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A PREGNANCY TEST:
WOMEN WORKERS AND THE HYBRID AMERICAN WELFARE STATE, 1940-1993

BY

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DISSERTATION

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ABSTRACT

This dissertation shows that the US developed the outlines of a maternity policy at least by WWII. Rarely were the needs of pregnant workers or new mothers at the top of social policy initiatives. However, when European countries were developing their plans, reformers and bureaucrats sought to establish similar plans in the United States and, for a while, seemed like they might. Politics intervened in the form of the Cold War. With a few state level exceptions, the experiences of WWII were largely dismantled in the wake of political changes, business and medical opposition and the Red Scare. Subsequent policies that emerged grew largely in the private sector where women's disadvantages in the workforce constrained maternity in the blossoming system of employee fringe benefits. Where they could, unions defended women's access to contractual benefits, but this effort was hampered by the marginalization of maternity in the private system. Finally, with the emergence of a rights framework in the 1970s, feminist lawyers forced the inclusion of pregnancy into the central operating welfare state of private workforce relationships and benefits, leading to the current national maternity policy. However, conservatism and globalization limited this approach and indicate the necessity of public social supports for maternity, or family, benefits.

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All errors of fact, weaknesses of reasoning, unfortunate omissions and abuses of the language are, of course, my own fault.

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INTRODUCTION:

CONCEIVING AN AMERICAN MATERNITY POLICY

This is the story of why the United States has the maternity policy it does today and what that maternity policy says about the American way of providing social supports. In the world today, state support for motherhood can range from virtually nothing to cash baby bonuses for all newborns, universal health insurance, nursing allowances, or even, as in Finland today, an imaginative and comprehensive layette delivered to the door of expectant parents in a gigantic cardboard box. Most often, especially among advanced economies, maternity policy includes some level of protection against discrimination for pregnant workers, the safeguarding of a woman's job for some period of time, some provision for obstetric care, and some mechanism for a new mother's financial support while she has a baby and cares for it. More and more countries are also adding paid leave for fathers.¹ In most of these measures, the United States lags behind not only industrialized democracies, but also many developing nations.

American national maternity legislation consists of the Family and Medical Leave Act (FMLA) of 1993 and the Pregnancy Discrimination Act (PDA) of 1979. But this does not mean the U.S. had no policy before 1979, or that these are the sum of policy in the United States today. We have no national system of paid leave. Some state laws, private employer insurance plans, company policies and collective bargaining agreements establish rights and benefits for working

¹ Sheila B. Kammerman and Peter Moss, eds., *The Policies of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Bristol: The Policy Press, 2011); International Labour Organization. *Maternity and Paternity at Work: Law and Practice Across the World*. Geneva: International Labour Office, 2014; The Finnish "Baby Box" started in 1938 and has, since the late 1940s, been available regardless of income. It is not a grant to the poor. Helena Lee, "Why do Finnish Babies Sleep in Cardboard Boxes?" Magazine, BBC News, June 4, 2013, <http://www.bbc.com/news/magazine-22751415> (accessed September 7, 2015). Dominic Tierney, "Finland's 'Baby Box': Gift from Santa Claus or Socialist Hell?" *The Atlantic*, April 13, 2011, <http://www.theatlantic.com/international/archive/2011/04/finlands-baby-box-gift-from-santa-claus-or-socialist-hell/237240/> (accessed September 7, 2015).

women when they become mothers. Of course, the legal structures specific to maternity are not the sum total of any country's policies and it is overly simplistic to lump the U.S. and Papua New Guinea together as the only countries lacking paid leave.² Legal protections and benefits in many countries leave large numbers of women uncovered in various ways. Nonetheless, it is true that maternity policy in the United States is incomplete, haphazard, tardy and stingy and depends on the private sector and family relationships to a far greater degree than in most other countries.

I seek to explain why the key parts of American maternity policy have the provisions that they do and why they lack some other features common in the rest of the industrialized world. It is not enough to note that the FMLA is deficient in providing for basic social needs, or that 1993, or even 1979, was quite late to establish a national maternity policy. We should also understand how both the FMLA and the PDA replicate inequality in America by excluding many workers from coverage and how the focus on the workplace slights the work of caring by women who do not work for wages. It is even better, as this dissertation does, to figure out how the FMLA and the PDA came to be as they are, what the practices and policies were in the United States before them and where maternity policy fits into the broader system of social benefits in this country.

Moreover, I show that American maternity policy is a window that reveals aspects of the complicated and exceptional American system of social welfare that can then be used to understand the rest of the system. Other important social policies are likewise spotty, difficult to navigate, based on private connections in a way that obscures their role in welfare policy, beholden to a particular definition of family and dependence and tied to the social valuation of

² "Almost Every Country in the World Offers more Generous Maternity Leave than the U.S.," *PBS NewsHour*, January 22, 2015, <http://www.pbs.org/newshour/bb/u-s-support-paid-family-leave-one-pay/> (accessed September 7, 2015); Margaret Talbot, "America's Family-Leave Disgrace," *The New Yorker*, January 22, 2015, <http://www.newyorker.com/news/daily-comment/paid-family-leave-obama-work> (accessed July 20, 2015); John Oliver, *Last Week Tonight*, Comedy Central, May 10, 2015.

some kinds of work above others. Marie Gottschalk writes that “the fact is, the United States has quite an extensive but generally overlooked welfare state that is anchored in the private sector but backed by government policy...a peculiar employment-based welfare system that is neither wholly private or public.”³ Maternity illuminates this neither public nor private system, its creation in the postwar period, its inherent inequalities, its political and economic vulnerabilities and its troubled future.

The story matters in part because we live in the structures and amidst the ruins that past policies put in place or tore down. Whatever changes are underway for American maternity policy (and certainly some changes seem to be underway right now) have to fit into the economic, legal and agency systems that already exist, as well as accommodate or challenge gender roles, definitions of family and ideas about work. It is also important to examine past American maternity policies, and policy failures, to measure the variety of possibilities and to learn from both successes and defeats.

A number of studies show that maternity policies have been the entering wedge of broader public welfare states in other countries.⁴ However, in the United States, the hybrid

³ Marie Gottschalk, *The Shadow Welfare State: Labor, Business, and the Politics of Health Care in the United States*, (Ithaca: ILR Press, 2000), 1-3.

⁴ Gisela Bock and Pat Thane, eds., *Maternity and Gender Policies: Women and the Rise of the European Welfare States 1880s-1950s* (London: Routledge, 1991); Rachel Fuchs, *Poor and Pregnant in Paris: Strategies for Survival in the Nineteenth Century* (New Brunswick, NJ: Rutgers University Press, 1992); Linda Gordon, “Introduction,” in *Maternity: Letters from Working Women*, edited by Margaret Llewelyn Davis (New York: W.W. Norton & Company, 1979): vi, viii, xii; Robert G. Moeller, “Protecting Mother’s Work: From Production to Reproduction in Postwar West Germany,” *Journal of Social History* 22, no. 3 (Spring 1989): 413-437; Linda Haas, *Equal Parenthood and Social Policy: A Study of Parental Leave in Sweden* (Albany: State University of New York Press, 1992); Carolyn Teich Adams and Kathryn Teich Winston, *Mothers at Work: Public Policies in the United States, Sweden and China* (New York: Longman, 1980); Meryl Frank and Robyn Lipner, “History of Maternity Leave in Europe and the United States,” in *The Parental Leave Crisis: Toward a National Policy*, edited by Edward F. Zigler and Meryl Frank (New Haven: Yale University Press, 1988): 3-22; Firoozeh Kashani-Sabet, *Conceiving Citizens: Women and the Politics of Motherhood in Iran* (Oxford: Oxford University Press, 2011); Asuncion Lavrin, *Women, Feminism and Social Change in Argentina, Chile and Uruguay, 1890-1940* (Lincoln: University of Nebraska, 1995); Nichole Sanders, *Gender and Welfare in Mexico: The Consolidation of a Postrevolutionary State* (University Park, PA: Pennsylvania State University Press, 2011); Marian van der Klein, “The State, the Women’s Movement and Maternity Insurance, 1900-1930: A Dutch Maternalism?” in *Maternalism Reconsidered: Motherhood, Welfare and*

public-private system slighted maternity benefits. One reason is that the Progressive Era and the New Deal generated relatively limited public structures. Another is that a substantial portion of American social supports are handled by the private sector, specifically employers, even when they are encouraged or mandated by the federal or state governments.

The private side of public/private was uniquely ill suited to cover maternity because the characteristics of pregnancy made benefits fragile. Insurers had trouble classifying pregnancy because it was seen as inherently normal, and thus not a “risk,” and also as alien to the workplace. Women had weaker ties to the labor market and, for much of the period under study here, were more likely than men to change employers over the course of their working lives. This made employers less interested in designing benefit packages of any kind for their female employees. Pregnancy often heralded a departure from the labor market, or at least from work for a particular employer. In this, pregnant workers, who often lost their jobs or left the labor force for some time, show what could happen to any worker who lost a job, changed jobs, or left the labor force for some other reason. Instability of employment characterizes more and more of the American workforce as it becomes less common for anyone to spend a career with one employer. This creates havoc with social welfare provisions tied to employment as can be seen by the efforts of the Freelancer’s Union to establish affordable health insurance, 401(k) retirement plans, disability insurance and life insurance for the “53 million Americans who are independent workers.”⁵

Social Policy in the Twentieth Century, edited by Marian van der Klein, Rebecca Jo Plant, Nichole Sanders and Lori R. Weintrob (New York: Berghahn Books, 2012), 38-59.

⁵ Sara Horowitz, Eugene V. Debs Award Acceptance Speech, Terre Haute, IN, October 25, 2014; Freelancer’s Union, <https://www.freelancersunion.org/about/> (accessed September 5, 2015); Another example of the predictable chaos of tying important benefits to a particular job in a climate where job changes are frequent is the Consolidated Budget Reconciliation Act (COBRA) passed in 1986 which mandates group plans to offer continuing coverage for a short time period, although costs of continuing coverage are born by the (former) employee and can be quite steep.

When the private welfare state covered the dependents of male workers, those covered wives were doubly vulnerable. They faced problems if their husbands lost their jobs, or if they lost their husbands. The private welfare state thus reproduced the family wage ideal of a male breadwinner and a female homemaker and depended on marriage-based entitlement. Tying social benefits to this ideal made them unreliable and, in any case, obviated the need for the other kinds of benefits that pregnant workers needed in their own right—job-secure maternity leaves with wage replacement provisions, possibility of job transfer out of dangerous occupations, perhaps accommodations to pregnancy in some situations. Furthermore, dependent coverage buttressed a particular notion of family that never covered all of those near and dear to workers. In the United States, other social supports have also underwritten the nuclear family of husband, wife and children, leaving some Americans without important benefits that others get on the basis of their sanctioned relationships.

Maternity policy dependent on private coverage limited benefits to those with a link, either their own, or their husbands', to the kinds of employers in the kinds of industries where fringe benefits flourished. African Americans, Hispanics, and low wage workers, many of them women, were concentrated in industries without job-related benefits and were often excluded from the private side of the welfare state. Their exclusion then strengthened societal divisions along lines of race, gender, and class.

Pregnancy and childbirth are seen as particularly private events divorced both from the public world of work and also from social responsibility. Part of this stems from prudish notions about sex and a woman's respectability. Thus, until well into the 1970s, many employers did not want pregnant women either working with men, or working with the public because it "wasn't

U.S. Department of Labor, FAQ, under COBRA, https://www.dol.gov/ebsa/pdf/faq_consumer_cobra.pdf (accessed September 5, 2015).

nice.” Until the PDA, many employers dismissed, or put on leave, pregnant workers before they began to “show,” especially if they had jobs working with the public, with men or with children. Unemployment compensation boards reproduced the assumption that pregnancy was not a public matter when they enforced special limits on pregnant women whose jobs entailed contact with the public, holding them “unavailable” for work in the second trimester, as soon as a pregnancy might become obvious. Workers who were “unavailable” were not entitled to unemployment compensation.

In other countries, maternity policies sometimes supported pro-natalist agendas and reinforced expectations about gender roles, encouraging women, men and nation to value women’s mothering over their other activities. This is one of the things feminist legal theorists feared about maternity-specific legislation in the 1970s, 80s and 90s and why they pursued gender neutral legislation. However, weak social support and the grounding of most benefits through the workplace has sustained a gendered division of care within the American family throughout the period under study here. While there has been some change recently, with more American men sharing the burden of caring for children and even more saying that they would like to, mothers still provide more care for their children than fathers do.⁶ Women report more difficulty balancing job demands and family responsibilities. Studies documenting a “maternal wall” show that mothers earn less than non-mothers while fathers earn more than non-fathers.⁷ Recently, some countries have begun to manipulate social policy in ways that encourage sharing

⁶ Kim Parker and Wendy Wang. “Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family.” Social and Demographic Trends. Pew Research Center, March 14, 2013. <http://www.pewsocialtrends.org/2013/03/14/modern-parenthood-roles-of-moms-and-dads-converge-as-they-balance-work-and-family/> (accessed September 7, 2015).

⁷ Shelly J. Correll, Stephen Benard and In Paik, “Getting a Job: Is there a Motherhood Penalty?” *American Journal of Sociology* 112 (2007): 1297-1338; Justine F. Andronici and Debra S. Katz, “Scaling the Maternal Wall,” *Ms. Magazine*, Winter 2007; Joan C. Williams, “Hitting the Maternal Wall,” *Academe* 90, no. 6 (November-December 2004): 16-20.

the work of care between parents.⁸ Current American legal structures regarding maternity do not preclude a transformation in gender roles relating to care, but they do little to proactively encourage them, leaving cultural presumptions to buttress the structure of the labor market which means women generally do more care work within the family. Social policy affects gender roles, but gender roles can also structure the kinds of policies available and mediate a worker's ability to make effective claims.

Part of a general American resistance to providing benefits for maternity is that maternity benefits and family benefits seem private concerns because they draw attention to babies. As the feminist economist Nancy Folbre points out, many “people think of children as pets” and that “those who care for them are the ones who get the fun out of them; therefore, they should pay the costs.”⁹ If the effects of economic downturns should be ameliorated with unemployment insurance and all workers pay into a public pension system against old age, maternity benefits have stumbled over adorable babies that make all their mothers' suffering and sacrifice worthwhile. Why should an employer, or the state, or fellow citizens pay for someone else to have a baby? Yet at the same time, nothing else could show so clearly the reasons for public social supports. “Children,” argues Folbre, are not pets. They “are public goods.”¹⁰ Maternity policy is about maternal and infant health and the next generation of citizens as well as about women workers' rights. Finland's “baby boxes” are linked to declines in infant mortality and

⁸ Anders Chronholm, “Sweden: Individualism or Free Choice in Parental Leave?” in *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market*, edited by Sheila B. Kammerman and Peter Moss (Bristol: The Policy Press, 2011): 227-242; Sheila B. Kamerman and Peter Moss, “Conclusion,” in *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market*, edited by Sheila B. Kammerman and Peter Moss (Bristol: The Policy Press, 2011), 263-264.

⁹ Nancy Folbre, *The Invisible Heart: Economics and Family Values* (New York: The New York Press, 2001): 109.

¹⁰ Folbre, *The Invisible Heart*, 111.

help make Finland one of the safest places for new babies.¹¹ In this country, wartime maternity policies like Emergency and Infant Care (EMIC) reduced maternal and infant mortality under challenging conditions. Pre-term birth and low birth weights declined in California, New Jersey and New York after the PDA meant pregnant women and new mothers could claim disability benefits in those states. Scholars even found a decline in pre-term birth and low birth weights after the passage of the FMLA.¹² Even more than other social supports, maternity policy demonstrate the multiple connections between welfare policy, the public good and the future of a nation's citizens.

As much as any study of health insurance or pensions, an examination of maternity policy illuminates the institutional forces shaping rights and benefits and the paths and barriers to reform. The division of sovereignty between the state and federal governments makes national policies harder to achieve. All states having two senators makes it possible for a minority of the population to block national legislation, as, for example, Southern Democrats preventing expansion of various welfare benefits that might undermine white superiority throughout much of the twentieth century. The separation of powers in the American system of government also complicates the making of new law, policy and regulations. These effects can be readily seen in the attempts to pass a variety of maternity legislation in the wake of World War II. Federalism also allows for some states to embrace their own approaches. Considering the number of states and territories, this allows for much potential difference, which we can see in the postwar period, and, especially, in the period after the passage of the FMLA. The resultant variation faced by

¹¹ Tierney, "Finland's 'Baby Box,'" Other countries also found declines in infant mortality when they increased leaves in their maternity policies. Moises Velasquez-Manhoff, "Should You Bring Your Unborn Baby to Work?" *The Atlantic*, March 2015, <http://www.theatlantic.com/features/archive/2015/02/should-you-bring-your-unborn-baby-to-work/384977/> (accessed July 30, 2015).

¹² Council of Economic Advisors, "The Economics of Paid and Unpaid Leave," The White House, June 2014, p. 4, https://www.whitehouse.gov/sites/default/files/docs/leave_report_final.pdf (accessed May 25, 2015).

American women in different states illuminates inequality among citizens based on the accident of their address. This feature of federalism also characterizes other parts of the American welfare state, notably unemployment insurance, workers' compensation insurance, health care and poor relief.

An examination of pregnant workers and new mothers in the workforce quickly demonstrates the need for advocates if women are to avail themselves of legal rights or rights under contracts. For much of the period under examination here, those advocates were labor unions. Unions were joined, in the 1970s, by civil rights lawyers. The percentage of the American workforce organized in labor unions peaked in the mid-1950s. The percentage of those members who are women has increased, but still, fewer workers enjoy what protections a contract, grievance procedure and union stewards could offer.¹³ Lawyers do not replace the influence unions once had.

A study of maternity benefits shows that social supports can both expand and contract. Benefits, even popular ones that met the needs of many women like Emergency Maternity and Infant Care, could be ended in light of new political developments, like the end of the war and a growing anti-communism. Indeed, this study shows both the importance of institutional structures and also the role of political developments, like World War II, the Cold War, the civil rights movement, the women's rights movement and the demand for marriage equality, in the success, or even the discussion of, social reforms. It is, as Jill Quadagno called the study of health insurance more generally, "a prism that reflected the grand historical events of the

¹³ Jake Rosenfeld, *What Unions No Longer Do* (Cambridge, MA: Harvard University Press, 2014), 1-3 and *passim*; Steven Greenhouse, "Union Membership in U.S. Fell to a 70-Year Low Last Year," *New York Times*, January 21, 2011.

twentieth century.”¹⁴ Politics matters. Social policy is indeed constrained by many institutional structures, but it is equally channeled by political pressures that can shut off possibilities or open new paths toward reform.

Literature

The FMLA is one of very few recent expansions in the American welfare state. Because of this, many scholars have examined the FMLA.¹⁵ The PDA, a legislative victory for the women’s movement, likewise has received academic attention¹⁶ and, as Ruth Bader Ginsburg nears retirement, interest in her legacy has spurred more examinations of the early pregnancy legal cases, some of which she worked on.¹⁷ This dissertation relies on the work of these other scholars, especially for the last two chapters. However, as I seek to understand how the US came to have the maternity policy that we do, I find this other work unsatisfactory. Much of it is fairly

¹⁴ Jill Quadagno, *One Nation Uninsured: Why the U.S. Has No National Health Insurance* (Oxford: Oxford University Press, 2005), x.

¹⁵ Ronald D. Elving, *Conflict and Compromise: How Congress Makes the Law* (New York: Simon & Schuster, 1995); Anya Bernstein, *The Moderation Dilemma: Legislative Coalitions and the Politics of Family and Medical Leave* (Pittsburgh: University of Pittsburgh Press, 2001); Steven K. Wisensale, *Family Leave Policy: The Political Economy of Work and Family in America* (Armonk, NY: M.E. Sharpe, 2001); Carolee Larsen, “Discourse and Political Power: The Case of the Family and Medical Leave Debate in the United Congress,” PhD diss., Northwestern University, 1996.

¹⁶ Joyce Gelb and Marian Lief Palley, *Women and Public Policies*, Rev. ed. (Princeton: Princeton University Press, 1987); Deborah Dinner, “Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law,” *Washington University Law Review* 91, no. 3 (2014): 453-530; Kevin S. Schwartz, “Equalizing Pregnancy: The Birth of a Super-Statute,” *Student Prize Papers*, paper 41 (2005): <http://digitalcommons.law.yale.edu/y1sspps/papers/> (accessed March 23, 2011).

¹⁷ Fred Strebeigh, *Equal: Women Reshape American Law* (New York: W.W. Norton & Company, 2009); Jane DeHart, *Pursuing Equality: Ruth Bader Ginsburg* (New York: Alfred A. Knopf, forthcoming); Linda Hirshman, *Sisters in Law: How Sandra Day O’Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World* (New York: Harper, 2015); Scott Dodson, ed., *The Legacy of Ruth Bader Ginsburg* (Cambridge: Cambridge University Press, 2015); Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project* (Bloomington, IN: Xlibris, 2004); Cary Franklin, “The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law,” *New York University Law Review* 85 (2010): 83-173; Neil S. Siegel and Reva B. Siegel, “Pregnancy and Sex Role Stereotyping: From Struck to Carhart,” *Ohio State Law Journal* 70, no. 4 (January 2009): 1095-1113; Neil S. Siegel and Reva B. Siegel, “Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination,” *Duke Law Journal* 59, no. 4 (January 2010): 771-798.

narrowly focused on legislation and the courtroom. My chapter 6 and chapter 7 do follow the typical legal cases and the permutations of lawmaking and lobbying, but they also provide a broader context of social change that is missing in the more legally focused work. Certainly law and social change have a reciprocal relationship. Even if the law were always in the lead (and it has not been) it would still be important to attend to the social and cultural reception and the economic effects of expanding legal rights.¹⁸

Focused on the legal cases, these earlier works are also largely driven by a debate over how maternity laws should be structured, to narrowly protect pregnant women and new mothers or to resist a biological determinism or to find a third interpretation.¹⁹ While this debate is important, strategizing by feminists over what is called “difference versus equality” was far from the only influence on the PDA or FMLA. A focus on this impressive ideological debate also fails to get at an important fundamental aspect of American maternity policy—its place in the broader welfare state. While feminists of several stripes were focusing on the meaning of pregnancy in the workplace for women’s job opportunities and gender relations within the family, the PDA, the FMLA and the legal cases that preceded (and followed) them were about access to benefits—either publicly provided ones, or employee fringe benefits. It is a story of the welfare state.

¹⁸ An exception is Erin Kelly and Frank Dobbin who expand the focus on the courts and legislation to measure the effects of new law upon the management trade press and employers practices. Erin Kelly and Frank Dobbin, “Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies,” *American Journal of Sociology* 105, no. 2 (September 1999): 455-92.

¹⁹ Lise Vogel, “Debating Difference: Feminism, Pregnancy and the Workplace,” *Feminist Studies* 16, no. 1 (1991): 9-32; Vogel, *Mothers on the Job: Maternity Policy in the U.S. Workplace* (New Brunswick, NJ: Rutgers University Press, 1993); Deborah Dinner, “Pregnancy at Work: Sex Equality, Reproductive Liberty, and the Workplace, 1964-1993,” PhD diss., Yale University, 2012; Dinner, “The Costs of Reproduction: History and the Legal Construction of Sex Equality,” *Harvard Civil Rights –Civil Liberties Law Review* 46, no. 2 (Summer 2011): 415-495; Dinner, “Recovering the LaFleur Doctrine,” *Yale Journal of Law and Feminism* 22 (2010): 343-406; Dinner, “Strange Bedfellows at Work.”

Most importantly, as a historian, I am troubled by the periodization these previous studies use to frame the origins of the PDA and the FMLA. Most of these studies are not by historians.²⁰ Nevertheless, nearly all of them reach for the same historical context to explain the origins of the PDA and FMLA—the maternalist reformers of the early twentieth century. The legal precedent of *Muller v. Oregon* and the institutionalization of maternalist assumptions within the federal bureaucracy and among women’s organizations did have long lasting effects on American maternity policy. However, the cornucopia of studies about maternalists and early twentieth century protective labor legislation are most useful here for the theoretical insights of those who study the maternalists, especially their insistence on looking at the role of women in constructing the welfare state and the effects of the state upon women. When it comes to explaining our current maternity policy, I am unsettled by the leapfrogging of four decades or more in the search for historical context of American maternity policy.

What happened in the 1940s and 1950s is especially relevant to grasping how and why American maternity policy is so different than the maternity policies of most of the rest of the world and to understanding many of the constraints on those who crafted the PDA and the FMLA. If other scholars occasionally nod to concerns about pregnant workers during WWII, or to the growth of fringe benefit plans in the postwar period, no one has done a substantial analysis of those periods in relation to current American maternity policy. No other scholar has shown just how close the US was, at that time, to considering more European-type plans, or at least to using the same kinds of language to discuss working mothers and their needs for social supports.

²⁰ Ron Elving and Peter Irons are journalists. Lise Vogel, Carolee Larsen, Erin Kelly and Frank Dobbin are sociologists. Steven Wisensale is an expert on welfare policy. Cathie JoMartin, Joyce Gelb, Marian Lief Palley and Anya Bernstein (Bassett) are political scientists. Neil Siegel, Reva Siegel, Catherine Albiston and Joan Williams are law professors as is the historian Deborah Dinner. Fred Strebeigh teaches writing.

By looking at WWII, I see a policy impulse and a set of reformers who are the intellectual heirs of earlier maternalist reformers. I see their influence broadened by the growth of women workers and the growth of the federal government in wartime that provided jobs for women professionals in the civil service and that allocated previously unimagined resources for the agencies they ran. Women in both the Women's Bureau and the Children's Bureau evinced both a gender and a class analysis of working women's problems. Following their careers and initiatives into the postwar period, I see how the domestic Red Scare effectively curtailed reform.²¹ Other scholars miss this dramatic narrowing of the politically possible when they look to the maternalists of the early twentieth century for the historic context of the PDA and FMLA. Without those years, they are left to see the differences between maternalists and feminists as philosophical and academic. This contributes to interpreting how some prominent left feminists came to change their minds on the Equal Rights Amendment during the 1960s as an almost natural evolution of beliefs. Missing the post-war period means missing the effect of political repression that silenced a range of options and also missing one important place to see the connections between maternity policy and wider political climate.

I also study more of the things that didn't happen, or that happened only on a small scale, or were quickly ended, than do other scholars because I believe that the policy failures are important to understanding both the tardiness of American protections and also their particular shape. Because WWII and the 1950s both saw increasing labor force participation by women, I am also curious to see how women workers managed to, or attempted to manage, a balance of work and childbearing in the years before the US had any official maternity policy. Because of this, I look at how employee fringe benefits regarded maternity at the time fringe benefits

²¹ For an examination of the way the Cold War decimated women within the federal government, see Landon R.Y. Storrs, *The Second Red Scare and the Unmaking of the New Deal Left* (Princeton: Princeton University Press, 2012).

expanded to cover significant parts of the workforce. These successful institutions of social support marginalized maternity even as they formed the backbone of the postwar American welfare state. I also examine the way pregnant workers accessed or were excluded from an existing and central broad social policy--unemployment insurance.

Because there was no one national maternity policy, the sources for this study are episodic. The best documented periods are World War II, when a wartime government accumulated employees, projects and huge drifts of paper, and the period of feminist legislation since the 1970s, which can easily be followed in legal cases and in a regular parade of analysis in law reviews. I tell the history of the intervening years, when the public/private system developed, from diverse sources, including some legal records, archival sources, trade and medical journals, and some cultural sources. Following the historians who have wanted to “bring the state back in,” I have sought to show how actual maternity policies were developed and administered, as well as how they affected pregnant workers. I also study particular webs, networks or bureaucracies where ideas about maternity policy percolated and persevered though unfriendly political climates, showing the limits of the possible and laying the groundwork for future reforms. From personal papers, personnel records, legal cases, newspapers, medical journals and textbooks, and an FBI file, I provide multiple historical contexts—World War II, the Cold War, labor, civil rights and feminism—for understanding the ideas and strategies of reformers and the barriers they faced.

Chapter Organization

Ch. 1 “Expecting Trouble”

World War II represented an unprecedented opportunity for the United States to develop a national maternity policy. For the first time, women publically entered essential industries organized by strong industrial unions. Vital wartime industry needed women workers. Under the pressures of war, the falling birth rates of the Great Depression raised a brief period of pro-natalist fear and arguments. At the same time, the growth in the federal government bureaucracy lent an unusual prominence to the women reformers’ networks within government. Attention focused on the war effort, but even as relative influence may have waned in favor of men within the Roosevelt Administration, the reach and the money available to, for instance, the Children’s Bureau, expanded. Patriotic pressures and also a special temporary freedom from focusing on costs, spurred unions, doctors and employers to search for ways to integrate women into previously male workplaces. They, in turn, looked to federal agencies for help and advice with their women problems, especially the problems posed by women’s reproductive capacity.

Ch. 2 “Pregnant Rosies and Soldiers’ Babies”

Three groups of pregnant women inspired special concern on the part of the US Government. WAACs, production workers and the wives of soldiers represented different aspects of pregnancy issues and inspired very different attention and policies from the wartime government and the public. The most significant of these was a federally funded US maternity health insurance for the pregnant wives and new babies of US servicemen. This program was revolutionary in many ways. It set standards for health care. It assured quality and guaranteed accessibility and the provision of care. An immensely popular program, EMIC showed that the

public was not opposed to maternity coverage. Women were extremely eager to take advantage of the program, which covered one out of seven births at its high point. However, the program also revealed one of the enduring problems with US social insurance. Because it was a marriage entitlement that women gained access to through their soldier husbands, the benefit dried up during demobilization even as women continued to have babies. EMIC shaped the standard of care for the babies of the baby boom, but only because of the lessons EMIC taught American doctors and expectant mothers, and not because the wartime experiment in maternity care survived into peacetime.

Ch. 3 “Miscarriage”

Instead of expanding on the experiments of WWII, the Fair Deal period represented retrenchment from not only the idea of EMIC, but also other New Deal Programs as well. Although the immediate postwar period saw some new public programs, like Cash Sickness Compensation in Rhode Island, and comprehensive maternity coverage in the Railroad Retirement Act, pro-business ideology, bureaucratic re-organization, and, most importantly, Cold War fears circumscribed the provision of social welfare benefits relating to maternity. Eager to make his own mark on the presidency after FDR’s long term in office, Truman’s sweeping re-organization disrupted longstanding ties among women in the Department of Labor by removing parts of the Children’s Bureau to the Social Security Administration. The Women’s Bureau remained behind in the Labor Department along with a few parts of the old Children’s Bureau. Bereft of their sister agency, and isolated within the Social Security Administration, which was staffed nearly entirely with men, the once expansive Children’s Bureau was crippled, offering a clear demonstration of the importance of an institutional home for reform within a bureaucracy.

Ch. 4 “Cold War/Stillbirth”

Ironically, while retrenchment was occurring at home, US women reformers in international agencies helped shape international maternity standards through the International Labour Organization and its revised maternity convention. Nonetheless, within the US, red baiting decimated the ranks of women reformers and union activists who advocated maternity policy. The Cold War thwarted the passage of specific legislation. Moreover, within a short time, it silenced what discourse there was about maternity benefits and associated the very idea with communism, threats to the nuclear family and destruction of the privileges of male breadwinners. Clear contrast can be seen in the stunning successes of EMIC and the failure, a decade later, to win a similar program for the wives and infants of Korean War soldiers off fighting the spread of communism.

Ch. 5 “Paying for Baby”

Spurred by the New Deal model of security and the wartime wage controls, companies and unions created private benefits plans tied to a particular work relationship and predicated upon long term employment. This emerging parallel system of a welfare state adopted wholesale gendered and racial ideas about the workforce. Wage privileges became benefit privileges as well. While women, as transient workers, were often excluded entirely from employee benefits, another problem was that in this critical period of development, the emerging private welfare state ignored benefits that would be of particular use to women, like job protected maternity leave or wage replacement for pregnancy disability. Health insurance schemes defined pregnancy and childbirth as normal events rather than unforeseeable illnesses. In their own actuarial interest, they strictly limited obstetric coverage even as the costs of childbirth rose

along with other medical care and the emerging field of neonatology ballooned the upper-limits of costs on high-risk pregnancies. Private benefits came to be a central feature of the public-private hybrid US welfare state. The exclusion and marginalization of pregnancy and maternity in this period of formation came to characterize a long term slighting of women from the central features of American welfare.

Ch. 6 “Prego Power”

In the 1970s, a new generation of women reformers and feminist lawyers emphasized the economic independence and full citizenship that accrued to women with careers and long-term attachment to the labor market. They sought to secure these rights for women through first establishing a woman’s right to keep her job even if pregnant. Then, they worked to somehow fit pregnancy into a benefits structure that had been designed to exclude women’s specific benefits. For this they appropriated the temporary disability model and won court decisions and then legislation, the Pregnancy Discrimination Act, to outlaw blatant discrimination on the basis of pregnancy. Finally, they realized that historic sex segregation in the labor force had excluded women from the kinds of jobs that had the most comprehensive private benefits systems. They pressed for integration of women into largely male jobs as well as comparable worth and union organizing of pink collar jobs like clerical work. While this group of reformers had important successes that have proven enduring, the focus on jobs and work-related benefits proved vulnerable to macro-economic changes that saw both good jobs evaporate, and a roll-back of job related benefits.

Ch. 7 “In the Family Way”

The last chapter traces the immediate history of the last major part of American maternity policy, the FMLA. It starts when, concurrent to Congress passing the Pregnancy Discrimination Act, legislators in several states also grappled with the challenges presented by increasing numbers of mothers in the workplace. Laws passed to protect pregnant workers by mandating maternity leave attempted to reconcile the increasing labor force participation of American women with the demands of motherhood. Such an approach, however, seemed to run afoul of the PDA. Companies tried to use the PDA to undermine maternity laws. Feminists feared that maternity laws could reinforce a gendered division of labor within families and disadvantage women in the workplace. The successful effort to get women into the professions meant more women held high corporate office. In part because of this and in part in response to pressure for new laws, personnel offices and insurance professionals expanded the private welfare state to begin accommodating maternity. A movement to craft a gender-neutral law drew on this private experience but also sought new allies and sources of argument. The authority of scholars in child development led to unstable rhetorical ground as childrearing leave shifted from a question of women’s rights to one of children’s needs, inviting the participation of the pro-life movement in an effort to pass family leave legislation. A larger irony emerged from the limited successes in getting employment-based benefits to respond to the needs of mothers. Women who didn’t have jobs or husbands to provide for them faced increasing stigmatization and decreased public support due to welfare “reform.” At the same time, in the midst of “efforts...to roll back the public safety net, the private-sector safety net was quietly under siege”²² as employers shifted more and more of the costs of benefits onto their employees.

²² Gottschalk, *The Shadow Welfare State*, viii.

Epilogue: Overdue

The epilogue briefly looks at how the FMLA has become part of the fabric of American life even as its protections remain stingy and out of reach for the majority of American women.²³ Efforts to build on the FMLA, for instance by getting paid leave, have had only limited success. Both the PDA and the FMLA are under constant threat by business interests. A Better Balance, the New York law firm specializing in discrimination and family leave, reports that lawsuits about pregnancy discrimination continue to grow.²⁴ Although a Supreme Court decision in March 2015 reaffirms the PDA, courts have generally interpreted the PDA and the FMLA in narrow terms, limiting their transformative potential for gender roles in the family and the workplace. The Affordable Healthcare Act, the most recent expansion of the American welfare state, does provide more women with access to health care, including prenatal and obstetric coverage. But, pregnancy is not a qualifying event for joining or changing coverage outside the open enrolment period, thus still leaving some pregnant women without social supports essential for maternal and infant health and for women's economic opportunities. Furthermore, carefully designed to buttress the existing private welfare system, Obamacare allows inequality in the workforce to continue to replicate itself in social provisions for health care. In June of 2014 there was a White House Summit on working families that highlighted the need for paid leave and other expansions in the FMLA. But this high profile endorsement by the president has not resulted in a major legislative push. It seems unlikely in the final years of the Obama

²³ Council of Economic Advisors, "The Economics of Paid and Unpaid Leave," 4; Jacob Alex Klerman, Kelly Daley, and Alyssa Pozniak, "Family and Medical Leave in 2012: Technical Report," Abt Associates, prepared for the United States Department of Labor, September 7, 2012, revised April 18, 2014,

<http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf> (accessed May 25, 2015).

²⁴ National Women's Law Center and A Better Balance. *It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers* (Washington, D.C.: National Women's Law Center, 2013).

administration, with a deeply divided congress, that we will see any new substantial expansions soon. Although Hillary Clinton has proclaimed herself interested in expanding the FMLA and other protections for working families, by many measures, robust supports for maternity are overdue and even should she win, one presidential election itself will not be enough to change a maternity policy grounded in the last sixty years. Government agencies tasked with insuring compliance with the laws are vulnerable to changes in administration and in funding. Finally, both laws were built upon assumptions about the American labor market that have never described women's employment very well and that, in the face of macro-economic trends, describes the American workplace itself ever less well.

The directions any expansions can take are limited by today's coalition politics, which are strongly shaped by the culture wars, by the economy, and by the history of American maternity policy that I tell in the following pages.

CHAPTER 1:
EXPECTING TROUBLE: WAR PRODUCTION, PHYSICIANS
AND THE WOMAN WORKER

During World War II, Thelma Bolen fainted while inspecting an airplane at a Firestone plant in Akron, Ohio. She was doing a man's job, which posed conceptual and tactical problems for her employer, for her union, and perhaps for her and her family. The exigencies of war made her new job possible, but not easy. Thelma, no more than twenty, was pregnant. She had not told anyone at Firestone because she liked her job and wanted to keep it. After she fainted, the company physician discovered her pregnancy and offered to arrange a job transfer, but, having lost the position she liked, Thelma chose to take a leave of absence instead. She never returned to work at Firestone.²⁵ Thelma's story illustrates many of the problems facing pregnant workers, their employers, unions, doctors and their government during World War II. How could women keep jobs they wanted or needed? How could employers retain trained workers? What kinds of jobs were considered too dangerous for pregnant workers? Who should decide that?

The war presented a unique moment for changes in the conditions of work for pregnant women. Women's war work, and the fears aroused by visible changes in jobs and work patterns, created a space to see and discuss the problems presented by pregnancy, women's employment, and war. The men and women who debated workplace pregnancy during the war each had their own ideas about reproduction, which reflected ideology and/or economic interest. Pregnancy already meant something to them and that colored the way they attempted to deal with the pregnancies of war workers. Women workers, their maternal functions and their babies were

²⁵ Kathleen L. Endres, *Rosie the Rubberworker: Women Workers in Akron's Rubber Factories During World War II* (Kent, OH: Kent State University Press, 2000).

elements of industrial hygiene that buttressed hard won Protective Labor Legislation in the early twentieth century.

At the same time, feminists in the National Women's Party thought arguments about women's special vulnerabilities obstructed the Equal Rights Amendment and underwrote occupational barriers for women workers. Obstetricians thought they had recently rescued pregnant women from dangerous and dirty midwives and offered them new standards of care involving hospitalization, new pharmaceuticals, and prenatal care. Employers needed women, even mothers, as soldiers of production to fill wartime demands. But they also demanded managerial control of work assignments and clung to a sex-segregated labor force that kept wages low for unskilled and semi-skilled workers.

The rise of industrial unionism in the 1930s offered a rationale for some unions to address working women's concerns. Yet, the family wage ideal still reverberated in an overall very masculine labor movement, even within unions with large numbers of women workers. The no-strike pledge, which swelled the ranks of labor with new women members due to maintenance of membership clauses, did not necessarily make unions more responsive to women workers since locals did not have to organize to gain members and since officially available options for union actions were constrained. When unions began to focus on employee benefits as collective bargaining issues, historic weaknesses in organizing women and the prevailing idea of the family wage did not offer strong challenges to employer prerogatives in personnel policies and the purchase of benefit plans that slighted pregnant workers. Wartime migration, with millions of young people leaving home for distant and sometimes exotic locales undermined community standards of propriety. Women and men mixed in new workplace and social venues

and, since the future was uncertain for many, some sought pleasure in the present. Sexual mores were in flux.²⁶

And then Rosie walked into the shipyard, pregnant.

No wonder everyone expected trouble, but the trouble wasn't only with Rosie. Wartime discussions about Rosie and her baby were not based mostly on maternal and infant health, or on an individual's rights to a job or reasons for wanting to work or on productivity. The arguments that raged about her tell us more about the other actors than they do about the real women who worked and had babies in this period of rapid change. Actually, Rosie's own voice is hard to hear at all. During World War II significant changes in maternity policy were made for pregnant women not because of pregnant women's demand for rights (as women, as workers, or as working women) but in spite of the fact that they rarely did so. All in all, they were the objects of reform, rather than the active agents of reform. Wartime decisions by influential groups and accommodations that they made or rejected for pregnant war workers shaped Rosie's life, her job, her pregnancy and the resources she had as a new mother. They also set the tone for the postwar pregnancies of other working women. The concern for pregnant Rosies during World War II resulted in a flurry of debates and pronouncements and some changes in workplace and medical practice. With the close of the war, women workers became far less prominent, their problems less pressing. Pregnancy did not emerge as a significant employment problem again until the 1970s. Furthermore, wartime changes, modest as they were, were long-lasting.

²⁶ Jane Mersky Leder, *Thanks for the Memories: Love, Sex and World War II* (Westport, CT: Praeger Publishing, 2006).

Expecting Trouble

When Rosie was expecting, everyone else expected trouble. In 1943, Gretta Palmer, a Vassar-educated journalist, wrote about the “vast army of pregnant women” for the *Woman’s Home Companion*. Palmer asserted that “pregnancy is America’s Number One industrial health problem today” and worried that employers, doctors and workers were confused by “the problem [that] is too new.”²⁷ She found that “what happens to individuals in the vast army of pregnant women may be the result of an accidental choice of a place to work.”²⁸

In 1940, there were 11 million American women working for wages outside the home. In 1945, there were 19.5 million. Women’s paid work had been growing since the 1890s, at first mainly among single women. During the war, more married women were employed than before. Most married women workers entering the labor market were older women with grown children or school age children.²⁹ However, the young wife and mother captured the public imagination and embodied the fears of employers, government policy makers, labor unions, and doctors. Women also worked on jobs and in industries that were previously all male. During the war, women came to make up over a fifth of heavy industry workers, which was more than double their share in those jobs before the war.³⁰ Women workers emerged as a priority, a solution and

²⁷ Gretta Palmer, “Your Baby or Your Job,” *Woman’s Home Companion* 70 (Oct 1943).

²⁸ Palmer, “Your Baby or Your Job,” 137. Palmer had contacted the Labor Department before publishing her story and Dr. Eliot of the Children’s Bureau prepared a paragraph statement for the Secretary of Labor to send her. The paragraph was basically the CB/WB standards. Martha M. Eliot to Mr. Fitzgerald, June 11, 1943 and paragraph with letter, “Employment of Mothers Outside the Home Jan 1943” (“Empl of Mothers Jan 43”) file # 4-7-1-1-1; Central File, 1941-1944 (CF, 1941-1944); Children’s Bureau Record Group 102 (RG 102): National Archives at College Park (NACP).

²⁹ Susan Householder van Horn, *Women, Work, and Fertility, 1900-1986* (New York: New York University Press, 1988): 141; See Karen Anderson, *Wartime Women: Sex Roles, Family Relations, and the Status of Women during World War II* (Westport, CT: Greenwood Press, 1981) and Susan M. Hartmann, *The Home Front and Beyond: American Women in the 1940s* (Boston: Twayne, 1982).

³⁰ van Horn, *Women, Work and Fertility*, 142.

sometimes a problem in crucial war industries. One of the problems was that Rosie might have a baby.

Some of this fear inspired the Lanham Act, federal funds for child care in “war impact areas.” Likewise, Kaiser Shipyards’ pressing need to retain women workers led to pioneering on-site child care facilities.³¹ A 1943 Office of War Information poster showed a young woman war worker in an aircraft factory changing her baby’s diaper on the plane’s nose.³² Another 1943 cartoon featured a very busy mother with a child clutching each leg of her coveralls, two more playing nearby on a half-built ship, and a baby in one arm while she wielded a torch with her free hand.³³ Ostensibly promotions for work-site and community child care centers, these cartoons betrayed profound discomfort with mothers’ employment. In fact, women war workers did not really bring their children to work. They relied on their husbands, mothers, other female relatives, older children, and neighbors. They solved child temporary care crises with absenteeism. To these cartoonists, mothers just belonged with their children, even on the factory floor. Only a few months separated these working mothers from pregnant workers who really did carry their future babies into their workplace. Skilled and semi-skilled war workers with babies had often had the training and some job experience before getting pregnant. Concern over the effect of war jobs on women’s ability to mother effectively stretched beyond child care back into the months of pregnancy.

³¹ On both the Lanham Act and the Kaiser experiments, see Sonya Michel, *Children’s Interests/Mothers’ Rights: The Shaping of America’s Childcare Policy* (New Haven: Yale University Press, 2000) and Amy Vita Kesselman, *Fleeting Opportunities: Women Shipyard Workers in Portland and Vancouver during World War II and Reconversion* (Albany: SUNY Press, 1990).

³² [unknown first name] Severns, “Mrs. Phipps just Convinced Me of the Need for Better Child-Care Facilities,” Office of War Information, [ca 1943], Library of Congress.

³³ Bob Barnes, “And Then in my Spare Time...” Office of War Information, [ca 1943], Library of Congress.

Pregnancy in the workplace during World War II was actually several different problems. Pregnancy was a production issue. A Bridgeport, Connecticut, plant that made casters worried that pregnancy was a problem because “[we] need all the help [we] can get” and discharge of pregnant women early in their pregnancy deprived them of experienced workers who might not return.³⁴ Industry fretted about pregnancy’s effects on productivity and about the risks of court action should misfortune befall a pregnant employee. One medical question was the effect of work, or different kinds of work, on maternal and fetal health. But health care professionals also differed over care and delivery of medical care to pregnant workers. Some unions, and to some extent, the U.S. Women’s Bureau, broached the right of an employee to keep her job, but this was a very minor theme during World War II. Proponents of an Equal Rights Amendment worried that workplace maternity policies would threaten women’s job opportunities. Defenders of existing Protective Labor Legislation were anxious to defend hard-won protections and were more concerned with the right to mother than the right to work. Federal government action on behalf of pregnant women workers during the war began within already established state and national standards.

Health and Safety and the Women’s Bureau

Before and during World War II, some of the best known specialists in industrial medicine, such as Alice Hamilton, Anna Baetjer and Clarence Olds Sappington, studied the reproductive health of women and proposed workplace standards.³⁵ Although there was

³⁴ “Bassick Co.-Bridgeport, Connecticut” questionnaire for Silverman, “Empl of Mothers Jan 43” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

³⁵ Allison Hepler, *Women in Labor: Mothers, Medicine, and Occupational Health in the United States 1890-1980* (Columbus, OH: Ohio State University Press, 2000), 67-83.

widespread agreement that certain industrial processes and the exposure to some chemicals could wreak havoc on women's reproductive health, there was disagreement over just which jobs were dangerous for women, or for pregnant women. Hamilton and Baetjer were cautious about broad assumptions of women's special vulnerability. Baetjer, always known for sticking closely to the science, told a meeting of the American Industrial Hygiene Association that there was no scientific evidence that women were more vulnerable to hazardous chemicals such as lead, benzol, or TNT and that furthermore, pregnant women might not be more vulnerable than other women or than men.³⁶ However, she did concede that the consequences of industrial disease could be worse for pregnant women and their children, even if the actual disease was the same.

Most hygienists, physicians, and government officials had a more protective response. Dr. Mary Meyer, of the New York State Department of Labor Division of Industrial Hygiene, acknowledged that there was "no evidence" of different susceptibility between men and women, nevertheless, she maintained that "special consideration" should be given to pregnant women.³⁷

Staff at the Women's Bureau were concerned about the effects of the war on workers' health. War production brought large numbers of women into contact with chemicals known to cause reproductive harm as women began doing some jobs previously held only by men. During the war, some states relaxed protective labor legislation that had prevented the employment of women in jobs with high exposure to some industrial poisons. Laws, collective bargaining agreements, and customs about the length of the working day or the number of days at work were also modified during the war emergency and as the hours at work lengthened, so did any

³⁶ Jennie Mohr to Miss Miller, February 28, 1945 "Talk Given by Dr. Anna Baetjer at meeting of local branch of American Industrial Hygiene Association," Folder "Health & Safety—1945," Records Re: Women Workers in WWII, 1940-1945 (Re: Wm Wkrs WWII); Division of Research (Div of Rsrch); RG86, NACP.

³⁷ Jennie Mohr to Miss Miller, February 23, 1945, "Interview with Dr. Mary Meyer, N.Y. State Department of Labor, Division of Industrial Hygiene," Folder "Health & Safety—1945," Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP.

chemical exposure.³⁸ Finally, the pressure for high production led some manufacturers to use older techniques with cheaper, easily obtainable chemicals instead of newer processes that employed safer ingredients.³⁹ Thus, while before the war, many states had laws preventing women from working with lead and one prohibited the employment of women in jobs with high exposure to benzene, women's wartime jobs in ship building included mixing kegs of red lead with barrels of benzene, working with lead solder and lead packing and chipping red lead paint from ships.⁴⁰

The U.S. Women's Bureau was concerned about the effects of industrial work on women. They made recommendations about safety clothing and uniforms during the war, for the benefit of plants with government contracts. As a result, necessary safety clothing was exempted from wartime austerity measures. The Bureau had extensive contact with Monsanto, a chemical company, about their design of work uniforms for women and tried hard to get the War Production Board to modify standards for women's jackets.⁴¹ They were also especially concerned about women's shoes.⁴² The Women's Bureau recommended women farm workers wear foundation garments—girdles. During the war, girdles were hard to obtain because of the amount of rubber needed for their manufacture. The Women's Bureau issued guidelines for the

³⁸ Hepler, *Women in Labor*, 70.

³⁹ Milton H. Kronenberg, "Working Conditions for Female Employees," *Journal of the American Medical Association* 124, no. 11 (March 11, 1944): 682.

⁴⁰ Hepler, *Women in Labor*, 76-77.

⁴¹ James W. Irwin, Monsanto, to Mary V. Robinson, Women's Bureau, 17 November 1942, Folder "Safety—1942" Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP; on WPB and jackets, see to Mr. H.M. Lawrence, ASA War Committee, January 23, 1945, Folder "Health & Safety—1945," Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP.

⁴² "Shoe Problems," Folder "Safety" Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP; also Hepler, *Women in Labor*, 71.

care and repair of girdles in order to make them last as long as possible.⁴³ Foundation garments were important for several kinds of women workers, the Women's Bureau observed, including those "who need such support for relaxed muscles following childbirth."⁴⁴

The use of pneumatic tools spread during World War II partly as a response to the increase in women workers. Government agencies encouraged manufacturers to redesign work processes with an eye towards the employment of women workers, young workers and, in some cases, handicapped workers. To government and to manufacturers, this meant reducing loads and increasing the use of power equipment. Power tools, however, had a strong connotation of masculinity, so an uneasy balance existed between the perceived needs of women workers for power equipment and the characterization of such equipment as male. One manifestation of this ambivalence is seen in the common attempts to "domesticate" women's war work. The War Manpower Commission and various private companies used homey metaphors to show the relationship between industrial work previously thought of as male and the domestic work of women. Thus, cutting out airplane parts became as easy as tracing a dress pattern while drill presses resembled electric mixers and bomb making was similar to baking a cake.⁴⁵

In another sign of discomfort about women using masculine tools, the Women's Bureau wondered what all this activity with power equipment might be doing to women's bodies and their childbearing function. Their suspicions and assumptions dramatize the contingent nature of

⁴³ "Following are Suggestions for Conserving Supporting Garments Containing Rubber," Folder "Safety," Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP.

⁴⁴ "Recommendations as to Foundation Garments for Women Farm Workers," U.S. Department of Labor, Women's Bureau, Washington, DC, "Safety," Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP.

⁴⁵ See Leila J. Rupp, *Mobilizing Women for War: German and American Propaganda, 1939-1945* (Princeton, NJ: Princeton University Press, 1978) and Susan M. Hartmann, *The Home Front and Beyond: American Women in the 1940s* (Boston: Twayne, 1982).

women's wartime occupational opportunities, the role of health and safety in the Women's Bureau's work, and the importance of protective standards to the Bureau's overall vision.⁴⁶

Many employers believed that women workers' higher absentee rates could be explained by monthly cramps.⁴⁷ They sought to combat this problem by developing special exercises for female employees that were thought to reduce menstrual discomfort.⁴⁸ Many plants also encouraged women suffering from cramps to take short breaks with a hot water bottle in the plant dispensary instead of missing a whole shift. Many, however, remained deeply troubled by the question of pneumatic tools because they believed that menstruating women who used them could be subject to "flooding" or "innard injury." One war plant tried to track its female employees' cycles and move them to different work when their "monthly visitor" arrived; other employers did not follow suit for reasons of logistics as well as the invasion of privacy.

Plants were much more unified in their assessment of the dangers to pregnant women. Some doctors and Children's Bureau and Women's Bureau researchers concurred that pregnant women should not be placed on jobs with power tools for fear that they might jiggle their fetuses severely or that the constant vibrations would interfere with normal fetal development. The Women's Bureau also worried that there was "the possibility of development of cancer as a result of holding large and powerful pneumatic tools against the breast for support."⁴⁹

⁴⁶ U.S. Department of Labor, Women's Bureau, "The Work of Women on Pneumatic Tools," March 1944, "Health and Safety," Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP.

⁴⁷ Allison Hepler also notes an example of employers and plant medical offices concern with menstruation. Hepler, *Women in Labor*, 73.

⁴⁸ Constance Bowman and Clara Marie Allen. *Slacks and Callouses* (1944; repr., Washington DC: Smithsonian Institution Press, 1999), 16.

⁴⁹ "For inclusion in a letter from the Secretary to a ~Women's Party~Feb 45," [sic] Folder "Health & Safety—1945," Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP.

This debate on the special susceptibility of women to industrial chemicals and processes had heavy political implications. The Women's Bureau had spent decades working on standards for women's working conditions and hours based upon the two-pronged argument that women needed greater protection because of their biological and social roles as mothers and that, partly because of those roles, they were less able to secure work protections themselves and so deserved state action on their behalf. The Women's Bureau sought to enforce protective labor legislation on behalf of working women. Historian Allison Hepler shows that during the war, when companies were granted exemptions from state protective labor legislation and placed women in non-traditional, heavy and dirty jobs, they treated women workers as responsible for their own health risks on the job. Education campaigns about safety equipment and safe practices, and the use of pre-employment and regular exams, allowed employers some latitude in continuing hazardous workplaces, much as safety campaigns focused on male workers did. The Women's Bureau, according to Hepler, rejected this approach and "tried to mandate additional protections" for women working in war industries.⁵⁰ During the war, they "tried to publish a list of hazards from which Women should be specifically excluded" but Alice Hamilton "persuaded them to focus only on the reproductive dangers" of lead and benzene.⁵¹

Hamilton was, at this time, a prominent supporter of protective labor legislation. However, Baetjer and Hamilton's narrow view of any special susceptibility of even pregnant women undercut the rationale for protective legislation. The Women's Bureau was very concerned about the National Women's Party and their perennially introduced Equal Rights Amendment. Drafting a letter for the Secretary of Labor to send to the Women's Party, a staff

⁵⁰ Hepler, *Women in Labor*, 75.

⁵¹ Hepler, *Women in Labor*, 77.

member from the Bureau railed, “It would be the height of unrealism to fail to recognize the differences arising from the child bearing function, and the need to protect this function in working women.”⁵² The science of reproductive occupational health, depending on how it was used and who was using it, could potentially threaten protective labor legislation. And yet, even stalwart proponents of protective labor legislation, like the social justice feminists who filled the U.S. Women’s Bureau, recognized that workplace sex discrimination could harm women’s job opportunities. According to Allison Hepler, during the war, for instance, the Women’s Bureau offered only tentative support for workplace pre-employment examinations that included a pelvic exam. They feared that women would be shut out of good jobs unfairly, and, Hepler surmises, also feared that pelvic exams would draw fire from the National Women’s Party.⁵³

The Doctor Will See You Now

Acting on their own or as consultants to US government agencies, physicians also expressed concern about conditions for pregnant workers. In addition to plant physicians, a pregnant woman might also be under the regular care of a private physician who was concerned with her overall health, her progress through pregnancy and the health of the baby she would have. Obstetricians, through their regular exams and through a substantial number of popular guidebooks for expectant mothers, and through the miracle of birth they presided over, played a powerful role in a pregnant woman’s life and decisions.⁵⁴ Pediatricians, identifying prenatal

⁵² “For inclusion in a letter from the Secretary to a ~Women’s Party~Feb 45,” [sic] Folder “Health & Safety—1945,” Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP.

⁵³ Hepler, *Women in Labor*, 76.

⁵⁴ In her introduction to a collection of letters to the childbirth reformer Grantly Dick-Read, Mary Thomas comments on the power of pregnancy guidebooks in shaping and even defining a woman’s experience of pregnancy and birth. Their proscriptive and sweeping explanations of what was and was not “normal” told women what to look for and how to understand their own feelings and sensations. In replacing an oral tradition of childbirth stories, from

conditions as relating to infant mortality, were also concerned with the effects of work on pregnancy.

There is an important body of historiography tracking and explaining the interrelated phenomena of a decline in the use of American midwives as birth attendants, the ascendancy of first physicians and then obstetricians, the switch from home to hospital births, the safety and benefits of different birth attendants and places of birth, the declining maternal and infant mortality rates, and the racial differences in those rates.⁵⁵ This study does not address the central controversy of whether or not the shift from midwives caring for women in their own homes to physicians delivering women in hospitals improved maternal and infant health. By the start of World War II, midwifery was already an unusual option of care. Judith Rooks explains that “Midwives attended one-half of all births in the United States during 1900. By 1935, the proportion had dropped to one-eighth.”⁵⁶ Midwives persisted longer among European immigrants and African Americans, but even by the 1930s, the majority of immigrant mothers were no longer using midwives; persistence of midwifery among African Americans was much longer--only by the 1950s were the majority of black infants born in hospitals.⁵⁷ Among the many reasons for the overall decline in midwifery was population mobility in the United States, which contributed to the decline of midwives, who drew their patient base by word of mouth and

mother to daughter, older female friends and relatives to the new mother, pregnancy guidebooks buttressed the male obstetrician’s take over from female midwives in delivery. Mary Thomas, ed. *Post-War Mothers Childbirth Letters to Grantly Dick-Read, 1946-1956* (Rochester, NY: University of Rochester Press, 1997).

⁵⁵ For an overview of this literature, see Leslie J. Reagan “Medicine, Law, and the State: The History of Reproduction,” in *A Companion to American Women’s History*, Nancy A. Hewitt, ed. (Malden, MA: Wiley-Blackwell, 2002), 354-356.

⁵⁶ Judith Rooks, *Midwifery and Childbirth in America* (Philadelphia: Temple University Press, 1997), 459.

⁵⁷ Richard W. Wertz and Dorothy C. Wertz, “Notes on the Decline of Midwives and the Rise of Medical Obstetrics,” in *The Sociology of Health and Illness: Critical Perspectives* 8th ed., ed. Peter Conrad (New York: Worth Publishers, 2009), 202; Charlotte G. Borst, *Catching the Babies: The Professionalization of Childbirth, 1870-1920* (Cambridge: Harvard University, 1995), 157.

their social ties within communities.⁵⁸ Whether or not it was good for maternal and infant mortality, midwives were delivering relatively few white American babies on the eve of WWII and the dislocations of war migration may have reduced that care further, independent of organized medical action or government programs.

Obstetricians had waged a long battle to gain a respected standing within the field of medicine and to discredit midwives as birth attendants.⁵⁹ Probably due to these professional battles, obstetricians were well organized and jealous of their turf. During the 1930s and 1940s, they turned their attention toward general practitioners and other non-obstetric specialties to promote their own field. In the context of WWII, when increasing numbers of women workers filled shifts at large companies that had industrial physicians on staff, some obstetricians worried about the care industrial physicians were providing. If company doctors provided a range of care to employees, then physicians in private practice might lose business.⁶⁰ Obstetricians also

⁵⁸ Wertz and Wertz, "Notes on the Decline of Midwives," 202, 211. See also Neal Devitt, "The Statistical Case for Elimination of the Midwife: Fact versus Prejudice, 1890-1935," *Women and Health* 4, no. 1 (May 1979): 81-96.

⁵⁹ Frances E. Kobrin, "The American Midwife Controversy: A Crisis of Professionalization," *Bulletin of the History of Medicine* 40 (1966): 350-363, reprinted in *Sickness and Health in America: Readings in the History of Medicine and Public Health* 2nd rev. ed. by Judith Walzer Leavitt and Ronald L. Numbers (Madison: University of Wisconsin Press, 1985), 197-205; Leslie Reagan, *When Abortion Was a Crime: Women, Medicine and Law in the United States, 1867-1973* (Berkeley: University of California Press, 1997), 90-112; Richard W. Wertz and Dorothy C. Wertz, *Lying-In: A History of Childbirth in America* (New York: The Free Press, 1977); Judith Walzer Leavitt, *Brought to Bed: Childbearing in America, 1750 to 1950* (New York: Oxford University Press, 1986). Maternity mortality review committees set up during the 1920s and 1930s began in order to reduce maternal mortality and also further coalesced obstetrical identity. On the heels of professional improvement, they applied lessons learned from inquiry into the deaths of mothers to the care of expectant mothers. Joyce Antler and Daniel M. Fox, "The Movement Toward a Safe Maternity: Physician Accountability in NYC, 1915-1940," *Bulletin of the History of Medicine* 50 (1976): 569-595, reprinted in *Sickness and Health in America*, 490-506.

⁶⁰ See, for instance, Dr. Johnstone, "Industrial Medicine's Responsibility During and After the War," paper to the Meeting of the Western Association of Industrial Physicians and Surgeons, May 3, 1942, also paper by Dr. Legge at same conference, Memo from Dr. [Edith] Sappington to Miss Bloodgood, May 6, 1942, subject "Meeting of the Western Association of Industrial Physicians and Surgeons, May 3, 1942," 4; "Empl of Mothers Sept-Dec 1942" file #4-7-1-1-1; CF 1941-44; RG 102, NACP. See also Goodrich Schaffer, "Women in Heavy War Work," *Western Journal of Surgery, Obstetrics and Gynecology* 52 (1944): 13.

believed that industrial physicians lacked specialized medical expertise about the health of pregnant women.

Obstetricians pointed out that experts in occupational medicine had minimal training in obstetric and gynecological conditions because prior to the war these were not industrial concerns.⁶¹ To be sure, Dr. Max Burnell, who was the medical director at General Motor's AC Spark Plug Company, argued that "dysmenorrhea, pregnancy and the menopause directly concern the industrial physician."⁶² However Dr. Wesley Pommerenke, an obstetrician and professor at the University of Rochester, urged industrial physicians to take "refresher courses" in gynecology when their companies began to employ large numbers of women.⁶³ Other obstetricians who did not think refresher courses sufficient training disagreed, claiming women's reproductive health as the terrain of specialists in their own field.⁶⁴ Dr. Goodrich Schaffler, an Oregon obstetrician, observed that industrial physicians frequently had the interests of employers at heart which resulted in "a great deal of harm...being done" "upon the sex organs and sex life of women employees."⁶⁵ Schaffler, a practicing obstetrician in a war production area, probably

⁶¹H. Close Hesseltine, "Specific Problems of Women in Industry," *Journal of the American Medical Association* 124, no. 11 (March 11, 1944): 693.

⁶²Max R. Burnell, MD, "Health Maintenance Program for Women in Industry," *Journal of the American Medical Association* 124, no.11 (March 11, 1944): 684, 685.

⁶³ Pommerenke, "Women in Industry," 510.

⁶⁴ Silverman, "Maternity-Leave and Maternity-Care," 164.

⁶⁵ Schaffler, "Women in Heavy War Work," 15-17. The Committee on the Health of Women in Industry of the Section on Obstetrics and Gynecology of the AMA recommended that industrial physicians should consult with obstetricians in plants where women worked. H. Close Hesseltine, et al, "Women in Industry: Preliminary Report of the Committee on the Health of Women in Industry of the Section on Obstetrics and Gynecology, Recommendation to the Council on Industrial Health," *Journal of the American Medical Association* 121, no. 11 (March 13, 1943): 799.

had hands-on experience treating pregnant workers.⁶⁶ On the other hand, obstetricians, who generally had very limited training in occupational medicine, rarely commented on chemical hazards. When they did so, they favored excluding pregnant workers from a long list of jobs with chemical exposure.

Government agencies sided with the obstetricians. The Children's Bureau, the Women's Bureau and their consultants from labor and medicine began their "Standards for Maternity Care and Employment of Mothers in Industry" with a statement that "A woman who is expecting a child should give first consideration to her own health and to plans for safeguarding the health and care of the child." The Standards covered hours of employment, types of dangerous occupations, rest periods, leave before and after childbirth, and job security. The first recommendation, however, both at the discussion and in the standards as printed and distributed, dealt with prenatal care. The Children's Bureau had administered the Sheppard-Towner Act, and continued to revise and distribute literature on prenatal and infant care even after the Act was repealed.⁶⁷ In addition to their own resources promoting prenatal care, the Children's Bureau had an advisory committee of obstetricians who helped draft the "Standards." Prenatal care had been identified as a factor in preventing maternal mortality by the various maternal mortality studies conducted by medical societies in the 1930s. While inadequate prenatal care lagged behind septic abortions, infection and surgical injury as a cause of death, physicians embraced its importance

⁶⁶ Charlotte Silverman to Goodrich Schaffler, April 23, 1943 and Charlotte Silverman to William Schmidt, San Francisco, April 23, 1943 and William M. Schmidt to Charlotte Silverman, April 13, 1943, "Employment of Mothers Jan 1943" file #4-7-1-1-1; CF 1941-1944; RG 102, NACP.

⁶⁷ The Sheppard-Towner Act, opposed by organized medicine, was championed by Progressive era social justice reformers. It provided funds for education about pregnancy and the care of babies and children. This program proved especially important to women in remote rural areas who often had very limited access to medical services. Passed in 1921, Congress withdrew funding for the program in 1929.

in part because prenatal care could secure private patients early in their pregnancies and because it highlighted the good that obstetric care could do.⁶⁸

Should a Pregnant Rosie Work?

The professional concerns of obstetricians, as well as the needs and experiences of pregnant war workers, shaped the maternity care these women received. Specialists in obstetrics were relatively few in number around the time of World War II. Most women had general practitioners for childbirth attendants. Obstetric clients were most likely to be middleclass or affluent women who could afford the higher specialists' fees, and who lived in urban areas where most obstetricians practiced. Teaching hospitals, charity hospitals and maternal mortality review committees did bring obstetricians into contact with women who could not afford specialists' fees. However, these doctors still assumed that their own private patients had the level of resources and lifestyle of the middle class. Obstetrics texts and popular pregnancy guides made scant mention of employment until much after the war.⁶⁹

⁶⁸ Antler and Fox, "The Movement toward a Safe Maternity," 490-506.

⁶⁹They usually devoted more attention to questions of the suitability of pursuits like tennis and horseback riding. See P. Brooke Bland, MD and Thaddeus L. Montgomery, MD, *Practical Obstetrics* (Philadelphia: F.A. Davis Company, Publishers, 1939): 159. In 1930, a key textbook, *William's Obstetrics*, referred to prenatal care as helping the pregnant and parturient patient "to fulfill her duties as mother and housewife with a minimal amount of invalidism." Comments about employment were limited to the suggestion that "among the poorer classes the patients should be cautioned against excessive work, especially during the later months, as overexertion has been shown to play an important part in the production of premature labor." J. Whitridge Williams, *Obstetrics: A Textbook for the use of Students and Practitioners*, 6th ed, (New York, London: D. Appleton and Company, 1930), 248. A popular guidebook, *The Prospective Mother*, devoted more than a page to the types of housework, such as sweeping and using a treadle sewing machine, that pregnant women could supervise, but should have help completing. The author then went on to point out that "women of the working-classes sometimes continue at their occupations to the natural end of pregnancy....It is undeniable, however, that among this class miscarriages are more frequent than among the well-to-do." Large numbers of low-weight babies also "indicates in the case of working-women who are pregnant the existence of a strain which may prove harmful." J. Morris Slemons, M.D. *The Prospective Mother: A Handbook for Women During Pregnancy*, third edition (New York: D. Appleton-Century Company, 1934), 121-122.

Wartime employment of large numbers of married women challenged obstetricians to pay more attention to the effects of work upon pregnancy. Fred Adair, who chaired the department of obstetrics and gynecology at the University of Chicago, worried that women who worked in jobs requiring heavy lifting, like machine tending with heavy stock, shipping, laundry work, and some kinds of hotel and domestic work, could suffer complications during pregnancy. He wrote to Children's Bureau pediatrician Dr. Katherine Bain that such work "would lead not only to undue fatigue and perhaps permanent partial disability but also to abortions and premature births."⁷⁰ Schauffler, who served on the AMA's wartime committee on the Health of Women in Industry, bemoaned that

Women and women's organizations and the Department of Labor scream over the puerperia's inalienable right to work if she wants to--and, to be frank, production demands every available hand for the emergency. For myself, and speaking purely from the medical standpoint, I am convinced that any heavy employment of a pregnant woman, and especially some of the nerve-wracking pursuits to which women are put in war industries, is unwarranted.⁷¹

Ideologically opposed to the employment of pregnant women, he observed that the war required physicians to lay many such principles aside. Waxing melodramatic, he proclaimed "Woe to him, however, who, in the face of waving flags and the din of war machinery dares to hold up a lonely hand which can be labeled even faintly obstructionist."⁷²

Wesley Pommerenke, at the University of Rochester Medical School, observed that "war or no war, women will have babies" but that due regard must be given to maternal health, even,

⁷⁰Fred L. Adair to Dr. Bain, July, 29, 1942 and Katherine Bain, M.D. to Dr. Fred L. Adair, Chicago, June 11, 1942 and "Tentative Recommendations on Maternity Leave for Women in Industry" June 11, 1942, "Employment of Mothers Jan 1943" file # 4-7-1-1-1; CF 1941-1944; RG 102, NACP. The context here shows that Dr. Adair means spontaneous abortions, which a lay audience today would call miscarriages, rather than induced abortions.

⁷¹ Schauffler, "Women in Heavy War Work," 16.

⁷² Ibid., 19.

or especially, in wartime. Citing maternal mortality in the late 1930s, he mourned “the magnitude of this wastage to society and to industry.” He asked in the “interest of war activity that pregnant women be maintained in a suitable state of health so that their productivity may be protected.”⁷³

Some doctors optimistically asserted that the right type of employment could be a good thing for a pregnant woman, especially a primipara, because work could occupy her mind and help her to “ignore the minor discomforts” of pregnancy.⁷⁴ Even the Surgeon General, O.F. Hedley, believed that pregnant women should get a “moderate degree of physical exercise,” including the lifting of weights, to ensure a less painful labor and delivery.⁷⁵ Determining the exactly the right type of work, however, took medical expertise.

Diagnosing Pregnancy in the Woman Worker

Industrial physicians did have control over one crucial medical examination—the pre-employment exam. Most large and some medium and small companies conducted pre-employment exams for production workers. Overall measures of health and fitness, they were designed to detect potential workers who might not be physically able to perform. Some companies and industrial physicians thought these exams especially important in “integrat[ing] women quickly into the workforce” on new jobs.⁷⁶ Several doctors at the Meeting of the Western Association of Industrial Physicians and Surgeons in 1942 emphasized the importance of pre-

⁷³ Pommerenke, “Women in Industry,” 511.

⁷⁴ Dr. Josephine H. Kenyon, “She’s Working and She’s Going to have a Baby,” *Good Housekeeping*, April 1943, 206. See also J.V. Sheppard, “Health for the Working Girl,” *Hygeia* 26, no. 4 (April 1948): 252. See also Palmer, “Your Baby or Your Job,” 137.

⁷⁵ Hepler, *Women in Labor*, 76.

⁷⁶ Hepler, *Women in Labor*, 71.

employment physical examinations to insure the proper placement of workers on jobs suited to their physical abilities.⁷⁷ For women, pre-employment exams often included pelvic exams, to detect uterine prolapse, possibly identify potential employees who might suffer more from cramps, and discover pregnancies.

Dr. Dorothy Frame, an industrial physician, justified pre-employment tests with a story. Frame examined a prospective employee who had been “married several years and never been pregnant.” When she discovered a “mass the size of a grapefruit” in the woman’s abdomen, she referred her to a private physician for a complete pelvic exam. Frame continued, “The next day the prospective employee telephoned us joyfully to say that she was pregnant and to congratulate us on being the first to discover it.” “Unfortunately,” Frame mused, “pregnancy is not always such happy news” for a woman who needed work.⁷⁸ The pregnant prospective hire did not get the job. Industrial physicians like Frame endorsed the preemployment exam in order to screen out pregnant workers who would most likely leave the company’s service (either through company policy or their own choice) before the company could reap the rewards of their training.⁷⁹

Obstetricians also heartily approved of pre-employment exams for women workers. The AMA Committee on the Health of Women in Industry suggested that “from the obstetric and gynecological point of view, the opportunity is too good to be missed for as thorough an evaluation of the system as possible.” Such screenings could uncover conditions like tumors,

⁷⁷ Memo from Dr. [Ethel] Sappington to Miss Bloodgood, May 6, 1942, subject “Meeting of the Western Association of Industrial Physicians and Surgeons, May 3, 1942,” 4, “Empl of Mothers Sept-Dec 1942” file # 4-7-1-1-1; CF 1941-44; RG 102, NACP.

⁷⁸ Dorothy F. Frame, “Examining Women in Industry,” *Industrial Medicine* 12 (May 1943): 267-8.

⁷⁹ See also Frank A. Barlow, M.D. “Proper Placement of Women in Industry,” *Journal of the American Medical Association* 124, No. 11 (March 11, 1944): 690.

prolapse, cysts, dysmenorrhea, menopause, and pregnancy which could affect the proper job placement of a woman. They also could result in referral to a private physician for appropriate treatment and supervision.⁸⁰

Who's your Doctor?

Despite the turf dispute, industrial physicians tended to defer to doctors in private practice as the primary medical authority especially in the case of pregnancy. Dr. Max R. Burnell, industrial physician at the General Motor's AC Spark Plug Company in Flint, Michigan, believed that plant medical officers could devise better service for a female employees, but should be careful to remember that the women had private physicians, or should. He advised that "The ethical relationship between the private practitioner and the industrial physician...should be reemphasized."⁸¹ Dr. H.A. Vonachen, an industrial physician in Peoria, had any pregnant employee bring him a letter from her own doctor every month until she began a leave at the fifth month.⁸² Pregnant workers at the Wheeling Stamping Company in Wheeling, West Virginia also had to bring letters from private physicians to the nurse on duty.⁸³

Letters from private physicians provided some assurance that a pregnant woman was healthy enough to be at work. They could also be used to aid appropriate job placement. Most importantly, doctors saw them as a way to determine the length of time Rosie might stay at her job and indicate when she should be released or put on leave. Dr. Edwin F. Daily, the Director of

⁸⁰ Hesselstine, et al, "Women in Industry," 800.

⁸¹ Max R. Burnell, "Health Maintenance Program for Women in Industry," *Journal of the American Medical Association* 124, no. 11 (March 11, 1944): 686.

⁸² Dr. H.A. Vonachen, comments following Max R. Burnell, "Health Maintenance Program," 687.

⁸³ "Leave of Absence for Maternity Cases (Wheeling Stamping Company, Wheeling, West Virginia)" "Health and Safety-1944," Re: Wm Wkrs WWII; Div of Rsrch; RG86, NACP.

the Division of Health Services of the Children's Bureau, was asked how long a woman might work during pregnancy. He replied that no "hard and fast rules" could be applied and "the advice of the obstetrician attending the woman during pregnancy would be essential in reaching a decision" because only the woman's doctor was situated to take into account a woman's health, her medical history as well as job conditions and exposures.⁸⁴ James E. Davis, a doctor at the UAW-CIO Medical Research Department, wrote to Bain at the Children's Bureau about a proposed agreement with the War Manpower Commission that pregnant women in industry should not work more than 40 hours a week. Davis insisted that "the judgment of the limitations of her work should be put squarely upon the shoulders of the attending physicians." Some women, he observed, might be able to work more, while others could not even work twenty hours a week and the woman's doctor should have the power to determine working limits.⁸⁵

Caroline Olsen, an industrial nurse who proposed procedures for dealing with pregnancy in the workplace, underscored the role of private physicians in an industrial maternity plan. She wanted each pregnant employee to immediately provide the company medical or first aid department with a statement from her doctor about her due date and general medical condition. After this initial medical diagnosis, a pregnant employee should meet with plant medical personnel "periodically that they may be assured she is consulting her family physician."⁸⁶ Professional jurisdiction in the case of obstetric care could be more strictly enforced, as in the case of women who worked at the Consolidated Vultee Aircraft Corporation in San Diego where

⁸⁴ Edwin F. Daily, M.D., Division of Health Services, Children's Bureau, to George J. Miller, Appeal Tribunal, New Jersey Unemployment Compensation Commission, Trenton, NJ, November 21, 1941, "Empl of Mothers," file # 4-7-1-1-1; CF 1941-44; RG 102, NACP.

⁸⁵ Dr. James E. Davis, UAW-CIO Medical Research Institute, Detroit, to Dr. Katherine Bain, Children's Bureau, Washington DC, April 10, 1944, "Empl of Mothers" file # 4-7-1-1-1; CF 1941-44; RG 102, NACP.

⁸⁶ Caroline G. Olsen, "A Pregnancy Adjustment Plan for Women in Industry," *National Safety News* 49, No. 2 (Feb 1944): 32.

a policy directive announced that “If a woman who is pregnant does not report to her own physician..., and if she has not properly advised the Plant Hospital that she is being cared for by a private physician, she is subject to immediate termination.”⁸⁷

Doctors may have agreed that they should have the final voice in determining whether or not Rosie should work while pregnant, what kinds of jobs she might perform and how late she could work into her pregnancy, but the wartime reality was very different. Management, not medicine, drove maternity practices. Company policy usually dictated rapid separation of pregnant workers and this inexorable job loss inspired many workers to delay seeking medical care when they wanted to keep their jobs for at least a little while longer.

Penalizing Pregnancy

While women journalists like Gretta Palmer wrote a magazine article about the pregnant war worker, the main systematic investigation of pregnancy dismissal policies was conducted by the U.S. government agency devoted to child health, the U.S. Children’s Bureau. Dr. Charlotte Silverman, a researcher with the Children’s Bureau, studied seventy firms that collectively employed 250,000 women in sixteen different war production industries. Of the seventy plants, sixty-two of them had some sort of policy regarding pregnancy, including termination of employment due to pregnancy. Nineteen of these companies discharged pregnant women, usually “on notification or discovery of pregnancy” or very early in the pregnancy.⁸⁸ Forty-three

⁸⁷ Memo from Jas. L. Kelly, division manager, Consolidated Vultee Aircraft Corporation, San Diego, CA, to All Department Heads, Superintendents, General Foreman, Foreman, and Assistant Foremen, October 12, 1943, “Empl of Mothers” file # 4-7-1-1-1; CF 1941-44; RG 102, NACP. In another example, when a woman worker at the American Viscose Corporation revealed a pregnancy, the plant physician recommended that she visit a private physician or a prenatal clinic. Memo from William M. Schmidt, M.D., September 5, 1942, subject: “Information from Dr. J.A. Calhoun, Medical Director, American Viscose Corporation, on policy for employment of pregnant women of the corporation.” “Empl of Mothers Sept-Dec 1942,” file #4-7-1-1-1; CF 1941-1944; RG 102, NACP.

⁸⁸ *Ibid*, 157.

firms laid-off pregnant women, sixteen “on notification or discovery” and a few more in the first trimester. Only a handful of firms allowed pregnant women to continue to work into their seventh or eighth month. Thirty-six companies had policies on reinstatement of workers after childbirth. Some, but not all of these, had some limited protection of seniority.⁸⁹

Some companies, like the bomber factory where Constance Bowman and Clara Marie Allen worked, allowed pregnant workers to continue on the job for a while.⁹⁰ However, most firms defended their policies of pregnancy dismissal matter of factly. Some believed that the practice of early dismissal or leave safeguarded the health and well being of the worker and her child. Others claimed that pregnant women could not do their jobs or could not do them efficiently. One aircraft factory on the West Coast claimed that pregnant women might be especially vulnerable during an air raid.

Some companies were concerned with the ““esthetic and moral”” issues raised by pregnancy, namely, that a visibly pregnant woman was proof of female sexuality. They “stated it was ‘not nice’ for obviously pregnant women to be working in a factory” because of the “bad effect on the male employees.”⁹¹ In situations where women worked in proximity to men, employers feared that a pregnant worker’s condition would distract male workers from their own duties, through solicitude or voyeuristic observation and comments.⁹² Adair had written to Dr. Ethel Dunham, of the Children’s Bureau, in 1939 that the length of time a woman could work through her pregnancy would depend in part on social considerations of her appearance. One

⁸⁹ Ibid., 157-158 and 162-164.

⁹⁰ Constance Bowman and Clara Marie Allen. *Slacks and Callouses*, 16.

⁹¹ Ibid, 159-160.

⁹² “Touchy Problem,” *Business Week*, Sept, 25, 1943, 80 and document, probably by Silverman, “On the Question of Terminating the Employment of Women when they become Pregnant,” “Empl of Mothers Jan 1-Aug 31, 1942 file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

young woman, who had been a riveter before resigning to follow her husband, later left a department store position at six months of pregnancy because she was “starting to show.” As she recalled, “People just did not like to see a pregnant woman behind a counter. It was considered gauche, not well taken.”⁹³

Employers and insurers cited the fear of an industrially caused miscarriage as a primary reason for policies of immediate dismissal upon the discovery of a pregnancy.⁹⁴ State Workers’ Compensation laws constrained workers from bringing civil actions relating to workplace injuries, but those laws might not cover the unborn babies of women workers. Some companies feared a lawsuit from women workers who might claim that their jobs had caused a miscarriage or harm to their babies in utero. One industrial physician observed that bleeding outside of a regular menstrual period might be a miscarriage and he advised sending the employee home immediately so that the miscarriage “not be allowed to take place in the hospital of the plant, because of possible legal complications.”⁹⁵ Dr. Robert DeNormandie, a Boston obstetrician, explained to Bain that many companies did not want to employ pregnant women largely because “so many unscrupulous women might sue them if anything happened while they were pregnant and a miscarriage followed.” DeNormandie suggested that plants require women employees to

⁹³Rose Truckey, in *Women Remember the War 1941-1945* ed. Michael E. Stevens (Madison: State Historical Society of Wisconsin, 1993), 87.

⁹⁴A.B. Martin, Hartford Accident and Indemnity Company, San Francisco, CA to [Gentlemen], Women’s bureau, January 29, 1943, “Employment of Mothers Jan 1943” file # 4-7-1-1-1; CF 1941-44; RG 102, NACP.

⁹⁵Eleanor Percival, M.D., “Menstrual Disturbances as they may affect Women in Industry,” *Canadian Nurse* 39, no. 5 (May 1943): 336-7.

report their pregnancies immediately and that, should a woman fail to adhere to this condition of employment, he thought “that the plant has a perfect right to discharge her at once.”⁹⁶

Silverman, who uncovered a great deal of *fear* about miscarriage, found only one actual case that could be linked to work.⁹⁷ In a firm employing 25,000 women, the industrial hygienist C.O. Sappington identified only one miscarriage attributable to work in twenty-five years.⁹⁸ In 1945, another industrial hygienist, Anna Baetjer, wrote to all of the state Workmen's Compensation Boards to ask about the incidence of claims for work-related miscarriage. Most states kept no records of such cases, but the overall impression was that there were very few.⁹⁹ Yet immediate dismissal was even the case when company medical directors admitted that the first trimester was the most dangerous and that a policy of immediate leave or dismissal was likely to result in successful attempts at concealment during this most vulnerable period. This would, therefore, put the company at the same or even increased risk of inciting miscarriages, since workers might persist in clearly unsuitable jobs until their pregnancies became visible during the relatively safe second trimester. The best way to reduce the risk of work-related miscarriage was to transfer women to safe jobs early in their first trimester. To do this, companies needed to encourage women to report their pregnancies to supervisors or plant medical personnel. This meant having policies that safeguarded instead of threatened women's jobs. One obstetrician agreed that only “removing the penalties which have formerly been

⁹⁶Katherine Bain, Children's Bureau, to Robert L. DeNormandie, Boston, August 5, 1943 and Robert L. DeNormandie to Katherine Bain, August 30, 1943. “Employment of Mothers Jan 1943,” file # 4-7-1-1-1; CF 1941-44; RG 102, NACP.

⁹⁷ Silverman, “Maternity Policies in Industry,” *The Child* 8 (August 1943); and Charlotte Silverman, Division of Research in Child Development, to Marie Schurmacher, New York, NY, July 5, 1943, “Employment of Mothers” Jan 1943” file# 4-7-1-1-1; CF 1941-44; RG 102, NACP.

⁹⁸ C. O. Sappington, *Health Problems of Women in Industry* (Pittsburgh: Industrial Hygiene Foundation, 1944), 8.

⁹⁹ Anna M. Baetjer, *Women in Industry, Their Health and Efficiency* (Philadelphia: W.B. Saunders Company, 1946; reprint, New York: Arno Press, 1977), 174.

attached to this condition in industry” would bring a pregnant woman to voluntarily disclose a pregnancy.¹⁰⁰ Other doctors offered their expert opinion that “accidental abortions result perhaps more often from abnormal or diseased ova and not because of work activity.”¹⁰¹ Policies of immediate dismissal or lay-off did not provide any protection against miscarriage, but did provide some protection for the company against tort actions by employees. But they were counter-productive, illogical and displayed a crude distortion of obstetric understanding.

Silverman believed that policies relating to immediate dismissal or lay-off, or dismissal or lay-off very early in a pregnancy, were unfair, unnecessary, and dangerous, and probably also encouraged induced abortions. Silverman described these practices as “penalizing pregnant women” and as somewhat sordid in their operation.¹⁰² Another investigator, the industrial nurse Caroline Olsen, found that in some plants, foreman determined pregnancy by their personal observations of women workers. Olsen pointed out that this procedure lent itself to embarrassing mistakes as some women thus identified “were getting fat instead of getting babies.” Such mistakes, Olsen observed, did little for labor harmony. When pregnant women did not “notify,” they were discharged or laid-off upon discovery, which involved “rumors,” “policing” and “suspicious symptoms.”¹⁰³ Because most women who wanted to conceal an early pregnancy could do so, such policies were counterproductive, potentially interfering with proper job

¹⁰⁰ Goodrich C. Schauffler, “Women in Heavy War Work: Obstetrical and Gynecological Aspects,” *Western Journal of Surgery, Obstetrics & Gynecology* 52 (1944): 18.

¹⁰¹H. Close Hesseltine, et al, “Women in Industry: Preliminary Report of the Committee on the Health of Women in Industry of the Section on Obstetrics and Gynecology, Recommendation to the Council on Industrial Health,” *Journal of the American Medical Association* 121, no. 11 (March 13, 1943): 801.

¹⁰² Charlotte Silverman, to Dr. Eliot, May 11, 1943, “Empl of Mothers Jan 1943” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

¹⁰³ Silverman, “Maternity-Leave and Maternity Care Practices,” 160. Caroline G. Olsen, “Suggested Pregnancy Adjustment Plan for Women in Industry,” 2. reprint, “Empl of Mothers” file # 4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

placement and adequate medical supervision. Silverman relayed the story of one “well built” shipyard worker who managed to conceal her pregnancy until the day before her baby was born. Although most women could not successfully disguise a pregnancy for nine months, many could easily avoid detection for several months. That they did exactly that was widely acknowledged. Mildred Gilman, of Planned Parenthood, wrote to Silverman about plants she knew “where the women prefer hiding their condition to the risk of being fired summarily.”¹⁰⁴

Silverman could not obtain figures on induced abortions, but she thought that the threat of immediate dismissal from needed employment might be a “motivating factor” in a woman’s choice to end a pregnancy through an illegal abortion.¹⁰⁵ Many others offered conjectures about the extent of induced abortions sought by women who chose jobs over babies. Dr. H. Close Hesseltine, chair of the AMA’s Committee on the Health of Women in Industry, had been influential in setting conservative standards for therapeutic abortions in Chicago. He wondered what effect industrial employment had on abortion, but, without data, he refrained from speculation in his articles on women and war work.¹⁰⁶ Dr. Wesley T. Pommerenke believed that policies of discharge upon the discovery of pregnancy could “even drive the woman to an abortionist.” “Industry pays dearly for the scourge of abortion,” he bemoaned and added, “Only the medical profession is fully aware of the potential dangers of abortions.”¹⁰⁷

¹⁰⁴ Mildred Gilman, Planned Parenthood Federation, to Charlotte Silverman, March 31, 1943, “Empl of Mothers Jan 1-Aug 31, 1942” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

¹⁰⁵ Silverman, “Maternity Policy in Industry” *The Child* 8 (August 1943): 25.

¹⁰⁶ Reagan, *When Abortion Was a Crime*, 320, note 66 and H. Close Hesseltine, Chicago, to Charlotte Silverman, Washington, D.C. May 27, 1943, “Empl of Mothers Jan 1-Aug 31, 1942” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

¹⁰⁷ Wesley T. Pommerenke, “Women in Industry: From the Standpoint of the Gynecologist,” *Industrial Medicine* 12., No. 8 (August 1943): 511.

Dr. Morris Fishbein, the editor of the *Journal of the American Medical Association*, told one journalist that elective abortions had increased dramatically during the war. An industrial physician told this same reporter that one fourth of the women workers who became pregnant while working at his company ended their pregnancies by abortion. Another told her that some women workers reported to the company hospital with incomplete abortions, but many, many more went undetected. This journalist cited midwives as abortionists, drawing on decades of associations nurtured by the AMA.¹⁰⁸ She also, however, identified war industry employment as a cause for women wanting to end their pregnancies and suggested that factories served as distribution points for information about how and where to find an abortionist. In an article ostensibly on pregnancy and employment, she devoted fully nine paragraphs, filled with shocking statements and lurid details, to abortion. Explicitly linking women's war work with a campaign to stigmatize and eradicate abortion, she observed, "in many cities today, the slang name for an abortion is 'three-day absence.'"¹⁰⁹

"Vast Army of Pregnant Women," Labor Unions and Maternity

The war brought more women into unionized industries. Women workers sought to press job rights through unions as well as in alliance with the Women's Bureau. In lieu of an increase in wages, unions often negotiated for expanded fringe benefits which might include maternity leave and health care. Before the war, very few collective bargaining agreements covered maternity issues. A Women's Bureau study of union contracts in 1945 found that only five of the

¹⁰⁸ Reagan, *When Abortion Was a Crime*, 90-112.

¹⁰⁹ Palmer, "Your Baby or Your Job," 137-138.

ninety-two they studied contained clauses relating to maternity leave and job protection.¹¹⁰ The Women's Bureau urged women in unions to talk with union officers, take women's issues to bargaining committees and run for union office to raise the issues.¹¹¹

Some unions, especially locals with large numbers of activist women, had made early attempts to secure some workplace rights for pregnant workers before the war. Nancy Gabin has uncovered a handful of cases in the late 1930s where UAW organizers addressed the loss of seniority following maternity leaves at an auto plant in Anderson, Indiana. The UAW sent union doctors to special meetings of women workers during an organizing drive tailored to the substantial proportion of women workers. In their first contract, they obtained a leave of absence for maternity instead of dismissal.¹¹² One of the workers who joined the UAW in this drive placed maternity leave within the context of other protections that the union negotiated for women workers. Many years later she remembered that "the union did a lot of good things because people who wanted to quit and have a baby could come back to work, you could still work after the age of 40 and if you were sick you came back to work. It was really needed."¹¹³

Gabin also found an Amalgamated Clothing Workers local in Muncie, Indiana whose contract protected seniority during maternity leave.¹¹⁴ However, the picture was mixed. The

¹¹⁰ "Maternity Leaves Urged for Workers," *New York Times* (May 1, 1945); and Jennie Mohr, "Maternity Leave Clauses in Union Contracts," *The Child* 9, no. 11 (1945): 168.

¹¹¹ *Ibid.*

¹¹² E-mail, Nancy Gabin to Ruth Fairbanks, June 4, 2003; "GM Sub Council 4 Meeting, January 7, 1940" Box 3, GM Sub Council 4 Minutes 10/29/39-11/3/40 Folder, Cecil Roeder Collection, Walter P. Reuther Archive of Labor and Urban Affairs, Wayne State University, Detroit, Michigan; Claude H. Hoffman, *Sit-Down in Anderson* (Detroit: Wayne State University Press, 1968), 82.

¹¹³ Interview with Helen Figo Russell, "Women Talk About Working" Oral History Collection, Indiana Room, Anderson Public Library, Anderson, IN.

¹¹⁴ E-mail, Nancy Gabin to Ruth Fairbanks, June 4, 2003; Contract, Eagle Glove and Garment Co. and Glove Workers Local 69, Amalgamated Clothing Workers, April 26, 1939, Box 537, Case No. 199-3710 Folder, RG 280, NACP.

Textile Workers of the AFL, for instance, found that some female members wanted short leaves of absence for maternity in order to make jobs available for young unemployed women. The union responded by actually reducing leave time in their contracts.¹¹⁵ The Hosiery Workers purposefully negotiated contracts where women leaving work to have a baby lost all seniority. If they returned to work, it was as new hires.¹¹⁶

The war began to change union attitudes because of the growing importance of the female labor force and the presence of more married women in the workplace, especially in basic industries organized by the CIO in the late 1930s. Powerful, activist unions that had previously had limited experience with large numbers of women workers saw their ranks swell with the influx of women into jobs previously held by men and with “maintenance of membership” clauses that automatically enrolled these new workers in the union.¹¹⁷ Before the war, there were about eight hundred thousand women union members. By VJ-Day, there were over three million.¹¹⁸ By 1945, 40 percent of the members of the United Electrical Workers (UE) and 28 percent of the United Automobile Workers (UAW) were women.¹¹⁹

¹¹⁵“Women Union Leaders Speak” U.S. Women’s Bureau Union Conference, April 18-19, 1945, U.S. Department of Labor, Washington, DC, 22. “Labor Advisory Committee 1945” (“LAC 1945,”); Office of the Director Labor Advisory Committee (OD LAC); RG 86, NACP.

