gets adapted to the workplace status quo rather than providing true flexibility for workers with caregiving responsibilities); Michelle A. Travis, Recapturing the Transformative Potential of Employment Discrimination Law, 62 WASH. & LEE L. REV. 3 (2005) [hereinafter Travis, Recapturing] (demonstrating how the “full-time face-time norm” disproportionately excludes workers who are caregivers); Michelle A. Travis, Telecommuting: The Escher Stairway of Work/Family Conflict, 55 ME. L. REV. 261 (2003) (explaining how the telecommuting revolution has been adapted to the workplace status quo rather than providing true flexibility for workers with caregiving responsibilities).

frequently rests on a more general determination of whether the employment outcome was really the result of the employee's own performance, conduct, choice, or decision, rather than simply the result of her status. In other words, courts often implicitly decide whether to view the employee or the employer as the "cause" of the employment event at issue. Our legal attributions of responsibility—like our social attributions of responsibility—follow our attributions of causation. The success of antidiscrimination law thus depends upon the accuracy with which judges make causal attributions. The psychological study of causal attribution theory is therefore essential in understanding the development of employment discrimination law.

Causal attribution theory is the branch of social cognition theory that studies the process by which people arrive at explanations for social events. More specifically, causal attribution is the cognitive process by which people link a social event to a particular causal antecedent. Social scientists have discovered that our rapid and often unconscious causal attribution process is typically efficient, effective, and highly adaptive, but at the same time it is also predictably biased. These researchers have documented a variety of ways in which we systematically make attribution errors when assessing the world around us.

In his recent book, *The Stuff of Thought: Language as a Window Into Human Nature*, Steven Pinker analyzes one such limitation on accurate causal attributions: the conceptual semantics of causal theory. Pinker's book explains that notions of causality are "woven into language," and he demonstrates how our language of causation sets the parameters for "how we understand our surroundings" and "how we assign credit and blame." In particular, Pinker has studied the conceptual semantics that govern our causal attributions "whenever a collection of circumstances is necessary for an effect in the outcome."
to occur.”\textsuperscript{16} That is the case when a woman loses her job or suffers another adverse employment action because she is pregnant: The result depends upon both the woman’s pregnancy and the employer’s inflexible practices or prejudiced norms. Pinker has found that rather than identifying all necessary circumstances as “causes,” we generally single out one circumstance and label it the cause, which we then view as the responsible event.\textsuperscript{17} “People somehow distinguish just one of the necessary conditions for an event as its cause and the others as mere enablers,” explains Pinker, “even when all are equally necessary.”\textsuperscript{18}

How do we choose which circumstance to identify as the cause and therefore the responsible event? Pinker explains that we use a technique involving the generation of counter-factuals.\textsuperscript{19} We make “an implicit comparison with certain other states of affairs (similar possible worlds, if you will) that we keep in the back of our minds as reasonable alternatives to the status quo.”\textsuperscript{20} The circumstance for which we can most easily generate a plausible counter-factual or imagine an alternative state of affairs, or the circumstance that we believe someone could have controlled most easily, is the one that we label the cause.\textsuperscript{21}

To illustrate this phenomenon, Pinker uses the example of a match burning, which requires a collection of necessary circumstances to occur: someone striking the match, the match being dry, oxygen being present, and there being shelter from the wind.\textsuperscript{22} “In all the possible worlds similar to ours in which the match is wet, the room is filled with carbon dioxide, or the striker is outdoors, the match does not burn,” explains Pinker.\textsuperscript{23} Nonetheless, when people are asked what caused the match to burn, they generally say it was caused by striking the match: “[W]e single out the act of striking it, not the presence of oxygen, the dryness of the match, or the presence of four walls and a roof.”\textsuperscript{24} This is because the circumstance for which we can most easily imagine an alternative state of affairs, and the circumstance that we believe someone most easily could have controlled, is the act of striking the match. “Since oxygen is pretty much always around, we don’t think of its presence as a cause of a match igniting,” explains Pinker.\textsuperscript{25} “But since we spend more time not striking

\textsuperscript{16.} Id. at 213.
\textsuperscript{17.} Id. at 213-14.
\textsuperscript{18.} Id. at 214.
\textsuperscript{19.} Id. at 213.
\textsuperscript{20.} Id. at 214.
\textsuperscript{21.} Id. (“To label a condition as a ‘cause’ means to identify a factor that we feel could easily have been different, or that someone could have controlled, or that someone might control in the future.”).
\textsuperscript{22.} Id. at 213.
\textsuperscript{23.} Id.
\textsuperscript{24.} Id.
\textsuperscript{25.} Id. at 214.
matches than striking them, and feel that it is up to us at any moment whether we strike or not, we do credit the striking as a cause.\textsuperscript{26}

There are ways, however, to shift our causal attributions from one necessary circumstance to another, thereby shifting where we rest responsibility. This can be accomplished by making counter-factuals of another circumstance easier to generate or by changing our assumptions about which circumstance most easily could have been different or controlled.\textsuperscript{27} In other words, "[c]hange the comparison set and you change the cause."\textsuperscript{28} If the initiation of fire is considered in the context of welding, for example, our identification of the cause shifts. Certain types of welding are typically done in oxygen-free chambers specifically to avoid the risk of fire.\textsuperscript{29} If oxygen somehow enters the chamber, and subsequently a spark ignites and fire ensues, we generally identify the presence of oxygen as the cause of the fire, rather than any act by the person involved in the event.\textsuperscript{30} In that context, the easiest circumstance for which to imagine an alternative state of affairs, and the circumstance we believe could have been controlled most easily, was the lack of oxygen.

Similarly, if we change our perception of a person's role in an event from one of active or direct participation to one of passive or indirect participation, our causal attributions may shift away from that person, even if that person's conduct was necessary for the event to occur. To illustrate this point, Pinker describes an experiment in which psychologists told subjects to imagine a coin perched on its edge.\textsuperscript{31} Some subjects were told that the coin was about to fall onto heads but that an actor rolled a marble at the coin and knocked it onto tails.\textsuperscript{32} Other subjects were told that the coin was about to fall onto tails, that a marble had been rolled at the coin and was going to knock it onto heads, but that an actor stopped the marble before it touched the coin, and that the coin fell onto tails as it was leaning originally.\textsuperscript{33} Subjects typically described the actor in the first scenario, but not the actor in the second scenario, as having caused the coin to fall onto tails, despite the fact that the actors' conduct was a necessary or "but for" cause of the coin falling onto tails in both situations.\textsuperscript{34} In the former scenario, the actor was viewed as an active participant exerting a force directly on the relevant outcome—on the coin that fell. In the latter scenario,

\begin{itemize}
\item \textsuperscript{26} Id.
\item \textsuperscript{27} See id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id. (including the interesting real-world example of the fire that killed three Apollo astronauts in 1967, which "is commonly blamed on the pure oxygen that filled the capsule, causing a minor spark to grow into an inferno").
\item \textsuperscript{31} See id. at 223.
\item \textsuperscript{32} See id.
\item \textsuperscript{33} See id.
\item \textsuperscript{34} See id. In other words, "but for" the actor's conduct in either situation, the result would have been different.
\end{itemize}
the actor was viewed as a passive participant who exerted a force on something else—on the marble, rather than on the coin. Pinker calls this a lay person’s “force-dynamic” conception of causation, which often ends up ignoring necessary causal antecedents.