¹¹⁶ Mrs. Noll to Miss Schermerhorn, November 27, 1942, “Empl of Mothers Sept.-Dec. 1942” file #4-7-1-1-1; CF 1941-44; RG 102, NACP.

¹¹⁷ “Maintenance of membership” clauses created union shops in which new employees automatically became members of the unions shortly after being hired. These clauses, along with dues check-offs, where the company deducted union dues from pay envelopes and gave them directly to the union, were negotiated into many wartime contracts partly to retain union allegiance to the “Little Steel Formula” where labor unions had agreed to a no-strike pledge for the duration of the war. “Maintenance of membership” clauses meant, among other things, that labor unions did not have to organize among the new women war workers in order to be sure that they joined the union and paid dues. Membership and dues happened automatically.

¹¹⁸ U.S. Department of Labor Women’s Bureau, “Women’s Bureau Confers with its Labor Advisory Committee” for immediate release, November 30, 1945, file “Unions Misc. Letters,” OD GC 1919-1948; RG 86, NACP.

¹¹⁹“Women Union Leaders Speak” U.S. Women’s Bureau Union Conference, April 18-19, 1945, U.S. Department of Labor, Washington, DC, 32. “LAC 1945,” OD LAC; RG 86, NACP.

The more progressive unions, and those with women on staff, had more interest in the problem of maternity. During the war, the Congress of Women's Auxiliaries of the CIO passed a resolution on "Expectant Mothers in Industry."¹²⁰ The UAW and the UE both drafted model maternity leave clauses for local unions to bargain for. Ruth Young of the UE reported that by 1943, the union had negotiated maternity leave clauses in contracts covering 130,000 electrical workers.¹²¹ By 1944, the UE had contract provisions providing for maternity leave in 149 plants, covering 281,600 electrical workers, which amounted to nearly 40 percent of its members. Clearly, the war years increased the attention that the UE paid to maternity policies. Only four UE contracts that expired in 1944 had provisions for maternity leave, while sixteen of the new contracts negotiated that year guaranteed leave.¹²² The UAW established its own Women's Bureau and assigned it to study maternity leaves.

In 1944, the U.S. Women's Bureau and their labor consultants from the AFL and the CIO drew up a pamphlet on "Suggested Standards for Union Contract Provisions Affecting Women" that contained a model clause on maternity leave.¹²³ In 1945, they produced a leaflet specifically encouraging the inclusion of maternity leave provisions in union contracts. Young thought that "all the old ladies of the Women's Bureau" found "the UE program was of interest and help to

¹²⁰ Mary Taylor to Eleanor Fowler, January 12, 1944 and Eleanor Fowler to Mary Taylor, February 21, 1944, "Empl of Mothers," file #4-7-1-1-1; CF 1941-44; RG 102, NACP.

¹²¹ Ruth Young, "Proposed Plan for Joint Cooperation between--Women's Bureau, Dept. of Labor and United Electrical, Radio & Machine Workers of America," [1943] UE, N945, Box 545, Archives Service Center (ASC), University of Pittsburgh (Pitt).

¹²² "Contract Provisions Affecting Women Workers" 1/12/44 and handwritten table, FF "Women Contract Provisions Affecting Women and Minorities," UE 2396 UE N1096, ASC, Pitt.

¹²³ Frieda S. Miller, Director, Women's Bureau to Violet Winarski, Recording Secretary, Local No. 1011, United Steel Workers of America, November 18, 1944, "Unions, Misc Unions (S-W)," OD GC 1919-48; RG 86, NACP.

them.”¹²⁴ When the Packing House Workers’ Organizing Committee of the CIO negotiated a contract with the Wilson Packing Company in 1943, they asked the Women’s Bureau for suggested standards and information on the “financial provision other companies are making for women on maternity leave.”¹²⁵ Mary Anderson, the Women’s Bureau director, replied that “in most cases no provision is made for payment during this time” although she offered General Motor’s AC Spark Plug as an exception. Anderson referred the Packing House Workers to the joint standards drawn up with the Children’s Bureau and their Obstetrical Advisory Committee and the Women’s Bureau and their Labor Advisory Committee.¹²⁶

In 1945, maternity policies figured prominently in the discussion at the Women’s Bureau conference of women union leaders on the “War and Postwar Problems of Women Workers.” The UE reported that they had maternity clauses that protected seniority for one year of maternity leave and that their next goal was to “get some pay during that period.”¹²⁷ The Farm Equipment Workers, another CIO union, reported that they already had a provision for pay in

¹²⁴ Ruth Young, Executive Secretary, District #4, UE, New York, to Julius Emspack, Secretary, UERMWA, New York, February 24, 1944, UE, N945, Box 545, ASC, Pitt.

¹²⁵ Helen Rubenstein, War Workers’ Welfare Committee of the Social Service Employees Union and Packing House Workers’ Organizing Committee of the CIO, Chicago, IL to Mary Anderson, Director, Women’s Bureau, June 8, 1943, “Unions, Misc Unions (S-W),” OD GC 1919-48; RG 86, NACP.

¹²⁶ Mary Anderson, Director, Women’s Bureau, to Helen Rubenstein, War Workers’ Welfare Committee of the Social Service Employees Union and Packing House Workers’ Organizing Committee of the CIO, Chicago, June 8, 1943, “Unions, Misc Unions (S-W),” OD GC 1919-48; RG 86, NACP. Other unions also wrote to the women’s bureau for help. See also Local 1011 of the United Steelworkers of America, which represented workers at Youngstown Sheet and Tube Company in Indiana Harbor, Indiana, wrote to the Women’s Bureau of the Department of Labor asking for “information pertaining to the rights and privileges of women employees also on maternity.” Violet Winarski, Recording Secretary, Local No. 1011, United Steel Workers of America, to Frieda S. Miller, Director, Women’s Bureau November 18, 1944, “Unions, Misc Unions (S-W),” OD GC 1919-48; RG 86, NACP.

¹²⁷ “Women Union Leaders Speak,” U.S. Women’s Bureau Union Conference, April 18-19, 1945, U.S. Department of Labor, Washington, DC, 32. “LAC 1945,” OD LAC; RG 86, NACP. For a general history of the Women’s Bureau see Kathleen A. Laughlin, *Women’s Work and Public Policy: A History of the Women’s Bureau, U.S. Department of Labor, 1945-1970* (Boston: Northeastern Press, 2000) and Judith Sealander, *As Minority becomes Majority: Federal Reaction to the Phenomenon of Women in the Workforce, 1920-1963* (Westport, CT: Greenwood Press, 1983).

one of their contracts. Furthermore, maternity leave clauses without pay were so common in their contracts that non-union shops in Chicago found it necessary to offer such leave as well.¹²⁸ One of the results of this conference was a Women's Bureau publication, "Union Provisions for Maternity Leave for Women Members."¹²⁹ This pamphlet, which reported on the limited number of contracts that covered maternity, described the "The Need" for maternity policies and "What Women Can Do" within their unions to address this issue. The UE and the UAW were both mentioned as working on incorporating maternity protections into contracts. Finally, a side-bar explained the Women's Bureau recommendations, drawn from the "Standards for Maternity Care and Employment of Mothers in Industry."¹³⁰ This short pamphlet from the Women's Bureau, printed in 1945, along with the joint "Standards" and a Children's Bureau leaflet "A Maternity Policy for Industry," formed a core of prepared materials that these bureaus could send to the companies, unions and agencies that would continue to approach them for help in the next few decades.

The More Things Change, the More they Stay the Same

Reconversion and the concurrent release of women from war work also affected the attention paid to reproductive occupational health. Instead of returning happily to full time homemaking, many women war workers ended up taking poorer paying jobs stereotyped as female occupations before the war, or they filled the growing service, clerical, and nursing

¹²⁸ "Women Union Leaders Speak," U.S. Women's Bureau Union Conference, April 18-19, 1945, U.S. Department of Labor, Washington, DC, 32. "LAC 1945," OD LAC; RG 86, NACP.

¹²⁹ U.S. Women's Bureau, *Union Provisions for Maternity Leave for Women Members* (Washington DC: U.S. Department of Labor, Women's Bureau, GPO, 1945).

¹³⁰ "Union Provisions for Maternity Leave for Women Members" No. 3—Union Series, US Department of Labor, 1945, "LAC 1945" OD LAC; RG 86, NACP.

sectors of the economy. War necessity had allowed many industries to seek exemptions from protective labor legislation that regulated women's hours, wages, shifts, exposure to chemicals and the weights that they could lift. After the war states began to enforce these regulations again, in the name of preserving women's health and their ability to produce and rear the next generation. Companies returned to compliance in much the same manner that they had before the war. Women were restricted from many well-paying jobs reserved for men while still being allowed to assume many of the same risks in jobs defined as female. Nonetheless, since law and custom dictated that women not do many hard, dirty and dangerous jobs, many people, even those who should have known better, assumed that women's jobs were therefore easy, clean and safe. In the next couple of decades, a handful of studies and reports described the risks a pregnant woman's job might subject her to, but by and large, there was little concern with women's occupational safety and health until the 1970s and 1980s when concern for the health of the fetus would supplant consideration for both a woman's own health and for her job rights.

After the war, tension appeared between wartime expectations of maternal employment and postwar domesticity. Six years after he first wrote the popular pregnancy guidebook *Expectant Motherhood*, Dr. Nicholson Eastman published a revision. In the new preface he noted the climbing birth rate since the war. Still, the wartime experience of women's employment had left its mark upon the practice of obstetrics. Though the book's section on employment was very short, Eastman commented that pregnant clerical workers could work as long as they wished, while women whose jobs required lots of standing or heavier work should begin a leave by the seventh month. "Although employers nowadays are very liberal-minded about such matters," Eastman admitted that there were those who, for aesthetic reasons, wished pregnant women to

stop work before they began to show, which Eastman advised was by the fifth month.¹³¹ *The Baby Manual*, a guidebook written by Dr. Herman N. Bundesen, reflected the influence of the Women's Bureau and Children's Bureau Standards and the work of the AMA Committee on the Health of Women in Industry. If the "mother-to-be" must work, Dr. Bundeson observed, she should advise her employer of her condition because many companies could find a pregnant woman suitable work and would "make allowances for any temporary setbacks, without interfering with her employment." A pregnant woman should stop working by her sixth month and not resume work for at least two months after her baby was born.¹³² Despite these few examples of change, most pregnancy guidebooks and obstetrics texts slighted employment concerns until the 1970s when women's actions and advocacy over obstetric practice forced doctors to become more responsive to their concerns and wishes. At the same time, lawsuits over pregnancy discrimination made pregnancy at work impossible to ignore.

During the war, several factors focused attention on the costs and payment of maternal and infant care. More women sought obstetricians for their care and specialists were more expensive than general practice doctors, or the few remaining midwives. Developments within obstetrics, including prenatal care, improvements in the management of high risk pregnancies and surgical deliveries, and the emergence of neonatal care for premature and ill newborns improved outcomes, but also increased the costs of having a baby. Finally, after years of low birth rates during the Great Depression, the Baby Boom began during the war. Babies cost more and there were more babies.

¹³¹Nicholson J. Eastman, *Expectant Motherhood*, 2nd rev. ed. (Boston: Little, Brown and Company, 1947), 77.

¹³² Herman N. Bundesen, M.D. *The Baby Manual: A Practical Guide from Early Pregnancy through the Second Year of Life* (New York: Simon and Schuster, 1944), 35.

The war created a loose coalition of government bureaucrats, physicians, and unions that investigated adverse conditions for pregnant women workers and promulgated industry standards. No longer was pregnancy at work invisible. The greatest credit for addressing the issues of maternity in the workplace goes to two government agencies staffed by women reformers, the US Children's Bureau and the US Women's Bureau. They issued Guidelines for employers and decried discrimination against pregnant workers. The war proved that women workers needed adequate medical care, child care and maternity benefits. Government programs and progressive union contracts made small inroads in meeting these needs.

In the midst of all the discussions about pregnancy problems, for production, medicine, labor, and the war effort, one of the thorniest difficulties was a discussion of funding. Who would pay for all these bundles of joy? In the next chapter, we look at three federal government maternity policies and how their wartime successes and failures set the stage for later efforts at providing maternity care.

CHAPTER 2:

PREGNANT ROSIES AND SOLDIERS' BABIES: THE LIMITS OF REFORM

As a result of the New Deal and the war, federal bureaucracies were adequately staffed and funded to investigate and improve conditions for working women and their children. Three parts of the federal government were especially concerned about pregnancy in the new working and living conditions women experienced during the war. First of all, the military worried about pregnancy in its early efforts to establish female branches, or auxiliaries, of the army and navy. There were only a few in the service. Most of the WAACs, WAVES, SPARS and Women's Air Corps were unmarried. Married servicewomen saw husbands infrequently. Some had access to contraceptives but all knew they faced discharge if they became pregnant. These branches of the military had very low rates of pregnancy compared to the civilian population. But the symbolic problem of pregnancy in the military was complex and explosive. The military worried more about the problems that pregnancies might pose for women's service units than about any individual servicewoman. The hypothetical pregnant soldier illuminates the connection between pregnancy and women's sexuality, the special pressures of pregnancy within a war mobilized country, and the limits of the American welfare state even within the military.

Military branches also employed civilians and oversaw contracts with war production companies. They worried about these civilian workers and their future babies. Military commanders were also intensely concerned about the pregnancies and new babies of the young wives of male military personnel. In this respect, some of the major actors described in Chapter 1 could, upon occasion, draw upon the powerful rhetoric of patriotism. The military reached out to

the U.S. Children's Bureau, part of the Department of Labor. Together they created and obtained funding for the largest American experiment in publicly funded maternal and infant health.

When the Children's Bureau was founded in 1912 it was a victory for maternalist reformers, politically-minded middle-class women with a commitment to social service, especially in the interest of more vulnerable members of society, such as women and children. Maternalist reformers crafted and realized many parts of the early American welfare state during the Progressive Era and the New Deal. Their work in drafting the New Deal Social Security Act allowed them space to operate a wartime program for dependents of servicemen. The Emergency Maternity and Infant Care (EMIC) program was the largest and deepest expansion of public money and regulation relating to pregnancy and maternity care during WWII. It was also a widely popular program that wrought deep and long-lasting changes in care. Even so, EMIC itself was short-lived.

The image of a pregnant WAAC proved the most uncomfortable portrait of a soon-to-be new mother.¹³³ During WWII, the leadership of the new women's services wanted to deal with any real cases quietly and quickly to minimize any side effects for the newborn WAACs and WAVEs. Pregnant women in the military were relatively rare. Rosies' pregnancies were far more numerous, because there were more women production workers than female soldiers and because the growth in women workers included huge numbers of married women. Though Rosie would likely change jobs with the end of the war, she would remain a participant in the workforce. Thus, policies, practices and studies about Rosie could have had a broader and a longer effect. However, at the close of the war, the major legislative and policy initiative arose

¹³³ Indeed, as women became ever a more important part of the armed forces, the military would confront this weighty question over and over, right up to the recent wars in Iraq and Afghanistan. Teri Weaver, "U.S. personnel in Iraq could face court-martial for getting pregnant," *Stars and Stripes* Mideast edition, http://www.huffingtonpost.com/2009/12/20/pregnant-iraq-personnel-c_n_398496.html (December 19, 2009).

not because of concern about the pregnant soldier, or the pregnant woman worker, but instead about the pregnant wife of a soldier.

In the end, there were some real, but very limited changes in the perception of the pregnant worker, her needs and her capabilities. But the emergency nature of reforms during the war, wartime constraints, and the postwar reversal of women's occupational opportunities, ensured that the changes would be small. War policy and studies did cement alliances among those who were already favorably disposed to improving conditions for pregnant workers. Ultimately, however, the greatest commitment to maternity care came about not because of concern about the pregnant worker, but because of concern about the morale of servicemen. That concern explains the passage and funding of EMIC the largest experiment in federal provision for health care for pregnant women in the United States. The selective attention to the health care, work conditions and worker rights of the pregnant women would have great portent in the postwar period, when patriotism and soldiers morale could no longer be invoked in favor of health care policies for pregnant women. The efforts, successes and failures on behalf of pregnant women during WWII, demonstrate the limits of possible reform, limits that continued to shape American maternity policy for decades after.

Pregnancy in the WAACs

The integration of women into the male bastion of military service and military life touched upon many deeply held presumptions about femininity and masculinity and was a veritable minefield of explosive issues. Opposition and hostility to the WAAC experiment was often expressed as fear over either male (servicemen) or female rampant sexuality. Leisa D. Meyer also argues, however, that WAAC supporters and officers, especially the top female

commander, Col. Ovetta Hobby, held their own assumptions about the appropriate behavior of enlisted women and female officers and designed a branch of service to insure that the rank and file fulfilled a feminine mission. External stereotypes and internal standards shaped the social, sexual and reproductive experiences of women who answered their country's call to duty.¹³⁴

During the debates surrounding the initial authorization of the Women's Army Auxiliary Corps (WAACs), critics charged that the army would become responsible for obstetric and maternity care of female soldiers. Congressmen opposed to the WAAC authorization raised the question of pregnancy at the initial hearings. Since most WAACs would be unmarried, this charge was really less about cost than it was besmirching the morals and questioning the intent of those women attracted to military service. Nevertheless, supporters of the WAAC program rushed to respond that the army would not provide medical care for pregnancy and delivery.

At her very first press conference, Hobby announced that "Any member of the Corps who becomes pregnant will receive an immediate discharge."¹³⁵ The policy of discharge for pregnancy separated a WAAC from not only the army, but its internal welfare state aspects of housing, wages, and medical care at the very time in which she had most need of them.

Allegations that large numbers of WAACs were being sent home from North Africa pregnant dogged the corps in a smear campaign starting in 1942. Some of the actual North African pregnancies were among married women who had shared R&R with their husbands. In her book, *Our Mother's War*, Emily Yellin describes the damage these rumors did to recruitment

¹³⁴ Leisa D. Meyer, *Creating GI Jane: Sexuality and Power in the Women's Army Corps During World War II* (New York: Columbia University Press, 1996).

¹³⁵ Judith A. Bellafaire, "The Women's Army Corps: A Commemoration of World War II Service," CMH Publication 72-15, <http://www.history.army.mil/html/books/072/72-15/index.html> (January 2, 2015).

efforts when the WAACs were accused of having loose morals.¹³⁶ The Army and the FBI investigated the spread of the rumors as possible enemy disinformation but it appears that male servicemen who did not want women in the military started the stories.¹³⁷ In a circle of misinformation, journalists and Congressional representatives recounted each other's reporting about alleged and suspected WAAC pregnancies and contraceptive use and the story fed upon itself. Secretary of War Henry L. Stimson denounced the allegations as "sinister rumors....absolutely and completely false."¹³⁸ One WAAC wrote home angrily after her parents passed along such a rumor. "You wrote that Sgt. Crocker came home to Palos telling about the five hundred pregnant WACs who returned on his ship. He must not realize that in spreading such a rumor he's committing as grave an act of sabotage as if he sank a ship."¹³⁹

Pregnancy posed multiple problems for the pregnant woman in military service and the corps. Early in the war, the WAACs proved their worth and new legislation made them an actual part of the army, which established similar ranks and pay for officers and gave women (now called WACs instead of WAACs) new benefits, including veterans' benefits and benefits for dependents. The army did not want large numbers of servicewomen getting pregnant. They were also leery of providing benefits to a woman's dependents, especially a single mother's. WAC

¹³⁶ Emily Yellin, *Our Mothers' War: American Women at Home and at the Front During World War II* (New York: The Free Press, 2004), 130-133; Meyer, *Creating GI Jane*, 58; Jane Mersky Leder, *Thanks for the Memories: Love, Sex and World War II* (Westport, CT: Praeger Pub, 2006), 44-45; Beth Bailey, *America's Army: Making the All-Volunteer Force* (Cambridge: Harvard University Press, 2009), 143-144.

¹³⁷ Meyer, *Creating G.I. Jane*, 39. Molly Merryman, *Clipped Wings: The Rise and Fall of the Women Airforce Service Pilots (WASPS) of World War II* (New York: New York University Press, 2009): 38; Yellin, *Our Mother's War*, 132; Mattie E. Treadwell, *The Women's Army Corps* (Washington DC: Office of the Chief of Military History, 1954), 206.

¹³⁸ Leder, *Thanks for the Memories*, 44-45; Yellin, *Our Mother's War*, 131.

¹³⁹ AK [Aileen Kilgore Henderson] to Mama and Daddy, 21 October 1944, reprinted in Aileen Kilgore Henderson, *Stateside Soldier: Life in the Women's Army Corps, 1944-1945* (Columbia, SC: University of South Carolina Press, 2001), 102.

supporters and officers had a variety of reasons for not providing contraception; they relied on a policy of abstinence. On the occasions when that failed, the WAC favored discharge to avoid a pregnant soldier or a soldier mother.

Separation had to be done thoughtfully out of fairness to the soon-to-be new mother and ex-WAC and also to minimize negative publicity. Officers sought changes to maternity policies that had summarily discharged (as opposed to honorably discharged) single women for pregnancy and that had denied women soldiers pay, housing and health care when they needed them most.¹⁴⁰ Hobby, who had initially announced the policy of separation due to pregnancy, nonetheless managed to secure some maternity care for pregnant discharged WACs at military hospitals in 1945.¹⁴¹ Hobby and other WAC officers and supporters also arranged for the American Red Cross to help unmarried pregnant WACs navigate their discharge, their pregnancies, the birth and possible adoption placement of their babies.¹⁴²

Charity Adams Earley, a WAC officer during the war, remembered that one of her special assignments was “getting pregnant women to sign their discharge papers.” As an officer processing these discharges, Earley probably provided the departing soldiers with some information about their remaining rights and resources. What she remembers, however, is that it was sometimes hard to collect the signatures because “some had problems believing their condition was real.”¹⁴³

¹⁴⁰ Meyer, *Creating G.I. Jane*, 112.

¹⁴¹ *Ibid.*, 233.

¹⁴² *Ibid.*, 113-115.

¹⁴³ Charity Adams Earley, *One Woman's Army: A Black Officer Remembers the WAC* (College Station, TX: Texas A & M Press, 1996), 102.

A women whose pregnancy ended in miscarriage, stillbirth or a therapeutic abortion before being discharged could ask to have her discharge cancelled. However, evidence of an illegal abortion could result in a court-martial.¹⁴⁴ Meyer finds military policies against abortion “a hodgepodge of formal regulations and rules of conduct.”¹⁴⁵ One wartime physician recalled a pathologist who kept abortions secret by substituting tissue and recording a diagnosis of hyperplasia after procuring abortions for nurses.¹⁴⁶ There were probably other sympathetic army doctors. The WAC had to have some policy against abortion, or else the practice of discharging women for pregnancy might be seen as encouraging women to end their pregnancies so that they could stay in the army. For civilians, abortion laws and enforcement varied by state and municipality.¹⁴⁷ Additionally, some WACs may have been stationed in countries where abortion laws were even more different from the various states. Holding servicewomen to a standard not enforced for the general population was neither fair nor workable and some in the WAC recognized this. However, the social and medical contexts of abortion were already changing in the 1940s as hospital abortions committees replaced doctors “as arbiters of Women’s access to legal therapeutic abortions.”¹⁴⁸ As persecution and prosecution of abortionists increased, Rickie

¹⁴⁴ “Officers Release of Women Officers because of Marriage, Pregnancy, or Parenthood” Special Regulations No. 605-225-10, Department of the Army, Washington DC, 17 June 1954, p. 2-3, In Author’s Possession. Enlisted Personnel Discharge Marriage, Pregnancy, or Parenthood” Army Regulations No. 615-361, Department of the Army, Washington, DC, September 21, 1954, 4, In Author’s Possession.

¹⁴⁵ Meyer, *Creating GI Jane*, 111.

¹⁴⁶ Carole Joffe, *Doctors of Conscience: The Struggle to Provide Abortion Care before and after Roe V. Wade* (Boston: Beacon Press, 1995), 74.

¹⁴⁷ Reagan, *When Abortion was a Crime*, 20-21, 116, 119; Rickie Solinger, *The Abortionist: A Woman against the Law* (New York: The Free Press, 1994): passim; Laura Kaplan, *The Story of Jane: The Legendary Underground Feminist Abortion Service* (Chicago: University of Chicago Press, 1995): passim; Joffe, *Doctors of Conscience*, 31, 74.

¹⁴⁸ Karen Anderson, “The Great Depression and World War II,” in *A Companion to American Women’s History*, ed. Nancy Hewitt (Malden, MA.: Wiley-Blackwell, 2002), 377.

Solinger and Leslie Reagan explain, more women were also caught in the net.¹⁴⁹ Courts-martial for abortion might have been more vigorously pursued in the postwar period. Finally, WAC officers faltered on the question of proof. Determining whether an abortion was induced or spontaneous (a miscarriage) could be impossible and the specter of an investigation and possible dishonorable discharge could haunt women whose pregnancies terminated on their own. Stringent prosecution could also deter women from seeking emergency medical help if an abortion, induced or spontaneous, went wrong.¹⁵⁰

Regulations recommended discharge within fourteen days of certification of pregnancy. However, this was a long time before easy, fast, reliable tests for early pregnancy. Diagnosis of a servicewoman's pregnancy could involve "biological or other tests," which probably refers to the use of rabbits or frogs. These tests involved injecting urine samples into the test animal, waiting, and then dissecting the animal to confirm the presence or absence of certain changes. This could take a while, especially since military hospitals were not always well stocked with rabbits and frogs.¹⁵¹ Diagnosis could also rely on "observation" "for a reasonable period of time."¹⁵² This could be as simple as waiting for another missed menstrual cycle, or could involve waiting for certain changes in the uterus or until a fetal heartbeat could be detected, which would have been with a stethoscope, probably after 20 weeks gestation, as opposed to today's Doppler technology which can detect pregnancy much earlier.

¹⁴⁹ Rickie Solinger, *Abortion Wars: A Half Century of Struggle, 1950-2000* (Berkeley: University of California Press, 1998), 16-17; Reagan, *When Abortion was a Crime*, 160-163.

¹⁵⁰ Meyer, *Creating GI Jane*, 110-112.

¹⁵¹ This point about the awkwardness of early pregnancy tests was humorously made in the television series *M*A*S*H*, set during the Korean War. In one episode, doctors use a pet rabbit to test for a nurse's pregnancy, anesthetizing rather than killing the animal before examining its ovaries. "What's Up, Doc?" Season 6, episode 20 January 30, 1978.

¹⁵² "Enlisted Personnel Discharge Marriage, Pregnancy, or Parenthood" Army Regulations No. 615-361, Department of the Army, Washington, DC, 21 September 1954, p. 2, In Author's Possession.

Servicewomen stationed abroad were separated from service fourteen days after their return stateside. It might be that a healthy woman stationed overseas, who didn't suspect she was pregnant herself, or who was not eager to reveal that early on, was not diagnosed with a pregnancy until late in her first trimester, had to wait until transportation could be arranged home and then, after reaching the United States had an additional two weeks in service before being discharged. Throughout this time, she could continue on duty. Since most miscarriages occur early in a pregnancy, if a WAC were going to miscarry, she would have done so during the period of confirming a pregnancy and awaiting discharge.¹⁵³ If the servicewoman had a miscarriage while awaiting discharge, she could request to stay in the service. If not, she would receive an honorable discharge and, after the early policy was quietly reversed, maternity care.¹⁵⁴

After 1945, WACs who received pregnancy discharges obtained some publicly funded care in recognition of their service to their country and their ties to the military welfare state. But the service and usually the women themselves collaborated in downplaying pregnancy in the military role. The WAC's provision of maternity services did not generate favorable publicity for the institutional future and public approval of military women. Unplanned discharges, even if honorable, interrupted military careers. Pregnant women were virtually unemployable and usually ineligible for unemployment insurance as well. Poverty and the stigma of single motherhood kept most pregnant WACs quiet about their experiences. The Red Cross helped place WAC babies for adoption. An army nurse, June Wandrey, recalled one telling case. "Very

¹⁵³ According the American Academy of Obstetricians and Gynecologists, about 15-20% of pregnancies end in spontaneous abortion (miscarriage). Nearly all of these happen in the first 13 weeks. See, "Early Pregnancy Loss Miscarriage and Molar Pregnancy" http://www.acog.org/publications/patient_education/bp090.cfm (May, 2002).

¹⁵⁴On the other hand, this somewhat slow process of immediate discharge due to pregnancy could mean that a woman who wanted to carry her pregnancy to term, and yet suffered a miscarriage before being mustered out, might blame the army practice of continuing duty for her miscarriage, as Meyer points out was the case in WWII. Meyer, *Creating G.I. Jane*, 233.

pregnant WAC here who can't recall who the father might be. She has decided not to return to her family when the war ends—just sort of disappear.”¹⁵⁵

Under Col. Hobby, WAAC officers and supporters vigorously protested slander about the incidence of pregnant WAACs. WAACs carefully cultivated respectability, morality and traditional femininity. Hobby very quietly changed the policy of providing access to care and assistance for those WAC's who did get pregnant. Like the “very pregnant WAC” above, the specter of a pregnant soldier also “just sort of disappear[ed]”. She would return to haunt the armed forces later, in the 1970s when Women's Liberation inspired career military women to challenge pregnancy discrimination and again, in the 1990s and later when military women held positions close to combat. But, after initially threatening to jettison the WAAC itself, pregnant soldiers were relatively easy to manage quietly, and with little significant change, during WWII. Larger changes occurred, actually, when their brothers in service were about to become fathers.

“Social Doctors,” the Children's Bureau, and Pregnant Workers

When companies, unions, doctors, women workers, state government agencies and other branches of the federal government worried about pregnancy and employment, they turned to the two agencies that were legacies of Progressive Era maternalist reformers, the Children's Bureau and the Women's Bureau, both part of the Department of Labor during World War II. Both these agencies had significant numbers of women on staff and both were headed by women, working under the first woman cabinet secretary, Frances Perkins, at the start of the war. Theda Skocpol notes that the US welfare state was characterized by “female-dominated public agencies

¹⁵⁵ June Wandrey, *Bedpan Commando: The Story of a Combat Nurse during World War II*, 2nd ed. (Holland, OH: Elmore Publishing Company, 1990), 193.

implementing regulations and benefits for the good of women and children.”¹⁵⁶ The U.S. Women’s Bureau, established in 1920, had a consulting body of doctors, but more significant ties to the labor movement. The Children’s Bureau, a federal agency since 1912, had cultivated a careful relationship with organized medicine, soliciting expert opinion and promoting the highest standard of medical practice while trying to avoid raising the ire of the American Medical Association. The AMA had opposed the Sheppard-Towner Act, which had provided funds for promoting maternal and infant health throughout much of the 1920s. While the Act and the Children’s Bureau administration of it focused on education rather than the provision of care, the AMA still feared it as a threat to their authority and economic interests. Doctors were ultimately instrumental in securing repeal of the law.¹⁵⁷ The defeat of Sheppard-Towner may have made the Children’s Bureau staff and supporters more cautious about proposing certain public health measures, but, if anything, they became even more committed to expert medical advice.

One tactic to further reform was to increase the role and the profile of actual physicians within the Children’s Bureau. The clearest example of this is the career of Dr. Martha May Eliot. Dr. Eliot, a Johns Hopkins trained pediatrician, began working for the Children’s Bureau in 1924. Her lifelong domestic partner Dr. Ethel Dunham, a pioneering neonatologist, also worked for the Children’s Bureau.¹⁵⁸ Eliot was in line for the directorship of the Children’s Bureau in 1934. But the social work establishment who had created the Children’s Bureau preferred the

¹⁵⁶ Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Belknap, 1992), 2.

¹⁵⁷ Kriste Lindenmeyer, *A Right to Childhood: The U.S. Children’s Bureau and Child Welfare, 1912-1946* (Urbana: University of Illinois Press, 1997), 89.

¹⁵⁸ Lillian Faderman, *To Believe in Women: What Lesbians have done for America—A History* (Boston: Houghton Mifflin Company, 1999), 291-305 and also Bert Hansen, “Public Careers and Private Sexuality: Some Gay and Lesbian Lives in the History of Medicine and Public Health,” *American Journal of Public Health* 92, no. 1 (January 2002): 40-41.

appointment of Katherine Lenroot. Dr. Eliot became the Assistant Chief in hopes of “appease[ing] some members of the medical community.”¹⁵⁹

During World War II, the Children’s Bureau had many physicians on staff, including Eliot as Assistant Chief, her partner Dunham, the obstetrician Dr. Edwin F. Daily, pediatrician Dr. Katherine Bain,¹⁶⁰ and many more. When the Children’s Bureau undertook to study the issue of pregnancy in the workplace, they employed another physician, Dr. Charlotte Silverman.¹⁶¹ These doctors cemented the Bureau’s ties to the medical community and gave it credibility.

Eliot, Dunham, Bain and Silverman never married or had children, although all focused attention on the protection and care of children. Noting this, critics charged the Children’s Bureau with a sort of deviance, as when a headline proclaimed “Spinster in Steel Specs, advisor on maternity.”¹⁶² Eliot and Dunham had each other. The others may have been single, or may have had hidden relationships; either way, not marrying opened them to some ridicule, but probably also protected their careers to some extent. All physicians, their choice to work for public agencies also marked them as unusual. Eliot and Bain had dabbled in private practice but both found that their sex disadvantaged them in attracting clients and their colleagues frowned

¹⁵⁹ Lindenmeyer, *A Right to Childhood*, 182. See also Jacqueline K. Parker, “Women at the Helm: Succession Politics at the Children’s Bureau, 1912-1968,” *Social Work* 39 (September, 1994): 551-559.

¹⁶⁰ After the war, while working to reduce an intolerable number of childhood household poisonings, Katherine Bain invented the child safety cap.

¹⁶¹ When Bain wrote to a New York group that was studying women war workers and their problems, she encouraged them to ask for Silverman’s help with their study. Bain was writing to a friend, a classmate of hers from a Vassar summer school program. Bain liked the person running the group and she obviously believed in the purpose. Yet, she observed, pointedly, “I notice that you do not have a physician on your committee.” Katherine Bain, M.D. to Miss Kathryn H. Starbuck, October 23, 1942 “Empl of Mothers Jan 43,” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

¹⁶² “Spinster in steel specs, adviser on maternity,” *New York Post*, 5 August 1949, 25.

upon their low fees. Public employment allowed these women physicians to pursue what Eliot once called “social doctoring” and make a living for themselves as well.¹⁶³

Like the Progressive Era maternalist reformers who had founded the Children’s Bureau, the agency’s WWII staff believed in gathering social survey information to inspire and ground national standards to protect public health, especially the health of women and children. They wanted to reduce the medical and social inequalities that threatened children’s and maternal health. They shared a moral compass, a belief in social justice and a life in service with kindred souls. The Children’s Bureau staff was a committed core of talented individuals. The working relationships were sometimes very close. Concluding one of her field reports to Bain, Silverman mused, “I have just glanced over this letter and it strikes me as being much too chatty and loosely-formed to be addressed to one’s chief. Please excuse the informality.”¹⁶⁴ Close working relationships, commitment, physician networking, and the institutional legacies of the Children’s Bureau’s previous work, all underwrote the World War II efforts of these social justice women reformers to improve maternal and infant health and set a precedent for a more far reaching maternity policy. Launching the most far-reaching program, however, also required money. The money came in khaki.

¹⁶³ William M. Schmidt, “Martha May Eliot: Social Pediatrician, Children’s Bureau Chief,” Address at the Harvard University Memorial Church, 1977, reprinted at www.harvardsquarelibrary.org/unitarians/eliot_m.html (9 March, 2009) and Faderman, *To Believe in Women*, 299.

¹⁶⁴ Charlotte Silverman, Los Angeles, to Dr. Bain, January 7, [1943], “Empl of Mothers Jan 1943,” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

Soldiers' Babies

It would be hard to overstate the problem of pregnancy in the serviceman's family. The "baby boom" associated with the postwar period was already underway in 1941.¹⁶⁵ Perhaps it started with brief periods of conjugal bliss before new recruits endured long periods of separation from their wives. As William Tuttle points out, the high percentage of these war births that were first babies indicates "the youthfulness of many of the parents."¹⁶⁶ Pregnant military wives had no idea what to expect during pregnancy or delivery, and no sense of the medical help they should seek or receive. The military's own demand for medical personnel absorbed huge numbers of doctors and nurses. Surgeons and general practitioners were in high demand but even obstetricians and pediatricians enlisted. By the end of the war, the Children's Bureau's own Dr. Edwin Daily, an obstetrician, was serving in the Navy.¹⁶⁷ Overall, there were fewer doctors to provide care for civilians and this problem was even more acute in areas that grew rapidly during the war—the areas around military camps and the war production areas. Military wives were quite likely to be in both these areas. They were also likely to be new arrivals or transients as they followed their husbands from base to base. One young wife was already pregnant when she "took a room" in Arizona to be nearby her navy husband. When he was sent to Hollywood for advanced training, they rented "a small apartment" which they had to give up when he was ordered to Virginia. She followed him, but he was shipped out and she returned home to her

¹⁶⁵ William M. Tuttle, *"Daddy's Gone to War" The Second World War in the Lives of America's Children* (New York: Oxford University Press, 1993), 24-25.

¹⁶⁶ *Ibid.*, 28.

¹⁶⁷ Obstetricians and pediatricians served successfully in the armed forces. Obstetrics is a surgical speciality focusing on the abdomen. Pediatricians have a lot of training and experience in epidemiology. Both sets of skills served the military well.

family in Detroit just before having the baby.¹⁶⁸ One pregnancy. Five addresses. Multiple doctors.

The military considered obstetric care for servicemen's wives a wartime problem. How could maternity care for these young, dislocated women be secured? Considering the wide range of hospital conditions and obstetric training and practice, how could quality care be ensured? Eliot, who had conducted a personal investigation of maternal and pediatric services in Great Britain early in the war, had noted the link there between expanded programs for maternity benefits and military morale, as well as the connection between maternity benefits and war production.¹⁶⁹ But the impetus for what became EMIC was an appeal from a base commander who saw his soldiers fretting over their wives and infants and worried, in turn, about their ability to fight when domestic responsibilities and cares weighed so heavily upon them.

Military doctors and hospitals had long provided some medical care for the families of servicemen. In fact, an 1884 statute entitled families to army medical care.¹⁷⁰ Problems emerged, however, when the draft suddenly swamped training camps as well as nearby communities. Camp commanders and medical personnel struggled to provide care for the recruits. When many young wives began following their young husbands to camp, the additional population influx put pressure on local resources. EMIC began with a pilot for the pregnant wives of recruits at Fort Lewis, Washington. Because of the number of soldiers at the base, military personnel and facilities could not be extended to dependents such as the pregnant wives waiting to see their

¹⁶⁸ Stanley J. Winkelman, *A Life in the Balance: The Memoirs of Stanley J. Winkelman* (Detroit: Wayne State University Press, 2000), 48-53.

¹⁶⁹ Lloyd C. Taylor, Jr., *The Medical Profession and Social Reform, 1885-1945* (New York: St. Martin's Press, 1974), 153.

¹⁷⁰ Joan Elizabeth Mulligan, "Three Federal Interventions on Behalf of Childbearing Women: The Sheppard-Towner Act, Emergency Maternity and Infant Care, and the Maternal and Child Health and Mental Retardation Planning Amendments of 1963" (PhD diss., University of Michigan, 1976), 68.

husbands off to war. Since they had followed their men to camp, they did not meet the local residency requirements to receive obstetric care through the county health department and many could not afford to pay for private care. The camp commander “felt that this circumstance harmed the soldiers’ morale.” He asked the state department of health for help.

State health departments could get federal money through the Children’s Bureau for maternal and infant health programs under the Social Security Act Title V. Usually these programs needed matching money from states and usually benefits were tied to residency requirements. A smaller part, the more flexible B funds, did not require a state match. The state health officer wondered if such funds could be used to pay for private medical care for soldiers’ wives around Fort Lewis. The Children’s Bureau approved the experiment. Between August 1941 and July 1942, some 677 pregnant army wives, mostly between 17-19 years old, received some medical care paid for by the Children’s Bureau. The program was not segregated, and accepted black women, although they appeared to have been offered private rooms after delivery in accord with the segregated practices in Tacoma private hospitals.¹⁷¹

The Children’s Bureau regarded the Fort Lewis experiment as a success and approved the requests of other state health departments to use B fund money to pay for maternity and pediatric care for dependents of servicemen. However, not all communities had programs receiving B

¹⁷¹ Of the 677 women, only 193 actual deliveries were covered during this time. The difference is probably because many who had begun prenatal care (and were thus included in the 677) had not yet had their babies and would do so after this initial phase. It is also possible that many of these wives went home to give birth near their own parents and in their own communities. This might especially have been the case for women whose husbands were deployed during the pregnancies. The medical care provided through this program might not be enough to keep pregnant wives near camp, in the crowded rooming houses these women usually stayed in. Though EMIC would eventually extend to cover the medical care of servicemen’s wives wherever they were, this pilot program was limited to the area immediately around Ft. Lewis. Some women would begin prenatal care near camp, but deliver elsewhere. Medical care for pregnancies would also cover the care of women who had miscarriages, and ectopic pregnancies thus helping to account for a handful of the 484 maternity cases that did not include delivery. Lindenmeyer, *A Right to Childhood*, 238; Nena J. Powell, “The Fort Lewis Maternity Care Project: A Pioneering Program for Enlisted Military Families in a Prewar Washington State Community,” *Family and Community Health* 37, no. 3 (2014): 179-187.

funds, those that did were quickly exhausting them, and the problem of pregnant military wives was growing. The American Red Cross reported that between July 15 and August 15 of 1942, “3,262 servicemen had asked...for help in securing obstetric care for their wives.”¹⁷²

The magnitude of the problem was only matched by the potential for a bold and creative solution. Eliot, who had written Title V of the Social Security Act back in 1935, and her colleagues at the Children’s Bureau, worked out a plan to secure additional funding from Congress and distribute it through state public health departments with approved plans for meeting the medical needs of the wives and children of servicemen. Between 1942 and 1946, the Children’s Bureau argued that wartime necessity enabled them to provide maternity and well-baby care to the families of most U.S. servicemen under Title V of the Social Security Act. Seizing on both the acute need and also the public relations opportunity, Lenroot insisted that “There is one casualty which no responsible nation should ask a fighting man to face. That casualty is the preventable injury of his wife or child back home.”¹⁷³ Congress agreed and repeatedly approved appropriations to fund this program.

Before Congress, Lenroot and Eliot asserted that this was not a new program, but merely an expansion of pre-existing work carried on by the Children’s Bureau that had become more pressing during the war. There would be differences with EMIC, though. First, there would be no need for matching state funds. Second, Children’s Bureau funds had almost all gone to education and preventative work. Rarely had these federal funds paid for actual medical care; EMIC funds would. Many of the problems, and an equal number of the successes of the program stemmed from these two wartime innovations.

¹⁷² Ibid., 239.

¹⁷³ quoted in Amy Porter, “Babies for Free,” *Colliers* (August 4, 1945): 19.

The program was unique in that it was not means-tested. The pregnant wives and infants of enlisted men in all but the top three pay grades were eligible for EMIC. The exclusion of the top grades was a crude sorting according to financial means. However, cases were not examined individually, which reduced overhead, since paperwork was minimized and investigations to determine eligibility were eliminated. Moreover, EMIC, available to any enlisted man, did not seem like charity, but rather an employee benefit. Justifiably proud of their husbands, wives were not at all ashamed to apply for this care. Servicemen who learned of the EMIC program through “stuffers” in their pay envelopes were not only relieved, but probably also proud to be able to take care of their wives and children this way. Initial estimates of expected applicants underestimated the baby boom and overestimated the number of eligible women too proud to accept what they might consider charity. By the time EMIC ended it had covered the medical costs of 1,160,000 maternity cases. When enrollment in the program peaked in the summer of 1944, one out of every seven births in the United States was paid for with federal funds.¹⁷⁴ Additional women were covered for some prenatal care or for miscarriage or ectopic pregnancy. Over 100,000 infants and sick children were also covered for care. The EMIC experiment was the closest the United States has ever come to the provision of universal maternity care for its citizens.

EMIC was guaranteed, not fee for service, maternity and pediatric care. It promised the beneficiary the care that was needed. EMIC paid for maternity care, including prenatal care, delivery and postpartum care, by a general practitioner or an obstetrician. It also paid for hospitalization of at least ten days, and covered consultation and specialist fees. Infants were also

¹⁷⁴ Nathan Sinai, *EMIC: A Study of Administrative Experience* (Ann Arbor: School of Public Health, University of Michigan, 1948, reprint, New York: Arno Press, 1974), 82-83. Sinai began his study while EMIC was still operating. He had access to Children’s Bureau records and staff and interviewed physicians and patients. His is the only book length study of the program. EMIC figures prominently, however, in several other studies, including Lindenmeyer, *A Right to Childhood*; Tuttle, *Daddy’s Gone to War*; Jennifer Klein, *For All These Rights: Business, Labor and the Shaping of America’s Public-Private Welfare State* (Princeton: Princeton University Press, 2003); Mulligan, “Three Federal Interventions on Behalf of Childbearing Women.”

covered for well-baby and pediatric care for one year.¹⁷⁵ EMIC paid the doctor and the hospital fixed rates. By the end of the program, EMIC paid \$50 to a doctor for delivery, at least five prenatal visits, urinalysis, a test for syphilis, and one postnatal check-up. Participating physicians had to agree that they would not charge or accept additional payment from EMIC clients. This was the “all or nothing” part of EMIC. Physicians complained that it was insulting to insinuate that they would take advantage of a serviceman’s wife and bill her more. On the other hand, some pointed out that since EMIC had no means test, EMIC clients included some women who really could afford to pay more for their medical care. The AMA demanded that the Children’s Bureau shift the method of payment to one of cash payments to the wives, who could then make their own arrangements and pay for their own medical care from physicians who could set their own fees. The Children’s Bureau strongly resisted this suggestion and argued that such a change threatened their mission, which was to provide care for servicemen’s dependents. They also knew that a cash allowance to a beneficiary would reduce the Children’s Bureau’s effectiveness in setting and maintaining standards for hospitals and doctors.

The guidelines for EMIC embodied many of the aims of the medical profession. EMIC encouraged the use of physicians trained at approved medical schools. It promoted consultation with obstetric and pediatric specialists for difficult cases. EMIC had two effects on hospitalization for maternity cases. Since EMIC paid for hospitalization, women who might not have gone to the hospital to deliver could do so. The trend to hospital births was already well underway, but some states did still have a lot of home deliveries. These declined very rapidly due in large part to EMIC. Most EMIC maternity patients delivered their babies in hospitals.

Although EMIC paid for home deliveries also, the fact that it would pay fully for hospital

¹⁷⁵“Emergency Maternity and Infant Care Program” *EMIC Information Circular No. 1* (December 1943) United States Department of Labor, Children’s Bureau, 1-9, in author’s possession.

deliveries encouraged women to have their babies in a hospital. This feature may have been especially attractive and important to military wives who might be living in crowded conditions far from the kind of female relatives who might have offered nursing and housekeeping help during a confinement. In 1944, 76% of all mothers gave birth in a hospital, but 91% of EMIC mothers did so.¹⁷⁶

EMIC strongly encouraged hospital births. The transition from mostly home to mostly hospital births may well have put more women at risk of injury and infection.¹⁷⁷ Probably hospitals did not become safer places to deliver until the advent of sulfa drugs in the late 1930s and the use of antibiotics soon after that. Safer or not, a trend toward delivery in hospitals was also already well established before WWII. Richard Wertz and Dorothy Wertz state that “[by] 1939, half of all women and 75% of urban women were delivering in hospitals.”¹⁷⁸ Judith Walzer Leavitt finds the major shift from home to hospital birth “in the second and third decades of the twentieth century,” and reports that “By 1940, 55 % of America’s births took place within hospitals.”¹⁷⁹ As a result of the war, that increased to 88% by 1950. Women like WWII military wives would probably have chosen hospital delivery anyway. Leavitt describes a social decay of female networks as a major push from women themselves towards choosing hospital births even in the 1920s and 1930s.¹⁸⁰ Many of the mothers covered by EMIC may not have had a suitable “home” to deliver in, since many were living in crowded rooming houses near military bases or

¹⁷⁶ Temkin, “Driving Through,” 589.

¹⁷⁷ Leavitt, *Brought to Bed*, 182-189.

¹⁷⁸ Wertz and Wertz, *Lying-In*, 133.

¹⁷⁹ Judith Walzer Leavitt, *Brought to Bed: Childbearing in America 1750-1950* (New York: Oxford University Press, 1986), 171.

¹⁸⁰ Leavitt, *Brought to Bed*, 174-176.

in the overpopulated war production centers. They had little space, often shared bathroom or kitchen facilities and they were far from networks of female relatives and friends who could have provided the care, references, and intervention that are a part of successful home births.

Under EMIC, hospital standards for the care of obstetric patients improved substantially. If a hospital did not meet EMIC standards, it would not be paid for the delivery of EMIC patients. Some of the standards were embarrassingly low, such as individual beds for maternity cases, screens on the windows, hand washing facilities for maternity caregivers, and some separation of maternity patients and newborns from other patients. Hospitals, striving to meet regulations such as these in order to admit EMIC patients, improved the conditions for all obstetric patients and quite probably often for non-obstetric cases as well. EMIC was especially important in upgrading segregated black hospitals in the South.¹⁸¹ EMIC patients received ten days hospitalization. With a shortage of hospital beds in many areas, this provision of EMIC provided some assurance that these young women and their new babies would not be the first “drive-through deliveries.” While hospital administrators occasionally grumbled about requirements, hospitals on the whole regarded EMIC pretty favorably and even most physicians praised EMIC’s improvement in hospital conditions.

Setting standards for the medical care of EMIC patients was far more difficult than setting standards for hospitals. The Children’s Bureau attempted to limit inclusion to doctors who had graduated from medical schools and designate as specialists only those who had met the standards of certain professional organizations. While in theory, the AMA might have supported these policies, states’ rights supporters, osteopaths, and MDs who practiced as “specialists”

¹⁸¹ Jennifer Nelson, “Health Care Reconsidered: Forging Community Wellness Among African Americans in the South,” *Bulletin of the History of Medicine* 81, no. 3 (Fall, 2007): 615.

without the requisite professional credentials reminded Congress that it was the states that determined eligibility to practice medicine within their borders.

In addition, doctors resisted “regulation” of their profession. EMIC required at least five prenatal appointments in order for a physician to collect the entire EMIC fee. While prenatal care was becoming a standard practice for obstetricians, many of the doctors delivering babies in the 1940s were general practitioners trained decades before who did not know how to conduct prenatal appointments. Some were mystified by EMIC requirements that brought healthy pregnant women into their offices months before delivery. Physicians also complained about pregnant women who did not present themselves in time to have five meaningful appointments.

EMIC prohibited additional charges for complications, even surgery, unless the surgery required the services of a different doctor. It also required doctors to deliver their patients at EMIC approved hospitals. The AMA and state medical societies heartily opposed EMIC at the federal level and also in state health departments that operated EMIC. Their main opposition revolved around the fixed rate of reimbursement. While many doctors, especially those in rural areas and in Southern states, actually saw their incomes rise with EMIC, doctors in urban areas and specialists complained that the EMIC reimbursement rate of \$50 per maternity case was too low. In his study of EMIC, conducted during its waning days, the health economist Dr. Nathan Sinai explained that the national nature of the plan, and certain features due to its emergency nature, contributed to an inevitable leveling of fees that caused those at the higher end of the spectrum to grumble. Northern urban specialists who dominated professional organizations voiced their feelings of dissatisfaction loudly, while doctors who had benefited were largely silent. While some individual doctors disagreed, most professional medical organizations opposed schemes that covered maternity care in ways other than transactions between a woman

and her private physician. EMIC, an emergency wartime measure, was phased out during demobilization and finally ended in 1949. The coming of peace defused the patriotic emergency that rationalized providing government health insurance. Efforts to reauthorize EMIC during the Korean War met with even stiffer opposition from the AMA. While it lasted, it was not only a success for the woman patient and her baby, and success for the soldiers' morale, but also a demonstration of the importance of government-financed health care.

Effects of EMIC

Military officials supported the program, as did the Veterans of Foreign Wars, the American Legion, and the Red Cross. Military officials "reported...that service men overseas voiced the greatest satisfaction that on the home front the emergency program was giving free medical care to their wives."¹⁸² The program was promoted heavily through targeted "stuffers" in military pay envelopes and also through favorable news coverage. Eleanor Roosevelt joined a press conference with Lenroot and Eliot to publicize the program.¹⁸³ Along with dozens of articles in the *New York Times*, there was an attractive photo spread in *Colliers*.¹⁸⁴ *Colliers* photographed one navy wife from her prenatal appointment to her newborn baby held upside down by the heels. The most moving photo showed her cradling her newborn in the hospital with her husband's picture on the bedside table in the foreground. The text celebrated the success of "Babies for Free" for servicemen. Corporal Kelly, describing the birth of his son to a public health nurse at an EMIC check-up, mused, "It sure was a load off my mind. You see, I couldn't

¹⁸² "AID of EMIC Program Hailed in Services," *New York Times*, 22 November, 1944, 19.

¹⁸³ "First Lady Points to Maternity Care," *New York Times*, 16 May, 1944, 17.

¹⁸⁴ Lindenmeyer, *A Right to Childhood*, 241 and Mulligan, "Three Federal Interventions," 92 and Taylor, *Medical Profession and Social Reform*, 157 and Porter, "Babies for Free," passim.

be here and I wanted things to be all right, and they were. It certainly is a wonderful thing for us!”¹⁸⁵ On the basis for its morale-boosting authorization, EMIC was a success. The effects of EMIC, however, were much broader.

National maternal mortality fell from 319.8/100,000 births in 1940 to 130.7/100,000 births among white women in 1946. While still much more likely to die in childbirth, black women also saw an improvement, from 781.7/100,000 in 1940 to 363.6 in 1946.¹⁸⁶ During the same years, infant mortality fell from 43.2/1,000 for white infants to 31.8/1,000 live births. Black infant mortality fell from 72.9/1,000 to 48.8/1,000.¹⁸⁷ Both infant and maternal mortality had been declining before EMIC started, mostly due to the application of sulfa drugs and antibiotics to combat infection.¹⁸⁸ However, some of the credit for this decline is due to EMIC. EMIC helped offset the ill effects of urban crowding, social dislocation, a shortage of medical personnel, and nutritional deficiencies suffered by girls during the depression. The effects of EMIC continued to be felt long after in the prenatal care and better hospitals that welcomed EMIC babies’ younger siblings. EMIC educated doctors, hospitals and mothers. Amy Porter, the *Colliers’* reporter, predicted this lasting effect when she pointed out that EMIC mothers would

¹⁸⁵ “Corporal Kelly and His Son: The Emergency Maternity and Infant Care Program,” *The American Journal of Nursing* 44, no. 4 (Apr., 1944): 366.

¹⁸⁶ Department of Health and Human Services, Centers for Disease Control, National Center for Health Statistics, “Maternal Mortality and Related Concepts” *Vital and Health Statistics Series 3*, no. 33 (Washington, D.C.: GPO February 2007), 9; Douglas L. Anderson, Richard Edward Barrett and Donald Joseph Bogue, *The Population of the United States* (New York: Simon and Schuster, 1997), 168.

¹⁸⁷ Anderson, et al, *The Population of the United States*, 162.

¹⁸⁸ John E. Lesch, *The First Miracle Drugs: How Sulfa Drugs Transformed Medicine* (New York: Oxford University Press, 2007), 270, 271; Melissa A. Thomasson and Jaret Treber, “From Home to Hospital: The Evolution of Childbirth in the United States, 1928-1940,” *Explorations in Economic History* 45, no. 1 (January 2008): 76-99.

expect and seek similar care for their subsequent children, and tell their younger sisters and their friends what to look for, too.¹⁸⁹

EMIC also buttressed the triumph of a medical model of pregnancy and childbirth. Long in the making by mostly male physicians, the medicalization of pregnancy privileged the doctor in the doctor-patient relationship and also diverted attention from nonmedical factors that made for a healthy pregnancy. While pregnancy guidebooks nodded to nutrition and rest, the preeminence of the obstetrician within a modern hospital facility as necessary for a satisfactory outcome displaced the importance of socio-economic resources such as wage-replacement, or universal access to medical care. In her study of three federally funded maternity programs, Joan Mulligan finds that the improvement and commitment to medical services is the most lasting legacy of EMIC. EMIC, she writes, “educated over one million women and men, Senators and Congressmen, to appropriate, professionally defined and managed pregnancy...EMIC experience established the place of medical technology in the management of pregnancy as no other previous federal program had been able to do.”¹⁹⁰

To be sure, EMIC was not designed to empower pregnant women, but to provide for them because their husbands were at war. Indeed, an assumption of women’s powerlessness underwrote some of the support for the program. For instance, at a fall 1943 conference on EMIC, military personnel objected to an AMA proposal that EMIC distribute cash payments to eligible wives and allow them to make their own arrangements for care. Cash payments would be a bad idea, the military argued, because of the youth and inexperience of the wives who would

¹⁸⁹ Porter, “Babies for Free,” 28.

¹⁹⁰ Mulligan, “Three Federal Interventions,” 99, 94.

not be able to secure the best care for themselves.¹⁹¹ Considering the reality of wartime migration, the shortages of doctors and overcrowding at hospitals as well as the number of first births and the other pressing financial needs of young military families, this was probably true. The assumption that expectant mothers could not manage their health care accounting was still patronizing. Some women recognized and resented the assumption of female weakness in some of the EMIC regulations. Geraldine Snyder had worked at AC Spark Plug before she followed her fiancé to Fort Bragg to get married. When he shipped out soon after, she returned home to Michigan to live with family while she had their baby. Decades later, parts of her experience with EMIC were still vivid. She recalled, “the Army insurance required you to stay in bed for 10 days after giving birth—you couldn’t even put your feet on the floor. They wouldn’t pay for the hospital bill if you did get out of bed.”¹⁹²

EMIC mandated prenatal and postnatal care. It also covered early childhood immunizations and helped set up “mother’s classes” through the USO and public health departments. It encouraged pediatric care for sick infants and provided a clear pathway to utilize specialists in complicated cases. It actively elevated the advice and the roles of physicians and specialists. The feminist health scholar Rima D. Apple agrees with Mulligan about EMIC and goes even further in arguing that EMIC promoted “widespread acceptance of scientific motherhood in the 1940s.”¹⁹³ Of course, it is important to note that influential as EMIC may have been, the trajectory towards obstetric care in a hospital environment was already well established. The physicians and social workers at the Children’s’ Bureau probably believed that

¹⁹¹ Taylor, *Medical Profession and Social Reform*, 156.

¹⁹² Geraldine Snyder, “Rosie the Riveter: Women Working During World War II, Geraldine Snyder,” <http://www.nps.gov/pwro/collection/website/geraldine.htm> (27 Feb, 2009). .

¹⁹³ Rima D. Apple, *Perfect Motherhood: Science and Childrearing in America* (New Brunswick, NJ: Rutgers University Press, 2006), 67.

the AMA- type medical care was superior. But they also certainly knew that the medical lobby was a powerful one and the interests of expanding care meant securing as much cooperation from organized medicine as possible. A technologically centered and masculine curative model of obstetric care may not have been the only method of reducing mortality, but it was the one that sneaked by Congress and the AMA in the rucksacks of American servicemen. The daughters and granddaughters of EMIC mothers would challenge this model of care in the Women's Health Movement of the 1970s but, arguably, it is still the dominant American way of birth.

Apple is concerned by the marginalization and oppression women experienced within the medicalized model of pregnancy and childbirth. But this was a distant worry to most of the actual beneficiaries of EMIC. While EMIC improved the morale of military men, it also certainly improved the morale of military wives. "Placidly" "knitting tiny garments" instead of worrying about how to pay her doctor bill, Mrs. Private Jones cheerfully told a reporter for the *New York Times* that "Uncle Sam is going to be my baby's godfather."¹⁹⁴ The availability and payment for quality maternity care for the dependents of servicemen was a notable accomplishment. EMIC directly affected the lives of millions of Americans. In his study of EMIC, Nathan Sinai reports that while EMIC operated, nearly every member of Congress received some mail about the program and during one year the Children's Bureau had 4,500 EMIC letters. "It is clear" writes Sinai, "that the EMIC program was close to the people."¹⁹⁵ Representative Cannon of Missouri told Dr. Eliot, "I do not think any money we have spent has been better invested than the money spent for this purpose."¹⁹⁶

¹⁹⁴ Beatrice Oppenheim, "Uncle Sam Looks after Babies," *New York Times* (October 3, 1943), X12.

¹⁹⁵ Sinai, *EMIC*, 54.

¹⁹⁶ quoted in Sinai, *EMIC*, 48. need to track down the original citation, there is a problem with his footnotes, it attributes this quote, made in 1946, to a hearing held in 1945.

Crib Death

EMIC's success may have stunted other possible programs. Military family allowances were modest, especially for dependent wives with no children yet. Many servicemen's wives needed to work. Patriotic incitements to women to do their part in the war effort also attracted women to the factories as the war drew their husbands overseas. EMIC did in fact cover maternity care for many women who had been pregnant workers, however, it did not cover all. Pregnant workers, even pregnant war workers, as well as the dependent wives of male war workers and draft deferees, did not enjoy government paid obstetric care. Maternity allowances, wage replacement during a maternity leave from work, or even a guaranteed maternity leave with seniority protection, came nowhere near legislative action. EMIC crippled a broader maternity policy that would have included a range of social benefits and that would have covered women in their own right, as workers or citizens, instead of as dependents of men. Maternity policy suffered from EMIC's successes and its shortfalls both during the war and after.¹⁹⁷

The first failure of EMIC is fundamentally its very success. The EMIC program was huge. Virtually overnight it became the largest program the Children's Bureau had ever run, far outstripping the wildest imaginations of Eliot, Lenroot and their staff. In the six years it operated, Congress awarded the Bureau more than twice as much money for EMIC than the entire

¹⁹⁷ Mulligan, noticing this huge gap in the government assumption of maternity care, characterized it as an accident of enabling legislation and the relative resources available to the Women's Bureau and the Children's Bureau. She writes "the problems of pregnant [workers]...did not present the Women's Bureau with as persuasive a case as that which the Children's Bureau had been able to present Congress on behalf of servicemen [and] there was no equivalent to Title V which would facilitate appropriations to industries for the protection of pregnant workers" by the Women's Bureau. However, both Bureaus were concerned about the health of pregnant workers and their babies. Mulligan misses that the Bureaus issued a joint statement of standards, and that throughout the war they sent out copies of each other's materials and often consulted each other. Title V says nothing about the dependents of servicemen. It authorizes the Children's Bureau to promote maternal and child health services. There is nothing in the enabling legislation that excludes pregnant workers in favor of servicemen's dependents and the Children's Bureau had a clear interest in the case of pregnancy and employment. Mulligan, "Three Federal Interventions," 89-91.

Children's Bureau budget had been for the previous six years.¹⁹⁸ Even before the first appropriations bill, the Children's Bureau was behind in developing the rules, regulations, and administrative framework necessary to carry out the program. The need was so great, and, once acknowledged, the demand was so great, that the Children's Bureau, in effect, had time and attention for little else. Coupled with the absorbing nature of the program they had just launched, was a tactical failure made very early on. In order to facilitate Congressional approval and back up their claim that EMIC was not a new program, Lenroot and Eliot initially told Congress that neither the Children's Bureau, nor the state health departments that would administer the program, would need any appropriations for overhead.¹⁹⁹ Had the program developed as anticipated, that might have been true. However, five months into the program, the Children's Bureau was back before the House Committee on Appropriations asking not only for more than three times the amount they had initially requested, but for some money for administration as well. Over the life of EMIC, the Children's Bureau received full funding from Congress to pay for the medical care of servicemen's dependents, but it was always a struggle to get any money at all for overhead.²⁰⁰ It is clear that other parts of Children's Bureau programs suffered from the internal diversion of resources towards EMIC and this is probably one reason that no funding could be found to continue a Children's Bureau study on pregnancy and employment.

The impetus for EMIC came from a base commander worried about the morale of his troops. Paeans to the sacrifices of servicemen were intimately tied to the program throughout. EMIC was presented not as charity, but rather as an "expression of gratitude" towards

¹⁹⁸ Lindenmeyer, *A Right to Childhood*, 242.

¹⁹⁹ Sinai, *EMIC*, 28, 31, 32, 97.

²⁰⁰ *Ibid.*, 35, 37, 97.

servicemen.²⁰¹ In Congress and before the AMA, this conceptualization deflected pressure to institute a means test beyond limiting the program to the four lowest pay grades of servicemen. In this way, Congress broadened the program and underwrote a universalism that permitted servicemen and their wives to embrace it wholeheartedly. A pragmatic and truly inspired rhetoric, the preservation of military morale enlisted conservative Congressmen on the side of the program and even gained the grudging cooperation of the AMA. Sinai concludes that “the antagonistic forces were cancelled by the urge to contribute to the war efforts, even though many individuals might have doubted the contributions.”²⁰²

Worse than the exclusion of non-military wives or single mothers, the strong linkage to military morale amidst a war emergency made this unique public program vulnerable in peacetime. EMIC only covered pregnancies that had begun during a serviceman’s time in the armed forces and did not cover veterans. Demobilization of servicemen rapidly reduced covered dependents. At the Committee on Appropriations Hearings in October 1945, Dr. Eliot presented a revised budget that reflected the shrinking military and, to the shock of the Congressional Committee, returned \$8,000,000 in funding. When an incredulous Representative Johnson of Oklahoma asked, “Do I understand from the witness that you have voluntarily returned money and ask that it not be continued for this service?” Dr. Eliot replied:

I would like to say that the Children’s Bureau has accepted the fact that this is a wartime service. We realize that it has been a very great service to the wives and infants of servicemen in this country. We also appreciate very fully that in peacetime as well as in wartime there are many mothers in this country and many children who are in need of the kind of service that has been provided in this program....proper growth, development, and health means so much to the health of future citizens of this country.²⁰³

²⁰¹ Ibid., 113.

²⁰² Ibid., 177.

²⁰³ Representative Johnson and Martha May Eliot, quoted in Sinai, *EMIC*, 47. There appears to be a mistake in Sinai’s book because his citation is to a hearing published in 1945.

Eliot's remarks about the peacetime need for maternity services show that she was still the "social doctor" she had set out to become. Caring for the "whole child" and ameliorating the pervasive effects of social disparity were part of her vision for herself, for the Children's Bureau and for the country. She was proud of EMIC and sorry to see it end.

Throughout the war, one of the criticisms leveled at the program was that it was an entering wedge for socialized medicine. The 1944 annual meeting of the AMA denounced EMIC, the initially supportive American Academy of Pediatrics withdrew its support, and a meeting of state medical societies called EMIC "the specter of 'state medicine.'"²⁰⁴ Lenroot and Eliot were denied funding to conduct a study of the EMIC program after spirited accusations that the two of them were looking for "justification" or "a lever to make it a national program."²⁰⁵ Though they could not say so to Congress or to organized medicine, Eliot, Lenroot and their staff did indeed want EMIC to be an entering wedge. Eliot joined efforts to revive and expand her pioneering program in the postwar period. Deprived of their wartime support from the AMA and conservative Congressmen, they failed. Although it was a brilliant expedient, military morale proved a shaky foundation upon which to build a national maternity policy because it was time-limited, not universal and not predicated upon the needs or citizenship rights of an expectant mother herself.

²⁰⁴ Taylor, *Medical Profession and Social Reform*, 158.

²⁰⁵ Sinai, *EMIC*, 51.

Pregnant Rosies

Many reformers favored publically funded universal maternity care.²⁰⁶ The 1919 International Labour Organization Convention on Maternity declared that all pregnant women should receive prenatal care, medical attendance at their deliveries, and follow-up care. This section of the convention elicited strong opposition from the American Medical Association, which was part of the reason the United States never signed it. In the U.S., physician opposition to the provision of universal obstetric care for maternity was strong.²⁰⁷ Aware of the ILO standard, and also with the wider availability of obstetric care in some European countries, staff of the Women's Bureau and the Children's Bureau had to be careful to couch any language about maternity care in vague generalities and include an obligatory nod to private practice in all of their material about pregnant workers. Neither agency explicitly advocated government maternity health insurance for pregnant workers or requiring employers to cover maternity care in their health insurance schemes.

In private, social justice women reformers in the Women's Bureau and Children's Bureau referred to Congressional debate over the establishment of the Women's Auxiliary Army Corps as reason enough to be leery about suggesting national maternity coverage. When WAAC supporters declared the government would not pay for obstetric care for pregnant soldiers, officials in the Women's Bureau and the Children's Bureau saw Congress closing a door to such

²⁰⁶ Laura G. Rapaport, National Council of Jewish Women, "When the Bough Breaks" CF 1941-1944; RG 102, NACP.

²⁰⁷ At the close of the WWII, a New York civic organization considered the possibility of a public debate on the topic "Should All Maternity Care Be Free?" They asked the Children's Bureau for suggestions on debaters. A staff member ran through a list of six possible affirmative speakers, domestic experts and foreign ones. Following details of their qualifications and attractions, the writer concluded succinctly, "Of course, on the negative side, you would have no trouble in getting a speaker from the medical profession." [no name] Children's Bureau, to Marion Carter, Town Hall, Incorporated, New York City, January 31, 1944, "Maternity Care-Financing," file # 4-18-4-2; CF 1941-1944; CB 102, NACP.

coverage for pregnant “soldiers of production” as well.²⁰⁸ Options for a publicly funded or mandated maternity policy seemed very limited, even under the war emergency with great numbers of married women at work in important industries. While the Children’s Bureau nursed a radical and expansive program in the delivery of medical care to soldiers’ wives and babies, their explorations of the incidence and the needs of pregnant workers was more research oriented and their recommendations far more tentative and advisory than the bold experiment of EMIC.

The Women’s Bureau and the Children’s Bureau received requests for information on standards for the employment of pregnant women in the 1920s and the 1930s. In 1939, for instance, there were two inquiries to the Children’s Bureau. Both letters were directed to Dr. Ethel Dunham, who was indignant at the wording of the questions, but was not sure of the answers. Dunham sought advice from the Women’s Bureau and from an obstetrician and also proposed, in a memo to Eliot, that the Children’s Bureau “put the question to our own Obstetric Advisory committee.”²⁰⁹ In these ways, Dunham set the stage for the investigative team of World War II—the Children’s Bureau, the Women’s Bureau, the Obstetric Advisory Committee and private obstetricians. These two letters to Dunham were, however, different from those that would soon pour in. One letter was from a public school district asking about its mandatory maternity leave for teachers and the other from a federal agency asking about its clerical staff.²¹⁰

Requests for advice surged dramatically in 1941 as the draft and the conversion of industries

²⁰⁸ Edith Baker to Miss Lenroot and Dr. Eliot, August 17, 1944, “Maternity Care-Financing,” file # 4-18-4-2; CF 1941-1944; CB 102, NACP. While the army continued to discharge women for pregnancy well into the 1970s, the policy of not paying for medical care was quickly modified and the army did cover obstetric care for discharged WACs. For examination of the shifting policy and practice relating to pregnant soldiers, see Meyer, *Creating GI Jane*.

²⁰⁹ E.C. Dunham to Dr. Eliot, October 14, 1939, “Employment of Women Before and After Confinement-Laws” (“Empl of Women B&A Confmnt”) file # 10-4-3-6; CF 1937-40; RG 102 NACP.

²¹⁰ O.B. Nesbit, M.D. to Medical Director, Maternal Health, September 5, 1939 and Frank M. Eliot to Dr. Ethel C. Dunham, October 13, 1939, “Empl of Women B&A Confmnt”) file #3. 10-4-3-6; CF 1937-40; RG 102 NACP.

drew women workers to previously male-dominated industries essential to the war effort. For the next few years, attention to maternity policies and the conditions of work for pregnant workers focused on factory work, especially in previously male jobs.

By the spring of 1942, staff at the Children's Bureau decided they needed a more systematic response to questions about pregnancy and employment. Bain compiled initial ideas from the Children's Bureau and Lenroot, the Chief, took them to Anderson, the Director of the Women's Bureau. They and their staffs planned a meeting to develop some joint standards on pregnancy and employment. The Children's Bureau invited the doctors on their Obstetric Advisory Committee. The Women's Bureau asked a list of labor representatives.²¹¹ Within two months they wrote and issued 1,675 copies of "Standards for Maternity Care and Employment of Mothers in Industry." Less than a year later, 12,000 copies had been sent out, many of them at

²¹¹They also invited Eleanor Rantoul, an expert on occupational health from the Metropolitan Life Insurance Company. Of the four physicians invited, one was a specialist in Industrial Hygiene; the other three were among the country's most preeminent obstetricians. James G. Townsend, of the National Institute of Health, was a specialist in Industrial Hygiene. Nicholson J. Eastman was the chief of obstetrics at The Johns Hopkins Hospital and author of the popular, and long running, pregnancy guide book *Expectant Motherhood*. H. Close Hesselstine, was professor of obstetrics at the University of Chicago, an obstetrician at the Chicago Lying-In and the chair of the AMA's wartime Committee on the Health of Women in Industry. The third, who tendered regrets that he was unable to participate "much as he would like to do it," was Philip F. Williams. Secretary of the AMA Section on Obstetrics and Gynecology and chair of the Committee on Maternal Welfare of the Philadelphia County Medical Society, Williams was also the author of its influential study on maternal mortality in Philadelphia. Philip F. Williams, Philadelphia, to Katherine F. Lenroot, Washington, DC, June 13, 1942, and Memo from Dr. Daily to Mrs. Warren, June 11, 1942 and Katherine Lenroot to James G. Townsend, NIH, Bethesda, Maryland, June 12, 1942, and "Recommendations on Standards for Maternity Care and Employment of Mothers in Industry" all in "Empl of Mothers Jan 1-Aug 31, 1942" file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP. The Children's Bureau also sought comments by mail from the Boston obstetrician Robert L. DeNormandie who had written several pregnancy guide books, including the 1930 revision of the Children's Bureau's own volume *Infant Care*. The labor representatives invited were Dorothy J. Bellanca of the Amalgamated Clothing Workers of America, Marion H. Hedges of IBEW, Elizabeth Nord from the Textile Workers Union of America, Rose Schneiderman, from the New York State Dept. of Labor, James Carey of the CIO, and Boris Shishkin, from the AFL. See Doctor Daily to Mrs. Warren, June 11, 1942, "Empl of Mothers Jan 1-Aug 31, 1942," file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP. Ultimately, Bellanca, Nord, Schniederman, Hesselstine, Eastman, Townsend and Rantoul participated, along with "the medical staff of the Children's Bureau," which probably meant Dr. Bain and Dr. Daily. "Recommendations on Standards for Maternity Care and Employment of Mothers in Industry," "Empl of Mothers Jan 1-Aug 31, 1942," file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP. It appears that no one from the Women's Bureau attended the meeting. But, the Women's Bureau Director, Mary Anderson, probably reviewed the recommendations before they were printed. Miss McConnell to Miss Lenroot, June 11, 1942, "Empl of Mothers Jan 1-Aug 31, 1942," file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

the specific request of particular employers, including the University of Illinois in Urbana.²¹²

Others went to state health departments and labor departments, the Federal Wage and Hour Division, the War Manpower Commission, and a wide range of unions and civic organizations.²¹³

The ad hoc committee agreed that “it is recognized as a general policy that provisions for maternity care and leave should not jeopardize the woman’s job nor her seniority privileges.” Members agreed to a numbered list of recommendations, including restrictions against night work, heavy work, dangerous work, work with hazardous chemicals, or continuous standing. The “Standards” suggested job transfers from inappropriate work, rest periods, a leave of at least six weeks prior to term and two months after delivery. The “Standards” recommended that additional leave before or after birth should be granted, if needed, based on physician advice. The “Standards” also contained a sort of vague assertion that “Facilities for adequate prenatal medical care should be readily available for all employed pregnant women.” The rest of this section dealt mostly with the question of time, availability and information about prenatal care.²¹⁴ This clause on prenatal care was the first of the numbered “general recommendations” and it proved to be a source of some controversy.

The “Standards” were vaguely worded and did not explicitly endorse private obstetric practice. They said that prenatal care should be available, that every woman should have access to such care and that someone in the plant should inform workers about how and where to get

²¹² J. Howard Beard to Katherine F. Lenroot, September 8, 1942, and other materials, “Empl of Mothers Sept-Dec 1942,” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

²¹³ The figure of 12,000 is reported in a memo dated March 2, 1943 in “Empl of Mothers Jan 1943” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

²¹⁴ Children’s Bureau and Women’s Bureau, “Standards for Maternity Care and Employment of Mothers in Industry,” July, 1942, “Empl of Mothers Jan 1-Aug 31, 1942,” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

prenatal care. Though he had been present at the meeting to draw up these “Standards” and had presumably voiced his professional opinion about the recommendation on prenatal care, H. Close Hesselstine, the chair of the AMA’s Committee on the Health of Women in Industry objected to the Children’s Bureau when he saw the “Standards” in print. Stumbling over his prose in his haste to claim prenatal care as the territory of private physicians, he wrote that “And the last clause in section 1 might have been further elaborated to indicate where adequate and proper prenatal care may be obtained either from private physicians and prenatal clinics as well as for those who are unable to afford the services of a private physician or physicians.”²¹⁵ Hesselstine argued that “antepartum care should be carried out by the employee’s own obstetrician, for he is prepared to give antepartum care and he has the responsibility of the parturition.”²¹⁶ Hesselstine stressed that this type of antepartum care, carried out by a woman’s own private physician, was “for the best interest of the patient.”²¹⁷ His letter, Bain explained to her superior at the Children’s Bureau, “represents the A.M.A. opinion that any services supplied through public agencies should have tacked on to them ‘only for those unable to pay.’” Since the wording had been agreed upon by the committee who drafted the “Standards,” Bain declined to revise the leaflet.²¹⁸ In fact, Hesselstine had little to fear in terms of major challenges to private medical practice. Few U.S. companies experimented with on-site prenatal care like some European concerns did.²¹⁹

²¹⁵ H. Close Hesselstine, Chicago, to Katherine F. Lenroot, Chief, Division of the Children’s Bureau, Washington, D.C. August 13, 1942, “Empl of Mothers Jan 1-Aug 31, 1942” file #4-7-1-1-1; CF 1941-44; RG 102, NACP.

²¹⁶ Hesselstine, “Specific Problems of Women in Industry,” 696.

²¹⁷ Hesselstine, et al, “Women in Industry,” 801.

²¹⁸ Memo from Dr. Bain, Children’s Bureau, Washington D.C. to Miss Lenroot, Children’s Bureau, Washington D.C., August 26, 1942, “Empl of Mothers Jan 1-Aug 31, 1942” file #4-7-1-1-1; CF 1941-44; RG 102, NACP.

²¹⁹ In 1942, Dr. Edwin F. Daily, the Director of the Division of Health Services of the Children’s Bureau, proposed that the federal government provide prenatal care in government buildings for pregnant employees in the District of Columbia. “This” he said, “would enable these individuals to secure prenatal care with a minimum loss of time and effort.” Edwin F. Daily, M.D., Division of Health Services, Children’s Bureau to R. R. Zimmerman, Council of

The “Standards for Maternity Care and Employment of Mothers in Industry,” inspired by wartime demands, remained the official word from the Children’s Bureau and Women’s Bureau for decades.²²⁰ The product of an eminent committee with experts from several fields, the “Standards” were not, however, based on research. In fact, when Bain first drew up her ideas on maternity leave, she mused about the paucity of knowledge and wondered if “Perhaps we could do a short study on what the practices are now in industrial plants.”²²¹ The dramatic response to this leaflet and requests for more information led the Children’s Bureau to undertake just such a study of existing practices.

The connections between the Children’s Bureau and physicians, especially those trained at Johns Hopkins, provided the initial impetus for that study. In May, 1942, Dr. Charlotte

Personnel Administration, Washington, DC, October 26, 1942. Also, at the American Viscose Corporation, some basic prenatal care and screening tests could be performed at the plant medical office, but only under the direction of a woman’s own physician. Memo from William M. Schmidt, M.D., September 5, 1942, subject: “Information from Dr. J.A. Calhoun, Medical Director, American Viscose Corporation, on policy for employment of pregnant women of the corporation.” “Empl of Mothers Sept-Dec 1942” file #4-7-1-1-1; CF 1941-1944; RG 102, NACP. Dr. Sidney Garfield of the Henry Kaiser Corporation explored the possibility of including obstetrics in the company hospital. Gretta Palmer, “Your Baby or Your Job,” 138. One aircraft plant, facing a local shortage of physicians, intended to begin providing prenatal care for pregnant workers who did not have their own doctors. Charlotte Silverman, “Maternity Policies in Industry,” 26.

²²⁰ Children’s Bureau sent it out in 1945, Ann DeHuff Peters, Children’s Bureau to R.A. Kreilkamp, Master Lock Company, November 7, 1947, “Employment of Mothers Jan 1 1945” file # 4-7-1-1-1; CF, 1941-1944; RG 102, NACP. In 1954, the Children’s Bureau also sent out the “Standards for Maternity Care and Employment of Mothers in Industry,” along with Charlotte Silverman’s pamphlet “A Maternity Policy for Industry,” with the comment that they were “the only materials we have on this subject.” see Ruth Doran to Regional Director, Kansas City, et al, October 25, 1954, “Empl of Mothers 1953-1956,” file #4-7-1-1-1; CF 1953-57; RG 102, NACP. Also Katherine Bain to Thomas Bradley, December 6, 1954, “Maternity Benefit Laws,” file #10-4-3-8; CF 1953-57; RG 102, NACP. In 1956, the director of the U.S. Women’s Bureau, Alice K. Leopold, wrote to Martha Eliot, who was then the director of the Children’s Bureau, to ask her if the Children’s Bureau had new standards that might be included in the Women’s Bureau’s *Handbook on Women Workers*. Eliot wrote back that although the “the original standards...were developed in 1942, the principles are still sound and the statement represents current opinion.” Martha M. Eliot, M.D. to Mrs. Alice K. Leopold, June 27, 1956, “Maternity Benefits, Insurance,” file #4-7-1-1-2; CF, 1953-57; RG 102, NACP. In 1963, the “Reply of United States Government to ILO Questionnaire on Employment of Women with Family Responsibilities” referred to the 1942 Women’s Bureau and Children’s Bureau joint “Standards” “Reply of United States Government to ILO Questionnaire on Employment of Women with Family Responsibilities” “Empl of Mothers, 1963-1968” file #4-7-1-1-1; CF 1963-65; RG 102, NACP.

²²¹ Dr. Bain to Miss Lenroot, June 3, 1942, “Empl of Mothers Jan 1-Aug 31, 1942” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

Silverman had just finished a master's degree in public health at Johns Hopkins, working with the industrial hygienist Dr. Anna Baetjer. Silverman, who wanted to work in a federal agency, took her civil service test, but did not get a job right away. Baetjer and another Johns Hopkins professor, the renowned obstetrician Dr. Nicholson Eastman, sent Silverman's research proposal, a "Proposed Study of Pregnancy in Women in Industry" to Eastman's friend, Dr. Edwin Daily, at the Children's Bureau.²²² It arrived as the Children's Bureau and Women's Bureau were meeting with medical and labor experts to draw up maternity standards for a recognized problem that no one really knew much about.

Silverman proposed to study the actual effects of industrial work on pregnant workers. She had expected "excellent and complete" employment records to include reports of the "effects of pregnancy on efficiency of work." By securing information from hospitals and doctors about prenatal care of workers and the rates of pregnancy complications, "abnormalities" at delivery and post-partum problems, she hoped to link problem pregnancies to specific jobs. She wanted to talk to pregnant workers and new mothers themselves to see if previous pregnancies differed from those while working. Daily and other physicians within the Children's Bureau found some problems. They thought she would have trouble getting the records she wanted. They also observed that even a very large plant was unlikely to have had enough pregnant workers to yield statistically significant information. If she pooled information from several plants, she would get more workers, but also more variables. Silverman's proposed study, they decided, was "so broad in its scope and fraught with so many difficulties" that it could not work. However, they thought

²²² Doctor Daily to Doctor Bain, memo "Conference on proposed study of policies relating to employed pregnant women," June 13, 1942, "Empl of Mothers Jan 1-Aug 31, 1942" file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP. Anna M. Baetjer to Dr. Nicholson J. Eastman, May 1, 1942, and Anna M. Baetjer to Dr. Nicholson J. Eastman, May 5, 1942 and Charlotte Silverman "Proposed Study of Pregnancy in Women in Industry" "Empl of Mothers Jan 1-Aug 31, 1942" file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP. Nicholson J. Eastman to Dr. Edwin F. Daily, May 28, 1942, "Empl of Mothers Jan 1-Aug 31, 1942," file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

that a study focused mostly on plant policy could be undertaken in a short time period and would yield very valuable information as war production continued to expand and more plants began employing women for the first time.²²³ They also agreed that Silverman was just the person for the job. Not only had she already done a literature review, her two professors, Baetjer and Eastman “say she has great tact and meets people well.”²²⁴

Traveling coast to coast, Silverman reported back to the Children’s Bureau on the stationery of various hotels. She gathered information from 70 plants, visiting 50 in person, most of them in the course of three months, also meeting with the staffs of health departments and labor departments, manpower commissions, unemployment boards, and some local doctors. She began by trying out her survey in Baltimore early in November 1942 before stopping in Philadelphia and moving on to Connecticut. By the end of December she had finished with Michigan and was in Oregon. Flooding in Oregon delayed her arrival in San Francisco, where she apparently worked an extra day because she did not get the letter from her superior telling her about a holiday she was entitled to take on January second. She wrote back to Dr. Bain from Los Angeles. Her “stay in San Diego was very limited,” so limited, in fact, that she visited the Pacific Parachute Company quickly enough that the company president, who had been expecting her, did not even notice that she had come and gone. She was on her way to New York in early

²²³ William M. Schmidt, MD to Dr. Bain, memo “The study of pregnancy in women in industry proposed by Dr. Charlotte Silverman” May 21, 1942, “Empl of Mothers Jan 1-Aug 31, 1942” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

²²⁴ Dr. Bain to Miss Lenroot and Dr. Eliot, memo “Study of the effect of pregnancy on the work that can be done by women in war industries,” June 24, 1942, “Empl of Mothers Jan 1-Aug 31, 1942 ” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP; Doctor Daily to Doctor Bain, memo “Conference on proposed study of policies relating to employed pregnant women,” June 13, 1942, and Dr. Eliot to Dr. Bain, June 25, 1942, “Empl of Mothers Jan 1-Aug 31, 1942” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

February.²²⁵ “You certainly must be having some interesting times,” wrote Bain to Silverman, then in Detroit. Bain thanked her for her field reports which were circulated within the Bureau “so that everyone gets a chance to see.”²²⁶

Silverman had switched the focus of her study from the effects of work on pregnancy to a survey of industrial policies and practices regarding pregnancy in the workplace. Even so, she was still surprised by gaps and absences in available records including the absence of recordkeeping by many companies. Either they had employed women so recently that they had not had time to consider the potential problems of pregnancy, or had always employed women and never considered pregnancy worth noting or tracking. Some plant representatives offered estimates of pregnancies, or the timing of departure from work, or the number of women who returned to work after a maternity leave, but the variation in estimates made them seem suspect. Record keeping of leave for “personal reasons” or “family reasons” also disguised some cases of pregnancy, but how many was unclear. Plants that required immediate dismissal or cessation of work very early in a pregnancy would be likely to miss pregnancies among women who kept working as long as they could conceal their condition and then left, offering other reasons. The only plants Silverman found that kept reliable records on the incidence of pregnancy were those that had fringe benefit plans that offered some maternity benefits. To receive benefits, women workers had to document their pregnancies. The company and its insurance agent would likewise

²²⁵ Dr. Silverman to Dr. Eliot, October 31, 1942 and Charlotte Silverman to Mr. D.W. Siemon, November 5, 1942 and Mrs. Noll to Miss Schermerhorn, November 27, 1942 and Charlotte Silverman to Dr. A.S. Gray, Hartford, Connecticut, February 28, 1942 and Charlotte Silverman to Jack Murray, Portland, Oregon, December 19, 1942 and Katherine Bain, M.D. to Dr. Silverman, Detroit, December 15, 1942 and Charlotte Silverman to Dr. Bain, Jan 7 [1943] and Charlotte Silverman to Dr. Leverett D. Bristol, New York, February 8, 1943 and Charlotte Silverman to Dr. Leo Price, New York, February 8, 1943 and Charlotte Silverman to Howard Smith, San Diego, February 17, 1943 and Howard Smith to Dr. Charlotte Silverman, January 24, 1943 “Empl of Mothers Jan 1-Aug 31, 1942” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

²²⁶ Katherine Bain, M.D., Washington DC to Dr. Charlotte Silverman, Detroit, MI, December 15, 1942, “Empl of Mothers Jan 1-Aug 31, 1942,” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

want to make sure that only those eligible for the benefits received them. Even here, however, there was some problem in the data because fringe benefit policies may not have covered all women employees. Some plants excluded some parts of the workforce. Others had waiting periods that might miss the pregnancies of new hires or plans might be structured so that workers could choose not to participate and so they would have no reason to document their pregnancies with the company.²²⁷

Casting a wide net even though her study had been narrowed by committee, Silverman tried to determine the incidence of employment during pregnancy by looking at birth certificates. Here she ran into more problems. In Alabama, for instance, there was “no question regarding occupation of the mother.” Even where birth records offered a space for mother’s occupation, however, they usually missed most women who had worked while pregnant. According to birth certificates in Los Angeles, 90 percent of the new mothers in this war production center were housewives. In Connecticut, where Silverman spent a lot of time visiting many war plants that employed large numbers of women, 98 percent of new mothers were housewives. Silverman knew these numbers were wrong. Most plants had policies of dismissal or leave that sent pregnant women home from work either immediately or sometime in their pregnancy. Even plants that allowed women to continue working during their pregnancies usually did not permit them to work past their sixth month. Since few plants would even consider hiring pregnant women, by the time a woman worker had had her baby, she had been without a paycheck for several months, thus making Rosie into a “housewife” by the time her baby was born, and making birth certificates useless to Silverman.²²⁸

²²⁷ Charlotte Silverman, “Maternity-Leave and Maternity Care Practices in Industry,” *Western Journal of Surgery, Obstetrics & Gynecology* 52 (1944): 152, 153.

²²⁸ *Ibid.*, 156.

Silverman was both a researcher and an advocate for improved working conditions for pregnant workers. When she visited war production plants, she gathered data, led discussions, and distributed Children's Bureau pamphlets. Silverman found that only eight companies had policies or practices regarding job transfer during pregnancy. When she suggested that other plants consider doing so, "the idea was coldly received."²²⁹ Different wage rates for different jobs and lack of suitable jobs for pregnant women buttressed practices of dismissal or lay-off. Undaunted by rebuff, Silverman sat down with the women's counselors at a shipyard and helped them draw up a list of "light jobs." She reported that they were "surprised at the number which they had never considered."²³⁰ It is unclear if this exercise actually changed practices at this shipyard, but it seems indicative of the investigative advocacy approach of Silverman, and the whole Children's Bureau, to the problem.

While still working for the Children's Bureau, Silverman helped set minimum government standards for some kinds of workers. In June 1943, Silverman was working with Mrs. Hobart of the War Department in designing a maternity policy for "plants under the jurisdiction of the War and the Navy Departments."²³¹ After writing her report and the article that appeared in the Children's Bureau periodical *The Child*, Silverman also drew up "a little flyer" on good maternity policy for the Children's Bureau to send to companies seeking advice. This flyer, like most Children's Bureau work, was sent to other doctors for comments, in this case, to Fred Adair, the Chicago obstetrician that Dunham had appealed to for advice a few years before. Adair generally liked Silverman's flyer, although he "would go even farther than your

²²⁹ Silverman, "Maternity-Leave and Maternity-Care Practices," 161.

²³⁰ *Ibid.*, passim.

²³¹ Charlotte Silverman to Dr. Eliot, memo "Conversation with Mrs. Hobart of the War Department," June 18, 1943, "Empl of Mothers Jan 1-Aug 31, 1942" file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

outline” in placing restriction on the kinds of work pregnant women could do and the length of leave.²³² There was a great demand for this leaflet; the War Department itself wanted 500 copies.²³³

Kathleen McLaughlin, the women’s editor at *The New York Times*, covered the story of women’s war work extensively and she pressed for advance notice of Silverman’s results. She, and Dr. George Koswick, the editor of the *American Journal of Obstetrics and Gynecology*, both asked for copies of Silverman’s report before it had been “edited and approved” by the Bureau. Sensing positive publicity, the Public Relations officer at the Children’s Bureau gave McLaughlin an exclusive and sent her Silverman’s draft and also a list of the firms she had visited.²³⁴ McLaughlin’s story in the *New York Times*, “War Plants Study Maternity Policy,” spurred numerous requests to Silverman and the Children’s Bureau for additional copies of her draft.²³⁵ Companies, libraries, newspapers, and Planned Parenthood, all wanted more information.

Silverman’s self-made fellowship at the Children’s Bureau lasted longer than the initial six months. It seems she wanted to stay and that there were some attempts to secure additional funding for her study to continue, perhaps more along the lines of her initial proposal. But Bain reported later, “limitation of funds made it impossible” which was unfortunate, because “Dr.

²³² Katherine Bain to Fred L. Adair, August 5, 1943 and Fred L. Adair to Dr. Bain, Friday, “Empl of Mothers Jan 1943,” File no. #4-7-1-1-1; CF 1941-1944; RG 102, NACP.

²³³ Miss McConnell to Dr. Bain, memo, “Flyer on ‘Maternity Policies in Industry,’” September 23, 1943, “Employment of Mothers Outside the Home” file # 4-7-1-1-1; CF 1941-1944; RG 102, NACP.

²³⁴ Laura Vitray, Public Relations, Children’s Bureau to Miss Kathleen McLaughlin, Women’s Editor, *New York Times* March 27, 1943 and March 12, 1943 and Kathleen McLaughlin to Miss Vitray, March 8, 1943 and George Kosmak to Dr. Silverman, March 31, 1943, “Employment of Mothers” Jan 1943,” file # 4-7-1-1-1; CF 1941-44; RG 102, NACP.

²³⁵ Kathleen McLaughlin, “War Plants Study Maternity Policy,” *New York Times*, March 31, 1943.

Silverman had made such an excellent start.”²³⁶ Her stint at the Children’s Bureau was so brief in a long and illustrious career as a public servant that it does not show up in her obituaries.²³⁷

Pursuing her research to the dogged end, however, Silverman did publish a more complete paper about pregnancy and war production in *The Western Journal of Obstetrics and Gynecology* in 1944. Far longer than her article in *The Child*, the academic one revealed a wide range of frustrations, with stymied research but even more with shortsighted and illogical industrial practices and naive obstetric care. Writing as one doctor to an audience of her peers, Silverman scolded: “It will not do to say that pregnant women should not work, when we cannot offer any substitutes for their incentives to work.”²³⁸

By the end of the war, the efforts of the Children’s Bureau and the Women’s Bureau had begun to make progress in changing management attitudes about pregnancy in the workplace. Companies of all sizes and in many industries referred to the joint “Standards for Maternity and Employment of Mothers in Industry” or to Silverman’s leaflet “A Maternity Policy for Industry” in explaining their maternity policies. Even the conservative National Association of Manufacturers advised that wise employers make allowances for pregnancies among their workforce. Pregnant workers should be protected from occupational hazards even if this required

²³⁶ Katherine Bain to H. Close Hesselstine, November 5, 1943, “Empl of Mothers Jan 1-Aug 31, 1942” file #4-7-1-1-1; CF, 1941-1944; RG 102, NACP.

²³⁷ After working at the Children’s Bureau, Silverman did get her long-term government positions. She worked on projects relating to tuberculosis in the Public Health Service and various state and municipal health services. Then she entered the National Institute of Health where she pioneered the epidemiology of depression. Later, working for the Food and Drug Administration, she studied the effects of non-ionizing radiation. In keeping with her social justice beliefs, she also studied the racial differences in Maryland’s infant and child mortality and in kidney disease among women. At the end of her very long and venerable career, she was applying her incisive epidemiology techniques to an examination of frequency and age at mammography. Her interest in pregnancy and employment might seem an aberration, except that her interests were always eclectic. Jacques Kelly, “Dr. Charlotte Silverman, 89, Johns Hopkins epidemiologist” *Baltimore Sun*, April 20, 2003, 4B; “In Memoriam” *Homepage: The Newsletter of the Johns Hopkins Bloomberg School of Public Health* 2005, http://www.jhsph.edu/publichealthnews/Newsletter/in_memoriam.html (1 March 2009).

²³⁸ Silverman, “Maternity-Leave and Maternity-Care Practices,” 170.

job transfer. They should have time to secure prenatal care. They should have leave before and after the birth of the baby and their jobs should be held for them.²³⁹ Silverman had breached the line between survey and women's advocacy when she conducted her study. Furthermore, the Children's Bureau, which had been since its inception a social activist federal agency, had shown the importance of establishing and promulgating national standards, even when there was no mechanism for enforcing them.

However, compared to EMIC and the benefits extended to servicemen's dependents in the interest of military morale and national gratitude, improvements for pregnant workers were modest indeed. After the initial period of denying care, even a pregnant WAC got more public financial support in defraying the increasing costs of pregnancy and childbirth than Rosie, unless Rosie was married to a serviceman. The Children's Bureau and Women's Bureau work on pregnancy and employment, some data collection and some vague, unenforceable guidelines, showed how strong physician opposition, a sex-segregated labor market and an ideology of a family wage limited reform possibilities for maternity policy. Even war production and pronatalist concerns on the heels of the Great Depression's birth rate decline could not overcome the assumptions that a mother's place was at home and that her doctor knew best.

No Watershed in Maternity Policy

Led by the Children's Bureau's assessment of child development and their concern over infant mortality, federal and state agencies always preferred that the mothers care for their young children full time themselves. They saw little need for maternity leave as new mothers were

²³⁹ National Association of Manufacturers, *Health on the Production Front: A Guide for America's War Production Plants, Both Small and Large, in Maintaining the Health, Efficiency, and Continuous Attendance at Work of the Nation's Great Wartime Industrial "Army of Production"* (New York: NAM, Jan 1944), 61.

discouraged from returning to their pre-birth jobs anytime soon. By the end of the war, many large companies had officially backed away from their draconian policies of firing pregnant workers immediately upon discovery. But it is unclear how widespread this change in policy was, and, in any case, many firms still had lengthy mandatory leaves, as did school districts. The Women's Bureau and the Children's Bureau did not write new guidelines for several decades and were still sending out their "Standards for Maternity Care and Employment of Mothers in Industry" well into the 1960s whenever employers, unions, or foreign governments asked for advice.

Many of the companies that had been so concerned about their employees' pregnancies were among those that laid off large numbers of women workers during reconversion and then replaced them with male workers who had superseniority through military service. Bereft of the huge numbers of women workers, some unions, therefore, had less pressure to bargain for maternity clauses in contracts. It remained official UAW policy to seek maternity leave and other benefits relating to pregnancy throughout the postwar period. But the dramatic postwar decrease in female membership must have made these demands easier to surrender in negotiations. The UAW even suspended the operation of its Women's Bureau for a time before bringing it back by popular demand. Throughout the rest of the 1940s and into the 1950s, most major unions bargained, obtained, and then expanded various fringe benefits, especially pensions and health insurance. Generous maternity leave was not generally a part of this trend and health insurance slighted obstetrical conditions. The war did not set a precedent upon which to build in peacetime, but instead proved how easy it was to dismantle any social reform relating to maternity.

CHAPTER 3:

MISCARRIAGE: MATERNITY AND THE POSTWAR WELFARE STATE

Sponsors of maternity policies in the postwar period could use the studies, experiments, and suggestions born of wartime necessity, but they had to confront reconversion to peacetime industry and new systems of employee relations as well as a baby boom, significant changes in obstetric practices and a growing, and changing, female labor force all in the context of a conservative political atmosphere. The Children's Bureau, and some other reformers, hoped that EMIC might serve as a model for national health insurance. But in fact, the de facto national maternity policy in the postwar period was Unemployment Insurance. Characterized by wide variation between states, an adversarial relationship between pregnant claimants and their former employers and a deep suspicion of women's labor market commitment, Unemployment Insurance was unsatisfactory all around as a maternity policy. In the postwar years there were several attempts to craft workable policies providing specific maternity benefits. Most of these—the Pepper Bill, the Wagner-Murray-Dingell Bills, the Fair Deal and the Langer Bills, and some state attempts—failed. During the war it was already clear that organized medicine opposed any version of national health insurance. The growing postwar medical lobby far outstripped the resources of health insurance and maternity benefit supporters. Doctors claimed health policy as well as health practice as their domain and presented themselves as the most qualified experts. Within the federal government, the network of social justice feminists centered in the Children's Bureau was ripped apart by Truman's reorganization plan and hamstrung by a new administrative structure which was inherently hostile to the Bureau's vision of "the whole child" and their materialist approach to social welfare.

However, there were some limited postwar successes in public policy both at the federal level and in territories and states. As before, none of them were initiated because of pregnant women demanding maternity policy but rather because of the expansion of social welfare programs. The Railroad Retirement Act, the Puerto Rican Maternity Act, and Rhode Island's Cash Sickness Compensation Act had very creative and useful features to address the real needs of pregnant workers. However, each also faced severe limitations and none was easily translatable to a truly national stage.

Unemployment Insurance

Conversion raised questions about unemployment as defense contracts ended and the armed forces demobilized, returning men from service to the labor market. Labor leaders, political and industrial leaders all worried about a return to the Great Depression. Senator Harry S Truman even held hearings on the question of reconversion and employment during the war. After he became president, he urged a summit attended by business, labor, and government. Held under the auspices of the Office of War Mobilization and Reconversion (OWMR), the contentious conference included representatives from the American Federation of Labor, the Congress of Industrial Organizations, the Chamber of Commerce, and the National Association of Manufacturers as well as the president himself. President Truman made employment policies and the extension of Unemployment Insurance key parts of his Fair Deal.²⁴⁰

Loss of work was of even greater import for women than men. Unemployment Insurance was an important item on the agenda at a 1945 Women's Bureau conference with women labor union activists. *Women* labor leaders knew that women were likely to be the hardest hit by lay-

²⁴⁰ Andrew Edmund Kersten, *Labor's Home Front: the American Federation of Labor during World War II* (New York: New York University Press, 2006), 218-221.

offs during conversion. But the leaders at this conference also identified ways that the system of unemployment compensation slighted women, including the total or partial exclusion of pregnant workers. Women labor union leaders wanted reform of unemployment insurance to address the real needs of working women.²⁴¹

In the United States, unemployment insurance is actually fifty-one different systems. Hampered by an unfriendly Supreme Court, New Deal reformers chose state-based plans, rather than a federal system, in establishing unemployment insurance. State programs varied; some taxed employers and employees, while others taxed only employers; rates varied and so did the resources and eligibility periods of plans. Additionally, state variation allowed plans to include experience rating so that employers with low rates of separation paid less for insurance. The states also had different policies and practices concerning pregnant claimants. Many states excluded pregnant claimants for all or part of their pregnancies. Appeals boards, which adjudicated disputes, held the power to decide eligibility and often ruled based on assumptions about women's ties to the labor market and the responsibilities of motherhood.²⁴²

In the postwar years, seven states and Puerto Rico had laws specifically restricting the employment of women for varying periods before and after childbirth.²⁴³ Most of these laws

²⁴¹ "Women Union Leaders Speak" U.S. Women's Bureau Union Conference, April 18-19, 1945, U.S. Department of Labor, Washington, DC, 22. Folder "LAC 1945," Office of the Director, Labor Advisory Committee, (OD LAC); Women's Bureau, National Archives at College Park (RG 86, NACP).

²⁴² On the origins of Unemployment Insurance and the causes and effects of state based plans and experience rating, see Daniel Nelson, *Unemployment Insurance: The American Experience 1915-1935* (Madison: University of Wisconsin Press, 1969).

²⁴³ "Women and Job Insurance Benefits" (January 1945), 1, file "Working Mothers," #3-1-2-4-1; Correspondence File 1948-1953 (Corresp File 1948-1953); General Correspondence of the Women's Bureau, 1948-1963 (Gnl Corresp 1948-1963); Office of the Director (OD); RG 86, NACP; New York State Department of Labor, *A Study of Pregnant Women as Unemployment Insurance Claimants in New York State* (New York: New York Department of Labor Division of Employment Research and Statistics Office, October 1963), 5, 11, 25, 35, 40. These states included Connecticut and Massachusetts with exclusions for four weeks before and four weeks after the birth of a baby, Vermont which prohibited employment of a woman two weeks before and four weeks after childbirth, Missouri, where women couldn't work three weeks before or four weeks after having a baby and Washington, with

dated from the Progressive Era when protective labor legislation restricted the employment of women in some situations. Women reaped the benefits of “protection” but not the benefit of income since they could not collect unemployment if they were excluded from the labor force by statute. In addition to these formal legal exclusions, many unemployment compensation laws had some specific language regarding pregnancy. In 1945, the Women’s Bureau found that 24 states disqualified women from unemployment compensation in cases of pregnancy. Benefits were unavailable in practice in some other states. In 1961, the President’s Commission on the Status of Women determined that thirty-seven states effectively barred pregnant women from collecting unemployment benefits.²⁴⁴ By 1968 it was thirty-eight.²⁴⁵ However, even states that had statutory language regarding pregnancy rarely covered all situations in which pregnant unemployed women might file for benefits. Individual cases sometimes slipped through the cracks, but they also often ended up at appeals tribunals. Pregnancy could be a very perplexing problem for those involved in administering unemployment compensation.²⁴⁶

Program variation from state to state was mind-boggling. In 1959, the New York State Department of Labor compiled a list of states with statutory provisions regarding the inclusion of

the longest period of exclusion—four months before and either four or six weeks after. Committee on Protective Labor Legislation, “Transcript of Proceedings, Feb. 6, 1963,” Box 6, folder “Committee on Protective Legislation,” US President’s Commission on the Status of Women, B-26, Schlesinger Library, Radcliffe Institute of Advanced Studies, Harvard University, Cambridge, MA, 170.

²⁴⁴ US Department of Labor / President’s Commission on the Status of Women “Draft...April 23-24”, Box 43, “Safeguards and Income Protection” file 875, Esther Peterson MC 450, Schlesinger Library, Radcliffe Institute of Advanced Studies, Harvard University, Cambridge, MA, 19.

²⁴⁵ “Progress Since 1963 on the Status of Women—Recommendation on Unemployment Insurance” June 5, 1968, file 967 “ICSW [Interdepartmental Committee on Status of Women] American Women, 1963-68 Chapter Drafts: Women in Employment, Labor Standards and Security of Basic Income,” Box 49, Esther Peterson Collection, MC 450 Schlesinger Library, 2.

²⁴⁶ New York State Department of Labor, *Unemployment During and After Pregnancy: Conditions for the Payment or Nonpayment of Benefits* (New York: Bureau of Research and Statistics, October 1959), 7-9. See also “Women and Job Insurance Benefits” (January 1945): 1, file “Working Mothers,” #3-1-2-4-1; Correspondence File 1948-1953 (Corresp File 1948-1953); General Correspondence of the Women’s Bureau, 1948-1963 (Gnl Corresp 1948-1963); Office of the Director (OD); RG 86, NACP.

pregnancy under Unemployment Insurance. One state specifically prohibited women from collecting UI during her ninth month of pregnancy. Sixteen states declared pregnant women to be ineligible starting sometime in their eighth month. In seven states, pregnant women could not claim unemployment benefits starting sometime in their seventh month and women six months pregnant were not eligible to claim benefits in two states. After the birth of a baby, thirteen states did not allow a new mother to collect unemployment for one month, seven states required a month and a half, five states required two months, and one state required three. Six states disqualified a new mother from collecting unemployment insurance until after she had returned to work in covered employment. Often there was an additional earnings or weeks employed benchmark. One state refused compensation until after a woman had furnished medical proof of ability to work. Two states specifically excluded women from coverage for the entire duration of unemployment due to pregnancy.

When applied to actual claimants, real women out of work and seeking benefits, the diversity in the plans meant that whether or not a worker could collect depended upon her state of residence. In 1950, a doctor told his patient that her job endangered her pregnancy. When she quit, the Connecticut unemployment commission determined that her unemployment was due to pregnancy and she was ineligible, by law, for benefits.²⁴⁷ However, in New York, a hospital nurse who had a history of miscarriages feared that her work would endanger her pregnancy. She left her job early in her pregnancy and looked for lighter nursing work in a doctor's office. The New York Appeals Board, finding her search for work diligent and sincere, awarded her

²⁴⁷ NY Department of Labor, *Unemployment During and After Pregnancy*, 10.

benefits.²⁴⁸ Meanwhile, the Idaho Unemployment Commission offered the opinion that “pregnancy is a voluntary act and thus claimant could not be held involuntarily unemployed.”²⁴⁹ In South Dakota, courts decided that a pregnant claimant had left work “voluntarily without good cause,” because pregnancy was not a “good cause” for leaving work.²⁵⁰ However, an unemployment office in Nebraska found a woman eligible for a claim starting just one day before she delivered and lasting until she went back to work six weeks later. Her employer appealed, but the referee upheld her claim, finding that she left work involuntarily, but even if her confinement could be considered voluntary, it was certainly a good cause.²⁵¹

Fifty-one different systems mean fifty-one different chances for exclusions or limited benefits. The Women’s Bureau recognized the unfairness of such a system. In 1945, a Women’s Bureau memo, preparing for an anticipated increase in women claimants during peacetime conversion, addressed the operation of state unemployment insurance systems in relation to pregnancy. It observed that “many benefit claims filed by women have been rejected, while others submitted under similar circumstances have been allowed, producing undesirable variation among States, sometimes within the same State.”²⁵²

Experience rating, which allowed companies with stable employment histories to pay less in unemployment insurance, posed a special hazard for pregnant women. The Social Security

²⁴⁸ New York State Department of Labor, *A Study of Pregnant Women as Unemployment Insurance Claimants in New York State* (New York: New York Department of Labor Division of Employment Research and Statistics Office, 1963), 8.

²⁴⁹ NY Department of Labor, *Unemployment During and After Pregnancy*, 12.

²⁵⁰ “Statement about Eligibility of Pregnant Women for Benefits,” U.S. Department of Labor Women’s Bureau, Washington, [Prepared by Buchanan M.E.P. April 23, 1942—handwritten note on typed statement], 2, “Working Mothers,” #3-1-2-4-1; Corresp File 1948-1953; Gnl Corresp 1948-1963; OD; RG 86, NACP.

²⁵¹ *Ibid.*

²⁵² “Women and Job Insurance Benefits,” 1

Act of 1935 allowed states to write their own legislation to grant discounts for maintaining stable workforces. In theory, experience rating reflected the belief that unemployment insurance should prevent job loss and that businesses should retain their workers on the job. In reality, experience rating set up an adversarial relationship, a class conflict of sorts, as the very basis for collecting unemployment. In a capitalist economy, employers offer jobs and workers seek them. Under the legislation enabled by the Social Security Act, if businesses did not have jobs for workers, then their former workers could collect the insurance that had been paid in by employers against just this situation. Experience rating gave this a twist. If employers could claim that jobs were available and that a fault in the worker prevented him or her from taking one, then the employers could pay less for insurance. Thus, many employers had a financial incentive to dispute jobless claims. Relying on information from unemployed workers and their former employers, Unemployment Boards sorted claimants automatically, to screen out those who were not truly in the labor market. This included those who had quit without good cause or who were dismissed for misconduct, workers on strike, and those excluded for other reasons. Workers or employers could appeal an initial decision to award or to deny benefits. Opponents of experience rating pointed out that “the chief effect of experience rating is to induce the employer to dispute every claim against his account.”²⁵³

An unemployment board deciding the case of a pregnant claimant had its own cultural presumptions about the appropriateness of a pregnant woman or a new mother in the workplace. Boards sifted through differing medical opinions as to the effect of work on pregnancy and the newborn. Some state statutes excluded part of a pregnancy, or the period immediately after childbirth. Furthermore, boards were under strong pressure from employers to limit claims to

²⁵³ Margaret S. Gordon and Ralph W. Amerson, *Unemployment Insurance* (Berkeley: University of California at Berkeley Institute of Labor Relations, 1957), 65-66.

those unemployed only “through no fault of their own,” a common phrase describing legitimate claimants. The appeals tribunal in Idaho that held that pregnancy was a “voluntary act” went on to say that

Industry was able to furnish the claimant with employment, but because of her own act she was unable to meet the demands of industry. Claimant’s unemployment was due solely to pregnancy and thus she did not meet the eligibility conditions of the law.²⁵⁴

The unemployed worker’s own voluntary act, getting pregnant, made her “unable to meet the demands of industry.” Since she could not accept a job, she could not collect unemployment compensation, at least not in Idaho.

The most common cause for joblessness among pregnant claimants was lack of work. Of those pregnant claimants who received benefits in New York in 1960, nearly half were unemployed due to lack of work.²⁵⁵ In many states, women laid off due to plant closures or workforce reductions might not be able to collect unemployment during part of their pregnancies because they were presumed to be unavailable for work. In Delaware, for instance, the Unemployment Commission interpreted the statute so that “In the case of a pregnant claimant whose unemployment was not due to pregnancy, her benefits will be suspended for the statutory period.”²⁵⁶ The Governor’s Commission on the Status of Women in North Dakota found that their state’s unemployment rate fluctuated between being “extremely high” in the winter and “extremely low” the rest of the year. Yet unemployment commissions automatically disqualified pregnant women from benefits at some point in their pregnancies even if their unemployment resulted from the endemic seasonal lull and had nothing to do with their pregnancies.²⁵⁷ A laid

²⁵⁴ NY Department of Labor, *Unemployment During and After Pregnancy*, 12.

²⁵⁵ NY Department of Labor, *Study of Pregnant Women as Unemployment Insurance Claimants*, 4

²⁵⁶ NY Department of Labor, *Unemployment During and After Pregnancy*, 11.

²⁵⁷ *Report of the Governor’s Commission on the Status of Women* (Bismarck, ND: The Commission, 1964), 14.

off worker who happened to be pregnant thus existed in two simultaneously operating conditions and when the gestation of one—her pregnancy—passed a certain point, her membership in the other—the labor market—was automatically suspended, depriving her of any privileges of that status, such as unemployment benefits. In Bismarck, North Dakota the Governor’s Commission observed that such “disqualification may be doubly unjust in that it withholds income at a time when a family may be in urgent need of it.”²⁵⁸

Members of appeals boards often viewed pregnant women as freeloaders whose true place was in the home. Women embarking upon family formation were assumed to be planning permanent or long-term departure from the labor market. Critics, claims examiners, and employers also tended to assume that most married women did not really need to work because their husbands could take care of them. Skeptical about pregnant workers’ needs for income replacement and protective of the still new unemployment insurance system, appeals boards did not want unemployment insurance to become severance pay, or a maternity benefit like those in countries with programs they characterized as “creeping socialism.” The authors of a 1957 study on unemployment insurance remarked on the threat women posed to the operation of unemployment insurance.

Married women who do not follow continuous work careers but move into and out of the labor force as their personal or family situations change account for **more than their share of violations.**²⁵⁹ (Emphasis added)

As “suspect claimants,” pregnant women and new mothers often encountered a variety of

²⁵⁸ Ibid.

²⁵⁹ Gordon and Amerson, *Unemployment Insurance*, 30.

stringent investigations into their eligibility.²⁶⁰ In New York, and in most other states, “the test of availability for work is applied with extra intensity in cases of pregnancy.”²⁶¹ There was a strong assumption that many pregnant women were not really eligible for employment. If a laid-off worker became pregnant while already collecting benefits, she was “identified by appearance, voluntary declaration, or intensive interview” according to guidelines set out by the New York Department of Labor.²⁶² The rules in New York stated that “Claimants filing for benefits within a limited period after childbirth must demonstrate return to the labor market by positive evidence, including reasonable independent efforts in seeking employment.” To succeed in obtaining unemployment benefits, new mothers had to launch very convincing job searches. In general Unemployment Insurance encourages beneficiaries to accept appropriate jobs offered to them, with some flexibility. Workers collecting unemployment were assumed to be looking for jobs similar to the ones they had lost and were allowed, within some limits, to reject jobs that did not meet their assessment of suitable replacement positions in terms of job, pay, or location. However, pregnant workers and new mothers who appeared to be too choosy risked their eligibility. Claims officers were predisposed to believe these women turned down job offers because of family or home responsibilities. As the New York Department of Labor advised, “Claimant restrictions regarding type of job, wages and working conditions upon return to the labor market are often evidence of unavailability.”²⁶³ Some state departments of labor required proof in advance that a new mother was capable of accepting a job before they awarded

²⁶⁰ Ruth Fairbanks, “Pregnant and Unemployed: Social Insurance and the Body In and Out of Work, 1940-1979,” Sixteenth Conference on the History of Women, May 22-25, 2014, Toronto, Canada, unpublished paper in possession of author.

²⁶¹ NY Department of Labor, *Study of Pregnant Women as Unemployment Insurance Claimants*, 5.

²⁶² *Ibid.*, 11, 25, 35.

²⁶³ NY Department of Labor, *Unemployment During and After Pregnancy*, 6.

unemployment insurance. In New York, pregnant claimants were singled out for more frequent questioning by claims examiners than nonpregnant claimants and investigators documented a woman's child care provisions as part of determining genuine availability for work, and thus eligibility for benefits.²⁶⁴

Prejudice and assumptions about maternal employment combined with concern for the solvency and reliability for the unemployment insurance system itself.²⁶⁵ One staff member of the Women's Bureau, writing in 1942, compared the U.S. situation to that of Great Britain where maternity provisions under the National Health Insurance provided wage replacement to women before and after the birth of a baby. Women collecting those benefits were excluded from the Unemployment Fund. "This method of dealing with a very real need of the woman worker during the period of childbirth offers a suggestive field for study in providing for at least some measure of protection to this important category of employees" without dipping into reserves in the Unemployment Insurance. However, the United States did not develop national health insurance, or maternity benefits at a national level. In a state that did develop a sickness compensation program, Rhode Island, concerns that pregnancy claims drained the fund echoed the concerns about the weight of pregnancy on Unemployment Insurance.

In 1960 and 1961, the New York State Department of Labor carried out a study on pregnancy and unemployment insurance claims that refuted such fears. Only a small number of women sought to secure unemployment benefits during a pregnancy. The Department estimated that only "one-eighth of all pregnant women workers who left or lost their jobs in 1960 filed

²⁶⁴ Ibid., pp. 5-6; NY Department of Labor, *Study of Pregnant Women as Unemployment Insurance Claimants*, 5, 11, 25, 35, 40.

²⁶⁵ "Statement about Eligibility of Pregnant Women for Benefits," 2

claims for benefits during pregnancy.”²⁶⁶ Since 30 percent of pregnant claimants were found ineligible at the time of their application and even the majority of those initially eligible lost benefits for part of their unemployment, payments to pregnant women were less than one percent of the total benefits paid out by New York Unemployment Insurance.²⁶⁷ This study offered reassurance that pregnancy did not endanger Unemployment Insurance, at least in New York. But the assumption that pregnant workers were not eligible for unemployment insurance, even that they were illegitimate applicants for benefits, continued to shape award decisions by many boards in many states.

Throughout the postwar period, women workers who found themselves out of a job and pregnant navigated very choppy waters. Whatever the reasons for their job loss, their pregnancies could often make it harder for them to find new positions at the same time that they stymied many in their application for Unemployment Insurance. This contradiction was not incidental. It was evidence of strong social presumptions about pregnancy and motherhood and it was also part and parcel of the basis for the system—experience rating. This tension and the general unfairness of the whole system eventually did spark a coherent challenge in a state, Michigan, that had clear pregnancy exclusions. The challenge occurred in the 1970s when pregnant workers solicited the notice of their union, the UAW, as well as the interest of the emerging feminist movement. Before then, conflicts went unnoticed—such struggles were haphazard, administrative and idiosyncratic. While many pregnant workers and new mothers wound their way through this morass with varying success dependent upon their state of

²⁶⁶ NY Department of Labor, *Study of Pregnant Women as Unemployment Insurance Claimants*, 1, 10.

²⁶⁷ *Ibid.*, 1-2, 37.

residence, occupation, or review board whims and prejudices, more coherent policies relating to pregnancy and employment rose and fell and rose again in the postwar period.

Federal Legislative Initiatives

In 1945, Florida's liberal Democratic Senator Claude Pepper submitted a bill written in part by Martha May Eliot and Harry Becker of the Children's Bureau.²⁶⁸ The Maternal and Child Welfare Bill called for a permanent system of maternal and child health insurance. Though Eliot took pains to distinguish this bill from EMIC, it was nonetheless their model for a national program. Like EMIC, the Pepper Bill would have provided fully funded services, not cash reimbursements. Like EMIC, the proposed program would have targeted maternal and child health, providing health care without a means test or residency requirements. Federal funds, from general revenue, would be dispersed to the states with approved programs, to be administered through the Children's Bureau. The Pepper Bill provided for more extensive coverage than EMIC. It was intended to cover care of children throughout childhood, including dental and nursing care as well as hospitalization and preventative treatment. Furthermore, the Pepper Bill would have covered all pregnant and newly delivered American women (for maternity care and intercurrent conditions) and all American children, whereas EMIC was limited to the dependents of servicemen in the lowest four pay grades. Women and children were covered in their own right, not through their relationships to a covered man. It was a program for the health care of citizens, focused on reducing infant and maternal mortality. Of course, it excluded men; but the Pepper Bill was boldly and uncompromisingly universal in ways that almost all other proposals for national health care were not. Because it was not tied to labor force participation, either

²⁶⁸ Klein, *For All These Rights*, 169-172. See also Richard A. Meckel, *Save the Babies: American Public Health Reform and the Prevention of Infant Mortality, 1850-1929* (Ann Arbor: University of Michigan Press, 1998), 224-5.

through a woman's own employment or that of her husband, the Pepper Bill sought to sidestep barriers of race, class, industry, and marital status that had circumscribed previous beneficiaries of federal health care coverage and that continued to haunt the American welfare state. The Pepper Bill, by tying coverage to citizenship alone (or, in the case of women, citizenship and pregnancy), was a universal policy. Furthermore, a short and emphatic clause in Section 103 (a) (3) reinforced the intent by stating that there would be no means test, no residency requirement and no discrimination based on race, creed, color or national origin.²⁶⁹

Pepper hoped that returning veterans would remember the program that had helped many of their wives and babies during the war. EMIC had received generally favorable press coverage and was an enormously popular program, as was reflected in some support for the Pepper Bill. The legislation had the backing of the new President, Harry Truman, and of many others, including the *Washington Post* and the surgeon general of the Navy.²⁷⁰ Both Claude Pepper and Martha Eliot won prizes from *Baby Talk* magazine in 1945 for their work on maternal and infant health, including Pepper's proposed legislation.²⁷¹ The International Latex Corporation took out very large paid ads in the *New York Times* in support of Pepper's proposal. Under the headlines "More Important than Atomic Energy," and "More Important than Reaching the Moon," the makers of Playtex products reminded readers that "Nothing more intimately concerns our future as a nation than the health of our children." The ads went on to claim that EMIC had helped mothers and babies "without in any way impinging upon the system of private medicine."

²⁶⁹ US Congress, Senate, Committee on Education and Labor, Maternal and Child Welfare Hearings on S 1318, 79 Congress., 2 Sess. (1946): 1-6 reprinted in Robert Hamlett Bremner and John Barnard, eds. *Children and Youth in America: A Documentary History* (Cambridge: Harvard University Press, 1974), 1270.

²⁷⁰ William M. Tuttle, Jr. "Daddy's Gone to War": *The Second World War in the Lives of American Children* (New York: Oxford University Press, 1995), 209.

²⁷¹ "Maternity Toll Seen Much too High," *New York Times*, November 16, 1945, 20.

Medicine, in fact, had been “strengthened” by the program that secured the best care for more women and their children. Senator Pepper would bring those benefits to more American citizens and reduce regional inequalities in infant mortality.²⁷² The Maternal and Child Welfare Bill envisioned a far-reaching federal government program funded by general revenue, with no means test and with health coverage not tied to either the military or the work force. The Pepper Bill also proposed new models of paying for medical care instead of the predominant “fee for service” system. This last provision engendered fierce opposition to the program on the part of the AMA.

Eliot testified before Congress in favor of the bill she had helped write, a bill that reflected her “social doctoring,” her dedication to “the whole child,” her keen appreciation of the link between healthy mothers and healthy babies and her ability to imagine social provision untethered from the family wage ideal which granted benefits to women based on their husband’s military or employment status. In her extraordinary career, this bill is one of the most emblematic examples of both her vision and her vulnerabilities. Eliot had risen to Assistant Chief of the Children’s Bureau in part to placate physicians who might respect the Bureau more with a physician at the helm. By the end of the war, however, a large part of organized medicine regarded Eliot the administrator as anathema, while still paying homage to her pioneering scientific work. In the postwar period, the AMA “publically censured” Eliot for socialist leanings. Her standing suffered even in pediatrics, her own specialty and a field moderately more open to public health proposals than some others.²⁷³ Hoping in vain to clear the air, Eliot called a

²⁷² “More Important Than Atomic Energy: Child Health,” *New York Times*, August 9, 1945, paid advertisement, 28; “More Important Than Reaching the Moon: Child Health,” *New York Times*, January 30, 1946, paid advertisement, 16.

²⁷³ Michael R. Grey, *New Deal Medicine: The Rural Health Programs of the Farm Security Administration* (Baltimore: Johns Hopkins Press, 1999), 163 and Elizabeth Fee and Theodore Brown, “Preemptive

meeting of the Children's Bureau Advisory Committees on Maternal and Child Health and on Services for Crippled Children. It did not go especially well, as the report in the *Journal of Pediatrics* showed. Her peers thought that the Pepper Bill went back on Eliot's promise that EMIC was an emergency measure, that the Maternal and Child Welfare Bill would interfere in research, and hamper the training of new doctors. They wanted a residency requirement and a very vocal and emphatic minority wanted a means test. Finally, it became quite clear that pediatricians on the Children's Bureau's own committee thought the Bureau was not the appropriate agency to manage a national health program.²⁷⁴

Eliot had a few longstanding allies. Dr. Edwards A. Park, a very prominent pediatrician, had been Eliot's professor at Johns Hopkins. After he moved to Yale, he hired her as a staff pediatrician, which allowed her to move to New Haven where Dunham already lived. The world owes the dramatic decrease in rickets to Eliot's community study, but she built her initial work upon Park's vitamin D research. As Eliot's reputation wavered and the Children's Bureau came under increasingly hostile attack by physicians, Dr. Park stood by his protégée and her bureau. Park asserted that the American Academy of Pediatrics was being "unjust" and misguided in opposing the Pepper Bill and discrediting the Children's Bureau. In purple prose fully as apocalyptic as Eliot's opponents, Park railed that "The talk against the Children's Bureau just discussed seems to me" as:

When a storm suddenly destroyed the pontoon bridge which Xerxes had had constructed across the Hellespont in his invasion of Greece, he ordered the heads of his chief engineers cut off, the water scourged and fetters thrown into it.²⁷⁵

Biopreparedness: Can we Learn anything from History," *American Journal of Public Health* 91, No. 5 (May 2001): 725.

²⁷⁴ "News and Notes," *Journal of Pediatrics* 28 (Jan-June 1946): 237-245.

²⁷⁵ Edwards A. Park, "Scattered Impressions and Thoughts of a Listener at the Annual Sessions," *Journal of Pediatrics* 27 (1946): 396-397, reprinted in Bremner and Barnard, eds. *Children and Youth in America*, 1281-1282.

Park was a lonely voice while there were plenty of Xerxes, all of them better funded and better organized, such as obstetrician Dr. Philip F. Williams. In 1956, Dr. Williams proudly recounted his opposition to the Pepper Bill.

I am not pugnacious, but as a governor of the Federation of Gynecologic Societies, I helped prevent the Pepper bill to perpetuate the wartime Enlisted Men's Infant Care program from getting out of committee in the U.S. Senate.

He could not remember the actual name of EMIC and, though an obstetrician himself, left "maternity" out of the title. But musing in his retirement for a reporter, he did remember that he opposed the Pepper Bill. Williams lobbied against the Pepper Bill on behalf of a committee of obstetricians. That committee, he added to the interviewer, was dissolved after the AMA set up a lobby in Washington DC.²⁷⁶

Many doctors, especially those in rural areas and in poorer states, looked favorably upon many of EMIC's features. Nearly all physicians approved of the changes it had wrought in hospitals. Some doctors, especially general practitioners in rural areas, found that their incomes rose with EMIC because in some parts of the country EMIC rates were "better than the prewar average" and, as the Children's Bureau pointed out, there were no "bad bills."²⁷⁷ However, other physicians, especially obstetricians in urban areas, thought the reimbursement rate too low. They chafed at the prohibition on additional fees for those able to pay and squirmed under EMIC regulations. Some physician resentment against EMIC was present throughout the war, but muted by patriotism. As the emergency waned, physician opposition became more vocal. By the end of the war, organized medicine was primed to oppose any other encroachments on their rights and interests.

²⁷⁶ "A Visit with Dr. Philip F. Williams," *Obstetrics and Gynecology*, 8, no. 1 (July 1956): 122.

²⁷⁷ "Close of the EMIC Program," *American Journal of Public Health* 29 (1949): 1579-1581.

Physicians, however, also faced a weakened adversary. The Children's Bureau probably reached the height of its influence during WWII. Huge amounts of money flowed through the Bureau because of EMIC. EMIC gave the Bureau power to set standards of care and to approve or disapprove of state plans. Lenroot and Eliot were a formidable administrative and lobbying duo. Because of sex discrimination in the private sector, their staff was drawn from the very most talented and committed women doctors, nurses, economists, statisticians and social workers. Some equally committed men worked at these agencies as well. Since its founding in 1912, the Bureau had matured into a complex agency addressing the needs and rights of "the whole child." When necessary, they could turn for administrative and research assistance to a sister bureau, the Women's Bureau, also in the Department of Labor. These Bureaus had women friends in high places, including Eleanor Roosevelt and the Secretary of Labor, Frances Perkins.

Shortly after the war, however, all that changed. Eliot was worried about the change at her meeting with pediatricians about the Pepper Bill. It seems sort of out of place, an uncharacteristically tentative coda to her methodological parsing of exactly why the Emergency Maternal and Child Health Bill was not the same thing as EMIC. She was asking for the doctors' support to keep the Bureau intact.

I would like to say further for Miss Lenroot and myself that we would have no objection to the transfer to another department with cabinet rank under conditions that would safeguard the integrity of the Children's Bureau and the services included in the Children's Bureau Program. I would like to say further that Miss Lenroot and I would consider transfer of the Children's Bureau to an independent agency without cabinet rank as a great sacrifice.²⁷⁸

It was "a great sacrifice."

President Truman proposed sweeping reorganizations that involved removing the

²⁷⁸ Martha M. Eliot, "Statement," "News and Notes," *Journal of Pediatrics* 28 (Jan-June 1946): 240.

Children's Bureau from the Department of Labor. The network of social justice women reformers that had conceived the Bureau in the first place and defended it from previous threats tried to rally to prevent the change. After the war, such reformers no longer enjoyed the same kind of influence. Women's organizations were at a low ebb and many of the individual advocates had retired from the scene. Grace Abbott, for instance, was dead; Eleanor Roosevelt was no longer First Lady, and the new Secretary of Labor, Lewis B. Schwellenbach, was not a dedicated supporter of the bureau.

There were many factors affecting the removal and demotion of the Bureau. Administrative efforts at streamlining may not have been entirely malicious. Doctors had long called for the medical programs to be withdrawn from the Children's Bureau. Probably some hostility towards the labor movement figured in the move because without the Children's Bureau, the Department of Labor was weakened. The Children's Bureau was divided. They lost the grants-in-aid programs, the Industrial Division stayed with the DOL, and the remainder of the Bureau was placed under the Social Security Board, a unit within the Federal Security Administration. Lenroot now had no direct contact with a cabinet secretary. It was clearly a demotion and also a difficult transplant. Taking in all those varied professionals, mostly in skirts, confused the FSA. The mostly men who worked there did not see doctors, nurses, social workers, economists and statisticians. They saw, according to Eliot's painful memory, a "huge corps of clerical workers." "It was," she recalled, "a very hard period of adjustment."²⁷⁹

The hardest adjustment may have been to work within another agency whose experience with social benefits and vision for their expansion was profoundly different. The SSB

²⁷⁹ Kriste Lindenmeyer, *A Right to Childhood: The U.S. Children's Bureau and Child Welfare, 1912-46* (Urbana: University of Illinois Press, 1997), 250-252. Lindenmeyer quotes Eliot from her interview Martha May Eliot, part four, 1969, 62-64; Columbia Oral History Project, Social Security Project; Columbia University Library, New York City. See also "Child Bureau Safe, Club Women Told," *New York Times*, June 13, 1946, 30.

administered social welfare programs of a contributory nature. Employees paid in while they were at work and if disabled or retired received a cash payment. Contributory social insurance excluded many. Ideally, and thanks in part to the Children's Bureau's early efforts, children do not work, and so, they do not contribute directly to social insurance programs. For a long time the official line at the Children's Bureau was that mothers should not work either. Thus, the whole romance of contributory benefits had less resonance at the Children's Bureau (although, in a way, EMIC was such a program). The social justice women reformers at the Children's Bureau had honed an ideology of "the whole child" that did not easily fit inside the industrial exclusions accompanying the contributory programs that the SSA ran and hoped to expand in a Fair Deal.

There was a tactical difference as well. One longstanding social justice reform belief was that benefits secured for children and women would eventually be extended to men, that gaining benefits for the most vulnerable was the entering wedge to transform the welfare system. Another complimentary belief was that women and children, who were politically, economically and perhaps physically weaker than men, needed the protection of the state. Furthermore, since they were uniquely important as producers of the next generation, they deserved state protection. In the postwar period, the threads of these ideas still ran through the Children's Bureau.

With the transfer to the Social Security Board, Lenroot, Eliot and their staff now found themselves also "continually in conflict with the members of the SSB." The SSB did not support the Pepper Bill, preferring instead to keep maternity benefits in their own contributory-based national health insurance proposals. The SSB even mounted a minor campaign against the Pepper Bill. Harry Becker, Eliot's assistant and co-author of the Pepper Bill, highlighted the reciprocating effects of vision and gender in the dispute when he referred to the "different

direction” of the “social insurance boys.”²⁸⁰ Becker did not last much longer with the Children’s Bureau; he left to work for the UAW. Eliot stuck out the transition, but once the worst was past, she and Dunham spent a few years in Geneva, working for the World Health Organization. Eliot returned to replace Lenroot as Chief of the Children’s Bureau, but it was Chief of a different Bureau, without the resources, the freedom, the responsibility and the vision of the agency in wartime.

The Maternal and Child Welfare Bill of 1945 never made it out of committee. Pepper did manage to secure an increase in funding for the Children’s Bureau programs for maternal and child health and crippled children’s services. The quick death of the Pepper Bill reflected the marginality of maternity benefits to the broader Fair Deal vision of social welfare grounded in contributory benefits. In other countries, maternity benefits had preceded other parts of the welfare state; not so in the United States. National Health Insurance, including maternity provisions, was once a part of the New Deal plan for Social Security, but was withdrawn from the bill in order to secure passage of the old age and unemployment compensation elements.

The Wagner-Murray-Dingell Bills

One of the most important, though ultimately unsuccessful, efforts to expand social security was the Wagner-Murray-Dingell Bill, first introduced in 1943. It would have extended coverage of Social Security to a wider pool of workers, replaced the patchwork of state unemployment insurance systems with a national one, and increased funding for the aged, the blind, and poor children. It also would have greatly broadened the scope of the welfare state in the United States, providing benefits to the permanently and temporarily disabled, including

²⁸⁰ Klein, *For All These Rights*, 175-176, 316, note 28.

maternity leave benefits, and establishing a system of national health insurance. The bill proposed increased social security programs but retained the concept of benefits earned through work.²⁸¹

Scholars who argue that organized medicine is the reason the US has no health insurance point to physician opposition to the Wagner-Murray-Dingell Bills as proof. To defeat the 1947 bill, the AMA levied a \$25 fee on all its members and launched a sophisticated and comprehensive campaign involving a public relations firm and every level of the organizational hierarchy from the AMA's national headquarters to the county medical societies. Doctors counseled patients against the national plan in their examination rooms. Jill Quadagno refers to this massive mobilization against the Wagner-Murray-Dingell Bills as "stakeholder mobilization." "The AMA" she writes, "had the capacity to set an agenda, generate resources, and mobilize a grassroots campaign in nearly every state, city and small town in America."²⁸² Commenting on the influence of the medical lobby in the wake of the Wagner-Murray Dingell Bills, Harry Truman blasted "a revealing example of how the Republicans dance when a well-heeled lobbyist pipes a tune."²⁸³ Threatened and then weakened by the Taft-Hartley legislation that passed that same year, organized labor was a weak countervailing force and the once influential network of social justice women reformers had lost much of its power. The several Wagner-Murray-Dingell Bills went down to defeat.

²⁸¹ Klein, *For All These Rights*, 175-176. Martin F. Hilfinger, "What the Bill Calls for," "Compulsory or Voluntary Health Insurance," 30th annual meeting, National Industrial Conference Board, May 16, 1946, New York, p. 3 Pamphlet Collection (PAM); Hagley Museum and Library, Wilmington, Delaware (Hagley).

²⁸² Jill Quadagno, "Why the United States Has No National Health Insurance: Stakeholder Mobilization Against the Welfare State, 1945-1996," *Journal of Health and Social Behavior*, 45 (2004): 29. See also Colin Gordon, "Why no Health Insurance in the United States? The Limits of Social Provision in War and Peace, 1941-1948," *Journal of Policy History*, 9, no.3 (July, 1997): 277-310; Alan Derickson, "Health Security for All? Social Unionism and Universal Health Insurance, 1935-1958," *Journal of American History*, 80, no. 4 (March 1994): 1333-1356.

²⁸³ Harry S Truman, "Statement by the President Upon Signing the Social Security Act Amendments," July 18, 1952, <http://trumanlibrary.org/publicpapers/index.php?pid=2355&st=&st1> (accessed January 23, 2010).

Shifting attention slightly away from national health insurance, Truman and his legislative allies attempted to expand the Social Security Act in that direction. In 1949, Senator Robert Lee “Muley” Doughton proposed amendments to the Social Security Act, H.R. 2893, which included a section on maternity benefits, along with the addition of temporary and permanent disability benefits that President Truman had asked for. These amendments would have provided maternity benefits for eligible women, married and unmarried, for a period from eight to fourteen weeks because of pregnancy, childbirth, and recovery. Doughton had introduced the original Social Security Act to the House and, as chair of the House Ways and Means Committee, had presided over the hearings on the original bill.²⁸⁴ Fourteen years later, his proposed amendments testify to some significant aspects of the developing American welfare state. Doughton, a Democrat from North Carolina, first took his seat in the House in 1910. He retired from Congress in 1952. Doughton was one of the Southern Democrats instrumental in shaping the New Deal. The long tenure of many Southern Democrats reflected the weakness of the Republican Party in the South after Reconstruction. Virtually uncontested elections and Congressional practices of seniority placed Southern Democrats in influential chairmanships. Their cooperation with Roosevelt’s New Deal underwrote its expansive scope, at least for white Americans. Sometimes called “boll weevils,” these Southern Democrats, also molded welfare policy to preserve racial segregation, for instance by excluding agricultural and domestic workers from unemployment and social security benefits.²⁸⁵ Still instrumental to reform efforts in the postwar period, Doughton illustrates the racial assumptions and agendas that continued to

²⁸⁴ Social Security Online “1935 Senate Bill” <http://www.socialsecurity.gov/history/reports/35senate.html> (20 January 2010); Biographical Directory of the United States Congress, “Robert Lee Doughton” <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000448> (20 Jan 2010).

²⁸⁵ Robert D. Hormats, *The Price of Liberty: Paying for America’s Wars* (New York: Henry Holt and Company, 2007), 142.

intersect American welfare policy but his 1949 amendments also show the continuing vision of an expanding New Deal in the early postwar period. Truman recognized Doughton's role in his Fair Deal agenda and honored him for shepherding through one more piece of a social safety net with this, his "last legislative achievement for the American people."²⁸⁶ The House passed Doughton's bill, but the Senate version did not include disability insurance. When Truman signed the compromise bill into law in 1950, he called the provision of disability insurance "unfinished business" and urged the Congress to pass this legislation.²⁸⁷

Working for Uncle Sam

In the meantime, the federal government had an opportunity to examine the situation of its own pregnant employees. Most of the member states in the League of Nations provided some maternity benefits to their own women employees. The ILO convention on maternity, #3, had passed in 1919. In a standard review of the progress of the convention, the ILO looked at maternity policies in signatory countries and at the maternity policies of other League of Nations countries. They found that even among countries who had not signed the maternity convention, it was common to provide paid leave for employees of the state.²⁸⁸ In the United States, there was no specific separate maternity benefit for government employees. Absent a maternity policy, the

²⁸⁶ Harry S Truman, "Statement by the President Upon Signing the Social Security Act Amendments."

²⁸⁷Frieda S. Miller, Director, Women's Bureau, to Miss Phyllis Gildner, March 12, 1951, p. 2, file "Maternity Legislation" Corresp File 1948-1953; Gnl Corresp 1948-1963; OD; RG 86, NACP; Wilbur L. Cohen and Robert J. Meyers, US Social Security Administration, "Social Security Act Amendments of 1950: A Summary and Legislative History," *Social Security Bulletin*, October 1950, rpt. in "1950 Social Security Amendments," Social Security Online, <http://www.ssa.gov/history/1950amend.html>, (Feb. 13, 2009).

²⁸⁸Statement of Frieda S. Miller in favor of S. 784 to Provide Maternity Leave to Federal Employees Before the Civil Service Committee" February 18, 1948, file "Working Mothers" #3-1-2-4-1; Corresp File 1948-1953; Gnl Corresp 1948-1963; OD; RG 86, NACP, also in "Statement of Frieda S. Miller in favor of S. 784 to Provide Maternity Leave to Federal Employees Before the Civil Service Committee," February 18, 1948, p. 3, folder 168, Box 8, Frieda S. Miller Collection, Schlesinger Library.

U.S. Civil Service Commission allowed federal employees to use accumulated sick leave for absences relating to pregnancy and delivery. As a result, a pregnancy leave depended upon the amount of leave accumulated by each individual prior to her confinement. Furthermore, taking leave for pregnancy meant pregnant federal employees had to hope they would not need their leave for illnesses.²⁸⁹

In 1948, Senator William Langer of North Dakota introduced S. 748, “A Bill to Provide 60 Days Maternity Leave per Year for Female Employees Who Have Worked At Least 10 Months for the Government.” Actuaries from the Social Security Administration estimated that, if passed, this act would cost four to six million dollars a year and cover 10,000 to 15,000 cases.²⁹⁰ The bill was opposed by an array of federal officials who thought that existing practices sufficed for the needs of pregnant federal employees.

Testifying before the Senate Committee on Post Office and Civil Service, Admiral P.B. Nibecker, responsible for the Navy’s civilian personnel, opposed the bill because he felt that the Navy already allowed sufficient benefits through accrued sick leave and annual leave. He claimed that in the Navy’s experience, two thirds of those who took a maternity leave did not return to work, thus, the extension of additional funds would only be a severance package and might interfere with hiring replacements.²⁹¹ Mary Irwin of the Post Office and Civil Service Committee pressed Nibecker to admit that it took a long time to accrue enough paid leave under the Navy’s practices, so some pregnant employees and new mothers endured at least part of their

²⁸⁹Frieda S. Miller, Director, Women’s Bureau, to Miss Phyllis Gildner, March 12, 1951, p. 1, file “Maternity Legislation” Corresp File 1948-1953; Gnl Corresp 1948-1963; OD; RG 86, NACP.

²⁹⁰ United States, Congress, Senate, “Maternity Leave for Government Employees: Hearings before a Subcommittee of the Committee on Post Office and Civil Service,” 80th Cong., 2nd sess., 17 & 18 February, 1948 Robert J. Meyers and Maurice S. Brown, 43-44.

²⁹¹ Ibid., 1-3.

leaves without pay. Musing that many of those who had one child “are very apt to have another one,” she raised the situation of an employee who used all her accumulated sick and annual leave to cover the expenses of her first child and then did not have enough time to accumulate leave before she had another baby.²⁹² Mr. LaCross, from the surgeon general’s office confirmed that “more people have leave accumulated now because during the war they couldn’t take it.”²⁹³ Several witnesses, including Martha May Eliot, pointed out that some women were incapacitated early in pregnancy and might need to use accumulated sick leave for severe morning sickness or threatened miscarriage instead of saving it to substitute for a maternity leave.²⁹⁴ A default maternity policy of allowing federal employees to use accumulated leave failed to serve new employees who had not had time to accumulate much leave, employees having a subsequent child after using all their accumulated leave on the first one, and women who needed to use their sick leave earlier in their pregnancy. This policy was also bound to work even less well as employees “spent” their wartime enforced leave savings.

As was always the case, the Women’s Bureau supported the position of the Children’s Bureau. In her testimony in favor of S. 784, Frieda Miller told the Civil Service Committee that “The Women’s Bureau looks forward to the time when standards for maternity protection will be established by law for women workers in all types of employment.” She hoped that eventually a national health insurance plan might include provisions for pregnant workers in the private sector. In the meantime, however, “S. 784 affords the Government an opportunity to take the lead toward accomplishment of the ultimate objective of maternity protection for all employed

²⁹² Ibid., 3.

²⁹³ Ibid., 36.

²⁹⁴ Ibid., 21.

women by adopting such legislation for its own women workers.”²⁹⁵

Senator William Langer (also known as “Wild Bill”), an Independent Republican senator from North Dakota, is best known for his rural populism, isolationism, and massive political corruption that interrupted his two terms as governor of the state. Less familiar is his interest in health care and disease which underwrote his sponsorship of the maternity leave bill. Like much of his public persona and legislative agenda, he had a somewhat quirky interest in health. He once championed a scientist with a “cancer powder” to secure funding from the National Institute of Health and he tried to set up a National Polio Clinic run by polio victims instead of doctors.²⁹⁶ He was especially fond of filibustering including the time he personally held up Earl Warren’s appointment to the Supreme Court. When Senator Langer’s maternity leave bill went down in defeat in the 81st Congress, he refused to allow the Senate to consider any other legislation that day. He promised to reintroduce his maternity bill.²⁹⁷ When he did, in 1950, the sub-committee of the Post Office and Civil Service Committee reported S. 85 favorably.²⁹⁸ However, when a federal employee wrote to the Department of Labor explaining that she needed information about “maternity benefits and protection privileges provided for the working woman,”²⁹⁹ Langer’s bill could not help her, because it never became law.

²⁹⁵“Statement of Frieda S. Miller in favor of S. 784.”

²⁹⁶ Robert D. Johnston, *The Politics of Healing: Histories of Alternative Medicine in Twentieth-Century North America* (New York: Routledge, 2004), 101.

²⁹⁷ “Langer to Reintroduce His Bill for 60’Day Maternity Leaves” newspaper clipping, nd, paper unknown, file “Maternity Leave” Records Re: Women Workers in WWII, 1940-45 (Re: Wm Wkrs WWII); Division of Research (Div of Rsrch); RG 86, NACP, see also, Frieda S. Miller, Director, Women’s Bureau, to Miss Phyllis Gildner, March 12, 1951, 2.

²⁹⁸ Frieda Miller, Women’s Bureau, Washington, DC, to Mrs. John S. Coonan, Washington, DC 7 December, 1950, file “Working Mothers,” #3-1-2-4-1; Corresp File 1948-1953; Gnl Corresp 1948-1963; OD; RG 86, NACP.

²⁹⁹ Mrs. John S. Coonan, Washington, DC to Department of Labor, Washington DC, 21 November 1950, file “Working Mothers,” #3-1-2-4-1; Corresp File 1948-1953; Gnl Corresp 1948-1963; OD; RG 86, NACP.

Railroad Retirement Act Maternity Provisions

There was one specific successful federal maternity benefit but it covered very few women. When the Railroad Retirement Act and the Carriers' Taxing Act passed in 1937, railroad workers had their own retirement plan separate from the Social Security Act. The retirement plan was funded by contributions from both employers and employees. In 1938, the Railroad Unemployment Insurance Act also set up a separate system of unemployment insurance for railroad workers, funded by a tax on the carriers.³⁰⁰ Collective bargaining, as well as the obvious interstate nature of the industry, helps to explain why railroad workers warranted a separate system for social welfare in the United States. Efforts to expand this system proved more fruitful than those targeted at expanding the measures of the Social Security Act. In 1944, amendments were introduced in the Senate and House to substantively enlarge the scope of benefits.³⁰¹

These amendments were introduced in the House by Robert Crosser, a Democrat from Ohio. Like Representative Doughton, Crosser served in the House for thirty-eight years.³⁰² Crosser was a Progressive, in the tradition of the Cleveland Progressive Era reformers like Tom Johnson, the mayor for whom Crosser had worked early in his career.³⁰³ Like the social justice women reformers who staffed government agencies into the postwar period, Crosser provided a genealogical link to that earlier era of reform. Crosser once gave a speech titled, "Why I believe

³⁰⁰ Jack M. Elkin, "The 1946 Amendments to the Railroad Retirement and Railroad Unemployment Insurance Acts," *Social Security Bulletin* 9 (December 1946): 33, 49-50. and "Changes Proposed in the Railroad Retirement and Unemployment Insurance Systems by a Bill in Congress (S. 293 and H.R. 1362) and Reasons Why the Bill Should Not be Passed" Association of American Railroads (Washington DC: January 25, 1945), 1-2, Box A9, Pamphlet File Collection, Hagley.

³⁰¹ One of the sponsors in the Senate was Senator Robert Wagner, also noted for his efforts to broaden Social Security under the Wagner-Murray-Dingell Bills.

³⁰² "Crosser, Robert," Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000932> (accessed 23 January 2010).

³⁰³ "The Encyclopedia of Cleveland History," <http://ech.cwru.edu/ech-cgi/article.pl?id=CRIO> (23 January 2010).

in Municipal Ownership.”³⁰⁴ It seems that he still believed in the mid-1940s. That hallmark Progressive impulse, a reaction to the robber barons, combined in Crosser with strong ties to railroad labor unions. Such unions were well organized, powerful, and especially concerned with issues of occupational safety and disability.³⁰⁵ Crosser himself had a special insight into questions of age and disability. He was in his 70s when he worked on this bill and had been confined to a wheelchair since 1935.³⁰⁶ Finally, Crosser was born in Scotland, and, although he immigrated as a child, he might have had some European inclination in favor of health insurance.³⁰⁷

Powerful unions, dangerous trade, interstate commerce, existing separate legislation and a friend like Crosser go a long way toward explaining why the Railroad Retirement Act dramatically expanded social supports for railroad workers at a time when many other attempts to expand welfare programs failed. The railroad carriers vigorously opposed the amendments to the Railroad Acts, but the Railroad Retirement Board, the Railroad Labor Executives Association and the AFL, the CIO, the railroad brotherhoods and Presidents Roosevelt and Truman all supported it. After some legislative wrangling, the bill, called the Crosser Bill, was passed by both houses and signed by the president on July 31, 1946.³⁰⁸

³⁰⁴ Robert Crosser, “Why I Believe in Municipal Ownership,” *Annals of the American Academy of Political and Social Science* 57, no. 1 (1915): 282-292.

³⁰⁵ John Williams-Searle, “Risk, Disability, and Citizenship: U.S. Railroaders and the Federal Employers’ Liability Act,” *Disability Studies Quarterly* 28, no. 3 (Summer, 2008), www.dsqsds.org/article/view/113/113 (accessed July 1, 2014).

³⁰⁶ “The Encyclopedia of Cleveland History,” <http://ech.cwru.edu/ech-cgi/article.pl?id=CRIO> (23 January 2010); Walter Polner, “The Aged in Politics: A Successful Example The NPA and the Passage of the Railroad Retirement Act of 1934,” *The Gerontologist* 2, No. 4 (1964): 207-215.

³⁰⁷ “Crosser, Robert,” Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000932> (accessed 23 January 2010).

³⁰⁸ Elkin, “Amendments to the Railroad Retirement and Railroad Unemployment,” 33, 49-50.

The new law expanded railroad workers retirement and unemployment benefits and offered several new protections, including survivors' benefits, disability insurance, and maternity benefits. The Railroad Retirement and Unemployment Insurance Act separated maternity benefits from the normal twenty-six week disability benefits. Thus, a woman temporarily disabled early in the pregnancy due to severe morning sickness or threatened miscarriage, or later in the pregnancy due to preeclampsia, could collect disability benefits from the main plan and not have to deplete maternity benefits set aside for the last couple of months of pregnancy and the first couple of months post-partum.³⁰⁹ Maternity Benefits under the Railroad Retirement Act were generous in both length and remuneration. They were payable for 116 days, beginning fifty-seven days before a woman's due date. Benefits were a daily benefit rate based on a woman's railroad earnings. For the first fourteen days of the leave and for the first fourteen days after the birth of the baby, benefits were one and on half times the regular rate.³¹⁰ Daily benefit rates ranged from \$1.75 to \$5.00 when the legislation became effective in 1947 and the rate was progressive, replacing a greater percentage of the wages of those who earned less.³¹¹

Relatively few women worked for railroads. The economist Margaret Dahm pointed out that only seven to eight percent of those covered by the plan were women. This raises questions about reasons for the inclusion of maternity at all. More women had worked for railroads during the war, and while many left in the postwar exodus of women from non-traditional jobs, some patriotic sentiment may have clung to the notion of women railroad workers. Probably, however,

³⁰⁹ Margaret Dahm, "Experience and Problems Under Temporary Disability Insurance Laws" California, New Jersey, New York, Rhode Island, Railroads," (U.S. Department of Labor, October 1955), 8.

³¹⁰ *Ibid.*, 24.

³¹¹ "Sickness and Maternity Benefits for Railroad Workers," *Monthly Labor Review*, 65 (August 1947): 195; Elkin, "Amendments to the Railroad Retirement and Railroad Unemployment," 31-32; Dahm, "Experience and Problems," 24.

most women who remained worked in clerical positions. Instead, it seems that maternity made it into the bill by a general association with disabilities, perhaps on the basis of the precedent set by Rhode Island. Probably the very small numbers of railroad women allowed maternity benefits to slip through. Supporters of the expansion of Railroad Retirement Benefits sometimes neglected to even mention maternity separately. Jack Elkin, of the Railroad Retirement Board, wrote proudly in the *Social Security Bulletin*.

For the first time in this country, a major group of industrial workers and their families is covered under a unified Federal program providing protection against the five major hazards of economic insecurity—old age, disability, death, unemployment, and sickness.³¹²

The railroad carriers, however, were themselves quick to single out maternity benefits. They had a decidedly less glowing appraisal of the legislation. In a pamphlet explaining “reasons why the bill should not be passed,” the Association of American Railroads called the sickness and maternity provisions unprecedented “anywhere in the world.” They argued that the amendments were “fundamental departures” from the original legislation and “represent wholly new concepts of the responsibility of an industry to its employees.”³¹³ The Association of American Railroads warned of dire consequences from the new Railroad Retirement and Railroad Unemployment Insurance Act. They argued that the new taxes on the carriers would cripple railroads in the competitive transportation industry, and, worse still they would be

³¹² Elkin, “Amendments to the Railroad Retirement and Railroad Unemployment,” 23. “Sickness and Maternity Benefits for Railroad Workers,” 194.

³¹³ “Changes Proposed in the Railroad Retirement and Unemployment Insurance Systems by a Bill in Congress (S. 293 and H.R. 1362) and Reasons Why the Bill Should Not be Passed,” 3.

inadequate to fund the expanded benefits, thus jeopardizing the whole system, including retirement benefits and unemployment insurance.³¹⁴

Because so few women worked in the railroad industry, maternity claims were few and posed no threat to the fund's solvency. In 1954, for instance, when claims for pregnancy gobbled almost a quarter of funds paid out by Rhode Island's Cash Sickness Compensation Plan, maternity claims under the Railroad Retirement Act amounted to only seven percent of total benefits.³¹⁵ Dahm, who reviewed temporary disability insurance laws for the Bureau of Employment Security, cautioned that since the Railroad Retirement Act covered only one industry, "railroad experience with particular provisions is not a test of what might happen under similar provisions for a State-wide program."³¹⁶ The carriers must have realized that maternity benefits were negligible in cost, but they seized upon them as an example of the new extravagant benefits "in no wise connected with or growing out of railroad employment."³¹⁷ They claimed that building a special welfare state for the workers in one industry was unfair to railroad companies and workers in the rest of the country. The Association of American Railroads blasted the special benefits of the new act.

The need for annuity life insurance for survivors and for sickness, accident, and maternity insurance, if it be recognized as a need for which the law should make provision, is a human need common to all mankind and in no way peculiar to or related to the railroad industry, and the fact that a person is a railroad employee neither causes such need nor aggravates it. There is no justification for a proposal to require the railroad industry to support a special and highly preferential system to insure its employees against such

³¹⁴ Ibid., 2

³¹⁵ Dahm, "Experience and Problems," 8, 24.

³¹⁶ Ibid., 8.

³¹⁷ "Changes Proposed in the Railroad Retirement and Unemployment Insurance Systems by a Bill in Congress (S. 293 and H.R. 1362) and Reasons Why the Bill Should Not be Passed," 4.

needs which are common to the employees of all industries and, indeed, to all mankind.³¹⁸

The pamphlet went on to point out that “The Government has never assumed any such responsibility toward its own employees as is now proposed to be placed upon the railroads.”³¹⁹ True. Some of the benefits granted to railroad workers in 1947 were not extended to federal employees until the 1990s and some of them are still not as generous as those the carriers were protesting back in the mid-1940s. Nonetheless, the Association of American Railroads was disingenuous in crying foul. The amendments to the Railroad Retirement Act were proposed in the context of a wide array of attempts to improve social welfare measures in the United States. The Railroad Amendments, sponsored in the Senate by Senator Robert Wagner, had important parallels in the Wagner-Murray-Dingell bills, which did not pass, but the carriers could not have been sure of their failure. About the time that the Railroad Amendments took effect, Senator Langer also began introducing his bills to provide paid maternity leave to married female employees of the federal government. Senator Pepper had introduced his Maternal and Child Welfare Bill in 1945. Langer and Pepper’s bills were defeated, but their plans were part of an ongoing and vibrant conversation about the nature of social welfare in the postwar period. Rhode Island’s Cash Sickness Compensation Act was in operation and other states were studying it with an eye to adopting similar measures. In the 1940s and 1950s there was tremendous growth and expansion of employee fringe benefits that included temporary disability insurance for non-occupational conditions and health insurance for members of an employee’s family. The Association of American Railroads was exaggerating in complaining the new act “represent[ed]

³¹⁸ Ibid., 37.

³¹⁹ Ibid., 38.

wholly new concepts of the responsibility of an industry to its employees.”³²⁰ The legal requirement made it different, but the fundamental idea of tying broad elements of social welfare to employment was already well grounded in the United States.

Puerto Rico

In addition to Rhode Island and the railroads, there was maternity policy developing on the fringes of the nation in the Maternity Law of the Commonwealth of Puerto Rico. Puerto Rico’s maternity policy was more extensive than that of the mainland. A law approved by the Puerto Rican legislature in March, 1942 focused specifically on the condition of pregnant working women. The new law, which went into effect that summer, mandated eight weeks of maternity leave, divided into four weeks before a woman’s expected date of confinement and four weeks after. During this time, a pregnant woman or new mother could not be employed “in any office, commercial or industrial establishment, or public service enterprise.”³²¹ Seven U.S. states had prohibitions on the employment of women before or after childbirth. What made this Puerto Rican law so very different is that on that island this leave was compensated. A woman taking this mandatory eight week leave received half her regular wages or salary.³²²

The law in Puerto Rico specified that a woman’s *employer* paid her half her regular wages for a period of eight weeks while she was on a mandatory maternity leave.³²³ This law, unprecedented in the United States, also guaranteed job protection, “to keep the position open for

³²⁰ Ibid., 3.

³²¹ “Laws of Puerto Rico Act #3” p. 2. file “Working Mothers,” #3-1-2-4-1; Corresp File 1948-1953; Gnl Corresp 1948-1963; OD; RG 86, NACP.

³²² Ibid., 1.

³²³ Ibid.

the pregnant worker.” It prohibited employers from firing pregnant workers “without just cause” and spelled out that “a decrease in the amount of work done because of the pregnancy shall not be considered just cause.”³²⁴ The law provided for an extension of the job-protected leave, though not the pay, in cases of miscalculated due dates, late babies or complications, to insure a fully recovered mother upon her return to work. Failure to comply with the law was a misdemeanor and could result in fines or imprisonment, or both, for any employer who failed to respect the rights of pregnant employees and new mothers.³²⁵

The law providing for a maternity leave and wage replacement during the leave was specifically targeted at pregnant workers. The definition of a woman worker was fairly broad, including office and service workers as well as manufacturing workers. Agricultural workers were not mentioned and were probably not covered. Puerto Rico still had a large agricultural sector in the 1940s. Domestic workers were also not covered and neither were women who took industrial work home from factories and completed it in their own homes. By the 1940s, the Women’s Bureau, other government reformers and labor unions had long campaigned to reduce industrial homework in the United States. In Puerto Rico, however, large numbers of women still depended on this type of work.³²⁶ These homeworkers were not covered by many of Puerto Rico’s labor laws, including the 1942 Maternity Law.³²⁷ It seems that the Puerto Rican law

³²⁴ Ibid., 2.

³²⁵ Ibid.

³²⁶ Eileen Boris explains the struggles over homework in the United States in general and in Puerto Rico in particular in *Home to Work: Motherhood and the Politics of Industrial Homework in the United States* (New York: Cambridge University Press, 1994) and in her chapter in *Puerto Rican Women and Work: Bridges in Transnational Labor*, ed. Altagracia Ortiz (Philadelphia: Temple University Press, 1996).

³²⁷ See Félix O. Muniz-Mas, “Gender, Work, and Institutional Change in the Early Stages of Industrialization: The Case of the Women’s Bureau and the Home Needlework Industry in Puerto Rico, 1940-1952” in Félix V. Matos Rodríguez and Linda C. Delgado, eds. *Puerto Rican Women’s History* (Armonk, NY: M.E. Sharpe, 1998), 191 for the exclusion of industrial homeworkers from the coverage of various labor laws, including the Maternity Law.

applied to comparatively few women. Perhaps the law was not enforced consistently, either.³²⁸ Nonetheless, the Puerto Rican law challenged American capitalism by shifting financial responsibility for a woman's reproductive activity to her employer.

Recognized occasionally by staff at the Women's Bureau and by international scholars, the Puerto Rican law did not get much domestic attention, either as an interesting model or as a cautionary tale. This was not the case with Rhode Island's Cash Sickness Compensation, which came under immediate and sustained scrutiny from coast to coast, "from California to the New York Island."

State Plans

During the same spread of years that the Truman administration supported a national health plan and Senators Wagner, Murray and Pepper and Representative Dingell were introducing legislation for public health benefits, a Republican governor of California introduced a series of proposals for health insurance. Earl Warren never succeeded in securing the passage of his state health insurance plan before he went on to become Chief Justice of the Supreme Court. The plans themselves demonstrate a general climate of possibilities for public health benefits not limited to the federal level. Warren's bills, which differed from each other dramatically as the Governor tried to find a winning formula, failed because of stiff, organized opposition from the medical lobby. Physicians lined up to testify against all his bills. Warren's staff recalled later that they only ever had one really good witness. Unfortunately, even that

³²⁸ Yamilla Azize Vargas identifies the importance of domestic employment and also points out that some of Puerto Rico's protective legislation was not enforced consistently in "At the Crossroads: Colonialism and Feminism in Puerto Rico," in Barbara J. Nelson, Nājamā Chowdhury eds. *Women and Politics Worldwide* (New Haven: Yale University Press, 1994), 631.

witness had a vulnerability that the medical lobby exploited.³²⁹

Warren's staff asked Dr. Nathan Sinai, probably "the nation's foremost medical economist," to testify on behalf of his proposals. Sinai built the program at the University of Michigan School of Public Health which today has an endowed chair named for him. A prodigious researcher, prolific writer and tireless teacher, Sinai, his colleagues and his students wrote about nearly all of the evolving and emerging developments in health policy from the 1930s to the 1960s. But after his careful testimony explaining the benefits of the Warren plan, his opponents had only one question: "What is your degree?"³³⁰

Sinai had a degree in business and a master's and a doctorate in public health. He was also, however, a veterinarian. Veterinary medicine is a pretty good background for public health because of its focus on epidemiology, especially when Sinai received his training. But the hearing room burst into laughter and a reporter quipped "There goes your bill. Can't you see the headlines: 'Horse Doctor Backs Warren Medical Scheme?'"³³¹

The story is emblematic of the power and success of organized medicine in claiming the domain of health policy, not just health practice. Under EMIC, obstetricians especially had fretted at being supervised by an agency of social workers, even though there were plenty of doctors on staff at the Children's Bureau. Repeatedly, they asked Congress to relocate EMIC to the Public Health Service, but Congress declined and the social workers held onto EMIC to the end. By the late 1940s, federal re-organization removed some of the medical programs from the Children's Bureau. Out in California, Dr. Nathan Sinai's testimony in favor of health insurance

³²⁹ Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York: Simon and Schuster, 1997), 164; Daniel J.B. Mitchell, "Impeding Earl Warren: California's Health Insurance Plan that Wasn't and what Might have Been," *Journal of Health Politics, Policy and Law* 27, no. 6 (December 2002): 947-976.

³³⁰ Cray, *Chief Justice*, 164.

³³¹ *Ibid.*

was a joke because he wasn't an MD.

Among the many studies Sinai authored was a comprehensive examination of EMIC and a number of important works on the emerging state disability plans. In the 1940s and early 1950s, four states passed Temporary Disability plans that compensated workers for periods of unemployment due to non-occupational illness and injuries.³³² Harkening back to the problems of unemployment insurance, the U.S. Department of Labor observed wryly that “Statutory differences in benefits for disabilities due to pregnancy and childbirth influence the interstate comparability of experience.”³³³ Rhode Island’s plan, passed in 1942, was the first and for a decade the only one that covered normal pregnancy and delivery as a compensable disability. Until 1951, New Jersey excluded pregnancy, and any disabilities arising from pregnancy, from coverage. In 1951-52 New Jersey amended its plan to provide coverage for four weeks before and four weeks after expected date of confinement. The California plan would not cover normal pregnancy and delivery, or pregnancy complications during pregnancy, but it could compensate workers for lost wages if a pregnancy-related disability continued more than twenty-eight days after delivery. In New York, a pregnant woman or new mother would find no help from the state disability insurance plan unless she returned to covered employment for at least two consecutive weeks after delivery or pregnancy termination and then subsequently found herself disabled by a pregnancy-related condition. Such a provision covered only a very small number of New York’s working new mothers.³³⁴

³³² Rhode Island, California, New Jersey and New York

³³³ US Department of Labor, “Significant Temporary Disability Insurance Data 1953-1954,” (January 1956): 9.

³³⁴ Dahm, “Experience and Problems,” 8.

The Rhode Island Cash Sickness Compensation program, which began making payments in April 1943, originated in the state's Unemployment Insurance Board. Rhode Island required employee, as well as employer, contributions to Unemployment Insurance, whereas most states required contributions only from employers. Contributions were also unusually high in Rhode Island. The state was also heavily industrialized and had a very healthy economy in the early 1940s. Consequently, Rhode Island had built up a large reserve of funds in Unemployment Insurance. Instead of reducing contributions across the board or eliminating the employee contribution entirely, members of Rhode Island's Unemployment Insurance Board, Social Security Board, and some labor leaders backed legislation that would use some of the employee contribution to create a program for temporary disability insurance.³³⁵ Rhode Island's Cash Sickness Compensation Act provided payments directly to workers temporarily unable to work, irrespective of their medical costs. It replaced lost wages instead of providing care and thus resembled the private temporary disability benefits or sickness and accident benefits that some firms offered their employees.

Rhode Island's law suggested that a generous welfare state lay just around the corner. The experiment drew the attention of many, both those eager and those fearful of such an outcome. When other states began to considering similar plans, they looked to Rhode Island as a roadmap of successes and of pitfalls.³³⁶ Advocates of public systems of health insurance also watched Rhode Island closely for what they could learn about public need and support, systems of financing, and relationships between the state and employers and the state and the medical

³³⁵ John E. Farrell, "An Experiment in Sickness Insurance," *Rhode Island Medical Journal* 25, no.11 (November, 1942): 229.

³³⁶ Nathan Sinai, *An Analysis of Rhode Island Cash Sickness Compensation* (Providence: Rhode Island Department of Economic Security, 1950), 25 and *passim*.

profession. Supporters of the Wagner-Murray-Dingell Bills turned to Rhode Island's experiences when drafting sections on both Temporary Disability and Maternity benefits. The federal Women's Bureau mentioned this state law when dealing with proposed revisions to the International Labour Organization's Maternity Convention. Just a year after Cash Sickness Compensation began disbursing payments, Rhode Island's Governor, J. Howard McGrath, proposed that the state also offer hospitalization insurance to those covered by Unemployment Insurance and Cash Sickness Compensation because the rising costs of medical care made special and extreme demands upon a worker's finances during illnesses, while normal expenses persisted.³³⁷

Opponents of government-sponsored health insurance or other expansions of social security also watched Rhode Island's experiment carefully. Cash Sickness Compensation relied solely upon employee contributions, which provided some insulation against business opposition. But insurance companies and especially physicians were wary. Months before the fund made any payouts, John E. Farrell, a Providence physician and head of the Rhode Island medical society, published a highly critical article in the *Rhode Island Medical Journal*. He complained about the lack of professional input. "Significant in the entire procedure was the failure to consult at any time the medical profession upon whom it is now apparent the burden for much of the future success of the plan will devolve."³³⁸ He expressed dissatisfaction that other practitioners of "the healing art" (meaning osteopaths and chiropractors) could provide the opinion and paperwork verifying an employee's illness. He disliked that the "definition of

³³⁷ Katherine G. Clark, "Rhode Island Breaks New Ground in Social Insurance," *Medical Care* 4, no. 2 (May 1944): 123, 134.

³³⁸ Farrell, "An Experiment in Sickness Insurance," 230.

sickness is very broad.”³³⁹ Writing near the anniversary of Cash Sickness Compensation’s actual début, another writer for a medical journal was more candid about the source of major tension between doctors and this program. “The program as a whole has not been viewed too kindly by the medical profession. Many doctors are said to have regarded it as ‘an entering wedge for socialized medicine’ . . . On the other hand, some physicians feel that plans such as this will serve to nullify the demand for federal legislation.”³⁴⁰ Most of them were upset that their expert opinion had not been sought.

Doctors delayed filling out and returning forms. They frequently left blanks, especially in the section that asked for an estimate of the duration of an illness. Doctors perceived the second opinion of the board’s own medical examiners as an aspersion upon their skill, expertise, or integrity. Outright opposition and systematic foot-dragging by physicians led to reforms enacted in 1949. These changes to the program rationalized the waiting period and the benefit year, increased the minimum and the maximum weekly benefit, and lengthened the maximum number of compensable weeks from 20 ¼ weeks to 26 weeks.³⁴¹ The procedures for medical reviews were changed to involve any doctor wishing to register as an impartial examiner and ongoing communication and education addressed the problems of incomplete forms. Those who administered the program learned the fundamental lesson that any program touching upon the vigorously defended turf of American medicine had to respect the best interests of physicians.

In 1950, Sinai completed a study of Cash Sickness Compensation for the Rhode Island Department of Employment Security. In this study, Sinai’s first comment about the coverage of

³³⁹ Ibid., 230.

³⁴⁰ Clark, “Rhode Island Breaks New Ground in Social Insurance,” 127.

³⁴¹ Sinai, *An Analysis of Rhode Island Cash Sickness Compensation*, 6.

pregnancy under the plan was that “Pregnancy, too, arises as a perennial administrative problem in the Cash Sickness program.”³⁴² In an earlier study of several disability plans, Sinai described the conundrum.

The inclusion of pregnancy...almost assures administrative chaos. Physiology shades into pathology; any arbitrary line vanishes between claimants who are unable to perform their customary work and claimants who are able. An existing tradition, a quickly-established custom, a physician’s viewpoint, a patient’s desire—any or all of these influences may become involved in the decision that an employee should discontinue work.³⁴³

Initially, Rhode Island’s Cash Sickness Compensation Plan made no distinction between pregnancy and other conditions. In fact, it made no mention of pregnancy whatsoever. The Unemployment Compensation Board decided that the plan covered pregnancy; it may be that Rhode Island’s large female workforce prevented them from excluding pregnancy entirely.³⁴⁴ In 1949, Sinai observed that “not mention[ing] pregnancy in the Act made it certain that the condition would be presented as a cause of illness.”³⁴⁵ Writing in 1955, and clearly reflecting upon Rhode Island’s experience, the economist Margaret Dahm observed that “To omit from the law any reference to pregnancy does not result in nonpayment of benefits, but merely leads to confusion.”³⁴⁶

In the plan’s early years, pregnancy claims amounted to almost a third of the money the plan paid out. To be sure, Rhode Island had a higher rate of female labor force participation than

³⁴² Ibid., 15.

³⁴³ Nathan Sinai, *For the Disabled Sick: Disability Compensation* (Ann Arbor: School of Public Health, University of Michigan, 1949), 122.

³⁴⁴ Ibid., 29.

³⁴⁵ Ibid.

³⁴⁶ Dahm, “Experience and Problems,” 30.

most states, but this drain on the fund probably motivated the other three states who soon developed Disability Plans to exclude pregnancy.³⁴⁷ In response to this situation, the board that oversaw the Rhode Island plan quickly began to reduce the weeks of coverage for pregnancy and to increase the measure of a woman's labor market commitment prior to her claim. In 1944, after barely a year of operation, a bill was introduced which would have reduced payments for pregnancy to a maximum of ten weeks.³⁴⁸ That bill failed. However, in 1946 an amendment did reduce pregnancy benefits to a maximum of fifteen weeks for a normal pregnancy and delivery.³⁴⁹ Despite this reduction, the fund still paid out a large percentage of total benefits for pregnancy cases. In 1950, Sinai discovered an administrative attempt to curtail these payments in the form of Form C.S.28. Form C.S.28, sent to pregnant claimants, informed them that department policy was to allow pregnancy benefits for only six weeks following delivery.³⁵⁰ Sinai questioned this practice and noted that it was in conflict with a section of the act which indicated coverage of normal pregnancy and birth for a period of not more than fifteen weeks. This subsection, the 1946 amendment that had itself reduced pregnancy benefits, had problems of its own. It allowed for payments of longer duration in cases of "unusual complications arising as a result of childbirth," but did not elaborate on what might constitute those "unusual complications."³⁵¹ In 1951, another amendment restricted payments due to pregnancy to a total

³⁴⁷ Sinai, *An Analysis of Rhode Island Cash Sickness Compensation*. See also Dahm, "Experience and Problems," 22.

³⁴⁸ Adela Stucke, "Notes on Compulsory Sickness Insurance Legislation in the States, 1939-1944," *Public Health Reports* 60, no. 52 (December 28, 1945): 1554-1555.

³⁴⁹ Grant M. Osborn, *Compulsory Temporary Disability Insurance in the United States* (Homewood, IL: Richard D. Irwin, Inc. 1958), 116.

³⁵⁰ Sinai, *An Analysis of Rhode Island Cash Sickness Compensation*, 15, 35.

³⁵¹ *Ibid.*, 15.

of 12 weeks with six of those weeks before delivery and six postpartum, barring complications.³⁵² Margaret Ackroyd, Chief of the Division of Women and Children in Rhode Island's Department of Labor, worried that pregnancy benefits would face more reductions in forthcoming years.³⁵³

Despite reductions in coverage, many women still took advantage of these benefits. In 1955, after two actual amendments to reduce this portion of total payments as well as some administrative finagling, pregnancy benefits constituted 22 percent of total payments.³⁵⁴ Much of the opposition to pregnancy benefits in Rhode Island stemmed from the financial demands they imposed. In a letter to the Women's Bureau in 1951, Ackroyd lamented that "There is very little sympathy apparently from any quarter for the inclusion of pregnancy benefits in cash sickness coverage." She went on to explain that doctors did not consider pregnancy to be a sickness and that "labor groups...[and] others" thought of providing benefits during pregnancy as a "gift" and "a serious drain on the fund."³⁵⁵ The Board itself observed that:

From a theoretical standpoint, the payments are made to women who are attached to the labor market. In actual practice, however, this is not the case. Even a cursory survey of the pregnancy claims will indicate that the women have left the labor market and, in most instances, do not intend to return to work after the birth of their child.³⁵⁶

This state plan was financed entirely through employee contributions. Many people questioned a

³⁵² Osborn, *Compulsory Temporary Disability Insurance*, 116 and Margaret F. Ackroyd, Providence, RI, to Margaret L. Plunkett, Women's Bureau, Washington, DC, May 18, 1951, "Working Mothers," file #3-1-2-4-1; Corresp File 1948-1953; Gnl Corresp 1948-1963; OD; RG 86, NACP.

³⁵³ Ackroyd to Plunkett, May 18, 1951.

³⁵⁴ Osborn, *Compulsory Temporary Disability Insurance*, 116-117.

³⁵⁵ Ackroyd to Plunkett, May 18, 1951.

³⁵⁶ Rhode Island Unemployment Compensation Board, "What Changes are Necessary in the Cash Sickness Act?" (November 28, 1947): 12.

woman's right to insurance from this fund, to which she had herself contributed, because she might not soon return to covered employment.

As the first state with a system of non-occupational sickness and disability insurance, Rhode Island had little practical experience to draw on at the same time that it endured tremendous scrutiny. In 1944, 1945 and 1949, Cash Sickness Compensation operated at a deficit despite an increase in the contributions in 1946 and a massive cash infusion from Unemployment Insurance in 1949.³⁵⁷ Pregnancy, which despite reductions, continued to constitute the single largest category of claims, seemed to threaten the solvency and continued operation of the plan as a whole. In its first decade of operation, Cash Sickness Compensation paid out between 17 and 30 percent of total disbursements for pregnancy claims.³⁵⁸ In 1954, pregnancy claims amounted to 23.9 percent of all benefits paid out.³⁵⁹ Pregnancy was often linked to “double dipping,” the practice of collecting both workman's compensation and Cash Sickness Compensation, as a troubling source of graft and inappropriate claims.

In Rhode Island, the large number of pregnant claimants and their drain on the fund threw the question of pregnancy coverage into high relief. Almost every discussion of the Cash Sickness Compensation Act eventually got around to pregnancy. The legislature's and board's attempts to stem the drain by reducing pregnancy coverage created a sort of maternity benefit for working mothers. Pregnancy itself, and not any disability resulting from it, was enough to make a claim, but it would be a limited claim. Sinai criticized this shift as “only a weak attempt to

³⁵⁷ Sinai, *An Analysis of Rhode Island Cash Sickness Compensation*, 9.

³⁵⁸ Dahm, “Experience and Problems,” 22.

³⁵⁹ *Ibid.*, 8.

exercise some financial control”³⁶⁰ and not a real resolution of the underlying problems pregnancy posed for Rhode Island’s program or for disability insurance in general.

Writing in the late 1950s, one author observed that “Few people would question that pregnancy benefits are in the interest of maternal and child health.”³⁶¹ But he then went on to explain that their high cost and the fact that they were seen as grants to “nonpermanent members of the labor force” made them a threat to the success and expansion of disability insurance. “Many disability insurance advocates,” he wrote, wanted maternity benefits, “but as part of a broad national health program, financed largely from general tax revenues.”³⁶² Until then, the patchwork of public-private welfare system in the US seemed better off, more politically and financially stable, without worrying about pregnant women. As a result, New Jersey, New York and California restricted coverage of pregnancy and pregnancy-related conditions in their own plans. The Rhode Island experiment, troubled as it was by pregnancy claims, contributed to effective opposition to disability plans in additional states.

What’s a Pregnant Worker to Do?

A pregnant worker in the postwar period fared best working on the railroad. Indeed, the maternity benefits under the Railroad Retirement Act are still among the best ever seen in the United States and many women today would wish they had them. Strong unions and the constitutional provisions that allowed federal involvement led to this generous plan. However, the benefits were so generous partly because relatively few women worked for railroad

³⁶⁰ Sinai, *For the Disabled Sick*, 122.

³⁶¹ Osborn, *Compulsory Temporary Disability Insurance*, 117.

³⁶² *Ibid.*

companies. Legally, pregnant workers enjoyed job protection and wage replacement in Puerto Rico, but it is unclear how effective the Puerto Rican law was in securing improvements for substantial numbers of women workers. Furthermore, assigning the burden of financing the leave to a pregnant worker's employer could create a hiring preference for men. Scholars and activists at the International Labour Organization pondered this problem in considering various different systems of paying for maternity provisions.

Federal legislation to pay for maternity provisions out of general revenue or payroll taxes failed in the postwar period. Instead, state disability and unemployment insurance programs provided the majority of public provision of benefits during pregnancy. In Rhode Island, this benefit was through the Cash Sickness Compensation program. In the rest of the country, it was through Unemployment Insurance, available only in some states to pregnant workers. Both systems had flaws. Rhode Island's plan was probably less litigious, because it had no basis in experience rating, so opposition to individual cases was not built into the system. It did depend on the cooperation of doctors, with their patients and with the plan's administrators. Therefore, the widely studied effect of organized medicine on the expansion of the welfare state did confound this program and hobble it occasionally. However, Cash Sickness Compensation was fairer and less capricious than Unemployment Insurance which varied by state and occupation.

In the very success of Rhode Island's Cash Sickness Compensation lies an irony. The program's conception lay in Rhode Island's nearly unique cash reserve in its unemployment insurance system. Most states had no such nest egg to start such a program. On the other hand, Rhode Island's exceptionally high levels of female labor force participation, and the very popularity of the pregnancy benefits which women's paid work entitled them to, paid for many Rhode Island babies during the baby boom, so many, in fact, that the fund threatened to collapse.

Watching this from outside the state, other reformers drew back from providing pregnancy or maternity benefits in plans they created or imagined for their own states. Most of the other states reached the conclusion that husbands or their employers should pay the cost of maternity care for the baby boom, and, since mothers were exiting the workforce, they needed no wage replacement. Successful gestation of maternity plans in Rhode Island may have aborted the chances for similar experiments elsewhere, either in different states or on a national stage.

The experiences of women who sought wage replacement during some part of their transition to motherhood foreshadows the experiences of their daughters in the 1970s. In the 1970s, pregnant workers who lost their jobs still had trouble collecting unemployment compensation, depending, still, upon their state of residence, their occupation, and the luck of the draw at appeals boards. The role of local officials in scripting the rights of pregnant working women also emerges in the varying school board attitudes towards pregnant teachers in the 1960s and 1970s. Doctors, jealous of their professional turf, still guarded against movements towards national health care. But they also themselves vacillated between regarding pregnancy as physiologically normal and therefore not a sickness, and pathologizing pregnancy in order to extend their professional reach and expand their professional expertise. By the 1970s, an emerging women's health movement raised profound challenges to the medicalization of birth and the power of doctors. The involvement of organized medicine, the haphazard nature of coverage and especially the profound suspicion of pregnant workers who sought benefits tied to their employment all characterized the shaky and meager welfare state policies of the postwar period and beyond. These factors also shaped the provision and enjoyment of the private fringe benefits whose growth in the postwar period was the real expansion of the American welfare state.

CHAPTER 4:

COLD WAR/STILL BIRTH: MATERNITY POLICY AND THE RED SCARE

Overlapping networks of women reformers and labor union leaders saw maternity policy as an all-important key to improving the status of women workers as well as protecting maternal and infant health. In the US, social justice women reformers in the Women's Bureau and the Children's Bureau formed the core of the political coalition in favor of maternity benefits. They had some allies in Congress within the Democratic Party such as Florida Senator Claude Pepper and were backed by academics and reformers in the United States and internationally. They were also joined by "labor feminists," such as those described by Dorothy Sue Cobble in *The Other Women's Movement*, from within both female-majority unions and the heavy-industry unions of the CIO.³⁶³ Some may have been sympathetic to the Soviet Union at one time; more were liberal anti-Communists and internationalists. Cobble defines labor feminists as feminists who put the needs of working-class women at the forefront of feminism and regarded unions as the major vehicle for benefitting the lives of working-class women. Labor feminists were interested in social and economic reforms as well as legal changes for women and tended to emphasize race and class as well as gender discrimination. They believed that equality could be achieved by accommodating gender difference, that is, by recognizing unique conditions of women that could be accommodated by employers and government benefits. In their view, special benefits for women were an intermediary stage until broader benefits available for men as well as women could be achieved.

³⁶³ Dorothy Sue Cobble, *The Other Women's Movement: Workplace Justice and Social Rights in Modern America* (Princeton: Princeton University Press, 2004).

Social justice feminists and labor feminists worked with insiders at the International Labour Organization to strengthen international standards for maternity provision and within labor unions to press for maternity benefits as part of collective bargaining and/or national policy. Social justice feminists and labor feminists were alive and pressing for maternity benefits in the 1940s and 1950s, but they faced opposition from the AMA as well as from leaders of American business who saw maternity benefits as a Communist plot threatening free enterprise, private medical practice, and the American family. Anti-Communist businessmen and physicians opposed organized labor, socialized medicine, and New Deal reform.

In the 1940s and 1950s, this cross-class coalition of women activists suffered one crushing defeat after another as they tried and failed to expand maternity benefits in a rampantly anti-Communist political climate. In this conflict, maternity policy was not only a real issue of benefits, but a weighty symbolic one as well. Government agencies as well as labor unions and prominent left-feminists championed maternity benefits. These individual leaders were Red-baited and many lost their positions of power or influence. As importantly, anti-Communist rhetoric implied that maternity benefits itself was not simply a labor union demand but a Communist idea, a threat to capitalism, freedom, and the nuclear family. It was this double stigma from the Red Scare—threats to the careers of major advocates of maternity insurance as well as associating the idea of maternity benefits with socialism and communism—that was the double legacy of the Red Scare for American mothers. The effects were immediately felt because New Deal and WWII policies that pointed in the direction of government payments for maternal health care were dismantled before and during the Korean War. Worse, the effects were lasting as the Red Scare either removed or constrained a key generational cohort of maternity activists. This story recounted here cannot be understood apart from the devastation to political and

professional careers of major advocates of maternity benefits. Finally, anti-communist critiques of maternity policy drastically narrowed the scope of acceptable American debate about social responsibility for reproduction for decades, until, possibly, the present.

Leila Rupp and Verta Taylor called the postwar years “the doldrums” of American feminism, a period after the passing of the First Wave (associated with woman’s suffrage and birth control advocacy), but before the second (beginning in the 1960s), when only a few National Women’s Party loyalists carried the banner of equal rights.³⁶⁴ Most labor historiography characterizes this intermediate period as one of retrenchment and labor- management accord. Recently, both women’s historians and labor historians have revised this conclusion, detecting more activism. Labor historians such as Kevin Boyle, Nelson Lichtenstein, and Jennifer Klein find unions insistently pushing for the expansion of social programs and militant about economic justice.³⁶⁵ Women’s historians have also begun to see the postwar period as full of proto-feminist roots and even feminist activity and thinking. Amy Swerdlow, Kate Weigand and Daniel Horowitz rescue the feminist critiques and credentials of American Communists and fellow travelers from the dust bin of the Red Scare.³⁶⁶ Nancy Gabin and Dorothy Sue Cobble find these years not only rich with labor activism but with a blossoming labor feminism as women pressured male unionists to recognize and address women’s issues and also developed their own

³⁶⁴ Leila J. Rupp and Verta Taylor, *Survival in the Doldrums: The American Women’s Rights Movement, 1945 to the 1960s* (New York: Oxford University Press, 1987).