Pinker has found that the use of causal semantics plays a significant role in establishing these often erroneous causal perceptions. In other words, words matter. In some situations, our natural choice of words favors verbs that help convey a conclusion of causation, such as “get,” “make,” or “set.” In other situations, our natural choice of words favors the use of verbs that convey mere enablement, such as “allow,” “let,” or “permit,” which do not result in causal attributions despite their subjects’ causal role.

This understanding of the conceptual semantics of causal theory helps explain how important the PDA has been in advancing women’s workplace equality. As noted above, when a woman suffers an adverse employment action because she is pregnant, that event results from multiple necessary circumstances, including both the woman becoming pregnant and the employer’s inflexible practices or prejudiced norms. Pinker’s theory of counterfactual causal logic reveals how easy it was prior to the PDA for employers, society, and, most importantly, judges to identify the woman’s decision to become a mother as the cause and therefore the act solely responsible for the adverse action. Prior to the PDA, there was nothing in Title VII’s general prohibition of sex discrimination that explicitly directed, constrained, or counteracted judges’ normal attribution biases. Because the counter-factual of the worker not being pregnant or not having pregnancy-related performance limitations was often more salient and readily imaginable than the counter-factual of the workplace designed around the life patterns of a woman, it was quite possible for judges who were applying the statute’s general “because of” language to view pregnancy as a choice rather than a status, and therefore not to recognize the employer as a causal actor in pregnant women’s sex discrimination claims. Analogizing to Pinker’s matchstick example, getting pregnant was like striking the match, and the workplace policies, practices, and norms that were incompatible with a woman’s pregnancy were like the match being dry, oxygen being present, and there being shelter from the wind. Because inflexible workplaces designed around the life patterns of men were typically all that existed, judges did not always readily conceive of the employer as a cause of pregnant women’s struggles to compete.

35. See id.
36. See id. at 219.
37. See id.
The Supreme Court demonstrated these causal attribution biases in *General Electric Co. v. Gilbert*, 39 which was the immediate impetus for the PDA’s enactment. 40 In *Gilbert*, the Court held that an employer did not engage in actionable discrimination by excluding pregnancy-related disabilities from its otherwise comprehensive disability benefits plan for non-occupational illnesses and injuries. 41 Although the adverse benefits action suffered by the class of women plaintiffs was necessarily the result of both the plaintiffs’ becoming pregnant and the employer’s decision to exclude a uniquely-gendered condition from its policy, the Court failed to recognize the employer’s causal role. The Court compared pregnant women to other workers who might seek non-occupational disability benefits and concluded that pregnancy was “significantly different” because it is often a “voluntarily undertaken and desired condition.” 42 The counter-factual of a worker not choosing to become pregnant was much easier to generate as an alternative state of affairs than was an employer choosing to provide an all-inclusive benefits policy or one that offers equivalent coverage for the work lives of both women and men. Accordingly, the Court viewed the women’s own decision to become pregnant as the circumstance that could have been controlled most easily, and therefore the circumstance that was most salient for selection as the cause and the legally responsible act.

The specific causal semantics used in *Gilbert* nicely illustrate Pinker’s observation that words matter. The majority implicitly compared the employer’s disability policy to the counter-factual of a workplace without any disability plan at all. It thus described the only active component of the employer’s conduct as the decision to give disability coverage to both men and women for a wide range of non-occupational illnesses and injuries that affect all workers. 43 The Court then described the plaintiffs’ claim as a challenge to the plan’s underinclusiveness, and it described the employer’s allegedly improper conduct as failing to include the unique condition of pregnancy-related disabilities. 44 These words depict the employer as a passive contributor to the outcome—in Pinker’s terminology, as a mere “enabler.” Describing the employer’s input with words of mere enablement allowed the Court’s causal sites to shift to other inputs: in this case, to the women who were pregnant. The Court compared the plaintiffs to all other workers and concluded that

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40. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678, 679 n.17 (1983) (stating that “when Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision,” and citing portions of the PDA’s legislative history documenting that the PDA was a reaction to and repudiation of *Gilbert*).
41. 429 U.S. at 145-46.
42. Id. at 136.
43. See id. at 138.
44. See id. at 134, 138-39.
pregnancy-related disabilities were “an additional risk” that these women uniquely brought to the workplace.\textsuperscript{45} By further describing that additional risk as a voluntary one, through an implicit comparison to women who were not pregnant, the Court stamped its causal attribution upon the plaintiffs rather than the employer, thereby defeating the discrimination claim.

In contrast, Justice Brennan’s dissent in \textit{Gilbert} (in which Justice Marshall concurred) invoked a different comparator set, which allowed the dissent to recognize the employer’s role as causal, rather than merely enabling. The dissent implicitly compared the employer’s disability policy to the counterfactual of a policy that covered all non-occupational illnesses and injuries.\textsuperscript{46} Accordingly, the dissent described the employer’s allegedly improper conduct as actively excluding pregnancy-related disabilities from its otherwise comprehensive program, rather than just passively failing to include them.\textsuperscript{47} The employer thus became analogous to the actor who rolled the marble at the falling coin and knocked it in a different direction, rather than the actor who merely prevented a rolling marble from doing the same.

One of the most important results of the PDA was to reject the comparison set used by the \textit{Gilbert} majority. In enacting the PDA, Congress recognized the economic and social reality of pregnancy as a normal condition of employment, and of pregnant women as a given in the workplace.\textsuperscript{48} This normalization of pregnancy in the workplace was one of the pervasive themes in the PDA’s legislative history. Congressional testimony repeatedly emphasized three crucial facts: the very large and rapidly growing size of the female workforce; the very large proportion of women who become pregnant while engaged in the paid workforce; and the financial necessity driving most women’s labor force participation.\textsuperscript{49} Simply put, Congress recognized pregnancy as a status, rather

\begin{itemize}
\item \textsuperscript{45} \textit{Id.} at 138-39.
\item \textsuperscript{46} \textit{See id.} at 152 (Brennan, J., dissenting).
\item \textsuperscript{47} \textit{See id.} at 151-52 (Brennan, J., dissenting).
\item \textsuperscript{48} \textit{See Hannah Arterian Furnish, Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964, 66 IOWA L. REV. 63, 84 (1980) (“The fact that pregnancy is a normal occurrence in the working life of female employees was a basic premise of section 701(k).”); Reva B. Siegel, \textit{Employment Equality Under the Pregnancy Discrimination Act of 1978}, 94 YALE L.J. 929, 939 (1985) (describing the PDA as a congressional assertion “that pregnancy is and must be treated as a normal condition of employment”).
\item \textsuperscript{49} \textit{See, e.g., Discrimination on the Basis of Pregnancy: Hearing on S. 995 Before the Subcomm. on Labor of the S. Comm. on Human Res., 95th Cong. 2 (1977) (noting that “[n]early half our Nation’s children have mothers who are in the labor force”); Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the H. Comm. on Educ. and Labor, 95th Cong. 62 (1977) (statement of Dorothy Czarnecki, M.D.) (urging that the “proper perspective” is to view pregnancy as “normal,” and noting that “[o]ver 40 percent of our work force is women” and that “[w]omen work because there is a need to provide for themselves and their families”); 124 CONG. REC. 21, 442 (1978) (statement of Rep. Burke) (noting that most women work out of economic necessity, with “more than 18 million working women whose husbands earn less than $10,000 per year,” and “[o]f that number, 6 million have husbands earning less than $5,000 per year”); 124 CONG. REC. 21, 441 (1978) (statement of Rep. Garcia) (noting that “56 percent of all American women work,” and most do so out of necessity); 124 CONG. REC. 21, 440 (1978) (statement of Rep. LaFalce) (noting that “[i]n recent years, the greatest increase in labor
than a choice, and it used the PDA to reflect the reality that pregnant women
were in the workplace to stay.

In so doing, the PDA made it more difficult for judges to consider the
employee not being pregnant or not having pregnancy-related limitations on her
ability to work as a counter-factual when trying to identify the cause of the
pregnant employee losing her job, and it also made it more difficult for judges
to consider the volitional nature of pregnancy as a basis for resting
responsibility on the woman herself. In Pinker’s matchstick example, he
observed that the mere fact that “oxygen is pretty much always around” helped
remove the presence of oxygen from our causal crosshairs. 50 Similarly, once
the PDA effectively required judges to recognize pregnant workers as “pretty
much always around,” it made it more difficult for judges interpreting sex
discrimination law to treat a pregnant woman’s decision to become a mother as
the cause of her workplace exclusion.

In Professor Wendy Williams’ testimony to the House of Representatives,
she explained how normalizing pregnancy would help shift judges’ causal
attributions for pregnant women’s workplace struggles away from women
themselves and onto the workplaces that are designed to make pregnancy
incompatible with work. 51 “The starting point for analysis,” explained
Professor Williams, “is the fact that around 80 percent of all women become
pregnant at some point in their worklives.” 52 Professor Williams used that
background fact to help reveal the causal attribution error in judicial reasoning

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50. See Pinker, supra note 9, at 214.
51. Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055
and H.R. 6075 Before the Subcomm. on Employment Opportunities of the H. Comm. on Educ. and
Labor, 95th Cong. 11-12 (1977) (statement of Wendy Williams, Professor of Law, Georgetown Law
School).
52. Id. at 12.
in cases like the Fourth Circuit's opinion in Cohen v. Chesterfield County School Board. In Cohen, the court had dismissed a school teacher's argument that it was unconstitutional to force her to leave her teaching job because she was pregnant. The court had reasoned that "[n]o man-made law or regulation excludes males from [the experiences of pregnancy and motherhood] and no such laws can relieve females from all the burdens which naturally accompany the joys and blessings of motherhood." Professor Williams explained to Congress that, in reality, "it is precisely man-made laws and rules which create burdens for the working woman.

Formally, the PDA accomplished this normalization of pregnancy and corresponding effect on judicial causal attributions by adding a provision in Title VII's definition section stating that the term "sex" includes "pregnancy, childbirth, or related medical conditions." Although many courts had taken that position and made appropriate causal attributions to employers in certain types of pregnancy discrimination cases prior to Gilbert, the Supreme Court's Gilbert decision demonstrated how easy it was for judges to direct their causal attributions away from employers in the absence of a normative understanding that pregnant workers should be viewed as an indisputable fact, rather than as a small group of unique, volitional actors. The PDA's enactment was Congress's first opportunity to publicly provide such a normative statement about the role of pregnancy in the workplace, which had been absent in the original legislative history of Title VII.

54. Cohen, 474 F.2d at 397.
55. Id. (internal quotations omitted). In Cohen, the Fourth Circuit repeatedly used active verbs denoting causation when describing women as "becom[ing]" pregnant but used passive verbs denoting mere enablement when describing the employer's policy as "notic[ing]" the fact that pregnancy affects women's lives. Id. The Court went on to describe the women's choice to become pregnant as the most easily controlled variable in the equation, stating that most women "wish" or "plan" to become pregnant and often "seek to select the time for doing so." Id. at 398.
57. Id.; see also 123 CONG. REC. 29, 662-63 (1977) (statement of Sen. Biden) challenging the relevance of pregnancy being "a voluntarily entered into condition" by emphasizing the fact that most women work out of economic necessity and shifting the causal focus onto employers' "discriminatory practices which pose barriers to working women in their struggle to secure equality in the workplace").
59. See, e.g., Hutchinson v. Lake Oswego Sch. Dist. No. 7, 519 F.2d 961 (9th Cir. 1975); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975); Commc'n Workers v. Am. Tel. & Tel., 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975).
In addition to normalizing pregnant women in the workplace and thereby reducing the salience of their own decisionmaking as a potential causal target for judges, the PDA simultaneously increased the salience of employers' input into the causal equation by necessitating judicial scrutiny of employers' motivations for adverse employment decisions and by demanding judicial inquiry into how employers treat other similarly-situated workers. The PDA provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."60 Although this requirement that employers need only treat pregnant workers "the same" as similarly-situated others has been criticized appropriately as limiting the statute's transformative effect,61 it at least served the purpose of shifting judicial focus away from a pregnant woman's decision to become a mother and onto an employer's treatment of pregnant women as members of the larger workforce. As a result, visions of both an alternative employer response and a more flexible workplace design became more plausible counterfactuals and more easily-imagined alternative states of affairs, which at least set the foundation for helping judges to identify the employer's causal role in adverse employment actions against pregnant women.

The PDA's explicit rejection of the Supreme Court's reasoning in the Gilbert majority makes it easy to characterize the PDA itself as having played a causal role in cabining and directing judges' causal attributions in sex discrimination claims. While women's dramatic increase in labor force participation and related cultural forces, including the rise of second wave feminism, eventually may have pushed the Supreme Court to reverse course and join the set of circuit courts that previously had recognized pregnancy as a protected status, the PDA certainly expedited that process in dramatic fashion by curtailing Gilbert's reach.

While the primary focus of this Article is on the PDA's effect on judges' causal attributions in pregnancy discrimination claims, one can speculate about the PDA's effect on causal analysis more generally. While it is more difficult to assess whether the PDA has affected the causal attributions of employers, employees, or others, there is reason to suspect that the PDA has made at least some contribution toward a more general recognition of pregnancy as status rather than choice.62

62. Beyond the question of what role the PDA has played in shifting the causal attributions of employers, employees, or others is the more fundamental question of the extent to which such a shift has occurred. To what extent have members of the public continued to believe that women should be viewed
This suspicion is based in part on lessons from sociologists in the "new institutionalism" tradition who have recognized that a law's practical meaning is determined in part by studying its effects on organizational policies and practices. In the context of antidiscrimination law, the new institutionalists have discovered that once employers identify a type of conduct as unlawful discrimination, employers often implement defensive practices that go well beyond what the law requires. For example, many employers adopted "no dating policies" in their workplaces in reaction to reports of sexual harassment litigation, even though no case suggests that employers may be liable simply by permitting consensual coworker dating. As Professor Joan Williams has recognized, "anti-discrimination law operates as a language of social ethics. When people begin to see something as 'discrimination' in the U.S., they begin to act quite differently, without tight reference to the specific contours of case law." This effect on organizational behavior is often the result of intermediaries, such as human resource professionals, in-house counsel, and employment lawyers, who translate legal obligations into institutional policies and who often advise employers to go beyond the four corners of the law as a litigation-avoidance strategy. To the extent that this may be occurring in the context of the PDA, the mere fact of organizational change might end up changing the belief systems of those involved. Evidence suggests that beliefs often follow behavior, rather than vice versa, as people attempt to resolve any cognitive dissonance between the two by bringing their beliefs in line with their

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64. See Travis, supra note 63, at 3; Joan C. Williams, Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality, 26 T. JEFFERSON L. REV. 1, 11 (2003); Williams & Segal, supra note 63, at 120-21.