³⁶⁵ Kevin Boyle, *The UAW and the Heyday of American Liberalism, 1945-1968* (Ithaca: Cornell University Press, 1995) and Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton: Princeton University Press, 2002). See also Judith Stein, “The Ins and Outs of the CIO,” *International Labor and Working Class History* 44 (Fall 1993): 53-63.

³⁶⁶ Amy Swerdlow, “The Congress of American Women: Left Feminist Peace Politics in the Cold War,” *US History as Women’s History: New Feminist Essays* eds. Linda K. Kerber, Alice Kessler-Harris and Kathryn Kish Sklar (Chapel Hill: University of North Carolina Press, 1995), 296-312; Kate Weigand, *Red Feminism: American Communism and the Making of Women’s Liberation* (Baltimore: The Johns Hopkins University Press, 2001); Daniel Horowitz, *Betty Friedan and the Making of The Feminine Mystique: the American Left, the Cold War and Modern Feminism* (Amherst: University of Massachusetts Press, 1998).

networks.³⁶⁷ Cynthia Harrison and Landon R.Y. Storrs find activist bureaucrats working to advance women's rights and improve conditions for working women.³⁶⁸ Cobble, in particular, considers postwar labor feminists not only precursors to the second wave, but also important, viable, and somewhat successful feminists in their own right. A nuanced, sensitive and broad account of labor feminists who did not rise to the top of the labor hierarchy, *The Other Women's Movement* locates strategically placed and influential mid-level women union leaders who developed their strategies and goals for an equality that accommodated difference. Cobble identifies labor feminists mostly in the non-Communist, or even the anti-Communist, liberal unions who enjoyed some moderate successes in large part because they were not Communists and had not been tainted by the Red Scare.

By contrast with her view, my research confirms the conclusions of Storrs, Swerdlow, Weigand, and Horowitz, who conclude that the Red Scare devastated American feminism. Swerdlow and Weigand describe the crushing effects of anti-communism on leftist individuals and organizations while Horowitz diagnoses permanent psychological scars from the Red Scare that would haunt even the Second Wave of feminism for decades. Storrs shows how anti-communists blurred a fear of leftist influence with a discomfort with women in government and specifically targeted left leaning women within the federal bureaucracy. The Red Scare is central to my story about maternity benefits. For all Cobble's heroic and exquisite rescue of the labor

³⁶⁷ Nancy Gabin, *Feminism in the Labor Movement: Women and the United Auto Workers, 1935-1975* (Ithaca, NY: Cornell University Press, 1990) and Dorothy Sue Cobble, *The Other Women's Movement*; Susan Hartmann, *The Other Feminists: Activists in the Liberal Establishment* (New Haven: Yale University Press, 1998).

³⁶⁸ Harrison, Cynthia. *On Account of Sex: The Politics of Women's Issues, 1945-1968*, (Berkeley: University of California Press, 1988); Landon R.Y. Storrs *The Second Red Scare and the Unmaking of the New Deal Left*, (Princeton: Princeton University Press, 2012); Landon R.Y. Storrs, "Red Scare Politics and the Suppression of Popular Front Feminism: The Loyalty Investigation of Mary Dublin Keyserling." *Journal of American History* 90, no. 2 (September 2003): 491-524; Landon R.Y. Storrs, "'Attacking the Washington Femocracy': Antifeminism in the Cold War Campaign against 'Communists in Government.'" *Feminist Studies* 30, no. 1 (Spring 2007): 118-152.

feminists' struggles and successes, the truth is that the conservative political climate of the 1950s, and especially the virulent expression of that conservatism in the Red Scare, did severely and profoundly constrain the available political and economic possibilities for pregnant working women and new mothers. Furthermore, American anti-Communism circumscribed the bounds of debate in ways that crippled liberals and leftists who were not themselves communists. Even some of Cobble's non-Communist labor feminists succumbed to the ravages of the Red Scare and others were hurt by those losses.

While Communist orthodox sectarianism and anti-Communist hysteria broke many bonds between Communist and non-Communist activists, including unionists and women, some ties remained. Years of cooperation during the Popular Front and World War II were not always thrown aside opportunistically. In the case of social justice feminists and labor feminists, an educational sisterhood had formed among alumnae of certain women's colleges; the summer schools for women workers, or other academic relationships, nurtured connections. The Red Scare not only threatened the work of Communists and fellow travelers but also threatened the resources and ideas that social justice feminists could draw on. Sometimes those ideas themselves, such as public social support for maternity provisions, were casualties of the Cold War. Cobble correctly reminds us that there was still a feminist voice in the "doldrums" that came from within the labor movement. But the accomplishments, even the discourse of labor feminists, was clearly limited by the Red Scare.

This chapter examines how and why the Red Scare narrowed any viable discussions about social benefits by looking at the case of maternity policies and proposals. American anti-Communism directly and indirectly removed from their official positions some of the more prominent proponents of maternity policy. The electoral defeat of Senator Claude Pepper

weakened chances for expanded maternity provisions in the postwar period. The Red Scare also decimated organizations that had worked to expand maternity benefits and that might have provided necessary pressure for their expansion had they not been special targets of the conservative political climate.

Ironically, in the postwar years American feminists could succeed in international organizations, while ceding ground at home. But their very success with the International Labor Organization was used against them. William McGrath, conservative American businessman and employer delegate to the ILO, used the details of the Maternity Convention to attack international cooperation in general. He turned social benefits for pregnant women into a red herring, meant to distract from his real Cold War mission. What McGrath sought to trivialize and dismiss, became, in discussions about the Korean War, even more symbolic and potentially dangerous, a fundamental threat to free enterprise and national values.

Red Pepper

In 1945, the Pepper Bill would have extended EMIC and made it a permanent system of maternal and child health insurance. However, as described in the previous chapter, this extension of EMIC suffered a quick end due to the welfare policy embraced by the Social Security Board, which preferred to include maternity benefits within a larger bill, the declining influence of the Children's Bureau, and, of course, to the end of the war. EMIC demonstrated both the potential of broad-based, national health programs and the power of the war effort to elicit cooperation among strange bedfellows.³⁶⁹ The demise of EMIC marked a political turning point and diminished chances for national health insurance programs of any kind. The demise of

³⁶⁹Klein, *For All These Rights*, 169-172; Richard A. Meckel, *Save the Babies: American Public Health Reform and the Prevention of Infant Mortality, 1850-1929* (Ann Arbor: University of Michigan Press, 1998), 224-5.

EMIC should also be understood in terms of the diminishing fortunes of its major political supporters.

National health insurance was a central component of the political philosophy of Claude Pepper throughout his career. Pepper himself quipped that he was the first New Dealer, or that he was a New Dealer before there even was a New Deal. Tracy E. Danese, in his study of Claude Pepper and his political nemesis, Ed Ball, writes that Pepper, “if not the first New Dealer, may be justly said to have been the last,” because the liberal ideologies Pepper evinced and developed early in politics continued to inform his long career.³⁷⁰ He served in the Florida House of Representatives from 1929-30 and then the US Senate from 1936-50. After a stint in the private sector, he returned to Washington in 1963, this time as a congressional representative from Miami. Unshakable, he remained in office until his death in 1989, ultimately serving with eight different presidents, none of whom, in his view, measured up to his hero, FDR. In the House, he became known as the guardian of Social Security, partly because of the Congressional district he represented, heavily populated with retirees, and partly because of his own advancing age. He was in his early sixties when he was first sworn in in the House. Returning to Washington, Pepper safeguarded Social Security, worked to expand it, and to pass Medicare and Medicaid.

The son of a sharecropper, Pepper had had uneven and limited access to health care growing up. When the poor boy from rural Alabama entered college in 1918, he was drafted into the Student Army Training Corps. While the First World War ended a month later, Pepper was still technically in the army when he was injured in training. The Army provided medical care and even rehabilitation. Rehabilitation, for Pepper, meant sending him on to law school—at Harvard. Danese writes that the quality and availability of medical care through the army and

³⁷⁰ Tracy E. Danese, *Claude Pepper and Ed Ball: Politics, Purpose, and Power* (Gainesville: University Press of Florida, 2000), 39.

then later through the student dispensary at Harvard made a “lasting and favorable impression” and inspired Pepper’s concern with quality medical care and unlimited access to it.³⁷¹

In the US Senate, Pepper quickly proved himself a staunch and reliable supporter of President Roosevelt, even tentatively backing FDR’s controversial court-packing scheme. Working tirelessly on behalf of all sorts of New Deal legislation from minimum wage to national health insurance, Pepper built close ties to welfare activists and labor unions. Pepper, with a seat on the Senate Foreign Relations Committee, was also an early anti-fascist. He backed the unusual third term for President Roosevelt and willingly followed him along the road to the Second World War, sponsoring the Lend-Lease Bill. Pepper’s liberalism and his close ties to the President served his political career, and his state. When Truman took office, Danese explains, the political terrain shifted in Florida, Washington, and the world. Pepper began to lose his footing. Pepper’s egalitarian attitudes on race, downplayed during his early years in office, came into conflict with southern white chafing at the early civil rights movement.³⁷² More importantly, Pepper had managed to alienate substantial sectors of Florida business, especially the powerful Ed Ball, who managed the extensive DuPont Florida interests. Support for labor union rights and higher taxes did not endear him to the business community. However, the specific enmity between Pepper and Ed Ball had a variety of other causes as well, some of which involved personal animosity.

Pepper’s ongoing interests in national health insurance proposals, especially EMIC, worried the medical profession. The Medical Society of New York County opposed the Pepper

³⁷¹ Ibid., 47.

³⁷² On Pepper’s role in improving health care for African Americans in the south, see Thomas, Karen Kruse. *Deluxe Jim Crow: Civil Rights and American Health Policy, 1935-1954* (Athens, GA: University of Georgia Press, 2011), 104-107, 124-129.

Bill and editorialized in their journal, *New York Medicine*, that obstetrics should not be “socialized” because removing maternity care from private practice would reduce the incentive for improved obstetrical standards. The editorial, “Why Socialize Obstetrics?” sarcastically suggested that those concerned for babies might just as well suggest socializing construction and textile industries to provide for the needs of babies.³⁷³ The American Medical Association, freshly mobilized as a lobbying organization in the wake of the various Wagner-Murray-Dingell Bills, targeted Pepper for defeat. In the 1950 election, Florida doctors paid a special \$100 assessment in a “season for canning Pepper.”³⁷⁴

Where he had once had friends, Pepper now had enemies--powerful ones. On a national level, Pepper had little respect for Harry Truman and actively campaigned against him in the 1948 Democratic primary. He opposed many of the President’s initiatives, especially Truman’s foreign policy--the peacetime draft, parts of the Marshall Plan, military aid to Greece and Turkey, and the Truman Doctrine.³⁷⁵ According to his victorious challenger, George Smathers, it was President Truman himself who suggested he run for Pepper’s seat.

Pepper’s approach to foreign policy and his understanding of the Soviet Union differed from Truman’s. Pepper was a close ally of Henry Wallace and supported his more accommodationist philosophy as well as his more progressive domestic proposals. Pepper’s internationalism left him open to charges of being soft on communism. Domestically, Pepper

³⁷³ “Editorial Assails Free Maternity Bill,” *New York Times*, 6 Sept , 1945, file “Maternity Leave,” Records RE: Women Workers in WWII 1940-1945; Women’s Bureau Division of Research (Women’s Bureau Div. Res.); Record Group 86 (RG86); National Archives, College Park, MD (NACP).

³⁷⁴ Monte M. Poen, *Harry S. Truman Versus the Medical Lobby: The Genesis of Medicare* (Columbia, MO: University of Missouri Press, 1996), 180, describes “Season for Canning Pepper” table top ads placed on the breakfast trays of patients in one Florida hospital.

³⁷⁵ Danese, *Claude Pepper and Ed Ball*, 199-200. The other major study of the 1950 campaign is James C. Clark, *Red Pepper and Gorgeous George: Claude Pepper’s Epic Defeat in the 1950 Democratic Party* (Gainesville: University Press of Florida, 2011).

continued to support progressive causes. Although a key sector of Florida's labor vote opposed him, siding with Ed Ball in an ongoing fight over a railroad, Pepper remained a friend to organized labor while nationally the political climate began to shift towards a more business-centered labor law and practices.

Danese argues that Pepper's foreign policy approach, his internationalism and especially his friendship toward the Soviet Union were out of step with national leadership and the American public, including Florida voters. He suggests that Pepper was perhaps naive or misguided about the Soviet threat. In any case, Pepper's views and statements and actions were fair targets in the campaign. His opponents were right to raise them and if he suffered, politically, from his internationalism and his accommodations, he had brought that on himself.³⁷⁶ However, Danese takes pains to downplay the Red Scare, when, in fact, lurid allegations of communist sympathizing dominated the campaign.

In *Mudslingers: The Top 25 Negative Political Campaigns of All Time*, Kerwin C. Swint includes this race as "one of the most negative ever." Pepper's opponent supposedly told audiences that Pepper had a sister who was a "thespian," and a brother who was a "homo sapien" and Pepper himself had once practiced "celibacy." Whether this play on Cold War and sexual fears of an uneducated electorate is true or apocryphal, the rest of the campaign was clearly rampant red baiting. In a campaign funded in part by business interests, the challenger, George Smathers, impugned Pepper's loyalty and painted him as an extremist with ties to international Communism. In the final days of the campaign, a booklet called "The Red Record of Claude Pepper" circulated around the state. A montage of speech excerpts, congressional voting record and photographs of Pepper with well-known leftists, including the African-American actor and

³⁷⁶ Danese, *Claude Pepper and Ed Ball*, passim, see especially 192 and 206.

singer Paul Robeson, the anonymous booklet was what Swint calls “a textbook example of how to smear an opponent” because of the way it selectively stretched the truth and because of its presentation and timing. After its release, an incensed Pepper had little time and could get little press coverage to rebut the charges; Smathers won in a landslide.³⁷⁷

Musing on the lost election and his virtual banishment from statewide office, Claude Pepper confided to his diary that “I am not as bad as many think and not really very radical.”³⁷⁸ Nonetheless, he had fallen victim, dramatically, to the Red Scare. When he eventually resumed his political career and was elected to the House, Pepper did resume his attention to health care. In addition to his special advocacy for older Americans—being dubbed “Mr. Social Security”—Pepper continued to advocate for women’s rights as well. In the House, Pepper supported the Equal Rights Amendment and even made a TV ad urging older women to back it.³⁷⁹ In the late 1980s, an “ancient Claude Pepper...slumped at the microphone” as the Chair of the House Rules Committee that heard the early versions of what became the Family and Medical Leave Act.³⁸⁰ He did not live to see it pass.

The loss of his voice in the Senate was consequential for the cause of national health insurance and national maternity programs. In the 1950s, his defeat in the Senate removed one of the staunchest supporters for an expanded welfare state that might have addressed the needs of

³⁷⁷ Kerwin C. Swint, *Mudslingers: The Top 25 Negative Political Campaigns of All Time* (Westport, CT: Praeger Publishers, 2006; repr., New York: Union Square Press, 2008), 47-48, 53-54. Cover of “The Red Record” is reproduced on p. 50. See also, Thomas, *Duluxe Jim Crow*, 256

³⁷⁸ Claude Pepper Diary, Nov. 17, 20, 1955, quoted in Danese, *Claude Pepper and Ed Ball*, 218.

³⁷⁹ Claude Pepper Ad, Produced by Beber, Silverstein & Partners, Dec 30, 1981, in National Organization for Women Video Tape Collection, 49vt, Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Cambridge, MA.

³⁸⁰ Ronald Elving, *Conflict and Compromise: How Congress Makes the Law*, (New York: Simon and Schuster, 1995). 71, 83.

pregnant working women. Pepper, for instance, was working in private law practice in Florida when the US Senate held hearings to re-authorize EMIC for Korean War servicemen.

During the immediate postwar period many different reforms were proposed, but by the time Pepper returned to Washington in the House of Representatives there was much less potential for broad-based social programs for him to champion. He did work to expand Social Security and to establish Medicare and Medicaid but many options that once seemed possible to him had been foreclosed by AMA opposition, the assault on organized labor, the shift towards private benefits, and the Red Scare.

The Red Scare and American Labor Unions

At the end of World War II, Jennie Mohr and others at the Women's Bureau had concluded that the best way to secure maternity protections for working women was through collective bargaining. Although an entirely different approach than passage of government-funded health care, it depended on the same political climate, one favorable toward expansion of federal government programs, supported by tax revenues and favorable toward rights of labor unions. Moreover, labor unions backed federal social welfare legislation, and therefore, their strength was an indicator of political support for expanding government social policy. Union membership peaked in the early 1950s. After organizing successes during the depression and a rapid growth in union membership during World War II, the Taft-Hartley Act outlawed some organizing techniques. Organizing efforts in the South, which promised to bring union rights into a largely nonunionized part of the country, faltered upon poor coordination and racism. Meanwhile, legislative and judicial battles and internal Red Scares within unions also drew resources and attention away from organizing work. There were fewer organizing campaigns just

as women's labor force participation grew. The conservative political climate also had profound effect on those unions in the forefront of women's rights and women's issues.

During World War II, both the UAW and the UE had written model maternity clauses that local bargaining teams were encouraged to include in collective bargaining. The UAW had its own Women's Bureau within the union's War Policy Division. The UAW Women's Bureau had helped create the model maternity clause and, as an institutional voice for women's rights within the union, lobbied the national leadership to encourage its inclusion in contracts and to eliminate separate seniority lists and wage discrimination.³⁸¹ With the end of the war, the union dismantled this division and the status of the Women's Bureau was unclear for a nearly a year until it eventually found a home in the Fair Practices and Anti-Discrimination Department.³⁸² As companies retooled for peacetime production, women and men suffered lay-offs, but women were affected disproportionately. Companies offered super-seniority to returning male veterans and often hired new male workers instead of recalling women. The common practice of separate seniority lists for male and female workers also hurt women who wanted to keep their jobs. This profound threat to the UAW female membership and to the union principles of seniority confronted the union at the same time the dislocation of the UAW Women's Bureau weakened their voice within the union.

Declining female membership and the waning of the UAW Women's Bureau coincided with rising anti-Communism and a conservative turn in national politics. Walter Reuther's assumption of the presidency in 1946 and his consolidation of power at the 1947 convention took place amidst a backdrop of red baiting. While women unionists were on both sides of this

³⁸¹ 1946 Women's Bureau report to the International Executive Board of the UAW, in Gabin, *Feminism in the Labor Movement*, 144-145.

³⁸² Gabin, *Feminism in the Labor Movement*, 141.

political divide, neither the Reuther faction, nor that of former UAW president R.J. Thomas, seems to have embraced women's issues in order to secure women's loyalty. Nancy Gabin writes that "indifference to gender inequality was the special province of neither the right nor the left."³⁸³ But the internal strife over communist influence certainly characterized the postwar period, one where dramatic industrial and workforce changes, especially those affecting women, could have used the union's wholehearted and united attention. By the time Reuther had vanquished communist influence from the UAW, the union faced new problems of automation, mergers, and plant relocation. The union's failure to grapple with women's issues during reconversion, especially their seniority rights, left remaining women especially vulnerable.³⁸⁴ These were also the years when employee fringe benefits expanded and unions, including the UAW, bargained for the inclusion of social provisions in their contracts. Having established a track record of addressing women members' concerns during World War II, the intervening accidents of temporary structural homelessness for the Women's Bureau and the disruptive Red Scare seem to have diverted attention at two important junctures for women workers, the postwar reconversion and job loss and the expansion of fringe benefits.

In her study of women in the UAW, Nancy Gabin explains the UAW Women's Bureau strategy in the postwar period. Stymied by dramatic loss of female membership and also by internal union developments that featured the Red Scare, internecine fighting, and the displacement of the Bureau itself, women UAW leaders encouraged women's activism at the local level not only to solidify support for the union but also so that emerging women leaders

³⁸³ Ibid., 146.

³⁸⁴ Ibid., 144. In addition to Gabin, the other major study of women in the postwar UAW is Ruth Milkman, *Gender at Work: The Dynamics of Job Segregation during World War II* (Urbana: University of Illinois Press, 1987).

would be positioned to pressure local union negotiators and grievance officers over women's issues, such as those of seniority and maternity policies.³⁸⁵ The UAW Women's Bureau approach, including the regional conferences they sponsored, nurtured a new generation of women leaders who would later have more successes in securing women's rights in the workplace and in labor union contracts. Nevertheless, the postwar climate muted feminist demands within the UAW.

The story was different at the UE, the other major union that had developed model maternity clauses during World War II. The UE did not lose as many women members during reconversion. Unlike auto and munitions, the electrical industry had always had a large percentage of female workers. During the war the union had taken stands not only for maternity leave but also for equal pay for equal work. At the international offices of the union, there was a high level of sensitivity to women's issues and women's rights, partly due to the prominence of women organizers such as Ruth Young, the first woman to serve on the UE Executive Board. The UE was at the forefront of union attempts to secure a variety of rights for women workers. A high percentage of female membership and the presence of women organizers on the staff of the union explain part of this commitment. The UE leaders were left wing, and included many communists on the staff and as officers of the organization. Leftist influence could inform the union position on a range of issues, including social welfare ones. Along with other unions, the UE came out of the war with a strong commitment to the expansion of public benefits. Their fundamental concern with securing a better life for their members and their long experience addressing women's concerns led them to put maternity benefits on the bargaining table.

³⁸⁵ Gabin, *Feminism in the Labor Movement*, 147-149.

In May 1954, UE's Working Women Conference produced a memo, called "Facts for Political Action," that listed UE's primary concerns about working women's rights. Heading the list were the inadequacies of the US Women's Bureau, whose budgets and staff had been cut following the war. One of the responsibilities that the Women's Bureau could not fulfill with reduced staff and a tremendous growth in the number of working women, was to study the "problems of married women who work," including the problem of job loss due to pregnancy. The UE memo also listed "Maternity Benefits" as a separate category of concern in their "Facts for Political Action," pointing out that only Rhode Island and Puerto Rico had any wage replacement provisions for time off from work due to childbirth.³⁸⁶

When UE leadership refused to take a loyalty oath as required under the provisions of the Taft-Hartley Act, the National Labor Relations Board refused to certify any more UE elections. The UE was one of the eleven unions expelled by the CIO in 1949 for Communist influence. Union leaders faced criminal charges relating to the Smith Act which outlawed membership in an organization that advocated overthrowing the US government and was aimed at the Communist Party. Within the CIO, a new international union, the International United Electrical Workers (the IUE) formed under the leadership of an anti-communist former UE labor leader and some dissident UE locals. This new union proceeded to raid the remaining UE locals and vie for membership in newly organized plants. These purges had complicated results for women workers' rights. On the one hand, as the IUE concentrated on raiding and the UE on retaining existing locals, neither spent many resources in organizing new plants, so fewer women than might have enjoyed the basic protections that collective bargaining offered. Also, these rear

³⁸⁶ "Facts for Political Action," pp. 1-2 5/15/54, file "UE Working Women Conferences, 1953-62 Summaries" UE 2396 N1096, UE Women and Minorities Red-Dot Refile, UE Archives, Special Collections, University of Pittsburgh, Pittsburgh, PA.

guard actions and the legal defense of leaders charged under the Smith Act, and efforts to prepare for testimony before HUAC, diverted UE attention away from both organizing and women's rights. The presence of an alternative to affiliation with the UE meant that disgruntled locals might consider affiliating with another union. Thus, the UE had to carefully balance national policy and local desires. However, Lisa Kannenberg and Dennis Deslippe have both found a surprising development in the inter-union competition of the 1950s. Because of their numerical significance, women electrical workers were a valuable voting bloc. Deslippe writes that in the 1950s, competition between the UE and the IUE forced both to address women's issues in the "form of support for equal pay, pregnancy benefits and the holding of conferences."³⁸⁷ After a while, this focus on women's issues abated, due in part to the devastation the Red Scare ultimately had on the UE, which was eventually reduced to a mere shell of its former self. Deslippe suggests that both unions lost focus on women's issues because of automation and relocation of plants to the anti-union South. But he also argues that both unions had forged an enduring commitment to women's rights during these postwar years. Indeed, in the 1970s, as we will see in chapter six, the IUE took a pregnancy discrimination case against GE all the way to the Supreme Court.

Ironically, in a time of competition for the support of women workers, many women workers did not in fact support pregnancy policies. Locals often reached side agreements with management that abridged the seniority rights of married women or discriminated against pregnant workers because single working women favored such discrimination.³⁸⁸ Single women

³⁸⁷ Lisa Kannenberg, "The Impact of the Cold War on Women's Trade Union Activism: The UE Experience," *Labor History* 34 (Spring-Summer 1993): 309-23; Dennis Deslippe, *Rights, not Roses: Unions and the Rise of Working-class Feminism, 1945-80* (Urbana: University of Illinois Press, 2000), 90; Susan M. Hartmann, *The Other Feminists: Activists in the Liberal Establishment* (New Haven: Yale University Press, 1998), 19-24.

³⁸⁸ On a local in Sandusky, OH that "allowed for discriminatory treatment of pregnant workers," see Deslippe, *Rights, not Roses*, 101.

often believed that they needed the jobs more than married sisters who had husbands to support them. Women, highly segregated from men in jobs, often competed with each other. Married women often had more seniority than single women, who were often younger. Single women in both UE and IUE locals argued that they should have preference despite the central union provision of seniority. Sometimes they convinced their locals to negotiate away the seniority rights of married women, or of pregnant women. Both unions tried to rein in such actions and preserve non-discrimination policies and seniority but they had to be careful, lest a disgruntled local bolt to the competition.

Like auto and electrical workers, members of the Retail, Wholesale and Department Store Union had technological and industrial restructuring to deal with in the 1950s. Department stores began to relocate in the suburbs, where a tradition of unionization was weak. The RWDSU tried to focus on women's issues and to organize in these new stores around the potential for bargaining for fringe benefits such as maternity leave and retirement. Like electrical workers, department store workers had to face a Red Scare that decimated their union.³⁸⁹

Because of the Red Scare, important women leaders were lost to the labor movement. When she was eighteen, Ruth Young, the daughter of communists, married a member of the Communist Party who was the son of women's trade union organizer, Clara Lemlich. After she had a child, Young still worked in the union movement. When Young attended the Women's Bureau conference at the end of World War II, she was proud of her union's model maternity clause and put it forth as a model for the Women's Bureau to support. By the end of the 1950s, Young had divorced, remarried, resigned her position in the UE and left the Communist Party, becoming both more of a housewife herself, and also part of the flight from the UE to the IUE.

³⁸⁹ Minna P. Ziskind, "Retail, Wholesale & Department Store Union," *Encyclopedia of US Labor and Working-Class History*, ed. Eric Arnesen (New York: CRC Press, 2007), 1187.

She supported her second husband's decision to change his local's affiliation in the mid-1950s. While both had had ties to the Communist Party and tremendous loyalty to the UE, her second husband, Leo Jandreau, business agent at the important GE plant at Schenectady, NY, came under increasing pressure in 1950 with the outbreak of the Korean War. The company instituted security programs aimed at insuring employee loyalty and Senator McCarthy held hearings in Schenectady where he called UE members and leaders to testify. Jandreau cut his ties to the Communists and to UE and took local 301 into the IUE in 1954.³⁹⁰ This break entailed painful personal losses, especially for Young, who lost many friends and became estranged from family as well. She had worked with many of these friends in the unions for many years on maternity rights and other women's issues. In a new town, withdrawn from the workforce herself and with a family health crisis and then a new baby, Young had also forfeited her connections by leaving the UE.³⁹¹

Luisa Moreno, a labor activist born to an upper-class family in Guatemala, was a poet and an organizer of Spanish-speaking civil rights organizations. Fearless in the face of company goons and jailed by local police, her organizing activism began in Spanish Harlem among Puerto Rican garment workers but led to stints among cigar workers in Tampa, cane workers in Louisiana, cotton pickers in Texas, and sugar beet workers in Colorado. Settling in San Diego in 1937, she organized Mexican-American cannery workers, mostly women, along the city's Cannery Row. As vice president of the United Cannery, Agricultural, Packing and Allied Workers of America (UCAPAWA), she helped negotiate labor contracts that included sick

³⁹⁰ Gerald Zahavi, "Passionate Commitments: Race, Sex, and Communism at Schenectady General Electric, 1932-1954," *The Journal of American History* 83, no. 2 (September, 1996): 538, on plant security programs, on McCarthy hearings, 546, on Local 301 leaving the UE, 544-547.

³⁹¹ Zahavi, "Passionate Commitments," 547.

leaves which could be used for maternity leave without forfeiture of seniority.³⁹² Deemed a Communist-infiltrated union, her union was expelled from the CIO. Tipped off by local cannery owners, California's precursor committee to HUAC called her to testify. She took the Fifth Amendment, refusing to say whether she had been a member of the Communist Party. She had never become a citizen. The FBI offered her a path to citizenship if she testified against fabled labor leader Harry Bridges. She refused and undertook "voluntary departure" to Mexico in lieu of deportation.³⁹³ Some of the postwar work on maternity leave went with her.

Betty's Babies

Labor unions were engaged in collective bargaining with management for employers to provide maternity leaves to women workers. Unions were also employers themselves, who often adopted model policies to display their commitment to social justice and serve as a prod to encourage management to act likewise. As employers, however, labor unions were faced with limited resources to provide benefits, and some unions had fewer resources than others. While there were thus economic constraints on the ability of unions to provide benefits, one employee of a union newspaper interpreted the lack of provision as lack of interest—of labor's sexism.

Long before she wrote the bestselling *Feminine Mystique* and helped launch the modern women's movement, Betty Friedan was a journalist who worked for left-leaning and union news

³⁹² Vicki Ruíz, *Cannery Women, Cannery Lives: Mexican Women, Unionization, and the California Food Processing Industry, 1930-1950*, (Albuquerque : University of New Mexico Press, 1987), 88, 94, 95, 87, xiii; [Vicki Ruíz](#), *From out of the Shadows: Mexican Women in Twentieth Century America* (New York: Oxford University Press, 2008), 101.

³⁹³ Vicki Ruíz, "Una Mujer Sin Fronteras: Lusia Moreno and Latina Labor Activism," in Vicki Ruíz and Virginia Sánchez Korrol, eds, *Latina Legacies* (New York: Oxford University Press, 2005), 175-192; Susan Ware, *Notable American Women: A Biographical Dictionary Completing the Twentieth Century*, vol 5 (Cambridge: Harvard University Press, 2004), 454-455; Mario T. Garcia, *Memories of Chicago History: The Life and Narrative of Bert Corona* (Berkeley: University of California Press, 1994), 116-120; Carlos Carrakde and Richard Griswold del Castillo, "Luisa Moreno and The Beginnings of the Mexican American Civil Rights Movement in San Diego," *The Journal of San Diego History* 43, no. 3 (Summer, 1997): 284-311.

outlets. In the 1940s, Friedan reported on issues of race and class for the Federated Press and then for the *UE News*. One of her pieces was an interview with Ruth Young about the role of women in the labor movement.³⁹⁴ Another, which started with a report on a strike of mostly women workers, became the basis for the UE pamphlet *UE fights for Women Workers*.³⁹⁵

Daniel Horowitz's complicated and imaginative biography of Betty Friedan provides several lenses on the importance of maternity protections to the UE and on the importance of the UE to American maternity protections. The case has many layers of meaning. Horowitz writes that Friedan "claimed that she lost her job at the UE when she was pregnant with Jonathan, her second child, because the union failed to honor its commitment to maternity leaves."³⁹⁶ Read on the surface and as Friedan herself understood it, this denial of leave revealed the lack of a real commitment on the part of the UE to women's rights. The union did not act on its word. Horowitz believes that Friedan experienced this as "persistence of male chauvinism"³⁹⁷ and as part of the personal experiences that informed *The Feminine Mystique*. Horowitz, however, complicates Friedan's analysis by pointing out that the UE, hemorrhaging members due to raiding, faced cuts in its staffing and halved the reporters at the *UE News* where Friedan worked. The reporters kept on staff had seniority over Friedan, in accordance with the union's principle on lay-offs. Here Horowitz's careful reconstruction of Friedan's life opens another way to examine this denied leave. Jonathan was Friedan's second child. Her first child had also been born while Friedan worked for the UE. When Daniel was born, Friedan had a maternity leave of

³⁹⁴ Horowitz, *Betty Friedan*, 109, 126, 138. See also Susan Oliver, *Betty Friedan: The Personal is Political* (New York: Pearson Longman, 2008), 38, 40.

³⁹⁵ Horowitz, *Betty Friedan*, 138.

³⁹⁶ *Ibid.*, 141.

³⁹⁷ *Ibid.*

almost a year and the first six weeks were paid. Horowitz writes “only six weeks paid,” but any paid leave was a good benefit at the time, in 1948.³⁹⁸ Here, in the young family of Betty and Carl Friedan, we have a little laboratory of the effects of the Red Scare on maternity practices. When Friedan was expecting Daniel, she worked for one of the largest unions in the CIO, a union that also had strong commitments to women’s issues, something Friedan herself reported on; Friedan enjoyed a generous maternity leave. By the time she was pregnant with Jonathan, Friedan worked for a much smaller labor organization, under congressional investigation for ties to the Communist Party and struggling for its very survival; she was laid off.

The personal devastations wrought by the Red Scare were not lost on Friedan, who Horowitz suggests, suffered permanent psychological damage from the secrecy, the intrigue, and the threat of exposure for someone with her affiliations. Thus, Horowitz concludes, it was the Red Scare as much as or more than any privileged white middle-class educated background of her own that contributed to the middle-class bias of *The Feminine Mystique*. In Horowitz’s words, the Red Scare “fostered a break in historical consciousness” in understanding the links between gender and class.³⁹⁹ It would take a very long time for feminism to rebuild the bridges back to concerns of class and race, concerns that Friedan had, ironically, started with. In the case of maternity benefits, for instance, when the mainstream women’s movement began to work on maternity policies in the 1970s, they focused their initial steps on narrower constructions of discrimination and equality. Broad public social supports received little attention. Drawn to its logical conclusion, the maternity leave that Friedan did not get had profound long term-consequences for a feminist approach to maternity policy.

³⁹⁸ Ibid., 138.

³⁹⁹ Ibid, 145.

International Labour Organization Maternity Convention No. 103

What could not be achieved in the United States was achieved in international labor standards. The New Deal coalition in favor of maternity benefits persisted after the war, but not in the US. The Women's Bureau favored a national maternity policy, but the chilly atmosphere of postwar America constrained its influence on legislation at home. The social justice feminists within the Women's Bureau, and the labor feminists with whom they worked persisted in their effort to secure maternity benefits, a crucial element of expanding working women's rights. In addition to the Pepper bill, the Langer bills, and national health insurance bills discussed in chapter two, they worked on the Women's Status Bill. Backed by social justice feminists and labor feminists partly as an alternative to the Equal Rights Amendment, the Women's Status Bill would have established a commission on the status of women as a prelude to eliminating sex discrimination without compromising protective labor legislation that benefited women.⁴⁰⁰

Along with failed efforts to craft passing legislation that addressed women workers' dual roles as workers and mothers, in the late 1940s and early 1950s, the Women's Bureau played a major role in fashioning an international agreement on maternity policy. The influence of American social justice feminists in developing these standards confirms the real expertise they brought to social policy and the importance of the intellectual and social networks they forged as well as the strength of the Red Scare.

Although the US never signed this international agreement, it probably did have some effect on a few pregnant workers in the U.S. Commenting on the ILO Convention on Equal Pay for Equal Work which was passed just before the Maternity Convention revisions, Mildred

⁴⁰⁰ Cobble, *The Other Women's Movement*, 62-66. The FBI regarded the Women's Status Bill suspiciously and believed it to have been authored by a Communist front organization. "Mildred Fairchild Woodbury," FBI file, FOIPA request, in author's possession.

Fairchild of the ILO pointed out that even non-ratifying nations regarded the convention as instructive. She pointed to legislation in non-signatory countries and in various US states. Furthermore, she believed that the Equal Pay Convention spurred labor unions and employers to bargain for and apply the Convention's recommendations even without the force of law.⁴⁰¹ The Maternity Convention could function the same way, as a blueprint or model that those concerned about women's employment could look to emulate even without the force of law.

“Convention No. 3 Concerning the Employment of Women Before and After Childbirth” was passed by the first meeting of the ILO in 1919. It constituted an international standard for national maternity policies, one that the US never adopted. The US did not sign the Versailles Peace Treaty which ended World War I and established the League of Nations, of which the ILO was initially a part.⁴⁰² The United States did not actually join the ILO until 1935 after a carefully orchestrated campaign by Frances Perkins, then Secretary of Labor and Mary Anderson, the Director of the Women's Bureau. Grace Abbott, who had been chief of the US Children's Bureau, served as one of the first official American delegates to the ILO in 1935.⁴⁰³ Back in 1919, Americans were just observers, albeit important ones; the meeting that drew up this first Maternity Convention was held in the United States.

The Maternity Convention took effect in 1921. By 1947, seventeen countries had ratified the convention and a number of others had national laws that at least met some of its

⁴⁰¹ “Code on Equal Pay for Women Hailed,” *New York Times*, May 22, 1953.

⁴⁰² The Convention set standards for a compulsory minimum maternity leave following childbirth, a further optional leave prior to delivery, income replacement during such leave, the provision of medical care during confinement, a guarantee of nursing breaks following return to work, and some job protection during the maternity leave “Convention No. 3 Concerning the Employment of Women Before and After Childbirth” (Convention No. 3); file # 6-2-9-3(3); General Correspondence of the Women's Bureau, 1948-1963, 1948-1953 (Genl Corresp, 1948-1963, 1948-1953); Office of the Director (Off of Dir); RG 86, NACP; and International Labour Organization, “C3 Maternity Protection Convention, 1919” <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C003>, (April 1, 2009).

⁴⁰³ Carol Riegelman Lubin and Anne Winslow, *Social Justice for Women* (Durham, NC: Duke University Press, 1990), 45-46.

conditions.⁴⁰⁴ The Convention called for decennial reports on the working of the Convention with an eye to possible revisions. Global depression and World War II served to delay undertaking the second report until 1947 when there were increased international concerns about women workers because of their wartime work in some countries and because of declining population in others.⁴⁰⁵

Concerned that the nations that largely made up the ILO, now a part of the United Nations, not appear to be backward on this issue, the ILO surveyed the maternity policies of both signatory and non-signatory countries. In 1948, when the office of the Assistant Director-General of the ILO transmitted the draft report to member nations, he asked for observations and recommendations for possible revisions.⁴⁰⁶ In the United States, the Children's Bureau, the Social Security Administration, the United States Public Health Service and the Bureau of Employment Security all provided recommendations and revisions that the US delegates to the ILO should support.⁴⁰⁷ However, the Women's Bureau, by 1948 the agency most active in the protection of pregnant workers in the United States, provided the bulk of American input into the maternity convention revisions.

The Women's Bureau was interested in maternity policy and had accumulated significant experience and expertise both in gathering relevant data and in attempting to influence

⁴⁰⁴ Ibid.

⁴⁰⁵ "Cross Reference Sheet," Mildred Fairchild, ILO, Geneva, Oct. 24, 1947, "Convention No. 3"; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

⁴⁰⁶ M. Viple, Assistant Director-General, International Labour Office, Geneva, to David A. Morse, Under-Secretary of Labor, US Government representative to the ILO, Washington D.C. [c. 1947] "Convention No. 3"; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

⁴⁰⁷ Gertrude Gates, Federal Security Agency, Washington DC, to Frieda Miller, Washington DC, April 22, 1952, and E.L. Keenan, Bureau of Employment Security, Washington DC, to Frieda Miller, Washington DC, April 17, 1952, "Convention No. 3"; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP, "Convention No. 3"; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

legislation. The US government delegate to the ILO would be briefed by the Department of Labor, of which the Women's Bureau was a part. Because of the Women's Bureau's close ties to the American labor movement, through their Labor Advisory Committee, the Women's Bureau might also work with the US labor delegate. The social justice feminists at the Women's Bureau and the Children's Bureau had long participated in international conversations about maternity policies and working mothers. The files of these agencies are liberally peppered with international correspondence and their researchers demonstrate wide reading about the laws, the practices and the research and theory behind social policy in other countries. In the case of the Maternity Convention revisions, researchers and administrators at the Women's Bureau also had close personal ties to their counterparts in the ILO Section on Women's Work and the Protection of Young Workers, the section responsible for compiling data and recommendations relating to the Maternity Convention.

The woman in charge of coordinating this process at the ILO was herself an American. Mildred Fairchild was the granddaughter of an early president of Oberlin College, whose long tenure in office is today commemorated in Fairchild Hall on the Oberlin campus. In 1916, she matriculated at Oberlin. Like many other educated women, she became interested in social questions, especially related to the working class. Fairchild found others who shared her interests at Bryn Mawr's newly established graduate program in Social Economy and Social Research. In 1929, she completed her dissertation on skill in the metal trades. She worked closely with the founder of the department, Susan Kingsbury, who had also helped start the Bryn Mawr Summer School for Women Workers in 1920. Kingsbury had a habit of bringing her friends and contacts to Bryn Mawr as speakers and guests and methodically connected her students with influential social feminists and women academics. After defending her dissertation, Fairchild taught

economics in the graduate school at Bryn Mawr. One of the economics teachers in the Summer School was Frieda Miller, who would, in the 1940s, become director of the US Women's Bureau. Miller later recalled that she had met Fairchild "on the faculty of Bryn Mawr College" and that over the years, she came to know her "very well as an economist and a teacher."⁴⁰⁸ They forged a friendship that would endure over their careers.

Fairchild was a Bryn Mawr professor when she testified before Congress in favor of the Lundeen Bill in 1935.⁴⁰⁹ The Lundeen Bill was the expansive unemployment insurance bill that would have included a much wider range of workers and also secured benefits for unemployment due to maternity or disability. Miller, then the head of the New York State Women's Bureau, would certainly have been watching the progress of this federal legislation.

After Kingsbury retired, Fairchild assumed the job of director of the graduate program in social work at Bryn Mawr from 1936 until 1946.⁴¹⁰ In 1947, Fairchild left Bryn Mawr to work for the ILO where she rose to chief of her division, the first woman to hold the title.⁴¹¹ She married Robert Morse Woodbury, chief of statistics at the ILO. They moved with the organization from Montreal to Geneva and stayed with the ILO for the rest of their careers.

⁴⁰⁸ "Mildred Fairchild Woodbury, nee Fairchild aka Mrs. Robert Woodbury, International Labour Office, United Nations, Geneva, Switzerland, Loyalty of Employees of the United Nations and Other Public International Organizations – IR" (August 24, 1953): 6. Mildred Fairchild Woodbury FBI files, FOIPA request, in author's possession, 97.

⁴⁰⁹ Suzanne Mettler, *Dividing Citizens: Gender and Federalism in New Deal Public Policy* (Ithaca: Cornell University Press, 1998), 134; "Mildred Fairchild Woodbury, nee Fairchild aka Mrs. Robert Woodbury, International Labour Office, United Nations, Geneva Switzerland, Loyalty of Employees of the United Nations and Other Public International Organizations – IR" (August 24, 1953): p. 11. Mildred Fairchild Woodbury FBI files, FOIPA Request, in author's possession, p. 102.

⁴¹⁰ "Mildred Fairchild Woodbury, nee Fairchild aka Mrs. Robert Woodbury, International Labour Office, United Nations, Geneva Switzerland, Loyalty of Employees of the United Nations and Other Public International Organizations – IR" (August 24, 1953): 7. Mildred Fairchild Woodbury FBI files, FOIPA, in author's possession, p. 98.

⁴¹¹ Lubin and Winslow. *Social Justice for Women*, 75.

When they retired, they returned to Bryn Mawr where Robert died in 1970.⁴¹² Fairchild died five years later in Kennet Square, Pennsylvania, where she had been living with her sisters.⁴¹³

The personal connection between Miller and Fairchild gave the Women's Bureau particular influence over the ILO standards. In 1947, while the ILO was still compiling its report on the workings of the Maternity Convention, the US Women's Bureau sent some information on maternity protection in the United States to Fairchild at the ILO in Geneva.⁴¹⁴ This material probably included the recently published Bulletin 214, "Maternity-Benefits Under Union-Contract Health Insurance Plans"⁴¹⁵ The personal connection, and the fact that the Women's Bureau had just completed its own domestic study of maternity provisions, meant that the Women's Bureau could easily participate in discussions about revising the Maternity Convention. Fairchild drew on the work of the US Women's Bureau and consulted with them as they wrote recommendations to pass along to the US government representatives to the ILO who then presented them to the ILO of which Fairchild was a part.⁴¹⁶

The Women's Bureau, with some input from other agencies and offices, drew up extensive recommendations for US delegates to support from expanding the types of workers covered by the convention to include professionals, public employees, domestic workers, farm

⁴¹² "Dr. Robert Woodbury, Served International Labor Office," *New York Times* (January 30, 1970).

⁴¹³ *Oberlin News-Tribune* (February 13, 1975): 7; *Oberlin Alumni Magazine* (Mar/Apr 1975): 37 both available at http://www.oberlin-high.org/obits/ohs_obits_ra-rm.html (June 25, 2011).

⁴¹⁴ "Cross Reference Sheet" Mildred Fairchild, ILO, Geneva, Oct. 24, 1947, "Convention No. 3"; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

⁴¹⁵ Jennie Mohr, "Maternity Benefits under Union-Contract Health Insurance Plans," *Women's Bureau Bulletin* 214 (Washington, DC: U.S. Government Printing Office, 1947).

⁴¹⁶ *Ibid.* and Frieda Miller, Washington DC to Mildred Fairchild, Geneva (March 11, 1948). and "Cross Reference Sheet" Mildred Fairchild, ILO, Geneva, March 7, 1949, and Frieda Miller, Washington DC, to Mildred Fairchild, Geneva (July 22, 1952). and Mildred Fairchild, Geneva, to Frieda Miller, Washington DC (July 30, 1952) "Convention No. 3"; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

workers and employees of non-profit organizations to lengthening the compulsory postpartum leave period to two months, with allowances made for additional leave if needed. They also proposed to clarify the provision for wage replacement from “benefits sufficient for the full and healthy maintenance of herself and her child,” as the 1919 Convention put it, to some measure tied to the cost of living and which might take into account any other dependents the woman might have. Furthermore, the Women’s Bureau called for special provisions in maternity cases that could be more favorable than those for other conditions covered by any national disability benefits. Finally, they also urged guarantee of income benefits throughout the period any individual woman needed leave, not just for the basic period determined to be adequate in most cases. The Women’s Bureau also recommended inclusion of several new provisions that grew out of the American wartime experiences. Especially interesting was a body of recommendations dealing with medical care.

The 1919 Maternity Convention guaranteed free medical care at confinement, which the Women’s Bureau expanded to include prenatal and postnatal care. Wartime experience increased the Bureau’s understanding of the professional and business concerns of American doctors. By the late 1940s, many in the Women’s Bureau were also veterans of the struggles over the Wagner-Murray-Dingell Bills. One of the AMA’s chief objections to the bills was a perception that national health insurance would limit patient choice of physician. The AMA included this point in literature sent to member physicians and encouraged them to write letters to newspapers and to discuss this with their own patients in order to build opposition to the bills. Small wonder, then, that at the end of the 1940s, the Women’s Bureau’s recommendations regarding revisions to the Maternity Convention expressed concern that

[T]he present standard as to ‘free’ medical care should be reviewed from the standpoint of encouraging policies and practices which would permit the worker to have a wide and

free choice of a physician. The right of the physician to accept or reject a patient should also be considered.⁴¹⁷

Like the suggestions on maternity care, comments on job security directly reflected the US wartime experience. Women's Bureau recommendations observed that "the provision against discharge needs considerable review." The 1919 ILO convention had prohibited discharge during a maternity leave of absence. By 1948, the US Women's Bureau found this very inadequate protection. Instead, they advocated prohibiting dismissal for reasons of pregnancy during any part of the pregnancy or leave. They also urged a statement on a positive right of reinstatement to a woman's job for a reasonable amount of time after childbirth. The Women's Bureau raised the question of seniority and suggested that seniority accumulate for the duration of the regular maternity leave and they advocated retention of seniority for a year. Finally, in a very interesting and insightful twist, these recommendations included a suggestion that women workers receive legal assistance, if needed, in securing these job protections.

In her 1947 study, "Maternity-Benefits Under Union-Contract Health Insurance Plans," economist Jennie Mohr of the Women's Bureau found that many workers did not avail themselves of benefits they were entitled to, perhaps because they did not know about them.⁴¹⁸ It may have been extrapolation from this study of health benefits, as well as from their close association with labor union activists, that led the Women's Bureau to conclude that rights on paper did not help women who were not aware of them, or who faced other impediments to

⁴¹⁷ "Points the US Government Recommends for Consideration by the Governing Body in Connection with Revision of Convention 3 (1919) 'Employment of Women Before and After Childbirth'" (March 11, 1948): 4.

⁴¹⁸ Jennie Mohr, "Maternity Benefits under Union-Contract Health Insurance Plans," *Women's Bureau Bulletin* 214 (Washington, DC: U.S. Government Printing Office, 1947).

obtaining them. To make maternity protections a reality, the convention should include provisions for assistance a woman might need in claiming benefits.

Equally as influential was the Women's Bureau support for the idea behind Pepper's bill, that a national government should fund the payment of maternity benefits. The Women's Bureau recommended to the ILO that maternity benefits should not be paid by employers.⁴¹⁹ Their stance was at odds with American reality, since the major growth in social supports in the US at the time was in the private sector through employee fringe benefit programs. This recommendation, which did become a part of the revisions, also fueled opposition from the US employer delegate to the ILO, even though, perhaps, it might be seen as a protection to employers. But the question of who paid for benefits for pregnant workers and new mothers was a complicated one, involving the responsibility of government as well business desire to secure employee loyalty. There was ample concern from other parts of the world that provisions for maternity not result in discrimination against women workers. In India, the Bombay Maternity Act contributed to a decline in women's employment opportunities.⁴²⁰ However, it could have been the experience of Chile, one of the signatory countries to the Maternity Convention, that most clearly illuminated the potential motivation for pregnancy discrimination within employer mandated benefits. Committees of the ILO had repeatedly warned Chile that making the employer "responsible for the greater part of the benefits for maternity leave is contrary to the text and principles of the Convention and [has]...adverse influences...on the right of the women

⁴¹⁹ "Points the US Government Recommends for Consideration by the Governing Body in Connection with Revision of Convention 3 (1919) 'Employment of Women Before and After Childbirth'" (March 11, 1948): 3.

⁴²⁰ "International Labour Office Second Draft Ten-Yearly Report of the Governing Body of the International Labour Office Upon the Working of the Convention (No. 3) Concerning the Employment of Women Before and After Childbirth" (Geneva, November 1947) reprinted in "Maternity Leave for Government Employees: Hearings before a Subcommittee of the Committee on Post Office and Civil Service United States Senate, Eightieth Congress, Second Session on S. 784 a Bill to Provide 60 Days Maternity Leave per Year for Female Employees who have Worked at Least 10 Months for the Government" (February 17 and 18, 1948) (Washington, DC: GPO, 1948), 72.

to be retained in employment.”⁴²¹ In 1947, the ILO Committee of Experts looked at some cases where pregnant workers had been dismissed in Chile and concluded that even when Chile’s courts intervened to force payment of maternity benefits, pregnant workers could end up without their jobs.⁴²² The clause that eventually became part of the convention was a Danish government proposal. But the US government representative, briefed by the Women’s Bureau, supported it.⁴²³

Imbued as they were with lessons from the last war, the actions and words of the Women’s Bureau also reflected the current conflict between the US and the Soviet Union. American policymakers were always aware of the impact of US policy on its image abroad. Black activists and American diplomats recognized and tried to address the implications that racial segregation in the United States had for global jockeying during the Cold War. Less inflammatory than the discrimination against African Americans, the role of women in the United States was still examined for its possible international repercussions. In 1950, Frieda Miller urged the US delegation to the ILO to support inclusion of the Maternity Convention revisions on the upcoming 1952 ILO agenda. She argued that maternity protection was important to many parts of the world, as indicated by the number of signatories to the Convention #3, which had not been revised since 1919. She also pointed out that in any number of nations, the US included, the number of married women at work was rising. But she also observed that ignoring the needs of pregnant workers and new mothers could be strategically unwise:

As you well know, the Iron Curtain Countries have recognized the importance of this question as far as building up a healthful and secure labor force is concerned. One recent

⁴²¹ Ibid., 68.

⁴²² Ibid., 77.

⁴²³ Lubin and Winslow, *Social Justice for Women*, 85.

evidence [sic] of this is the establishment of a law in East Germany “for the Protection of Mothers and Children and the Rights of Women,” which incorporate [sic] provisions relating to maternity leave and benefit payments. Other Eastern European countries have established protection along the same lines. If the ILO now sidesteps this important matter, this action may well be taken up as one more propaganda item against the ILO and against the U. S. as a leading policy maker in that organization.⁴²⁴

Reformers at the Women’s Bureau belonged to an international community of scholars and social justice feminists who wanted to offer their own wartime experiences in the service of the world’s working women. They wanted successful international models that could later be used to argue for domestic maternity policies. Eager to see the extension of international cooperation, Frieda Miller and the Women’s Bureau may also have believed that social reforms were an essential bulwark against the expansion of Soviet influence. But while Miller sought to position the US and the ILO favorably in a game of maternity realpolitik, this broader anti-communist mission foundered upon the shoals of a domestic Red Scare that caught maternity policy in a hostile climate and forced the Women’s Bureau to justify its positions.

The new Maternity Convention was adopted at the 35th Conference of the ILO with 114 delegates voting for it, thirty-six against, and twenty-five abstaining.⁴²⁵ US delegates and

⁴²⁴ Frieda S. Miller, to Edward B. Persons, (November 10, 1950), “Suggestions for the Agenda of the 35th Session of the International Labour Conference (1952),” 2, “Convention No. 3”; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP. The US and the USSR both had a checkered history with the ILO. The International Labour Organization was formed in 1919 as a part of the League of Nations. It later became a part of the United Nations. Although its first meeting, the one that produced the Maternity Convention, was held in the United States, the US did not join the ILO until 1934, partly because the US Congress did not ratify the Treaty of Versailles which ended the First World War and established the League of Nations. Later, the US withdrew from the ILO in 1977 and then rejoined in 1980. The Soviets, for their part, boycotted the ILO from 1937 until 1940, when they were officially expelled because of their invasion of Finland. They didn’t rejoin until 1954, although some Eastern Bloc countries were members in the early 1950s.

⁴²⁵ “Revision of the Maternity Protection Convention” 35th Conference of the International Labor [sic] Organization, Geneva, Switzerland, June 4-28, 1952, folder 186, Box 9, Frieda S. Miller papers, Schlesinger Library. Only six of the seventeen articles of Maternity Convention #103 deal with the substantive issues relating to pregnancy, new motherhood and employment. The balance are administrative clauses dealing with ratification, exceptions, and possible future revisions to either individual ratifications or to the convention itself.

government agencies were often instrumental in shaping ILO research and convention, even though the United States has approved only a very small fraction of ILO conventions. Nonetheless, fearful that ILO conventions would interfere with domestic labor laws, American business interests were wary of the ILO. Following the passage of the Taft-Hartley Act, anti-union employers were especially concerned about some ILO conventions that guaranteed freedom of association in ways broader than US law. Opponents of the ILO also argued that the American system would make ratification of conventions problematic because many labor laws were state rather than federal ones. Concerned about maintaining the primacy of domestic labor laws and also alarmed when the Soviet Union rejoined the ILO, business interests backed a constitutional amendment introduced in the US House “that would have limited the executive branch’s treaty-making power.”⁴²⁶ Many versions of this “Bricker Amendment” were introduced. While none passed, the hearings on the bill provided ample opportunity for its proponents to voice their opposition to the United Nations and the ILO.

The composition of the US delegation to the ILO injected Red Scare politics into negotiations about international labor standards. Each country sent three delegates to the ILO, one from the government, one from labor, and one from employers. Each delegate had support staff, including a deputy. While the ILO considered revisions to the maternity convention, the US employer delegate was Charles P. McCormick, the greatgrandson of the founder of International Harvester. His deputy was William L. McGrath, who would take over from McCormick at the ILO in 1954-55. During McCormick’s tenure, McGrath observed meetings and probably shouldered more work and responsibility when the employer delegate became ill.

⁴²⁶ Richard McIntyre and Matthew M. Bodah, “The US and ILO Conventions No. 87 and No. 98: The Freedom of Association and Right to Bargain Collectively,” Worker Rights Conference, AFL-CIO/Michigan State University, East Lansing, MI, Oct 11, 2002, 7

McGrath had climbed his way up the corporate ladder to become president of Williamson Heater Company in Cincinnati. After serving in key war department positions, he became director of the Chamber of Commerce at the end of the war.⁴²⁷ McGrath favored US withdrawal from the ILO and wrote articles denouncing the organization. He was instrumental in getting the National Association of Manufacturers to stop nominating employer delegates in 1961. While serving as a delegate, he boycotted any committees which had employer delegates from communist countries. He also testified before Congress in favor of the Bricker Amendment that would have restricted US participation in the ILO.⁴²⁸

McGrath feared that ILO conventions would expand the rights of labor unions and overturn US laws. He also objected to the return of the Soviet Union and to the seating of Soviet “employer” delegates, which, he asserted, did not represent the interests of employers. Singling out Convention No. 103 for opprobrium, he called it “obnoxious as an international treaty.”⁴²⁹ Testifying before a Senate Sub-Committee he told them, “I sat on the committee discussing the maternity protection. At times I could not believe my ears.”⁴³⁰ He criticized the convention clause guaranteeing benefits to all pregnant women, those with and “without benefit of marriage” because it avoided the “good Anglo-Saxon words” legitimacy and illegitimacy. He implied that both the provision of benefits and also the change in wording were likely to increase nonmarital pregnancies because “an unmarried girl need not worry about having a baby. Government will

⁴²⁷ http://www.cincinnati-chamber.com/cham_a.aspx?menu_id=144&id=1169 (December 4, 2008).

⁴²⁸ Paul F. Power, “American Employer Behavior in the International Labor [sic] Organization,” *Midwest Journal of Political Science* 12, no. 2 (May 1968): 259-278. See also William L. McGrath “ILO: Back Door to Socialism,” *Economic Council Letter*, no. 303 (Jan. 15, 1953) and William L. McGrath “The Surprising Case of the ILO,” *American Mercury* 90 (March 1960): 107-111.

⁴²⁹ [McGrath Testimony], p. 2, “Convention No. 3”; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

⁴³⁰ McGrath was probably an observer on this committee and assistant delegate to the employer delegate Charles P. McCormick. Ibid.

provide.”⁴³¹ Warming to his screed, McGrath derided the provision for nursing breaks. “For one whole afternoon...nations all over the world, debated the question as to whether a woman nursing her baby, on time paid for by the employer, should do so in a single period of one hour per day, or two periods of one-half hour each.” Was the baby consulted? Senator Everett Dirksen of Illinois wanted to know. McGrath replied, “And yet, you know the thing is not funny, the thing is just so tragic that you are just appalled by it all.” McGrath reported on ILO discussions about providing milk for babies whose mothers could not nurse them and on a proposal for governments to compensate nursing mothers. McGrath lamented the discussion, even though the proposal was not included in the final convention.

If the government bought cow’s milk for one mother, was that fair to the mother who was able to furnish her own milk? The led to the conclusion that a mother who could furnish her own milk should likewise be paid by the government for doing so, and while dispensing it she would also be paid an hourly rate by her employer, and then there was some facetious discussion about time and a half.⁴³²

McGrath also recounted “a long debate on the subject of whether the Government should or should not furnish layettes.”⁴³³ The maternity convention discussions, and especially the nursing clause, had, according to McGrath, caused the US employer representative to have a heart attack.⁴³⁴

Government-funded maternity benefits, McGrath feared, constituted socialism, threatened capitalism, and interfered with the freedom of contract in American labor relations.

⁴³¹ Legitimacy and illegitimacy are not Anglo Saxon words.

⁴³² [McGrath Testimony], p. 7, “Convention No. 3”; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

⁴³³ Ibid.

⁴³⁴ Ibid. 4-5.

McGrath believed that under capitalism, private employers should provide benefits to their workers as a means of securing their loyalty. Positively fuming, McGrath declared that following the lead of the US's own delegate, "the majority Socialists" wrote into the Maternity Protection convention the clause, "In no case shall the employer be individually liable for the cost of such benefits due to women employed by him." In addition, McGrath believed that employer-provided benefits constituted public recognition of motherhood which benefited both a pregnant woman and her employer. He argued that benefits paid for by government increased taxes and deprived employers of the personnel and public relations benefits of helping employed mothers. Such an idea was, to McGrath, both un-American and immoral. "Under socialist philosophy, human considerations are not allowed the employer. They are permitted only to government."⁴³⁵ Hand in hand with his defense of employer beneficence went a defense of patriarchy. McGrath bemoaned the way such socialist measures subverted the father's responsibility to provide for his family. In a written statement on "Maternity Protection," McGrath dreaded the prospect of "paternity in the Socialist Utopia." If all women worked and had on-site day care and nursing breaks and collected publicly financed maternity benefits, regardless of marital status, who needed the father? McGrath worried that if the US ratified the maternity convention, Government would replace husband and father in the lives of women and their children. "The place of the father in the scheme of things, married or unmarried, is reduced purely to the function of paternity."⁴³⁶

⁴³⁵ Ibid., 4.

⁴³⁶ William L. McGrath, "Maternity Protection" Excerpt from "The 35th International Labor Conference of the International Labor Organization Article" "Convention No. 3"; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

The Maternity Convention did not prohibit employer benefits. It laid out a package of benefits, in terms of time off from work, job security, income replacement, and the provision of medical care during pregnancy, childbirth, postpartum and also infant care to be provided to all women and their children by a government-funded program. To the ILO researchers, the US Women's Bureau, the US government delegate, and many other ILO delegates, this safeguarded women's employment opportunities. To McGrath, government entitlements threatened the fundamental basis for labor relations in the United States and US sovereignty. "Now over here" testified McGrath, "on a voluntary basis in negotiating contracts we have hospitalization....but if this particular convention were ever to go into effect over here, the chances are it might outlaw the voluntary system of contribution that is now in effect." He worried that it "would even outlaw arrangements made through collective bargaining."⁴³⁷

McGrath used the Maternity Convention to extend the conservative business critique of international cooperation and domestic reform efforts. He testified in favor of the Bricker Amendment, which would have imposed various limits on the President's constitutional authority to make treaties and would have probably severely hobbled US participation in the United Nations and all United Nations organizations, including the ILO. The focus on the Maternity Convention was, for McGrath, tactical. To him, the Maternity Convention was part of an international assault on the system of American labor relations where business interests had recently reasserted their upper hand. In a paper about ILO Conventions about Freedom of Association and the Right to Bargain Collectively (87 and 98), Richard McIntyre and Matthew M. Bodah argue that these were the international agreements that McGrath and the American business community really opposed and the reason that they supported the Bricker

⁴³⁷ [McGrath Testimony], p. 4, "Convention No. 3"; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

Amendment.⁴³⁸ There were parts of the Maternity Convention that would have changed American labor relations, by removing basic maternity policy from the bargaining table and the benefits office and by protecting the job rights of pregnant women and new mothers. However, more important than these specific provisions was the danger to American capitalism that the US would begin to ratify ILO conventions, including 103, 87 and 98, and that, according to ILO guidelines and the US constitution, they would become the law of the land, rewriting not only maternity practices, but also, for instance, the Taft-Hartley Act.

Frieda Miller, the director of the Women's Bureau, called McGrath's testimony "devious and purposefully distorted." She pointed out that "Obviously Mr. McGrath is using the Maternity Convention merely as an example—which he thinks can be made to appear ridiculous—in a general attack on ILO Conventions."⁴³⁹ McGrath had done so before. "In this case, however, his comments have been very carefully formulated with a sophisticated appreciation of how to misrepresent without actually making false assertions."⁴⁴⁰ Miller identified two prongs to McGrath's attack, that maternity policy should not be determined by treaty and that maternity policy was private matter and not a public one at all. Briefing the Secretary of Labor on McGrath's testimony, Miller pointed out that the ILO maternity convention "was not something new" and had, in fact, been first approved in 1919. Furthermore, Miller asserted that "social insurance" was a "proper area for Government action" in the United States. The ILO Maternity Convention, if ratified, would "simply" extend public benefits to cover maternity. Finally, though she acknowledged that there were "a limited number of companies" with private

⁴³⁸ McIntyre and Bodah, "The US and ILO Conventions No. 87 and No. 98."

⁴³⁹ Frieda S. Miller (WB) to Harper Barnes (SOL), March 9, 1953, p. 1, "Convention No. 3"; file # 6-2-9-3(3); Genl Corresp, 1948-1963, 1948-1953; Off of Dir; RG 86, NACP.

⁴⁴⁰ *Ibid.*, 2.

maternity benefits, she was not worried about threatening them because “in no case with which we are familiar do the benefits meet those called for in the Convention.”⁴⁴¹

Observing that McGrath made liberal use of red baiting to tarnish the ILO, Miller mused that US participation in the ILO began under the influence of Samuel Gompers and Woodrow Wilson “against either of whom charges of socialism would be difficult to sustain.” She also noted McGrath’s dubious conflation of the new Convention with the related “Recommendations,” which were not binding on even those countries that ratified the convention. Since items in the “Recommendations” were the most radical under discussion and the most unlike existing provisions in the United States, raising them was a red herring and a distraction to the more basic benefits covered in the Convention itself. Miller also pointed out that the very inclusion of maternity benefits in the private plans of American companies was proof that they were “legitimate and desirable” and a “reflection of the marked increase in the number and proportion of married women in the labor force.” “McGrath’s implied horror” was disingenuous.

While Miller presented the need for an ILO position on maternity policy as part of the bulwark against Communism and legitimated the organization by linking it to the well-known anti-communists Woodrow Wilson and Samuel Gompers, there were, perhaps, additional reasons for McGrath to regard the ILO as staffed and stacked with communists. One of those reasons might have been the ILO’s Mildred Fairchild herself.

⁴⁴¹ Ibid.

Pink Ladies

Not all women in government were left feminists and not all women federal employees faced loyalty investigations. However, the historian Landon R.Y. Storrs finds “a strikingly high number of women in government and politics who, from the late 1930s through the 1950s, faced challenges to their loyalty.”⁴⁴² Their gender may have made them especially vulnerable, even more so when they may have deviated from proscribed sex roles.⁴⁴³ These influential women who were caught up in the Red Scare had a distinct social profile. First, they “knew each other.” In fact, Storrs finds a “network of female experts and activists,” who moved in intersecting “circles” and “overlapped” at colleges and within non-governmental organizations such as labor unions, the American Association of University Women, and consumer groups as well as within government. They were “well-connected.” For many of these women, government jobs were important because they faced discrimination in the private sector of business, labor and academic employment.⁴⁴⁴ Ties between and among these women ranged from the social to the professional but Storrs finds among them a loose range of political beliefs about “the need for state policies to increase the living standards and political participation of poor and working-class Americans,” especially women.⁴⁴⁵ This network of left feminists that Storrs identifies had gained influence within the New Deal and used their positions, and the crisis of the war, with its concomitant government growth and interesting political possibilities, to expand social supports, especially for women and workers. Not all New Dealers who favored an expanded welfare state were

⁴⁴² Storrs, “Red Scare Politics,” 496; Landon R.Y. Storrs, “‘Attacking the Washington Femmocracy’: Antifeminism in the Cold War Campaign against ‘Communists in Government,’” *Feminist Studies* 30, no. 1 (Spring 2007): 125.

⁴⁴³ See Elaine Tyler May, *Homeward Bound: American Families in the Cold War*, (New York: Basic Books, 1988, 1999) for a rich discussion of the way proscriptions of femininity underwrote the cold war.

⁴⁴⁴ Storrs, “Red Scare Politics,” 492, 493, 496, 509, 520.

⁴⁴⁵ *Ibid.*, 494, 509, 511.

women, but a significant number were. Vulnerable in the cold war world, their “ties became liability” for each other and also for the kinds of programs that they supported, like national health insurance and the expansion of social security.⁴⁴⁶ “Women’s high visibility among promoters of national health insurance” and other expansions of the welfare state, such as maternity benefits, led to a feminization of reform impulses in a time when feminization was suspect itself. Thus, these elaborations of social supports were doubly, or even triply, “pink—both Communist and feminine.”⁴⁴⁷

This pinkness of femininity and alleged ties to communism colored the ILO. Fairchild was not a card-carrying member of the Communist Party, but she was certainly a left feminist or a social justice feminist. At least for a part of the time, and in important parts of her published work, she was sympathetic to the Soviet Union. Soon after defending her dissertation, she and Kingsbury, her mentor, took a research trip to the Soviet Union. On their return they presented a study on unemployment in the USSR to the World Social and Economic Congress in 1931, a timely piece considering the global depression of the time.⁴⁴⁸ A few years later they published a book together, *Factory, Family and Women in the Soviet Union*.⁴⁴⁹ This book established the two women as experts on this subject. A seminal work grounded upon extensive primary research in the Soviet Union, it is still being assigned in Russian Studies, history, and economics classes today. Clearly quite favorable to the Soviet Union and the Bolshevik Party, especially in its

⁴⁴⁶ Ibid., 520.

⁴⁴⁷ Ibid., 523.

⁴⁴⁸ Susan M. Kingsbury and Mildred Fairchild, *Employment and unemployment in pre-war and Soviet Russia*; report submitted to the World Social Economic Congress, Amsterdam, August 23-29, 1931 (Schiedam, Holland, "De Eendracht", 1932).

⁴⁴⁹ Susan M. Kingsbury and Mildred Fairchild, *Factory, Family and Women in the Soviet Union* (New York: G.P. Putnam’s Sons, 1935; repr. New York: AMS Press, 1974).

assessment of women's rights and the protection and advancement of workers, *Factory, Family and Women in the Soviet Union* is based on research from the early 1930s, the first Five Year Plan, and the very earliest parts of the collectivization of agriculture. It was not uncommon for visiting Americans in the 1930s to know nothing about famines and political repression. Full of glowing reports of rapid and successful industrial progress and the eager embrace of new work and social opportunities for women, Kingsbury and Fairchild examine "Industrial Life" and "Social Life" in ways that make clear what they find lacking in their own country. At one point, Fairchild rhetorically asks whether Russian women are happier after the Revolution than they were before. She dissembles that such "a question is impossible to answer" but then goes on to point out the drudgery of recent serfdom and the backwardness of Russia's weak industrial sector along with the new government's philosophy of "equality of the sexes," the modernization of working conditions and the social supports for motherhood.⁴⁵⁰ What is striking about her report on Soviet women's happiness after the Revolution is the vividness of her verbs. She writes:

The young woman worker...flings herself into the shock brigades in every factory, pours life and energy into every club and incites the volunteer social worker to new activity. She walks with an erect carriage and a vigor that at times comes close to a swagger. She laughs with a ringing note that fills silent hallways and shakes cobwebs from dusty corners...lends sparkle to every gathering....the new life and new hopes engendered by the Revolution belong to her.⁴⁵¹

Fairchild identifies the forward-looking Soviet policies relating to maternity as stemming from women's growing participation and influence in the trade unions. Like women in "the trade unions of the West," they demanded shorter hours, an end to child labor, universal education, day care, women inspectors, and benefits "for women during the period preceding and following

⁴⁵⁰ Ibid., 72.

⁴⁵¹ Ibid., 40.

childbirth”⁴⁵² In the book, Kingsbury elaborates on those laws and programs for pregnant workers and new mothers. In their exhaustive research, they found a guaranteed leave of two months before and two months after childbirth. A woman’s employer continued her wages during the leave. Women with complications of pregnancy were granted shortened hours. State insurance paid for “expenses of confinement,” a layette, a monthly allowance for the baby and an additional nursing allowance.⁴⁵³ New mothers were entitled to nursing breaks during work time.⁴⁵⁴ Some of these provisions are similar to the ones that so disturbed McGrath when Fairchild again discussed them in the context of the ILO Maternity Convention and Recommendations. Her particular views on the Soviet Union may have changed by the time she oversaw the Maternity Convention Revision. The USSR was, at this time, still trying to subvert the ILO with an alternate organization and many of the contacts she had established in the Soviet Union in the early 1930s suffered from the purges. But in print she had made her beliefs clear when she wrote that “compared with national income no other nation has made commensurate effort to provide for its mothers’ and children’s welfare.”⁴⁵⁵

While Fairchild herself was not called to testify before HUAC or Senator McCarthy’s Senate hearings, her name did come up at least a couple of times. Once, McCarthy demonstrated his poor academic reading skills by accusing the editor of an anthology of authoring a text rightly attributed to Fairchild. After asking to see the passage McCarthy had marked, the editor

⁴⁵² Ibid., 83.

⁴⁵³ Ibid., 151-152.

⁴⁵⁴ Ibid., 268.

⁴⁵⁵ Ibid., 268.

explained that it was Fairchild who had written the article on Family in the Soviet Union.⁴⁵⁶ In 1947, Walter S. Steele named Mildred Fairchild as a key figure in two communist front organizations in testimony before HUAC.⁴⁵⁷ The Red Scare extended far beyond hearings before Congress. Fairchild, as an American employee of the UN, was subject to internal government loyalty investigations. In 1953, the FBI launched an investigation of “Loyalty of Employees of the United Nations and other Public International Organizations (Executive Order 10422).” This investigation targeted 139 people, thirty-eight of them women; among them was Mildred Fairchild Woodbury.⁴⁵⁸

In March, 1953, Fairchild filled out a seven page form labeled “Identification and Personnel Data for Employment of United States Citizen.” Question 14 required listing all foreign travel. Since she worked for the ILO her international travel had been extensive, covering much of Western Europe as well as Ceylon, Iran, Pakistan and India. However, her first three foreign trips, which fit in the standard section before she had to start attaching pages, all occurred before her work with the ILO and all included stops in the Soviet Union, in 1929, 1932 and 1936 while she and Kingsbury were doing research on their book. She also had to attach pages for question 18, “Membership in Other Organizations.” As her very last items demonstrate, Fairchild

⁴⁵⁶ David H. Price, *Threatening Anthropology: McCarthyism and the FBI's Surveillance of Activist Anthropologists* (Durham: Duke University Press, 2004), 149.

⁴⁵⁷ “Testimony of Walter S. Steele regarding Communist Activity in the United States” July 21, 1947, (Washington DC: United States Government Printing Office, 1947); FBI, “Personal History” Mildred Fairchild Woodbury, nee Fairchild, August 24, 1953, Washington DC, p. 14 in “Mildred Fairchild Woodbury, FBI File,” FOIPA request, in Author’s Possession, p. 105.

⁴⁵⁸ Director, FBI to SAC, Washington Field, “Loyalty of Employees of the United Nations and other Public International Organizations (Executive Order 10422)” (August 18, 1953), Mildred Fairchild Woodbury FBI file, FOIPA Request, in author’s possession, p. 82-85.

knew that this form was part of a loyalty investigation and that her record might prove suspicious to anti-communists.⁴⁵⁹

After listing eighteen organizations under “past memberships,” Fairchild added her own heading “In addition it should be noted:” that contained paragraphs on two other organizations. These two were “a so-called Advisory Council to ‘Soviet Russia Today’” and the American Women’s Congress. Fairchild wrote that *Soviet Russia Today* never asked her to be an advisor. She never had any editorial meetings and she did not even know she was listed as an advisor until someone mentioned it to her after the Soviet invasion of Finland, at which point she wrote the magazine to demand her name be removed.

Fairchild was reported as a vice president of the Congress of American Women, a women’s organization founded in 1946, claiming interest in women’s issues, social and racial equality and international peace. While it briefly enjoyed the support, membership and leadership of a variety of prominent women, the CAW lasted only four years, victim of the Red Scare when the Department of Justice required the group to register as a foreign agent. The CAW did have acknowledged Communists, including Elizabeth Gurley Flynn and Muriel Draper, in national office.⁴⁶⁰ Knowing that this organization affiliation was going to cause her

⁴⁵⁹ Mildred Fairchild Woodbury, “Identification and Personnel Data for Employment of United States Citizen” Mildred Fairchild Woodbury FBI file, FOIPA request, in author’s possession, 9-15.

⁴⁶⁰ Amy Swerdlow, “The Congress of American Women: Left Feminist Peace Politics in the Cold War,” *US History as Women’s History: New Feminist Essays* eds. Linda K. Kerber, Alice Kessler-Harris and Kathryn Kish Sklar (Chapel Hill: University of North Carolina Press, 1995), 302. One CAW member, Gerda Lerner, burned all of her CAW pamphlets and correspondence after the organization was placed on the Attorney General’s List of subversive organizations. Few records seem to have survived anywhere, so the full extent of the CAW’s interest in maternity policy cannot be discerned from the written record. Gerda Lerner, *Fireweed: A Political Autobiography* (Philadelphia: Temple University Press, 2002), 273. California Legislature, *Senate Investigative Committee on Education* (Sacramento: California State Printing Office, 1957), 244; “Results of Investigation” New York, August 12, 1953, p. 3; Mildred Fairchild Woodbury FBI file, FOIPA Request, in author’s possession, 71; In October 1949, HUAC released a report on the Congress of American Women and identified Fairchild as a supporter. John Edgar Hoover to Liaison Representative, June 18 1953, Mildred Fairchild Woodbury FBI file, FOIPA request, in author’s possession, 21.

problems, she carefully explained, as the very last thing on her loyalty investigation form, that she had not, in fact, ever belonged to the Congress of American Women. She had been invited to join, but she had declined and did not find out until later that the organization had listed her as an officer anyway. She did not know because since she was not a member, she had no communication with them and, in any case, “throughout the period had been stationed outside the country.” The last line was an emphatic: “I was never a member of this organization.”⁴⁶¹

She was correct to be worried about her tenuous connections with these two organizations. They come up repeatedly in the papers in her FBI file, although J. Edgar Hoover and his agents usually, but not always, gave a nod to her explanations.⁴⁶² The FBI was also concerned with her membership in the American Civil Liberties Union, which she listed as an organization she had belonged to.⁴⁶³ They also noted that a few years before, one of highest placed Communist Party FBI informants, Louis F. Budenz, had called Dr. Mildred Fairchild “one of 400 concealed Communists.” Having been once named by Budenz, even if he did change his mind later, tainted Fairchild pink.

At least two of the women she listed as personal references were almost certainly themselves under investigation by the FBI, and so was her husband, Robert Woodbury.

Much of the 143 page long FBI file on Fairchild is repetitive, since it was actually the third FBI investigation of Fairchild. At the end of August, 1953, Hoover was urging

⁴⁶¹ Mildred Fairchild Woodbury, “Identification and Personnel Data for Employment of United States Citizen” Mildred Fairchild Woodbury FBI file, FOIPA request, in author’s possession, 15.

⁴⁶² SAC Washington Field to Director, FBI (buded: Jul 18, 1953) Mildred Fairchild Woodbury FBI file, FOIPA request, in author’s possession, 17. The New York agent didn’t get the memo and reported in August 1953 that the Congress of American woman listed Fairchild as a vice president in a 1947 memo. NY 138-1475 “Results of Investigation,” New York, 12 August 1953, p. 3 Mildred Fairchild Woodbury, FBI File, FOIPA Request, in Author’s possession, p.71; See also “Mildred Fairchild Woodbury, Personal History,” August 24, 1953, p.5, Mildred Fairchild Woodbury FBI file, FOIPA Request, in author’s possession, 96.

⁴⁶³ New York 138-1475 “Results of Investigation,” New York, August 12, 1953, the second, p.7, Mildred Fairchild Woodbury FBI File, FOIPA Request, in author’s possession, 79.

“expeditious attention” to the investigation of UN employees generally, and of Mildred Fairchild Woodbury specifically.⁴⁶⁴ About a month later, Fairchild and Woodbury had retired from the ILO and the FBI investigation ended.⁴⁶⁵

Most of the informants who gave information about Fairchild admitted that they did not know her personally but a few did. Philadelphia Confidential Informants T-7 and T-8 are less interesting for their willingness to inform than for the fear that must have gripped formerly liberal women who now understood that advocacy of maternity benefits was communistic. Philadelphia Confidential Informant T-7 “knew of no information bearing unfavorably on” Dr. Fairchild. In fact, she described her as “a kind and generous person” who would go to “endless trouble for workers.” However, T-7 “could not recommend her as a loyal American citizen” because she “possessed ‘very strong liberal views’ such as a belief in heavy taxation by the state for the betterment of social organizations.”⁴⁶⁶ Philadelphia Confidential Informant T-8, a professor and former colleague of Fairchild’s, believed that Fairchild was so interested in the “‘working woman’ and devoted considerable time to research on social problems” that she became “‘gullible and confused’” and joined “organizations, the identities unknown, but some of which were later referred to as procommunist organizations.”⁴⁶⁷ T-9 said that while Fairchild was

⁴⁶⁴ Director, FBI to SAC, Washington Field, August 18, 1953 and John Edgar Hoover, Director, to John N Horan, office of Security, Dept. of State, August 24, 1953, in Mildred Fairchild Woodbury, FBI file, FOIPA request, in author’s possession, 82-85, 87.

⁴⁶⁵ United States Civil Service Commission to Director, Federal Bureau of Investigation, August 20, 1954; SY Miss Hahn to Federal Bureau of Investigation, Sept. 28, 1953; John Edgar Hoover, Director, to John N. Horan, Dept. of State, October 5, 1953, Mildred Fairchild Woodbury FBI File, FOIPA request, in author’s possession, 125, 124, 123.

⁴⁶⁶ “Results of Investigation” Philadelphia, Pennsylvania, (July 17, 1953), 2, Mildred Fairchild FBI File, FOIPA Request, in author’s possession, 51, 57.

⁴⁶⁷ Ibid.

“in a sense loyal to the United States,” she was a “left-wing socialist” who “believes in social reform.” T-10 called Fairchild a “missionary for the working class.”⁴⁶⁸

Fairchild moved in a circle of like-minded social reformers who wanted to expand provisions of the New Deal welfare state to better serve women, children and workers. William McGrath sought energetically to discredit the Maternity Convention by opposing communism to the private family and feminine matters of infant care. He wanted to taint larger international organizations with not only communism, but also with rampant and inappropriate feminine concerns. Meanwhile, among Fairchild’s old colleagues and acquaintances, she was suspicious because, among other things, she believed in high taxes. In the midst of the Red Scare, some of them informed on her to the FBI. This was true even of those close enough to her that they knew of her pending retirement before the FBI did.

Fairchild, who had, as Chair of the ILO Division of Women and Children, shepherded through some very important international conventions for working women, especially those on equal wages and on maternity, left the ILO just as her loyalty investigation was drawing to a close. She was sixty; her husband was sixty-four. Perhaps they were ready for retirement.⁴⁶⁹ Perhaps as they watched the narrowing of political options for reform possibilities, including J. William McGrath’s antipathy towards the Maternity Convention, they despaired of any success in expanding social rights for women, children or workers. Or, perhaps, knowing what kinds of evidence anti-communists were looking for and what they were likely to find, this couple made a personal calculation and went home to Bryn Mawr.

⁴⁶⁸ PH 138-339 “Results of Investigation,” Philadelphia, PA, July 17, 1953, pp 8-10, 12. Mildred Fairchild Woodbury FBI file, FOIPA request, in author’s possession, 53-55, 57.

⁴⁶⁹ Françoise Thébaud, an expert on the history of the ILO, believes that Fairchild retired pursuant to the standard ILO retirement age of 60. Personal communication, Nov. 2, 2015, in author’s possession.

Mildred and Robert both lived to be eighty. Following her retirement, Fairchild's activities were modest for such an accomplished public scholar and activist. In 1959, as part of the National Child Labor Committee, she testified before the National Advisory Committee on Farm Labor in favor of a prohibition on the employment of children under fourteen in commercial agriculture. In this testimony, she challenged a California grower who maintained that farm work reduced juvenile delinquency.⁴⁷⁰ In 1963, she received a "Distinguished Daughters of Pennsylvania Award."⁴⁷¹ Throughout the 1960s, she continued to be involved with the Bryn Mawr School of Social Work and the American Association of University Women. In the early 1970s, Fairchild was a board member of the Pennsylvania Program for Women and Girl Offenders.⁴⁷² Fairchild remained active in social reform organizations, but she rarely provided the public face, or the published voice, that she had before her retirement and before the concerted loyalty investigation.

McGrath's response to the ILO maternity convention revealed the limits of international cooperation in the face of conservative business interests at home. The Red Scare effectively narrowed the debate on social welfare by lopping off part of the spectrum of participants. This spectrum included the network of well-placed social justice feminists in government and policy organizations. This loss was devastating to hopes for expanded social insurance and also

⁴⁷⁰ Bess Furman, "Farm Child Labor Abuse Scored; Law urged to Help all under 14." *New York Times*, February 7, 1959.

⁴⁷¹ "Distinguished Daughters of Pennsylvania Award," *The Pennsylvania Manual*, 9-5, http://www.revenue.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_33118_1581_420488_43/http%3B/pubcontent.state.pa.us/publishedcontent/publish/cop_general_government_operations/dgs/community_content/publications_and_media_services/portlets/vol_118_section_9/vol_118__sec_9__distinguished_daughters.pdf (June 26, 2011).

⁴⁷² Mildred Fairchild Woodbury Papers, 1951-1973, Bryn Mawr College Special Collections, Philadelphia, PA. These papers also confirm that Mildred Fairchild Woodbury and Robert Woodbury lived in a house that Fairchild had jointly owned with Kingsbury and where Kingsbury had lived between the war and her death. While Fairchild taught at Bryn Mawr she and Kingsbury had shared a different house on campus. Many thanks to the Bryn Mawr archivist for checking the scope of these papers for me.

confounded American feminism for decades. As Storrs explains, “Anticommunists’ curbing of social justice feminism in the 1940s and the 1950s helped forestall the expansion of the fledgling New Deal welfare state”⁴⁷³ and “anticommunist attacks on women in government and policy circles curbed both feminism and the social democratic potential of the New Deal.”⁴⁷⁴

A New EMIC?

Unlike debates about maternity conventions, those about re-authorizing EMIC for the dependents of servicemen fighting in the Korean War involved two sides who both appealed to patriotism and anti-Communism and thus at first glance offered a better opportunity for passage. Both those for a new EMIC and those against one could and did claim to be fighting Communism with maternity policy. The disappointing outcome of repeated attempts to reauthorize EMIC show just how far the pendulum had swung away from welfare expansion in the short time since the end of World War II.

While a shorter war with fewer casualties than World War II, the Korean War did allow for patriotic rhetoric and vociferous support for America’s fighting forces. However, a war against communists also sparked reflections about fundamental differences between communist societies and “free” societies. While fighting the communists in Korea, Americans at home needed to uphold the values that distinguished the free world from the communist one. The Korean War presented very complicated opportunities for rhetoric. In Congressional hearings over the reauthorization of EMIC both supporters and opponents appealed to fundamental American values and the imperatives of defense.

⁴⁷³ Storrs, “Red Scare Politics and the Suppression of Popular Front Feminism,” 523.

⁴⁷⁴ *Ibid.*, 496.

The original EMIC had been passed as a wartime measure. It was justified by the sacrifices that enlisted personnel were making in the war effort and by the dislocation and wartime migration of many servicemen's families as well as domestic shortages in medical care. During the Korean War, far fewer men served in the armed forces. There was not as much internal relocation of wives and children. Cities did not feel the intense competition over housing and medical care that they had when servicemen's families and war workers flocked to industrial centers during World War II. During the height of the baby boom, hospitals struggled to accommodate the demands for obstetrical services. However, an expanded medical profession was primed to oppose national health care initiatives in ways that they had not been when Martha May Eliot slipped EMIC through wartime expenditures initiatives on the basis of her reading of the Social Security Act.

In April 1950, NSC-68 called for a massive build-up of military strength in order to deter communist expansion. In June, North Korea attacked across the 38th parallel into South Korea, which was under the US influenced government of Syngman Rhee. US military forces returned to Korea and the way was paved for the huge military expenses called for under NSC-68. The defense budget ballooned from 13 billion in 1950 to 50 billion in 1953. Not much of this budget, however, was social support for the families of the men half a world away fighting to prevent the spread of Communism.

In the spring of 1953, two bills were introduced in the Senate which would have reauthorized EMIC and provided public health benefits for the wives and babies of servicemen.. The first, S. 1245 of the 82nd Congress, 1st session, was "A Bill to Establish a Program of Grants-in-aid to Assist the States to Provide Maternity and Infant Care for the Wives and Infants of Enlisted Members of the Armed Forces During the Present Emergency." The second, S. 2337,

was titled. “A Bill to Provide for the National Defense by Enabling the States to make Provision for Maternity and Infant Care for Wives and Infants and Hospital Care for Dependents, of Enlisted Members of the Armed Forces During the Present Emergency, and for Other Purposes.”

EMIC had been authorized as a temporary wartime measure. The authors of these new bills tried to replicate that success by referring to “the Present Emergency.” S. 2337 was even more bold in adopting military necessity as the language to disguise maternity policy in the title “A Bill to Provide for the National Defense.” Who could be against the National Defense? It was something of a leap to argue that the Korean War itself was National Defense. Perhaps it was even more of a leap to assert that providing maternity benefits is providing for the national defense. But, in the climate of the Cold War and in the climate of Senate hearings, and in anything relating to pregnancy or motherhood, sentiments run high. The combination of all these multiple themes in the hearings to reauthorize EMIC produced extraordinary rhetoric.

The Defense Department testified in favor of a new EMIC as a matter of defense. So did the office of the Surgeon General of the Army and the Morale and Welfare Branch of the Department of the Army.⁴⁷⁵ The American Association of Social Workers referred to the new EMIC as a “patriotic duty,” submitting testimony that:

The health of the citizens is a basic asset to our country. While we are engaged in a protracted struggle abroad to defend our democratic way of life, it is imperative that we organize and maintain those resources—such as maternity and infant care and hospital care for dependents of enlisted personnel in the Armed Forces—which contribute to the morale of our fighting men and the well-being of their families....To do less is to fail in the national defense.⁴⁷⁶

⁴⁷⁵ Congress, Senate, Subcommittee on Health of the Committee on Labor and Public Welfare “Health Care for Dependents of Servicemen: Hearings before the Subcommittee on Health of the Committee on Labor and Public Welfare United States Senate, S. 1245 and 2337,” (“Health Care for the Dependents of Servicemen: Hearings”) Eighty-second Congress, (Washington, GPO: 1952), 215-224.

⁴⁷⁶ “Statement of the American Association of Social Workers re: S. 2337 & S. 1245”, “Health Care for the Dependents of Servicemen: Hearings,” 196.

Testifying on behalf of several religious and reform organizations, Mrs. Theodore O. Wedel, a board member of the National Council of Churches, supported the reauthorization of EMIC as a social good and as a defense expenditure. “Planes, tanks, air bases, and flat-tops are considered legitimate military expenses that will contribute to the security of this country. Medical care for the wives and babies of the men who man the machines of war are just as legitimate a charge.”⁴⁷⁷

However, an Iowa doctor, writing on behalf of his colleagues in the state, asserted that “The enlisted personnel of the Armed Forces enlisted to fight Communism and socialism and not to foster similar practices by their own Government.”⁴⁷⁸ Material and social conditions had changed as well as ideology. Where some had once compared having a child and serving in the armed forces as both forms of national duty and responsibility to the country, in the highly commercialized atmosphere of the 1950s, childbearing could be presented as a consumer choice. The same Iowan doctor who had chastised the new EMIC proposal as diametrically opposed to the very values that American servicemen were fighting for also offered a perspective on what he thought American values and opportunities really were and how having a baby fit into that life. His vision was perhaps informed by the fact that in his own life, babies were profitable. Childbearing was less a civic duty than it was an act of consumption, less a service to the nation and more like buying a car, or a living room suite. He rejected the notion that the government should foot the bill for a serviceman’s baby and suggested instead, that if he and his wife wanted children, they should pay. He asked, “Why shouldn’t the family spend its savings or borrow if

⁴⁷⁷ Mrs. Theodore O. Wedel, United Churchwomen of the National Council of Churches of Christ, et al, “Health Care for the Dependents of Servicemen: Hearings,” 228

⁴⁷⁸ Matt G. Sanders, president, Webster County Medical Society, Iowa, “Health Care for the Dependents of Servicemen: Hearings,” 285.

savings are not available, to finance the cost of a baby the same as they would do to obtain many other things?”⁴⁷⁹

This doctor could refer to savings and consumer credit as resources that would have been largely unavailable to enlisted men in the war that followed on the heels of the Great Depression. However, other conditions had changed as well. In the 1950s, for instance, many of these men had left jobs behind that had provided substantial fringe benefits, often including health insurance for dependents. Their new jobs in the armed forces might thus represent a distinctive fall in living standards for themselves and their families and one which they might resent, especially if it put their wives and babies at risk when they could not protect and provide for them.

Following their usual concern for meeting the best standards of medical practice and for attempting to address the concerns of the medical community, Children’s Bureau staff sounded out the AMA about a plan to re-authorize EMIC. While they hoped to head off opposition, their discussions may have had the opposite effect. The AMA, through its Committee on Maternal and Child Care, sent out questionnaires to state medical societies and also to “individual pediatricians and obstetricians...who had been vocal about the old EMIC.”⁴⁸⁰ With an apparatus in place that had already defeated the Wagner-Murray-Dingell Bills, the AMA plugged directly into some members’ dissatisfaction with the previous program. While studies had indicated high degrees of satisfaction with EMIC, some doctors, especially specialists in large urban areas, had chafed at EMIC regulations. Those most unhappy with the program were disproportionality influential in

⁴⁷⁹ Ibid.

⁴⁸⁰ John P. Hubbard, MD, “EMIC Again?” *Pediatrics* 8, no. 1 (July 1951): 150.

the profession. When the Korean War came around, the AMA gave those doctors an engraved invitation to hold forth on their views.

As a case in point, Dr. Edwin Crosby, of the American Hospital Association, opposed a new EMIC in vividly anti-communist rhetoric:

This emergency—this cold war—is going to last for a long time, in our opinion. Our aim in this struggle is not to vanquish our enemies. It is to preserve freedom for our individual citizens. We must encourage our free institutions to prosper and be stronger than ever before....We have an obligation not to destroy freedom and independence at home while our boys fight for it abroad....If these groups are entitled to free medical and hospital care at Federal expense, then we shall have accomplished socialized medicine without the necessity of special legislation for it....Can we help these people without making them totally dependent upon the Federal Government?⁴⁸¹

Having geared up to oppose the Wagner-Murray Dingell bills in the late 1940s, throughout the 1950s, the AMA continued to flex its political muscle whenever health coverage arose in proposed legislation. AMA representatives spoke out against EMIC reauthorization before Congress and in the media. They sent editorials to the *New York Times* opposing it. Strong AMA opposition helped defeat health care for military dependents in 1950, 1951, 1952 and 1953. When Congress did finally pass the “Dependent Medical Care Act of 1956” it was eviscerated and contained restrictions and co-payments that placed a burden on the struggling young families of servicemen.⁴⁸²

⁴⁸¹ Dr. Edwin L. Crosby, American Hospital Association, “Health Care for the Dependents of Servicemen: Hearings,” 170.

⁴⁸² W. Michael Byrd and Linda A. Clayton, *An American Health Dilemma* (New York: Routledge, 2000), 241.

Cold War Maternity Policy

While the international community advanced maternity standards after the war, the U.S. regarded such proposals as communistic and a threat to the family. Eileen Boris argues that as late as the maternity convention revisions, the US was behind much of Western Europe, but stood about even with many other countries, especially those in Latin America, in terms of social provisions for maternity.⁴⁸³ Moreover, countries that may have looked better on paper often lacked enforcement provisions that would have made their protections meaningful. Some also excluded many workers, or structured funding in ways that disadvantaged women in the workplace. In comparison with many other nations in the Americas—Chile, Uruguay, Bolivia, Columbia, Mexico, Cuba and more—that struggled to enact social legislation, including maternity benefits, during the early and mid-twentieth century, the US seems less of an outlier.

The ILO Maternity Convention was shaped by both US experiences and sensibilities and by the left-feminists at the Women's Bureau and by the American academic Mildred Fairchild. Ironically, such women, despite their left backgrounds, may have thought they were designing social insurance that would stand as a bulwark in the fight against communism. But, after the ILO maternity convention, domestic conservatives used these same provisions as weapons against both international cooperation and domestic reform. Social welfare advocacy and left feminism both suffered. Maternity benefits represented a symbolic threat to freedom of contract, free enterprise, motherhood, fatherhood, virtue, and private medical practice. Red Scare tactics ousted friends of maternity within American politics, international organizations, the American

⁴⁸³ Eileen Boris, "No Right to Lattes or Nursing Time: Maternity leave and the question of United States Exceptionalism." In Leon Fink et al., eds., *Workers, the Nation-State and Beyond: Essays in Labor History Across the Americas* (New York: Oxford University Press, 2011), 171-193.

labor movement, and the US government. As Storrs says, “the red scare left a gendered legacy that constrained both social policy and modern feminism.”⁴⁸⁴

The Red Scare also marked a sharp division in the history of American women’s activism. The feminists of the women’s liberation movement of the 1960s and 1970s had fewer ties to the social justice feminists of the 1930s and 1940s than those women had had to the suffrage-era women reformers. This is part of the reason that when the feminists of the 1970s tried to understand and address the problems faced by pregnant working women they largely neglected the experience and approaches tried by Martha May Eliot, Frieda Miller, Charlotte Silverman, Ruth Young, Luisa Moreno, Mildred Fairchild, Harry Becker and Claude Pepper. Very few social ties connected the left feminists of the New Deal and Fair Deal to the women active in government, universities and unions in the 1970s. Instead, they were inspired by Fannie Lou Hamer, Ella Baker, Bob Moses, or Martin Luther King.

A few women in government crossed the divide of the Red Scare and remained active into the early years of Women’s Liberation. Among them was Esther Peterson, who had worked closely with Claude Pepper on minimum wage legislation and the Pepper Bill, and would, under President John Kennedy, become the Director of the Women’s Bureau. Martha May Eliot would return from Geneva after the Red Scare to become Chief of the Children’s Bureau. But, as Daniel Horowitz and Landon Storrs point out, survivors of the Red Scare trod very carefully in the changed political climate.

When Deborah Dinner tries to explain the abandonment of the social welfare approach and the embrace of an anti-discrimination model among those who wanted maternity policy reform in the 1960s and 1970s, she identifies a “change in statutory law” (the inclusion of sex in

⁴⁸⁴ Storrs, “Red Scare Politics,” 524.

Title VII of the Civil Rights Act) that created new institutional possibilities for addressing the needs of pregnant workers. This is an excellent point, but it would be a mistake to ignore the deep and widespread effects of concerted political repression. Dinner makes specific reference to Esther Peterson and Mary Dublin Keyserling who both survived traumatic investigations of themselves, their husbands and their friends during the Red Scare. Dinner tells a story of Peterson changing her mind about special protective laws for women, but anti-communism doesn't figure into Dinner's explanation.⁴⁸⁵

Yet another reason that 1970s activists for the rights of pregnant women had such different understanding and approaches to maternity policy was that, by the 1970s, the nature of social welfare in the United States had itself changed a great deal with the maturation of a hybrid welfare state of both public and private benefits. The next chapter examines how the private welfare state of employee fringe benefits accommodated pregnancy. While pregnancy seems particularly marginalized in private plans, it is important to remember pregnancy only highlights broader, inherent weaknesses in a system dependent on private coverage and what happened to pregnant workers is an exaggeration of the risks and pitfalls potentially facing all workplace-related benefits.

⁴⁸⁵Dinner, "Pregnancy at Work," 143, 130-131; Storrs, "Red Scare Politics," 491-524; Esther Peterson, with Winifred Conkling, *Restless: The Memoirs of Labor and Consumer Activist Esther Peterson* (Washington DC: Caring, 1995), 83-87; Storrs, *The Second Red Scare*, 107-11, 229-31.

CHAPTER 5:

PAYING FOR BABY: EMPLOYEE FRINGE BENEFITS AND PREGNANCY

In the 1940s and 1950s, a pregnant employee of Edward Don & Company could expect a baby buggy and mattress and a week of termination pay.⁴⁸⁶ The Joseph E. Seagram and Sons Company sent bouquets of flowers or fruit baskets to the wives of their managers upon the births of their babies.⁴⁸⁷ In the postwar period, employers experimented with a wide variety of fringe benefits to increase employee loyalty, but examples like these indicate something more than creativity in the benefits office. An employer's gift of a baby buggy resembles a baby shower more than an essential element of social welfare. Benefits such as termination pay, or the right to cash in accumulated vacation days upon separation due to pregnancy, demonstrate assumptions that mothers did not belong in the workplace. They also, however, mark the gendered limits of a welfare state described by employment. Termination pay is the last benefit a worker receives from an employer—a parachute, not a safety net. The limited provision of maternity fringe benefits reflected a deep suspicion of pregnant workers, constituting and reinforcing widespread employment discrimination against women.

In the postwar period, some firms had no maternity policy at all and others had a policy of dismissing pregnant employees at some point during their pregnancies. However, many companies did develop coherent, if not generous, coverage. In reality, many women relied on these plans and balanced work and motherhood upon these meager, but real, supports. Far better off than many of their sisters, the new mothers who enjoyed job-related maternity benefits were

⁴⁸⁶ Edward Don & Company, "To Women Associates," *Personnel Benefits* [Chicago, ca. 1950], Pamphlet Collection, Hagley Museum and Library, Wilmington, Delaware (Hagley).

⁴⁸⁷ "Procedure Book for Personnel Depts in the Production Div." p. 3 and p. 1, rev 8/62 file "Pers: Proc Book c. 1954-1965" Box 882, Series XI, Group 2, (2126), Joseph E. Seagram and Sons (Seagram Company), Hagley.

the beneficiaries of a private welfare state not only for mothers and children, but for all workers and their dependents.

This chapter will first examine several key provisions of maternity policy in the private sector—maternity leave, temporary disability insurance, and health insurance. There were functional weaknesses to a privately based maternity policy; each of these benefits was often more limited in days or weeks or dollar amounts than similar fringe benefits unrelated to maternity. Benefits were not equally available to all. The private welfare state excluded many workers and their dependents and those it did include were not covered equally.

However, it is the complications of pregnancy, and also the complications of employment, that reveal the intrinsic flaws of privately-based social welfare provisions. Pregnancy's long duration, its frequent occurrence, and the idiosyncrasies peculiar to each pregnancy made predicting the cost, in medical care and also in lost wages, difficult. A normal pregnancy could be easy and cheap, but pregnancy complications could be very expensive and each case in between required careful scrutiny under a system of employee benefits. This private system also hinged upon a stable relationship with one employer when the reality was that even in the postwar period that was not always the case. Employment stability is a weak foundation upon which to build a system of social welfare and nothing shows this so clearly as a nine-month gestation, women's fragile ties to the labor market and the question of dependent coverage.

The menu of employee benefits can best be understood through a case study of a large employer. Throughout this chapter there is a special emphasis on one firm, a private company and the largest distillery of alcoholic beverages in the world at the time, Joseph E. Seagram & Sons. Seagram's maternity policy included all the key benefits. They were not the best place for women to work, but neither were they the worst. Seagram had union and non-union employees

and an active and conscientious employee benefits division that preserved interoffice correspondence about policy.

The Growing Private Welfare State

Scholars of the welfare state have extensively compared the US version to those of other advanced industrialized countries, documenting the weaknesses and absences of numerous social provisions in the United States. They have also sought to determine why some essential social protections, such as health insurance and maternity benefits, are missing, and why others, such as old age pensions, unemployment insurance and disability, are so paltry. Recently, scholars have emphasized a broader history that can account for both the state-supported and distributed welfare programs as well as the private, or corporate welfare embodied in employee fringe benefit programs. Such programs, rooted in the early twentieth century, adapted to a brief New Deal surge in public benefits and then blossomed during World War II and the postwar years as the opportunity for expanding public benefits was lost. At its height in the early 1970s, the private welfare state of employee fringe benefits covered “about 90 percent of all unionized workers...and many workers in large nonunion firms” as well as their dependents.⁴⁸⁸ When private benefits are accounted for, the American picture does not look nearly so bleak. Many American workers did enjoy a high level of social support for the exigencies of illness, unemployment, and old age as well as for vacations and other quality-of-life concerns. This history of American maternity policy must take in the policies offered by Seagram or SunLite Company. Most pregnant workers and expectant mothers had no government-funded care, but many had maternity benefits offered by their own employer or a husband’s employer.

⁴⁸⁸ Nelson Lichtenstein, *Labor’s War at Home* (Philadelphia: Temple University Press, 2003), 240.

Employee fringe benefit plans expanded exponentially during and after World War II to include wage replacement (often called Sickness and Accident Insurance or Temporary Disability Insurance), paid and unpaid leave, vacations, pensions, health insurance for the employee and for the employee's dependents, and other benefits. Through these private plans, employers became responsible for the health and well-being of their employees, and their employees' families outside the workplace and off the job. Important social welfare provisions were vested in the private sector and not with the state. Maternity provisions, often the entering wedge for public benefits in other countries,⁴⁸⁹ were inserted into private plans that reflected deeply held social anxieties about the employment of mothers and the sporadic relationship of women workers in general to the permanent labor force. Private plans, which were usually chosen only by the employer, also revealed the balance of power in the employment relationship and the limits of collective bargaining.⁴⁹⁰ Pregnancy confounded questions of health and disease at the same time that the costs of obstetric care spiraled upward, making workers, employers and insurance companies eager to shift the baby-boom bills to someone else.

⁴⁸⁹ See especially Rachel G. Fuchs, *Poor and Pregnant in Paris: Strategies for Survival in the Nineteenth Century* (New Brunswick: Rutgers University Press, 1992); Seth Koven and Sonya Michel, eds. *Mothers of a New World: Maternalist Politics and the Origins of Welfare States* (New York: Routledge, 1993); Gisela Bock and Pat Thane, eds. *Maternity and Gender Policies: Women and the Rise of the European Welfare States 1880s-1950s* (London: Routledge, 1991); Robert G. Moeller, "Protecting Mother's Work: From Production to Reproduction in Postwar West Germany." *Journal of Social History*. 22, no. 3 (Spring 1989): 413-437; Linda Haas, *Equal Parenthood and Social Policy: A Study of Parental Leave in Sweden*, (Albany: State University of New York Press, 1992); Carolyn Teich Adams and Kathryn Teich Winston, *Mothers at Work: Public Policies in the United States, Sweden and China* (New York: Longman, 1980); Meryl Frank and Robyn Lipner. "History of Maternity Leave in Europe and the United States," in *The Parental Leave Crisis: Toward a National Policy*, ed. Edward F. Zigler and Meryl Frank, (New Haven: Yale University Press, 1988), 3-22; Firoozeh Kashani-Sabet, *Conceiving Citizens: Women and the Politics of Motherhood in Iran*, (Oxford: Oxford university Press, 2011); Asuncion Lavrin, *Women, Feminism and Social Change in Argentina, Chile and Uruguay, 1890-1940*, (Lincoln: University of Nebraska, 1995); Nichole Sanders, *Gender and Welfare in Mexico: The Consolidation of a Postrevolutionary State*, (University Park, PA: Pennsylvania State University Press, 2011); Marian van der Klein, "The State, the Women's Movement and Maternity Insurance, 1900-1930: A Dutch Maternalism?" in *Maternalism Reconsidered: Motherhood, Welfare and Social Policy in the Twentieth Century*, ed. Marian van der Klein, Rebecca Jo Plant, Nichole Sanders and Lori R. Weintrob (New York: Berghahn Books, 2012), 38-59.

⁴⁹⁰ Klein, *For All These Rights*, 235-238.

Government policy, industrial strategy and union tactics drove the growth of private benefits during and after World War II. Nelson Lichtenstein points out the tax advantage granted to fringe benefit programs in 1942, but identifies the real impetus to such plans from War Labor Board decisions. During the war, the Little Steel Formula offered unions maintenance-of-membership clauses and dues check-offs in exchange for a wage freeze and a no-strike pledge. Unions' membership grew dramatically, but workers encountered inflation; corporate profits were soaring but workers labored under extreme pressure for high production. Not surprisingly, there were a large number of unauthorized strikes. The War Labor Board allowed unions to bargain for fringe benefits even if they could not bargain for wage increases, in what Lichtenstein calls "a politically adroit maneuver designed to derail union efforts to break the Little Steel Formula."⁴⁹¹ The War Labor Board initially upheld unions' positions relating to benefits that employers might have already promised workers, but encouraging labor to seek improvements at the bargaining table did lead to an expansion in benefits through labor agreements. By 1946, collective bargaining included health and welfare benefits. Unions negotiated over company pensions in 1949 and pressed for supplemental unemployment insurance as part of fringe benefit policies by 1955.⁴⁹² Certainly, the flood let loose by the War Labor Board's attempt to avoid wartime strikes profoundly shaped the system of American social supports for decades.

Beth Stevens argues that developments in the postwar period proved an even stronger impetus to fringe benefit programs than the decision of the War Labor Board. Having failed to

⁴⁹¹ Nelson Lichtenstein, "From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era," in Steve Fraser and Gary Gerstle, eds., *The Rise and Fall of the New Deal Order, 1930-1980* (Princeton: Princeton University Press, 1989), 151. Joseph G. Rayback observed that this strategy worked. "To a remarkable degree they quieted labor unrest in the last two years of the war." Joseph G. Rayback, *A History of American Labor* (New York: Simon and Schuster, 1966), 382.

⁴⁹² Lichtenstein, *Labor's War at Home*, 240.

expand the welfare state significantly after the New Deal, unions sought additional protections from life's hazards through their employers. Companies sought to secure employee loyalty. They also wanted to stymie any expansion of public provisions along the lines of the Wagner-Murray-Dingle bill. Some politicians who agreed with this goal also thought collective bargaining over fringes would reduce labor unrest, as it had during the war.⁴⁹³ The burgeoning postwar insurance industry developed and marketed new products and encouraged employers to reap the benefits of employee goodwill and loyalty without having to engage in collective bargaining.⁴⁹⁴

In *For All These Rights*, Jennifer Klein tracks the growth and development of private insurance plans and an ideology of “security” that also underwrote the successes of the New Deal. She shows how insurance companies and the employers who purchased insurance policies shared financial interests in the cost indemnity system which subverted not only public benefits, but even different kinds of private or cooperative medical care systems, such as Blue Cross. As a result of these plans, medical costs ballooned. Inherently inflationary structures contributed to high obstetric bills that, for various reasons that this chapter will show, the private benefits system did not cover well. Klein documents labor unions’ gradual shift from pushing for an expanded welfare state to bargaining for fringe benefits. This was a somewhat successful strategy. Workers covered by private “hospital insurance increased from one million before the

⁴⁹³ Beth Stevens, “Labor Unions, Employee Benefits and the Privatization of the American Welfare State,” *Journal of Policy History* 2, no. 3 (July, 1990): 233-260.

⁴⁹⁴ An insurance salesman with Equitable Assurance wrote to the manager at Scovil manufacturing: “many employers feel that it would be desirable from a management standpoint to promote voluntarily a program which the employer can financially support and receive whatever benefit there is to be derived from such voluntary action on his part rather than to wait until action is forced upon them when organized labor will take full credit for having had the benefits provided.” John F. Plummer to Alan C. Curtis, November 2, 1944, Scovil II, c29, “Insurance-1944,” Historical Collections Department, Baker Library, Harvard Business School, Boston, Massachusetts (Baker). See also Klein, *For All These Rights*, 98-104, 202, 207-212, 236, *passim*.

war to 8.5 million by 1944.⁴⁹⁵ More people received coverage as dependents. The system continued to grow rapidly in the postwar period, reaching two thirds of all wage and salary workers and many of their family members in the 1960s.⁴⁹⁶ However, in the context of labor-management relations, a focus on bargaining for more benefits usually constrained demands for union participation in exactly how the private welfare programs that they won operated. Congressional investigations into union corruption also hamstrung direct labor involvement in social services to members.

Klein finds that the private state expanded in tandem with the public welfare state. Programs such as Social Security did not cripple private pensions; they spurred the development of supplementary programs. Private benefits flourished partly as a bulwark against stronger public ones, but also both grew together. When public benefits seemed less possible, or, indeed, when they shrank, the private welfare state could also shrink.⁴⁹⁷ In terms of maternity policy, then, the very weakness of public maternity provisions would, according to Klein's argument, contribute to underdeveloped private programs as well.

Ironically, maternity benefit coverage was more prevalent in male-dominated industries as dependent health care coverage than in the female job sector. Lauri Perman and Beth Stevens examined the persistent gender difference in fringe benefit coverage between women and men. They use data from 1979, but their findings can be extrapolated to an earlier period because, despite some weakening in occupational sex-segregation, what was true about women's

⁴⁹⁵ Klein, *For all These Rights*, 212.

⁴⁹⁶ *Ibid.*, 248.

⁴⁹⁷ *Ibid.*, *passim*.

employment in the 1950s was still true in 1979.⁴⁹⁸ Perman and Stevens find a health insurance benefit gap similar to a wage gap between men and women. They conclude that the benefit gap was not due to overt sex discrimination, which by 1979 was illegal. Rather, industrial distribution of workers by sex explains the benefit gap.

Perman and Stevens conclude that the “workers least likely to have health insurance coverage are women workers in nonunion firms in the service, retail, nondurable, and construction industries.” Three of the industries that employed the highest percentages of women workers, services, retail trade, and nondurable manufacturing, were among those less likely to offer health insurance benefits and the most likely to exhibit a gender gap between the covered and uncovered. Observing that “industries have differing abilities to generate” insurance coverage, such as profit margin, market stability and company size, Perman and Stevens note that these three industrial sectors are also not heavily unionized. Furthermore, within these sectors, women were more likely to work for non-union firms than men. Regression analysis showed that unionization both increased the number of workers covered by health insurance plans and reduced the gender gap in coverage. These authors go on to point out that “part-time workers are the largest single group of workers without health insurance, and these workers are disproportionately women.”⁴⁹⁹

The roots of the problems Perman and Stevens study lay in the immediate postwar period when female labor force participation grew, but Rosie left the shipyard and the auto plant for light manufacturing or, even more likely, for a sales, clerical or service job. These industries had

⁴⁹⁸ Barbara F. Reskin and Patricia A. Roos, *Job Queues, Gender Queues: Explaining Women's Inroads into Male Occupations* (Philadelphia: Temple University Press, 1990), 4-6.

⁴⁹⁹ Lauri Perman and Beth Stevens, “Industrial Segregation and the Gender Distribution of Fringe Benefits,” *Gender and Society* 3, no. 3 (September 1989): 395, 396, 398, 400, 402.

few of the large companies that, together with their unions, forged the most complete private welfare states. Unions, barred from some of their organizing techniques by the Taft-Hartley Act, frustrated by organizing failures such as Operation Dixie, and hemmed in by internecine battles and loyalty investigations, did turn increasingly to the bargaining table to secure expanded benefits for their members rather than pursue aggressive membership drives among women workers in low-paying women's jobs at small firms. All of these factors influenced the extent to which private maternity benefits of any kind might reach a woman worker in the postwar period. They also affected the comprehensiveness of coverage. Private maternity benefits were not widely available. They were poorly coordinated with both other personnel practices and with the health and well being of mothers and babies. They were haphazard, vulnerable and very confusing.

Pregnant Workers and Jim Crow Jobs

In 1950 four out of ten employed black women were domestics working in a private home; another two out of ten were cooks, laundresses, or service workers in an establishment outside an individual employer's home. The concentration of black women in service or field work was even higher in the South. Very few of these women had work-related coverage for obstetric care or for any other maternity benefit. Public benefits such as Social Security and Unemployment Insurance excluded domestic service and agriculture entirely, while needs-based welfare programs that helped some mothers and children were usually locally administered and often discriminated against black women. Most whites thought that black women should work if their husbands could not support them and that black mothers should be forced to accept any low-paying job rather than receive a welfare payment. African American women were more

often permanent, rather than temporary, members of the labor force, whose income was vital in the support of their families. As domestic workers they were usually employed in the private space of a home, where they had a single employer. Rebecca Sharpless, in *Cooking in Other Women's Kitchens*, describes the most common fringe benefit for black cooks as the “service pan” of leftovers that many domestic workers took home to their own families at the end of a long day.⁵⁰⁰

Social supports for domestic workers were inadequate, capricious, and most of all, limited. Sharpless observes that it was common for white employers to simply fire pregnant cooks because they did not want to make any accommodations and they worried about an upcoming absence for childbirth. Domestic service could be grueling labor for long hours. Sharpless recounts the concern some black physicians had over the high rate of stillbirths and infant mortality among black women that they accorded to overwork. She tells the story of one cook, circa 1957, whose labor started at work and who delivered a stillborn baby.⁵⁰¹ Many domestic workers returned to work very soon after having their babies. They hung onto their job in the face of little security and the need for pay. Most employers did not offer any wage replacement for periods of ill health of any sort.

In Anne Moody's widely read autobiography, her mother's pregnancies form a tableau of all the problems facing a black woman in the Deep South in the years following WWII. Much of the time an important or even the sole support of herself and her children, Toosweet had to work. Sharecropping with her husband, she worked while pregnant; the crop went bad and so did her

⁵⁰⁰ U.S. Department of Labor, *Changes in Women's Occupations 1940-1940, Women's Bureau Bulletin 253* (Washington, D.C.: US Government Printing Office, 1954), 9-10; Rebecca Sharpless, *Cooking in Other Women's Kitchens: Domestic Workers in the South, 1960-1960* (Chapel Hill: University of North Carolina Press, 2010), 74-76.

⁵⁰¹ *Ibid*, 120.

marriage. When Moody describes her mother's fourth baby, conceived with a boyfriend whose mother did not approve of the match, Moody, the oldest of her mother's children, remembers work-related details vividly.

She cried just about every night, then she would get up sick every morning. She didn't stop working until a week before the baby was born, and she was out of work only three weeks. She went right back to the café.⁵⁰²

Moody's mother managed to return so quickly because the baby's father and his mother took the infant, a practice complicated in this story by tensions between the families, but that Sharpless finds an important child care resource for domestic servants who either lived-in, or lived out but worked long and sometime irregular hours.

After her mother's fifth baby, Moody meets the midwife and, while she is initially frightened by the old woman, she develops a respect and admiration for her and how hard the midwife worked to make a living on what she could charge her poor clients. This delivery, in the mid-1950s, cost ten dollars.⁵⁰³ Though African American midwives were cheap, the cost could prove daunting to domestic workers who earned only about that much for a whole week of work. Employers rarely paid for obstetric costs. Sharpless recounts some cases of employers who did pay for the medical care of some servants, including one white woman who took her cook to a gynecologist to have her fitted for a diaphragm out of concern for her employee's health following numerous pregnancies and almost as numerous infant deaths.⁵⁰⁴ While employers did sometimes pay for health care, they were not under any obligation to do so. Money for the

⁵⁰² Anne Moody, *Coming of Age in Mississippi* (New York: Bantam, Doubleday, Dell publishing Group, 1968), 31

⁵⁰³ *Ibid.*, 60.

⁵⁰⁴ Sharpless, *Cooking in Other Women's Kitchens*, 119.

midwife was rarely given, unexpected, and often created or implied a sense of indebtedness.⁵⁰⁵ In any case, Sharpless found few white women who paid for the childbirth expenses of their cooks or cleaning women.⁵⁰⁶

Black women's periodic efforts to form domestic service unions concentrated on minimum wages and limits on hours. In that effort, they found few allies among middle-class women reformers, even in a liberal state such as New York, because the home was seen as clean and safe, not the kind of workplace in need of state regulation and because middle class women who supported improved conditions for factory workers balked at the idea of government regulation of their own homes when their homes were the workplaces for their maids.⁵⁰⁷ Black and Puerto Rican women workers were often employed in commercial laundries where the CIO and later the AFL organized laundry worker's unions. Initially, these unions concentrated on wages and hours as well as sexual harassment on the job and on extending Fair Labor Standards legislation to their work.⁵⁰⁸ By 1947, New York laundry workers, both white and black, organized in the Amalgamated Clothing Workers Union, did have job protected leave and some maternity benefits.⁵⁰⁹ But this success was not widespread.

Racial inequalities in employment constructed racial inequalities in American maternity policies. To be sure, black, Native American, Asian and Hispanic women were concentrated in the sectors of the labor market that were left out of labor legislation. But as we have seen, black

⁵⁰⁵ Ibid, 80.

⁵⁰⁶ E-mail from Rebecca Sharpless to author, 19 August 2011, in author's possession.

⁵⁰⁷ Vanessa H. May, *Unprotected Labor: Household Workers, Politics, and Middle-Class Reform in New York, 1870-1940* (Chapel Hill: University of North Carolina, 2011), 78-79, 108, 140, passim.

⁵⁰⁸ Karen Pastorello, *A Power Among Them: Bessie Abramowitz Hillman and the Making of the Amalgamated Clothing Workers of America* (Urbana: University of Illinois Press, 2008), 112

⁵⁰⁹ Ibid, 158.

wives of servicemen benefitted from EMIC. Black, Hispanic and Puerto Rican cannery or laundry workers gained maternity benefits in union contracts. However, the concentration of women as solo employees in private homes and the assumption that it was difficult and unnecessary to regulate this type of employment separated many black and other minority employed women from the reform discourse about maternity benefits.

Maternity Leave of Absence

The most basic work-related maternity benefit was the maternity leave of absence—the right to return to a job after having a baby. Many companies assumed that a pregnant woman leaving a job to have a baby was withdrawing permanently from the labor market, or at least taking a very long break to raise her children. This widespread belief often prevented the formation of maternity leave policies. But despite social presumptions about the mothers of young children, many women workers did plan to resume working after having their babies. In a study of pregnant workers who had filed for unemployment insurance, the New York Department of Labor found that six weeks after the birth of their babies, almost 80% of new mothers had already returned to work or said that they were planning to do so.⁵¹⁰ In the New York study there was no consistent pattern from one case to another. Companies that offered lengthy maternity leaves may have engendered a firmer commitment to the employer and a stronger tie to the labor market.

Maternity leaves did seem to encourage mothers to return to jobs at Seagram. In a 1930s

⁵¹⁰ New York State Department of Labor, *A Study of Pregnant Women as Unemployment Insurance Claimants in New York State* (New York: New York Department of Labor Division of Employment Research and Statistics Office, October 1963), 33. This study followed women who had filed for unemployment benefits while pregnant, not those who withdrew from the labor market and never applied for unemployment benefits. Also, it includes both those who had returned and those who merely said that they were going to return. So, it probably includes some women whose plans changed later on.

contract between Joseph E. Seagram & Sons and the Distillery Workers Union (DWU), the union recognized the company's "right to dismiss and discharge from employment any female showing signs of pregnancy, provided that her pregnant condition is verified by either her own or a Doctor's certificate." This contractual clause supporting company policy of dismissing pregnant workers was removed from the contract during negotiations in the late 1930s or early 1940s.⁵¹¹ In 1939 and 1940, the union contracts with Wilson Distilling still upheld a policy of dismissal.⁵¹² By the mid-1940s, however, the DWU was negotiating contracts that had maternity leave provisions in them. An unsigned draft contract between the DWU Local #10 and Old Prentice Distillery proposed a ten-month leave of absence, without pay, but with the protection of a worker's existing seniority. Whether or not this clause made it into the final contract, it was an early attempt by the DWU to bargain for a leave, instead of a dismissal.⁵¹³

By the late 1940s or the early 1950s, the DWU contract with Seagram and Sons contained a maternity leave of absence. In the 1954 contract negotiations, the company and the union were talking about a six-month maternity leave with the possibility of a leave extension upon a doctor's request. Once on leave, the draft contract allowed that a pregnant employee would be eligible to "draw such sick leave benefits as she may be entitled." The clause also, however, spelled out that this maternity leave had to be applied for, and begun between the fourth and fifth month of pregnancy. Failure to comply with this contractual part of the leave

⁵¹¹ "Proposed New Provisions, Existing Provisions to be Deleted" file "Distillery Workers Union: Contracts and Addenda (1 of 3) n.d. 1937-1940" ("DWU: Contracts & Adden 1937-1940") Box 887 Series XI, Group 2, (B 887, Ser XI, Grp 2) Seagram Company, Hagley.

⁵¹² "Agreement between Dist. Wkrs Union Local No 21264, Bristol, Penna. Affil to the Am Fed of Labor and the Wilson Distilling Co., Bristol, Penna" Nov. 17, 1939, and [Wilson Co, and AFL Fed. Labor Union Local 21264] Dec 9, 1940, retro to Oct. 15, 1940, file "DWU: Contracts & Adden 1937-1940," B 887, Ser. XI, Grp 2, Seagram Company, Hagley.

⁵¹³ "Agreement July 1, 1946: between DWU Local #10 and Old Prentice Distillery" file "DWU: Contracts & Adden 1937-1940," B 887, Ser XI, Grp 2, Seagram Company, Hagley.

would result in “permanent release of the employee.”⁵¹⁴ Throughout the 1950s and 1960s, many production workers sought these leaves and formal extensions of their leaves rather than simply withdrawing from the labor market. When Seagram benefits officers discussed some changes in maternity policy in 1961, they noted that, at least in the Sales and Administrative Divisions, “approximately 99% of the female employees who leave for pregnancy reasons indicate a desire to return to work.”⁵¹⁵ Women workers at Seagram took advantage of maternity leave benefits to maintain their ties to their employer while absent from the labor force having their babies and nurturing their little ones.

Seagram allowed six months of unpaid leave, which could be extended under some circumstances. Job protection provisions, however, were quite weak. At the end of their maternity leave, new mothers were “reemployed only if there is a job available for them at the time the leave expires.” An employee’s pension plan benefit was preserved during the leave and she still had health insurance coverage “for the pregnancy existing at the time she went on the maternity leave.” But the status of her other employee benefits was unclear. In 1961, the benefits officers of Joseph Seagram & Sons discussed suspending all other benefits for employees on maternity leave. Treading somewhat delicately about the subject in the passive voice, a memo suggests that “it is felt that perhaps” such leaves should be automatically granted, but accompanied by cancellation of benefits like life insurance and major medical insurance.⁵¹⁶ There seems to have been a lot of variation in what happened to other benefits while a worker

⁵¹⁴ “1954 Contract between DWI, Seagram, Calvert, Hunter-Wilson, Julius Kessler, Carstairs & Gallagher & Burton” [probably a draft, not signed], file “DWU n.d. 1953-1964” B 878, Ser XI, Grp 2, Seagram Company, Hagley.

⁵¹⁵ W.B. Zachry to E.G. Duenweg, June 22, 1961, file “Ind Relns Pension Pln: Ext of Leave, 1951-56,” B 871, Ser XI, Grp 2, Seagram Company, Hagley.

⁵¹⁶ Ibid.

was on maternity leave. Some plants would not allow workers whose maternity leave covered the summer vacation season to collect a vacation allowance, while one plant did grant vacation pay, but saved it until the covered worker was back on the job.⁵¹⁷

Seagram was not alone in ambivalence and uncertainty about an employee's right to fringe benefits during maternity leave. The issue of whether a woman who had taken maternity leave was entitled to a paid vacation led to a strike in St. Louis in 1966. The Laundry Workers International Local 108, which included a significant number of black women workers, signed a contract that required a six-month maternity leave but guaranteed seniority rights to any woman on leave. The contract also contained a paid vacation week for employees with continuous service for at least a year. It allowed that an "employee who had been laid off from work or away from work because of illness and then rehired and who would otherwise have been continuously employed" was eligible for vacation pay if the absence was less than 60 days. When a woman on the mandatory maternity leave filed for vacation pay, the company refused and the union went on strike until both parties agreed to arbitration. The arbiter found for the company, noting that the preservation of seniority was not the same thing as active employment, that six months was a considerable length of time, and if vacation pay was allowed to women who had taken six-month maternity leaves, it might well have to be allowed to some worker who, for instance, was elected to public office, which would involve, the arbiter said, "a most tortuous construction" of the contract.⁵¹⁸

Here, and in other cases, a woman's ability to take full advantage of other employee

⁵¹⁷ M.G. Northcutt to L. Gordon, "DWU Payments: Confidential," September 18, 1953, and Leonard Gordon, to M.G. Northcutt, June 1, 1953, "Vacation for Employees on Maternity Leaves of Absence: Confidential" file "Distillery Workers Union: Corresp. (2 of 4) n.d. 1951-1953" (DWU: Corresp. 1951-1953): B 886, Seagram Company, Hagley.

⁵¹⁸ "Arbiter Nixes Vacation Bid for Employee Taking Maternity Leave," *Daily Labor Report* no. 197 (10-10-66): A-3, A-4.

fringe benefits was constrained by pregnancy and the maternity “benefits” at her workplace. Because she was on mandatory maternity leave, she could not collect vacation pay. Her union did not think this was right, and they struck. The news story, however, spends less time on the strike than on the arbiter’s decision, which likened maternity leave to a choice to hold “public office.” Because of powerful associations of work with a male breadwinner, private fringe benefits fostered a need to find equivalents between men and women in their use of benefits. This tendency developed even more as an emerging Second Wave of US Feminism embraced a civil rights approach to gaining narrowly defined “equality” with men. This arbiter focused on the voluntariness of the decision to run for office, or get pregnant. He also regarded pregnancy as a choice not governed by contract and devoid of an employer’s responsibility to provide social benefits, in this case, vacation pay.⁵¹⁹

Sometimes, constraints on maternity benefits and the strain pregnancy put on employment ties endangered life insurance survivor benefits. One unmarried Seagram employee on maternity leave died in childbirth. Her parents could not collect any life insurance to help them care for their infant grandchild because no one had paid to continue their daughter’s insurance premiums once her leave started. The lapse in insurance was probably a result of confusion rather than an explicit decision; nonetheless, her leave of absence jeopardized access to other important benefits.⁵²⁰ The private welfare state exists on the basis of exclusions. The value of private fringe benefits has to be maintained through gate keeping and recordkeeping. This unfortunate case was partly a failure of recordkeeping that left a newborn baby not only

⁵¹⁹ Ibid.

⁵²⁰ W. J. de Rubertis, Relay, to E.G. Duenweg and L. Gordon, Louisville, February 16, 1951 “Confidential” [memo] file “DWU: Corresp. 1951-1953,” B 886, Seagram Company, Hagley.

motherless but destitute as well.⁵²¹

Private welfare provisions could also exclude not only individual mothers but entire groups of employees. The women who worked in the numerous offices at the various Seagram plants had no union and no officially protected maternity leave. In the mid-1950s pregnant office workers at one plant could take their sick leave, their vacation leave and then maternity leave, although their benefits officer seemed a bit unsure about the practice. At the time, other plants had the policy that, “a pregnant office employee is permanently released and does not come back.”⁵²² Benefits officers realized there was a need for a “unification of our administering” of maternity leaves for office workers.⁵²³ After discussions among five plants and the New York headquarters, the benefits officers at Seagram decided on a policy that “no maternity leaves of absence will be granted to nonunion pregnant females but that they will be permanently released at the time of separation.”⁵²⁴ Persistent benefits officers at some of the plants eventually secured exceptions for employees whose husbands were in school or the army, or whose pregnancies ended in miscarriage.⁵²⁵

Maternity leave, the most basic of maternity benefits, was vulnerable to social mores and the sexual double standard in ways that benefits enjoyed by men very rarely were. It was common for companies to restrict maternity leave to married women and dismiss unmarried

⁵²¹ W. J. de Rubertis, Relay, to E.G. Duenweg and L. Gordon, Louisville, February 16, 1951 “Confidential” [memo] file “Distillery Workers Union: Corresp. (2 of 4) n.d. 1951-1953” Box 886, Seagram Collection, Hagley.

⁵²² W.B. Zachry to E.G. Duenweg, October 24, 1961, file “Industrial Relations Miscellaneous J-L 1950-1962” (“Ind Relns Misc J-L 1950-1962”) B 876, Ser XI Grp 2, Seagram Company, Hagley.

⁵²³ E.N. Wareheim, Dundalk, to E. G. Duenweg, Louisville, May 27, 1955, file “Industrial Relations Leaves of Absence, 1955-1960” (Ind Relns Lvs of Ab, 1955-1960”) B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵²⁴ W.B. Zachry to F.B. Brand, et al, March 22, 1962, file “Ind Relns Misc J-L 1950-1962” B 876, Ser XI Grp 2, Seagram Company, Hagley.

⁵²⁵ E.N. Wareheim, Dundalk to W.B. Zachry, New York, April 10, 1962, and W.B. Zachry to F.B. Brand, et al, March 22, 1962, file “Ind Relns Misc J-L 1950-1962” B 876, Ser XI Grp 2, Seagram Company, Hagley.

pregnant workers. Companies such as the Wrigley Stores in Detroit frowned upon the “immoral character” of unmarried pregnant women and claimed that “the presence of an unmarried pregnant employee cannot help but damage the company’s reputation and standing in the public eye.” When an unmarried checkout clerk got pregnant in 1960, management reluctantly granted her a maternity leave, but warned her that they “would not tolerate this again.” When she had her second baby out of wedlock, they fired her. Her union, Local 40 of the Retail Clerk’s International Association, brought a grievance on her behalf. The arbiter who heard the case acknowledged that unmarried women who became pregnant were stigmatized, but he found it hard to believe that “the public holds the employer answerable for the morals of his employees after working hours.” Noting that the Wrigley Store was a large supermarket in an urban area, the arbiter doubted that most of the customers even knew that the pregnant clerk was unmarried. The company suffered no adverse publicity. The contract did not limit leave to married women. In this case, the arbiter found for the union and reinstated the mother with back pay.⁵²⁶ This unmarried store clerk retained her rights to her job, despite societal disapproval and her employers’ attempt to limit a work-related benefit based on a construction of morality. She did not have a husband, but she did have a union and a contract and she may have been lucky with the choice of arbiter. If no one had stood up for her contractual rights, she probably would have lost her job as many unmarried women did when their pregnancies revealed their sexual activity.⁵²⁷

Maternity leaves were a real benefit to pregnant workers because they provided a

⁵²⁶ “Unmarried Pregnant Employee Denied Leave and Fired Wins Reinstatement,” *Daily Labor Report* no. 226 (20 November 1963): A-9, A10.

⁵²⁷ Joan Sangster finds similar developments in Canada, where companies tried to extend control over women workers to regulating their moral character through dismissing workers for out of wedlock pregnancies and unions defended those workers less out of concern for them than out of concern for contract language. Joan Sangster, *Transforming Labour: Women and Work in Post-War Canada* (Toronto: University of Toronto Press, 2010), 193.

mechanism for return to a job and because they protected at least some other benefits, such as pension and seniority. But the employer, not the worker, determined when the leave began. Employer policy for the commencement of maternity leave could vary markedly by company or by the type of work a pregnant employee performed. When a leave started might be different if a worker belonged to a union, worked in an office, or had a job that involved contact with the public.

Employer policies dictated when a leave would commence—usually long before the baby was due. Women’s Bureau researchers found an average time of leaving work at five months gestation.⁵²⁸ Pregnant women, it seemed, had no place in the workplace. This was part of a general discomfort with pregnancy in public and the connection between pregnancy and a woman’s sexual activity. As late as 1953, producers of *I Love Lucy* wanted Lucille Ball to hide her real-life pregnancy behind costuming and furniture. Ball and her husband/co-star insisted on writing her pregnancy into the script, but the pregnant Lucy episodes were very few. The key action on the day she gives birth takes place in the waiting room and involves the expectant father and his male friend, not the pregnant Lucy. Pregnancy and childbirth was still a delicate condition in polite society, although Lucy’s televised pregnancy probably did have something to do with dismantling prejudices about pregnancy in public.⁵²⁹

In the 1970s, public school teachers waged legal battles over who determined when a

⁵²⁸Frieda Miller to Albert F. Reinwart, T.H. Mastin & Company, St. Louis, May 11, 1953, File 3-3-2-5-1 “Maternity,” Correspondence File, 1948-1953 (Corresp File, 1948-1953); Office of the Director, General Correspondence of the Women’s Bureau, 1948-1963 (Off of Dir, Genl Corresp, 1948-1963); Women’s Bureau, Record Group 86, National Archives, College Park (RG 86, NACP).

⁵²⁹ Kathleen Brady, *The Life of Lucille Ball* (New York: Billboard Books, 2001), 209-211; Thomas Patrick Doherty, *Cold War, Cool Medium: Television, McCarthyism and American Culture* (New York: Columbia University Press, 2003), 51-52. Laura Tropp points out that Lucy Ricardo did not, in fact, have the first television pregnancy. That was Mary Kay Stearns, a few years earlier. Tropp does think that Lucille Ball had the first celebrity pregnancy. Laura Tropp, *A Womb with a View: America’s Growing Public Interest in Pregnancy* (Santa Barbara: ABC-CLIO, LLC, 2013), 106-107.

teacher would leave the classroom. Until then, teachers, sales workers, and often clerical workers faced lengthy mandatory maternity leaves or dismissal beginning often in the fourth or fifth month of their pregnancies, or even earlier. As the arguments over teachers made clear, the timing of such leaves was usually predicated upon the physical manifestation of pregnancy. By the fifth month, most pregnant women begin to look pregnant; there are noticeable changes to the body. Many employers believed that obviously pregnant women had no place in the workplace, or at least in certain parts of the workplace. Unemployment compensation boards recognized and buttressed this deeply held belief when they held pregnant women especially unavailable for work in jobs that required meeting the public.

When a Virginia woman working as a draftsman became pregnant in 1952, her company turned the matter of determining a maternity leave over to its lawyer, who, in turn, sought counsel from the Women's Bureau. Like the firms studied by Charlotte Silverman during World War II, the supervisors of this one feared they might be held liable for a miscarriage should anything happen to their pregnant employee at work. They told her to start her leave immediately; she wanted to keep working.⁵³⁰ In 1953, an insurance underwriter wrote to the Department of Labor that "it has always been my belief that where the women do not work on a strenuous job...that they could be permitted to work for 6 months." While most of the companies that he insured had been following this guideline, recently several "women have been reluctant to leave the job after 6 months and have been backed up by their union."⁵³¹ A pregnant woman in Chicago was forced to take a leave of absence from her job during her fifth month. Not wanting

⁵³⁰ Frieda Miller to Franklin C. Salisbury, Washington, DC, December 18, 1952, File 3-3-2-5-1 "Maternity" Corresp File, 1948-1953; Off of Dir, Genl Corresp, 1948-1963; RG 86, NACP

⁵³¹ Albert F. Reinwart, T.H. Mastin & Company, St. Louis, to S. J. Butcher, Bureau of Labor Standards, Dept. of Labor, Washington, DC, April 17, 1953, File 3-3-2-5-1 "Maternity" Corresp File, 1948-1953; Off of Dir, Genl Corresp, 1948-1963; RG 86, NACP.

to leave work, she sought help from her union to keep her job.⁵³² At Seagram, the first DWU contract recognizing a right to a maternity leave provided that it start by the fifth month of pregnancy. In the 1960s, production workers may have worked longer into their pregnancies, removed from the public eye and under the protection of their union. Office workers, however, might have been released from their jobs very early in their pregnancies. The 1960-61 study about pregnancy and unemployment in New York State found that clerical staff were the workers most likely to lose their jobs due to company policies about pregnancy.⁵³³

Job-protected leave is an important benefit. However, taking such a leave, if unpaid, could be an economic hardship, no matter what other benefits it secured. Furthermore, such a leave was not always in the best interest of the pregnant worker or new mother. Who benefited from a maternity leave that started in the fourth or fifth month? If a maternity leave lasted six months, then the baby would be only two months old when its mother went back to work. She would have spent the bulk of her maternity leave pregnant, awaiting the birth of her baby, maybe decorating the nursery and knitting little sweaters, but not earning money and not caring for her newborn. Certainly doctors advised patients to be well rested before labor began and some women did appreciate time off from work before the baby's birth. Resting and nesting, however, do not have to take four or five months. Many women, such as the Virginia draftsman or Chicago typesetter, wanted to earn money while they were pregnant and healthy. This particular feature of maternity leave, the employer's prerogative in determining the commencement of leave, became the central struggle of pregnant teachers in the early 1970s.

⁵³² George N. Bante, President, Chicago Typographical Union Number 16, Chicago, to Women's Division, US Department of Labor, Washington, DC, May 7, 1952, File 3-3-2-5-1 "Maternity" Corresp File, 1948-1953; Off of Dir, Genl Corresp, 1948-1963; RG 86, NACP.

⁵³³ New York State Department of Labor, *A Study of Pregnant Women as Unemployment Insurance Claimants*, 34.

While employers had their own reasons for wanting pregnant women to take leaves starting in their second trimester, many women would have preferred more time off after childbirth than before. Company policies often had procedures for extensions of maternity leave, and many women received them and were able to spend more time recovering from pregnancy complications and caring for their newborns. However, extensions were not a right; they required approval from the benefits office. To apply, a cooperative doctor had to attest to a patient's need for more time off. Furthermore, anyone who gained an extension also gained more time without a paycheck and jeopardized some of the other possible benefits of employment, such as health and disability insurance, life insurance, and paid vacation.

Thus, maternity leave ceded control to the employer, not the pregnant worker. It often limited the kinds of benefit coverage she could receive, and threatened unrelated employee benefits. It was predicated upon the assumption that a pregnant worker did not belong in the workplace because she was a visible symbol of sexual intercourse. Employer regulations also reflected prevailing assumptions that a visibly pregnant woman belonged instead at home, patiently waiting months until her baby was born, while, ironically, potentially punishing the new mother who may have preferred more time at home with her newborn baby.

Sick leave and Temporary Disability Insurance

If one fundamental flaw was that maternity leave was unpaid, there were mechanisms to provide some income support during long absence from work. Two benefits connected to private employers figure prominently in wage replacement during maternity leave: sick leave and temporary disability insurance. Pregnant workers, benefits officers, and labor unions at companies offering these benefits tried to apply them to maternity leaves.

Sick Leave and Temporary Disability Insurance had some similarities, but they differed in ways that especially affected their usefulness in covering maternity. At companies that had sick leave policies, all eligible workers accumulated a certain amount of “days” each year that they could cash in if absent due to illness. If they used up these sick days, then subsequent absences would be unpaid. Many companies allowed workers to accumulate, or bank sick leave and carry over unused balances to the next year, up to a certain point. Employees owned their sick days and individuals could manage their balances to some extent (by going to work with colds, for instance). Furthermore, the company could also manage them. These were very predictable expenses, because they were available to all employees and because the company could set a maximum on the days allowed.

Temporary Disability Insurance (TDI), or Sickness and Accident Insurance (S&A), as it was often called, was not an internal company accounting matter. Employers purchased these policies from an insurance company. Workers eligible for the insurance could not be sure that they would collect. These plans usually covered only a portion of one’s wages. While benefits were often available beginning the first day of absence due to a non-occupational accident, there was usually a three to eight day waiting period for illnesses. However, the time period that could be covered was usually far longer than that a worker could accumulate in sick days. TDI or S&A plans might cover twelve weeks, or twenty-six, or even fifty-two. These benefits were available even if an employee had exhausted sick leave benefits. Also, the limit usually applied to an incident, rather than to an individual. The expenses of a TDI plan could mount substantially, which is why companies rarely self-funded these kinds of plans. Insurance companies spread the risk more widely and discouraged frivolous claims through waiting periods for illness, only

partial reimbursement of lost wages, and limits on one kind of common claim—maternity.⁵³⁴

Workers' attempts to use sick leave or TDI to cover pregnancy and childbirth raised what the public health expert Nathan Sinai called "an old and unsettled question"⁵³⁵ of whether or not pregnancy was an illness. If it were, then presumably it should easily be covered under plans that dealt with any sort of non-occupational illness or injury among workers. However, employers and insurance companies had an economic incentive to define pregnancy not as an illness, but as a normal condition. First, companies were quick to point out, pregnancy was often planned, or at least could have been avoided. This, they argued, made it different from illnesses which were accommodated within company policies precisely because they were unexpected emergencies. Second, since so many women became pregnant at some point in their lives, childbearing could be seen not as an illness, but as a normal physiological experience, a natural state of women. An umpire in an arbitration case summarized this dilemma this way: "To be sure, pregnancy is not an illness, generally speaking. Illness is something to be avoided; pregnancy is sought by married folk as a fulfillment of married bliss."⁵³⁶

The timing of maternity leaves also confounded thoughts about wage replacement. Whether due to company policy, physician recommendation, social norms or personal inclination, many women began maternity leaves at a point in their pregnancies when they were very healthy and not at all ill or disabled. While all women having babies are clearly temporarily disabled for at least some small part of the birthing process, the amount of time any woman is

⁵³⁴ See, for instance, "Sickness and Accident Benefits in Union Agreements, 1949" *Monthly Labor Review* 70 (June 1950).

⁵³⁵ Nathan Sinai, "For the Disabled Sick: Disability Compensation," Bureau of Public Health Economics Research Series No. 5 (Ann Arbor, Michigan: University of Michigan, School of Public Health, 1949), 121.

⁵³⁶ Harry Shulman, Opinion A-103, Case Number 162, *The Umpire*, May 29, 1944, in Folder 14, Box 21, Dorothy Haener Collection (Haener), Wayne State University Archives of Labor and Urban Affairs, Detroit, Michigan (Reuther).

incapacitated varies widely and depends on a range of factors and decisions. In the postwar period, it was rare that an employee worked up until she went into labor, so if a pregnant worker wanted to take sick leave, when should she do that? When she started a maternity leave and was healthy, or after she had been on leave for a few months and was suddenly actually “sick” in labor, delivery and recovery? Could someone already on a leave of absence cash in sick leave? Some women would have used up their sick leave earlier in their pregnancies due to morning sickness, perhaps, or even for unrelated illnesses. A woman counting on accumulated sick leave to partially fund her maternity leave might still be cursed by the flu, or even more frighteningly, by the German measles epidemic that swept the country in the mid-1960s. What if she had no sick leave left by the time her maternity leave started? Some employers set limits on the ability of employees to claim sick leave for reasons relating to pregnancy. In the 1970s schoolteachers brought suit to use their accumulated sick leave for pregnancy. Sick leave claims for pregnancy raised a lot of questions, but due to intrinsic time limits, sick leave was inconsequential. Employers seemed more comfortable allowing pregnant women to claim sick leave for pregnancy. It was, after all, theirs already and if they did not use those days for pregnancy, they would probably use them for something else.

The real battle over wage replacement emerged in discussions about Temporary Disability Insurance. Insurance companies wanted to make a profit on these policies. The companies that purchased these plans had to pay premiums based in part on the proportion of females in their workforce. The more generous the provisions for maternity, the higher the cost of the entire plan. While workers sometimes contributed to the purchase of insurance plans, they were usually not involved in decisions about the policy their employers purchased. There were some union experiments in overseeing health and welfare plans, but this was not generally the

case. In the postwar period, while unions did press for the creation and expansion of benefit programs, management retained control over the final decisions and the finer points of purchase agreements.⁵³⁷

In 1950, the US Department of Labor determined that 30% of all collective bargaining agreements had “some type of nonoccupational sickness or accident benefit.”⁵³⁸ This study found 678 newly negotiated contracts that contained a disability pay clause. In twelve of these, women received lower rates of compensation due solely to their sex. In the rest, the same rates would produce lower payments for women because women’s regular wages were lower. Of the 678 contracts, only 114 had provisions for maternity disability. The vast majority of those that did specified a benefit period of six weeks for maternity, far less than for other conditions. In fact, 97% of maternity plans were for six weeks or less while 61% of Sickness and Accident plans allowed wage replacement for thirteen weeks or more for other conditions.⁵³⁹

This pattern existed beyond those 678 contracts the Department of Labor investigated. Plans that offered twenty-six or fifty-two weeks of coverage for non-occupational disease and injury usually limited benefits for pregnancy to six weeks total per pregnancy.⁵⁴⁰ This might mean that a woman disabled due to severe morning sickness or a threatened miscarriage in her

⁵³⁷ Klein, *For All These Rights*, 235-238.

⁵³⁸ “Sickness and Accident Benefits in Union Agreements, 1949,” 636.

⁵³⁹ The numbers that this study produced for compensated weeks are not as clear-cut for general S&A as they are for maternity. Out of 678 plans some of the plans had an element to the period based on the length of service of the employee and some plans had some weeks at one rate and additional weeks at a lower rate. So, this calculation of 61% is based on the 286 firms who did not vary covered weeks by years of service or reimburse at different rates. In those firms that did adjust, however, 13-15 weeks was also the most common duration of benefits. “Sickness and Accident Benefits in Union Agreements, 1949,” 638-639.

⁵⁴⁰ Fred Slavick, *The Operation of Sickness Benefit Plans in Collective Bargaining* (Princeton, NJ: Industrial Relations Section, 1951): Appendix. See also: *Digest of One-Hundred Selected Health and Insurance Plans Under Collective Bargaining, 1954* Bulletin No. 1180 (June 1955) US Bureau of Labor Statistics, United States Department of Labor. See also “Maternity Protection of Employed Women,” *Bulletin of the Women’s Bureau*, No. 240, (Washington, DC: 1952): 17-24.

first trimester could have used her six weeks long before delivery. Employers who required pregnant women to quit work in their fourth or fifth month might still only offer six weeks of wage replacement. E.I. DuPont De Nemours & Company had a temporary disability plan in place from 1937 on that covered wage replacement for workers suffering from a non-occupational disability or illness for up to three months. However, “in cases of disability due to pregnancy, the maximum period during which disability wages may be paid under this Plan [sic] shall not exceed six weeks in any one case.”⁵⁴¹

Companies often questioned the wisdom of providing private S&A benefits to an employee they believed unlikely to return. Payments made for disabilities due to pregnancy were often seen as severance packages, so many plans excluded coverage for maternity in their benefit plans. In 1945, the Pacific Service Employees Disability Plan, for instance, specified exclusions from their plan.

Benefits shall not be payable for disability directly or indirectly or partly due (a) to intoxication, or to immoderate use of stimulants or narcotics, or to unlawful acts or immoralities, or to venereal diseases, however contracted, or to the results thereof, or to sane or insane attempt to commit suicide, or to war or any act of war or (b) to maternity, pregnancy or miscarriage.⁵⁴²

Pregnancy exclusions such as this instance likened pregnancy to a social disease, a criminal act, or warfare and placed pregnancy in the same category as a sin, a crime, or a man-made decision so catastrophic that no one could be held accountable. Limits on the ability to cash in accumulated sick leave and especially limits on the number of weeks a worker could claim disability pay for pregnancy functioned to cushion industry, especially the insurance industry,

⁵⁴¹ E.I. DuPont de Nemours & Company, “Disability Wage Plan” file “1937 Emp Relns Dis Wg Pln file 8” Box 24, Wm F. Harrington (1813) Collection, Hagley.

⁵⁴² “Section 8,” *Pacific Service Employees Disability Plan: Constitution and By-Laws, Rules and Regulations* (San Francisco: Executive Committee, Pacific Service Employees Association, April 17, 1923, revised August 31, 1945): 25, Pamphlet Collection, Hagley.

from the costs of reproduction. These costs, in lost wages and, as we will see below, in medical expenses, were shifted to the pregnant worker or new mother and her family. Maternity costs were privatized in a manner different from industry's assumption of the pensions and health insurance and vacation pay of male workers. The limited way that TDI plans might cover pregnancy bore little confluence with the length of actual maternity leaves. As we will see later in the section on complications, it also divorced disability benefits from any measures of actual disability in a one-size-fits-all maternity corset of wage replacement.

Obstetrical Health Insurance

In the postwar period, two developments relating to health insurance coverage elevated the importance, and the potential costs, of this benefit in the private welfare state, forcing employers and insurers, as well as individual workers, to closely examine the way company health insurance plans covered obstetrics. First, the costs of medical care for pregnancy increased as prenatal care became more extensive, as hospitalization became nearly universal, and as obstetric interventions became more common, saving lives of mothers and babies. Obstetric care costs may well have exceeded the notable general medical care inflation of this period what with the growth of prenatal care, thanks in part to EMIC, and the emergence of the field of neonatology.

The other development increasing liability was that company health insurance programs came to cover more women. The growing percentage of women in the American workforce coincided with the growth in employee fringe benefit programs such as health insurance. Furthermore, it became more common to extend some kinds of benefits, especially health insurance, to cover an employee's dependents. Employees paid a portion or sometimes the entire

premium for dependent coverage, but even so, companies took on new expenses and their insurer's new liabilities when a health insurance plan covered dependents. These developments, higher rates of women in the labor force and also the spread of dependent coverage, occurred during the height of the Baby Boom. Because of this, companies with largely male workforces and their insurance companies were now disgruntled by the costs of maternity. One insurance expert reflected on the costs of reproduction, to a family and to an insurer, and concluded that:

The general feeling among insurance companies is that the costs of normal confinement in a hospital and of delivery can easily be budgeted by the average family. Obviously, the incidence of pregnancy among married females will be high, and consequently the insurance company is practically in the position of covering a cost which is a certainty.⁵⁴³

From an accounting perspective, pregnancy is not an illness because, first of all, as something planned, it can be "budgeted by the average family." Also, it plays havoc with actuarial tables because it happens to so many women that it is "a cost which is a certainty." So how could insurers write profitable plans that covered married women who should have been budgeting for their own babies? Some insurers offered plans that excluded normal pregnancy and delivery entirely and only covered complications.⁵⁴⁴ Their plans thus excluded most women workers and most wives of male workers. Such attempts to divide births into those that were normal biological events and those that were illnesses recognized that no one was planning for surgical deliveries and postpartum complications when they welcomed a new baby to the family. Instead of two opposites, there was a medical continuum here, since many births were not perfectly normal or simple but did not require obstetric heroics. To most people, even normal pregnancy and childbirth had come to look like medical events. Prenatal visits to the doctor,

⁵⁴³ Frank Joseph Angell, *Health Insurance* (New York: The Ronald Press Company, 1963), 153.

⁵⁴⁴ Angell, *Health Insurance*, 139, 153.

laboratory tests, hospitalization, pain medication or anesthesia, nursing care of mother and newborn, and postpartum visits to mark the end of convalescence were all clearly contained within the bounds of the health care system even when there were no complications. Rather than exclude normal births, most plans fell back on the tactic used in TDI or S&A plans, of allowing, but restricting, benefits for maternity cases.

Health insurance plans that covered maternity often set limits on this coverage different than those for other conditions. Hospitalization was often fixed at a certain rate for a certain number of days. Seven, ten, twelve and fourteen day limits were all common in maternity cases while the same plans would allow thirty-one, fifty or even seventy-five day limits for other conditions.⁵⁴⁵ Many plans provided for a small fixed additional amount for other hospital charges, such as a charge for a delivery room or for dressing, medicine and anesthesia and sometimes for nursery charges for the newborn. Many plans, however, specifically excluded a newborn from the family insurance coverage until the baby was a couple of weeks old. Sometimes plans would cover a child born with medical complications but many employers and insurers were very resistant to paying for the care a normal baby received in the hospital. When Equitable Insurance mistakenly rewrote the policy for Joseph E. Seagram & Sons to cover children from birth, the company made them remove this coverage. Seagram had a fixed \$175 total limit for normal delivery and was “not interested in picking up so-called crib charges and other normal charges incurred by the child at birth.”⁵⁴⁶

⁵⁴⁵ Fred Slavick, *The Operation of Sickness Benefit Plans*, Appendix; *Digest of One-Hundred Selected Health and Insurance Plans Under Collective Bargaining, 1954*; “Maternity Protection of Employed Women,” 17-24.

⁵⁴⁶ Zachry to McArdle, August 23, 1960 and McArdle to Zachry, August 29, 1960, file “Ind Relns Ins, Grp: Maternity 1960-1965” B 880, Ser XI, Grp 2, Seagram Company, Hagley.

The coverage for obstetrical claims usually fell short of the actual medical expenses of having a baby, depending on the plan, the city where the baby was born and the individual circumstance of the birth. While plans often had higher levels for complications, such as surgical deliveries, they did not take into account more minor variations in labor and recovery, length of hospitalization or type of hospital room. The Byzantine administration of reimbursement could confuse even savvy managers. The insurance company required bills from both the hospital and the physician before reimbursing a covered worker even if one bill alone exceeded the total cap. Expenses far in excess of the cap were common, even outside the major cities.⁵⁴⁷ Curious about what the actual costs of having a baby were, a benefits officer asked his staff to compile from recent records “a rough idea” of obstetrical fees and hospitalization for childbirth. They found that doctors in Manhattan charged about \$200 for delivering a baby and semi-private rooms ran about \$21 a day with an additional hospital charge of about \$100. For a five day hospital stay a New York mother would incur about \$405 in medical expenses at a time when the maximum maternity benefit at Joseph Seagram & Sons was \$175. A longer stay would have increased the disparity between bills and benefit.⁵⁴⁸ Complications, such as a Caesarean section or a postpartum infection, could receive higher benefits on the surgical schedule, but be cancelled out due to all of the additional expenses derived from pregnancy complications. A claim filed in the

⁵⁴⁷ W.B. Zachry to R.E. Stackpole, January 13, 1961 and R.E. Stackpole to W.B. Zachry, January 27, 1961 and W.B. Zachry to R.E. Stackpole, February 9, 1961 and R.E. Stackpole to W.B. Zachry, April 20, 1961 all in file “Ind Relns Ins, Grp: Mat. 1960-65” B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁴⁸ W.B. Zachry to Mrs. Berger, December 29, 1960, file “Ind Relns Ins, Grp: Mat. 1960-65” B 880, Ser XI, Grp 2, Seagram Company, Hagley. In 1956, Semi private rooms in Baltimore averaged \$13 a day, but the range was between \$11 and \$18. See W. J. Rubertis to W.B. Zachry, April 18, 1956, file “Ind Relns Ins Grp: Mat 1960-1965” B 880, Ser XI, Grp 2, Seagram Company, Hagley.

early 1960s indicated that the medical costs incurred by a new mother who had had a surgical delivery had exceeded even the “maternity limits for a Caesarean section.”⁵⁴⁹

Health insurance, though increasingly common, was not universally available to American workers. Furthermore, it did not always cover maternity, or maternity provisions might not apply to all those otherwise covered by the plan. A study in 1950 by the New York Department of Labor found that of the 304 plans they examined, 143 firms had no maternity coverage at all. Wives fared better than women workers. While 161 employers offered maternity benefits for female employees, 171 did so for the wives of male workers.⁵⁵⁰ Such disparities reflected the belief that men were providers, women their dependents who would quit their jobs for the career of full-time motherhood. Let their husbands’ employers cover their pregnancies. Other exclusions were common as well. Sometimes production workers had maternity benefits that office employees lacked. Dependent maternity coverage applied to only some dependents and not others. A plan might exclude dependent daughters from maternity coverage.⁵⁵¹ Often, obstetric coverage was only available under the family, not the individual plan. Thus, to be covered for maternity benefits through her employer, a woman had to purchase family coverage even though her husband might already have his own coverage. Many maternity plans did not pay for the pregnancy of the single woman, who would have been excluded from purchasing family coverage.

⁵⁴⁹ Carl A. Tellarico to G.N. McKee, February 24, 1961, in file “Ind Relns Ins, Grp: Mat. 1960-65” B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁵⁰ “Maternity Protection of Employed Women,” 11

⁵⁵¹ J.A. Shields, Superintendent, Equitable Life Assurance, New York, New York, to Carl A. Tellarico, Assistant Employee Benefits Administrator, Joseph E. Seagram & Sons, New York, New York, (October 29, 1962): File “Industrial Relations Insurance Group: Maternity 1960-1965” B 880, Ser XI, Grp 2, Seagram Company, Hagley.

Companies could sometimes make mistakes in the coverage they purchased, especially for conditions that were low on their priorities. The Feather-Lite Manufacturing Company signed a contract with Steelworkers Local 6794 that guaranteed \$70 in maternity benefits. The company purchased a plan that included maternity benefits, but only under the dependent coverage provisions. Originally, Feather-Lite had no female employees, but eventually they did hire a woman. When she got pregnant, the company told her that she was ineligible for the maternity benefit because she had not enrolled for dependent coverage. Shocked, the union grieved the matter. When the case reached arbitration, the arbitrator agreed with the union. The collective bargaining agreement specified maternity insurance benefits of \$70. Whatever the terms of purchase between the employer and its insurance carrier, that policy “can’t be used to alter the terms of the labor-management agreement.” If the carrier would not pay, the woman’s employer must pay the benefit itself.⁵⁵²

Two points emerge from this story—the capricious nature of social benefits dependent on the whims and profit motives of not one, but two companies, and the importance of a union in safeguarding the welfare provisions of the private welfare system. Where there was a union, it usually did defend a worker’s contractual rights. Unions protected the jobs, seniority, and access to benefits of their members through grievance procedures and in arbitration and often insisted upon the interpretation most generous to their pregnant member. Studying a similar phenomenon, and in some cases the same unions, in Canada, Joan Sangster observes, however, that “Union victories in these pregnancy and maternity cases were not necessarily victories for the concept of maternity leave as much as they were clever defenses of contract leave clauses”⁵⁵³

⁵⁵² “Arbiter Says Employer Must Make Good on Maternity Benefits Not Covered by Policy,” *Daily Labor Report* no. 124 (27 June 1969): A-6, A-7.

⁵⁵³ Sangster, *Transforming Labour*, 191.

whose strength underlay the rights of other workers as well. Unions, she found, were particularly robust defenders of pregnant workers' seniority rights, since the principle of seniority was so fundamental to them.⁵⁵⁴

Unions were less successful in fundamental challenges to employment policies and in securing specific maternity benefits in contract negotiations, perhaps because this was rarely a priority. Since many of the female employing industries were not highly unionized, unions did not usually place great importance on the benefits that may have benefited women most. Furthermore, while they could bargain for benefits and they could make sure that workers received benefits to which they were entitled, privately purchased insurance plans shut out union participation. Even when the union wanted a plan with a certain kind or scope of coverage, employers resisted a union voice in insurance purchase decisions.

The Independent Refinery Workers Union of Toledo, Ohio, which represented employees of Sun Oil Company, was a vigilant union. All Sun Oil Plants except the Toledo Refinery were insured through a company contract with Equitable Insurance and the company made a contribution towards premiums. Workers at the Toledo Refinery were covered under a Blue Cross and Blue Shield Plan that seems to have been in effect prior to the company purchasing one from Equitable. Union members at Toledo probably paid all their premiums themselves. The union asked the company to begin contributing to the insurance for its members. The company, however, insisted that it would only contribute to one uniform plan for all company employees. Workers at the Toledo refinery had a choice. They could join the Equitable plan to which their employer contributed, or they could remain outside the company plan and contribute to the Blue Cross plan themselves.

⁵⁵⁴ Ibid., 193.

It proved to be a very difficult choice. The Refinery's workers, or at least their union, were very attached to their Blue Cross and Blue Shield plan and they mounted a valiant effort to retain it. The Blue Cross plan in Toledo was one of the nation's oldest⁵⁵⁵ and it is likely that the Sun Oil employees had been with Blue Cross for more than a decade when they undertook this effort to secure an employer contribution. Sun Oil happened to be reexamining the policy it had in effect at its other plants and was considering improving the plan. The Toledo union campaigned vigorously to have the company subscribe to Blue Cross and Blue Shield for its entire far-flung workforce.

Maternity benefits were foremost among the provisions the union valued in their existing plan. The Toledo Blue Cross plan allowed seventy days hospitalization for maternity cases and covered the child at birth. The Equitable plan, even with the proposed improvements, would only cover up to \$150 of hospitalization and would not cover a baby until it was fourteen days old. To be sure, the proposed Equitable plan offered much better surgical benefits for obstetrics cases than the Blue Shield plan in effect in Toledo and the union commented on this feature approvingly. Even so, the union preferred the longer coverage of their Blue Cross plan, especially, they concluded, in maternity cases. In his analysis of the plans that he sent to the company, the union president wrote that

Blue Cross fully recognizes the importance of providing complete protection for maternity and complications of childbirth. The mother and new born child are entitled to 70 days of hospital care on an unlimited basis. Premature children requiring expenses in the way of services, material, oxygen and equipment are completely covered saving the subscriber hundreds of dollars.⁵⁵⁶

⁵⁵⁵ Klein, *For All These Rights*, 129.

⁵⁵⁶ Robert L. Trapp, President, IRW Union of Toledo to Clarence H. Thayer, V.P. Sun Oil Company, August 20, 1952, Sun Oil Company, Hagley.

When the company had its own insurance experts compare the plans and respond to the union's analysis, they pointed out that hospital stays for maternity were usually for five to six days, and so the Equitable plan would be sufficient for most cases. The union remained concerned. The union president worried that under the Equitable plan, a newborn would have to be released from the hospital and sent home before its own expenses would be covered.⁵⁵⁷ Sun Oil Company officials differed with this interpretation and offered that a newborn would be covered while its care was part of the mother's stay and then would be covered on its own behalf after fourteen days of age. The only lapse in coverage would have been any days after the mother's own hospital discharge but before the child's age of eligibility.⁵⁵⁸

Since most of the women employees at the refinery were probably clerical workers, and perhaps not union members, it appears that the union was concerned about maternity coverage as a benefit for the wives of male members. Even so, according to a study conducted by Sun Oil Company, all three plans—the Toledo Blue Cross and Blue Shield, the proposed Equitable plan and even the original Equitable plan—provided more generous benefits for maternity under both hospitalization and surgical schedules than was the norm for oil companies, a number of which had no dependent coverage for maternity at all.⁵⁵⁹

The extent of this controversy is extraordinary. The union was concerned with other weaknesses of the Equitable plan and an impulse to keep the plan they knew, which is certainly understandable, but the union repeatedly returned to maternity benefits in this dialogue about the responsibilities of an employer for the non-occupational health concerns of not only employees,

⁵⁵⁷ Ibid.

⁵⁵⁸ "Memorandum RE: Hospital Plan Comparisons....," September 16, 1952, Sun Oil Company, Hagley.

⁵⁵⁹ "Analysis of Surgical Schedules of Various Oil Companies" and "Analysis of Important Features of the Hospital, Surgical and Medical Plans of Various Oil Companies"(8/29/52) Sun Oil Company, Hagley.

but also their dependents. Their concern was more than opportunistic grandstanding; they cared deeply about these benefits. The cost of obstetric care was rising and these babies were, of course, a part of the Baby Boom. Union members had a very pressing need to have their wives and children covered. Union leaders recognized that some kinds of health insurance coverage were much better than others. Here, the concern over maternity benefits was not so much a matter of sex equality as male providers concerned about the health care of their wives and infants.

The persistence of Toledo Blue Cross members highlights the importance of obstetric care financing in the postwar period and demonstrates that maternity policy was not just a woman's concern. Despite a high level of attention to details of coverage, organized labor had a relatively weak position in expanding important private welfare supports. Unions may have been able to bargain for benefits during and after World War II, but even when they appear to have achieved security for their members, they were rarely involved in choosing the insurer or in writing the plan. Employers maintained control, and, as Klein suggests, a certain amount of secrecy, over the details and administration of fringe benefits. Those Toledo workers knew a good plan when they saw one, but their ambitious and careful comparisons did not sway the company, which ultimately decided to which plan to purchase.

Pregnancy Complications

Where there are pregnancy complications, the adequacy and availability of maternity benefits become even more doubtful. What, exactly, was a complication of pregnancy? The state disability plans of Rhode Island, New Jersey, and California (which covered women for unusual pregnancy disabilities), had to struggle with the issue of pregnancy complications. Nathan Sinai

pointed out that when the Rhode Island Cash Compensation board tried to clear up this question they only made things more confusing. On the one hand, pregnancy complications were by definition an illness, not a normal condition, but a doctor had to make the distinction. Insurers, such as these state offices or insurance companies in the case of private benefits, wanted to keep their costs low. Even granting the cases of clear complications left unsettled the degree of additional benefits for those cases. This tension between medical opinion and actuarial desire underwrote some of the problems the Rhode Island plan encountered with physicians.

In the private sector, pregnancy complications could extend maternity leaves, upon a doctor's certification, but by this point, the leave was usually unpaid in any case, so it was not a question of money for the employer or its insurance company. Maternity leaves, however, operated independently of wage-replacement policies. We have seen that cash benefits were very unlikely to cover more than a small part of even a normal leave. If a leave were extended because of complications during pregnancy, delivery or postpartum, wage replacement benefits would have already been exhausted. One problem, as previously mentioned, was with fitting maternity benefits into a model of temporary disability insurance was that while all women are disabled for at least a very short time during and just after childbirth, the length of the period of true disability can vary significantly. While many women are minimally troubled by pregnancy-related complaints, can function normally throughout their pregnancy, and physically recover quickly, others suffer complications of varying duration. Fitting maternity into S&A with a maternity limitation deprived women with complicated or high-risk pregnancies the coverage that they needed.

A Seagram insurance department memo spelled out quite clearly the "Maternity Limitation" of its plan. Women leaving active employment because of pregnancy could use up to

one month of accumulated sick leave, if they had that much. They were also eligible for six weeks of temporary disability insurance concurrent with sick leave and payments could not exceed the worker's salary. A pregnant worker with a lot of banked sick leave could take off a month at full pay and then have two weeks more of a smaller amount—the temporary disability insurance. But the problem here was that this was a maximum amount of paid leave for any one particular pregnancy. The memo went on to elaborate with a specific example. A woman “disabled due to pregnancy complications in the third month of pregnancy” would start drawing both her sick leave and her temporary disability insurance. If she was out of work for a month then she would have used up all her eligible sick leave and also a month of her TDI. She could go back to work, but, when she did take her inevitable maternity leave or resigned from her job, she would only have two weeks left of her TDI and no sick leave left at all.⁵⁶⁰

Complications highlight some of the problems of maternity limits for temporary disability insurance, but the benefit where complications threatened to collapse the system of private welfare was health insurance. Company benefits officers had difficulty deciding what were truly pregnancy complications and what was within the realm of a normal delivery. Equitable Insurance helpfully provided a memo, “DEFINITION OF COMPLICATIONS” (emphasis in original) which stated that “a complication may be defined as a condition which is not normal or which is not anticipated.” The memo listed some of the possible pregnancy complications that could trigger a higher schedule of payments. Caesarean section topped the list which also included Rh-factor problems, toxemia, severe morning sickness, threatened miscarriage or, in a classic example of using a term to define itself, “complication with respect to

⁵⁶⁰ W. B. Zachry to R.E. Stackpole, August 2, 1960, and R.E. Stackpole to W.B. Zachry, July 19, 1965, file “Ind Relns Ins Grp: Mat 1960-1965” B 880, Ser XI, Grp 2, Seagram Company, Hagley.

new born child.”⁵⁶¹

Pregnancy complications were complicated administratively. Employers and their insurance carriers wanted to be sure that when they paid more for obstetrical care, it was because of special circumstances—complications—and not because the doctor charged too much, or ordered expensive medical care for a normal delivery, or because a new mother or her husband was trying to maximize their reimbursement or get the company to pay for a private room. When complications did arise, on the other hand, necessary expenses sometimes outstripped the amount allowed under ordinary plans and “major medical” plans kicked in, necessitating calculation of deductibles and accounting of which parts of which complicated pregnancy were covered under which type of private employee health insurance.

Company benefits officers and insurance companies skirmished over calculating expenses and insurance reimbursement for complicated deliveries or tubal pregnancies. Sometimes higher schedules for complications fell far short of the actual expenses. Seagram also had a major medical plan that could pay for cases of extraordinary bills. But, what often happened with maternity cases is that the basic plan covered up to its schedule and the portion of expenses that was left over was not itself high enough to trigger major medical coverage. Thus, a worker with what might look like really good coverage might still face substantial out-of-pocket expenses for maternity complications.⁵⁶²

The failure of private plans to accommodate the real needs of high risk pregnancies and complications burdened women who were already suffering physically and physiologically as

⁵⁶¹ The Equitable Life Assurance Society to C. Tellarico, June 8, 1961, file “Ind Relns Ins, Grp: Mat. 1960-65” B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁶² Carl A. Tellarico to Mrs. Y.S. Berger, April 6, 1961 and Yvette S. Berger to W.B. Zachry, 3/14/1961 and “Authorization Request” 3/24/61, file “Ind Relns Ins, Grp: Mat. 1960-65” and The Equitable Life Assurance Society of the United States, “Major Medical Claim Details and Benefits,” Group Joseph E. Seagrams Sons, Inc, file “Ind Relns Ins Grp: Mat 1960-1965” B 880, Ser XI, Grp 2, Seagram Company, Hagley.

they struggled to take care of themselves and their infants. Worried about paying for the additional expenses of surgery and a longer hospital stay, some new mothers also missed the TDI they may have used up in their first trimester, but now needed even more. They might also have worried about losing their jobs if they could not get a leave extension. A private welfare state that only grudgingly and stingily covered childbirth that went well was weakest when it came to the coverage of pregnancy complications.

Employment Complications

Benefits were tied to employment and employment was often unstable for pregnant workers, especially when companies required resignations or lengthy leaves. Some women also chose to withdraw from the labor market, permanently or temporarily, with the births of their babies. Pregnant workers were also workers who could be laid off if the company fared badly, or let go temporarily because of seasonal production cycles. Furthermore, if a pregnant woman received health insurance through her husband's employer, her coverage depended upon his employment history and prospects. Klein introduces her book with the stories of companies that faced bankruptcy or that folded entirely, and the loss of the benefits employees had come to rely on.⁵⁶³ In a private welfare state, all covered workers depended upon a bond between themselves and their employer. Hence, important social supports were at risk from market forces.⁵⁶⁴

⁵⁶³ Klein, *For All These Rights*, 1, 267.

⁵⁶⁴ COBRA is an effort to address the problem of breaks in insurance coverage when a covered worker and/or his/her family leave their job for whatever reason. COBRA and the similar HIPAA are products of the 1980s. They allow an insured person to maintain their insurance policy, temporarily, after leaving a job that had initially granted that health insurance. The former employee assumes the whole premium, but, if he or she can afford to do that, is not dropped from insurance. A recognition of the central role health insurance had come to play in quality of life, of the high cost of medical care and also of the increased labor market fluidity, especially during the years of high unemployment in the early 1980s, COBRA and HIPAA were patches to the private system, not fundamental fixes. Even these patches, however, were unavailable in the 1950s and 1960s.

Maternity benefits were not unique in this way, but pregnant workers and new mothers were especially vulnerable because of pregnancy's long duration, the discrimination against pregnant women in the workplace, and the fact that pregnancy often happened to the dependents on a health care policy.

Pregnant workers could be caught up in seasonal lulls, plant closings or downsizings completely unrelated to their "condition." The New York study on pregnant unemployment insurance claimants showed lack of work as the leading reason for unemployment among the women they surveyed. A previous chapter discussed the way pregnancy limited a worker's access to the important public benefit of unemployment insurance. Laid off workers, however, could still have a claim on some private benefits. What were the responsibilities of companies to employees on leaves of absence when mass separations occurred? If they were paying sickness and accident or maternity benefits, could they "lay off" someone on leave and stop paying them or did they have to keep paying benefits to someone who would have got a pink slip? What about someone who had begun a waiting period for temporary benefits but who had not yet received them when the company downsized? What about an employee who would have been eligible for maternity benefits, but who was laid off before she could request them? Companies, unions, and employees did not always agree on what was fair in such situations.

In some industries, seasonal slowdowns were part of the normal production cycle and did not indicate systemic problems with the company or the economy. Seagram sold more whisky during the Christmas season and regularly laid off workers after filling holiday orders from distributors. Layoff and recall was part of the normal operation of distilling and bottling. While not actively at work, employees on layoff still had ties to the company that both workers and company wanted to preserve. Laid off workers would probably be active workers pretty soon,

unless, of course, they could not return to work.

Seagram's benefit office determined that "A female union employee actually drawing or receiving pregnancy sick leave benefits at the time of a lay off shall continue to receive sick benefits up to the maximum otherwise permissible."⁵⁶⁵ On the other hand, anyone who had not yet completed the three-day waiting period for drawing sickness and accident benefits was not eligible for those benefits if they would have been caught up in mass separations (layoffs) in the meantime.⁵⁶⁶ The union protested this policy.⁵⁶⁷ Perhaps they were right to protest, because the company had a different policy for non-union employees. A laid-off non-union employee who had a baby within nine months of the last day worked was "eligible to receive sick benefits."⁵⁶⁸ Benefits officers at the different plants had some flexibility as to how and when they put workers on maternity leave. Sometimes maternity leave could deflect a pink slip.⁵⁶⁹ Most of those employees who temporarily lost their jobs in seasonal layoffs would have been eligible to collect unemployment insurance. As the previous chapter explained, pregnant unemployed workers probably would not have been able to collect unemployment, so maternity leave allowed some

⁵⁶⁵ L. Gordon, memorandum "Sick Leave" December 14, 1951, file "Sick Leave: Reconciliation of Accounts nd 1947-1955" ("Sk Lv: Recon of Accts 1947-1955") B 891, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁶⁶ L. Gordon, Louisville, to M.G. Northcutt, Lawrenceburg, December 31, 1952, "Sick Leave Your Memo of December 29, 1951" file "Sk Lv: Recon of Accts 1947-1955," B 891, Ser XI, Grp 2, Seagram Company, Hagley and also M.G. Northcutt, to L. Gordon, Louisville, "Confidential Memo: Union Discussions," July 14, 1953, p. 2 and also, M.G. Northcutt to Harry Jarboe, DWU, September 22, 1953 file "Lawrenceburg, IN Plant: Correspondence and Union Activities Reports (2 of 6) 1953-1954" ("Lawrenceburg: Corresp & Union Activities 1953-1954") B 8889, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁶⁷ M.G. Northcutt, to L. Gordon, Louisville, "Confidential Memo: Union Discussions," July 14, 1953 "Lawrenceburg: Corresp & Union Activities 1953-1954") B 8889, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁶⁸ E.G. Duenweg, Louisville, "Sick Leave: Female Non-union Employees," January 10, 1952, file "Sk Lv: Recon of Accts 1947-1955," B 891, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁶⁹ W.J. de Rubertis, Relay, to E.G. Duenweg, Louisville, July 13, 1953 and M.G. Northcutt, Lawrenceburg, to E.G. Duenweg, Louisville, November 25, 1953, "Extended Maternity Leaves of Absence," ("Ext Mat Lv of Abs") file "Ind Relns Pension Pln: Ext of Leave, 1951-56" ("Ind Relns Pen Pln: Ext Lv, 1951-56") B 871, Ser XI, Grp 2, Seagram Company, Hagley.

access to the benefits of the company plan, which appears to have included some sick leave pay and also probably continuation of some insurance provisions.

Recall sometimes revealed workers that management thought were too pregnant to return to work. If a pregnant worker did resume her job, was she eligible for sick leave and/or maternity benefits? Did it make a difference if her pregnancy had commenced while she was still on the active rolls or if she became pregnant while already laid-off? Should she have notified her employer of her pregnancy while she was laid-off? What a mess. Employers and unions addressed these cases in negotiations but sometimes they could not seem to resolve all the questions. For instance, the Distillery Workers Union and Seagram and Sons once agreed that the company could decide if a recalled worker was “too pregnant to work” in her fourth or fifth month, but if they allowed her to start working again, they had to award her “all sick leave benefits.” However, they failed to reach an accord about the rights of workers who became pregnant while on inactive status.⁵⁷⁰ As family planning could follow a different cycle than business lulls or slowdowns, or as there might not have been planning involved in a pregnancy at all, it is quite likely that this happened often. Sometimes it may have worked out to a pregnant worker’s benefit. Other times, however, it was clearly a complication. Many companies that did offer leaves, or require them, for pregnant workers might have job protection and perhaps some wage replacement for those leaves. Even these companies, however, usually tried to avoid hiring pregnant women, a form of discrimination legal and widespread until the passage of the Pregnancy Discrimination Act in 1978. Recall of workers on layoff was somewhere in the middle; workers on inactive rolls were not new hires. They had an existing relationship with the

⁵⁷⁰ “Memorandum” attached to “Confidential Inter-Office Corresp.” between W.J. de Rubertus and L. Gordon, 24 May 1956, file “Holidays, Sick Leave, Leaves of Absence, 1954-1956,” B 888, Ser XI, Grp. 2, Seagram Company, Hagley.

company and usually retained accumulated seniority for the purposes of retirement, job bidding, wage rates, and, crucially, position on the recall list. However, gearing up for the busy season, or a return to higher levels of production, management must have eyed pregnant women with trepidation because of the predictability of their impending leave and because there was probably a queue of non-pregnant workers behind them only a phone call away from filling the same job.

Recall gave a personnel department a fresh chance to assess the conditions of employees. Their determination was often based on the unreliable method of observation as was true in the following case at a Seagram plant in the early 1950s. Because the DWU business rep got involved protesting the case, the personnel manager set it down in a memo to his own superiors. He recalled: “A Bottling girl was laid off....When she was recalled to work...she was noticeably pregnant.” The personnel manager asked her how far along she was and she told him she was in her fourth or fifth month. He told her she could not return to work despite the fact that she wanted to and that she was under the impression that she was eligible to work for at least another month into her pregnancy. Had this employee, this “Bottling girl,” not been “noticeably pregnant,” had she been more effective at camouflage, it seems likely that she would have returned to active status and then, when she did take a leave, would have had access to her 160 hours of paid sick leave, accumulated because she was a very healthy and conscientious employee who had not taken any sick leave for the previous two years. Because she “showed” when she appeared for work, she went home with nothing.⁵⁷¹

The same thing happened to Patricia Kupczyk, who worked at Westinghouse Electric in New York in the late 1960s. When Westinghouse recalled Kupczyk from layoff, the company doctor determined that she was late in a pregnancy and should not return to work. When the re-

⁵⁷¹ M.G. Northcutt, Lawrenceburg, to L. Gordon, Louisville, September 18, 1953 “DWU Payments: Confidential” September 18, 1953, file “DWU: Corresp. 1951-1953,” B 886, Seagram Company, Hagley.

employment physical exams turned up male workers who were temporarily disabled, the company just returned them to the inactive seniority list—to layoff where they might have another chance to be recalled to work later. But this isn't what Westinghouse did with Kupczyk. Instead, they gave her a letter indicating that she had “quit” and that her seniority was severed. Like the Seagram's “bottling girl,” Kupczyk took her problem to her union. The International Union of Electrical Workers (IUE), grieved the issue and Westinghouse reinstated Kupczyk to the layoff list in line with her seniority. In this case, a strong union with a background in addressing working women's issues was able to challenge the worst form of pregnancy discrimination.⁵⁷²

Kupczyk also filed a complaint of sex discrimination with the New York State Division of Human Rights, which, in 1969 issued a decision that Westinghouse's practice of treating pregnant workers differently than male workers who might have been temporarily disabled at the time of recall constituted sex discrimination and was in violation of the 1965 New York State Human Rights Law. Westinghouse was ordered to end this practice and let all employees know about the change in policy.⁵⁷³ Kupczyk's turn to the legal system marks a new approach to securing workplace maternity protections, one that will be more carefully examined in the following chapter. Kupczyk's complaint, and the decision by the New York State Division of Human Rights, used civil rights laws to challenge her employer's maternity leave practices. To do so, they had to analogize her pregnancy to conditions suffered by male workers, a tactic that seemed promising, but that, as it has come to underwrite American maternity policy, has also proven very limited. Just how limited Kupczyk soon learned. The Human Rights Division

⁵⁷² “New York Agency Orders Employer to Grant Leave to Pregnant Employees,” *Daily Labor Report* No. 61 (31 March 1969): A1-A3.

⁵⁷³ *Ibid.*

decision did nothing for Kupczyk, since her union, through the grievance procedure, had already won her reinstatement to the recall list. But, that was small security indeed. She won the right to wait around some more with no income. This was the case with many women on maternity leave. She, however, was laid off and so her case again highlights the multiple vulnerabilities of a privatized maternity policy.

Tying important social provisions to a particular employment relationship ignores a wide array of reasons that employment relationships are not necessarily as persistent as are the social and human needs that private fringe benefits attempted to address. This problem arises frequently in terms of some women's episodic commitment to the labor market. We saw the question arise again in terms of labor market forces such as seasonal lulls and periodic economic downturns. But it could appear in even the most favorable circumstance and here too, maternity benefits are proof of the dangers that lie in tying employment to social support. Consider this scenario. A woman is expecting a baby. Her husband receives generous health insurance benefits for himself and his family through his employer, a prosperous and venerable company. The economy is thriving. For some reason, the expectant father leaves his job. He is "terminated for cause"; he has not performed as expected or has violated company rules. Or, he leaves to take a better job. Why he left does not matter. The question is, does the insurance coverage he and his wife had when her pregnancy began continue to cover her through delivery? Or, by leaving his job, did he lose her spousal benefit. Did he consult her before jeopardizing coverage she needed? This is an important personnel question even if he left for a new job, because the health insurance at his new job probably has a waiting period and might specifically exclude coverage of an existing pregnancy.

Such a situation arose at a Seagram plant when a former employee submitted a maternity

claim for health insurance.⁵⁷⁴ Although similar cases had arisen before, this one touched off quite an extensive discussion. Part of the acknowledged reason for employee fringe benefits was to enable firms to insure the loyalty of excellent employees. Thus, when an employee had left, that purpose had already failed. So, why continue? It would not have cost that much to continue the insurance coverage for this man's wife. Furthermore, covering her almost certainly would not have led to a rash of similar cases. Qualified and loyal employees would not start quitting in droves to avail themselves of a benefit they already enjoyed. Still, it struck a nerve, and Seagram's Insurance Department delved deeper into the case because of "the importance being more of evaluating the obligation to the employee in this class."⁵⁷⁵ The insurance department looked at the operation of several of its policies and found that only "serious misconduct" voided such benefits as severance pay and vacation benefits. After pondering the case from a variety of angles, the company finally determined that maternity coverage in this case, and in others, was a claim initially made while the employee was still on the active rolls and this coverage should continue as a continuing claim. They paid maternity benefits for this former employee and new father.⁵⁷⁶ Seagram delayed paying the claim until a final decision was reached, providing the young family with six months of financial worries. Ultimately they did cover this mother and baby and others like them, but the discussion in the insurance department and the kinds of concerns that they raised when addressing the case make it clear that other companies may not have reached the same decision and that there were families left without maternity insurance

⁵⁷⁴ [Handwritten notes], file "Ind Relns Ins Grp: Mat 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁷⁵ Robert J. Ruppel, to William B. Zachry, August 12, 1960, "Employee Welfare Program, Extension of Coverages to Employees Terminated or Resigned," file "Ind Relns Ins Grp: Mat 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁷⁶ W.B. Zachry to R.J. Ruppel, January 10, 1961, "Group Insurance-Maternity Benefits, Extension of Coverages to Employees Terminated or Resigned" file "Ind Relns Ins Grp: Mat 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

coverage when male breadwinners changed jobs, or lost them. Dependent wives and their children could also lose coverage with divorce or the untimely death of a husband and father.

If it was a pregnant worker herself who lost the covered job, we have already seen how hampered she would be in her search for another position. Companies were very unlikely to knowingly hire pregnant workers and suspicious of women workers who became pregnant soon after they started a new job. Sometimes they worried that women had sought employment solely or mostly for the maternity benefits and would work only long enough to secure them before withdrawing from the labor market with the birth of their babies. Companies, insurers, and even labor unions regarded these benefits as stemming from the employee-employer relationship and took a dim view of possible opportunists who wanted the benefits but not the job itself.⁵⁷⁷

Company personnel offices or benefits administrators were especially suspicious of workers who filed requests for pregnancy benefits earlier than the established waiting periods. Waiting periods for maternity benefits were usually at least nine months long, sometimes longer, such as a year, even when waiting periods for other conditions were much shorter, say, three months.⁵⁷⁸ At the very minimum, these waiting periods sought to exclude from coverage any pregnancy that may have begun before a woman, or her husband, started employment with the company purchasing the plan. That is the reason for the commonly chosen nine-month waiting

⁵⁷⁷ “Maternity Protection of Employed Women,” 9; Rhode Island Unemployment Compensation Board, “What Changes are Necessary in the Cash Sickness Act?” (November 28, 1947): 12-14; Nathan Sinai, *An Analysis of Rhode Island Cash Sickness Compensation* (Ann Arbor: University of Michigan School of Public Health, 1950), 20-21.