65. See Williams, supra note 64, at 11.

66. Id.

67. See Travis, supra note 63, at 4, 47.

68. Advice newsletters from employer-side employment law firms to their clients suggest that this is at least a possibility. See, e.g., Crowell & Moring, Avoiding a Maternal Profiling Claim, http://www.crowell.com/NewsEvents/Newsletter.aspx?id=859 (last visited Apr. 4, 2009) (urging employers not only to follow the legal requirements of pregnancy discrimination law, but also to avoid "otherwise engaging in activity that may be perceived as stereotyping" or treating pregnant workers or mothers differently); Gordon & Rees, LLP, Publications: Employment Law Alert, Pregnancy Discrimination Claims, http://www.gordonrees.com/pubs/employmentLawAlert_100107w.cfm (last visited Apr. 4, 2009) (urging employers to take "extra care" whenever they are "dealing with women who are expecting the birth of a child, or who are on or recently returned from maternity leave").
In other words, if the law changes behavior, changes in attitude may not be far behind.

While it is thus possible that the PDA may have affected causal reasoning outside the confines of judicial chambers, the remainder of this Article will continue to focus on the PDA’s effect on judges’ causal attributions in pregnancy discrimination claims. While case law helps reveal how the PDA has directed judges’ causal attributions in the right direction from the perspective of an “unreasonable woman,” its ability to fully adapt the workplace to the realities of pregnancy has limits. The following sections will describe the varying levels of success that the unreasonable woman’s agenda has achieved in the courts with varying types of PDA claims.

A. Disparate Treatment Claims: Partial Success

In disparate treatment claims, pregnant women allege that their employers intentionally took an adverse action against them because of their pregnancy. These claims can be categorized into three general types: (1) claims in which the pregnant employee can perform all job functions under the conditions established by the employer, but the employer nevertheless treats the employee adversely with respect to the terms, conditions, or benefits of the job; (2) claims in which the pregnant employee needs some alteration of the job conditions established by the employer and the employer refuses, although the employer grants requests by non-pregnant workers who require similar alterations for other reasons; and (3) claims in which the pregnant employee needs some alteration of the job conditions established by the employer and the employer refuses, just as the employer does for non-pregnant workers who require similar alterations for other reasons. In the first two categories, but not the third, the PDA has been successful at facilitating employer-focused causal attributions by judges and thereby holding the employer responsible under antidiscrimination law.

The first category of cases includes, among others, situations like the Gilbert case itself, where the scope of an employer’s benefits package is at issue rather than a pregnant employee’s inability to perform within the conventional workplace design. In Cooley v. DaimlerChrysler Corp., for

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69. See Travis, Recapturing, supra note 7, at 3, 17; see also Scott Plous, The Psychology of Judgment and Decision Making 30 (1993) (explaining that “changes in behavior” can lead to “changes in attitude” because “the pressure to feel consistent will often lead people to bring their beliefs in line with their behavior”).

70. Another type of case in this category is one in which an employer takes an adverse job action against a pregnant employee based on the assumption that the employee will need accommodations. See, e.g., Maldonado v. U.S. Bank, 186 F.3d 759, 766-67 (7th Cir. 1999) (holding that although the bank could lawfully fire an employee for absenteeism even if that absenteeism is caused by pregnancy, the PDA prohibits the bank from firing an employee because it assumes that her pregnancy will make her
example, a class of female employees brought a PDA claim against their employer for excluding prescription contraceptives from its health care benefits plan.\textsuperscript{71} Under \textit{Gilbert}, the court likely would have characterized the employer as having provided equal coverage to men and women, as having merely \textit{failed} to include an additional and \textit{volitional} pregnancy-related risk, and therefore not as an active discriminator. Post-PDA, the district court in \textit{Cooley} was required to view the case in the same way that the dissent had viewed the exclusion of pregnancy-related disabilities from the employer’s disability benefits plan in \textit{Gilbert}. With the PDA having normatively positioned pregnant workers as an undisputed fact of employment, the \textit{Cooley} court viewed pregnancy as a “‘status’” rather than as a choice.\textsuperscript{72} In a small victory for all of us unreasonable women, the court stated that the PDA “recognizes that women have different sex-specific needs for which provisions must be made to the same extent as other health care requirements.”\textsuperscript{73} The court therefore turned its attention to the employer and identified the employer’s active role in “selectively excluding prescription contraceptives from its otherwise comprehensive benefit plan.”\textsuperscript{74} Using the treatment of men as a counter-factual—a group that was “protected from all categories of risk”—it became easy to identify the employer’s causal and discriminatory role in granting women “only partial protection.”\textsuperscript{75}

The PDA has had similar success in facilitating judges making causal attributions to employers in cases involving pregnant employees who need workplace changes or rule modifications, at least where employers have provided such flexibility to similarly-situated others. These cases are significant because the pregnancy-related limitations on the employees’ ability to perform the job in its conventional design can provide a highly salient causal focus when judges are reviewing adverse job consequences. The PDA’s requirement that courts compare the employer’s treatment of the pregnant worker to the employer’s treatment of other workers with similar limitations on their ability to work is thus quite useful in ensuring that judges identify the employer’s causal role in what might otherwise be deemed a performance-based termination. The PDA’s comparator requirement forces judges to consider behavioral counter-factuels on the employer’s side, and it allows judges to perceive the employer’s control in situations in which the employer merely \textit{fails} to accommodate. The decisions in \textit{Adams v. Nolan},\textsuperscript{76} \textit{EEOC v. Ackerman, Hood & McQueen, Inc.},\textsuperscript{77} and \textit{Scherr v. Woodland School Community

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unavailable during the bank’s critical summer months without any evidence that such absences will occur.
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\textsuperscript{71} 281 F. Supp. 2d 979 (E.D. Mo. 2003).
\textsuperscript{72} Id. at 984 (quoting UAW v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991)).
\textsuperscript{73} Id. at 985.
\textsuperscript{74} Id. at 984 (emphasis added).
\textsuperscript{75} Id.
\textsuperscript{76} 962 F.2d 791 (8th Cir. 1992).
\textsuperscript{77} 956 F.2d 944 (10th Cir.), \textit{cert. denied}, 506 U.S. 817 (1992).
Consolidated Dist. No. 50 are three examples of this second category of cases in which employers' own conduct has demonstrated the feasibility of workplace flexibility, thereby facilitating employer-directed causal attributions by the courts.

In Adams, the employer denied a patrol officer's request to transfer to a light duty position during her pregnancy, which forced her to take an unpaid leave. The Eighth Circuit reversed a bench trial and held that the employee had stated a cognizable discrimination claim. The court could have considered the counter-factual of the plaintiff not becoming pregnant, could have noted that the pregnancy rendered the plaintiff temporarily unable to perform her required job duties, and could have held that her own pregnancy-based performance limitations were the cause of the negative employment action. But since the PDA declared pregnancy a "given" rather than a choice, and because the PDA requires an inquiry into how the employer treats similarly-situated others, the court instead considered the fact that the employer had granted light duty transfers to other workers with temporary work restrictions from non-pregnancy-related conditions. This easily-identifiable counter-factual on the employer's side of the equation made evident the employer's causal role in the employee's forced leave. Because of this comparison, the necessary circumstance that appeared most easy to control — and therefore most causally influential — was the employer's decision to exclude pregnant women from its transfer policy, rather than the employee's inability to perform the job as traditionally designed. Because responsibility follows causal attribution, the court labeled the employer's conduct discriminatory.