⁵⁷⁸ Seagram had a “maternity rider” to its policy in 1961 that spelled out a nine month waiting period for maternity. Carl A. Tellarico, December 8, 1961, file “Ind Relns Ins Grp: Mat 1960-1965” B 880, Ser XI, Grp 2, Seagram Company, Hagley; A United Hatters, Cap and Millinery Workers International Union contract with the New York Millinery Joint Board required three years of union membership before awarding maternity benefits, though other benefit coverage took affect at 4 weeks to 6 months. See Fred Slavick, *The Operation of Sickness Benefit Plans in Collective Bargaining*, Appendix; U.S. Bureau of Labor Statistics, *Digest of One-Hundred Selected Health and Insurance Plans Under Collective Bargaining*, 1954; “Maternity Protection of Employed Women,” 17-24. Also Angell, *Health Insurance*, 139.

period. It seemed a reasonable selection to provide adequate and comprehensive health coverage for the employees of a company while excluding coverage to those not in the company's employee when the condition began. But, pregnancies are not always uneventful, simple, or predictable. Furthermore, the increasing practice of prenatal care complicated this waiting period timeline. What should a company do, then, if it provided maternity benefits to employees and brand new hires sought to secure these benefits? The company wanted to be absolutely sure that a claimant was not pregnant before they had hired her—that her employment, or her husband's employment if she was a dependent, preceded her pregnancy. Before they decided whether or not to pay her hospital bills, the insurance company wanted to know the date of her last menstrual period.⁵⁷⁹

Waiting periods thus presented problems for workers and dependents whose pregnancies began before they enrolled in insurance plans. This is yet another way that the private welfare state allowed for inequities in the provision of important social services. Even for those who began their pregnancies in a timely manner according to their insurance coverage, established waiting periods could pose problems. As obstetric care developed for high risk pregnancies and neonatology emerged as a pediatric specialty providing life-saving and expensive care for premature babies, maternity benefit waiting periods could threaten the coverage of these most costly cases. Employee benefits officers and insurance companies eventually accommodated such cases, but in these early years of private insurance coverage for workers and their dependents, the special cases of pregnancy complications, compounded with the employment

⁵⁷⁹ Kathleen to Carl [benefits office and insurance company personnel, last names unknown], December 7, 1960, file "Ind Relns Ins Grp: Mat 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

history of the covered beneficiary, meant several rounds of memos and quite likely at least weeks of financial worries for families, before they were notified of the company's decision.⁵⁸⁰

There are few such complicated cases as this one faced by the benefits officers at Seagram & Sons. The mother of a former employee called about maternity benefits for her daughter. The "girl," as she was referred to in the Seagram memos, had worked at Seagram for three years before resigning to join her husband stationed overseas in the army. She was going to have their baby in a base hospital. Her mother wanted to know what Seagram benefits she was still eligible for.⁵⁸¹ The Seagram benefits officers pondered the possible costs of "confinement in an Army hospital" and believed that the plan could still cover those charges, if the former employee was indeed eligible for maternity benefits at all.⁵⁸²

The overseas address and the government hospital were red herrings. Conception was the real crux. Her predicted due date made it unlikely that she had become pregnant while still at work. It is possible that the baby was conceived during her last week at work. But the memos say she resigned "to join her husband in Army camp," which indicates that he had proceeded her abroad. If he had more than a couple of days head start on her, then she probably wasn't pregnant when she left. Their baby might have been conceived during her week of vacation. Does a vacation period, cashed in after she had already resigned, count in terms of considering her an active employee? Conception could have also happened in the days following her "vacation." Of course, this was a delicate situation. It would have been awkward indeed to ask a mother about

⁵⁸⁰ Brand to Tellarico, July 26, 1962; Albach to Tellarico, July 24, 1962; Brand to Zachry, July 17, 1962 in file "Ind Relns Ins, Grp: Maternity 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁸¹ Northcutt to Carl Tellarico, 8-7-61, file "Ind Relns Ins Grp: Mat 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁸² Carl A. Tellarico, New York, to M.G. Northcutt, Lawrenceburg, August 7, 1961, file "Ind Relns Ins Grp: Mat 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

the actual details of her daughter's sex life. The Seagram benefits officers resolved the dilemma neatly though counting months instead of days and concluding that "maternity benefits are in order for pregnancy terminating nine months from termination of insurance."⁵⁸³ If she was eligible for some coverage, she was eligible for it all. If she delivered her baby in a timely manner, she would have hospitalization, she could also use the 160 hours of sick leave she had accumulated and she could get Accident and Health benefits as well for the limit allowed for maternity. Despite the facts that they knew she would never return to work at Seagram, that she had already resigned, and that her pregnancy quite likely happened while she was on vacation, she would receive full benefits, but only if she delivered in the nine month window.⁵⁸⁴ Otherwise, Seagram had no responsibility for her and her new baby.

Determining conception also became a problem for companies if and when they changed their own insurance carriers. Who was responsible for covering maternity care for women whose pregnancies overlapped the transition? It might seem easier to say that the first company would cover any pregnancy that ended within nine months of its replacement. But, what about premature births and miscarriages? These complications of pregnancy could entail higher costs and these higher costs were rightly born by the new company if those pregnancies originated after the transition.⁵⁸⁵

A pregnant employee might have obstetric health insurance that would cover the birth of her baby even if she was not actively at work—if she was on leave, or even if she had left the

⁵⁸³ Carl A. Tellarico, New York, to M.G. Northcutt, Lawrenceburg, August 7, 1961, file "Ind Relns Ins Grp: Mat 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁸⁴ Northcutt to Carl Tellarico, 8-7-61, file "Ind Relns Ins Grp: Mat 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

⁵⁸⁵ Carl A. Tellarico to Cliff Kopp, February 15, 1963, file "Ind Relns Ins Grp: Mat 1960-1965" B 880, Ser XI, Grp 2, Seagram Company, Hagley.

company's employment but wanted coverage for the condition that began while she was an employee. However, if she had not purchased a family plan, her baby might not be covered. A baby born with complications might have a mother who withdrew from the labor force to take care of her child. The birth of such a child might also include larger medical bills. Hopefully, the father had dependent coverage, because it could be difficult for a woman who had left employment to buy the individual coverage that handled her own expenses at delivery to pay for hospital charges for the baby. At least once, however, benefits officers tried to retroactively convert a woman worker's individual plan to a family plan and collect a deductible from the former employee in order to cover her newborn.

Conclusion

Providing maternity benefits such as health insurance, sick leave, and temporary disability insurance, through the employment relationship created a social safety net riddled with holes. When health care is not universal, a lot of energy has to be put into figuring out rules for eligibility and coverage. There are many ways to fall through the holes in the net. Employers and insurance companies have a built-in incentive to examine each claim that comes their way because employee use of those benefits, however incomplete they may be, still represents a cost to them and a loss to the insurance company. This is not to say that many companies did not try to do their best by their workers, or that they understood that sometimes the cost of investigating claims or changing policies was negligible in terms of their overall expenses. Unions could also be watch guards for the benefits guaranteed in collective bargaining contracts. But the sticky situations, no matter how sensitively the company tried to resolve them, or how vigorously a union advocated, illuminate the hazards of a private welfare state.

It paid to have a benevolent employer or a strong union, or a husband possessed of those attributes. While the rates of coverage were expanding, in the 1950s and 1960s, private benefits seemed to hold a lot of promise. At least 55% of American births in 1958 were covered by some kind of health insurance. Richard Meckel observes that “one major consequence of this transformation was a significant decline in the broad-based support that proposals for a national maternity and infancy program had historically enjoyed among American women and organized women’s groups.”⁵⁸⁶ Postwar government funding had fueled hospital construction and increased the number of qualified doctors through expanded medical school programs. When private health insurance schemes allowed more women access to private medical care, many women became less likely to support broader public programs, relying instead on the benefits of employers. This is much like the constrained choice that organized labor embraced, according to Stevens and Klein. Meckel goes further, however, and observes that, as access to maternity care increased through the private system, “middle-class and professional women began focusing their sights on the orientation rather than on the availability of maternity services.”⁵⁸⁷ They realized that the medicalization of birth had marginalized women and their families in a central event of their lives and they came to demand more control, flexibility, and respect in the doctor’s office and the delivery room. Widespread, though not universal, access to quality obstetric care, thus transformed concern about maternal and infant mortality, characterized by support for the Sheppard-Towner Act, EMIC and other proposed maternal care programs, into demands for fathers at the birth and “natural” childbirth, characterized by Lamaze classes and a renewed interest in midwives. This is an interesting idea, but not wholly correct. As explained in the

⁵⁸⁶ Meckel, *Save the Babies*, 225, 226.

⁵⁸⁷ Meckel, *Save the Babies*, 226.

chapter on postwar public benefits, during the early postwar period social justice feminists and their organizational homes with government were weakened by reorganization and the aging of particular notable figures. Whole groups and key reformers were themselves either removed or transformed to jettison their social justice focus on universal access to broad maternity benefits. The second wave of American feminism that spawned the Women's Health Movement was thus largely bereft of the background and the insights this earlier group developed. But Meckel is right to notice the shift in American women's criticisms of American medicine and how the spread of private insurance plans, hospitals, and physicians camouflaged the real failures of American maternity policy.

The minutiae of benefit coverage at Seagram and other employers reveals the need for a simpler, more efficient, and fairer alternative, a comprehensive maternity policy, including job protected leave, health insurance, and income replacement. Complete coverage, even in a private welfare state, would have required a whole range of coordinated benefits—rather than the often contradictory benefits pregnant workers found themselves grasping. Why were these benefits so stingy? Insurance companies had the greatest interest in keeping maternity coverage low. In the postwar period, unions engaged in collective bargaining to secure the best possible benefits for their members. However, some of the unions most successful in securing the best of the private plans, such as the Steelworkers or the Autoworkers, had relatively few women members. Clerical and service work, mushrooming occupations in the 1950s and 1960s that attracted huge proportions of women workers, remained chronically under-unionized. Unions, such as the one at the Toledo Oil Refinery, may have been most concerned with securing good benefits for the working father. It is also important to state again, as Klein showed so clearly, that while unions engaged in collective bargaining for benefits to substitute for expansions in the welfare state,

even successful unions rarely exercised much choice over the source or the actual construction of private policies, which remained firmly management prerogatives even when union pressure had inspired company programs.⁵⁸⁸ Employers offered good benefits to “ideal” workers who they hoped to retain for years. They regarded working women as somewhat temporary employees. Instead of inspiring comprehensive maternity policies, pregnancy, with its biological, cultural and social trappings, cemented the impression that women workers were transient. Indeed, a pregnant worker raised suspicions that she might be deliberately trying to “game” the system and shift the costs of her baby onto an employee fringe benefit plan before withdrawing from the labor force to mother full time. Seagram’s many female employees repeatedly faced a barrage of benefits questions raised by pregnancy and childbirth. Benefits officers at Seagram were more often kindly than mean. Even at Seagram, however, benefits usually fell far short of a comprehensive maternity policy because it was easy enough to find another “bottling girl” when one left to have her baby.

The actual range of benefits was both a patchwork and a maze, difficult for both the employee benefits officer and the woman and her family to figure out. Women workers did engage in strategies to make the most effective use of the benefits they had, but there were also many women who did not pay a life insurance or dependent child health care premium they would end up needing. Some of the weaknesses affected all workers, but were especially significant for pregnant workers because benefits were tied to a specific employer and to coverage rules affecting when employment began and ended. Pregnancy discrimination could be grounded in beliefs that mothers did not belong in the workplace, or that mothers were dependents of male breadwinners, or that it was aesthetically or morally problematic for a visibly

⁵⁸⁸ Klein, *For All These Rights*, 237.

pregnant woman to work with unrelated men or deal with the public. Whatever the reason, discrimination in employment erected a barrier to private welfare supports. The private welfare state did no better than the public one in confronting the dilemma of whether pregnancy was a normal condition or an illness. The correct answer was that it was both, or, at least that it could be both. However, as a normal condition, it fell outside the range of benefits constructed by employers and insurance companies. The more employers treated pregnancy as a normal condition, the lower the overall coverage for pregnant workers and new mothers. However, regarding pregnancy as an illness, especially pregnancy complications, created a phantom two-class system within private maternity benefits. A new mother who had had a high risk pregnancy or complications at delivery might be entitled to additional weeks or months of maternity leave. However, since even a normal leave was far longer than any scheme for wage replacement, additional leave could well mean additional financial stress. When health insurance plans failed to cover the costs of a normal delivery, major medical plans, either instead of, or in addition to, surgical and hospital reimbursement schedules, held out the promise of additional coverage when a birth was far more expensive than a reasonable worker could anticipate. However, Klein documents the inherently inflationary push such plans gave to medical costs, and the way this inflation undermined the effectiveness of private plans at providing real security to workers and their families. This chapter has also demonstrated that expensive pregnancy and childbirth complications could still fall short of triggering major medical plans, leaving new mothers and their families to absorb the extra burden, even if they might have seemed well covered.

The precedent set by early postwar fringe benefit plans affected maternity coverage well into the 1970s. In 1970, Pennsylvania Blue Shield still covered only \$90 for a normal delivery, a rate set in 1958, even though the average physician's charge had risen to \$243. This schedule

that paid only 37% of the charge for a delivery would cover 70% of the charge for an appendectomy.⁵⁸⁹ The influence of the early plans, however, goes far beyond the specific coverage amounts. Plans that discriminated against pregnant employees in terms of leave, wage support, and health coverage would continue to plague women workers until Congress passed the Pregnancy Discrimination Act in 1978. The maternity policies that I have described here are an important part of the explanation of why the US has the national maternity policy, or family policy, that we do today. As medical costs soar, companies are employing the give-and-take in the employment relationship to roll back their share of insurance coverage. It is one thing to hold the private sector responsible for the health of American citizens when such accountability suits them, but it is another to peg important social welfare measures to the employment relationship because such insurance is little assurance that needs for health care and income support, in the face of illness, disability or social reproduction, will be met. Maybe an employer should just send a fruit basket after all.

⁵⁸⁹ Insurance Commissioner's Advisory Task Force on Women's Insurance Problems "Report to the Pennsylvania Insurance Commissioner: Initial Findings and Recommendations, Part One" January 1974, p. 6, File 3, Box 4, AFSCME Program Development Department, Reuther.

CHAPTER 6:

“PREGO POWER”: MATERNITY RIGHTS AS CIVIL RIGHTS

After decades of disinterest, public policy failures, dead ends and neglect, pregnancy in the workplace appeared on the national radar screen as a problem of great concern in the early 1970s. According to Martin O’Connell’s study for the Census Bureau’s *Current Population Reports*, in the early 1960s, 44% of American women pregnant with their first child worked during their pregnancies. By the early 1980s, this percentage had risen to 65%. In the 1960s, 17% of these new mothers were back at work within a year. By the early 1980s, a third were back at work within three months and more than half were punching the time clock by their babies’ first birthday. In the early 1960s, almost 63% of women who had worked while they were pregnant quit their jobs because of pregnancy or childbirth. Twenty years later, only 28% of pregnant first time mothers did. Women also came to work much later into pregnancy before quitting or taking a leave. In the early 1960s, just under 45% of pregnant workers worked into their ninth month. By the early 1980s, about 65% of pregnant workers were on the job very close to delivery. The biggest jump in how late a woman worked into her first pregnancy occurred right in the middle of the 1970s.⁵⁹⁰

Moreover, women’s wages had become ever more important to larger numbers of American families and women workers, even pregnant ones, had become an indispensable part of some industries. Nurses Hellen Callon and Margaret Farrell recalled a hospital administrator musing that “These women employees who get pregnant are a big headache, but we can’t run the

⁵⁹⁰ Martin O’Connell, “Maternity Leave Arrangements: 1961-1985,” *Current Population Reports* Series P-23, No. 165 (March 1990): 11, 15, 16.

hospital without them.”⁵⁹¹ Social and medical expectations about pregnancy and cultural assumptions about women’s sexuality had also changed, allowing for far greater acceptance of pregnancy in public. All these macro-level economic and cultural changes meant that pregnant workers would indeed become an issue once again, as they had not been since WWII.

Women workers, feminist activists, lawyers, and politicians who tackled the problems of pregnant workers in the 1970s redefined the issue as one of civil rights for women. Conceiving maternity policies as equal rights for women depended upon a number of factors. Some of the long-time antagonism between feminists and social justice feminists lessened because of the passing of an older generation. Political repression during the Red Scare gave way to civil rights activism, antiwar protest, and feminism. The President’s Commission on the Status of Women and the Citizens’ Advisory Committee on the Status of Women lent their weight to including maternity leave within the framework of temporary disability benefits. Lawyer Pauli Murray offered a compromise between the Equal Rights Amendment proponents and those in favor of protection by suggesting that the Fourteenth Amendment’s guarantee of Equal Protection included women and could be employed effectively as a legal argument against pregnancy discrimination. By the 1970s pregnancy was redefined as visible, normal, and athletic in American culture. Pregnancy only seems like a timeless biological event.⁵⁹² The pregnancies, as

⁵⁹¹ Helen F. Callon and Margaret Farrell, “The Pregnant Hospital Employee,” *American Journal of Nursing* 63, no. 5 (May 1963): 111.

⁵⁹² Recently a lot of interesting work has been done on how the experience and meanings of pregnancy have changed in response to technology, medicine and culture. See Leslie Reagan, *Dangerous Pregnancies: Mothers, Disabilities and Abortion in Modern America* (Berkeley: University of California Press, 2012); Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* (Oxford: Oxford University Press, 2010); Sandra Steingraber, *Having Faith* (Cambridge, MA: Persius Publishing, 2001); Jacqueline H. Wolf, *Deliver Me From Pain: Anesthesia and Birth in America* (Baltimore: The Johns Hopkins University Press, 2009); Barbara Katz Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood* (New York: Penguin Books, 1987); Janet Golden, *Message in a Bottle: The Making of Fetal Alcohol Syndrome* (Cambridge, MA: Harvard University Press, 2005); Cynthia Daniels, *At Women’s Expense: State Power and the Politics of Fetal Rights* (Cambridge, MA: Harvard University Press, 1993). For a more distant historic perspective, Barbara Duden, *The Woman Beneath the Skin: A Doctor’s Patients in Eighteenth-Century Germany* (Cambridge, MA: Harvard University Press, 1998) and

well as the workplaces, that precipitated court cases in the 1970s were distinctly different than the ones that Charlotte Silverman had tried to track during WWII.

The shift toward understanding the rights of pregnant workers as *civil rights* and the denial of those rights as pregnancy discrimination owed most to the growing presence of women in the legal profession and the structures and successes of the African American civil rights movement, which an emerging cohort of feminist litigators drew on for theoretical and tactical inspiration. The most substantial framing of the issue was the passage of the 1978 Pregnancy Discrimination Act, which banned the most egregious forms of pregnancy discrimination. Its roots and its operation lay in the civil rights movement, and in the legislation, court decisions, and federal government agencies that arose as part of the machinery to enforce the end of racial discrimination at work. In fact, the PDA is an amendment to the 1964 Civil Rights Act. The PDA does not require paid leave for female workers at the birth of a child. But indirectly, it brought paid benefits for many workers, partly because of its effect on the handful of states that offered temporary disability insurance. State and federal court decisions and the PDA also had another indirect effect on paid benefits in terms of unemployment insurance since unemployment insurance could no longer exclude eligible workers simply if they were pregnant. But, the most notable way that American civil rights legislation extends social supports to women who are about to have, or who have just had, a baby is that the PDA theoretically prevents the private welfare state from discriminating on the basis of pregnancy.

Several recent legal histories have chronicled lawsuits and evolving feminist legal theory in defining, expanding, or creating the rights of pregnant workers. Fred Streibach tells a dramatic and suspenseful story of dedicated women lawyers fighting alongside individual litigants for

Barbara Duden, *Disembodying Women: Perspectives on Pregnancy and the Unborn* (Cambridge, MA: Harvard University Press, 1993).

women's rights. Serena Mayeri traces the emergence of feminist legal theory to the civil rights movement and to black women theorists, lawyers, and plaintiffs. Deborah Dinner portrays the ways that antidiscrimination law in the 1970s went beyond formal equality in challenging sex role stereotypes and shifted the costs of childbearing from the woman to her employer.⁵⁹³ This chapter explains how, after the Red Scare's foreclosure on postwar maternity benefits, a new interpretation about pregnant workers emerged based on a civil rights model. This involves a focus on the interaction between law, culture and society, the way that legal challenges related to unionism and feminism, and the way that women inside and outside government cooperated in creating new forms of administrative, judicial, and legislative law. These developments occurred as second-wave feminism reached its highest point of influence and then was buffeted by increasing conservative developments in the US Supreme Court and in American politics.

The narrow focus on the workplace and an embrace of civil rights court cases reflects the influence of the dynamic and successful civil rights movement of African Americans and highlights the connections between that and the new wave of American feminism. It is also a marker of the maturity of the particular and peculiar American welfare state. By the 1970s, as African American civil rights movement activists already realized, good jobs meant not only good money and respect, but also access to a set of more comprehensive social supports. As earlier social justice feminists had looked about the country and seen the expansion of maternity benefits in the expansion of the New Deal, or in the broader application of EMIC, the new

⁵⁹³ Fred Strebeigh, *Equal: Women Reshape American Law* (New York: W.W. Norton & Company, 2009); Serenea Mayeri, *Reasoning From Race: Feminism, Law, and the Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2011); Deborah Dinner, "The Costs of Reproduction: History and the Legal Construction of Sex Equality," *Harvard Civil Rights – Civil Liberties Law Review* 46, no. 2 (Summer 2011): 415-495; "Recovering the LaFleur Doctrine," *Yale Journal of Law and Feminism* 22 (2010): 343-406; Deborah Dinner, "Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law," *Washington University Law Review* 91, no. 3 (2014): 453-530.

network that emerged in the 1970s was able to identify the private sector as the most lucrative path toward an all-inclusive recognition of women as workers, mothers and citizens.

First, they needed to establish the right of a pregnant worker to her job in the first place. For the public-private welfare state to accommodate pregnancy, pregnant workers had to be able to work as long as they wanted to. At the legal level, this stage generally came first and was marked by lawsuits brought by teachers, the automatic military discharges for pregnancy and the problematic issue of pregnant flight attendants.

This issue re-emerged with company fetal protection policies barring fertile women from some male dominated jobs in heavy industry that women began to integrate in the 1980s. These jobs involved exposure to toxic chemicals, in particular lead, that were known teratogens but that were also dangerous for adults, women and men. Rhetorically fueled by pro-life demands for fetal rights, fetal protection policies were an end-run around Occupational Safety and Health Administration and union demands that workplaces should be safe for everyone in them, but they were also a reaction to feminist successes in gaining women limited access to some high-paying blue collar jobs with good benefits. Companies in feminized industries never had fetal protection policies even when those women's jobs involved exposure to hazardous chemicals.

Having established the right of a pregnant worker to her job, pregnancy activists next needed to fit pregnancy into the parameters of a workplace system designed for men. On the whole, this framework involved emphasizing the similarity of women to men based on their similar needs for temporary disability payments. The pregnancy-as-temporary-disability framework is characterized by changes in the EEOC guidelines, concerted multi-pronged union campaigns, two prominent Supreme Court cases, and the ultimate passage of the Pregnancy Discrimination Act.

The women's movement also sought access to traditionally male jobs, which had more robust safety nets, and also demanded better benefits for women within female sectors of the labor force. As a result of their efforts, many more public and private employers began to cover pregnancy in temporary disability leave plans or to offer workers paid maternity leave. The emergence of state and federal family leave laws is covered in the next chapter. What follows is a narrative of lurching forward, or problematic progress, as the gains that were achieved fell far short of the twin goals of achieving full citizenship for American women and remaking the American workplace to balance work and family.

Civil Rights Education

Sara Evans documented the way individual women forged a feminist analysis through personal experiences within the civil rights and anti-war movements in the 1960s and 1970s.⁵⁹⁴ A new compilation of essays, *Feminist Coalitions*, edited by Stephanie Gilmore and Sara Evans, maps the personal influences and shared circles of protest among feminists, civil rights and anti-war activists.⁵⁹⁵ Benita Roth and Serena Mayeri locate the ongoing important role of women of color in the feminist movement and the crucial role that black women played in extending an analysis of discrimination to include sexism.⁵⁹⁶ Mayeri follows the development of legal arguments that became central to feminist litigators' attempts to gain equality through the courts

⁵⁹⁴ Sara Evans, *Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left* (New York: Vintage, 1980); see also Ruth Rosen, *The World Split Open: How the Modern Women's Movement Changed America* (New York: Penguin Books, 2000); and Estelle Freedman, *No Turning Back: The History of Feminism and the Future of Women* (New York: Ballantine Books, 2003).

⁵⁹⁵ Stephanie Gilmore and Sara Evans, *Feminist Coalitions: Historical Perspectives on Second-Wave Feminism in the United States* (Urbana: University of Illinois Press, 2008).

⁵⁹⁶ Benita Roth, *Separate Roads to Feminism: Black, Chicano, and White Feminist Movements in American's Second Wave* (Cambridge, UK: Cambridge University Press, 2004); Serena Mayeri, *Reasoning From Race*.

and legislation. Fred Strebeigh explains how women lawyers, law professors and law students devised legal challenges patterned upon those developed by the NAACP Legal Defense Fund.

Transforming maternity policy from a question of social welfare and unionism to one of civil rights required an entirely new way of thinking about women's work, citizenship, and the harms pregnant workers suffered. Nancy MacLean lays out the way that struggles for civil rights in the workplace transformed the workplace and reshaped feminism. Feminists patterned their own approaches and arguments upon those initially devised by African Americans. MacLean makes clear that battles over workplace rights are the most fundamental claims to equality in the United States because in this country, not only income, but also status and social rights are tied to work. She explains that securing good jobs was the main path to full American citizenship and for that reason, equal opportunity in employment was central to the African American civil rights movement.

At the last minute, sex was included in the 1964 Civil Rights Act of 1964.⁵⁹⁷ Once sex was included within Title VII of the act, women workers had a legal and theoretical basis with which to challenge sex bias. They also had access to the administrative machinery of the Equal Employment Opportunity Commission created by the act. The first EEOC commissioner, Herman Edelsberg, was publicly reluctant to enforce the prohibition on sex discrimination. But the commission soon found that women workers took the provision seriously and began filing claims immediately. Feminist lawyers at the EEOC, and activists, especially women who would form the National Organization for Women, worked together to address male chauvinism and enlighten Edelsberg and his staff. NOW leaders, including Betty Friedan, met with the EEOC to

⁵⁹⁷ For this history see Carl M. Brauer, "Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act," *Journal of Southern History* 49 (February, 1983): 37-56 and Cynthia Harrison, *On Account of Sex: The Politics of Women's Issues 1945-1868* (Berkeley: University of California Press, 1988).

press them to investigate allegations of sex discrimination and hire women attorneys.⁵⁹⁸ NOW insisted that employers who discriminated on the basis of sex were operating just like those who practiced racial discrimination and that instruments designed to confront racial bias could and should be used to address sex discrimination.⁵⁹⁹

Initially, the EEOC issued guidelines that indicated it did not consider bias against pregnant workers to be sex discrimination. As women workers and their unions flooded the agency with complaints, the EEOC developed a broader understanding of discrimination, especially sex discrimination. Their evolving understanding owed much to the work of young feminist lawyers within the EEOC, especially Sonia Pressman and Susan Deller Ross and the influence of Catherine East of the Citizen's Advisory Commission. In 1971, the EEOC ruled that pregnancy discrimination in sickness and accident plans constituted sex discrimination. In March of 1972, the EEOC issued *Guidelines on Discrimination because of Sex* with a new section on "Employment Policies Relating to Pregnancy and Childbirth," which advised that pregnancy and childbirth should receive the same considerations "applied to other temporary disabilities."⁶⁰⁰ These guidelines also warned that companies that had no leave available for any conditions might still be guilty of sex discrimination if denying leaves "has a disparate impact on employees of one sex." The significance of the guidelines was that they used the framework of temporary disability (with its job guarantees and payments to the disabled worker) as the means to promote job security for the pregnant worker while also relying on the framework of "disparate impact" as an argument in favor of making special accommodations on behalf of pregnant workers.

⁵⁹⁸ Rosenberg, *Divided Lives*, 188.

⁵⁹⁹ Nancy MacLean, *Freedom is Not Enough*, 147.

⁶⁰⁰ EEOC, "Title 29, Labor, Chapter XIV, Part 1604, as Amended (as of March 31, 1972): *Guidelines on Discrimination because of Sex*, folder 13, box 21, Dorothy Haener Collection, Reuther.

New federal administrative law spawned new state administrative law, at least in states where feminist organizing was strongest. A new generation of feminist lawyers and law students as well as federal, state and sometimes municipal agencies and civil servants issued guides on how to file anti-discrimination lawsuits. The Employment Committee of New York NOW produced “The Angry Woman’s Arsenal Against Sex Discrimination in Employment or How to File” in the early 1970s. This guide advised women facing discrimination to “File fast and file everywhere.” A helpful chart of agencies, their mandates, their deadlines and their addresses also contained pragmatic assessments of the speed and efficacy of different city, state, and federal agencies. As a test a woman might perform to see if her treatment constituted sex discrimination, NY NOW suggested imagining “‘if I were a white male’” would this have occurred? In the “special case” of maternity, “substitute ‘heart attack’ for pregnancy.”⁶⁰¹

Women’s Liberation

The concerns over pregnancy in the workplace and the rights of pregnant workers arose within the context of sweeping transformations of gender roles that encompassed everything from work, family relations and reproduction to health and even language. The Boston Women’s Health Book Collective produced *Our Bodies, Ourselves* in 1971. *The New Pregnancy* was published in 1979 and was serialized in *Redbook*. In 1975, Kathleen Peratis and Elisabeth Rindskopf cited major feminist works--Kate Millett’s *Sexual Politics*, Simone DeBeauvoir’s *The*

⁶⁰¹ New York National Organization of [sic] Women, the Employment Committee, “The Angry Woman’s Arsenal Against Sex Discrimination in Employment or How to File,” box 3, folder 32a, *New York Times* Women’s Caucus, Schlesinger. Radcliffe Institute, Harvard University.

Second Sex, and Shulamith Firestone's *Dialectic of Sex*--on the first page of an article about pregnancy discrimination for the *Women's Rights Law Reporter*.⁶⁰²

When the appellate court upheld the decision that excluding pregnancy from California's temporary disability program was unconstitutional, Dwight Geduldig, the director of the California State department of Human Resources told the *New York Times* that "This ruling will bust the disability insurance program within a year" if the state didn't also raise the tax on workers.⁶⁰³ In Washington, Catherine East fumed. She sent Geduldig some publications on pregnancy disability, along with a note on her personal stationary. East's stationary proclaimed, in capital letters, "WOMEN ARE PEOPLE." Her specific message to Geduldig was no less clear. His cost estimate for an increase was far too high, she explained. He had no idea what he was talking about. "Some of your staff appear not to understand pregnancy, or women; we've found from several years' experience with the subject that some men are the victims of many misconceptions on the subject."⁶⁰⁴

The place of pregnancy in the workplace emerged as key terrain in the battle of the sexes. The larger cultural context colored the specific concerns, the feminist theorizing, their allies, and often the tone of the debate. While the IUE lawyer Ruth Weyand questioned East in the Gilbert case, the attorney for GE, Theophil C. Kammholz, thought the testimony drifted into hearsay to which he frequently objected. Finally, wary of the changing gender dynamics, and probably also of the judge's well known impatience with obstructive lawyers, he ventured, "I dislike being a constant objector, particularly since I am a male, but may I have a standing objection?" The

⁶⁰² Kathleen Peratis and Elisabeth Rindskoph, "Pregnancy Discrimination as a Sex Discrimination Issue," *Women's Right's Law Reporter* 2 (1974-1975): 26-34.

⁶⁰³ "Disability Payment on Pregnancy Held Peril to Coast Plan," *New York Times*, June 3, 1973.

⁶⁰⁴ Catherine East to Mr. Geduldig, (June 19, 1973): box 10, folder 12, in Catherine East, Schlesinger, Radcliffe Institute, Harvard.

judge himself, Robert R. Merhige, acknowledged the minefield of male privilege when he upheld a different objection from defendant's counsel, despite "the risk of being one of those middle-class chauvinistic males."⁶⁰⁵ Later, while East was being cross-examined, the GE attorney allowed as how there were not many women in GE management because "They are hard to come by." At which point the judge interjected, breaking into East's reply, that "You see a picket line form around the courthouse and you wouldn't think they are so hard to come by." Sharing this moment of poking fun at feminists, Kammholz admitted, "I may have the advantage, Your Honor, in being able to get out of town quickly." The judge advised "Not if you stay close to me."⁶⁰⁶

Indeed, the whole time Catherine East testified before the court is threaded through with the cultural upheavals of a new gendered order that made men, even highly successful men like a leading attorney for a corporate giant and a federal judge, uncomfortable. Much of Kammholz's cross-examination of East consisted of a back and forth over the ERA, East's testimony in favor of the ERA before various groups and also, specifically, her response to the majority report of the Committee on Equal Rights over whether or not the proposed ERA could recognize any differences between men and women. East knew that he wanted this congressional discussion of difference within the debate about the ERA to buttress his client's special policies relating to pregnancy and she resisted giving a yes or no answer. The exchange deteriorated when Kammholz quoted Senator Javits "[Vive] la difference" and East retorted "Well, male chauvinists say that. We know where a man is when that is the way he talks." It got worse. Kammholz continued "Well, if the female of the species adheres to the point of view which I

⁶⁰⁵ "East – Direct," 103.

⁶⁰⁶ East – Cross, 152.

gather you take to the contrary, too long, there won't be any of us around to worry or argue?" Not letting him get the last word, especially such a flippant one, East replied, "you are misrepresenting my point of view. I have two children and I am very happy with them." Getting back to the point of the trial, she added, pointedly, "and I had sick leave when I had them." Kammholz persisted. Attempting once more to link the demand for pregnancy rights to the radical fringe of women's liberation, he asked snidely, "You were Mrs. East at the time?" She replied "I am Mrs. East, yes, sir." Kammholz clarified "But, you are Ms. East now?" Trying to put a lid on that line of discussion, East replied "It doesn't matter. Whatever is comfortable for you is comfortable for me."⁶⁰⁷

One of the most common insurance practices relating to pregnancy was to give maternity coverage only to women who held family plans and claimed their husbands as dependents. As already noted, married men with family plans had maternity coverage for their wives, but often not for their dependent daughters. While this constellation of marital status and beneficiary enrollment was typical of health insurance and disability insurance since their beginnings, it became a more salient issue with the sexual revolution in the 1960s and 1970s. Wives of covered male workers might receive full obstetric coverage while single women employees, or even married women workers on an individual plan, or the teenage daughters of covered male workers, faced the costs of pregnancy alone. The insurance industry seemed a step behind the enormous cultural changes of the 1960s and 1970s. Barbara Golter of the UAW was surprised to learn that neither she nor any of her female co-workers were covered for maternity, although coverage for all women workers was available to the company for a small fee.⁶⁰⁸ She understood

⁶⁰⁷ "East-Cross," 159.

⁶⁰⁸ Barbara Golter to Olga Madar, April 27, 1975, Coalition of Labor Union Women Collection, Box 16, no. 7, Reuther.

this as prudishness but also saw some ugly racial assumptions beneath the moral standards at insurance companies. Someone at Aetna told Golter that maternity policies excluded single women because of “a large number of single, black, female employees.” Golter remembered that the “insurance man” mused “and who knows how many children they’ll have.”⁶⁰⁹

Pregnant Lawyers

Feminist lawyers acquired from the civil rights movement a belief in full and equal citizenship. They also emerged from the changing demographics of the legal profession. In the 1970s, the EEOC and other government agencies were able to draw upon a suddenly emerging cohort of women lawyers. Prior to this, law schools had admitted only small quotas of women. Deans and professors displayed hostility towards women law students in the classroom. Some women remember being asked why they were taking places that should have gone to men.⁶¹⁰ In the late 1960s and early 1970s, law schools began to change. First, President Lyndon Johnson withdrew draft deferments for most graduate degrees, including law school, starting in 1968.⁶¹¹ As the number of male students declined, places opened up for women. Second, the number of law schools grew, expanding the number of spots available. Richard Abel found that in the

⁶⁰⁹ Barbara Golter to Olgar Madar, April 27, 1975. After the PDA became law, the EEOC issued guidelines for compliance. One of the guidelines established that the PDA protected pregnant workers regardless of their marital status. Employers could no longer limit any of their maternity benefits based upon marriage and could not require employees to have purchased a family plan in order to obtain their own benefits related to maternity. Barbara A. Brown, “Pregnancy-Related Disability—The Scope of Permissible Coverage,” *Employment Relations Today* 12, no. 3 (Autumn 1985): 223.

⁶¹⁰ Cynthia Fuchs Epstein, *Women in Law* (New York: Basic Books, 1981); Fred Strebeigh, *Equal*; Jane De Hart, *Pursuing Equality: Ruth Bader Ginsburg* (New York: Alfred Knopf, forthcoming).

⁶¹¹ David Card and Thomas Lemieux, “Going to College to Avoid the Draft: The Unintended Legacy of the Vietnam War,” *The American Economic Review* 91, no.2 (May 2001): 98; Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (Chapel Hill: University of North Carolina Press, 2009), 76 also Susan Deller Ross, “Interview with Susan Deller-Ross,” (July 8, 2003) <http://lib.law.cua.edu/nacle/Transcripts/Deller-Ross.pdf> (accessed 14 August 2011).

1960s, “lawyers increased twice as fast as the population” at large and in the 1970s, “lawyers increased eight times as fast as the population,” meanwhile, physicians only “increased less than five times as fast.”⁶¹² Some traced the growth in lawyers to the rising income for the profession and the broadening employment opportunities within government and industry. However, Abel attributes much of the increase to “idealism rather than materialism” as college students influenced by the civil rights movement and the anti-war movement regarded the law as a tool for social change.⁶¹³

Changes in sex discrimination law, including law suits against law firms and law schools, affected law schools. By 1972, the EEOC interpreted Title VII as applying to law school placement offices and that year Congress also passed Title IX which specifically forbade discrimination in education, including law school admissions and also scholarships.⁶¹⁴ The increase in women attending law schools was far more dramatic than that of women in medical school. Over the decade of the 1970s, the number of women lawyers had increased fivefold.

Behind many a feminist lawyer was one of the few feminist law professors. Women graduates maintained contacts with Ruth Bader Ginsburg at Rutgers and later Columbia or Herma Kay Hill at Boalt Law School in Berkeley. Feminist lawyers founded women’s legal defense funds to offer pro bono assistance to women litigants. Jo Carol LaFleur, a Cleveland school teacher, found pro bono legal help when she approached the Women’s Equity Action League (WEAL) in Cleveland. Focused on issues of sex discrimination in education, law and legislation, WEAL had a special interest in job discrimination and a mission to press for the

⁶¹² Richard L. Abel, *American Lawyers* (New York: Oxford University Press, 1989), 77. See also Lawrence M. Friedman, “Lawyers in Cultural Perspective,” in Richard L. Abel and Philip S.C. Lewis, *Lawyers in Society: Comparative Theories* (Washington DC: Beard Books, 2005).

⁶¹³ Richard L. Abel, *American Lawyers*, 80.

⁶¹⁴ Epstein, *Women in Law*, 94.

enforcement of antidiscrimination laws. LaFleur's WEAL lawyer Jane M. Picker was a co-founder of another feminist law group, the Women's Law Fund. Nora Simon, an Army nurse, Anna Flores, a Navy seaman, and Susan Struck, an Air Force nurse, turned to the ACLU Women's Rights Project (WRP) for help. NOW's Legal Defense and Education Fund, the Women's Legal Defense Fund, the National Woman's Law Center and the Women's Law Program and the feminist lawyers who staffed them formed what Julianna S. Gonen calls the "litigating arm" of the women's movement.⁶¹⁵ They were joined by a number of labor lawyers and by feminists working within legal aid organizations, such as the Southern Poverty Law Center and California Rural Legal Assistance, and in labor unions, the EEOC, the Justice Department, and other government agencies. Sally Armendariz, one of the plaintiff's in the *Guduldig v. Aiello* case, worked for California Rural Legal Assistance.⁶¹⁶

Many women lawyers identified with the discrimination their clients complained of since they had experienced pregnancy discrimination in law school and at law firms. Elizabeth Dole, Sandra Day O'Connor, Ruth Bader Ginsburg, Geraldine Ferraro, Janet Reno, Patricia Schroeder, and many others, had trouble getting jobs while male classmates with weaker resumes thrived. Male judges refused to hire women law clerks and women attorneys were told they did not make partner because the firm only needed one woman or clients did not want to work with a woman. Ginsburg, the architect of the ACLU Women's Rights Project, left law school and followed her husband to Oklahoma when he was drafted. To support herself and her family, Ginsburg took the civil service exam and found work in the Social Security Administration typing pool. When she told her supervisor she was pregnant, she was demoted three ranks. Ginsburg recalled this

⁶¹⁵ Julianna S. Gonen, *Litigation as Lobbying: Reproductive Hazards and Interest Aggregation* (Columbus, OH: State University Press, 2003), 26.

⁶¹⁶ Strebeigh, *Equal*, 83.

experience in 1965, when, as an untenured law professor at Rutgers on a year-to-year contract, she hid her second pregnancy as long as she could under ever increasingly baggy clothes.⁶¹⁷

Ruth Weyand, who shepherded the union case against pregnancy discrimination at GE, had also faced job discrimination. While a lawyer for the National Labor Relations Board, she married a lawyer for the NAACP. Their interracial marriage was, in 1949, still illegal in many states. They kept it a secret for a while but when their marriage was revealed, Weyand lost her job. The NLRB thought her notoriety, due to her marriage to a black man, made her a liability to the government. Later, when Weyand gave birth to her son, she refused anesthesia out of fear that something could happen to an interracial baby if a parent was not watching to protect him. In the days before fathers were present at births, that had to be her.⁶¹⁸

Ginsburg and Weyand were of an older generation, and while their experiences may well have shaped their grasp of the issues, the breaking wave of a much larger cohort had even greater effect. All of a sudden there were a lot more women lawyers, and a substantial group were the same age. Many of them started families at the same time as each other and at the same time that they were establishing their careers.

Sonia Pressman Fuentes, a founder of the National Organization for Women, was a lawyer with the EEOC and pregnant with her own daughter when she tried to convince the agency to take sex discrimination seriously. Linda Dorian, who worked on the government's contribution to the Gilbert case, had just recently had a baby when she joined the EEOC.

Kathleen Peratis, an ACLU lawyer, argued a pregnancy case before the Supreme Court in 1975.

⁶¹⁷Strebeigh, *Equal*, 21, 35; Rosalind Rosenberg, *Divided Lives: American Women in the Twentieth Century* (New York: Hill and Wang, 1992), 214-215; Nancy MacLean, *Freedom is Not Enough: The Opening of the American Workplace* (Cambridge, MA: Harvard University Press, 2006), 135.

⁶¹⁸ Strebeigh, *Equal*, 106-107.

When the court handed down its opinion and found in favor of her client, Mary Ann Turner, Peratis told the *New York Times* that she was especially pleased with the decision, since she was herself pregnant at the time.⁶¹⁹ The ACLU offered six weeks paid maternity leave, which both Peratis and Susan Deller Ross, who worked on an amicus brief for the *Gilbert v GE* case while she was pregnant, started at about the same time. When upcoming Supreme Court briefs called them back to work early, the ACLU set up on-site day care in the ACLU offices to care for the babies of these young feminist lawyers working to eliminate pregnancy discrimination.⁶²⁰

Feminist lawyers learned that judges did not take pregnancy discrimination seriously from the way they were treated in the courtroom. Harriet Rabb, who worked with the Employment Rights Project at Columbia Law School and represented women employees in their lawsuits against the *Reader's Digest* and the *New York Times*, recalled that while she was visibly pregnant and delivering her summation, the judge, concerned for her condition, asked her to sit down. When she chose not to, he gallantly stood himself for a while before abandoning chivalry in the face of Rabb's continued professionalism and ongoing concluding arguments.⁶²¹ Selma Cash Paty remembers that her professor banned her from moot court when she was pregnant in law school and she knew the judges were unhappy with her appearance in court in a later pregnancy.⁶²² A judge agreed with a defense lawyer that a pregnant prosecutor might sway the jury unfairly and postponed a trial until Wendy Murphy's baby was two weeks old. When she

⁶¹⁹ Leslie Oelsner, "Supreme Court Upholds Jobless Pay in Pregnancy," *New York Times*, Nov 18, 1975, 77.

⁶²⁰ Susan Deller Ross, http://www.aclu.org/files/women's_rights/tribute/3.html (accessed 20 May 2012); Strebeigh, *Equal*, 127.

⁶²¹ Lindsay Van Gelder, "Harriet Rabb, Scourge of Corporate Male Chauvinism," *New York [magazine]* (June 26, 1978): 38 in *New York Times Women's Caucus Records*, box 3, folder 32a, Schlesinger.

⁶²² Selma Cash Paty, in William Lynwood Montell, *Tales From Tennessee Lawyers* (Lexington: University of Kentucky Press, 2005).

was allowed back in his courtroom, he made a public issue out of her desire to take a fifteen minute nursing break.⁶²³

Which Side Are You On?

Labor unions continued to grapple with various questions surrounding pregnancy—maternity leave and the right to return, seniority, light duty, and, especially the coverage of pregnancy and childbirth in health insurance and temporary disability plans. Unions raised these issues sometimes in collective bargaining and sometimes, where the particular situation was unusual, or if the contract language was unclear, they filed grievances to push the envelope. In the 1970s, several unions began to deploy these approaches in a much more coordinated way throughout their own internationals. They also reached out systematically to other unions who were also suddenly much more interested in maternity benefits. The emergence of CLUW (the Coalition of Labor Union Women) in 1974 provided a clearinghouse, but unions also communicated through less formal routes and patterned their approaches on each other.

Unions, especially those with large numbers of women members, were generally ahead of the EEOC and challenged the agency to enforce the sex discrimination clause. Long experience with grievance procedures provided basic experience. By the time women began filing charges of pregnancy discrimination, many unions were adept at using the machinery of the EEOC to file charges of racial discrimination. By 1970, unions and their legal departments were well aware of how unresolved EEOC cases could enter the court system. Ironically, one of the early EEOC

⁶²³ Wendy Murphy, "Finding the Time," in Robin Sax, ed. *Reaching the Bar: Stories of Women at all Stages of their Law Careers* (New York: Kaplan Publishing Group, 2009), 118.

cases relating to pregnancy found a union to be in violation of Title VII because the union had negotiated a collective bargaining agreement with a policy of terminating pregnant employees.⁶²⁴

The unions most inclusive of women's issues tended to be those with large numbers of women and African Americans, often industrial unions with strong national offices or public sector unions⁶²⁵ The IUE, as before, was in the forefront. In the 1970s, the union happened to have two creative and talented lawyers who were also strong feminists, Ruth Weyand and Winn Newman. Newman, General Counsel at IUE, was a union man committed to gender equality and the protection of his union. Advising union leadership that Title VII made the union itself vulnerable to charges if it did not actively seek to eliminate discrimination from contracts, he made the elimination of sexism and racism a core part of the union's business.⁶²⁶

Keeping Up with the Law, the IUE newsletter on labor law published between 1971 and 1981, educated officers and shop stewards about worker's rights under anti-discrimination law. It covered a range of issues, but featured cases relating to sex and race discrimination. The newsletter reported on and abstracted EEOC and arbitration cases. It described step by step the procedure the legal department wanted the IUE to follow. For example, the May-June 1971 issue reported on an EEOC decision about pregnancy discrimination in disability benefits and followed the report with six specific tactics to obtain pregnancy benefits for IUE members.⁶²⁷

⁶²⁴ 2 Fair Empl.Prac.Cas. (BNA) 514, EEOC Dec. No. 70-600, EEOC Dec. P 6122, 1970 WL 3578 (E.E.O.C.)

March 5, 1970, Peratis and Rindskopf, "Pregnancy Discrimination as a Sex Discrimination Issue,"²⁷; Arthur Larson, "Sex Discrimination as to Maternity Benefits," *Duke Law Journal* 1975, no. 4 (Sept 1975): 826.

⁶²⁵ MacLean, *Freedom is Not Enough*, 288.

⁶²⁶ MacLean, *Freedom is Not Enough*, 138.

⁶²⁷ *Keeping Up with the Law* (May-June, 1971).

When Dorothy Haener of the UAW Women's Bureau learned about the comprehensive steps that IUE lawyers had outlined to address pregnancy discrimination, she sent a memo to Steve Schlossberg, the UAW general counsel. She strongly suggested that the UAW follow the same steps because "we have always been in the forefront on women's issues" and this strategy reflected a recent convention resolution.⁶²⁸ Six months later, the UAW had its own comprehensive pregnancy anti-discrimination plan in place. By October, the UAW had filed EEOC charges against GM, Ford, and Chrysler for discriminating against pregnant women in disability benefits. Leonard Woodcock, president of the UAW, indicated that he was ready to "implement the remainder of our strategy for bringing other employers into compliance with the Civil Rights Act."⁶²⁹ Backed by the UAW legal department, which coordinated "this enforcement program," Woodcock explained how stewards and local officers should proceed.

In 1973, UAW vice-president Irving Bluestone wrote to his counterpart at GM as part of the UAW comprehensive strategy to expand disability coverage for pregnancy. Other UAW officials wrote to Chrysler, Ford and other companies.⁶³⁰ Bluestone regretted that the 1970 contract negotiations had not eliminated the six week limitation on disability coverage for pregnancy, and pointed out that by 1973, it appeared that that limitation was illegal and would need to be eliminated from the new agreement. He continued, "Putting the law aside, however, it is also our view that simple fairness and equity require that women employees disabled by

⁶²⁸ Dorothy Haener to Steve Schlossberg, March 10, 1972, folder 13, box 21, Dorothy Haener Collection, Walter P. Reuther Archive, Wayne State University, Detroit, Michigan.

⁶²⁹ Leonard Woodcock to Officers and Regional Directors, October 31, 1972, folder 14, box 21, Dorothy Haener Collection, Walter P. Reuther Archive, Wayne State University, Detroit, Michigan.

⁶³⁰ William H. Oliver to Caroline Davis, November 30, 1973, folder 13, box 21, Dorothy Haener Collection, Reuther.

pregnancy be treated the same way as employees disabled” otherwise.⁶³¹ Speaking for GM, George Morris, a vice president in charge of industrial relations, declined to negotiate about discrimination and said the company preferred to wait for court and EEOC decisions expected soon since GM believed that their insurance provisions did not violate the Civil Rights Act.⁶³²

The Communications Workers of America brought suits against AT&T and New York Telephone Company over denial of disability benefits for pregnancy in 1973 and 1974. In 1973, United Rubberworkers used the courts and an arbitrator to force Goodyear to remove a six-week limit on disability in cases of pregnancy.⁶³³ Flight attendant unions filed several suits against airlines for their harsh policies towards pregnant stewardesses, policies clearly aimed at controlling the bodies and sexuality of the female labor force. Challenging pregnancy discrimination, weight standards, marriage bans, age limits and grooming inspections came to be a central part of an emerging feminist labor union identity as well as a way to improve job conditions. By 1974, the Association of Flight Attendants had filed EEOC complaints “against no fewer than twenty airlines” for maternity and weight policies alone.⁶³⁴

Both the National Education Association (NEA) and the American Federation of Teachers (AFT) were involved in many cases where teachers challenged mandatory maternity leave, or the denial of sick leave, or the dismissal of untenured teachers. The NEA’s DuShane Emergency Fund contributed to the *Lafleur* case, another prominent teacher case, *Green v.*

⁶³¹ Irving Bluestone to George B. Morris, November 12, 1973, folder 13, box 21, Dorothy Haener Collection, Reuther.

⁶³² George B. Morris, Jr. to Irving Bluestone, November 15, 1973, folder 13, box 21, Dorothy Haener Collection, Reuther.

⁶³³ National Employment Law Project, “Legal Developments in Sex Discrimination Concerning Pregnancy and Employment,” August 1974, 15-16, file “Women Working Women” vertical File, American College of Obstetricians and Gynecologists, Washington, DC.

⁶³⁴ Kathleen M. Barry, *Femininity in Flight: A History of Flight Attendants* (Durham: Duke University Press, 2007), 205-207.

Waterford Board of Education, in Connecticut and several other challenges to mandatory maternity leave policies. Deborah Dinner explains that under the leadership of Marjorie Stern, chair of the Women's Rights Committee, the AFT began a comprehensive campaign to change school board maternity policies beginning in 1970 with a resolution demanding the retention of job rights and the elimination of mandatory, arbitrary and lengthy leaves. Stern also advised locals to bargain for the use of sick leave, for more complete health care coverage and for the extension of protections to unmarried teachers. While her efforts through the national AFT came to an end in 1974 with a change in union leadership, Dinner thinks Stern planted a lot of "seeds of change" that would blossom in the nation's schoolhouses and courtrooms.⁶³⁵

In confronting pregnancy discrimination, union women were parallel to or even ahead of middle class feminists in the 1970s women's movement. Susan Hartmann offers a thoughtful consideration of union embrace of the pregnancy discrimination issue. Linked to efforts to broaden women's occupational opportunities, secure seniority and obtain comparable pay, ending pregnancy discrimination resonated with women members. Male leaders at the local and national level championed the cause. Hartmann writes that "elimination of pregnancy discrimination did not threaten male privilege, and the gains won by women were compatible with popular perceptions of their appropriate roles."⁶³⁶ Ending pregnancy discrimination did not put women into "male" jobs or unsex them. Instead, it celebrated and elevated motherhood along with expanding women's economic opportunities.

⁶³⁵ Dinner, "Pregnancy at Work," 169-184.

⁶³⁶ Hartmann, *The Other Feminists*, 45.

Pregnant Soldiers and Sailors

The WWII experiment with women in the armed services relied on discharge of pregnant servicewomen. While some sought help in their new circumstances, few challenged the premise of the discharges. On the heels of the sexual revolution, and in the midst of the Vietnam War, the pregnant soldiers and sailors in the 1970s resisted discharge. In the early 1970s, a few women service members sued to keep their positions. Their cases raised a range of issues for the military and the public including the fitness of a pregnant women in the workplace, the compatibility of motherhood with military service and, perhaps most clearly, the sexual double standard.

In 1970 seaman Anna Flores, single and pregnant, wanted to remain in the Navy but even after she miscarried, her superiors insisted on her discharge. The navy refused to condone a dilution of the “standard of morality” for women in the Navy.⁶³⁷ The Navy’s deputy chief of personnel, Rear Admiral Douglas C. Pate, firmly believed that it was permissible for the Navy to have different sexual standards for women than for men. When the ACLU supported her case and it went to trial, the Navy changed its mind about Flores and gave her a waiver, allowing her to remain in the service and even be promoted.

The Air Force tried to enforce the sexual double standard against an unmarried pregnant nurse, Captain Susan Struck, who wanted to stay in the service but did not even consider an abortion because of her Catholic faith. Not wanting to raise a child as a single parent, she planned to give her baby up for adoption and recover from childbirth within her accumulated sick leave. The Air Force, however, proposed an honorable discharge. In 1970, Struck fought the discharge. Considering the courts’ “historic deference to the military,” it was an uphill battle.⁶³⁸

⁶³⁷Judith Stiehm, *Arms and the Enlisted Woman* (Philadelphia: Temple University Press, 1989), 116; Judith Hicks Stiehm, “The Generations of US Enlisted Women,” *Signs* 11, no. 1 (Autumn 1984): 167.

⁶³⁸ Kloppenberg, *Playing it Safe*, 207.

Struck was represented by legal counsel from the ACLU Women's Rights Project, including Ruth Bader Ginsburg. Struck's lawyers argued that the presumptive discharge was a violation of Struck's right to due process. They also argued that the Air Force had violated Struck's right to equal protection under the law. Pregnancy, alone among all possible temporary disabilities, was cause for mandatory discharge. Other service members disabled by broken legs or illness were allowed to recover and resume their duties without a career interruption. Because a court ordered a stay in her discharge, Struck remained on duty and, in fact, had an excellent work record. Furthermore, her lawyers pointed out that women who secured abortions could also stay in the service. Her case raised issues of religious freedom; since Struck's Catholicism meant she could not morally obtain an abortion, she was going to lose her job while someone else, of a different faith, might be able to keep hers.

The Achilles heel for the Air Force was that they treated women differently than men. The Air Force, in fact, made accommodations for fathers, but not mothers.⁶³⁹ When possible, it was Air Force policy that an officer should not be posted away from home for six weeks prior to a wife's delivery date or six weeks after.⁶⁴⁰ Military readiness allowed an expectant father twelve weeks of an assurance that he could probably remain near home and be there for the early period of his child's life. Meanwhile, they discharged women like Struck because new mothers would present scheduling difficulties.

⁶³⁹ Carla A. Monroe-Posey, "TRICARE and its Impact on Military Social Work Practice," in *Social Work Practice in the Military*, ed. by James G. Daley (Binghamton, NY: Haworth, 1999), 68; Jay Stanley, "Societal Influences and the Ethics of Military Health Care," in *Military Medical Ethics*, eds. Thomas E. Beam and Linette R. Sparacino (Washington DC: Office of the Surgeon General, TMM Publications, 2003), 730.

⁶⁴⁰ Kloppenberg, *Playing it Safe*, 207.

The district court and the ninth circuit court upheld the Air Force policy.⁶⁴¹ But the dissenting judge asked how it could be true that an officer with a broken leg could stay in the service without compromising military readiness while a woman in early pregnancy had to be discharged. “Why? If this be rational, nothing is irrational!”⁶⁴² After the Supreme Court agreed to hear the case, the Air Force offered Struck a waiver to its policy and allowed her to follow her plans. She had her baby, surrendered her infant for adoption, recovered from delivery using her sick leave, and returned to duty as an Air Force nurse.

The resolution to Struck’s case skirted central issues within the military and within the judiciary. When the Air Force offered Struck a waiver, the Supreme Court decided that the case was moot and did not hear arguments. Ginsburg had thought that the Struck case raised important questions about sex equality, which could underscore how pregnancy discrimination violated the equal protection clause of the Fourteenth Amendment. Donna Matthews and Lisa Kloppenberg suggest that the court decision to regard the case as moot, and not hear arguments, reflects a larger pattern on the court of trying to decide sex discrimination cases in a narrow manner so as to offer little in the way of precedent. A moot case absolved the court of not only hard work, but even having to listen to the arguments.⁶⁴³

As the Vietnam War and the armed services that fought it became increasingly unpopular, it seemed ever more plausible to take the Army, or the Navy, Air Force or Marines, to court. While the draft provided a renewable supply of fresh male soldiers, the role of women in

⁶⁴¹ In a slightly later case, *Robinson v. Rand*, the U.S. District Court for the District of Colorado sided with the plaintiff, who wanted to stay in the Air Force and pursue the promotions she was due after having given birth. The court found the Air Force’s arguments weak and believed that their concerns could be met by requiring pregnant servicewomen to report their pregnancies immediately so they could be re-assigned out of sensitive positions. *Robinson v. Rand* 340 F. Supp. 37 (1972).

⁶⁴² Kloppenberg, *Playing it Safe*, 208.

⁶⁴³ Kloppenberg, *Playing it Safe*, 209.

American fighting forces had been well enough established that the armed forces had to consider the effects on morale and staffing that inflexible pregnancy policies posed. Feminists demanded equal occupational opportunity for women in the service and also sought to dispel the sexual double standard that assumed male sexual freedom while penalizing the sexual behavior of women, especially if they were single.

Ultimately Seaman Flores and Captain Struck did not signal a wholehearted transformation of American maternity policies. For years, the military sidestepped the issue by granting waivers for women who challenged the discharges. This diffused the impact of the high profile Struck case.⁶⁴⁴ Struck and Flores were also unusual. Most pregnancies don't end in miscarriage like Flores and most women who have babies do not give them up for adoption like Struck. By the time Struck had her baby, even many single white women were deciding to keep and raise their children rather than give babies up to adoption. Finally, though, most working women did not pursue non-traditional careers like the military. The extremes involved in these military cases made them less applicable to the majority of working women. It would take workers in one of the most heavily female-dominated occupations—education—to mount a challenge that fundamentally re-wrote assumptions about pregnancy in the workplace.

The Teacher who Swallowed a Watermelon

Some school districts were already eliminating long unpaid mandatory maternity leaves before a volcano of lawsuits erupted in the 1970s.⁶⁴⁵ The number of cases that went to court, and

⁶⁴⁴ The Department of Defense ended the military practice of immediate dismissal for pregnancy in 1977. Dinner, "Pregnancy at Work," 219.

⁶⁴⁵ Patricia Carter writes about teachers in New York waging various struggles to keep their jobs while becoming mothers starting in 1914. Schoolboards became much more accommodating to pregnant teachers and teachers with children during the Baby Boom and teacher shortage of the 1950s. Alice Leopold, Director of the US Women's Bureau, encouraged school to hire married women with their own children. While many schools still tried to retain

the media coverage they generated, certainly hastened the demise of long mandatory leaves. Discrimination against pregnant teachers involved mandatory leave that could easily extend over a year and that seemed to have little to do with either medical standards of care or the protection of the public. Teachers who did not yet have tenure might be terminated instead of given a leave. Unmarried teachers often lost their jobs if they got pregnant. School districts usually refused to allow teachers to use sick leave for a maternity leave. Teaching was a clean job, not regarded as physically strenuous and, although a couple of school boards tried to argue that pregnant teachers could not adequately serve the needs of their students, they did not have the success that airlines did in suggesting that pregnant flight attendants were a danger to the flying public. Long leaves from teaching could have a significant impact on long-term career prospects, especially in acquisition of tenure but also where the break in service affected wage computations or length of service towards retirement. It seemed ironic that those charged with the stewardship of the nation's tender youth should be penalized for having their own young. In this way, the cases of pregnant teachers fell on the extreme end of discrimination.⁶⁴⁶

Susan Cohen, a New York City transplant and graduate of Columbia Teachers College, had been teaching in Chesterfield County, Virginia for two years when she got pregnant. On November 2, 1970, she notified the school board of her pregnancy and asked for a leave beginning the first of April, about a month before her estimated due date. Her doctor concurred with her that she could continue working. The school board disagreed and, citing their maternity

control over their teachers lives off the job, schools were adapting and many had begun to lift mandatory maternity leaves or shorten them or provide some flexibility even before the explosion of lawsuits in the 1970s. Patricia A. Carter, *Everybody's Paid but the Teacher;* *The Teaching Profession and the Women's Movement* (New York: Teachers' College Press, 2002), 122-131.

⁶⁴⁶ Ruth Fairbanks, "The Teacher who Swallowed a Watermelon: Pregnant Teachers, School Boards and the Courts, 1964-1985," North American Labor History Conference, Detroit, MI, Oct. 19, 2007, unpublished paper in author's possession; See also Dinner, "Pregnancy at Work," chapter three.

leave regulations, almost immediately informed her that her leave would begin on the 18th of December. At the end of November, Cohen went to a school board meeting to ask that her leave be postponed to the first of April. When they once more said no, she asked if she could teach at least to the end of the semester, January 21st. Her principal supported her, but the school board demurred. Her leave would begin December 18th. Because she would not finish the semester, she would lose seniority credit for the nearly half a year she had taught. The school board's ruling would have lasting effects on her salary and the issue was especially crucial to Cohen because she did not yet have tenure in the system.

Although the Chesterfield County School Board had recently denied two other teachers their requests to postpone their maternity leaves, Cohen, a high school Government teacher, believed that her rights had been violated, and she sued.⁶⁴⁷ At the first trial, Cohen was just days away from her delivery date. Lawyers for the school board maintained that she knew about the maternity policy when she was hired and agreed to abide by it when she signed her employment contract. The trial judge frowned upon the suggestion that a teacher could waive her constitutional rights by signing an employment contract. He twice rejected the board's argument that the case should be dismissed on this ground.⁶⁴⁸

When Susan Cohen first took her case to court in 1971, her lawyers asked the school board members why they believed teachers should take a leave so early in their pregnancies. Three members said they were concerned about teacher absenteeism in the later part of pregnancy. Another three and the superintendent worried that a pregnant teacher would have

⁶⁴⁷ Robert R. Merhige, Jr., "Order" In the United States District Court for the Eastern District of Virginia, Richmond Division, Mrs. Susan Cohen v. Chesterfield County School Board and Robert F. Kelly, in Catherine East papers, Box 9, Folder 43.

⁶⁴⁸ "Robert R. Merhige, Jr., "Memorandum" In the United States District Court for the Eastern District of Virginia, Richmond Division, Mrs. Susan Cohen v. Chesterfield County School Board and Robert F. Kelly, 4 in Catherine East papers, Box 9, Folder 43.

trouble navigating halls and stairs safely. In a deposition, one board member, Wells, said “because some of the kids say, my teacher swallowed a watermelon, things like that. That is not good for the school system.”⁶⁴⁹ Two other board members concurred that timing the leaves before a teacher started to “show” was important for classroom discipline. At a preliminary hearing, the superintendent argued that pregnant teachers missed too many school days.⁶⁵⁰ At trial, the school board claimed to be worried that a teacher’s baby could be injured in utero because of pushing in school hallways, or that a pregnant teacher would be a liability in fire drills and a danger to her students during an emergency evacuation.⁶⁵¹

The school superintendent, Robert F. Kelly, came up with a different rationale for the maternity policy. Students suffered, he said, when there was a change in teachers. The school board’s maternity policy operated to maintain a “continuity of education” that was a legitimate concern.⁶⁵² Of course, there would have been more continuity had Cohen been allowed to finish out the semester as she wished. The district court judge, Robert R. Merhige, found for Cohen, awarding her full salary and seniority credit for the three months she was on forced leave.⁶⁵³ The Chesterfield County School Board appealed to the Fourth Circuit, where a partial panel upheld

⁶⁴⁹ School board member Wells, A.54 quoted in “Brief for the Appellee,” United States Court of Appeals for the Fourth Circuit No, 71-1707, Susan Cohen, Appellee V. Chesterfield County School Board, et, al., Appellants, on appeal From the United States District Court for the Eastern District of Virginia, Richmond Division, 3, 26, Catherine East Papers, Box 9, Folder 43.

⁶⁵⁰ Stewart Jones “Teacher’s Plea in Sex Bias Suit Denied,” *Richmond News Leader*, January 12, 1971 in Catherine East Papers, Box 9, folder 43 Schlesinger.

⁶⁵¹ Robert R. Merhige, Jr., “Memorandum” In the United States District Court for the Eastern District of Virginia, Richmond Division, Mrs. Susan Cohen v. Chesterfield County School Board and Robert F. Kelly, in Catherine East papers, Box 9, Folder 43.

⁶⁵² “Brief for the Appellee,” United States Court of Appeals for the Fourth Circuit No, 71-1707, Susan Cohen, Appellee V. Chesterfield County School Board, et, al., Appellants, on appeal From the United States District Court for the Eastern District of Virginia, Richmond Division, 4-5, Catherine East Papers, Box 9, Folder 43

⁶⁵³ Judge Merhige is perhaps best known for his decisions regarding desegregating Virginia schools, Kepone pollution of the Chesapeake Bay and the Dalkon Shield.

Merhige's decision. A full court, however, reversed, leaving Cohen to take her case to the US Supreme Court, where Cohen's suit was joined with a similar case from Cleveland, that of Jo Carol LaFleur and Ann Elizabeth Nelson.⁶⁵⁴

In the 1960s and 1970s, as school districts integrated, black teachers as well as black students shared classrooms and schools with white teachers and students. At times, pregnancy discrimination was a cover for racial discrimination.⁶⁵⁵ Black women, who had high labor force participation rates even after marriage and childbearing, brought a number of lawsuits against school districts that had forced them out of teaching jobs during their pregnancies. Many of them had lawyers from the NAACP and their cases were often supported by the NEA.⁶⁵⁶ Since the highest profile teacher case involved a white women, Jo Carol LaFleur, the racial subtext that animated pregnancy discrimination, and the connection between the civil rights movement and the earliest challenges to pregnancy discrimination are harder to see. Nonetheless, American race relations shaped American maternity policy in multiple ways, including a racialized construction of LaFleur's school as a potentially dangerous place for a white woman in a delicate condition.

Jo Carol LaFleur had a very strong personal commitment to teaching in a disadvantaged educational environment. LaFleur grew up in segregated Richmond in the 1950s but she had

⁶⁵⁴ Cohen and LaFleur each had an affinity for the law and politics. Cohen was a government teacher. After her case, LaFleur later went back to school herself, earned a law degree and became a public defender. Peter Irons, *The Courage of their Convictions: Sixteen Americans who Fought their Way to the Supreme Court* (New York: The Free Press, 1988), 326-327. Ann Elizabeth Nelson wasn't put on maternity leave; she was actually fired, because she had not taught a full year yet. See Dinner, "Pregnancy at Work," 187.

⁶⁵⁵ [William Edward] Doyle, Circuit Judge, *Buckley v. Coyle Public School System*, United States Court of Appeals, Tenth Circuit, January Term, 1973, decision, p. 11, in Catherine East Papers, Box 13, file 13, Schlesinger; see also Dinner, "Pregnancy at Work," 196, 220; *Buckley v. Coyle Public School System* 476 F.2d 92 (1973).

⁶⁵⁶ [William Edward] Doyle, Circuit Judge, *Buckley v. Coyle Public School System*, United States Court of Appeals, Tenth Circuit, January Term, 1973, decision, in Catherine East Papers, Box 13, file 13, Schlesinger; "Maternity Bias' 5 Alabama teachers file Suit," *Chicago Daily Defender*, Sept 29, 1971, 25; "Maternity Suit Stirs a System," *Chicago Daily Defender*, Dec 16, 1972, 15; Peter Lipowicz, "Cohen v. Chesterfield County," *The Messenger*, no. 104 (January, 2013), 4.

sought a teaching degree in a special program that trained teachers to work in inner-city schools like Patrick Henry Junior High School in Cleveland. In 1970, students at Patrick Henry were from poor, mostly single parent, mainly black households. The school was extremely crowded. In this less than ideal teaching environment, there was a special class for seventh-grade girls who were even more marginal students than most of their schoolmates. The girls had multiple educational and behavioral problems; several of them were pregnant or already mothers. The “transition” class was supposed to give them special continuity and support in junior high. One teacher taught them for most of their subjects. The girls faced another problem in the middle of their school year when the teacher they had come to know and rely upon had to take a mandatory maternity leave in December. Jo Carol LaFleur was the perfect replacement.

However, within a month she discovered that like her predecessor and several of her students, she too was pregnant. LaFleur did not consider this to be a problem; she embraced it as an opportunity. She wanted to be role model to her students, to talk with them about prenatal care and parenthood. LaFleur had no complications and was untroubled with many of the common pregnancy-related complaints the school board offered as reasons pregnant teachers were not competent to teach.⁶⁵⁷

The retired superintendent who had helped draft the Cleveland Public Schools maternity policy in 1952 testified in court that the rule was in part to protect pregnant teachers from student teasing and general disrespect.⁶⁵⁸ The Cleveland school board argued that continuity of education

⁶⁵⁷After being forced out of teaching at Patrick Henry, she was still invited to the summer staff picnic, where, much to the principal’s surprise, she joined a volleyball game. She was still playing golf and tennis the week before her son was born, though she refrained from jumping the net. Peter Irons, *The Courage of their Convictions*, 317-326.

⁶⁵⁸ *La Fleur v. Cleveland Board of Education* 326 F. Supp. 1208; 1971 U.S. Dist. LEXIS 13341; 3 Fair Empl. Prac. Cas. (BNA) 503; 3 Empl. Prac. Dec. (CCH) P8228; 32 Ohio Misc. 193; 59 Ohio Op. 2d 90. For more on the LaFleur case, see Tracy A. Thomas, “The Struggle for Gender Equality in the Northern District of Ohio,” in Robert Alexander and Paul Finkelman, eds. *Justice on the Shores of Lake Erie: A History of the Northern District of Ohio* (Columbus, OH: University Press, 2012), 165-187.

necessitated lengthy mandatory maternity leaves. They also claimed to be concerned for the safety of the teacher and the fetus. At the trial, Cleveland public schools were portrayed as blackboard jungles and educational battlefields. A public school official testified to “256 assaults upon teachers” in the 1969-1970 school year. Teachers confiscated forty-six guns and eighteen knives from students. Cleveland public schools employed 132 security guards. School violence had ratcheted up in the turbulent sixties. The trial judge, impressed with these statistics, reproduced them in his decision, including “that there were 136 teachers accidentally injured as the result of falls in corridors and hallways.”⁶⁵⁹ The judge also worried that pregnant women faced imminent danger of medical complications almost too numerous to list, though he tried. He found in favor of the school board. His decision, however, offered little in the nature of precedent for most of the country’s schools outside those in poverty-stricken inner cities.⁶⁶⁰

While the complete Fourth Circuit reversed Merhige’s decision, Cohen’s lawyer offered an equal protection argument to the Supreme Court. LaFleur, on the other hand, had lost with this argument in the first court, but on appeal, the Sixth Circuit agreed that the school’s maternity leave had violated her equal protection rights. It would be up to the Supreme Court to resolve the differences in appellate court decisions. The day the court heard oral arguments, the room was packed with young women.⁶⁶¹

⁶⁵⁹ *La Fleur v. Cleveland Board of Education* 326 F. Supp. 1208; 1971 U.S. Dist. LEXIS 13341; 3 Fair Empl. Prac. Cas. (BNA) 503; 3 Empl. Prac. Dec. (CCH) P8228; 32 Ohio Misc. 193; 59 Ohio Op. 2d 90. See also Peter Irons, *The Courage of their Convictions*, 310.

⁶⁶⁰ Just after the initial decision in the LaFleur case, an arbitrator rejected a school board’s claim that the decision in favor of the Cleveland Board of Education’s maternity leave policy should help the arbitrator decide their case. The arbitrator distinguished the case of Estella Chiolino from that of LaFleur primarily because there was no “reason to compare the LaFleur situation with circumstances likely to be faced by grievant continuing as a first grade teacher in the Southgate Community School District.” Southgate Education Association and Board of Education of the Southgate Community School District, Southgate, Michigan. Grievance: Estella Chiolino. Case Number 5439 0323 71, David G. Heilbrun, Arbitrator, American Arbitration Association, in Catherine East Papers, Box 10, file 17, Schlesinger.

⁶⁶¹ Dinner, “Pregnancy at Work,” 230.

Many cases before the Burger court in the 1970s were Fourteenth Amendment cases. In fact, Susan Cohen's lawyer, Philip Hirschkop, was one of the lawyers for Richard and Mildred Loving, who successfully fought for the elimination of anti-miscegenation laws in 1967. Lawyers for both LaFleur and Cohen filed cases alleging violation of the Fourteenth Amendment rights, especially "equal protection of the laws." Many teacher cases claimed infringement of Fourteenth Amendment rights and most of them focused on equal protection. In equal protection thinking, pregnancy was a temporary disability, as evident, for example, in Judge Mehrige's ruling in *Cohen v. Chesterfield Country*.⁶⁶² He wrote:

The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment.⁶⁶³

Before the US Supreme Court, school board lawyers pared down their argument to two points. They said they were concerned primarily with instructional continuity and secondarily with the health and well-being of the pregnant teachers and their babies. Summer babies like Jo Carol LaFleur's and Ann Elizabeth Nelson's highlighted the insincerity of the educational continuity defense. Michael LaFleur was born towards the end of July 1971 and Nelson's baby was born the following month. Supreme Court Justice Lewis Powell, who concurred with the majority result, found no merit in the claims of the school boards. "For no apparent reason," he puzzled, "they remove teachers from their students and require the use of substitutes."⁶⁶⁴ LeFleur

⁶⁶² Serena Mayeri, *Reasoning from Race*, 64.

⁶⁶³ *Cohen v. Chesterfield County School Board* 326 F. Supp. 1159; 1971 U.S. Dist. LEXIS 13279; 3 Fair Empl. Prac. Cas. (BNA) 526; 3 Empl. Prac. Dec. (CCH) P8231.

⁶⁶⁴ *LaFleur v. Cleveland Board of Education* 414 U.S. 632; 94 S. Ct. 791; 39 L. Ed. 2d 52; 1974 U.S. LEXIS 44; 6 Fair Empl. Prac. Cas. (BNA) 1253; 7 Empl. Prac. Dec. (CCH) P9072; 67 Ohio Op. 2d 126.

was an especially good example of this particular irony since after her principal removed her, she took a job substitute teaching in a neighboring district that did not have that policy on maternity leaves and finished the year in the classroom.⁶⁶⁵ As a whole, the court acknowledged that school boards should be concerned with continuity of education. However, such a concern had to be balanced against the right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁶⁶⁶

The court held that concern for the health of the mother and her fetus did not necessitate mandatory maternity leave. Medical testimony convinced the justices that there was no health-related reason for a blanket rule mandating leave at four or five months of pregnancy. Standard maternity leave policies, by failing to recognize the different capabilities and situations of individual pregnant teachers, violated the due process clause and infringed on a fundamental right.

The 7-2 Supreme Court decision in *Cleveland Board of Education v. LaFleur* masked some serious disagreement among the justices. Justice William Rehnquist, writing for himself and for Chief Justice Warren Burger, wrote a scathing dissent lambasting the decision on the basis of due process. Rehnquist believed that school boards had the power to decide on employment rules and that all impositions of workplace rules were somewhat arbitrary.⁶⁶⁷ The majority was divided. Justice Powell concurred in the result, but not the reasoning. He agreed

⁶⁶⁵ Peter Irons, *The Courage of their Convictions: Sixteen Americans who Fought their Way to the Supreme Court* (New York: The Free Press, 1988), 323.

⁶⁶⁶ *Eisenstadt v. Baird* 405 U.S. 438, 453 also cited in *LaFleur v. Cleveland Board of Education* 414 U.S. 632; 94 S. Ct. 791; 39 L. Ed. 2d 52; 1974 U.S. LEXIS 44; 6 Fair Empl. Prac. Cas. (BNA) 1253; 7 Empl. Prac. Dec. (CCH) P9072; 67 Ohio Op. 2d 126.

⁶⁶⁷ *LaFleur v. Cleveland Board of Education*.

with Judge Merhige that the “equal protection analysis is the appropriate frame of reference.”⁶⁶⁸ Because the court failed to get a decision based on equal protection, the reach and applicability of *LaFleur* as precedent was limited.

Once *LaFleur* had invalidated lengthy mandatory leaves, other teachers disputed provisions that denied the benefit of leave (mostly the right of return) to teachers without tenure. Others challenged restrictions on the use of sick leave during absences due to childbirth. Finally, some clashed with school boards over the rights of unmarried pregnant teachers to keep their jobs and enjoy maternity benefits on the same basis as married women teachers. Lengthy unpaid leaves determined by school boards were a problem for many teachers. Still, many appreciated school board policies that allowed extended leaves while still protecting seniority and the right of return to their jobs. They were able to care for their young children without entirely sacrificing their career investments. The New York City School Board allowed up to four years of unpaid, seniority protected leave, but only to mothers. When he became a father in 1970, junior high school social studies teacher Gary Ackerman wanted to take an unpaid paternity leave to care for the baby on the same terms. Denied permission for leave, he took one anyway and complained to the EEOC, which decided his case in 1973. As a result, the New York City School Board was forced to change the policy.⁶⁶⁹ The same year, the Seattle School Board allowed an unpaid paternity leave for music teacher Vernon Olson.⁶⁷⁰ Repeatedly, teachers led the class in expanding the rights of pregnant employees and new parents.

⁶⁶⁸ Ibid.

⁶⁶⁹ *Ackerman v. Board of Education City of New York* 387 F. Supp. 76 (1974); Maurice Carroll, “Child-Care Leave for Men Backed,” *New York Times*, January 6, 1973, 66.

⁶⁷⁰ Shawn G. Kennedy, “Paternity Leave for Teaching Fathers: An Idea that has not Caught Fire,” *New York Times*, July 9, 1975, 63; Dinner, “Pregnancy at Work,” 178.

In 1975, the Supreme Court used *LaFleur* as precedent summarily reversing the decision of the Utah Supreme Court in a pregnant worker's charge of discrimination involving unemployment compensation. Mary Ann Turner was pregnant when she was laid off from her job. Her joblessness had nothing to do with her pregnancy. She began to collect unemployment, but her benefits ended twelve weeks before her due date and only resumed six weeks after she had her baby. Appeals boards and the Utah Supreme Court held that the law establishing unemployment insurance in Utah specifically excluded pregnant women near term and new mothers from receiving benefits. One justice pointed out that unemployment compensation was established to provide for workers who were both unemployed through no fault of their own and also ready and available for employment and that while Turner clearly met the first requirement, she failed the second one; her pregnancy made her unemployable.⁶⁷¹ The justice who wrote the decision, Justice Ellet, invoked not only religious beliefs, but also beliefs about the body and women's real labor in his decision. He wrote:

Should a man be unable to work because he was pregnant, the statute would apply to him equally as it does to her. What she should do is to work for the repeal of the biological law of nature. She should get it amended so that men shared equally with women in bearing children. If she could prevail upon the Great Creator to so order things, she would be guilty of violating the equal protection of the law unless she saw to it that man could also share in the thrill and glory of Motherhood.⁶⁷²

The US Supreme Court, in the wake of *LaFleur*, disagreed with the Utah decision that "the course of nature with respect to pregnancy is so well known as to require no expatiation." Rather, the U.S. Supreme Court held that the Utah law violated the principle of due process, because many pregnant women would be able to work through their last trimester of pregnancy

⁶⁷¹*Turner v. Department of Employment Security of Utah* 531 P.2d 870; 1975 Utah LEXIS 828; 10 Fair Empl. Prac. Cas. (BNA) 422; 10 Empl. Prac. Dec. (CCH) P10,486

⁶⁷² *Ibid.*

and/or return to work earlier than six weeks. Therefore, these women should be able to collect unemployment for the time that they were able and willing to work and unemployed through no fault of their own.⁶⁷³

In New York, the New York State Division of Human Rights had already interpreted the State Human Rights Law to prohibit pregnancy discrimination against unemployed workers and had ordered Westinghouse to keep pregnant women on their inactive seniority lists if they were laid off while pregnant.⁶⁷⁴ In July 1974, Federal Judge Charles Joiner agreed with the UAW and decided that the Michigan Employment Security Commission should award unemployment benefits to women workers who were placed on mandatory maternity leaves.⁶⁷⁵ *LaFleur* and *Turner* established that the Fourteenth Amendment did protect some rights of pregnant workers.

In a larger sense, though, these cases had very limited effects on U.S. maternity policy. Lengthy mandatory maternity leaves were already on the decline for most women workers, with the exception of flight attendants. Prohibiting this grossest violation of pregnant workers' rights was little threat to most businesses. As public employees, teachers were able to invoke the Fourteenth Amendment, a legal path many other workers could not follow. Furthermore, as Lisa Kloppenberg and Donna Meredith Matthews point out, deciding *LaFleur* on the basis of due process, rather than equal protection, let the Supreme Court virtually ignore the connection between pregnancy and gender discrimination.⁶⁷⁶ Due process meant that women were compared

⁶⁷³ *Turner v. Department of Employment Security of Utah*, 423 U.S. 44; 96 S. Ct. 249; 46 L. Ed. 2d 181; 1975 U.S. LEXIS 94; 11 Fair Empl. Prac. Cas. (BNA) 721; 10 Empl. Prac. Dec. (CCH) P10,487

⁶⁷⁴ "State Backs Ruling on Working Mothers," *New York Times*, March 30, 1969; Bureau of National Affairs, *Labor Relations Yearbook* (1970).

⁶⁷⁵ "Courts rule on pay for maternity leave," *Industry Week* 182, no. 6 (August 5, 1974): 13.

⁶⁷⁶ Kloppenberg, *Playing it Safe*, 212 and Donna Meredith Matthews, "Avoiding Gender Equality," *Women's Rights Law Reporter* 19 (Winter 1998): 140-141.

to each other; once a range was acknowledged, each woman had her own rights that could not be circumscribed because of the condition of another pregnant woman worker. Thus, the narrow due process decision, which affirmed the right of pregnant teachers to stay in their classrooms, was not contrary to the decision the court reached soon after in *Geduldig*, which excluded pregnant workers from California's state disability plan. Rather, these two decisions are of a piece because they both refused to extend the equal protection clause of the Fourteenth Amendment to pregnant workers.

Exclusion from Temporary Disability

The Supreme Court decided *Geduldig v. Aiello* a mere five months after handing down the decision in *LeFleur*. While *LeFleur* emboldened the women's movement claims for equality and guaranteed women their rights as workers, the court's decision in *Geduldig* slammed shut the door *LaFleur* had nudged open. Having established the right of pregnant workers to their jobs, this next stage of the feminist legal approach to civil rights was to establish the place of pregnancy benefits within the American welfare state.

After 1975, pregnant women could claim jobless benefits in the US if their unemployment was because of lack of work, but American unemployment insurance did not cover temporarily disabled workers.⁶⁷⁷ As already noted, five states and Puerto Rico did have plans for wage replacement for disabled workers.⁶⁷⁸ Rhode Island's plan had always covered disability due to childbirth, albeit, for a shorter period than for other disabilities. In the wake of

⁶⁷⁷ In 1971, reforms extended Canadian unemployment insurance benefits "to those unemployed owing to sickness, disability or pregnancy." James Struthers, *No Fault of their Own: Unemployment and the Canadian Welfare State, 1914-1941* (Toronto: University of Toronto Press, 1983), 213, 257 note 10.

⁶⁷⁸ Rhode Island, New Jersey, New York, California and Hawaii.

the 1972 EEOC guidelines that stated that pregnancy should be treated the same as other conditions equally disabling, Hawaii amended its disability plan. The three other states with disability insurance, California, New York and New Jersey, all restricted women's ability to make claims because of pregnancy and childbirth. In *Geduldig v. Aiello*, the plaintiffs charged that the California state disability plan violated the equal protection clause of the Fourteenth Amendment because it discriminated against pregnancy. In attempting to follow the path forged by teachers, the plaintiffs, Carolyn Aiello, Augustina Armendariz, Elizabeth Johnson and Jacqueline Jaramillo reached a dead-end. The court did not regard denial of pregnancy benefits as an infringement of equal rights. But, very shortly afterwards, another group of women workers who were denied benefits for pregnancy that were awarded for other disabling conditions tried a different legal approach.

California's state disability insurance system was completely funded by workers' contributions. It provided some wage replacement for workers temporarily unable to work due to illness or accident not covered by workers' compensation. Aiello and Johnson lost work time, and hence wages, due to ectopic pregnancies. Armendariz, missed work when she had a miscarriage and Jaramillo missed work at the end of a normal pregnancy and while recovering from childbirth. All four women had paid into the state disability plan and insisted they should be covered by the plan for the time they were disabled. Pregnancy exclusions, they claimed, violated their rights to equal protection under the Fourteenth Amendment. A lower court found in their favor, but the California Department of Human Resources and Development, with Dwight Geduldig as director, appealed the case to the Supreme Court.⁶⁷⁹ In the meantime, another case, *Rentzer v. California Unemployment Appeals Board*, extended disability benefits to

⁶⁷⁹ Ashlyn K. Kuersten, *Women and the Law: Leaders, Cases, and Documents* (Santa Barbara, CA: ABC-CLIO, Inc., 2003), 44.

women who suffered pregnancy complications. Therefore, the case that reached the Supreme Court involved only benefits for normal pregnancy and birth.

The Court rejected the arguments of the California women workers. The majority found that pregnancy exclusions of California's disability plan did not violate the Equal Protection Clause of the Fourteenth Amendment. Writing for the majority, Justice Stewart divided the population of California workers into two groups—pregnant people and non-pregnant people. The first group was entirely women, and the second group contained both sexes. To Stewart a policy that disadvantaged only pregnant people was not necessarily sex discrimination because it did not discriminate against all women—only those who were pregnant. Furthermore, the majority found that the interest of the state in trying to prevent bankruptcy of the plan were compelling.

Even as *Geduldig* was working its way up to the Supreme Court, another important case was underway in the Federal District Court in Richmond, Virginia, where Robert Merhige, the judge who had decided in favor of Susan Cohen, the pregnant high school civics teacher, heard arguments in *Gilbert v. GE*. In this case, the International Union of Electrical Workers (IUE) sued on behalf of female employees at GE's Salem, Virginia plant. Women there had been denied disability benefits when they were disabled by pregnancy and childbirth. GE had temporary disability benefits that provided some wage replacement for employees unable to work due to illness or disability. On the surface, this seemed very much like the California case of *Geduldig v. Aiello*. There were three differences. First, *Gilbert* was about company disability plans, which were common, not a state temporary disability plan, which were rare.⁶⁸⁰ This challenge to pregnancy exclusions in company fringe benefits struck at the heart of the American

⁶⁸⁰ Rhode Island, 1942, California 1946, New Jersey 1948, New York 1949, Puerto Rico 1968, Hawaii 1969. <http://www.ssa.gov/policy/docs/progdsc/sspus/tempdib.pdf> , 44-45 (April 8, 2011)

welfare system and its cradle of masculine presumptions. Second, the case challenged pregnancy exclusions on the basis of the 1964 Civil Rights Act, newer statutory law, instead of the Fourteenth Amendment. Third, *Gilbert* was carefully orchestrated by a strong labor union.

GE's Salem plant was organized by the IUE, a union with a long history of challenging gender discrimination and positive responses to demands of women members. In the wake of the Civil Rights Act, the IUE embarked on a multi-pronged and consistent program of confronting discrimination within the union, at the bargaining table and in union workplaces. They filed amicus briefs in several sex discrimination lawsuits, including *LaFleur*, while orchestrating a broad challenge to pregnancy discrimination at GE.⁶⁸¹ Other unions followed the *Gilbert v. GE* case very closely for the lessons it might offer them in representing their own women members in similar suits, and in pressing contract negotiations at the bargaining table. Many union women, who were ambivalent about pushing for expanding opportunities into "male" jobs, nevertheless saw pregnancy discrimination in benefits as an important problem.⁶⁸² Because of the broader spread of private plans and the involvement of a large and proactive union, the *Gilbert* case, no matter the outcome, would be the one to set the precedent in similar cases.

The IUE hoped to win on grounds of the Civil Rights Act of 1964. They hoped to extend the Supreme Court's 1971 decision in *Phillips v. Martin Marietta Corp.* Martin Marietta Corp had denied employment to women with young children but not to men with young children. The Court had held that such a policy violated the Civil Rights Act by treating differently workers who were similarly situated except for their sex. GE excluded pregnancy and pregnancy-related

⁶⁸¹ Dennis Deslippe, *"Rights not Roses": Unions and the Rise of Working Class Feminism, 1945-1980* (Urbana: University of Illinois Press, 2000); Susan M. Hartmann, *The Other Feminists: Activists in the Liberal Establishment* (New Haven: Yale University Press, 1998), 25-27.

⁶⁸² Hartmann, *The Other Feminists*, 29, 43-46.

conditions from a temporary disability plan while covering nearly all other potentially disabling conditions, including some faced only by men. This seemed, to IUE lawyers, very similar to *Phillips v. Martin Marietta Corp.*

GE filed a counterclaim against the IUE alleging that the union had agreed to the company's pregnancy policy when they signed the contract; if the company was found to have violated the law, the union had violated it as well and would be liable. During the 1970s, women workers did sometimes find themselves at odds with their unions. Courts had previously found unions potentially liable for signing, and therefore approving and installing contracts with illegal provisions. However, the IUE objected that it had made serious attempts to combat pregnancy discrimination at GE. They had "made a good faith effort to alter that portion of the contract when its illegality was established" following the 1972 EEOC guidelines.⁶⁸³ At the trial, lawyers for IUE pointed out that on four separate occasions the union had attempted to bargain for pregnancy coverage under the sickness and accident plan.⁶⁸⁴ Furthermore, a lawyer for IUE telephoned the company Employee Benefits manager in 1971, shortly after the EEOC announced that it considered pregnancy discrimination in benefits to be a form of sex discrimination.⁶⁸⁵ There was some irony here when, in the course of her research, Ruth Weyand discovered that the IUE's own insurance plan harbored very similar discriminatory features.⁶⁸⁶

The IUE was dogged, persistent, and thorough. After meetings in 1971 and 1972, GE agreed to the union requests to discontinue mandatory maternity leave beginning at six months of

⁶⁸³ Martha V. Gilbert et al., *Plaintiffs v. General Electric Company*, Defendant No. 142-72-R United States District Court for the Eastern District of Virginia, Richmond Division, 59 F.R.D. 267; 1973 U.S. Dist. LEXIS 13836: 5 Fair Empl. Prac. Cas. (BNA) 989; 5 Empl. Prac. Dec. (CCH) P8664 April 30, 1973 (hereafter *Gilbert v. GE*).

⁶⁸⁴ In 1955, 1963, 1966 and 1969. *Gilbert v. GE* note 11.

⁶⁸⁵ *Gilbert v. GE* note 42.

⁶⁸⁶ Hartmann, *The Other Feminists*, 46.

pregnancy. While they succeeded in changing this policy, the union could not get pregnancy included in the company temporary disability plan.⁶⁸⁷ Their legal strategy began with encouraging pregnant workers and new mothers to file claims for disability benefits. When these benefits were denied, they brought grievances and filed claims with the EEOC. Ten IUE women members who had worked, or were still working, at GE plants sued their employer after they had been denied sickness and accident benefits on the basis of their pregnancies.⁶⁸⁸

Sherrie O'Steen was one of them. O'Steen already had a two-year-old when she learned that she was pregnant again. When her husband left her, she became the sole support of her daughter, and needed her job even more than before. However, GE had mandatory maternity leave at the Salem plant where O'Steen worked. Though she tried to hide her pregnancy as long as possible, her boss eventually sent her home. Because the TDI plan excluded pregnancy, O'Steen collected no benefits. At home on her enforced leave, O'Steen and her young daughter lost electricity and could not afford heating oil.⁶⁸⁹ O'Steen was whipsawed by pregnancy discrimination that proclaimed her unfit to work due to her condition, but unable to claim disability benefits because her condition was not a sickness.

Another plaintiff, Emma Furch, had worked at GE for five and a half years. She was hospitalized soon after starting a maternity leave and her baby was stillborn. Grieving, she went home from the hospital, but soon returned with a blood clot in her lung. She filed a claim for

⁶⁸⁷ *Gilbert v. GE*

⁶⁸⁸ The *AFL-CIO News* printed a picture of local IUE officers, three of the women who filed the case, and four of their children. The named plaintiff, Martha Gilbert, held her baby in the picture. "Court Rules GE Must Provide disability Pay for Pregnancies," *AFL-CIO News* 19:16 (April 20, 1974).

⁶⁸⁹ "Statement of Sherrie O'Steen, Plaintiff, in *General Electric v. Gilbert and IUE*," in Subcommittee on Employment Opportunities of the Committee on Education and Labor House of representatives, *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075*, 95th Cong., 1st sess., April 6, 1977, 50-51; Kevin S. Schwartz, "Equalizing Pregnancy: The Birth of a Super-Statute," *Student Prize Papers*, paper 41 (2005), http://digitalcommons.law.yale.edu/y1sspps_papers/41, 1-2.

benefits based on this condition, but GE denied it as well, claiming that her pregnancy leave made her ineligible for sickness and accident benefits.⁶⁹⁰ If she developed a blood clot while walking a picket line, she would have been covered. Because she had just had a stillborn baby, Furch could collect no benefits.⁶⁹¹

In court, GE insisted that pregnancy was voluntary since women could use birth control to prevent pregnancy and the 1973 *Roe v. Wade* decision had legalized abortion. Indeed, GE used the fact that women workers had not terminated their pregnancies through abortion to demonstrate that the pregnancies were voluntary, and therefore this burden, undertaken by the worker herself, should not be shifted to the actuarial plan provided by the company for sickness and accidents. Merhige, disagreeing with this reasoning, insisted that when Congress passed the 1964 Civil Rights Act they did not intend for women to give up their fundamental reproductive rights in order to secure equal treatment at work. Nor did the Supreme Court mandate that women exercise abortion rights in order to gain job rights.⁶⁹² There is an almost casual inclusion of abortion in this case, reflecting its currency in judicial opinions and in culture, but also illuminating the issue's fluidity. Abortion was a lightning rod, but not yet a landmine.⁶⁹³ Reflecting on birth control, Merhige mused that "Neither negligence nor accident are foreign to human and legal experience." And that

At best...with proper care, forbearance, and precaution, pregnancy can to a large extent be avoided. But "voluntariness" in this sense is meaningless. This standard is not applied

⁶⁹⁰ *Gilbert v. GE*, 5.

⁶⁹¹ Dissent by Justice Brennan, *Gilbert v. GE*, 24.

⁶⁹² *Gilbert v. GE*, 8, 15.

⁶⁹³ Janet Golden also observed this short window in between *Roe v. Wade* and the emergence of a strong anti-abortion lobby when conversation about abortion was more open and almost casual. Janet Golden, *Message in a Bottle: The Making of Fetal Alcohol Syndrome* (Cambridge, MA: Harvard University Press, 2005), 43-44.

to informal athletic injuries, most of which could also be avoided by appropriate preparation, forbearance and circumspect precaution.⁶⁹⁴

GE had paid sickness and accident benefits to employees injured while playing sports, in a fight, and even from attempted suicide, and also those suffering from lung cancer, drug addiction and elective plastic surgery, all conditions that could be said to result at least partly from voluntary choices.⁶⁹⁵ Because the GE plan was so comprehensive, and in fact covered all disabilities faced by male employees, no matter the degree of voluntariness involved, GE's objection to providing benefits for pregnancy based on its voluntariness "loses much viability."⁶⁹⁶ In a later cartoon, critics of GE's policy lampooned the company position that anything that happened to a man was a sickness. A cartoon boss confronts a pregnant employee across a polished desk. He tells her "Of course my hair transplants will be covered by sick pay. Baldness is a disease. Pregnancy, on the other hand, is the natural state of women."⁶⁹⁷

GE was concerned about the cost, and the difficulty of predicting costs, should they provide sickness and accident benefits for pregnancy. An actuary testified for GE that pregnancy would be especially thorny and expensive to cover because it was voluntary. Furthermore a new mother might exaggerate the length of her disability if she wanted to spend more time with her new baby. Despite the provision of a doctor's diagnosis, the actuary believed that women who wanted more paid time off could find a cooperative physician who would write a note claiming that they needed more time to recover from childbirth.

⁶⁹⁴ *Gilbert v. GE*, 8.

⁶⁹⁵ *Gilbert v. GE*, 7.

⁶⁹⁶ *Gilbert v. GE*, 15.

⁶⁹⁷ Campaign to End Discrimination Against Pregnant Workers, "Pregnancy Discrimination," [circa 1978] papers of Catherine East, Box 10, folder 15, Schlesinger.

GE also worried that providing benefits for pregnancy would result in a baby boom at GE plants and at trial they pointed out that this was not only of financial concern for the company, but was also at odds with any national efforts to limit population growth. Merhige dismissed the company concern about population growth as “self-serving, conclusory or irrelevant” although he enjoyed the story the GE lawyers told about the about the stock stork. In 1953, the nine month countdown to GE’s Seventy-fifth anniversary inspired the company to offer a unique fringe benefit. Any employee who had a baby on the company’s anniversary would get five shares of company stock. The company anticipated sharing birthdays with fifteen to twenty new members of the GE family, but in the end, 189 children were born on GE’s birthday.⁶⁹⁸ According to the lawyers, this illustrated the way reproduction could be manipulated by fringe benefit policies and why GE was particularly reluctant to include pregnancy in its sickness and accident plan.⁶⁹⁹

In courts across the country, momentum was building on behalf of treating women equally with men. Hawaii had just included pregnancy under its state temporary disability insurance plan and by the time Judge Merhige was hearing testimony in *Gilbert*, the lower court in California had decided in favor of *Aeillo*, ruling that the exclusion in the California plan violated the Fourteenth Amendment.⁷⁰⁰ In Virginia, Merhige found that company practice of excluding pregnancy from all of GE’s generous benefits violated the Civil Rights Act.

GE appealed. The appellate court agreed with Merhige, even though the Supreme Court had recently decided *Geduldig v. Aeillo*. GE appealed again and the Supreme Court agreed to hear the new case. It became clear that the majority of the court did not find much in *Gilbert*

⁶⁹⁸ *Gilbert v. GE*, 13.

⁶⁹⁹ *Gilbert v. GE*, 13, footnote 10.

⁷⁰⁰ “East – Direct,” 101.

different than *Geduldig* and they reversed the appellate court decision. Justice William Rehnquist, who wrote the opinion, quoted extensively from the *Geduldig* case.⁷⁰¹ The court majority once again found that “there is no risk from which men are protected and women are not” and that “pregnancy-related disabilities constitute an additional risk,” albeit one unique to women. The GE plan could exclude these risks without engaging in sex discrimination.

Justices Brennan, Marshall and Stevens dissented from the majority opinion. Both Brennan and Stevens wrote dissenting opinions. Stevens’ short dissent focused on two points. He argued that *Geduldig* was not effective precedent because that case was brought and decided as a Fourteenth Amendment case and *Gilbert* was brought under Title VII of the Civil Rights Act of 1964, which is a “statutory provision against discrimination.”⁷⁰² Then he turned to the crux of Rehnquist’s distinction between “pregnant women and nonpregnant persons.” He pointed out that policies and insurance plans address possible developments, or “future risks.” Coverage of prostrate operations is provided not only to someone who needs one right now, but also to those who might in the future need one. The exclusion of pregnancy coverage excluded pregnant women, and also all plan beneficiaries who might possibly ever need pregnancy benefits. Nonpregnant persons who faced a *risk* of being pregnant, even if they never actually were, were also discriminated against by the GE plan. That group could be nearly all current and future women employees. Therefore, Stevens concluded, pregnancy exclusion policies constituted sex discrimination and were clear violations of the law.⁷⁰³

⁷⁰¹ Opinion by Justice Rehnquist, *Gilbert v. GE*, 17, the wording is a quote from the *Geduldig* decision, 417 U.S. at 492.

⁷⁰² Dissent by Justice Stevens, *Gilbert v. GE*, 28

⁷⁰³ Stevens, *Gilbert v. GE*, 29.

Justice Brennan had more complaints and criticized the majority in strong language. He remarked that the Court's assumption of a "gender-neutral risk-assignment process is purely fanciful" and regarding pregnancy as not sex-related "offends common sense."⁷⁰⁴ Brennan also pointed out that *Geduldig* had specifically left open a different decision in subsequent cases where pregnancy discrimination might form a part of broader sex discrimination. Brennan, like Merhige, believed that GE's pregnancy exclusion policies were of one piece with additional sex discrimination in employee benefits. Brennan remembered a 1958 article that had been introduced as evidence in the case. This article explained GE's rationale for excluding women from various employee benefits. The Supreme Court majority, Brennan pointed out, "studiously ignores" this crucial element of GE's intent.⁷⁰⁵ Brennan realized that "programs are not creatures of a social or cultural vacuum devoid of stereotypes and signals concerning the pregnant woman employee."⁷⁰⁶ GE had a pattern of discriminating against women and pregnancy discrimination was a part of that pattern.

Brennan agreed with the lower courts that singling out pregnancy alone was disparate treatment. He dismissed the company's claim that pregnancy was voluntary and was troubled by incidents where the company did not cover conditions that were clearly pathological, like Emma Fuch's blood clot.⁷⁰⁷ Brennan wondered if companies could exclude other female specific or predominant conditions and still assert gender neutrality because "Women, like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payment for pregnancies, breast cancer, and the other excluded female-dominated

⁷⁰⁴ Dissent, Mr. Justice Brennan, *Gilbert v. GE*, 22-23.

⁷⁰⁵ *Ibid.*, 23.

⁷⁰⁶ *Ibid.*, 27.

⁷⁰⁷ *Ibid.*, 24.

disabilities.” Furthermore, the court’s rationale raised the prospect of companies excluding other conditions suffered predominantly by a distinct social group. What if GE excluded sickle cell anemia?⁷⁰⁸ Raising sickle-cell anemia, which almost exclusively affects people of African descent, showed that Brennan understood a parallel between sex discrimination and racial discrimination.

It also bothered Brennan that the Court paid so little regard to the EEOC’s official position, which Brennan believed had been formed after the commission’s “thorough and well-informed consideration.”⁷⁰⁹ Furthermore, Brennan believed that the 1972 EEOC guidelines on pregnancy did reflect Congressional intent. Certainly, the 1972 guidelines matched the current practices for civil service workers, the 1972 Title IX and also the inclusion of pregnancy under the much older Railroad Insurance Act.⁷¹⁰ Brennan also called the EEOC guidelines “a solution now accepted by every other Western industrial country.”⁷¹¹ Concluding that the court should have taken into account the context of the creation of pregnancy exclusion policies and also the effect of such policies on women’s employment, Brennan believed that the EEOC had been right to say that pregnancy discrimination was sex discrimination. He wrote “pregnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship thereby exacerbating women’s comparatively transient role in the labor force.”⁷¹²

⁷⁰⁸ Ibid.

⁷⁰⁹ Ibid., 26.

⁷¹⁰ Ibid., 27.

⁷¹¹ Ibid.

⁷¹² Ibid.

A year after *Gilbert* the Supreme Court issued another decision about pregnant workers' rights. *Nashville Gas Co. v. Satty* was a mixed bag. This decision did establish that employees on maternity leave retained their accumulated seniority. Women who had babies would not lose their job history, and the important fruits of long-term service, like the ability to bid for promotions, job security in the face of layoffs, pension credit, and raises. This was essential for promoting women's ties to the labor market and for insuring that they could close a pay gap with men and retain a degree of independence in their family relationships. For this reason, *Satty* was like *Lafluer* and the cases of pregnant servicewomen. But *Satty* also repeated the logic of *Geduldig* and *Gilbert* when the majority found that employers were free to deny pregnant workers access to their banked sick leave.⁷¹³ The courts, which had, for a while, seemed a promising route towards integrating pregnant workers into the American workplace, now seemed to be setting dangerously limiting precedents that would keep maternity outside the American system of private social supports.

“Prego Power”

The Supreme Court decisions in *Geduldig*, *Gilbert* and *Satty* presented a crisis for women workers, for civil rights attorneys, and for labor unions. Some unions had been raising demands for various rights for pregnant workers for a while. The UE and UAW both introduced model maternity leave clauses in the 1940s. UAW included maternity leave in contract negotiations with some success in the postwar period. By 1970, when the next big push for expanding the rights of pregnant workers occurred, UAW contracts at many plants already included a six week wage-replacement maternity benefit. The EEOC guidelines gave unions incentive and support

⁷¹³ Ruth Weyand, to All Members of the Campaign to End Discrimination Against Pregnant Workers, August 10, 1977, Catherine East, Box 10, folder 15, Schlesinger.

for revisiting the issue, even outside the normal contract bargaining time frame. But as cases, especially the carefully selected *Gilbert* case, approached the nation's highest court, negotiating teams postponed bargaining over the issue of pregnancy disability benefits in the belief that the courts would eventually decide in their favor. Companies also stalled on the issue while awaiting final word from the Supreme Court.⁷¹⁴ Some union representatives, with the EEOC guidelines in hand and watching the progress of the question before various state anti-discrimination agencies and the lower federal courts, believed that soon the law would require changes to contracts. So, there were advantages to not pressing too hard during scheduled contract negotiations.

Wait and see meant missing a chance to negotiate for much needed benefits and protections. After Supreme Court decisions in *Gilbert v. GE* and *Nashville v. Satty* unions faced an empowered adversary at the bargaining table.

Ruth Weyand had argued cases before the Supreme Court ten times. The *Gilbert* case was her only defeat and she was not about to take it lightly.⁷¹⁵ Almost as soon as the court handed down its decision in *Gilbert*, Weyand, along with Susan Deller Ross and the ACLU Women's Rights Project, took the fight from the courtroom and into the halls of Congress. Weyand and Deller Ross were elected co-chairs of the hastily organized Campaign to End Discrimination Against Women Workers, and liberal labor unions and feminist organizations set out to overturn the Supreme Court decision with new legislation that would definitively include pregnancy in the Civil Rights Act.

Letty Cottin, an editor and writer for *Ms. Magazine* and mother of three testified at Senate Hearings in favor of the Pregnancy Discrimination Act (PDA). Linking the *Gilbert*

⁷¹⁴ NAM and the Chamber of Commerce filed amicus curie briefs in support of GE, putting faith in the Supreme Court finding in *Geduldig*.

⁷¹⁵ Women's Equity Action League, "Dear Friend of Ruth Weyand" Received April 3, 1985, CEP 65:12.

decision to broader gender inequality, she noted the irony of urging a committee of men to make recommendations to a larger group of men about possibly rectifying a decision made by another group of men about a women's issue. "If men could get pregnant," she mused, "maternity benefits would be as sacrosanct as the G.I. Bill." Clever with words as always, she ended with a plea that "For the kind of 'labor pains' that trouble the pregnant worker, an obstetrician will not help. This legislation is her only delivery."⁷¹⁶

Unions from the IUE to the UAW and AFSCME formed a key part of this coalition. The IUE legal department contributed a co-chair. IUE President David Fitzmaurice testified before Congress in favor of the proposed legislation and urged locals to lobby their representatives.⁷¹⁷ The new Coalition of Labor Union Women (CLUW) acted as a clearinghouse for information through conferences and newsletters. Church groups and civil rights organizations also joined. The most unusual members of the broad coalition were pro-life groups who believed that the offer of maternity benefits to a pregnant woman would convince her to carry her fetus to term rather than seeking an abortion. Ultimately, the Campaign to End Discrimination Against Pregnant Workers had over three hundred member groups. Communications between the Co-Chairs and their member groups reminded supporters to write and lobby Senators and members of Congress and asked for money to fund the group, particularly to enable the Campaign to communicate with its large base.⁷¹⁸

⁷¹⁶ Letty Cottin, "Statement of Letty Cottin, Editor and Writer for *Ms. Magazine*" Subcommittee on Labor of the Committee on Human Resources, United States Senate, *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995, 95th Congress, First Session* (Washington DC: US Government Printing Office, 1977), 450

⁷¹⁷ Hartmann, *The Other Feminists*, 45.

⁷¹⁸ Ruth Weyand, to All Members of the Campaign to End Discrimination Against Pregnant Workers, August 10, 1977, Catherine East, Box 10, folder 15, Schlesinger. Also, Joyce Gelb and Marian Leif Palley, *Women and Public Policies* (Princeton: Princeton University Press, 1982), 162.

The unusual approach of overturning case law by direct congressional action highlighted the organizing acumen of the progressive labor movement and the spirit of the Women's Liberation credo that "the personal is political." Extensive correspondence among feminist lawyers, women's organizations and the staffs of many large labor unions, as well as photo essays of New York demonstrations by feminist photographer Bettye Lane indicate that the turn from the courts to Congress and to political mobilization at the federal and state level both depended on and nurtured political ties among activist women.

American business organizations opposed pregnancy discrimination legislation. The Chamber of Commerce, the National Association of Manufacturers (NAM), and the National Retail Association led the fight. In a flyer from July 1977, NAM predicted some form of the legislation would pass. They urged their members to lobby widely for business friendly amendments capping weeks of disability, allowing exclusions for pre-existing pregnancies, delaying implementation, and removing a provision that forbade companies from reducing benefits in order to comply.⁷¹⁹

The business lobby itself recognized the difficulty of opposing motherhood. The National Association of Manufacturers (NAM) which lobbied against the PDA sent "Guidelines for Action on Pregnancy Disability Legislation" to their members in which they reported that during testimony against the bill in the Senate "we could not find a single company witness to testify with us" and this reticence was causing problems for business allies among lawmakers. Utah Senator Orin Hatch intended to offer amendments to the bill but NAM worried "he can't fight our battles unless we give him ammunition." Business opposition was not universal in part

⁷¹⁹ "NAM Guidelines for Action on: Pregnancy Disability Legislation" July 13, 1977, National Association of Manufacturers, Series IV, Box 23, folder Industrial Relations Department Guidelines for Action 5/74-8/77, Hagley Museum and Library, Wilmington, DE.

because many companies, especially a few large, well-known companies, already included pregnancy in their disability and health insurance plans.⁷²⁰ Joyce Gelb and Marian Lief Palley suggest, in their analysis published only a few years after the PDA went into effect, that individual American companies were cautious, in the late 1970s, about facing off against the women's movement and at the same time leery of being perceived as anti-mother.⁷²¹

The broad coalition for the bill, however, was divided by clearly competing motives for supporting the legislation. While Susan Deller Ross, the ACLU Women's Rights Project and other explicitly feminist groups sought legislation against pregnancy discrimination specifically to advance equality, open more occupational opportunities to women and insure women's financial independence, not all members of the Campaign to End Discrimination Against Pregnant Workers had those particular goals. Members of the Campaign included pro-life groups such as American Citizens Concerned for Life.⁷²² Pro-life activists worried that a woman faced with either the loss of her job or a period of unpaid leave just at the time when she needed money more would be more likely to terminate her pregnancy. Those who were familiar with the trial court history of *Gilbert* or the story of Captain Struck had good reason to regard job loss as a spur to abortion. Captain Struck's superiors had suggested she get an abortion and the lawyers for GE had used *Roe v. Wade* as a specific proof of the voluntary nature of pregnancy.

⁷²⁰ Appendix A "Plans of 'leading Firms in a Variety of Industries' Which Pay Temporary Disability Benefits for Disabilities Arising out of Pregnancy," in Subcommittee on Employment Opportunities of the Committee on Education and Labor House of representatives, *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075*, 95th Cong., 1st sess., April 6, 1977, 192-194.

⁷²¹ Gelb and Palley, *Women and Public Policies*, 160-161.

⁷²² *Ibid.*, 161.

Anti-abortion activists were prominent among supporters of the proposed bill. Dr. Andre Hellegers testified before Congress in support of the PDA because of his anti-abortion beliefs.⁷²³ Even more interesting, however, is that feminist organizers worked to nurture anti-abortion support. This presages a similar concurrence in work for family leave a decade later.⁷²⁴ Nurturing this unusual partnership took some juggling. In a fact sheet on “The Abortion Issue” that the Campaign to End Discrimination Against Pregnant Workers sent to members, the Campaign acknowledged that “Pro-life and anti-abortion groups are among the strongest supporters of legislation” to protect pregnant workers. The fact sheet also explained, with emphasis, that when women were denied employee benefits for pregnancy “THIS LOSS OF INCOME ENCOURAGES ABORTIONS” and “This legislation is essential to stop coerced abortions.”⁷²⁵

In their book published a few years after the PDA, Joyce Gelb and Marian Lief Palley ponder a basic connection between the PDA and anti-abortion activism. They point out that both the PDA and the Hyde Amendment, which prohibited Medicaid coverage for abortion, were reactions to Supreme Court decisions—the PDA to *Gilbert v. GE* and the Hyde Amendment to *Roe v. Wade*. In both cases, activists responded to Court decisions by turning to legislation. The Hyde Amendment passed in 1976, just months before the court handed down its decision in *Gilbert*. It trod the legislative path before the attempt to get the PDA, and many of those who would become active in the Campaign to End Discrimination Against Pregnant Workers would

⁷²³ Referring to an unusual psychosomatic condition experienced by a few men who experience disabling pregnancy symptoms when their wives are expecting, Dr. Hellegers mused that these men, suffering from couvade syndrome, could actually collect GE disability benefits for pregnancy symptoms if weight gain or pernicious vomiting kept them from work, although a pregnant woman could not. “Statement of Dr. Andre Hellegers, Director, Joseph and Rose Kennedy Institute, Georgetown University,” *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy*, 55, 58.

⁷²⁴ See, especially, Dinner, “Strange Bedfellows at Work.”

⁷²⁵ Campaign to End Discrimination Against Women Workers, “Fact Sheet: The Abortion Issue,” Catherine East Papers, Box 10, folder 15, Schlesinger.

have noticed this strategy and its success with distress. The Hyde Amendment emboldened pro-life activists and gave them valuable lobbying experience, making them a force to be reckoned with as opponents, or as prospective allies. The Hyde Amendment also indicates what Marlene Fried calls a “two-pronged” approach of the anti-abortion movement, committed to a total ban, but, in the meantime, embracing opportunities to restrict access whenever abortion rights could be redrawn more narrowly.⁷²⁶ This, then, explains the pro-life embrace of the PDA, and the later FMLA. More than just the rational understanding that discrimination against pregnant workers could lead some to terminate their pregnancies, any legislation relating to reproduction offered a vehicle for further reducing abortion rights. After all, the Hyde Amendment was attached to a continuing appropriations bill, an even less likely medium than the PDA. The PDA would, in any form, have had to face scrutiny by a growing, and ever more well-connected, pro-life lobby. Efforts to keep pro-life activists on the side of the bill were pragmatic although such “strange bedfellows,” as Deborah Dinner rightly calls them, disturbed more traditional alliances among feminists, posed deep-seated ethical challenges, and threatened to delay or scuttle the bill.⁷²⁷

Treading a fine line between needing the support of pro-life forces and also needing to keep that of pro-choice allies, the Campaign opposed anti-abortion amendments offered in the House and earlier in the Senate (which passed the bill without amendment). The National Abortion Rights Action League (NARAL) and the National Organization for Women (NOW) opposed a strategy to bring the House Bill to the floor with the anti-abortion amendment under special rules that meant only an up or down vote, while the ACLU Women’s Rights Project and

⁷²⁶ Marlene Fried, “Hyde Amendment: The Opening Wedge to Abolish Abortion,” *New Politics* 11 no. 2, (Summer 2007), <http://newpol.org/content/hyde-amendment-opening-wedge-abolish-abortion>, 2 August 2014.

⁷²⁷ Dinner, “Strange Bedfellows at Work.”

other groups supported the strategy as a way of getting the legislation out of the House where a conference with the Senate might have a better chance of removing the amendment.⁷²⁸

Despite discomfort with the House amendment, and discord among its ranks, the Campaign urged all its members to continue to support the bill and offered a series of reassurances that the abortion amendment would pose little actual threat to women workers reproductive rights. A Fact Sheet on “The Abortion Issue” pointed out that since the vast majority of abortions were simple, uncomplicated procedures, very few women would find themselves disabled by them long enough to be eligible for temporary disability benefits anyway. State laws might protect workers needing abortions, as, indeed, it seemed many already did. Finally, exemptions for religious institutions like those written into the amendment seemed, long before *Hobby Lobby*, constitutionally suspect and were predicted to be struck down.⁷²⁹

The Campaign to End Discrimination Against Women Workers believed that if need be, some compromise was acceptable in order to firmly establish that pregnant workers had rights and to reverse the troubling direction of court decisions. Some supporters needed more convincing. Ruth Weyand, the IUE attorney who had lost the Gilbert case at the Supreme Court, wrote a personal and very long (4 pages, typed, single spaced) letter to Olga Madar, former vice-president of the United Autoworkers and the first President of the Coalition of Labor Union Women (CLUW). Weyand reminded Madar that abortions rarely met time requirements for disability anyway, that they were relatively inexpensive, that companies understood that and so most would continue to include coverage for them. She also pointed out that the bill would

⁷²⁸ Gelb and Palley, *Women and Public Policies*, 162. See also Campaign to End Discrimination Against Women Workers, memo from Co-chairs Susan Ross and Ruth Weyand to All Members of the Campaign, March 3, 1978, Dorothy Haener Collection, Box 21, file 13, Reuther.

⁷²⁹ Campaign to End Discrimination Against Women Workers, “Fact Sheet: The Abortion Issue,” Catherine East Papers, Box 10, folder 15, Schlesinger.

prevent discrimination in terms of hiring, firing and promotion against women who had had abortions. Weyand pointed out that the PDA, if passed, would help prove legislative intentions of the Equal Rights Amendment and make it stronger if it passed, which, in 1977 still looked likely. This was a key appeal because Madar had long been committed to the passage of the ERA. The most interesting part of this letter, however, was not Weyand's rationalizations and minimizations of the dangers posed by the anti-abortion amendment. It was her interpretation of the threat that the anti-abortion amendment posed for the PDA and for the tactical ability of any group working to expand women's rights. Weyand thought at the time, and Gelb and Palley agreed later, that the internecine struggles over abortion rights among the supports of the PDA meant that the business lobby thought they could stand back and watch the legislation implode without risking anything themselves. Weyand observed how employer opposition vanished with the appearance of the abortion amendment. She worried that "They count on the women fighting among themselves over abortion to kill the bill." In language designed to resonate with a fellow unionist, Weyand described a Gilded Age-inspired cartoon with the wives of various Robber Barons making competing large donations to each side of the abortion debate to fund a pointless and endless struggle within the Campaign while their husbands laughed all the way to the bank on their ability to pay women less than men. Weyand wondered, "Are we going to let them get away with it?" She asked Madar to support the bill despite Madar's qualms.⁷³⁰ Having wagered so much in court, and lost, Weyand and the Campaign to End Discrimination Against Pregnant Workers really needed to win in Congress.

⁷³⁰ Ruth Weyand, Philadelphia, to Olga M. Madar, Detroit, May 18, 1978, in Catherine East Papers, Box 10, file 15 Schlesinger. Deborah Dinner also refers to this letter and Weyand's allusions to the wives of Robber Barons. "Strange Bedfellows," 511.

Despite the delay over the abortion amendment and the divisions stoked among feminist lobbyists, the passage of the act in 1978 was a quick and fairly decisive victory for working women's rights. The law garnered more than eighty sponsors from both sides of the aisle and passed by large margins in both houses of Congress. Some provisions became law immediately upon the President's signature, although those related to fringe benefits would not take effect until the next year. The whole campaign took much less time than a court case.⁷³¹

Inducing Change in Company Maternity Policies

An understanding of the legal rights of pregnant workers and the operation of sex discrimination began to emerge not just from the carefully chosen cases that a handful of feminist lawyers shepherded through the system but through a widespread pile up of pressure from union grievances and contract negotiations, EEOC charges, state anti-discrimination charges, court cases and coverage of these developments in management and popular press.

By the time the Supreme Court decided *LaFleur*, there were at least twenty-four other teacher cases in state and federal court systems.⁷³² In the early 1970s, many school boards changed their maternity policies, both when they were challenged and in response to developments in other school systems.⁷³³ By 1974, as Judge Merhige was deciding *Gilbert*, other

⁷³¹ There was a documentary about the PDA released in 1982. *Pregnant but Equal* premiered at a CLUW conference, and was also shown at the Kennedy Center for the Performing Arts and on PBS. The Women's Film Project, "*Pregnant but Equal* press release," Cincinnati, Ohio, folder 4, file 11, Coal Employment Project, Archives of Appalachia.

⁷³² National Employment Law Project, "Legal Developments in Sex Discrimination Concerning Pregnancy and Employment," August 1974, 4-21, file "Women Working Women" vertical File, American College of Obstetricians and Gynecologists, Washington, DC.

⁷³³ See *Guelish v. Mounds View Independent Public School District No. 621* 334 F. Supp. 1276 (D. Minn 1972) and *Danielson v. Board of Higher Education* 358 F. Supp. 22 (S.D.N.Y 1972) and *Monell v. Department of Social Services of City of New York* 357 F. Supp. 1051 (S.D.N.Y. 1972) and National Employment Law Project, "Legal Developments in Sex Discrimination," 4-21.

judges were hearing at least seven other cases relating to the denial of disability benefits for pregnancy claims.⁷³⁴ More challenges were grieved or in arbitration. Before the Supreme Court decided *Turner*, a Utah unemployment insurance case, fifteen other cases in eleven other states had already challenged the categorical exclusion of pregnant women from unemployment insurance benefits. Nearly all these cases threw out statutes and policies that prohibited women from collecting unemployment if they were pregnant.⁷³⁵ The speed and degree of change were not due only to the handful of cases that reached the Supreme Court and attracted the legal briefs and energies of the emerging feminist litigators. Some cases that went to court became moot in whole or in part because of changing employment policies or previous court decisions. Even *Geduldig* was much narrowed in scope by the decision in *Rentzer v. California Unemployment Insurance*, which had made California's disability plan cover pregnancy complications.⁷³⁶ Looking back, *LaFleur*, *Geduldig*, *Gilbert* and maybe *Satty* and *Turner* help us trace the developing legal arguments and strategies. As decisions of the highest court, they created precedent. Certainly, they are the easiest stories to tell because they produced the biggest paper trails. However, other cases and other stories also affected the changes underway in the American workplace as employers confronted more women in the workplace and more mothers who intended to work while their children were young.

In "Civil Rights Law at Work," Erin Kelly and Frank Dobbin examine the many administrative, judicial and legislative efforts to end pregnancy discrimination. They find that more organizations adopted maternal leave policies as a result of the promulgation of the EEOC

⁷³⁴ National Employment Law Project, "Legal Developments in Sex Discrimination," 4-21.

⁷³⁵ *Ibid.*, Connecticut, Ohio, Maryland, Texas, Vermont, Michigan, Rhode Island, Iowa, Nevada, Washington and Arizona had already had cases challenging pregnancy exclusions from unemployment insurance.

⁷³⁶ *Ibid.*

guidelines than as a result of the passage of the PDA in 1978. Paradoxically, companies adopted their leave policies because administrative rulings, the weakest form of law, were highly likely to be litigated. Personnel managers learned about EEOC guidelines from newspaper articles and stories about cases and decisions in trade press and management journals. Personnel managers embraced new policies as a response to “uncertainty,” rather than certain punishment. Their job was not to advance the cause of equality but to minimize risks a company might face. Sometimes they adopted policies because another well-known company in their industry had already done so. The fragility of the EEOC guidelines and the intransigence of companies that resisted them introduced a new vocabulary and set of ideas to the broader profession benefits officers. The publicity surrounding *LaFleur* and *Gilbert*, all the way up to and including the decisions by the Supreme Court, provided the necessary professional tools and impetus to begin expanding maternity benefits. Personal and management journals and the Bureau of National Affairs’ *Daily Labor Report* also covered many other cases, now virtually forgotten. By the time Congress passed the Pregnancy Discrimination Act in 1978, much of the more important cultural and social work necessary for accommodating pregnancy in the workplace had already been done.

Like the mushrooming amicus briefs, the circuit of expert testimony and the regular mootness of cases, the coverage accorded to pregnancy benefits and pregnancy discrimination in trade and general press tie the new feminist legal approach to other cultural and social changes.

Gloria’s Pink Slip

For a changed political consciousness about pregnancy in the workplace there is no better place to look than the sitcom *All in the Family*. The character Gloria’s first pregnancy, very early in the series, ended in a miscarriage. The second, during season six in 1975, culminated with the

birth of a baby in a hospital scene that paid homage to the birth of *I Love Lucy's*, Little Rickie.⁷³⁷ The audience was asked to identify with Gloria and Mike, a young couple in which the wife needed to hold onto paid labor in her pregnancy. Gloria's pregnancy provided comic opportunities but the writers also developed the public context and pregnancy's connection to larger social issues. The episode where Gloria reveals her pregnancy includes a lot of pickles, but also features a frank discussion of birth control devices, addresses population pressure and even grapples obliquely with abortion. Gloria's soliloquy on natural childbirth might have been taken straight from *Our Bodies Ourselves*. Other episodes dealt with body image and sexual attractiveness. Always, of course, the economic struggle loomed large as the young couple contemplated stretching their meager finances to cover three.⁷³⁸

One night, after work behind a perfume counter, a clearly pregnant Gloria opened her paycheck and found a pink slip. Later that evening, a co-worker brought over the things Gloria had left at the department store where she had been employed. In commiserating with her over the job loss, the older female employee divulged that Gloria had been let go because she broke "the personnel director's 11th commandment—'thou shall not commit pregnancy.'" Shocked, as well as hurt, Gloria protested that such treatment was "penalizing the human race for reproducing themselves." Both she and Mike also immediately and vigorously protested that such firing was illegal and Gloria invoked the Supreme Court. The next day they both went to

⁷³⁷ When Lucille Ball was pregnant, producers wanted her to hide her real life pregnancy behind furniture and costuming on the set of *I Love Lucy*, but she and her co-star and husband, Desi Arnaz, prevailed on writing the pregnancy into the show.

⁷³⁸ *All in the Family*, "Gloria has a Belly Full," episode 6, (Feb 16, 1971); "The Very Moving Day," episode 110 (Sept. 8, 1975); "Mikes's Pains," episode 114 (Oct. 6, 1975); "Mike Faces Life," episode 116, (Oct. 27, 1975); "Gloria Suspects Mike," Episode 119, (Nov. 17, 1975); "Gloria is Nervous," Episode 122 (Dec. 8, 1975); "Birth of the Baby," episodes 124 and 125, (Dec. 15, 1975 and Dec 22, 1975).

see Gloria's boss and Mike carried a copy of the New York State law on equal employment opportunity.⁷³⁹

Shades of Watergate colored the scene where D. Bertram Crenshaw III operated a tape recorder in his office to catch incriminating threats from Mike and leave gaps where he himself confessed to overt pregnancy discrimination. More importantly, when Crenshaw dictated a letter firing a man scant weeks before retiring and receiving a pension, the audience learned that the company also tried to cheat its long-term male workers of their benefits. Crenshaw's racial views were equally unenlightened. Crenshaw affirmed to the Stiviks his pride at "our blacks in the maintenance department, and our Puerto Rican window washers and our Philippine elevator operators" and the Indians displayed in the store windows at Thanksgiving.

Off the record and with the tape stopped, Crenshaw offers the Stivicks "the truth," which is that the image of the department store would not be served by "a girl who very soon is going to look like Alfred Hitchcock in drag." By this time, feminists were developing a sophisticated critique of how pregnancy discrimination revealed the degree to which women's bodies, attractiveness and sexuality were built into the business model of some employers in ways that men's bodies were not. This exploitation made some workers, like pregnant workers, very vulnerable, but also undermined efforts to widen employment opportunity or improve traditionally women's jobs. It revealed a very narrow appreciation of what women were capable of. "Alfred Hitchcock!" protested Gloria. "In drag" answered her unrepentant smarmy boss. As the Stivicks stormed out, Gloria paused in the doorway, fist in the air, to declare "Prego Power!"

⁷³⁹ *All in the Family*, "Mike Faces Life."

“Let the record show,” Crenshaw sputtered into his tape recorder, that Mrs. Stivick raised her hand “in a Communist salute.”⁷⁴⁰

Mike and Gloria took their fight to the people and honored the substantial consumer power of pregnant women, who bought maternity clothes and layettes at Crenshaw’s Department Store. They mobilized a picket of the store and counted on public opinion and consumer power to sway Crenshaw. This scene tapped into the milieu of movement demonstrations, including not only civil rights protests, but also the 1968 Miss America protest, the 1970 sit-in at the *Ladies’ Home Journal*, and the 1971 demonstrations protesting employment discrimination against women at AT&T. The staging emphasized the connection. *All in the Family* was filmed before a live audience. The show had a set for Crenshaw’s office. But they must have filmed the demonstration scene beforehand, because it appears, within the TV show, on a TV set that Mike carries downstairs into the Stivick’s living room to watch the evening news with Gloria and Edith (and the studio audience). The fictional newscast covers a demonstration about pregnancy discrimination in New York shortly after there had been actual organized demonstrations in New York about the rights of pregnant workers. Bettye Lane had photographed this real life demonstration that featured a pregnant barefoot man as well as picket signs. In the Stivick’s demonstration, one of the police officers who responded to the call ended up taking a sign and marching along since she was also pregnant. The fake news concluded, “Along with Black Power, Brown Power, and Red Power, we now add Prego Power.”⁷⁴¹

Of course, Gloria got her job back, much more quickly than the long tortured operation of a lawsuit would have taken, and in spite of the fact that the most recent Supreme Court decision

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid.

prior to this episode had found against pregnant workers. The court of popular culture was American's best-loved TV show.⁷⁴² *All in the Family* reflected a new understanding of the legal rights of pregnant women in the workplace as well as a new expectation that pregnant women would be working late into their pregnancies, even if their jobs entailed close contact with the public. Soon legislation would help the Supreme Court catch up with *All in the Family*.

Mama's Got a Brand New Job

Pregnancy discrimination lawsuits reflected the importance of women's demands for workplace equality, but lawsuits were only one feature of more widespread efforts. In the 1970s, feminists tried to secure women workers access to the kinds of jobs that already had established benefits and tried to enhance the benefits available in traditionally women's jobs. These efforts were as important as challenging overt pregnancy discrimination. When women began to try to get the better paying craft jobs at AT&T in the early 1970s, the company administered pregnancy tests to women applying for men's jobs. When, facing investigation by the EEOC, the company dropped the practice, some of its divisions continued the pregnancy tests anyway, while others instead began asking intrusive questions about menstrual cycles.⁷⁴³ Here was one way companies used woman's reproductive capacity to maintain occupational segregation and keep women out of certain jobs.

By the 1980s, a new area of feminist litigation involved fetal protection policies, which barred fertile women from jobs defined as working with teratogens (harmful substances which

⁷⁴² The show, which won multiple Emmy Awards and Golden Globes, was first in the Nielson ratings for five years in a row and Archie and Edith's chairs have been seen by 2.8 million visitors to the Smithsonian Museum of American History so far this year. Smithsonian Museum Newsdesk, <http://newsdesk.si.edu/about/stats> (August 15, 2015).

⁷⁴³ Marjorie A. Stockford, *The Bellwomen: The Story of the Landmark AT&T Sex Discrimination Case* (New Brunswick: Rutgers University Press, 2004), 181.

could cross the placenta). Employers also sometimes prohibited women from taking any job whose normal promotion route would lead to any job with teratogenic exposure. Such policies defined fertile women so broadly that nearly all women workers fell in this category. Playing on the fears of recent teratogenic tragedies, like the mid-1960s rubella epidemic and the sedative thalidomide, and feeding on the new pro-life discourse of the right, employers drew lines in the sand that excluded women from some good-paying jobs that often had comprehensive benefits.⁷⁴⁴ Women who wanted those jobs sometimes went to great lengths to keep them, such as the women at American Cyanamid who had themselves surgically sterilized to keep their jobs, and opened themselves to a new forms of harassment on the job as they were mocked for being incomplete women or aggressively propositioned as being available for casual sex.⁷⁴⁵

Feminist lawyers, scientists and labor activists united in efforts to challenge these fetal protection policies as violations of employment law and the Occupational Safety and Health Act. In 1991, the Supreme Court, in *UAW v. Johnson Controls*, found that fetal protection policies violated the PDA and the Civil Rights Act and that employers could not choose for their workers what risks they wished to undertake.⁷⁴⁶ The lawsuits and grievances that challenged these

⁷⁴⁴ Leslie Reagan, *Dangerous Pregnancies: Mothers, Disabilities, and Abortion in Modern America* (Berkeley: University of California Press, 2010), 43-44,55-73, 85-89, 225-234, Sara Dubow, *Ourselves Unborn: A History of the Fetus in America* (Oxford: Oxford University Press, 2010), 120-130; "A Report on the EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s," (Washington: US GPO, 1990); Robert H. Blank, *Fetal Protection in the Workplace: Women's Rights, Business Interests, and the Unborn* (New York: Columbia University Press, 1993); Roth, Rachel. *Making Women Pay: The Hidden Costs of Fetal Rights* (Ithaca: Cornell University Press, 2000); Susanne Uttaro Samuels, *Fetal Rights, Women's Rights: Gender Equality in the Workplace* (Madison: University of Wisconsin Press, 1995).

⁷⁴⁵ Cynthia Daniels, *At Women's Expense: State Power and the Politics of Fetal Rights*. (Cambridge: Harvard University Press, 1993), 63-68.

⁷⁴⁶ *UAW v. Johnson Controls*, 499 U.S. 187; 111 S. Ct. 1196; 113 L. Ed. 2d 158; 1991 U.S. LEXIS 1715; 59 U.S.L.W. 4209; 55 Fair Empl. Prac. Cas. (BNA) 365; Sally J. Kenney, *For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain*. (Ann Arbor: University of Michigan Press, 1992); Samuels, *Fetal Rights, Women's Rights*; Rachel Roth, *Making Women Pay*; Daniels, *At Women's Expense*; Blank, *Fetal Protection in the Workplace*.

policies built upon the philosophy and the tactics of the major lawsuits and legislation of the decade. Fertile women won the legal right to keep their jobs, but not necessarily the right to workplaces free of toxins. Furthermore, legal rights don't impart job skills.

Getting women the requisite backgrounds and the opportunities to undertake non-traditional jobs was an even bigger task.⁷⁴⁷ The Coal Employment Project was one of many groups formed in the 1970s and 1980s to get women training in non-traditional jobs like the skilled trades, heavy manufacturing, and mining. These groups attempted to solve the problem posed, in a way, by the PDA: that women were unlikely to have the kinds of jobs that offered the best benefits. The CEP began as an effort to bring women into coal mining in the late 1970s. The CEP initially did a lot of legal work forcing mining companies to hire women. Later they worked on sexual harassment cases and launched a major campaign, covered in the next chapter, to get parental leave policies in union contracts.

Very early on, the CEP faced questions about pregnancy and mining. This first arose when women miners became pregnant while laid off from their mining jobs and were subsequently called back. While worried about potential health effects, these miners still wanted their well-paying jobs back, perhaps especially as they anticipated greater family expenses. They wanted to know what they should do. Their doctors didn't know; their companies didn't know; their union didn't know; their co-workers didn't know. The CEP began collecting stories and interviewing women who had worked in mines while pregnant. In 1982, they published *Pregnant and Mining: A Handbook for Pregnant Miners*. The *Handbook* included stories of

⁷⁴⁷ Stockford, *The Bellwomen*, 9, 27-30, 41, 164-182; Molly Martin, ed. *Hard-Hatted Women: Stories of Struggle and Success in the Trades* (Berkeley: Seal Press, 1988); Jean Reith Schroedel, ed., *Alone in a Crowd: Women in the Trades Tell Their Stories* (Philadelphia: Temple University Press, 1985); Susan Eisenberg, *We'll Call you if we Need You: Experiences of Women Working Construction* (Ithaca: ILR Press, 1998); MacLean, *Freedom is Not Enough*, 270-271.

pregnant miners and survey results about mining jobs women had worked while pregnant. It also had a section on job rights. However, most of the *Handbook* was a general basic pregnancy guide, in part reflecting the paucity of information the CEP had been able to find about pregnant miners. *Pregnant and Mining* only scratched the surface, but there was a big demand for the booklet. The CEP undertook a larger study. This pregnancy study would remain an interest of CEP for many years. CEP received some grants, including one from the March of Dimes, and another from the Alexander Fund to work on this study.⁷⁴⁸ However, as the total number of women miners was never very large, the pregnancy study faced a fundamental problem of sample size and whatever conclusions could be drawn from it were largely anecdotal.

Efforts to get women blue collar jobs were never as successful as efforts to desegregate law, medicine, journalism and business. The height of their success was met by widespread technological change, in the case of the Bell system, and sweeping macroeconomic developments like the collapse of American steel manufacturing, a severe downturn in coal mining and a slump in the building trades. The stories of women in starting non-traditional jobs in the 1970s and 1980s are woven through with references to layoff, an indication not of cyclical unemployment, but of structural job loss.⁷⁴⁹ The Reagan Administration's emphasis on small government also hurt women's job opportunities. Women lost the inroads they had begun to make into well-paying blue-collar jobs as the number of those jobs began a precipitous decline. The ongoing job segregation in working class occupations alongside relative success integrating the professions exacerbated class differences among women.

Meanwhile, feminists hoped to improve the pay, benefits and work conditions of jobs

⁷⁴⁸ June [Rostan] to Margaret, July 25, 1983, CEP 5:18.

⁷⁴⁹ Martin, ed., *Hard-Hatted Women*; Schroedel, ed., *Alone in a Crowd*; Eisenberg, *We'll Call you if we Need You*.

held largely by women. Flight attendants challenged their working conditions, the airlines' exploitation of their sexuality and the paternalism of labor unions dominated by pilots. Their battle to be taken seriously as real workers with the kinds of jobs that confirmed full American social citizenship explicitly involved addressing the costs of reproduction and the control airlines exercised over their bodies.⁷⁵⁰

The number of flight attendants, however, paled in comparison to the number of clerical workers in the United States, another nearly all-female labor force. In the late 1970s and into the 1980s, clerical workers also tried to transform their workplaces and their jobs. Along with better pay and greater respect, they demanded improved working conditions. Disrupting the long-held assumption that clerical work was physically non-taxing, office workers documented repetitive motion injuries, sick building syndrome, and ergonomic issues and raised concerns about the health effects of new technologies, including reproductive health effects.⁷⁵¹

In 1980, the clerical workers organization 9 to 5 contacted the Women's Legal Defense Fund and the Coalition for the Reproductive Rights of Workers for information and advice on "organizing and educating around occupational safety and health for clerical workers."⁷⁵² While 9 to 5 would raise concerns about copier fumes, sick buildings, stress and injuries, this health and safety campaign quickly focused primarily on the proliferation of Video Display Terminals and a spectrum of health problems, including reproductive ones, associated with them.

⁷⁵⁰ Kathleen Barry describes this multifaceted struggle where feminist labor organizing met entrenched sexism on the eve of airline deregulation. Kathleen Barry, *Femininity in Flight: A History of Flight Attendants* (Durham: Duke University Press, 2007), 125, 147, 170-175, 205-6.

⁷⁵¹ Ruth Fairbanks, "The Working Fetus: Exclusionary Policies, Video Display Terminals and Reproductive Occupational Health in the 1980s," Illinois Program for Research in the Humanities, Conference on Reproduction, Urbana, IL, 5 April 2002, unpublished paper in author's possession.

⁷⁵² Debra Cohn, Cambridge MA to Judith Gregory (Working Women) Cleveland, OH (Sept. 8, 1980) 9 to 5 88-M96, 89-M104 Box 5, folder 156, Schlesinger.

VDTs were first introduced to American workplaces in publishing among mostly male reporters in the early 1970s. The VDTs potential for automating repetitive work done mostly by female secretaries and clerks quickly became apparent and by the end of the decade there were seven million VDT operators in the US, most of them women. This revolution in office technology coincided with the increasing commitment of women to the permanent labor force. In an economy buffeted by inflation and recession the computer industry emerged as a rare bright spot but clusters of miscarriages, stillbirths, and birth defects among female VDT operators in the US and Canada contributed to unease about changing technology, and about the place of women, especially mothers, in the workplace. Like the controversy over fetal protection policies, concerns over the babies of VDT operators reflected a new discourse about the fetus stimulated by medical advances and by the pro-life movement.

The computer industry insisted that its products were safe and American scientists and doctors in and out of government generally agreed. Most scientists dismissed the suspected mechanism of harm (non-ionizing radiation from the fly-back transformer) and close examination of the numbers indicated the clusters of problem pregnancies were not statistically significant. After thalidomide, Love Canal and Three Mile Island, many working women were dubious. Problem pregnancies and the fear that many clerical workers felt about the effects of their jobs upon their babies presented challenges not only to scientists, but also to feminists who were struggling to defeat Fetal Protection Policies that kept women out of some male jobs. The issue of birth defects and VDT use became a part of the office worker movement to improve working conditions and organization among clerical workers. In their proposal for a two year campaign on VDT risks that 9 to 5 distributed to raise funds, they declared “To do nothing while waiting for the scientists to determine precisely why unborn children are being harmed would be

criminal.”⁷⁵³ One health and safety activist explained, “It’s a very emotional issue. People imagine a little nuclear power plant zapping their baby.”⁷⁵⁴

Along with the materials that 9 to 5 generated on the reproductive dangers of VDTs, they included information about ergonomic concerns, stress and vision problems. Studies that were partially spurred by 9 to 5s continuing pressure also sometimes included these hazards. As a pink collar, and supposedly “clean,” “safe” job, clerical work hadn’t reached the attention of scientists, doctors, or government regulators as a site for occupational hazards. Spurred by the troubling images of deformed babies, they ended up improving the conditions under which many women worked. Office workers demands gained some protective equipment, such as screen shields, and sometimes forced employers to offer transfers to women who wanted them. The computer industry, responding to an upsurge of concern about their products, began to make design adjustments with the safety, health and comfort of operators in mind. Also, the mobilization of concern about the pregnancies of clerical workers contributed to 9 to 5s campaign for maternity and parental leave and other family-friendly policies.

9 to 5 raised the general plight of office workers in public consciousness as they linked reproduction to low pay, little respect, and insurance discrimination. However, the office worker movement’s two favorite tactics, surprise actions and federal lawsuits showed declining returns. Employers were no longer so easily shocked by public shaming and had developed strategies to minimize publicity. The ongoing growth of women’s presence in clerical work accompanied a decline in the strength of American labor unions. President Ronald Reagan hobbled the EEOC

⁷⁵³ “Prop for 2 year campaign...,” 5.

⁷⁵⁴ Lisa Gallatin, director of Boston’s Office Technology Education Program, a group sponsored by unions and women’s groups. quoted in Tamar Lewin, “Pregnant Women Increasingly fearful of VDTs,” *New York Times*, July 10, 1988, Section 1, 19.

and OSHA. As one participant put it, “The office worker movement expected to come of age in the 1980s. It did not anticipate that the 1980s would be the age of Ronald Reagan.”⁷⁵⁵

Pregnancy Rights as Civil Rights

Favorable legislation and even heightened legal consciousness, was never enough. While some Supreme Courts cases and the PDA guaranteed pregnant workers’ rights on the job, women often needed advocates to avail themselves of those rights. Both labor unions and feminist organizations acted as watchdogs as employers sometimes pushed the bounds of the new law. Such was the case of Maugerita Roliz, a mail handler for the US Post Office who worked nights. When her employer refused to make accommodations to her job that would allow her to continue working, the feminist organization Equal Rights Advocates and her union intervened to make sure her rights under the PDA and the union contract were recognized. Roliz finished her pregnancy working the day shift from a straight backed chair, instead of standing, and her union sought back pay for the time she had been unfairly placed on leave.⁷⁵⁶

Fundamentally, the connection between maternity policy and the employment nexus faltered upon a segregated labor market and macro-economic changes. Many American women did not have jobs in the industries or with the companies that provided extensive benefits. Legislation that required companies to treat pregnancy the same as other conditions was no improvement if it meant equally bad coverage. The women’s movement of the 1970s included concrete and creative efforts to propel more women into better, often traditionally male, jobs. There was some progress in this area, but it stalled in the face of high unemployment in the

⁷⁵⁵Roberta Lynch, “Organizing Clericals: Problems and Prospects” *Labor Research Review* 8 (Spring 1986): 93.

⁷⁵⁶“Equal Treatment v. Equal Opportunity,” *Equal Rights Advocates* (1984 issue of newsletter), 5, CLUW 70:30.

1970s and 1980s. Workplaces with the best benefits were often those with strong unions. The recession of the 1970s and 80s foretold a broad economic restructuring of automation, capital mobility and globalization. A lot of those missing jobs did not come back. The numerical strength of unions declined from nearly a third of all American workers in the 1950s to about 10% of the workforce now. The percentage of women in this group is higher than before, but a weaker labor movement is less able to push substantially expanded benefits in the private sector or in the public sector.⁷⁵⁷

In 1997, Helene Silverberg pondered the differences between abortion care in the United States and Europe. She noted that in the United States, abortion had been determined, by the highest court in the land, to be protected by the most supreme law—the Constitution—thus establishing a much clearer right to abortion than in nearly any other country. However, this right was, and is, under constant attack at the edges, many American women are unable to avail themselves of the right because of restrictions or costs or a lack of abortion care providers reasonably nearby. Furthermore, the American public and American politicians seem trapped in irreconcilable opposition—the “abortion wars.” Looking abroad, Silverberg saw weaker absolute guarantees, but in practice a broader availability, easier access for the poor and a categorically different kind of debate about abortion.⁷⁵⁸

She explains this difference by the failure of the US to develop, in the postwar period, a robust system of national health care. In many other countries, abortion was legalized by code and its regulation was folded into the practice of existing health care provisions and agencies. By and large, these existing systems had public support and a cohort of respected health policy

⁷⁵⁷ Jake Rosenfeld, *What Unions No Longer Do* (Cambridge, MA: Harvard University Press, 2014).

⁷⁵⁸ Helene Silverberg, “State Building, Health Policy, and the Persistence of the American Abortion Debate,” *Journal of Policy History*, 9, no. 3 (1997): 333-334.

experts. There were institutional homes that embedded abortion care within a language and system of health policy. This wasn't available in the United States because those types of agencies weren't there or were very weak. Indeed, three of the most significant health policy institutions in the postwar period, the Veterans Administration, Medicare and Public Health Services (concerned mostly with contagious diseases), had little to do with reproductive health. The one major federal health care institution that did include, centrally, concerns about women's reproductive health issues was Medicaid. Medicaid, however, is extremely vulnerable in part because, as aid to the poor it has a weak constituency but also because it depends on annual appropriations and is therefore easy to politicize.⁷⁵⁹

In countries that have robust national health systems, abortion care is broadly regarded by health officials, by government and by the public, as a part of the health care system. There is still some protest against it, but abortion is not as divisive as it is in the United States where institutional poverty in federal health agencies left abortion to be pursued not on the basis of health, but on the basis of a civil right. Even before the Supreme Court decision on abortion in 1973, abortion care and abortion access have been a part of the story of American maternity policy. After *Roe v. Wade* the two become tied explicitly together as some employers embraced the legalization of abortion to avoid having to pay maternity benefits while an emerging pro-life movement seized on mandated maternity benefits to reduce a woman's incentive to seek an abortion. This is the story Deborah Dinner tells of "strange bedfellows."⁷⁶⁰

It is also true that maternity policy more broadly faced the same situation as abortion care. The lack of broad based systems for public health care and social insurance meant that

⁷⁵⁹ Ibid., 311, 315-320.

⁷⁶⁰ Dinner, "Strange Bedfellows at Work," 453-530.

when pregnant workers began to demand change in the 1970s there were fewer avenues to channel that demand than there would have been if, for instance, any of the Wagner-Murray-Dingell Bills, or the Pepper Bill had passed or if more states had followed Rhode Island's lead in establishing temporary disability insurance. Deborah Dinner points out that the inclusion of "sex" in Title VII of the Civil Rights Act produced an opening through which to channel concerns about maternity.⁷⁶¹ This is certainly true. This opening, however, drove a certain kind of language, the language of rights, and it proved difficult to bend this approach to the service of the multiple needs pregnant workers and new mothers faced. I find, like Silverberg does, that this tactic of employing a rights-based approach reflects not only on the legal tactics of a brilliant cohort of feminist lawyers, but also upon the ashes of social policy defeats in the previous decades.

Civil rights law and the temporary disability approach that accompanied it afforded new opportunity for working women. Benefits and rights were opened through policies of employers, public and private. But full and equal citizenship required that all women, including the less advantaged, should be able to share in the opportunity. This required not simply anti-discrimination law but social welfare entitlements, guaranteed by the state, that a civil rights approach was ill-equipped to demand. In addition, even those good jobs that did remain changed as companies began rolling back fringe benefits, charging more for co-payments and deductibles in health insurance and reducing benefits. Assumptions about women workers—their temporary allegiance to the workforce, their dependence on a male provider and their primary social role as mothers—resulted in excluding maternity from all kinds of evolving benefits in the heyday of the private welfare state of the 1950s and 1960s. Women gained status as legitimate workers and

⁷⁶¹ Dinner, "Pregnancy at Work," 20, 60-61, 143.

forced the inclusion of pregnancy benefits at the same moment that the whole private system began to contract and implode. As successful as the 1970s civil rights approach was and as secure as their victories are, the broader realization of social support for reproductive labor was limited by its connection to employment. Once again, maternity benefits showed the weakness and vulnerability of benefits being tied to work history.

CHAPTER 7:

IN THE FAMILY WAY: WORK-FAMILY CONFLICT AND THE FMLA

The PDA left many problems facing pregnant workers and new mothers unresolved. Many feminist lawyers hoped that disparate impact claims could be made under the PDA to challenge facially neutral policies that hurt pregnant women and new mothers.⁷⁶² Then Ronald Reagan was elected president in 1980 and two years later the Equal Rights Amendment was defeated. As a result, the opportunity to expand PDA from rights into benefits disappeared. At the same time, more American women than ever worked while they were pregnant and more mothers with young children were in the labor force. Many of them faced hardships trying to balance their jobs and their families. Noticing this, state legislatures began to pass maternity leave laws even before the PDA was signed into law.

The feminist legal theorists who successfully pressed for PDA worked on a new solution to deliver help to women workers without essentializing biological difference in ways that might constrain women's occupational opportunities or reinforce gender roles within families. These twin goals partly explain why the Family and Medical Leave Act (FMLA) differs from maternity policies in much of the rest of the world. The historical context for the passage of the FMLA will be explored here first, from broad economic and demographic changes affecting American women to greater professional opportunities for women. Changes in women's roles also encouraged changing notions of American fatherhood. The political context was as important as the demographic. Republicans presented themselves as the party that defended family values. The Democrats responded by claiming that they were the party that "valued

⁷⁶² Deborah Dinner, "Pregnancy at Work: Sex Equality, Reproductive Liberty, and the Workplace, 1964-1993" (PhD diss., Yale University, 2012), 7, 19, 27, 77-80.

families,” the party that looked out for the interests of “working families.” Large firms, unions, and states developed family leave policies, which served as models for federal legislation. Finally, a flexible language of rights, rather than a commitment to strong social supports for maternal labor, shaped the structure and forged the alliances that led to the FMLA, one of the very few recent expansions in the American welfare state.

Working Mothers and the Sandwich Generation

While demographics do not explain the shape of family leave as law or as employment practice, changes in the American family and the composition of the workforce are central to understanding why such legislation generated public interest. Demographic changes in the labor force *demand*ed a response of some kind. After a period of postwar prosperity, American families continued to thrive and consume because American mothers increased their commitment to the labor force, even during years of childbearing and intensive childrearing. That development and the growth of women in the professions provided pressure for policies and practices that accommodated pregnancy much as WWII led to maternity policy in the 1940s. According to the United States Census Bureau, 1986-1990 were the years with the highest percentage of first-time mothers who worked during their pregnancies, 67% of new mothers, compared to 61% in the five years before and 44% between 1961-1965.⁷⁶³

By the 1980s, newspaper and magazine articles and witnesses before Congress cited statistics about women’s increasing presence in the workforce and made special note of the number of women workers who had small children. During the 1970s, in part due to declining

⁷⁶³ This rate would increase to 69% at the turn of the century but then fall to 66% between 2006-2008, probably due to the recession. Lynda Laughlin, “Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008,” U.S. Census Bureau, *Current Population Reports* (October 2011), 4.

real wages and successes of the Women's Movement, more married women were working for pay, increasing the number of dual income families. By the 1980s, the average age when a woman had her first child was increasing along with the educational levels of first time mothers.⁷⁶⁴ First time mothers were more likely to be in the labor force. By 1986, the Bureau of Labor Statistics and the Bureau of the Census found that 60% of American mothers were working for wages. The number of working mothers had increased threefold between 1950 and 1981. Nearly half of mothers were at work by the time their babies turned one. Two-thirds of mothers were working by their child's third birthday.⁷⁶⁵

Pregnant women were also staying at work longer into their pregnancies. From 1961 to 1965, only 35% of pregnant working women were employed during their final month. After the 1972 EEOC guidelines, the Supreme Court decision in *LaFleur*, passage of state anti-discrimination laws and the PDA, changing social mores about pregnancy in public and the growing importance of a woman's wage to the family economy, by 1986-1990, 76% of pregnant working women did. The percentage was even higher—90%—for full-time workers.⁷⁶⁶ College educated women and older women were more likely to work late into their pregnancies, exhibiting stronger ties to the labor market because of their increased career investment.⁷⁶⁷ Even between 1981 and 1986, it became much less common for a first time mother to either quit or

⁷⁶⁴ Lynda Laughlin, "Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008," *Current Population Reports* (Washington, D.C. United States Census Bureau, 2001): 2,3; Harriet B. Presser, "Can we Make Time for Children? The Economy, Work Schedules, and Child Care," *Demography* 26, no. 4 (1989): 523-543; Kristin Smith, Barbara Downs and Martin O'Connell, "Maternity Leave and Employment Patterns 1961-1995," (Washington, DC: U.S. Department of Commerce, 2001): 2, 6.

⁷⁶⁵ William L. Clay and Frederick L. Feinstein, "The Family and Medical Leave Act: A New Federal Labor Standard," *ILR Report XXV*, no. 1, (Fall 1987): 29. See also Laughlin, "Maternity Leave and Employment Patterns."

⁷⁶⁶ Laughlin, "Maternity Leave and Employment Patterns." 7.

⁷⁶⁷ Kristin Smith, Barbara Downs and Martin O'Connell, "Maternity Leave and Employment Patterns 1961-1995," 7.

lose her job because of pregnancy.⁷⁶⁸ Between 1975 and 1984, the average employed new mother returned to work by the time her baby was three months old.⁷⁶⁹ In 1983, 47% of American children aged six and younger had working mothers.⁷⁷⁰ On the eve of FMLA's passage, Sheila Kamerman wrote that "the labor force participation rate for women with children under age one had increased by almost 60% over the past decade." In 1976, 31% of mothers with infants worked for wages; by 1986, half had paying jobs.⁷⁷¹ In her editorial in support of family leave legislation, the historian Patricia Nelson Limerick summarized the demographic change in the American workforce in her title, "I Saw the Future, and She Worked."⁷⁷²

Single parent families increased from about 11% of American families in 1970 to 28% by 1997.⁷⁷³ Much of this growth was because of divorce. The 1970s and 1980s had a divorce rate was over twice as high as the 1950s and 1960s.⁷⁷⁴ The lessening stigma about out-of-wedlock births, and increasing opportunities for women in the workforce contributed to a rise in the number of single mothers as well. In 1984, the US Census Bureau reported that one out of every four American mothers was single and predicted that the rate of single mothers would continue

⁷⁶⁸ Laughlin, "Maternity Leave and Employment Patterns," 9.

⁷⁶⁹ Laughlin, "Maternity Leave and Employment Patterns," 13.

⁷⁷⁰ Sheila B. Kamerman, "Child-Care Services: A National Picture," *Monthly Labor Review* (December 1983): 35.

⁷⁷¹ Patricia Garrett, Sally Lubeck and DeeAnn Wenk, "Childbirth and Maternal Employment: Data from a National Longitudinal Survey," in *Parental Leave and Child Care*, 24.

⁷⁷² Patricia Nelson Limerick, "I Saw the Future, and She Worked;" *USA Today*, April 24, 1986.

⁷⁷³ Steven K. Wisensale, *Family Leave Policy: The Political Economy of Work and Family in America* (Armonk, NY: M.E. Sharpe, 2001), 17.

⁷⁷⁴ *Ibid.*

to grow over the decade.⁷⁷⁵ By 1981, over 60% of single mothers worked for wages. Only a decade earlier, only 53% had.⁷⁷⁶ But single mothers with young children had high rates of unemployment even when they were actively pursuing jobs. That reason alone contributed to high rates of poverty among female-headed households.⁷⁷⁷

More married women had workforce commitments as well. Declining wages necessitated a second family income and increased career opportunities for women made employment a standard expectation. As a result of the growth of women's paid employment, more working women were facing what Arlie Hochschild termed a “second shift,” of household and child care following a day at work.⁷⁷⁸

On top of that, some of these women were also facing a burden of care for the elderly. Daughters and daughters-in-law had long provided care for elderly relatives. In the 1970s and 1980s, American lifespans increased. There were more older relatives to care for and they were likely to live longer, even in the face of chronic health conditions. In 1950, senior citizens were only 8% of the population; by 1984 they were 12% of the population.⁷⁷⁹ According to A.R. Day and Emily Abel, the fastest growing part of the population were the “old old,” people age 85 and over.⁷⁸⁰ This was a population likely to need some kind of care. Care of the elderly, like care of

⁷⁷⁵ Johanna Freedman, “The Changing Composition of the Family and the Workplace,” in *The Parental Leave Crisis: Toward a National Policy*, ed. Edward Zigler and Meryl Frank (New Haven: Yale University Press, 1988), 27.

⁷⁷⁶ *Ibid.*, 25.

⁷⁷⁷ *Ibid.*, 27.

⁷⁷⁸ Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (New York: Viking Press, 1989).

⁷⁷⁹ Emily K. Abel, *Who Cares for the Elderly?: Public Policy and the Experiences of Adult Daughters* (Philadelphia: Temple University Press, 1991), 6.

⁷⁸⁰ A.R. Day, *Who Cares? Demographic Trends Challenge Family Care for the Elderly* (Washington, DC: Population Reference Bureau, 1985); Emily K. Abel, *Who Cares for the Elderly*, 6; John R. Plewa, “The Wisconsin

young children, was gendered. Abel reports that 77% of adult children who provided care to elderly parents were women—daughters and daughters-in-law.⁷⁸¹ As lifespans increased, more elderly needed care for longer periods of time. In Abel’s study of fifty-one women who provided care to relatives, 88% of them provided care for more than a year. Nearly 40% of the women she followed spent more than four years doing unpaid care work for aging loved ones.⁷⁸² If this problem seemed acute in the 1980s, academics and policy makers were well aware that the Baby Boom generation would be following, greatly magnifying the pressures created by longer lifespans and chronic conditions.

Fundamental transformations about women in the workforce repeatedly spurred political dialogue and efforts to craft legislation, especially about child care. Although President Nixon vetoed a child care bill in 1971, the dependent child tax credit was passed in 1976.⁷⁸³ Proponents of family leave became fluent in statistics describing large scale social transformations for American women.⁷⁸⁴ Even cartoon characters, like Andrea in the nationally syndicated cartoon strip *Cathy*, drew on numerical firepower when confronting her once and future boss. Andrea lost her job with the birth of her baby but was re-hired to replace her own replacement when she, in turn, left for childbirth. Holding her baby Zenith in her arms, Andrea lectured her boss about the changing nature of family and workforce in the United States as smoothly as an expert

Family and Medical Leave Act: States Resolving the Conflict between Parenthood and Livelihood,” 187, *Parental Leave and Child Care*, 190.

⁷⁸¹ Abel, *Who Cares for the Elderly*, 4.

⁷⁸² *Ibid.*, 9.

⁷⁸³ Laughlin, “Maternity Leave and Employment Patterns,” 3.

⁷⁸⁴ “Goldie Totten and Bobbie Totten, “Goldie and Bobbie Mat/Pat Speech.” CEP 69: 7.

witness before Congress.⁷⁸⁵ Fundamentally, statistical framing casts the issue as one of inevitable and inexorable large scale social forces that necessitated a policy response. When Representative Schroeder introduced her first bill in 1985, she observed that the American family “which existed 30 years ago.... isn’t the predominant model anymore...more women are working in the paid labor force, and more men are taking on the responsibilities of childrearing. Our employment policies should begin to reflect the changing reality of parenthood.”⁷⁸⁶

Maternity Suits and the Pregnant Professional

The woman doctor or lawyer, not the waitress, sales clerk or factory worker, shaped the popular face of the problem. While the demographic changes, in aggregate, provided a strong general impetus to seek policies and develop practices relating to work and family, women’s access to the professions and the growing numbers of women in prestigious careers and high positions presented a particular crucible for balancing motherhood and work. One of the greatest successes of 1970s feminism created its own particular problems for the most successful working mothers which, in turn, shaped the overall debate about pregnant workers and new mothers in the workforce.

Obstetric textbooks and maternity guides from the 1940s and 1950s assumed that only poorer and working class women would have to work during and after pregnancy. However, by the 1960s, the U.S. Department of Health, Education and Welfare found that women with higher levels of education were more likely to be employed during their first pregnancy than women with lower levels of education. There was also a positive correlation between family income

⁷⁸⁵ Cathy Guisewite, *Why do the Right Words always come out of the Wrong Mouth?* (Kansas City, MO: Andrews and McMeel, 1988), 22.

⁷⁸⁶ “Caucus Members Announce Parental Leave Bill,” April 17, 1985, CEP 65:12.

level and employment during pregnancy, at least for first pregnancies.⁷⁸⁷ Women with more education had more rewarding kinds of jobs that were easier to do while pregnant, that paid more and often offered more benefits. By the 1980s, more women had those kinds of jobs.

The attempt to pass family leave legislation arrived on the heels of a successful feminist attempt to secure admission for women into graduate and professional schools and to desegregate the previously all-male bastions of law, medicine, and business. A report from the Institute for Women's Policy Research found that in 1972, about 10% of physicians and surgeons were women and the percentage had doubled by 1990. In 1972, less than 5% of attorneys were women; by 1990 a little more than 20% of those practicing law were women. In 1972, almost no civil engineers were women but by 1990, women represented 5% of that profession.⁷⁸⁸ That first large cohort of women who graduated from the graduate and professional schools and polished their resumes in the 1970s was, by the 1980s, struggling to balance work and family.⁷⁸⁹ A much larger number of doctors, lawyers, bankers, business executives, and journalists were having babies in the 1980s than ever before. These juggling acts marked a lifecycle stage not only in the lives of individual women, but also in the feminist movement and the labor force.

The parental leave bills, and the discussions surrounding the bills, were associated with the pregnancies of women in the professions through a regular media parade of stories about

⁷⁸⁷ "Employment During Pregnancy: Legitimate Live Births United States-1963," National Center for Health Statistics, Washington, DC, series 22, no. 7 (September 1968): 2, 7, 12. By 2008, 87% of women with college degrees who were expecting their first baby stayed at work during their pregnancies. Lynda Laughlin, "Maternity Leave and Employment Patterns," 5-6.

⁷⁸⁸ Ariane Hegewisch and Heidi Hartmann, "Occupational Segregation and the Gender Wage Gap: A Job Half Done" (Washington DC: Institute for Women's Policy Research, 2014): 3.

⁷⁸⁹ As early as 1975, *New York Times* reporter Georgia Dullea remarked on the importance placed on women in the medical field when she read a medical school brochure that featured the image of a pregnant doctor attending to a patient. Georgia Dullea, "More Women Now in Law and Medicine," *New York Times*, January 15, 1975, 68.

pregnant bankers, lawyers, doctors, and MBAs. They were a ready market for self-help and advice books, newspaper columns and magazine stories addressing pregnancy in the workplace.⁷⁹⁰ Such women were also publishing their own accounts, which offered readers personal insight about ways to cope and pitfalls to avoid for the professional woman about to have a baby or pondering if they should. The feminist psychology professor Phyllis Chesler wrote *With Child*, replete with accounts of women's career conflicts.⁷⁹¹ Many journalists recognized themselves in the stories they began to cover more often about pregnant professionals and their needs for maternity leave.⁷⁹² Stories of pregnant bankers and lawyers were easy to write and were very appealing.⁷⁹³ The problems they presented seemed difficult, but also fairly clear cut. Well-spoken, highly achieving women wanted very much to succeed at their jobs and mothering. The *New York Times* reported that “Nancy Jones wanted it both ways. ‘I love corporate America,’ she said, ‘but I love my family too.’”⁷⁹⁴

Maternity is a key part of the larger puzzle of sex segregated jobs and lower wages and pensions for women. Most women only have a few children. In any given workplace, there are unlikely to be many pregnant women at a time. But pregnancy had long lasting effects on a

⁷⁹⁰ Jean Marzollo, *Your Maternity Leave: How to Leave Work, Have a Baby, and Go Back to Work Without Getting Lost, Trapped, or Sandbagged along the Way* (New York: Poseidon Press, 1989); Diana Mason and Diane Ingersoll, *Breastfeeding and the Working Mother* (New York: St. Martin's Press, 1986); Wendy Wardell Morrones, *Pregnant While You Work: A Practical Guide to Having a Baby and a Job* (New York: Macmillan, 1984); Meg Wheatly and Marcie S. Hirsch, *Managing Your Maternity Leave* (New York: Houghton Mifflin Company, 1983); Susan Schiffer Stautberg, *Pregnancy Nine to Five* (New York: Simon & Schuster, 1985); Eileen Casey, *Maternity Leave: The Working Woman's Guide to Combining Pregnancy, Motherhood and Career* (New York: Avon, 1995).

⁷⁹¹ Phyllis Chesler, *With Child: A Diary of Motherhood, an Intimate Account of Pregnancy, Childbirth and Mothering* (New York: Thomas Crowell, 1979).

⁷⁹² You can deduce this by the number of these stories written by women, but sometimes the connection is made explicit as in an *Industry Week* story in 1986, where a text box points out that the author has two kids, aged 3 and 1. Joani Nelson-Horchler, “Executive Super-Moms: Mixing Business Careers and Motherhood,” *Industry Week*, (February 3, 1986): 36.

⁷⁹³ Nelson-Horchler, “Executive Super-Moms,” 32-36.

⁷⁹⁴ “Company News, Time off for Child Care: Programs Vary,” *New York Times*, January 27, 1981.

woman's career. Women who leave their jobs with the birth of a child lose not just a few months or years of income, they also lose seniority, opportunities for advancement or training, pay raises and pensions which can have significant and long lasting detrimental effects on careers and lifetime earnings. Cultural ambivalence over careers for the mothers of young children constrained the career possibilities for women, even those who had relative power and influence in the workplace.

Stephanie Whyche observed, in *USA Today*, that “It’s not unusual for a personally desired pregnancy to be professionally troubling for high-level executives.” “For women working their way into a male corporate system, pregnancy can make blending in difficult.”⁷⁹⁵ In the 1980s, bosses and peers offered conflicting advice. A woman company president advised a young female manager who was “serious about her career” “to get back as quickly as she possibly can,” like her own ten day maternity leave. An executive recruiter told *Industry Week* that most highly paid executive women “make absolutely no demands on their employers because of their children.”⁷⁹⁶ Betty Lehan Harragan, author of a book on women and corporate culture, told a reporter for *USA Today* that a pregnant executive “better have a very healthy pregnancy” because if she didn’t, “then she almost better start looking for a transfer to a staff job.”⁷⁹⁷ A system that could incorporate normal pregnancy and delivery only begrudgingly was hopelessly inadequate in responding to complications. Luck played a significant part in woman’s effort to juggle work and motherhood.

⁷⁹⁵ Stephanie Whyche, “Be Professional About Your Pregnancy” *USA Today*, Oct. 13, 1987.

⁷⁹⁶ Nelson-Horchler, “Executive Super-Moms,” 36.

⁷⁹⁷ Whyche, “Be Professional About Your Pregnancy.”

When a pregnant Phyllis Chesler tried to negotiate her university teaching schedule for the semester after her baby was born, she wanted classes at a campus near her apartment or a part-time schedule at the main campus. The administration was uncooperative. She remembers being asked, “Why don’t you just make up your mind? Do you want to teach or be a mother?” Someone else suggested that she quit. Her own chair, more sympathetic but less powerful than higher administration, advised that she go on sick leave. By the time he had figured out a part-time schedule for her, she had taken an unpaid leave. “Child” she said, addressing her belly, “No one takes my need for money seriously.”⁷⁹⁸ Despite her unpaid leave, Chesler had a full schedule promoting her earlier book. She found that travel, conferences and interviews meant leaving her son, suffering engorged breasts, and confronting a professional and social world that didn’t accommodate pregnant women and new mothers. Feeling out of place, she wondered, “will they take away my books, my doctorate? Will they give me a cotton housedress and tell me not to bother them for twenty years?”⁷⁹⁹ Even after the FMLA passed, one lawyer told Joan Williams that “Since I came back from maternity leave, I get the work of a paralegal. I want to say, look, I had a baby, not a lobotomy.”⁸⁰⁰ Some occupations are easier to leave and re-enter while others may be harder to return to, thus channeling mothers into and away from certain fields.

Fashion advice was a special subset of attention to pregnant professionals. Dressing for work was a problem for many pregnant workers. When writing a guidebook for pregnant professionals, Jean Marzollo found a nurse who had struggled to meet uniform requirements

⁷⁹⁸ Phyllis Chesler, *With Child*, 99, 100, 139.

⁷⁹⁹ *Ibid.*, 163.

⁸⁰⁰ Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to do about It* (Oxford: Oxford University Press, 2000), 69.

after learning the special blue student nurses' uniform had no maternity versions.⁸⁰¹ Maternity police uniforms were newsworthy stories.⁸⁰² Some policewomen had to create their own maternity uniforms by piecing in additional panels of fabric to their regular uniform and others were banned from their department pictures because their uniforms didn't fit.⁸⁰³ Some flight attendants recalled being told airline pregnancy bans were because there were no maternity uniforms for stewardesses.⁸⁰⁴ One pregnant pilot was criticized by a male pilot for being out of uniform because he did not recognize the *maternity uniform* as a *uniform*.⁸⁰⁵ Once pregnancy didn't result in military discharge, maternity uniforms became an on-going issue in military supply in the armed forces.

Business women and lawyers didn't exactly have uniforms, but maternity played havoc with their wardrobes as well. In a six point plan for "Pre-Baby Planning" for pregnant professionals, *USA Today* delivered fashion advice as point two: "Look professional in maternity business suits and separates. Stay away from school-girl jumpers."⁸⁰⁶ Marzollo advised readers

⁸⁰¹ Jean Marzollo, *Your Maternity Leave*, 59. B. Park-Dixon remembered that her pregnant co-workers had had to wear "hideous" smocks. When she was pregnant herself, she tried to avoid the maternity uniform by just asking for the regular uniform in a larger size. B. Park-Dixon, *Student Nurse 60's Style* (Bloomington, IN: AuthorHouse, 2011), 111.

⁸⁰² Barbara Basler, "Police Plan a Uniform for Pregnant Officers," *New York Times* (September 21, 1982); Delta's first maternity uniform appeared in 1983.

⁸⁰³ Jaime E. Bachantin and Renee L. Cowan, "Total Motherhood and Having it All: Reproduction, Maternity and Discourses of Choice among Female Police Officers," in *Contemplating Maternity in an Era of Choice: Explorations into Discourses of Reproduction* ed. Saba Hayden and D. Lynn O'Brien Hallstein, (Lanham, Maryland: Lexington Books, 2010), 251-252.

⁸⁰⁴ United States Commission on Civil Rights, *Perspectives: The Civil Rights Quarterly* 12-14 (1980): 10; "Delta Flight Museum," <https://www.deltamuseum.org/exhibits/delta-history/delta-brand/uniforms/the-jet-age> (August 21, 2015); "Vintage AA Stewardess Uniforms American Airlines: Maternity Wear," <http://aastewardess.com/Maternity/Maternity.htm> (August 21, 2015).

⁸⁰⁵ Louwanda Evans, *Cabin Pressure: African American Pilots, Flight Attendants, and Emotional Labor* (Lanham, MD: Rowan & Littlefield, 2013), 50.

⁸⁰⁶ Whyche, "Be Professional About Your Pregnancy."

of her book *Your Maternity Leave*, to “Wear maternity clothes that project the same image your regular clothes did.”⁸⁰⁷ Women in the corporate board room or the legal practice worrying about leave, childcare, appointments, and potential complications, had best also remember their “image.” In fact, there are entire books from the 1980s that focus on maternity fashion for the career women and concern for this “image” gave birth to a successful company.⁸⁰⁸

In 1982 Rebecca Matthias was pregnant. She wanted a nice suit to wear to meetings with bankers while trying to get a small business loan for starting a computer company. However, she could not find anything to wear that projected a business-like image. So, instead of a computer company, this architect founded MothersWork to fill the demand she felt herself as a working pregnant professional.⁸⁰⁹ Her company specialized in maternity business suits with special camouflaging features designed to distract from the pregnant body and the suspicions it might arouse about a woman’s career commitment. This company, now Destination Maternity, is a major retail conglomerate of maternity stores. A publically traded company since 1993, this business includes the high fashion store Pea in a Pod, Mimi Maternity and Motherhood Maternity as well as its original catalogue and a patent on its “secret fit belly” technology.⁸¹⁰ Its founding mission, to obscure the pregnancies of emerging women professionals, businesswomen and lawyers, illustrates tensions between pregnancy and work. Camouflaging a normal biological

⁸⁰⁷ Marzollo, *Your Maternity Leave*, 51.

⁸⁰⁸ Alyson Fendel, *Waiting in Style: A Maternity Wardrobe that Works* (Washington, DC: Acropolis Books, 1983); Maryann Buckman Brinley, *Maternity Style: How to Look Your Best When You’re at Your Biggest* (New York: St. Martin’s Press, 1985); see also Susan B. Tribich, “Maternity Fashion Business Just Expanding,” *New York Times* May 8, 1977.

⁸⁰⁹ Alison Leigh Cowan, “Rebecca C. Matthias: Entrepreneur” *New York Times*, May 7, 1989.

⁸¹⁰ Rebecca Matthias, *MotherWork: How a Young Mother Started a Business on a Shoestring and Built it into a Multi-Million Dollar Company*, (New York: Doubleday Business, 1999); Maria Panaritis, “Founder Leaving her Apparel Empire,” http://articles.philly.com/2009-11-15/business/25283950_1_crescendo-partners-rebecca-matthias-mothers-work (June 20, 2015); Alyson Fendel, *Waiting in Style*.

event gives the sense that women are not the real workers and that there is profound discomfort with the idea of the female body in the workplace. Also, pregnancy is a problem for the worker herself to solve, on her own, in part through buying the right clothing. The columnist Ellen Goodman called the maternity business suit “pregnant with meaning.” Using fashion advice as a stand in for other parts of the work-a-day world, she observed that “even when working women are in the family way, they are supposed to dress in the male way.”⁸¹¹

In 1986, *Industry Week* suggested that a part of the solution was mental attitude. “Positive thinking may be the key. Some women are so highly driven to achieve both as executives and as parents that they find they can do both because they *think* they can” (emphasis in original).⁸¹² This advice from *Industry Week* lays the blame for any problems directly in the already full lap of working mothers. If they struggled, it was evidence that they didn’t have the right attitude. As offensive, patronizing and victim-blaming as this is, it’s also patently a poor excuse for policy.

However, by the 1980s, law firms, medical practices, newspapers and business firms had become less likely to engage in the most overt kinds of pregnancy discrimination, at least against their highly paid professionals. These very good jobs were likely to have robust fringe benefits and to offer some flexibility and individual control over, for instance, bathroom breaks, seating, access to snacks and the ability to schedule prenatal appointments during the day.

Not only were there more women in the professions, younger men in those positions were more likely than before to have working wives, and, indeed to have wives with careers, not just jobs, perhaps in the same profession as their husbands. These men were also likely to be re-examining what it meant to be a father and to be re-making the role in light of the needs of a

⁸¹¹ Ellen Goodman, “Equalwoman.”

⁸¹² Joani Nelson-Horchler, “Executive Super-Moms,” 36.

working spouse and their own needs and desires. John Plewa, who worked to get family leave through the Wisconsin state legislature, believed that one reason states made progress passing family leave while it was stalled in the US Congress was that state legislators were likely to be younger than US Representatives and Senators. This meant they were more likely to have young children themselves and also be of a generation more likely to have dual income families.⁸¹³

Personnel policies, in particular the availability of leave, had a profound effect on new mothers. In 1990, Martin O'Connell found that overall, 56% of new mothers returned to work within six months of having their first child in the early 1980s. However, 71% of new mothers whose employers offered formal maternity leave returned to work within six months. This, O'Connell believed, was because these new mothers felt loyal to employers who had been loyal to them, but also because employees on leave did not have a job search ahead of them when they were ready to go back to work.⁸¹⁴ Maternity leaves saved time for women *and* for employers.

Getting substantial numbers of women into the professions was a real change in the labor force, although, to be sure, the numbers were still small, much smaller in real life than in the public imagination. Susan Faludi reported that "between 1972 and 1988, women increased their share of such professional jobs by only five percent" and this "progress slowed to a trickle or stopped altogether by the end of the decade."⁸¹⁵ The real growth areas for women were in already female dominated jobs or in new positions, like the rapidly growing video display terminal operator positions.

⁸¹³ John R. Plewa, "The Wisconsin Family and Medical Leave Act," 187-188.

⁸¹⁴ Martin O'Connell, "Maternity Leave Arrangements: 1961-1985," *Current Population Reports Series P-23*, no. 165 (March 1990): 11. See also Lynda Laughlin, "Maternity Leave and Employment Patterns," 9; Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (Washington, DC: Department of Labor, 1996).

⁸¹⁵ Susan Faludi, *Backlash: The Undeclared War Against American Women* (New York: Crown Publishers, 1991), 366.

In 1961-1965, women college graduates were slightly *less* likely than women who had not finished high school to receive some paid leave from their jobs when they had their first babies. This reflects the influence of labor unions and their role in getting benefits for their members. However, by 1981-1985, when more women with college degrees worked and many had good jobs with career prospects, college graduates were *nearly three times* as likely as women who had not finished high school to have some form of wage replacement when they had their babies. By 1991-1995, that gap was even greater.⁸¹⁶ Professionals and management were likely to receive a wage replacement benefit that was a percentage of their usual pay and was often as high as their regular salary. Blue collar workers, in contrast, were less likely to have wage replacement and when they did, it usually covered less of their usual wages.⁸¹⁷ Pink collar workers, the majority of women in the labor force, were least likely to have benefits that included wage replacement. Equal Rights Advocates pointed out that most working woman were also unlikely to enjoy the protections of collective bargaining agreements “since women are largely segregated into female-only occupations, unions have not championed the cause of pregnant workers and indeed these occupations are unorganized.”⁸¹⁸

In their argument in favor of specific dedicated maternity leaves, Equal Rights Advocates observed that the conflict between employment and family “disproportionately affects women in female-concentrated occupations since these women are less likely than women in the professions to find employers willing to accommodate their needs.”⁸¹⁹ Women who had reached

⁸¹⁶ Lynda Laughlin, “Maternity Leave and Employment Patterns ,” 12; Kristin Smith, Barbara Downs and Martin O’Connell, “Maternity Leave and Employment Patterns 1961-1995,” 13.

⁸¹⁷ Melissa A. Berman, “What do Women Get?” *Across the Board* (March 1987): 20.

⁸¹⁸ “Equal Treatment v. Equal Opportunity,” *Equal Rights Advocates* (probably a 1984 issue of their newsletter): 6, CLUW 70:30.

⁸¹⁹ *Ibid.*, 1.

high level professional positions had greater flexibility built into their positions. Personal secretaries, private offices, the authority to schedule meetings and delegate work, and the financial resources to hire housekeepers or nannies, could all help women high up a corporate ladder balance heavy work expectations with family needs. A woman senior vice president at American Express recognized the flexibility that came with being the boss when she remarked, in *Industry Week*, that “it’s easier to be an executive parent than it is to be a clerical parent.”⁸²⁰

In the 1970s, pregnant employees who filed grievances, EEOC complaints and lawsuits can be grouped into three main categories—teachers, flight attendants, and others. In the remainder category, most of the plaintiffs held working class pink collar or blue collar positions. In *Gilbert*, *Gedulidig*, and *Satty* all the plaintiffs were working class. Even in the two cases that heralded the shift between the anti-discrimination approach of the PDA and the move to obtain family leave as a positive right, the *Cal Fed* receptionist and the *Miller-Wohl* clothing store clerk were decidedly working class women who needed their jobs. Cases like Tamara Buley’s and Lillian Garland’s raised stickier questions about poverty and other barriers to opportunity. Buley had missed days of work in her first month on the job. Garland, who, in her interviews does come off as beautiful and very sweet, was unmarried and her job choice was severely constrained by both her education and her income. She could not afford a car to get to a job at some other Cal Fed branch. Furthermore, Garland was African American and a single mother. In the era of the “welfare queen” stereotype that stigmatized poor black women and pathologized single mothers, an unmarried mother like Garland was more likely to be blamed for social decay than held up as a role model for women attempting to have it all.

⁸²⁰ Joani Nelson-Horchler, “Executive Super Moms,” 34.

U.S. News & World Report contrasted the stories and photos of Lillian Garland with Barbara Inkellis, general counsel and “the highest-ranking woman executive” at her firm. Inkellis “had more leeway to work out a flexible maternity arrangement” because she largely controlled her own schedule anyway and because her company valued her skills.⁸²¹ While Garland needed help combining paid labor with motherhood, women like Inkellis would fuel much of the discussion about family leave throughout the 1980s.

By the Sweat of her Brow

In California, early in 1982, Lillian Garland, an African American single mother, gave birth. She took two months off work at California Federal Savings and Loan to recover from the caesarian delivery and then returned to Cal Fed to resume her job as a receptionist. Before she left her job, she had discussed returning with her supervisor. Nevertheless, Cal Fed had filled her position and she had lost her job. Standing in the bank on what she thought would be her first day back at work, she “felt cold all over” and asked, “What do I do now?”⁸²² Single and unable to find other employment, she lost her housing and ended up sleeping on a friend’s couch, which was a factor in temporarily losing custody of her new baby to the father.⁸²³ Along the way, Garland learned about a California law that required employers to allow women up to four months leave to recover from childbirth.

Puerto Rico’s maternity leave law (the only one that was paid) was passed in 1942. By the 1970s, states began responding to demographic changes among employed mothers. Five

⁸²¹ “Expectant Moms, Office Dilemma,” *U.S. News & World Report*, March 10, 1986.

⁸²² Cynthia Gorney, “Justice and the Price of Pregnancy,” *Washington Post*, April 5, 1984.

⁸²³ *Ibid.*; Tamar Lewin, “Maternity Leave: Is it Leave, Indeed,” *New York Times*, July 22, 1984.

states passed laws that required employers to hold the jobs of women who needed a pregnancy leave even if they did not allow leave for other reasons. In 1972, the year the EEOC released guidelines on avoiding pregnancy discrimination, Massachusetts passed legislation regarding job-protected maternity leaves and Connecticut followed the next year. The Montana Maternity Leave Act became state law in 1975. In 1978, the California legislature passed a maternity leave law, introduced by Howard Berman and supported by, among others, Maxine Waters. The California law passed just months before Congress passed the PDA. Wisconsin's provision for job-protected maternity leave passed shortly after the PDA, in 1981.⁸²⁴

These state laws applied even if an employer provided no leave for any other condition. It was a positive right specifically for pregnant employees, unlike the PDA, which did not grant pregnant workers any right specifically, only mandating that they not be treated worse than other employees. The California law applied to workplaces with more than four employees.⁸²⁵

The California Department of Fair Employment and Housing had received hundreds of complaints about companies violating this law.⁸²⁶ They told Garland's employer, California Federal Savings and Loan Association, to reinstate her and pay her back wages. Eventually, Cal Fed did re-hire Garland for a receptionist position, poignantly to replace a woman out on maternity leave, but they did not pay her back wages, or admit that they had broken the law. Instead, they challenged the law in court, claiming the California law violated the 1978 Pregnancy Discrimination Act because it sought to require benefits for pregnant workers, four

⁸²⁴ Lise Vogel, *Mothers on the Job: Maternity Policy in the U.S. Workplace*, (New Brunswick: Rutgers University Press, 1993), 180, note 12; *Miller-Wohl v. Commissioner of Labor and Industry* 228 Mont. 505; 744 P. 2d 871; 1987 Mont LEXIX 1024; 44 Mont. St. Rep. 1718; 44 Fair Empl Prac. Cas. (BNA) 1853; 45 Empl. Prac. Dec. (CCH): 37, 740 Oct 15, 1987. The history of the passage of the California and Montana laws can be found in ch. five of Dinner, "Pregnancy at Work."

⁸²⁵ Gorney, "Justice and the Price of Pregnancy."

⁸²⁶ *Ibid.*

months of protected leave, that the bank did not provide for other workers. Because of the PDA, Garland probably claimed benefits under the state disability insurance program to provide some wage replacement for the period she was unable to work when she had her baby. But, when she tried to return to work, her employer thought that the PDA protected *them*.

Cal Fed, and the Chamber of Commerce and the Merchants and Manufacturing Association, who both joined the case, unabashedly sought protection for practices that left new mothers unemployed within the very statute that feminist legal strategists had crafted to preserve rights for pregnant workers. Lou Custrini, speaking for the Merchants and Manufacturing Association, told a *Washington Post* reporter “The feminist argument was that women are equal to men...Do they want to be treated the same as men in the workplace, or do they want exceptions in the workplace?”⁸²⁷ Furthermore, at trial, the lawyers for Cal Fed suggested that the California law violated not only the PDA, but also Title IV of the Civil Rights Act of 1964 because it would force the bank to discriminate on the basis of sex *against men* whose jobs would never be held for them for pregnancy leave.⁸²⁸

In Montana, the Montana Maternity Leave Act (MMLA) had also been challenged in court by employers who said that the federal Pregnancy Discrimination Act invalidated the state law. One of the most colorful acknowledgements of the new workforce composition was that of Montana Supreme Court Justice John Sheehy who wrote, in his opinion:

The Montana Maternity Leave Act is a legislative recognition of changing economic mores in American family life....Economic necessity has converged with the growing insistence of women for equal opportunity in all fields to bring about legislative enactments such as the Montana Maternity Leave Act. The biblical imprecation that the

⁸²⁷ Ibid.