In Ackerman, the Tenth Circuit affirmed a bench trial for the plaintiff, who was fired for requesting that she not be required to work over forty hours per week during her pregnancy. The court rejected the employer's argument that the employee herself caused the termination by her insubordinate refusal to work overtime. Once again, by establishing pregnancy as a normal state of employment and by demanding an inquiry into the employer's treatment of similarly-situated others, the PDA directed the court's attention to the employer. The court focused on the fact that the employer had granted other employees' requests for leaves or work schedule adjustments for a variety of non-pregnancy-related personal needs, which provided a ready counter-factual to the employer's response to the plaintiff's request. This allowed the

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78. 867 F.2d 974, 978-80 (7th Cir. 1988).
79. 962 F.2d at 792-93.
80. Id. at 792.
81. Id. at 795-96.
82. 956 F.2d at 945.
83. Id.
84. Id. at 948.
court to see the employer as an active participant in excluding the employee from a flexible work option instead of a passive participant in merely failing to provide workplace accommodations. Accordingly, rather than attribute the employee’s fate to her own pregnancy-based limitations on her ability to work, the court attributed her termination to the employer’s lack of “effort” to respond to her restrictions, “despite a history of doing just that for employees with other medical concerns.”

In *Scherr*, the Seventh Circuit found a triable discrimination claim against an employer who refused to allow pregnant teachers who took unpaid maternity leaves to extend their time off with accumulated paid sick leave, while allowing non-pregnant workers to combine accumulated paid sick leave with extended unpaid personal leave for other types of temporary disabilities. The court recognized that this result was due to a combination of both the employee becoming pregnant and the specific design of the employer’s disability leave plan. In selecting the cause among these two necessary circumstances, the dissent and the majority focused on different counter-factuals. The dissent considered the counter-factual of a pregnant teacher deciding to take paid sick leave instead of unpaid maternity leave. This led the dissent to deem the pregnant teacher the one in control of the outcome and therefore the causally responsible actor. “The school districts’ leave policies do not ‘force’ the teachers to give up sick days,” reasoned the dissent, “instead, the teachers presumably choose to forego paid sick days because they want to spend more time at home after their pregnancy rather than immediately return to work when their pregnancy-related disabilities end.” The majority, in contrast, correctly followed the PDA’s mandate to consider the employer’s treatment of similarly-situated employees. The fact that the employer allowed other employees to combine paid and unpaid leave made the counter-factual of an even-handed disability policy a reasonable alternative state of affairs, thereby allowing the majority to rest causal responsibility on the employer. The majority took seriously the PDA’s mandate to treat pregnant workers as a given and therefore carefully scrutinized the mismatch between “the needs of pregnant teachers” and “the actual coverage” of the employer’s policy.

While these cases are encouraging, the PDA’s comparator requirement has had a limited effect on shifting causal attributions to employers in the remaining category of disparate treatment cases in which comparators are unavailable. These cases also involve pregnant employees who need some

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85. *Id.* at 949.
86. *Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50, 867 F.2d 974, 975-83 (7th Cir. 1988).*
87. *Id.* at 982.
88. *Id.* at 986 (Manion, J., concurring in part and dissenting in part).
89. *Id.*
90. *Id.* (emphasis added).
91. *Id.* at 975-82.
92. *Id.* at 983.
alteration of conventional job requirements and employers who refuse to accommodate, but the employers’ inflexibility is uniformly applied to all workers who are similarly limited in their ability to work. Because the courts in these cases have no easy counter-factual against which to compare the employer’s response to the accommodation request, they instead compare the pregnant employee’s performance to someone without physical restrictions, which results in a causal attribution to the employee’s performance limitations, rather than to the employer’s rigid and exclusionary workplace design.

In Gratton v. JetBlue Airways,93 for example, the plaintiff alleged that her employer forced her to take extended leave after refusing to provide light duty options to accommodate her pregnancy-related restrictions on lifting and working outdoors in the heat. Because the employee did “not identif[y] any accommodation given to other temporarily disabled employees that was withheld from her,” the court viewed the employee’s own inability to perform the required job duties as the cause of her termination and granted the employer summary judgment.94 Similarly, in EEOC v. Detroit-Macomb Hospital Corp.,95 a nurse and a nurse’s aide were forced to take involuntary medical leaves when their pregnancies prevented them from performing tasks in certain portions of the hospital that would pose risks to their unborn fetuses. Because there was no proof that the hospital “treated pregnant employees worse than employees with medical restrictions who were not pregnant,” the court viewed the employees’ own inability to perform required job duties as the cause of their leaves and affirmed summary judgment for the employer.96 In both cases, there was no available counter-factual of the employer’s treatment of similarly-situated others to make salient the employer’s causal role in designing an exclusionary workplace, so the highly salient counter-factual of the employees’ own pre-pregnancy performance facilitated a causal attribution to the employees’ post-pregnancy performance limitations.

In these cases, the courts implicitly are creating a false dichotomy between behavioral and situational characterizations of the employer: the “employer-as-decisionmaker” versus the “employer-as-workplace.” While demonstrating a willingness to see the employer as causal when there is evidence that the employer made one decision for a pregnant employee and a different decision for a similarly-situated non-pregnant employee, courts have not readily identified the employer’s similar causal role in designing job requirements or policies around the norm of a worker who does not face periodic physical limitations that may demand light duty work, limited hours, or time off. In the latter scenario, the employer is not seen as an actor at all, but rather as

94. Id. at *7.
96. Id. at *2.
situational background, thereby rendering the employer unavailable as a causal target.

This distinction reflects what social scientists have long documented as the most pervasive causal attribution bias: the "fundamental attribution error." In addition to the conceptual semantics that Pinker has identified as affecting the accuracy of our causal attribution process, the fundamental attribution error can result in causal reasoning that is at odds with the realities of "but for" causation. When trying to assess the cause of a social event, our potential causal attribution targets can be divided into two general categories: first are "internal" or "personal" targets, which are attributes of an actor involved in the event, such as the actor's level of effort, ability, or intelligence; and second are "external" or "situational" targets, which are attributes of the environment in which the social event took place, such as the weather, the task difficulty, or even luck. Social scientists have found that observers tend to over-attribute to internal causes and under-attribute to external causes. In other words, the fundamental attribution error describes our tendency to perceive people as causing social events, while we underestimate the power of situational constraints in controlling peoples' behavior.

The PDA's requirement that pregnant women "be treated the same" as similarly-situated others helps shift judges' causal attributions from one person (the pregnant woman) to another person (the "employer-as-decisionmaker") by making salient a behavioral counter-factual for the latter. When an employer refuses to accommodate a pregnant worker but grants an accommodation to someone else with similar limitations, judges following the PDA will identify the employer as a cause of the pregnant worker's performance struggles, rather than as a mere enabler, in Pinker's terms. The shortcoming of the PDA's "same" treatment requirement is that it does not require judges to generate situational counter-factuals, which means that the PDA does nothing to overcome the fundamental attribution error that makes situational constraints fade into judges' cognitive background. Without requiring consideration of possible alternative workplace policies, practices, organizational norms, or workplace designs, the PDA does not directly help judges identify the employer's causal role when a pregnant woman struggles to perform in the face

97. See Ross, supra note 10, at 184-85 (coining this term and noting that this attribution bias "has been noted by many theorists" and "disputed by few"); see also Travis, supra note 12, at 519-25 (describing the social science evidence documenting and explaining the fundamental attribution error).

98. See Hewstone, supra note 10, at 30-31 (explaining the historical development of the internal/external causal attribution dimension); David O. Sears et al., Social Psychology 118-19 (6th ed. 1988) (identifying the internal/external dimension as the "central issue in most perceptions of causality"); Travis, supra note 12, at 514 (describing the internal/external causal attribution dimension).

99. See Ross, supra note 10, at 183-85, 193-94.

100. See Hewstone, supra note 10, at 50; Richard Nisbett & Lee Ross, Human Inference: Strategies and Shortcomings of Social Judgment 31 (1980); Sears et al., supra note 98, at 136-37; Ross, supra note 10, at 183-85, 193-94; see also Travis, supra note 12, at 519-22 (summarizing the social science evidence documenting this phenomenon).
of a uniformly-applied workplace practice that is inhospitable to her physical limitations. In those situations, there is nothing to help overcome the natural tendency that judges share with all of us to make an internal causal attribution (in this case, to see the pregnant woman as the cause of her own performance struggles), as there is nothing to increase the salience of the situational constraints (in this case, to reveal the role that rigid workplace practices play in the woman’s perceived performance shortfall).  

However, while the PDA’s express language does not directly facilitate situational attributions that could help judges overcome the fundamental attribution error, the PDA is actually a definition housed within Title VII’s full set of substantive provisions. One of those provisions is the prohibition against facially neutral practices that have a disproportionate effect on members of a protected group. As described below, considering the PDA in the context of such disparate impact claims could help courts identify the causal role of the “employer-as-workplace” in cases in which no comparator is available.

B. Disparate Impact Claims: Untapped Potential

Disparate impact claims hold the greatest potential for plaintiffs to use the PDA to advance the unreasonable woman’s agenda of adapting the workplace to the realities of pregnancy. The Supreme Court first endorsed the disparate impact theory in *Griggs v. Duke Power Co.* in 1971, seven years before the PDA’s enactment in 1978. Congress later amended Title VII through the Civil Rights Act of 1991 to explicitly codify the disparate impact theory that the *Griggs* Court had recognized as implicit in Title VII’s more general provisions. Under the 1991 Act, employers are prohibited from “us[ing] a particular employment practice that causes a disparate impact on the basis of . . . sex,” if the employer fails to demonstrate that the practice is “job related” and “consistent with business necessity.” Even if the employer makes such a showing, the employer will still be liable if the employee can show that it refused to adopt an “alternative employment practice” that serves its business necessity with a less discriminatory effect. Because the PDA defined “sex” to include “pregnancy, childbirth, and related medical conditions,” the disparate

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101. *Cf.* Travis, *Recapturing,* supra note 7, at 13-16 (explaining how the fundamental attribution error helps to essentialize the conventional workplace design and render invisible the structural and organizational aspects of the workplace that often make it impossible for workers with caregiving responsibilities to succeed).
impact theory is available to attack employment practices that disproportionately affect pregnant women.106

The transformative potential of disparate impact claims comes from the fact that they challenge a workplace practice, rather than an individual employment decision, which means that the remedy may include eliminating or modifying the practice across the board, rather than just exempting an individual employee from a workplace requirement.107 This model gives pregnant women a way to address the “employer-as-workplace” scenarios described above, in which women face default structures that are inhospitable to the demands of pregnancy, such as no-leave or inadequate leave policies, inflexible hour requirements, mandatory overtime rules, or the refusal to provide light duty work.108 By demanding judicial consideration of situational counter-factuals against which to compare the employer’s conduct, the “alternative employment practices” provision could facilitate judicial recognition of an employer’s causal role. Most importantly, the consideration of situational counter-factuals could help judges overcome the fundamental attribution error that otherwise would make a pregnant employee’s own performance limitations the most salient causal target. Moreover, by revealing an employer’s control over various aspects of the conventional workplace design that would otherwise be viewed as inaction, the disparate impact theory should render irrelevant the lack of a comparator whom the employer treated differently from the plaintiff when assessing a pregnancy discrimination claim.

106. See generally Deborah A. Calloway, Accommodating Pregnancy in the Workplace, 25 STETSON L. REV. 1, 39-42 (1995) (explaining how the PDA’s text and legislative history support the availability of disparate impact claims under the PDA); Siegel, supra note 48, at 929 (arguing that the disparate impact theory should be available in pregnancy discrimination claims).

107. See Travis, Recapturing, supra note 7, at 38 (comparing the remedies in disparate impact and accommodation claims); Travis, Virtual Workplace, supra note 7, at 329-30 (same).

108. See 29 C.F.R. § 1604.10(c) (2008) (stating that “an employment policy under which insufficient or no leave is available” may violate the law by disproportionately excluding women, if such policy is “not justified by business necessity”); Calloway, supra note 106, at 42 (arguing that “[d]isparate impact analysis can be used to resolve many of the accommodation problems faced by pregnant women[,]” by allowing them to bring a claim if, for example, “an employer does not permit employees with medical needs to take leave, request light duty, take bathroom breaks, or work a flexible schedule”); Maureen E. Lally-Green, The Implications of Inadequate Maternity Leave Policies Under Title VII, 16 VT. L. REV. 223, 255-60 (1991) (arguing that policies providing inadequate pregnancy leave or requiring a choice between sick leave and maternity leave are subject to disparate impact challenge); see also Travis, Recapturing, supra note 7, at 77-91 (explaining how the disparate impact theory could be used to transform workplace structures that are not designed around a caregiving worker norm); Williams & Segal, supra note 63, at 134-38 (explaining how to litigate disparate impact cases to effectively gain workplace accommodations for family caregivers).

The disparate impact theory also has been used to challenge benefits packages that exclude pregnancy-related health items from coverage. See, e.g., Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979 (E.D. Mo. 2003) (holding that a class of female employees established a prima facie disparate impact case under Title VII, as amended by the PDA, against an employer’s health care plan that excluded coverage for prescription contraceptives). While this type of disparate impact claim does not restructure the workplace to accommodate pregnant women, it is still quite significant in helping pregnant women obtain parity in compensation and basic medical care.
In one of the most promising early cases, *Abraham v. Graphic Arts International Union*,, the D.C. Circuit found a triable disparate impact claim against a union's inadequate leave policy for pregnancy. The employer's contract with the union limited all temporary employees to ten days of sick leave and ten days of vacation, with no other type of leave. Under this policy, the employer fired the plaintiff when she requested pregnancy leave.

"An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have," held the court, "and it takes little imagination to see that an omission may in particular circumstances be as invidious as positive action." Several lower courts have reached similar favorable conclusions. In *EEOC v. Warshawsky & Co.*, the District Court for the Northern District of Illinois granted the plaintiff summary judgment on a claim alleging that an employer's failure to provide sick leave during the first year of employment was a practice that disparately impacted women due to pregnancy. "[I]f an employer denies adequate disability leave across the board," held the court, "women will be disproportionately affected." In *Miller-Wohl Co. v. Commissioner of Labor & Industry*, a Montana state court similarly recognized a disparate impact claim against an employer's ban on leaves of absence for temporary disabilities during an employee’s first year of work. Because “the employer provided a leave policy that was inadequate for pregnant women,” the court found the employer liable under the PDA.

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110. Id. at 819.
111. Id.
112. Id. at 819 & n.66 (citing 29 C.F.R. § 1604.10(c) (2008)).
114. Id. at 654.
116. 692 P.2d at 1252; see also Rhett v. Carnegie Ctr. Assocs., 129 F.3d 290, 299, 306-08 (3d Cir. 1997) (McKee, J., dissenting) (criticizing the court's holding that Title VII does not require an employer to grant maternity leave or to reinstate an employee after maternity leave and suggesting that the disparate impact theory may apply because "[p]regnancy and absence are not... analytically distinct"); Maganuco v. Leyden Cmty. High Sch. Dist. 212, 939 F.2d 440, 445 (7th Cir. 1991) (affirming dismissal of plaintiff's disparate impact challenge to her employer's leave policy, but noting in dicta that "[t]his is not to say that a policy which does not provide adequate leave to accommodate the period of disability associated with pregnancy might not be vulnerable under a disparate impact theory of liability under Title VII," and acknowledging that "courts have struck down such policies"); Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50, 867 F.2d 974, 978-80 (7th Cir. 1988) (finding a triable disparate impact claim against an employer who refused to allow pregnant teachers who took unpaid maternity leaves to extend their time off with accumulated paid sick leave, while the employer allowed non-pregnant workers to combine accumulated paid sick leave with extended unpaid personal leave for other types of temporary disabilities); Marafino v. St. Louis County Cir. Ct., 537 F. Supp. 206, 213 (E.D. Mo. 1982) (suggesting that an employer's "policy of refusing to hire those who planned to take an early leave of absence" was a practice subject to disparate impact analysis, but holding that the plaintiff failed to show the practice disproportionately affected women), aff'd, 707 F.2d 1005 (8th Cir. 1983).
While these cases are very promising, the full potential for using disparate impact claims in conjunction with the PDA to redesign workplaces around the needs of pregnant women currently remains unrealized. More recent courts have fallen prey to the fundamental attribution error and refused to see the causal role that employers play in designing inadequate leave or flexibility policies, which these courts describe as the "absence" of a "practice" that would be subject to disparate impact review. In Dormeyer v. Comerica Bank-Illinois, for example, the Seventh Circuit affirmed summary judgment for the employer in a claim alleging that the employer’s rigid attendance policies disparately impacted pregnant women who may be unable to work traditional hours because of morning sickness or other complications. Rather than characterizing the bank’s absenteeism policies as "practices" subject to disparate impact analysis, the court characterized them as "legitimate requirements" of the job, or simply as the "work for which she had been hired." The court described the employer as not having adopted any challengeable rule or practice, and the court conversely described the pregnant employee as having asked the employer "to excuse" her from performing her job. By thus defining the employer’s role in situational terms and the employee’s role in behavioral terms, the court inevitably attributed the employee’s perceived performance shortfalls to her own personal limitations, rather than to the constraints imposed by the employer’s choice of one attendance policy over another.
These divergent sets of cases reveal the relatively weaker constraint that the PDA places on judicial causal attributions in disparate impact claims than in disparate treatment claims. In disparate treatment claims, described above, the PDA’s “same as” language explicitly requires judges to generate employer-side behavioral counter-factuals by assessing how an employer treated similarly-situated non-pregnant employees in order to determine if the plaintiff has stated a prima facie intentional discrimination claim. In a disparate impact case, the portion of the legal doctrine that most directly requires judges to generate employer-side situational counter-factuals is the assessment of less discriminatory alternative employment practices. That inquiry typically is reached only after a plaintiff successfully proves a prima facie case of disparate impact and the employer successfully defends the existing practice on the basis of business necessity. At best, the legal doctrine might implicitly direct judges to generate counter-factuals at the business necessity defense stage, as the existence of feasible alternatives may be relevant in assessing an employer’s justification of the existing practice. As a result, judges are relatively less constrained in their causal attributions when assessing the plaintiff’s prima facie case, which means that causal attribution biases or errors by judges at that initial stage can effectively end the plaintiff’s case. While there may be many explanations for the outcomes in successful versus unsuccessful disparate impact cases, including both factual differences and differences in judges’ ideologies, those differences appear at least to have reflected themselves in divergent causal attributions when assessing the plaintiffs’ prima facie case.

One significant factual difference present in the successful cases of Abraham, Warshawsky, and Miller-Wohl (but not in the unsuccessful case of Dormeyer) is that the employers applied their challenged facially-neutral practices to only a portion of their workforce. In Abraham, the challenged practice of making no leave time available beyond ten days of sick leave and ten days of vacation applied only to any “full-time temporary employee,” while the employer made generous leave time available to “each of its three classes of regular full-time permanent employees.”\(^\text{123}\) In Warshawsky, the challenged practice of making no sick leave available applied to employees who had worked less than a year, while the employer provided paid sick leave for employees who had worked a year or more.\(^\text{124}\) In Miller-Wohl, the challenged practice of making no leaves of absence available for temporary disabilities similarly applied only to employees during their first year of work.\(^\text{125}\) In

impact review. By describing the attendance policy as an “actual, legitimate requirement[] of the job,” and as the lack of a medical leave or vacation practice, the court rendered the employer a virtual non-actor in the event. See id. at 859-62.


\(^{125}\) 692 P.2d. 1243, 1249 (Mont. 1984).
Dormeyer, in contrast, the challenged attendance practice appeared to apply to the entire workforce.¹²⁶

Legally, this factual distinction should not be dispositive. In a prima facie disparate impact case, the plaintiff need only demonstrate that a facially neutral employment practice disproportionately affected members of a protected group, not that the employer applied a different practice to some employees than to others. However, this factual distinction appears to have played a role in the judges’ causal attributions, which in turn affected their findings on the plaintiffs’ prima facie case. In Abraham, Warshawsky, and Miller-Wohl, the fact that the employer applied different facially-neutral policies to different categories of workers provided the judges with a highly salient counter-factual on the employer’s side of the equation. This fact allowed the judges in each of those cases to view the no-leave policies as an active choice by the employers, turning a workplace attribute into an employer behavior. By shifting the “employer-as-workplace” into the “employer-as-decisionmaker,” this crucial fact likely helped overcome the fundamental attribution error and allowed the judges to view the no-leave policies as “practices” subject to disparate impact challenge. In Dormeyer, in contrast, no salient situational counter-factual existed to highlight the element of employer choice in establishing attendance expectations. Instead, the judge viewed the no-absence policy not as an act by the employer, but as a defining characteristic of the job itself, part of the situational background that evaded causal recognition.

The judges in Abraham, Warshawsky, and Miller-Wohl also appeared to take more seriously the PDA’s objective of normalizing pregnancy in the workplace, which, as described above, made it more difficult to consider the volitional nature of pregnancy a basis for resting responsibility on the woman herself. In Abraham, the court found it significant that the PDA’s legislative history documented the “normal period of pregnancy leave” as much greater than that provided by the employer’s facially neutral policy when finding the employer causally responsible for the employee’s inability to perform.¹²⁷ In Warshawsky, the court described the PDA as endorsing the “commonsense view” of pregnancy as a status intertwined with sex and as “[making] clear that pregnancy was a condition that affected women employees.”¹²⁸ In Miller-Wohl, the court followed the EEOC’s lead in taking “official notice of the fact that pregnancy, being a natural, expectable, and societally necessary condition, is certain to occur in a statistically predictable number of females in the labor force.”¹²⁹ In each of these cases, this respect for the PDA’s normalization of pregnancy helped enable the judges to view the employers’ policies, rather than

¹²⁶ 223 F.3d 579, 583 (7th Cir. 2000).
¹²⁷ 660 F.2d at 819 & n.64.
¹²⁸ 768 F. Supp. at 653.
¹²⁹ 692 P.2d at 1254.
the plaintiffs' pregnancies, as the primary cause of the plaintiffs' inabilities to perform. The Dormeyer opinion, in contrast, contains no explicit recognition of the normative backing that the PDA provided to pregnancy as a status, rather than a choice, and it is therefore unsurprising that the opinion characterizes the pregnant plaintiff's claim as a request to "excuse" her from performing her job. As these contrasting cases illustrate, it remains unclear to what extent pregnant women may use the PDA not merely as a "shield against discrimination," but also as a "sword" to attack the inflexible workplace designs that are just as effective as outright prejudice in excluding pregnant women from meaningful equality at work.

II. LIMITATIONS: UNREASONABLE WOMEN'S UNFINISHED WORK

Even if courts begin realizing the full transformative potential of the disparate impact theory, the PDA's effect on causal analysis inevitably will be incomplete. Because the PDA established pregnancy as a normal condition of employment but did not incorporate the broader norm of women who breastfeed or who have significant caregiving responsibilities, it failed to raise the causal salience of an employer's role in designing a workplace that disadvantages mothers over the long-term. In Piantanida v. Wyman Center Inc., for example, the Eighth Circuit rejected a woman's discrimination claim alleging that she was demoted because of her employer's belief that her prior position was incompatible with childrearing responsibilities. The court attributed the cause of—and therefore the responsibility for—the plaintiff's demotion to her own decision to take on the "social role" of a parent and her own "choice to care for a child." The federal district court in Wallace v. Pyro Mining Co. made explicit the PDA's incomplete causal shift when it rejected an employee's discrimination claim alleging that her employer had refused her request for a six-week leave of absence after her maternity leave because her baby could not be weaned from breastfeeding, and had fired her when she could not return to work. The court held that breastfeeding was not covered by the PDA's protection of "pregnancy, childbirth, or related medical conditions," and therefore the pre-PDA approach in Gilbert still applied. As in Gilbert, the court characterized

130. 223 F.3d at 585.
131. This distinction comes from Rhet v. Carnegie Ctr. Assoc., 129 F.3d 290, 297 (3d Cir. 1997), in which the court held "the PDA is a shield . . . not a sword in the hands of a pregnant employee."
132. 116 F.3d 340, 342 (8th Cir. 1997).
133. Id.; see also Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491-92 (D. Colo. 1997) (holding that an employer's refusal to provide a part-time schedule for breastfeeding or childrearing did not violate Title VII because the PDA only protects "medical conditions related to pregnancy or childbirth").
135. See id. at 869.
the employer’s role as a passive enabler of the outcome by “merely remov[ing] one situation, breast-feeding, from those for which personal leave will be granted.”136 As in Gilbert, the court therefore shifted its causal focus to the employee by ignoring the medical necessity of her baby’s breastfeeding demands and characterizing the employee in volitional terms as “want[ing] to stay home to take care of the child,”137 and “wishing to nurse” her baby.138 By failing to normalize caregiving, Congress paved the way for courts like the one in Wallace to avoid employer responsibility by holding that “child-care concerns” are not covered by the “plain language” of the PDA.139

More generally, the limits on the PDA’s ability to shift causal attributions toward employers under a variety of conditions highlights the limits of relying on an antidiscrimination model in the first place to address the misfit between the conventional workplace and working women’s lives.140 Because of antidiscrimination law’s reliance on simple causation models as a basis for attributing legal responsibility, it will always be an incomplete method for transforming the workplace around a caregiving worker norm.141 That is not to understate the significance of antidiscrimination law—and of the PDA in particular—to the unreasonable woman’s agenda, given the immediate availability of this tool and the enduring resonance of equal opportunity rhetoric.142 But it does highlight the importance of viewing employment discrimination law as just one tool in a multifaceted approach.

136. Id. (emphasis added).
137. Id. at 869-70 (quoting H.R. Rep. No. 95-948, at 5 (1978), as reprinted in 1978 U.S.C.C.A.N. 4749, 4753 (emphasis added) (internal quotations omitted)).
138. See id. at 870 (quoting Barrash v. Bowen, 846 F.2d 927, 932 (4th Cir. 1988) (emphasis added) (internal quotations omitted)).
139. See id.
140. In addition to directly mandating workplace flexibility, such as paid maternity leaves, another option would be to use an accommodation model. One potential negative consequence of the PDA’s normalization of pregnancy, however, is that it may have contributed to the exclusion of ordinary pregnancy from the definition of disability in the Americans with Disabilities Act, which contains one of the few legal mandates for the types of workplace accommodations that most pregnant workers might seek, such as light duty work, job restructuring, flex-time, part-time, and temporary leaves. 42 U.S.C. § 12111(9)(B) (2000) (defining “reasonable accommodation” to include “job restructuring, part-time or modified work schedules, reassignment to a vacant position, ... and other similar accommodations for individuals with disabilities”); 29 C.F.R. app. § 1630.2(h) (2008) (stating that because pregnancy is “not the result of a physiological disorder,” it is not an impairment and, therefore, not a disability); see Jessie v. Carter Health Care Ctr., 926 F. Supp. 613, 616 (E.D. Ky. 1996) (holding that because “[n]o unusual circumstances exist[ed]” with respect to the employee’s pregnancy, “such condition [was] not a ‘physical impairment’ under the ADA”); see also Colette G. Matzzie, Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act, 82 Geo. L.J. 193, 194, 198 (1993) (arguing that feminists should not “fear the characterization of pregnancy as a disability,” and that the ADA’s text and remedial purpose supports interpreting disability to include pregnancy).
141. Cf. Schultz & Petterson, supra note 38 (analyzing cases in which courts attributed the cause of women’s segregation in low-paying, dead-end jobs to women’s own lack of interest in better positions rather than to any discriminatory action by the employers).
142. See Joan Williams, Do Women Need Special Treatment? Do Feminists Need Equality?, 9 J. Contemp. Legal Issues 279, 316-17 (1998) (arguing that “equality rhetoric (and discrimination claims, which are really claims of equality withheld), are the strongest weapons Americans [sic]
CONCLUSION

While significant work remains to be done before we realize the ultimate goal of workplaces that fully embrace workers with caregiving responsibilities, that unfinished business should not diminish the importance of the PDA as an initial and successful groundbreaking step. By providing the conceptual tools to begin shifting judges' causal sites away from female workers' perceived shortcomings and onto employers and the shortcomings of workplace design itself, the PDA laid the foundation for future legal efforts to hold employers responsible for the remaining social, structural, and organizational barriers to achieving full workplace equality for women.

feminists have in a culture deeply committed to a self-image of equality”); see also Dowd, supra note 7, at 154-55 (explaining that using antidiscrimination law in the work/family context “takes advantage of an existing set of ideas and legal categories that retain great power and persuasive capacity”).