⁸²⁸ Ibid.

male shall eat his bread by the sweat of his brow has been broadened; Eve is now included.⁸²⁹

While Sheehy recalls that God punished man for eating the forbidden fruit by sentencing him to heavy farm labor, many readers would remember that in the same passage of *Genesis*, God punished woman by the pains of childbirth. Sheehy left this much only implied, but it certainly fit the case of Tamara Buley, whose difficult pregnancy cost her her job in Montana and whose situation the justice was considering.

Buley, a new employee of the clothing store chain Miller-Wohl, missed some days of work, and spent extra time in the bathroom coping with symptoms of early pregnancy. She was fired because the company had a policy of no sick leave for employees with less than a year of service. She knew about the Montana Maternity Leave Act and filed a complaint with the state commissioner, who ordered Miller-Wohl to reinstate her and pay her back wages. Instead, the company filed suit in federal court to have the law itself struck down as being in violation of the federal 1978 Pregnancy Discrimination Act. When the federal district court agreed with the Montana Commissioner, the company appealed and took their case to the state court where they secured a favorable decision. Then the Commissioner appealed to the State Supreme Court. Writing for the majority, Justice Sheehy observed that “sorting out the legal issues in this case is like walking through a hall of mirrors, so many facets are presented.”⁸³⁰ He observed that laws sincerely meant to protect pregnant workers’ rights ended up hurting individual pregnant workers like Tamara Buley. The Montana Supreme Court decided against Miller-Wohl. Sheehy found

⁸²⁹ *Miller-Wohl Company v. Commissioner of Labor and Industry* 214 Mont 238; 692 P. 2d 1243; 1984 Mont. LEXIS 1141; 36 Fair Empl Prac. Cas. (BNA) 1010; 5 Employee Benefits Cas. (BNA) 2622; 36 Empl. Prac. Dec. (CCH) P35, 1976.

⁸³⁰ *Ibid.*

that the company had violated Montana's law and that maternity leave law in Montana was not in conflict with the PDA. The US Supreme Court declined to hear *Miller-Wohl* and so the judgement of the Montana Supreme Court stood. *Miller-Wohl* and the *Cal Fed* case, especially, spurred interest in a federal law that would provide the protections of the California law within the same principles of gender neutrality that underwrote the PDA.

Difference Versus Equality Debate

Susan Deller Ross called the *Cal Fed* case “an upside-down lawsuit” because it was brought by the employer. “This is not your normal Title VII suit.” she said, “The remedy issue has been distorted.”⁸³¹ Although she was troubled by *Cal Fed* and the attempt to use the PDA *against* a new mother, Deller Ross was also uneasy about the California law itself. She agreed, in theory, with the trial court judge, Judge Manuel L. Real, who said equal treatment of men and women meant both equally good treatment, if good treatment was to be had, but also, unfortunately, equally bad treatment in those situations where no one got job benefits like job-protected leave.⁸³²

As *Miller-Wohl* and *Cal Fed* wound their way through the courts, the cases split the feminist community in two.⁸³³ For instance, the national ACLU Women’s Rights Project filed an amicus brief opposing the California law while the California state ACLU filed a different brief

⁸³¹ Susan Deller Ross, quoted in Mark Rust, “Maternity Leave Caught in the Crossfire,” *ABA Journal* (August 1, 1986): 55.

⁸³² Deborah Dinner suggests that Susan Deller Ross supported the California law. However, Deller Ross was pained by the case, but clearly committed to a gender-neutral approach. She was a co-author of a gender neutral brief filed in the *Cal Fed* case and she told the *New York Times* that “there is a conflict between the Federal Pregnancy Discrimination Act...and the California law.” Tamar Lewin, “Debate over Pregnancy Leave,” *New York Times* February 3, 1986.

⁸³³ Wendy Williams labeled the split “difference versus equality” in an early law review article about maternity leave laws. Most subsequent analysts employ her terminology.

defending the law. On one side were some of the most important architects of the PDA, including Susan Deller Ross, Wendy Williams, and the lawyers of the Women's Legal Defense Fund, who believed that specific special protective treatment for pregnant workers was a Trojan horse through which discrimination against women workers could spring once biological difference was encoded as an acceptable distinction. They pointed out that early twentieth century protective labor legislation had been used to "protect" women out of certain jobs and restrict occupational opportunities.⁸³⁴

On the other side, other feminists argued that equal treatment would produce very unequal outcomes since women faced job loss upon becoming mothers that men did not face when they became fathers. Feminists as prominent as Betty Friedan, Herma Hill Kay and Sylvia Law supported the California Law. So did Planned Parenthood, the California Federation of Teachers, the International Ladies Garment Workers Union, and the Coalition for Reproductive Equality in the Workplace.⁸³⁵ Claiming that workplace accommodations for pregnancy represented equality of opportunity, supporters of the California Law, and those in Montana, Connecticut, Massachusetts and Wisconsin, said that the workers who should be compared in this case were those women about to become mothers and those men about to become fathers. If new mothers were penalized for reproducing by losing their jobs and new fathers were not, a law against that was entirely consistent with the PDA.⁸³⁶

⁸³⁴ Carol Kleiman, "Maternity Law Fraught with Controversy," *Chicago Tribune* (April 7, 1986); David G. Savage, "What is Equal?" *Los Angeles Times*, September 24, 1986; Tamar Lewin, "Debate over Pregnancy Leave," *New York Times*, February 3, 1986.

⁸³⁵ Bettyann Kevles, "A Feminist in the late 80's" *Los Angeles Times Magazine*, 17 May 1987, reprinted in Janann Sherman, ed., *Interviews with Betty Friedan* (Jackson, MS: University of Mississippi Press, 2002), 79; Vogel, *Mothers on the Job*, 81-84.

⁸³⁶ "Equal Treatment v. Equal Opportunity," *Equal Rights Advocates* (probably a 1984 issue of their newsletter): 6, CLUW 70:30.

Importantly, feminist support of these maternity laws also raised the question of reproductive rights. Workplace policies that provided no job-protected leave at all represented a barrier to women workers' ability to have children, a right that the Supreme Court had recognized, while such policies would not burden a male workers' decisions to become a father or not.⁸³⁷ This argument tapped into a series of Supreme Court decisions about reproduction and the right to privacy. Lillian Garland understood this argument. If she had known she would lose her job and be unable to support her child, she said she would not have had a child, and she told the *Washington Post* that "a lot of women do have to make exactly that decision."⁸³⁸

The split among feminists was eventually distilled into the shorthand "difference versus equality debate." This fundamental divergence in understanding pregnancy in the workplace was an extension of the old debate over protective labor legislation reinterpreted in light of new laws and legal precedents and expanded occupational opportunity for women, especially in the professions. The ink spilled in this disagreement became a part of the story of American maternity policy, evident in dozens of law review articles.⁸³⁹ A reporter for the *Washington Post* observed that

⁸³⁷ Ibid.

⁸³⁸ Gorney, "Justice and the Price of Pregnancy.

⁸³⁹ The major works addressing the "equality-difference debate" raised by the PDA, various state laws on maternity leave, and the federal and state legislation introduced during the 1980s and early 1990s. include the following. Ann C. Scales, "Towards a Feminist Jurisprudence," *Indiana Law Journal*. 56, no. 3 (1980-81): 375-444; Wendy Williams, "The Equality Crisis: Some Reflections on Culture, Courts and Feminism," *Women's Rights Law Reporter* 7, no. 3 (1982): 175-200; Linda Krieger and Patricia Cooney, "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality," *Golden Gate University Law Review*. 13, no.3 (1983): 513-572; Wendy Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," *Review of Law and Social Change* 13 (1984): 325-380; Wendy Chavkin, "Walking a Tightrope: Pregnancy, Parenting and Work," in *Double Exposure: Women's Health Hazards on the Job and at Home*, ed. Wendy Chavkin (New York: Monthly Review Press, 1984): 196-213; Herma Hill Kay, "Equality and Difference: The Case of Pregnancy," *Berkeley Women's Law Journal* 1, no. 1 (1985): 27-37; Nadine Taub and Wendy W. Williams, "Will Equality Require more than Assimilation, Accommodation or Separation from the Existing Social Structure?" *Rutgers Law Review* 37 (1985): 825-44; Reva B. Siegel, "Employment Equality under the Pregnancy Discrimination Act of 1978," *Yale Law Journal* 94 (March 1985): 929-56; Nancy E. Dowd, "Maternity Leave: Taking Sex Differences into Account," *Fordham Law Review* 54 (April 1986): 699-765; Ruth Colker, "The Anti-Subordination Principle:

In law review articles, in conference room arguments and long-distance telephone fights, in legal workshops arranged specifically to dispute this issue, lawyers have assailed each other with questions that push at the very definition of women's equality.⁸⁴⁰

Some lawyers and activists who had worked on the passage of the PDA worried that laws that gave special rights to pregnant women could encourage employers to hire fewer women and perpetuate discrimination in the family by enshrining the care of newborns as a mother's responsibility. They worried that maternity leave "does nothing to encourage men to participate in early childrearing and in fact, locks women in to this role."⁸⁴¹ Maternity leave might help an individual woman, but at risk of perpetuating women's inequality within both the family and the workforce.

As the California case wound its way to the Supreme Court, a loose group of activists and lawyers thought about ways to address the real needs and concerns of pregnant women and new mothers within a framework of equality. They saw the injustice of Garland and Buley losing their jobs exactly when they most needed their jobs. But they also held that a workplace that would replace any worker who was absent for health or family concerns was cruel to pregnant women, new mothers, and other workers as well. In *Miller-Wohl*, amici curiae briefs from some

Applications," *Wisconsin Women's Law Journal* 3, no. 59 (1987): 62; Ava Baron, "Feminist Legal Strategies: The Powers of Difference," in *Analyzing Gender: A Handbook of Social Science Research*, ed. Beth Hess and Myra Marx Ferree (Newbury Park, CA: Sage, 1987); Susan M. Damplo, "California Savings and Loan Ass'n v. Guerra and the Feminist Debate: Sameness/Difference Assumptions about Pregnancy in the Workplace," unpublished paper, Georgetown University Law Center 1987; Lusinda Finley, "Transcending Equality Theory: A Way out of the Maternity and Workplace Debate," *Columbia Law Review* 86, no. 6 (1988): 1118-1182; Joan Scott, "Deconstructing Equality-Versus-Difference: Or, the Uses of Post structuralist Theory for Feminism," *Feminist Studies* 14 (Spring 1988): 33-50; Nancy Dowd, "Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace," *Harvard Civil Rights-Civil Liberties Law Review* 24 (1989): 79-172; Kathleen Daly, "Reflections on Feminist Legal Thought," *Social Justice* 17, no. 3 (Fall 1990): 7-24; Lise Vogel, "Debating Difference: Feminism, Pregnancy and the Workplace," *Feminist Studies* 16, no. 1 (1991): 9-32; Susan Deller-Ross, "Legal Aspects of Parental Leave: At the Crossroads, in *Parental Leave and Child Care*, 94-124; Vogel, *Mothers on the Job*.

⁸⁴⁰ Gorney, "Justice and the Price of Pregnancy."

⁸⁴¹ Congressional Caucus for Women's Issues, "Fact Sheet on Parental Leave Legislation," [May 1984], CEP 68:41.

feminists urged the state and the court to require Montana employers to hold the jobs of all workers out for a time with medical conditions and thus harmonize the MMLA with the PDA by expanding, instead of reducing, rights. The Montana Supreme Court liked this idea but deferred to the legislature to provide a remedy. Speaking to the *Washington Post* after the Real decision in *Cal Fed*, Wendy Williams lamented that “workers who get sick in this country don’t have protection by law. . . . I want for myself that my lot should be the same as other workers, and that we can work together.”⁸⁴² Reacting to the Real decision in the *Cal Fed* case, the syndicated newspaper columnist Ellen Goodman found the problem was in the assumption that the “normal” worker was male and normal needs and expectations in the workforce were those of men. She suggested that the solution was to redefine the normal worker as female and measure equality by the way male needs could also be accommodated within a model of a female workforce. Goodman argued that “Instead of settling for equally shabby or dangerously preferential treatment, we can embrace the ideal of equally decent treatment.”⁸⁴³

The appeals court reversed Judge Real. *Cal Fed* appealed and, in January 1987, the US Supreme Court decided that the PDA did *not* invalidate the California maternity leave law. Justice Thurgood Marshall wrote that congressional intent showed the PDA to be “a floor beneath which pregnancy disability benefits may not drop, not a ceiling above which they may not rise.”⁸⁴⁴ If anything, this decision spurred the equality feminists working on a gender neutral bill to even greater commitment to a solution that did not enshrine women’s biological difference

⁸⁴² Gorney, “Justice and the Price of Pregnancy.”

⁸⁴³ Ellen Goodman, “Equalwoman: Special Garbage in Garb,” *Knoxville Journal*, April 10, 1984.

⁸⁴⁴ Thurgood Marshall, Decision, *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272; 107 S. Ct. 683; 93 L. Ed. 2d 613; 1987 U.S. LEXIS 284.

in law. They did not want to see more maternity only leave laws, but in 1987, Iowa, Tennessee and Louisiana did pass such laws and eight additional states introduced such them.⁸⁴⁵

Mothers and Fathers

The PDA had defined maternity specifically as “pregnancy” and the temporary disabilities and needs that arose out of this limited biological experience. Unlike protective legislation of the early twentieth century, the PDA eschewed the social roles of mothers out of concern that maternal responsibilities might hold women back from job opportunities and that legislative endorsement of mothering would buttress unequal relations within the family. Also, physical limitations and needs could be analogized with other temporary disabilities that could affect men, while child care could not be compared to a heart attack or a skiing accident. However, while it did not itself consign a new mother to take care of her baby, the PDA did nothing to positively promote the sharing of child care between mothers and fathers. Fathers could not access any of the protections of the PDA because they were not themselves ever disabled by their children’s births. Furthermore, adoptive mothers were not disabled either by the way their families grew. The next step in American maternity policy was to argue that fathers and adoptive parents had the right to a leave as well.

In 1987, Puerto Rico extended coverage of the Working Mothers Act to include mothers who adopted a child under school age.⁸⁴⁶ The states with maternity leave laws, and those with disability leaves, however, continued to base their coverage around the issue of pregnancy and

⁸⁴⁵ Steven K. Wisensale and Michael D. Allison, “Family Leave Legislation and Federal Initiatives,” 185.

⁸⁴⁶ [An Act to Amend the Working Mothers’ Protection Act], 7th Session of the 13th Legislature of Puerto Rico: (November 10, 2003) <http://www.oslpr.org/download/en/2000/0120.pdf> (29 June 2015); (June 30 2003) <http://www.oslpr.org/download/en/2000/0054.pdf> (29 June 2015).

not motherhood. However, even when physical effects provided the rationale for her leave, while recovering from childbirth, a new mother could have four, six, or eight weeks, depending on her company or state disability plan, to care for and bond with her baby. Disability plans and the PDA did not say she should, but, if she was there at home changing bloody super-sized sanitary napkins and waiting for the swelling to go down in her feet, she was also usually the one feeding her baby and changing diapers and going for walks with her baby and receiving visitors and getting to know her child. An adoptive mother would have no such job protected leave time because she had no recovering to do although her baby clearly needed the same care and her family needed the same time to bond and adjust to the new arrival. Indeed some adoption agencies required that one parent stay home with the child for a certain number of weeks, or months, in order to approve an adoption. Some companies offered some leave to adoptive parents, but sometimes, adoptive mothers were denied requests for maternity leave. Such cases made for heart-wrenching stories where sometimes families had to pass up an opportunity to adopt a child they wanted.

Once some mothers enjoyed a certain amount of legal protection, it quickly came to seem unjust that some others did not. As Nancy MacLean observes in *Freedom is not Enough*, the strategies and successes of the African American civil rights movement had, by the 1980s, profoundly transformed American notions of discrimination and supplied a new language and analysis that adoptive mothers employed in their own efforts to juggle jobs and children. One adoptive mother whose company offered a paid eight weeks maternity leave had to use vacation time and an unpaid leave to cobble together five weeks off. She told *Working Woman*, “To have

a paid leave for biological mothers and an unpaid leave for adoptive mothers is discrimination.”⁸⁴⁷

As more and more women delayed marriage and childbearing to finish advanced degrees and to establish themselves in their careers, more couples encountered structural infertility, spurring demand for assisted reproductive technologies and also for adoptions. Media relentlessly exaggerated rising infertility. Biological clocks ticked ominously in popular literature and culture and women were warned not to defer pregnancy too long lest they lose out on having children entirely.⁸⁴⁸ Women unable to conceive might regret their career decisions and might even be represented as objects of pity or as somehow unfeminine. A 1983 study by Catalyst found that 17% of the companies surveyed provided some benefits for adoption and some others might make benefits available case by case. But the National Adoption Exchange could point to very few companies that approached their model policy on workplace benefits for adoptive parents.⁸⁴⁹ Missing out on maternity leaves could be perceived as a slight towards the families of women who adopted, or an aspersion on their womanhood. One adoptive mother denied a paid leave by her employer felt that “all these middle-aged men in management were saying, ‘What’s wrong with you that you can’t have your own child?’”⁸⁵⁰ The personal demands of adoption were touching feminist lives. When Donna Lenhoff of the Women’s Legal Defense

⁸⁴⁷ Charlene Canape, “The Forgotten Parents: When Working Women Adopt,” *Working Woman* (June 1985): 136.

⁸⁴⁸ In the 1987 film *Baby Boom*, a high level and competitive management consultant, played by Diane Keaton, becomes the guardian of a baby. Her new family responsibilities lead her to abandon the New York rat race and retreat with her baby to charming small town Vermont to care for her child, find romance, and launch a successful line manufacturing organic baby food. The movie implies that career success has made her barren and unwomanly. To reach feminine fulfillment, she needs a more flexible career, a beautiful little girl, and the love of a handsome man. Women, this movie was not alone in pointing out, needed to have children--and did not need high powered careers. *Baby Boom*, written by Nancy Meyers and Charles Shyer, directed by Charles Shyer.

⁸⁴⁹ Susan McHenry, “Advice for Corporations,” *Ms.* (September 1984): 118.

⁸⁵⁰ *Ibid.*

Fund adopted a baby shortly after President Bush vetoed the FMLA in 1992, she did have leave from the WLDF.⁸⁵¹ Advocates of the FMLA understood the personal politics of adoption.

The inclusion of fathers in maternity policy could potentially transform gender roles within the family by promoting greater equality in domestic responsibility that could, in turn, lead to greater opportunities for women in the workplace once fathers shared the burdens of home and family.

The campaign for family leave was reinforced by what was sometimes called a “new fatherhood” of men actively involved in the care of their children. Buttressed by the work of such scholars as Joseph Pleck, who found the involvement of fathers beneficial to both father and child, this phenomenon was also driven by the reality of two career families. However, it was probably also driven in part by a conservative backlash against single mothers and a desire to retain a prominent role for fathers, even on shifting cultural terrain.

Many employers were not sympathetic to parenting leaves for fathers. When Lieutenant Timothy Scioli asked the Buffalo police department for maternity leave, the force looked askance at the request, because he was not pregnant.⁸⁵² The 1984 Catalyst study of workplace parental leave policies found that in 1980, only 9% of the 384 companies that responded had offered paternity leave but by 1984, almost 37% did. All but the tiniest fraction of these leaves were completely unpaid. David Milofsky, novelist and English professor, did some of his own research on paternity leave and found only one company in Denver that offered paternity leave. Furthermore, very few men actually took advantage of that policy, as was the case, he found, at Proctor and Gamble in Cincinnati and even at the Ford Foundation. Milofsky called paternity

⁸⁵¹ Ronald D. Elving, *Conflict and Compromise: How Congress Makes the Law* (New York: Simon and Schuster, 1995), 260, 277.

⁸⁵² “Father’s Leave Hinges on His Being Pregnant,” *New York Times*, May 27, 1982.

leave a “phantom benefit.” A spokesperson for the one Denver company that did offer paternity leave admitted that management culture was hard to change. “So when a guy thinks about asking his boss for a paternity leave, he rightly figures the boss isn’t going to like it. A lot of times he just doesn’t ask” despite the policy on paper.⁸⁵³ By 1987, Johnson and Johnson Baby Products had a parental leave in addition to its maternity leave. Parental leave could be taken by adoptive parents and covered both mothers and fathers. However, when a reporter asked about the program, she found that “to date, no men have taken advantage of the leave policy.”⁸⁵⁴ During the effort to pass family leave in Minnesota, a study could not find any company that had a formal paternity leave, although some reported allowing fathers unpaid leaves.⁸⁵⁵ One Denver employer admitted to Milofsky that he would give paternity leave but only “if it was a case of the mother dying in childbirth” and if the employee was easy to replace.⁸⁵⁶

As women entered higher earning positions, the family calculus of providing care and weighing the costs of care could sometimes involve fathers taking leaves, or taking a break from their careers. For example, Clint Funk had not planned to stay home with his son, but was not happy with available child care options when his wife’s maternity leave ended. Funk’s career as a self-employed photographer was more flexible than his wife’s career in education, so he assumed the bulk of child care. Many stories where fathers interrupted their careers to care for children involve self-employed men. A mother who was not only a major breadwinner, but also

⁸⁵³ David Milofsky, “The Baby vs. the Corporation,” *Working Woman* (June 1985): 134.

⁸⁵⁴ Dana E. Friedman, “Liberty, Equality, Maternity!” *Across the Board* (March 1987): 14.

⁸⁵⁵ Patricia M. McGovern and Myra J. Segal, “Minnesota Parental Leave Law Weighs Social Reforms Against Costs,” *Business and Health* (December 1987): 42.

⁸⁵⁶ David Milofsky, “The Baby vs. the Corporation,” 134.

the source of the family's employee fringe benefits like health insurance, might decide, with her husband's cooperation, to keep her job.

Milofsky wondered about how to increase the number of men taking leave to care for young children. Job protection was certainly necessary, as was pay because most families depended on a man's paycheck in addition to his love. But, Milofsky also pointed to the need for a changed consciousness. "Favorable word of mouth might even make it socially acceptable."⁸⁵⁷ Shortly before the ultimate passage of FMLA, Pat Schroeder held hearings specifically on the work-family conflicts faced by American men, "Babies and Briefcases: Creating a Family Friendly Workplace for Fathers."⁸⁵⁸ Betty Friedan believed that changes in the workplace that benefited both women and men would not come about until men began to demand them too. In her 1981 book *The Second Stage* she wrote:

We will never solve the new problems and bring about changes in the workplace and child-care options so necessary for the well-being of families if their only supporters and beneficiaries are women. The need for such innovations becomes increasingly urgent as more and more women enter the workplace, harassed by those new problems as mothers, facing these new choices. But the solutions will come about only because more and more *men* demand them, too—not to "help" the women, but because of their own new problems and needs and choices, as fathers and for themselves as men. [emphasis in original]⁸⁵⁹

Union Family

By the 1980s, labor unions had more experience than anyone in getting maternity benefits. Union women pointed out the problem with unemployment insurance and pregnancy early in the 1940s. Sitting on the President's Commission on the Status of Women in the early

⁸⁵⁷ David Milofsky, "The Baby vs. the Corporation," 134.

⁸⁵⁸ U.S. House of Representatives, *Babies and Briefcases: Creating a Family Friendly Workplace for Fathers: Hearing before the Select Committee on Children, Youth, and Families* (Washington, DC: GPO, 1991); Larsen, 282.

⁸⁵⁹ Betty Friedan, *The Second Stage* (Cambridge, MA: Harvard University Press, 1981), 109.

1960s, Bessie Abramowitz Hillman of the Amalgamated Clothing Workers Union argued for a European-style social insurance plan for maternity.⁸⁶⁰ Behind the scenes in the 1970s unionized women, not just feminist lawyers, were laying the groundwork for national family leave legislation. Many unionized workers were already covered by maternity benefits. Some unions also negotiated personal leave policies that members could use to take paternity leave. In the 1980s, pressure to do something regarding maternity emerged at the negotiating table, the company boardroom and the halls of Congress as never before, or at least as it hadn't since WWII.

In part, this was a response to the overall increase in women in the workforce but it also reflected a push by unions to organize sectors, like public employees and service workers, that were feminized. Women held offices in many unions and some unions had organizational structures or offices specifically for women. In the 1970s and 1980s, labor feminists began to organize and network specifically as women confronting the dual oppressions of gender and class and to challenge the male hierarchy in organized labor. In California, Union WAGE's earliest demands included demands for job protected maternity leave and maternity benefits.⁸⁶¹ The founding of the Coalition of Labor Union Women in 1974 brought together women union activists, incubated demands on working women's issues, connected union women to the feminist movement and developed women union leaders.⁸⁶² Diane Balser, who studied the intersection of the labor movement and the feminist movement, saw CLUW's main role and

⁸⁶⁰ Karen Pastorello, *A Power Among Them: Bessie Abramowitz Hillman and the Making of the Amalgamated Clothing Workers of America* (Urbana: University of Illinois Press, 2008), 168-170.

⁸⁶¹ Diane Balser, *Sisterhood and Solidarity: Feminism and Labor in Modern Times* (Boston: South End Press, 1987), 95.

⁸⁶² Carolyn York, "The Labor Movement's Role in," in *Parental Leave and Child Care*, 176.

success as “bring[ing] gender issues to the labor movement.”⁸⁶³ From the start, CLUW demanded maternity leave and an end to pregnancy discrimination.⁸⁶⁴ 9 to 5, National Association of Working Women, formed in Boston in 1993, focused on clerical workers. 9 to 5 pioneered new forms of workplace organizing and creatively explored connections with the labor movement, specifically Service Employees International Union. 9 to 5 prioritized family issues like maternity leave, parental leave and child care.

The Coal Employment Project, founded in 1977, also made a major commitment to parental leave. Women miners consistently raised concerns about the conflict between their jobs and their families. Many of these early women coal miners had sought work underground because traditional women’s jobs did not pay enough to support their children. Many women pioneers underground accepted these jobs in order to make more money to support their children.⁸⁶⁵ Parental leave became one of, if not the, central issues for the Coal Employment Project (CEP) over the course of the 1980s. CEP pushed to get parental leave in UMWA contracts. CEP organizers had ambitious plans for state legislation and they were one of the very earliest groups to join the coalition working out of the Women’s Legal Defense Fund offices on federal bills. They held conferences, attended others, and established a network of “support groups” to focus on parental leave. They wrote articles, newsletters, and letters to politicians. They testified before Congress. They gave interviews to the press. Miners appeared on ABC’s *Good Morning, America* to talk about parental leave.⁸⁶⁶ They printed T-shirt and sold stickers

⁸⁶³ Balsler, *Sisterhood and Solidarity*, 49.

⁸⁶⁴ *Ibid.*, 156, 158, 202.

⁸⁶⁵ Coal Employment Project, “UMWA Accountability/Family Leave Project,” 2, CEP 23:4.

⁸⁶⁶ Betty Jean Hall, Dumfries, Virginia, to Kate Chieco, “The Alexander Fun,” New York, February 27, 1986, 6, CEP 23: 20.

declaring “Parental Leave: It’s not just kid’s stuff.” A spin-off group of member’s children, Kids for Parental Leave, organized a children’s letter-writing campaign and made crossword puzzles.⁸⁶⁷

The CEP encouraged women in other unions to push family issues in their unions, at their bargaining tables, at their statehouses, and on Capitol Hill. The SEIU, included many women low-wage workers at hospitals and hotels, stressed that a family leave bill would help low wage workers, even if it was unpaid. They supplied witnesses for congressional hearings and organized letter writing campaigns.⁸⁶⁸ 9 to 5 also campaigned for state and national legislation.

Family and medical needs received significant attention in contract negotiations in the 1980s. In 1987, the National Council of Jewish Women reported that workers with unions were far more likely to have job-protected parental leave than workers without unions.⁸⁶⁹ SEIU surveyed their own contracts in 1987 and found that 84% of their public sector collective bargaining agreements provided for job-protected parental leaves of six months or more and 75% of their private sector contracts established leaves of at least three months. Many of these leaves extended to adoptive parents as well.⁸⁷⁰ The American Federal State County and Municipal Employees (AFSCME) had parental leaves in 84% of its contracts by 1988. That year, the International Ladies Garment Workers Union (ILGWU) won parental leave, including adoptive

⁸⁶⁷ Ruth Fairbanks, “Putting the Family in Family Leave: The Coal Employment Project and Family Leave Activism, 1979-1993” Work-Life Integration Conference, Indiana State University, unpublished paper, October 2014.

⁸⁶⁸ Carolee Larsen, “Discourse and Political Power: The Case of the Family and Medical Leave Debate in the United States Congress” (PhD diss., Northwestern University, 1996), 245.

⁸⁶⁹ York, “The Labor Movement’s Role in Parental Leave and Child Care,” 177.

⁸⁷⁰ Ibid.

parents, in contracts in the Northeast, Chicago, St. Louis and San Francisco.⁸⁷¹ The Communications Workers of America already had a clause on “Leave Absence for Care of Newborn Children” in their contract with Bell Telephone and AT&T by 1983.⁸⁷² In 1989, CWA and the International Brotherhood of Electrical Workers negotiated contract with AT&T that dedicated the company to expanding child and elder-care services, created ways for employees to set aside gross pay for dependent care and increased the amount of time employees could request for parental leaves or leaves to care for seriously ill family members. CWA made these provisions “standard demands” in their other upcoming contract negotiations.

CLUW, the AFL-CIO and the U.S. Department of Labor sponsored a conference called “Bargaining for our Families” in 1989. Conference registration pointed out that “FAMILY ISSUES ARE NO LONGER FRINGE BENEFITS! They are what determine a truly decent, humane standard of living; they are what determine for many people today the ability to work at all.” (Emphasis in original.) Workshops addressed child care, flex time, coalition building, media relationships and various other topics, but the afternoon plenary session was about legislation, especially family and medical leave.⁸⁷³

United Steelworkers and Bethlehem Steel Corporation also made contractual agreements dramatically expanding family friendly fringe benefits. These plans received positive press in industry periodicals that predicted the companies would reap major benefits in employee productivity, attendance and retention and that these policies would be especially important in attracting qualified women employees.⁸⁷⁴ However, very shortly, the stories about Steel would

⁸⁷¹ Ibid., 178.

⁸⁷² June Rostan, Oak Ridge, Tennessee to District Coordinators, May 18, 1983, CEP 5:14.

⁸⁷³ “Bargaining for our Families,” February 24, 1989, Atlanta, Georgia, CEP, 8:8.

⁸⁷⁴ Faith Lyman Ham, “Bringing the Family to the Bargaining Table,” *Business and Health* (August 1989): 42-44.

be mostly about industry decline and reorganization, the loss of union jobs, and the USX lock-out. In the 1980s and early 90s, unions faced renewed management attacks as well as industry reorganization, economic slumps affecting several industries, for instance coal, and pressure at the bargaining table to rollback benefits. The percentage of Americans belonging to a union fell as well. In 1954, 35% of American workers were unionized. By 1983, only 20% were and a decade later, the percentage had fallen four more percentage points.⁸⁷⁵ Union membership declined especially steeply in the private sector during the 1970s and 1980s.⁸⁷⁶ Despite being in the forefront of demands for family friendly policies since the 1940s, unions would mostly be supporting players in establishing legislation protecting new parents. Their presence, and also their relative weakness, contributed to the shape of the FMLA.

Family Leave in the Private Welfare State

Several business organizations led the opposition to national family leave legislation. Meanwhile, many Fortune 500 companies were showing their eagerness to adopt such policies as key fringe benefits. While there were thus many forward-thinking employers, they were also reluctant to publicly tackle the national organizations that opposed family leave in Congress. Despite the series of compromises on the bill and the extent of private policies, few businesses were willing to publically support the legislation. A handful of exceptions included Ben & Jerry's, Stride Rite and the Burlington Northern Railway.⁸⁷⁷ The WLDF wrote to CEOs who on

⁸⁷⁵ Drew DeSilver, "American Unions Membership Declines as Public Support Fluctuates," *FACTALK* (February 20, 2014), <http://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support/> (6 July 2015).

⁸⁷⁶ Jake Rosenfeld, "Little Labor: How Union Decline is Changing the American Landscape," *Pathways* (2010): 3, https://web.stanford.edu/group/scspi/_media/pdf/pathways/summer_2010/Rosenfeld.pdf (accessed July 6, 2015).

⁸⁷⁷ Donna Lenhoff and Lissa Bell, "Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study," www.nationalpartnership.org (accessed June 20, 2015): 6.

the list of *Working Mother's* best companies for women to work for, thinking that companies with good plans, that were publically proud of their efforts to help working mothers, might support legislation to support minimum labor standards. But company spokespeople declined to support the FMLA. They confessed to Donna Lenhoff that they did not want to publicly oppose the US Chamber of Commerce and other business groups.⁸⁷⁸ Even the Conference Board, which had vigorously championed work-family policies in its research and reports, and the National Association of Women Business Owners found it politically dicey to represent business support for the legislation.⁸⁷⁹

The Chamber of Commerce argued that many employers were eager to provide these benefits, but should not be compelled by "government mandate" to do so.⁸⁸⁰ Erin Kelly and Frank Dobbin point out that family leave legislation, introduced in the mid-1980s and into the early 1990s, did not replace purely private initiatives with an era of government interference in employment policies. Rather, the large number of maternity policies that business and conservative politicians pointed toward as proof of marketplace response were themselves often the product of earlier government actions regarding maternity policies.⁸⁸¹

Corporate America could be both central to the expansion and provision of family-related benefits and also responsible for the delay and stinginess of public policy. Employers, Cathie Jo Martin points out, are not monolithic. Dividing American companies into two groups, she finds

⁸⁷⁸ Martin reports this from an interview with Donna Lenhoff. Martin says WLDF wrote to *Working Woman's* list of 100 Best Companies, but it was *Working Mother* that had this list, and I think that's what they were referring to. Cathie Jo Martin, *Stuck In Neutral*, 222-223.

⁸⁷⁹ *Ibid.*, 223.

⁸⁸⁰ "IBM Expands its Personal Leave, "Flex" Policies," *Industry Week* (November 7, 1988): 21.

⁸⁸¹ Erin Kelly and Frank Dobbin, "Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies," *American Journal of Sociology* 105, no. 2 (September 1999): 456.

significant numbers of employers interested in a “high-performance workplace” that entailed family friendly benefits and possibly public policies as well, while other employers were committed to lower labor costs and suspicious of any kinds of government programs.⁸⁸² Thus, businesses could be both in the forefront of developing family leave policies and also be instrumental in thwarting policy initiatives. Martin finds the divide generally along size. Larger firms that had extensive and professionalized personnel departments kept up on the literature and best practices of investing in human capital. Small business had fewer “organizational resources” to either accommodate benefits or to understand them and were not tied into a “business policy network” that supported social policy.⁸⁸³

Company policies and also the business and industry press show the boundaries of the possible in management practice. In 1987, *Business Week* advised employers to “face two facts of life: Nearly half the workforce is female and more than 90% of them will bear a child while employed.”⁸⁸⁴ *Across the Board*, the journal for the Conference Board, a business oriented research and advocacy group, advised its readers that “work-family conflict is one of the new costs of doing business.”⁸⁸⁵ In 1983, Catalyst, a group dedicated to increasing women’s opportunities in business, told employers that “in the long run, the value of efficient, lifetime

⁸⁸² Cathie Jo Martin, *Stuck in Neutral: Business and the Politics of Human Capital Investment Policy*. (Princeton: Princeton University Press, 2000), 7-9.

⁸⁸³ *Ibid.*, 11.

⁸⁸⁴ Aaron Bernstein, “Business and Pregnancy: Good Will is No Longer Enough,” *Business Week* (February 2, 1987): 37.

⁸⁸⁵ Dana E. Friedman, “Liberty, Equality, Maternity!” *Across the Board* (March 1987): 17.

employees will more than pay for the effort it will take to properly address the question of parental leaves.”⁸⁸⁶

Catalyst set about to see how companies were handling parental leaves. Catalyst collected data from 384 American companies. Eighty percent of these companies had some form of disability leave available to women who had babies. Nearly all of these leaves had at least some wage replacement. The majority of women who took these pregnancy disability leaves were back at work within eight weeks, although a substantial minority had a somewhat longer leave. Such data implies that the private American welfare state was accommodating at least some of the needs of pregnant workers and new mothers. Catalyst, however, had *asked* 1,500 companies; the 384 who responded may not have been a representative sample. Companies with plans were probably more likely to respond. It is likely this study overestimated the extent of workers who were covered for pregnancy disability by job protected leaves including wage replacement. Nonetheless, opponents of family leave legislation often cited the Catalyst study as an indication that the market was already responding to the needs of working women.⁸⁸⁷

In 1987, the Conference Board used data from California’s, New York’s, New Jersey’s and Rhode Island’s temporary disability insurance programs to investigate usage, costs, and duration of pregnancy leave and to compare these leaves to those for other temporary disability claims. New York, with a low birth rate, had a low proportion of claims for pregnancy, while claims for pregnancy represented 20% of those in California, which had a much higher birth rate. The Conference Board study also found, however, that claims seemed to be stable in both places and that the cost of pregnancy claims had not been rising compared to those for other

⁸⁸⁶ Catalyst, “Career and Family: Maternity and Parental Leaves of Absence” (New York: Catalyst, 1983), 10; “Study Finds New Mothers Get Limited Time Off From Work,” *New York Times*, December 25, 1983, 48.

⁸⁸⁷ Melissa A. Berman, “What do Women Get?” 18.

disabilities.⁸⁸⁸ The Conference Board report encouraged companies to consider self-insurance for short-term disability coverage, including pregnancy, finding the costs predictable and relatively small and noting that “more and more employers are following this route” and that many of the self-insured plans exceeded state mandated minimums.⁸⁸⁹

In the mid-1980s, Aetna Life & Casualty conducted a study on the costs of replacing employees and determined that it made much more financial sense for a company to try to keep employees rather than pay for finding and training new ones.⁸⁹⁰ Aetna joined a growing consensus among part of American businesses that companies should try to get valuable women employees to return to work after they had a baby. Maternity leaves, sometimes with wage-replacement, options for flextime or part-time schedules, on-site child care centers or child care subsidies were all possibilities explored by various companies and covered in insurance industry journals and the business press. *Working Woman* and *Working Mother* magazines started in the late 1970s were especially keen to cover business practices relating to work-family balance. *Working Mother* began issuing its annual list of one hundred best companies for women to work for in 1985.⁸⁹¹ Rankings on this list frequently depended on family policies such as flexible work schedules and fringe benefit packages tailored to the needs of mothers. The 1980 movie *9 to 5*, which starred Jane Fonda, Lily Tomlin, and Dolly Parton, revolved around women making such changes to their workplace in the temporary absence of their swarthy boss and finding that these

⁸⁸⁸ Ibid.

⁸⁸⁹ Ibid., 19-20.

⁸⁹⁰ Ronnie Sandroff, “Helping your Company become Family-Friendly,” *Working Woman* (November 1989), 136-137.

⁸⁹¹ Kate Stone Lombardi, “As a Magazine Folds, A New Venture Begins,” *New York Times*, December 9, 2001; “*Working Mother*,” *Wikipedia* http://en.wikipedia.org/wiki/Working_Mother (17 May 2015).

changes not only humanized the workplace, but also benefited the company bottom line.⁸⁹² In the context of this exploration of new benefits, family-friendly policies emerged alongside of cafeteria plans, which allowed employees a hand in crafting their own individual benefit package and allowed employers to offer a wider range of benefits without actually offering more benefits.

In addition to pressures from the growing number of mothers of young children in the workforce, the presence of women in upper level management positions spurred some companies to offer a range of benefits much more sensitive to women's biological and social roles and the needs of families with two parents in the workplace.

When a woman became benefits manager at Southern New England Telephone Company the company instituted a yearlong job protected maternity leave. The leave was unpaid, but benefits like health insurance and telephone bill discount continued and women on leave still received the employee newsletter. Ninety percent of these new mothers returned to work at the company when most American companies could expect a much lower return rate. Maryles Castro, who had only a one month leave for her own child, saw to it that her employees got up to a full year and upon return could work flex time. Barbara Keck was also unhappy with her own leave experience and, when she had the chance, she worked to change corporate culture about work-family balance in the mid-1980s. She observed that "Companies are losing valuable people by not responding to societal changes."⁸⁹³

When more women gained access to management positions, they also pulled back the curtain on how men themselves were struggling to juggle demands of work and the needs of their families. After becoming president of Monet Jewelers, Inc., Jane Evans, mother of an eleven

⁸⁹² *9 to 5* written by Patricia Resnick and Colin Higgins, directed by Colin Higgins (1980).

⁸⁹³ "Pregnancy Leave: Is there Sufficient Legal Protection," *Industry Week* (April 16, 1984): 31-32.

year old, reflected on her need to be able to take a sick child to the doctor or attend teacher conferences and school events. She offered her suspicion that “I think men [executives] have always done those things anyway, without telling anyone.”⁸⁹⁴ Evans’ observation that some men were taking time off for family demands by just calling it something else was confirmed by Joseph Pleck who found self-fashioned paternity leaves masquerading as vacation time and sick leave.⁸⁹⁵ Evans believed that men would also benefit from re-making a workplace to meet the needs of parents.

Pink collar industries, where most women worked, had always been poorly served by private insurance and were not generally the industries that embraced the new range of family friendly benefits. Declines in manufacturing jobs and in the percentage of American workers who were unionized reduced the fraction of Americans who enjoyed robust private social benefits. Unions began fighting a new kind of rearguard action as they struggled to retain insurance benefits and companies sought to transfer some of the costs of fringe benefits to workers through higher co-payments and deductibles.

Concluding its report on pregnancy disability leave, the Conference Board recognized that outside the handful of states where leave was mandated, “for the most part, whether a firm voluntarily offers short-term disability insurance—and at what level—depends on its size.” This was a problem because “women tend to work in poorer jobs and industry sectors, and for smaller firms.”⁸⁹⁶ Sheila Kamerman and Alfred Kahn’s 1981 study of maternity leave had also

⁸⁹⁴ Joani Nelson-Horchler, “Executive Super-Moms,” 34.

⁸⁹⁵ “Friends of the Family: 25 Men Who Have Made it Easier for Working Parents to Raise and Nurture Children,” *Working Mother* (June 1997): 28; Joseph H. Pleck, “Fathers and Infant Care Leave,” in *The Parental Leave Crisis: Towards a National Policy*, eds Edward F. Zigler and Meryl Frank (New Haven: Yale University Press, 1988), 186, 189.

⁸⁹⁶ Melissa A. Berman, “What do Women Get?” 20.

determined that small companies were less likely to offer maternity leave benefits.⁸⁹⁷ The Congressional Caucus for Women's Issues "found that one third of U.S. employers provided no sick leave" at all and so the PDA had not expanded protections for women working at those companies.⁸⁹⁸ In the divisive battle over the family leave bill in Minnesota, the legislature determined that more than half of all employers in the state offered no maternity leave.⁸⁹⁹ Many women, who were concentrated in female-dominated occupations, often worked part-time and for smaller companies, and did not receive disability benefits through their employers. Kamerman, Alfred Kahn and Paul Kingston reported that, in the early 1980s, 60% of pregnant workers and new mothers had no wage replacement (no disability pay, no sick leave, no personal leave or maternity leave) during the time they needed off for delivery and recovery from childbirth.⁹⁰⁰ Many of these mothers also did not even have their jobs held for their return. For some women, the best they could hope for, Polly Dwyer Hitt observed dryly, was to "pick a long weekend to deliver."⁹⁰¹

Proponents of the FMLA modeled their bills on existing common business practices.⁹⁰² Nevertheless, business opposition to parental leave laws was fierce. A majority of small business owners were unalterably opposed to any new government mandates. According to John Motley, lobbyist for the National Federation of Independent Business, "We were playing a long-term

⁸⁹⁷ Ibid.

⁸⁹⁸ Margaret Engel, "Should Congress Set a National Maternity Policy?" *Glamour* (September 1985): 236-237.

⁸⁹⁹ Patricia M. McGovern and Myra J. Segal, "Minnesota Parental Leave Law Weighs Social Reforms Against Costs," *Business and Health* (December 1987): 42.

⁹⁰⁰ Sheila B. Kamerman, Alfred J. Kahn and Paul W. Kingston, *Maternity Policies and Working Women* (New York: Columbia University Press, 1983), 39-40.

⁹⁰¹ Polly Dwyer Hitt, "Pick a Long Weekend to Deliver;" *USA Today*, April 24, 1986.

⁹⁰² Sheila B. Kamerman, Alfred J. Kahn and Paul W. Kingston, *Maternity Policies and Working Women* (New York: Columbia University Press, 1983), 221.

game of containment here.”⁹⁰³ Ultimately opponents retreated to an absolutist position against “mandates” of any kind, even for good ideas. The business response is aptly summed up by the title of Virginia Lamp’s Chamber of Commerce op ed in *USA Today*: “People don’t need Congressional Nannies.”⁹⁰⁴ Martin argues that “small business groups may take full credit for” “keeping the Family and Medical Leave Act off the legislative books for many years” despite its popularity among Americans, the extent of similar fringe benefits and the nearly universal international standard for some guaranteed leave.⁹⁰⁵

Small business could mobilize a large base of business owners in every congressional district who could be mobilized to oppose government spending and social welfare legislation. Starting in 1986, the National Federation of Independent Business took polls of its membership on the question of parental leave legislation. Members consistently opposed such legislation by large majorities of “nearly 85%.” The NFIB made sure that these poll results reached Senators and Representatives. In 1986, The US Chamber of Commerce announced it was also organizing opposition to Congressional action on parental leave. Their coalition of business opponents quickly reached over 40 groups.⁹⁰⁶ Every time there were congressional hearings the Chamber organized a direct mail campaign to its members, urging them to express their opposition to their legislations.⁹⁰⁷ The NIFB made votes on family leave litmus tests for supporters of small businesses.

⁹⁰³ Douglas Harbrecht and Susan B. Garland, “A Bush Flip-Flop Gives New Life to the Parental Leave Bill,” *Business Week* (September 26, 1988): 61.

⁹⁰⁴ Virginia Lamp, “People don’t need Congressional Nannies,” *USA Today*, April 24, 1986.

⁹⁰⁵ Cathie Jo Martin, *Stuck in Neutral*, 220.

⁹⁰⁶ Ronald D. Elving, *Conflict and Compromise*, 61-62.

⁹⁰⁷ Cathie Jo Martin, *Stuck in Neutral*, 223.

Opponents focused on the costs associated with even unpaid leaves. The Chamber of Commerce released an initial estimate of \$16.2 billion dollars a year if companies were required to provide unpaid family leave. Later, even they would have to revise the estimate downward, to \$2.6 billion, although the General Accounting Office placed the estimated costs closer to \$147 million.⁹⁰⁸ Publically, business opponents focused especially on the vulnerability of small businesses and worried that mandated leave would cause small businesses to fail.⁹⁰⁹ This concern resonated even with some supporters of family leave. Compromise that raised the size of the exempted small businesses to fifty employees within a hundred mile radius, that reduced the number of weeks of leave from eighteen to twelve, and that increased the measure of an employee's labor market commitment in the previous year, denying coverage to new hires and part time workers brought few new supporters in Congress and did little to soften opposition.

Family Leave as a Child's Right

Feminists on both sides of the difference versus equality debate believed that they were supporting a vision that enabled women to succeed in careers and establish economic citizenship without being penalized for having children. While this remained at the heart of their concerns in crafting new legislative proposals, this goal became shrouded in other social concerns and the agendas of other advocates as family leave legislation emerged as a solution to the problems facing pregnant workers and new moms. Nothing in the FMLA specifically thwarted women's occupational and economic opportunities, but much that could have furthered that goal was either left out or dropped from legislative proposals. Other paths seemed more likely to lead to a

⁹⁰⁸ Ibid., 221-223.

⁹⁰⁹ Patricia M. McGovern and Myra J. Segal, "Minnesota Parental Leave Law Weighs Social Reforms Against Costs," *Business and Health* (December 1987): 42.

successful bill and so, over time and with the addition of new coalition partners, the rationale shifted from securing women's economic equality to other benefits of family leave.

Part of this shift was due to the heavy involvement of social scientists and other non-legal experts in discussions about family leave. Family leave was first raised in the U.S. Congress when Ed Zigler of the Yale Bush Center on Child Development and Sheila Kamerman, a sociologist from Columbia, brought up parental leave in their testimony at hearings on child care. Both these scholars would return to testify in favor of family leave. Both wrote extensively about the issue and they were joined in academic journals and at conferences and hearings by a growing cohort of experts producing what Steven Wisensale called "an almost constant flow of research literature" studying child development and family policy in the US and around the world.⁹¹⁰

⁹¹⁰ Steven Wisensale, "Approaches to Family Policy in State Government: A Report of Five States," *Family Relations* 39, no.2 (April 1990): 136; Following is an incomplete list of what he's talking about. Sheila Kamerman, *Maternity and Parental Benefits and Leaves: An International Review* (New York: Center for the Social Sciences, Columbia University, 1980); Sheila Kamerman and Alfred Kahn, *Child Care, Family Benefits and Working Parents: A Study in Comparative Policy* (New York: Columbia University Press, 1981); Joan Aldous, *Two Paychecks: Life in Dual-Earner Families* (Beverly Hills: Sage Publications, 1982); Sheila B. Kamerman, Alfred J. Kahn and Paul W. Kingston, *Maternity Policies and Working Women*; M. H. Cantor, "Strain Among Caregivers: A Study of Experience in the United States" *The Gerontologist*, 23, no. (1983):597-604; Edward Zigler, Sharon Lynn Kagen and Edgar Klugman, eds, *Families and Government: Perspectives on American Social Policy* (New York: Cambridge University Press, 1983); Halcyone H. Bohem, "Gender Equality in Work and Family: An Elusive Goal," *Journal of Family Issues* 5, no. 2 (1984): 254-272; Edward F. Zigler and S. Muenchow, "Infant Day Care and Infant-care Leaves: A Policy Vacuum," *American Psychologist*, 38 (1984): 91-94; S. Preston, "Children and the Elderly in the US," *Scientific American* 250, no. 6 (1984): 44-49; Rosalie Genovese, ed., *Families and Change: Social Needs and Public Policies* (New York: Praeger, 1984); Joseph Pleck and G. L. Staines, "Work Schedules and Family Life in Two-earner Couples," *Journal of Family Issue* 6, no. 1 (1985): 61-82; J. Peden and F. Glahe, *The American Family and the State*, (San Francisco: Pacific Institute for Public Policy Research, 1986); Sheila Kamerman and Alfred Kahn, *The Responsive Workplace* (New York: Columbia University Press, 1987); P. Raabe and J. Gessner, "Employer Family-Supportive Policies: Diverse Variations on the Theme," *Family Relations* 37, no. (1988): 196-202; Bruce Bower, "From Here to Maternity," *Science News* (October 1, 1988): 220-222; Joseph H. Pleck, "Fathers and Infant Care Leave," 177-194; Institute for Women's Policy Research, *Unnecessary Losses: Costs to Americans of the Lack of Family and Medical Leave* (Washington, DC: AAUW, 1988); Shirley Zimmerman and Phyllis Owens, "Comparing the Family Policies of Three States: A Content Analysis," *Family Relations*, 39 (1989): 190-195; Steven K. Wisensale, "Approaches to Family Policy in State Government: A Report on Five States," *Family Relations*, 39 (1990): 136-140; James T. Bond, Ellen Galinsky, Michael Lord, Graham L. Staines and Karen R. Brown, *Beyond the Parental Leave Debate: The Impact of Laws in Four States* (New York: Families and Work Institute, 1991).

The steady increase in the labor force commitment of mothers drove an academic interest in how their families fared. As women joined the professions in significant numbers, they also made some progress integrating the ivory tower. Some of this work was done by women whose own balancing acts might have yielded research questions and insights. Some of the other work was done by men whose wives had careers.

Involvement of social scientists had the potential to introduce new questions and new possible answers to the problems facing pregnant workers and new mothers. Not wed to either precedent nor to the careful reading of the Constitution, and starting from different points than women's equality, social scientists broadened the discussion, raised related issues and widened the range of solutions.

Scholars easily and often drew on international comparisons, usually involving Sweden. Where the civil rights strategy of the lawsuits in the 1970s and the passage of the Pregnancy Discrimination Act had depended on American precedents in the African American civil rights movement, American feminism and American conceptions of equality, the movement towards family leave invited international comparisons that became a regular part of arguments in favor of providing protections for pregnant women, new mothers and parents in general.⁹¹¹ When scholars such as Sheila Kamerman began explaining maternity policies around the world, she had an eager audience and other supporters quickly began to refer to the situation new parents

⁹¹¹ G. Erler, "Maternity and Parental Leaves in Europe," *Work Times* (1982): 1-5; Sheila B. Kamerman, *Maternity and Parental Benefits and Leaves: An International Review*; Sheila B. Kamerman, Alfred J. Kahn and Paul W. Kingston, *Maternity Policies and Working Women*; Linda Haas, "Equal Parenthood and Social Policy: Lessons from a Study of Parental Leave in Sweden," in *Parental Leave and Child Care*, 375-405.

faced in other nations. This was something that was more difficult to do in the 1940s and 1950s, when the red scare meant any such comparisons might be suspect.⁹¹²

Scholars plumbed company policies at the most generous firms and studied the effects and successes, the costs and benefits of industry practice.⁹¹³ They analyzed the experiences of states with disability leaves and with maternity protections and the early states with family leave, allowing those states to emerge as familiar models and references for those advocating family leave.⁹¹⁴ Scholars raised the issues of fathers who needed access to leaves to meet their own needs and to enable a broader transformation in gender roles at home and in the workplace.⁹¹⁵ In the widely read compilation of essays, *The Parental Leave Crisis*, Urie Bronfenbrenner, one of the founders of Head Start, really thought outside the box. In what even Bronfenbrenner admitted were “preposterous proposals,” he suggested that solving the problems of working mothers should include not only family leave, but also running family resources and support programs through the existing network of the Agricultural Extension Service and implementing a

⁹¹² Larsen found that at the early hearings on family leave, opponents “hinted at creeping communism and other cold war themes” but that the dissolution of the Soviet Union removed this form of opposition. Carolee Larsen, “Discourse and Political Power,” 120.

⁹¹³ Sheila Kamerman and Alfred Kahn, *The Responsive Workplace*; Randy Sheinberg, “Parental Leave Policies of Large Firms,” *The Parental Leave Crisis: Toward a National Policy* eds. Edward F. Zigler and Meryl Frank (New Haven: Yale University Press, 1988), 211-222; Barbara Butler and Janis Wasserman, “Parental Leave: Attitudes and Practices in Small Businesses,” *The Parental Leave Crisis: Toward a National Policy* eds. Edward F. Zigler and Meryl Frank (New Haven: Yale University Press, 1988), 223-234; Eileen Trzcinski, “Employers’ Parental Leave Policies: Does the Labor Market Provide Parental Leave,” in *Parental Leave and Child Care*, 209-228; Linda M. Clifford, “Family Leave Policymaking in a Mid-Sized Professional Firm: A Case Study,” in *Parental Leave and Child Care*, 252-266.

⁹¹⁴ Steven K. Wisensale and Michael D. Allison, “Family Leave Legislation: State and Federal Initiatives,” 182-189; Donna R. Lenhoff and Sylvia M. Becker, “Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach,” *Harvard Journal on Legislation* 26, no. 2 (1989): 410-12; Steven K. Wisensale, “Approaches to Family Policy in State Government: A Report on Five States,” *Family Relations* 39, no 2 (April 1990): 136-140; James T. Bond, Ellen Galinski, Michele Lord, Graham L. Staines, Karen R. Brown, *Beyond the Parental Leave Debate, the Impact of Laws in Four States* (New York: Families and Work Institute, 1991); Janet Shibley Hyde and Roseanne Clark, “The Wisconsin Parental Leave Study: Maternity Leave and the Health of Women and their Families,” in *Parental Leave and Child Care*, 269-279.

⁹¹⁵ Joseph H. Pleck, “Fathers and Infant Care”; Marilyn J. Essex and Marjorie H. Klein, “The Wisconsin Parental Leave Study: The Roles of Fathers,” in *Parental Leave and Child Care*, 280-293.

“Curriculum of Care” in the nation’s public schools so that everyone in the next generation valued caregiving and knew how to provide it. Bronfenbrenner also suggested that families, and the nation as a whole, would be better off if both women and men—everyone—worked three-quarter time, leaving “a quarter of one’s life for living.” He also believed that women’s problems in the workplace, and the neglect of family policies promoting child development were both markers of the gendered nature of political and economic power. To fix this, he urged “a substantial increase in the number of women in positions of decision making and power, both in the public and private sector.”⁹¹⁶ Bronfenbrenner’s proposals would not survive the narrowing use of scholarship in politics as the debate on family leave wore on, nor would much less preposterous proposals.

Family policy and its relation to the workplace spread out from colleges and universities and even became topics for study at think tanks because of a “growing demand for research to assist and guide decision makers” in industry and in government. Steven Wisensale, one of the leading scholars of family leave, even turned his attention to studying the impact of think tanks on scholarship and policy relating to family and work issues.⁹¹⁷ Wisensale studied large long established think tanks with broad research portfolios. Family leave, specifically the movement for federal legislation, also helped launch a specifically feminist think tank. Following the Chamber of Commerce’s vastly inflated cost estimate in opposition to family leave legislation, proponents of the FMLA approached the new Institute for Women’s Policy Research and asked them for a study on the costs that a lack of family leave posed to American women. Today the IWPR has scores of studies and is often approached for expertise on a variety of issues relating

⁹¹⁶ Urie Bronfenbrenner, “Strengthening Family Systems,” *The Parental Leave Crisis: Toward a National Policy*, eds. Edward F. Zigler and Meryl Frank (New Haven: Yale University Press, 1988), 152-156.

⁹¹⁷ Steven K. Wisensale, “The Family in the Think Tank,” *Family Relations* 40, no. 2 (1991): 199-207.

to women, economics and policy. Roberta Spalter-Roth and Heidi Hartmann recalled, however, that this study on how much missing leaves cost American women, their employers and American taxpayers “was IWPR’s first major research effort.”⁹¹⁸

Child development and family scholars became central in the long campaign for family leave. They testified before congress and before state legislatures. They published books read by academics and by general audiences. Some wrote shorter pieces for the popular press. They gave interviews to journalists. Their books and articles formed parts of lobbying materials. Overall, this had great potential for moving the discussion in lots of directions, but political discourse, the ascendancy of the Right and the Republican Party’s success in claiming to be the party of “family values” tapped into the potential for family leave to be understood as about the family and about children instead of being about women’s rights to economic independence and opportunity. Scholarship on work and family pointed in various directions and much of it could have supported feminist solutions, but in the end, the role of academics may have been to dilute the feminist challenge that family leave presented to gender roles at work and at home. Carolee Larsen studied the rhetoric surrounding family leave. She finds that feminist rhetoric waned quickly even as the influence of social scientists increased. Ascendant political rhetoric, the structure of Congress, and the appeal of the press all filtered a massive body of work in ways that eliminated the most radical proposals and favored those findings most in line with conservative social and economic perspectives.⁹¹⁹

⁹¹⁸ Roberta M. Spalter-Roth and Heidi I. Hartmann, “Science and Politics and the ‘Dual Vision’ of Feminist Policy Research: The Example of Family and Medical Leave,” in *Parental Leave and Child Care*, 41-65; Roberta M. Spalter-Roth and Heidi I. Hartman, *Unnecessary Losses: Costs to Americans of the Lack of Family and Medical Leave* (Washington, DC: Institute for Women’s Policy Research, 1990).

⁹¹⁹ Carolee Larsen, “Discourse and Political Power,” 212.

Academic and medical experts whose focus was the family or the child shifted the question away from a woman's rights as a worker or citizen to the effects her work had on others, particularly others who had a claim upon her time. A discussion on the effects of parental leave upon children and families had great tactical importance. This is especially notable in Dr. T. Berry Brazelton's public support for family leave. This popular pediatrician had his own television show and was the author of numerous child development books. In testimony entered into the *Congressional Record*, Senators cited "America's pediatrician" on the need for parental bonding. Brazelton, known as his generation's Doctor Spock, was probably the most famous of the expert witnesses on behalf of parental leave and was often quoted in magazines, newspapers, and childrearing literature on the importance of mother-infant bonding. Congressional staff thought of him as a very influential witness.⁹²⁰ He testified three times on behalf of parental leave, bringing warm and cuddly films of parents nuzzling their babies and got members of Congress to coo. Brazelton taught Congress and the American public about "bonding" between a new baby and its parents.

The Chamber of Commerce could not possibly be against "bonding" between an infant and its parents and the National Federation of Independent Businesses faced a serious problem going up against Dr. Brazelton's charming video of adorable babies and their besotted mothers and fathers. Over time, Brazelton focused his arguments ever more narrowly on children and their needs. He also became less gender neutral, less inclusive of fathers and more focused on a child's need for its mother. Brazelton's testimony was so compelling not just because of the visual aids, but also because it did not involve the rights of mothers or parents but instead the

⁹²⁰ Ibid., 232, 264.

rights of the child to the kind of care they needed--care that Brazelton's testimony claimed would cut the likelihood of juvenile delinquency and psychological problems later in life.⁹²¹

Larsen interviewed a member of Congress from Oregon, who had worked on both state and federal campaigns for family leave. Commenting on the extension of leave to care for sick family members, this congressperson observed the changing notions of rights and who had them in the long movement for family leave. “The benefit isn’t one to the parents, the benefit is one to the child, and that affects the policy greatly, because it’s more than the parents having time off, its [sic] more the right of the child to have time with their parents.”⁹²²

Foregrounding the rights of children in the movement for family leave also subverted an emerging cultural representation of pregnant women as dangerous to their own fetuses. A pro-life movement mobilized images and manipulated language to create a new and separate fetal “person” while aggressive protestors harassed and impeded women seeking health services and a terrorist fringe bombed clinics as well as targeted doctors. Alongside the abortion wars, some companies barred women from certain jobs that involved chemical exposure in order to protect hypothetical future children from their mothers’ reckless desires for better paychecks. Warning labels appeared on alcoholic beverages advising pregnant women not to drink. Some women, all of them poor with life stories full of challenges and abuses and most of them black, found themselves delivering their babies while handcuffed to hospital beds, losing custody of their children and being charged with child abuse, assault, delivery of drugs to a minor or murder because they had drug addictions, usually to crack cocaine. Even white women with some means could find themselves hauled into court and ordered to undergo medical treatment they did not

⁹²¹ Ibid., 100-106.

⁹²² Ibid., 178.

want, usually Caesarian sections, but that some doctor or hospital had decided was in the best interest of their fetus. The March of Dimes launched a campaign in which fetuses implored pregnant women not to drink or smoke. In public, strangers policed pregnant women who did.⁹²³ In this climate, emphasizing that family leave benefited babies and children diffused any potential charge that women were selfishly pursuing their own material ends.

Shifting the attention to children allowed far greater tactical scope for supporters of family leave. The Coal Employment Project's Kids for Parental Leave had children writing letters to their Congressmen and Senators and letters to the editor as well as designing family leave crossword puzzles and word searches. In Minnesota, when Governor Tommy Thompson disparaged family leave legislation in his state, a dozen children tried to see him to change his mind. The governor sent staff to meet with the kids. One child, a survivor of cancer, informed the governor's representative that "Operations and tests hurt more when your parents aren't there."⁹²⁴ Ellen Bravo, one of the leaders of the movement for family leave in Minnesota, let her son tell about being in the hospital after being hit by a car. At the end of his story, he concluded "I would like to say to the governor, how would you like it if your son was sick and you couldn't take the time off from work to be with your sick kid."⁹²⁵ In 1988, Minnesota became the second

⁹²³ Leslie Reagan, *Dangerous Pregnancies*, 225-234; Janet Golden, *Message in a Bottle: The Making of Fetal Alcohol Syndrome* (Cambridge, MA: Harvard University Press, 2005), 74-119; Elizabeth Armstrong, *Conceiving Risk, Bearing Responsibility: Fetal Alcohol Syndrome and the Diagnosis of Moral Disorder* (Baltimore: The Johns Hopkins University Press, 2003), 1-22; Laury Oaks, *Smoking and Pregnancy: The Politics of Fetal Protection* (New Brunswick: Rutgers University Press, 2001), 171-188; Monica J. Casper, *The Making of the Unborn Patient: A Social Anatomy of Fetal Surgery* (New Brunswick: Rutgers University Press, 1998); Sandra Matthews and Laura Wexler, *Pregnant Pictures* (New York: Routledge, 2000), 186-193; Cynthia Daniels, *At Women's Expense*. Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* (Oxford: Oxford University Press, 2010), 112-152.

⁹²⁴ Ellen Bravo, *Taking on the Big Boys: Or Why Feminism is Good for Families, Business, and the Nation* (New York: The Feminist Press at the City University of New York, 2007), 61.

⁹²⁵ *Ibid.*

state to pass family leave. As a sign of the role played by children in getting the law passed, Governor Thompson gave Bravo's son, Craig Miller, the pen he used to sign the law.⁹²⁶

The extent of this understanding, that family leave was a benefit for children more than their parents, is apparent in a TV movie made about family leave several years after the FMLA passed. In the film, a fictionalized child with cancer tells a congressional hearing that if her own job is to fight cancer and get better, then family leave should be a part of her treatment.⁹²⁷

Rhetorically, Americans are very committed to children and families. Experts on child development and the family, and children themselves, effectively and completely occupied that rhetorical ground in ways that neither business opponents, nor feminist litigators, possibly could. Opponents were forced, repeatedly, to endorse the laudable goals of family leave even as they struggled to defeat the legislation. Virginia Lamp, lawyer for the US Chamber of Commerce, wrote in *USA Today* that the "Chamber of Commerce supports parental leave." "Parental leave," she wrote, "is an excellent employee benefit and one that many companies provide" already. Her guest editorial was in opposition to the parental leave legislation introduced in Congress by Pat Schroeder, but the reality of public relations meant that Lamp had to bracket the Chamber of Commerce's arguments about small business and flexibility and job growth and the potential for abuse within statements supporting the ideal in principle.⁹²⁸ She had to do this because of the success of experts on child development and the American family in defining family leave as a social good.

⁹²⁶ Ibid, 63.

⁹²⁷ *A Child's Wish* starred John Ritter and featured a cameo by President Clinton, the first ever film appearance of a sitting president. *A Child's Wish* written by Susan Nanus and directed by Waris Hussein. CBS (1997).

⁹²⁸ Virginia Lamp, "People don't need Congressional Nannies," *USA Today*, April 24, 1986.

Parental leave was described as a means of strengthening families--a means of promoting family stability. This shift was due to many factors, including specific tactical decisions made by leading feminists who had helped craft the bills and shepherded it through the legislative process. Keeping their eyes on the prize of a new law and their commitment to a gender neutral structure, they courted allies who could deliver votes and were willing to compromise, especially on the rhetoric surrounding the bill. Scholarly work that focused on the needs of children and that shifted attention away from women's rights at work played well in a conservative political climate and also helped build bridges between the original backers of family leave and congressional representatives and groups more comfortable with traditional definitions of the family.⁹²⁹ Larsen notes, in order to pass the bill, "congressional statements and debates began to frame the bill as a protective measure for the family in perilous times."⁹³⁰

Pro-Family and Pro-Life

The association of groups that worked together to draft, re-write, amend, testify for and especially lobby on family leave came to include 250 groups.⁹³¹ Organized by the Women's Legal Defense Fund (now the National Partnership for Women and Families), this coalition included a wide range of organizations—specifically feminist groups, other, older women's groups like the Junior League, labor unions, other worker's organizations, the American

⁹²⁹ Larsen found a shift in focus over the years the legislation was debated in Congress. She coded the arguments made by members of congress and also by witnesses. Her findings indicate that between the first hearings in 1985 and the last ones in 1993, the number of arguments aired before Congress that were based in a feminist perspective declined while the number of arguments concerned with either a patriarchal family structure or another family centered concern increased. Starting in 1987, some hearings had no one at all who made primarily a feminist argument in favor of the bill. Politicians from Pat Schroeder to Christopher Dodd emphasized that mothers were employed out of economic necessity. Carolee Larsen, "Discourse and Political Power," 361-371.

⁹³⁰ Ibid.,178.

⁹³¹ Ronald Erving, *Conflict and Compromise*, 152.

Association of Retired Persons, and many churches and religious organizations, including the US Catholic Conference.

The Catholic Conference became a leading supporter of Family Leave, which fit within the social mission of the church, but which also dovetailed with an increasingly active anti-abortion stance. Securing women job protected leave, even unpaid, for a time when it's nearly impossible to find child-care, and for any unexpected serious illness of their babies or children, might enable a woman to imagine carrying a baby to term. If having a baby meant losing her job, she might feel she had no choice but to abort. The Catholic Conference, an experienced lobbying group, used its connections to lawmakers to push this analysis and eventually did convince quite a few, including Congressman Henry Hyde of Illinois, legendary anti-abortion lawmaker, to support the bill.⁹³²

Culture wars over abortion led opponents to represent adoption as an equivalent "choice" for a woman who didn't want to be pregnant or have a child. For adoption to be a "choice" for a woman with an unwanted pregnancy there had to be a clear demand for babies and adoption had to be culturally normative. Pregnant women had to be protected from discrimination and this is why pro-life groups supported the PDA, especially after it had the anti-abortion clause. In addition to protecting birth mothers, anti-abortion activists had to protect and promote adoptive mothers as well so that they could assure birth mothers, and the public, that middle-class families with strong economic resources wanted, and would be able to, adopt as many babies as were given up. The family leave bills thus supported pro-life missions by helping parents who wanted to adopt secure leave from their jobs to do so and by helping pregnant women and new mothers keep their jobs when they kept their babies. Like the pro-life involvement with the PDA, anti-

⁹³² Ibid., 177.

abortion activists pursued influence over family leave legislation not just to pass a bill, but also to shape it in ways to chip away at the edges of abortion access.⁹³³ The FMLA would not guarantee leave for women to obtain or recover from an abortion. The provision for disability leave was written “to exclude ‘non-recurring conditions for which treatment and recovery last no more than a few days,’” that is, to exclude abortion.⁹³⁴

Putting the “Family” in Family Leave

The principle of comparability had been key to the legal framing of the PDA within a disability model. Only women could experience pregnancy, but that distinction dissolved within the whole wide range of possible similarly disabling conditions, most of which could be encountered by either women or men. A gender neutral parental leave would have to do the same thing—establish a universe of needs that either women or men might have. It’s true that women or men are able to take care of a newborn, and advocates of a gender neutral leave made sure that this was clear. In fact, that was one of the two central problems they had with a maternity only bill.

However, those drafting this new legislation realized that it would take more than legal protection of an unpaid leave in order to change deeply held social and cultural norms. Parental leave for the care of a newborn would fall, nearly entirely, to women, and everyone would know that it would.⁹³⁵ Data from Sweden, the first country to offer gender neutral parental leaves, beginning in 1974, demonstrated that gender neutral language alone would hardly change social

⁹³³ Marlene Fried, “Hyde Amendment: The Opening Wedge to Abolish Abortion,” *New Politics* vol XI-2, whole # 42 (Summer 2007), <http://newpol.org/content/hyde-amendment-opening-wedge-abolish-abortion>, 2 August 2014.

⁹³⁴ Fred Feinstein, [committee report for H.R. 4300] quoted in Ronald D. Elving, *Conflict and Compromise*, 57.

⁹³⁵ William L. Clay and Frederick L. Feinstein, “The Family and Medical Leave Act: A New Federal Labor Standard,” *ILR Report* XXV, no. 1 (Fall 1987): 31.

practices of parenting.⁹³⁶ They needed to broaden the potential beneficiaries who would keep new mothers company beyond just a few new fathers.

Lillian Garland and Tamara Buley both lost their jobs while they were themselves disabled by pregnancy and childbirth. For them, and many others, it was a question of health and recovery. It was natural for those working on new legislation to include protection for all workers who were temporarily disabled. They just extended the California and Montana laws' protections for pregnant workers to all workers, much as Wendy Williams, Ellen Goodman and the amici curiae in *Miller Wohl* had suggested. Many other countries provided some job protection (and wage replacement) for workers unable to work for health reasons. This was usually a part of a broader health program. Because the US lacked such protections, the drafters of parental leave legislation saw potential to make the pool of potential beneficiaries truly gender neutral.⁹³⁷

Including fathers in the proposal for leave also allowed the inclusion of adoptive mothers and fathers who would be caring for children even if they did not need to recover themselves. Adoption of older children should also be covered in recognition of the needs adoptive parents had in welcoming their children to their families. Again, the pool broadened.

Fathers, like mothers, could also care for an ill or dying child. A group of women miners was behind this novel conception of family leave. They met, in 1983, under the auspices of the

⁹³⁶ Even though Swedish leaves were even paid--something very few in the coalition working with Pat Schroeder on a bill thought was a possibility in the United States--less than 0.5% of Swedish parents on leave were men in the first year of operation. It wasn't until 1995, when one month was reserved specifically for fathers, that Swedish fathers began to embrace time off work for caregiving of small children. Today, with two months available to a family only if both parents have taken leave, 90% of Swedish fathers take some leave time when their children are babies and about 25% of parents on leave are men. "Why Swedish Men take so Much Paternity Leave," *The Economist Explains* (blog) July 22, 2014, <http://www.economist.com/blogs/economist-explains/2014/07/economist-explains-15> (January 17, 2015).

⁹³⁷ A Congressional staff member told Larsen very clearly that the inclusion of leave for temporary disability was an effort to include as many men as possible in the group that might need these leaves. Carolee Larsen, "Discourse and Political Power," 141.

Coal Employment Project, to campaign to get parental leave into the union contract between the United Mineworkers and the Bituminous Coal Operators Association. Only about 1% of miners were women. The CEP was founded in the late 1970s to help women get a toehold in the mines. Once hired, women miners faced all kinds of on-the-job discrimination and harassment which the CEP also addressed in legal advice and law suits, including a group known as the peep-hole cases. The first two women elected as UMWA convention delegates went to the convention in 1976. The UMWA convention in Denver in 1979 had only ten women out of well over a thousand delegates. In Pittsburgh in 1983, women delegates, guests and press contended with a convention booth selling lingerie with explicit language on the panties.⁹³⁸ In such a male dominated union, women miners needed to make alliances with men or their concerns would never be heard. If they wanted maternity leave in the BCOA Contract, these women, many of whom were mothers, needed fathers.

At this 1983 meeting, while these women miners were talking about how to include fathers' needs in the proposal and fathers themselves in the organizing, someone remembered co-workers who had been forced to choose between being with sick children or keeping the jobs and insurance coverage that provided medical care for their loved ones. CEP decided to include a demand for leave to care for sick kids as well as newborn or newly adopted children.⁹³⁹ This inclusion grew out of the context of miners' lives as much as it did out of the need for paternal support.

⁹³⁸ Betty Jean Hall, to Staff (December 19, 1983) "Progress Report for Week of December 12, 1983" [UMWA Convention in Pittsburgh, PA], 2, CEP 6:11.

⁹³⁹ Cosby Totten, "For Our Children: The Coalminer's Fight for Parental Leave!!" Coal Employment Project and Coal Mining Women's Support Team, CEP 65:6 and Cosby Totten, "For Our Children: The Coalminer's Fight for Parental Leave!!" Volume 8, Issue 4 (October 1985): CEP 20:3.

The CEP Pregnancy Study mentioned in the previous chapter had attempted to track birth defects in babies born to women who mined while working. In the 1960s and 1970s there was a lot of attention to the health of miners and their families. President Nixon signed the Federal Coal Mine Health and Safety Act in December 1969. At the time when CEP began getting women jobs in mines, “half a million miners, widows and other beneficiaries were receiving federal black lung benefits.”⁹⁴⁰ By the 1980s, environmental concerns about mountaintop removal and mine pollution were also percolating in the coal fields. Many wondered if exposure to mine tailings and run-off caused childhood cancers. Even if there were no additional health risks to the miners’ children, many mining families lived far from advanced medical centers. If a child had a serious disease and needed the care of pediatric specialists, they were likely to be far from home and hard to get to. Miners, both women and men, sometimes had to decide between keeping their jobs or being with a seriously ill and perhaps dying child. The CEP used this tragic experience to build bridges between the very few mothers and the many, many fathers who were miners.⁹⁴¹ Reflecting on this conceptual leap and its significance for the ultimate successes of parental leave within the UMWA and the federal and state campaigns, one CEP activist observed “whoever suggested including ‘Surrounding the serious illness of a child’ was the genius in the bunch. That is what helped make it acceptable, particularly since everyone knew a male miner who needed time off to take a child for medical treatment.”⁹⁴²

The CEP approach underwrote the expansion of family leave into something big enough that, indeed, the birth of a baby was only one of many possible reasons an employee might need

⁹⁴⁰ Alan Derickson, *Black Lung: Anatomy of a Public Health Disaster* (Ithaca: Cornell University Press, 1998), 181.

⁹⁴¹ Judith A. Scott, “The Coalminers’ Fight for Parental Leave: Part II,” *ILR Report* XXU, no. 1 (Fall 1987): 24-25.

⁹⁴² No author, [possibly June Rostan after she left the CEP] to Cosby [Totten], nd, CEP 69:1.

leave, and so childbirth was embraced within a whole range of things that women—and men—do as members of families.⁹⁴³ The director of the Coal Employment Project, Betty Jean Hall, was part of the group drafting the federal bill and organizing support for it from the very beginning. By this time, the CEP already had made significant experience and progress on parental leave within the United Mineworkers. Representative Patricia Schroeder mentioned miners with dying children in the opening statement of the first hearings on the federal bill in 1985.⁹⁴⁴ The bill she introduced in 1985 would have provided 18 weeks of unpaid leave for the birth, adoption or serious illness of a child within a two year period in addition to disability leave for an employee's own illness of up to 26 weeks.⁹⁴⁵

Providing leave to care for a sick or dying child responded to one of the problems facing women workers because even mothers with jobs were still responsible for the care of their children when they were sick. However, it did also broaden the pool of men who might imagine themselves taking leave. While birth or adoption had some pretense of possible planning, no one could plan for the serious illness of a child, a tragedy that might even require the presence of a father. Including this put new mothers in the same boat as all parents and recognized the responsibilities all parents had to care for their children. This was a key piece of a strategy to gain women rights without essentializing differences that could come back to constrain women's opportunities.

This strategy also opened up the witness list for hearing and tapped into the personal stories of individual members of Congress. Such stories played upon the heartstrings of other

⁹⁴³ Cosby Totten, Goldie Totten and June Rostan, "Women Miners' Fight for Parental Leave," *Labor Research Review* 1, no. 11 (1988): 94-95. Cosby Totten and Betty Jean Hall, *ILR Report* XXV, no. 1 (Fall 1987); 22-23.

⁹⁴⁴ Ronald Elving, *Conflict and Compromise*, 48.

⁹⁴⁵99th Congress, H.R. 2020 "Parental and Disability Leave Act of 1985," <https://www.congress.gov/bill/99th-congress/house-bill/2020> (July 1, 2015).

lawmakers, as more and more of them could imagine themselves, or their friends on the Hill, needing such leave. During the long campaign for family leave, the representative from Queens, New York was Gary Ackerman. Before entering politics, Ackerman had been the junior high school teacher who forced the New York City School Board to allow unpaid paternity leaves in the early 1970s. Ackerman told his colleagues how important it had been to him, as a father, to have time with his children when they were babies. Ackerman was a co-sponsor of the bill from Schroeder's very first 1985 Parental and Disability Leave Act.⁹⁴⁶ Republican Representative Marge Roukema, from New Jersey, had a child who died from leukemia and this personal history was undoubtedly part of the reason that such a strong supporter of small businesses eventually voted for the bill. After she orchestrated an exemption for "small" businesses of under 50 employees, Roukema became the first Republican co-sponsor of family leave legislation and one of its main champions. Roukema used her own family tragedy to make the case for leave. She wrote in a *New York Times* op-ed, "When my son was stricken with leukemia and needed home care, I was able to be at home to give him the loving care he needed. But what of the millions of mothers who work for the thousands of companies that do not have family leave policies?"⁹⁴⁷ On the floor of the Senate, and later in campaign speeches, Senator Al Gore recounted the days he had spent in the hospital with his young son after an auto accident. Senator Edward Kennedy's son lost a leg to cancer. At one point, Patrick Kennedy even testified before Congress in favor of the bill. Iowa Representative Richard Gephardt's son was also a cancer survivor and California Representative Vic Fazio's daughter had had leukemia. These parents

⁹⁴⁶ 99th Cong Status Profile for H.R. 2020, EP 65: 6.

⁹⁴⁷ Marge Roukema, "Mr. Bush, Keep Your Promise to American Families," *New York Times*, June 20, 1990.

could relate to the witnesses who told about losing their jobs to be by their children's hospital beds.⁹⁴⁸

A dramatic expansion of gender neutral coverage itself, the inclusion of care for sick children also logically opened the possibility of covering time to care for other sick family members. Like providing for care for sick children, extending coverage to care for other sick family members recognized the realities faced by many working women as their own parents lived longer, even with chronic conditions that required care. Again though, in the process of addressing a real problem for many working women, this expansion also brought more men into the fold of workers who might need this protection, or imagine that they might someday need it, including members of Congress. In front of his colleagues, Senator Paul Wellstone of Minnesota remembered taking time off to care for his parents while they suffered from Parkinson's disease. Representative Roukema, who had buried a child, had also provided personal care to her aging mother-in-law.⁹⁴⁹ Indeed, as Representative Clay observed, "Of all the circumstances covered by the bill, it is the need to care for a seriously ill parent that the members of Congress, themselves, are most likely to have recently experienced."⁹⁵⁰

Equally importantly, this expansion tapped into powerful political allies whose support for the bill could make a difference in its passage, like the American Association of Retired Persons. Tactically, little can top getting the AARP into the Family Leave coalition. The AARP is a large, well-funded lobbying institution with substantial experience, contacts and a large, organized, activist constituency. The AARP could get members to write to their representatives

⁹⁴⁸ Ronald D. Elving, *Conflict and Compromise*, 93, 176, 207, 256, 174.

⁹⁴⁹ Donna Lenhoff and Lissa Bell, "Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study," www.nationalpartnership.org (20 June 2015): 10.

⁹⁵⁰ William L. Clay and Frederick L. Fainstein, "The Family and Medical Leave Act: A New Federal Labor Standard," *ILR Report* XXV, no. 1, (Fall 1987): 31.

in support of the bill. Since AARP members were especially likely to vote, members with large elderly constituencies had a further incentive to support family leave.⁹⁵¹ AARP opened doors no one else could and the AARP organized witnesses for the later hearings on family leave. Concerns for spousal and elder care made the resulting FMLA distinctly broader than the policies of even generous Scandinavian welfare states.

Larsen believes that while the coalition backing family leave grew and the themes of discussion changed, the original feminist framers of the gender neutral bill retained a lot of influence. They made strategic choices in allies and emphasis in order to help get the bill passed. One feminist lobbyist told Larsen, “We took a feminist agenda and sold it as something else.”⁹⁵² Larsen thinks, however, that in the process of reframing the issue and seeking allies, feminists may have gotten the law passed but they also lost ground in the realm of rhetoric and meaning. Once the FMLA was law, Judith Lichtman spoke about how important it was for the Women’s Legal Defense Fund to proclaim their role in getting it passed.

Women in America don’t know and can’t figure out what the feminist movement has done for them....In the case of family leave, we saw a need and created a public policy that would make an everyday difference in people’s lives. That idea was very important to me. The message was that the feminist movement cares about working families.⁹⁵³

What had started as concern over the protecting the civil rights of women in the workplace had become, even to the feminist lawyers who championed the FMLA, more about the needs of working families than women’s rights.

⁹⁵¹ Donna Lenhoff and Lissa Bell, “Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study,” www.nationalpartnership.org (20 June 2015): 5, 10.

⁹⁵² Carolee Larsen, “Discourse and Political Power,” 143.

⁹⁵³ Ronald Elving, *Conflict and Compromise*, 285.

Legislative Gestation of the FMLA

Howard Berman had written the California law. Serving in the US Congress when Real's decision appeared to invalidate his state's maternity protections, he hoped to pass a federal maternity leave bill similar to the original California one. He was surprised to find that many feminists did not support him. Berman first turned to Donna Lenhoff of the Women's Defense Fund because the WLDF had been instrumental in the Campaign to End Discrimination Against Pregnant Workers. Lenhoff was well connected to the circle of feminist legal theorists who, while sympathetic to Lillian Garland, worried about the precedent of maternity-only leaves. Lenhoff put together a group that immediately began working on a plan to apply the principle of comparability embodied in the PDA disability model to a broader need for leave. They wanted a bill that would provide leave for parents, not just for mothers. The initial small group grew quickly through a network of connections among feminist lawyers working for women's organizations, labor unions, children's advocacy groups and civil rights organizations. Meeting at a conference on work and the family held by the Junior Leagues in New York, and in the Washington, DC offices of the Women's Legal Defense Fund, supporters of a gender neutral law developed a draft that would establish the principle of parental leave—leave for a parent of either sex to care for a newborn, an adopted child or a sick children. Only a couple of months into their planning they had assembled coalition of over fifty groups to send mailings, provide feedback on drafts and strategize about lobbying.⁹⁵⁴ Donna Lenhoff was the mother of the FMLA. She conceived the bill and shepherded it through its early years, finding friends and allies, explaining it to the world and vigorously protecting the principle of gender neutrality. Berman despaired

⁹⁵⁴ "Organizations Interested in Parental and Temporary Medical Leave," CEP, 68: 41.

over the long haul of social transformation and political change a gender neutral law would take. Though he would support the WLDF draft bill from the start, he was not the lead sponsor.

Patricia Schroeder was first elected to represent the Colorado congressional district that included Denver in 1972. Schroeder, a mother and a Harvard law school trained lawyer, claimed to be the first member of Congress sworn in while holding a package of disposable diapers. Her youngest child was a toddler during her first congressional campaign. She grew frustrated by persistent questions about how she could combine motherhood and a career in Congress. Finally, she retorted, “I have a brain and a uterus and I use both.”⁹⁵⁵ More than any other member of Congress at the time, Schroeder understood that pregnancy and childbirth could present unexpected problems. Her second pregnancy ended with neonatal death and her third landed her in the hospital for five weeks after the birth of her daughter and left her with Hepatitis C from blood transfusions.⁹⁵⁶

Schroeder introduced the Parental and Disability Leave Act in 1985.⁹⁵⁷ The next year she changed the name of her bill to Parental and Medical Leave in response to concerns raised by disability activists who disliked a title that implied that disabled people were unable to work. After Schroeder had a falling out with unions over a plant closing bill, Representative William Clay, who had closer ties to organized labor and more appropriate committee assignments, took over from Schroeder as the main sponsor of the bill in the House; his aide, Fred Feinstein,

⁹⁵⁵ Kaye Northcott, “Only a Heartbeat Away,” *Mother Jones* (June 1984): 36; Pat Schroeder, *Twenty-Four Years of Housework...and the Place is Still a Mess: My Life in Politics* (Riverside, NJ: Andrews McMeel, 1998), 128; Joan A. Lowy, *Pat Schroeder: A Woman of the House* (Albuquerque: University of New Mexico Press, 2003), 10.

⁹⁵⁶ Schroeder, *Twenty-Four Years of Housework*, 107-109.

⁹⁵⁷ The initial draft was called the “Family Employment Security Act” (FESA). Those working on their hopeful bill changed the name because “public opinion experts” told them that “the American public reacts negatively to ‘family; because it is traditionally opposed to federal regulation of the family.” Donna R. Lenhoff, Women’s Legal Defense Fund, Washington DC, to Interested Organizations, March 19, 1985, CEP, Archives of Appalachia, Box 65, file 11.

shouldered much of the work on language, compromises and coordinating with Donna Lenhoff's growing coalition of legislative supporters.⁹⁵⁸ Christopher Dodd from Connecticut, one of the states that already had a maternity leave law, introduced a companion bill in the Senate. In 1986, when negotiations over the House bill expanded it to cover care for a seriously ill parent or spouse, the name of the bill in the House became the Family and Medical Leave Act.

Steven Wisensale argues that the ultimate form of the FMLA owed a lot to developments in the states and that "whatever legislative activity occurred in the states also influenced the design of the federal FMLA."⁹⁵⁹ Parental or maternity leave or family leave legislation of some kind was adopted in at least thirty-two states by the time the FMLA was signed.⁹⁶⁰ The District of Columbia and various municipalities also took action. Several states considered multiple bills related to family leave. Maryland, for instance, considered at the same time three bills, one for eighteen weeks of family leave, another for sixteen weeks of maternity leave and a third for four weeks of parental leave for state employees.⁹⁶¹ Connecticut, Minnesota, Oregon and Rhode Island were the first states with Parental Leave Laws, which they passed in 1987.⁹⁶² That year, 24 additional states had introduced, but not passed, various family leave bills. The next year, thirteen states introduced family leave bills with three of them passing.⁹⁶³ By 1988, ten states

⁹⁵⁸ Elving, *Conflict and Compromise*, 54-57.

⁹⁵⁹ Wisensale, *Family Leave Policy*, 132.

⁹⁶⁰ *Ibid.*, 127.

⁹⁶¹ Patricia M. McGovern and Myra J. Segal, "Minnesota Parental Leave Law Weighs Social Reforms Against Costs," *Business and Health* (December 1987): 43.

⁹⁶² Wisensale, *Family Leave Policy*, 123.

⁹⁶³ Steven K. Wisensale, "Approaches to Family Policy in State Government: A Report on Five States," *Family Relation* 39, no. 2 (April 1990): 137.

already had some sort of family or maternity leave law or regulation and some others held that a lack of maternity leave might violate their state anti-discrimination laws.⁹⁶⁴

Passage of family leave in the states contributed to momentum for a federal standard. State level work encouraged activists and brought them and their experience into lobbying efforts for the federal bill. Ellen Bravo of 9 to 5, for instance, worked on the passage of family leave in Wisconsin before becoming a key player in the coalition in Washington.⁹⁶⁵

State plans also provided laboratories to show that such laws were workable. Connecticut, a state that had had a maternity leave law since the 1970s, was the first to pass a family leave law. This state, like the other three early states to pass parental or family leave, had a Democrat-controlled legislature and a Democratic governor. In Connecticut, family leave legislation was also folded into a larger legislative agenda on family issues and the successful passage of multiple bills created some momentum for family leave.⁹⁶⁶ Because the bill in Connecticut was initially limited to public sector employees, the business lobby did not oppose it.⁹⁶⁷ The Minnesota bill that passed in 1987 did face employer opposition and so presaged several of the compromises that proponents of a federal bill would eventually make.⁹⁶⁸ The bill's supporters there had to agree to exclude part-time workers. Minnesota's family leave law also excluded small businesses, defined as those with fewer than twenty-one employees. Minnesota

⁹⁶⁴Patricia M. McGovern and Myra J. Segal, "Minnesota Parental Leave Law Weighs Social Reforms Against Costs," *Business and Health* (December 1987): 42.

⁹⁶⁵ Erving, *Conflict and Compromise*, 154.

⁹⁶⁶ Steven K. Wisensale, "Approaches to Family Policy in State Government", 137; Anya Bernstein, *The Moderation Dilemma: Legislative Coalitions and the Politics of Family and Medical Leave* (Pittsburgh: University of Pittsburgh Press, 2001), 48-50.

⁹⁶⁷ Steven K. Wisensale and Michael D. Allison, "Family Leave Legislation and Federal Initiatives," *Family Relations* 38, no. 2 (April 1989): 184; Anya Bernstein, *The Moderation Dilemma*, 50-52.

⁹⁶⁸ Wisensale and Allison, "Family Leave Legislation and Federal Initiatives," 184.

limited the amount of leave time to six weeks, specifically so that any temporary employee hired to fill in for someone on leave would not be eligible to collect unemployment insurance once the leave taker returned.⁹⁶⁹

Rhode Island family leave legislation was an especially important precedent in carving out an exemption for small business. This law limited coverage to employees of companies with more than fifty employees. Legislators exempted small businesses there in response to complaints that family leave would drive small companies, including the many small costume jewelry companies in the state, to fail.⁹⁷⁰ States that introduced family leave proposed wildly ranging exemptions for small businesses, from the Massachusetts proposal that would cover companies with even six employees to the Tennessee law that exempted firms with fewer than one hundred workers.⁹⁷¹ The federal bill was initially crafted to cover all businesses with no size exemption. Over the course of various revisions, the exemption kept rising before Republican Representative Marge Roukema successfully pressed to raise the exemption to fifty.⁹⁷² Over its gestation, federal legislation also narrowed by reducing the weeks of coverage from twenty-six to twelve and by limiting coverage to full-time workers with an established history with their employers.

Most of the initial supporters of the family leave, at the state and federal level, favored paid leave. Scholars who testified in favor of the various versions of the legislation came out for it as well. When the Yale Bush Center for Child Development released the findings of their two-

⁹⁶⁹ Patricia M. McGovern and Myra J. Segal, "Minnesota Parental Leave Law Weighs Social Reforms Against Costs," *Business and Health* (December 1987): 43.

⁹⁷⁰ Steven K. Wisensale, *Family Leave Policy*, 125-126.

⁹⁷¹ *Ibid.*; Bernstein, *The Moderation Dilemma*, 73.

⁹⁷² Elving, *Conflict and Compromise*, 86.

year study of maternity leave in 1985, they recommended a six month parental leave with the first three months compensated at three quarters pay and the next three months unpaid. The Yale Bush committee suggested that wage replacement could operate through insurance funded by both employee and employer contributions, much like the Rhode Island Cash Sickness Compensation fund.⁹⁷³ Women's organizations such as the National Organization for Women and the Coalition of Labor Union Women supported paid leave. But, political realities constrained advocates. Schroeder said, "I figured if I put in pay, the bill would be defeated."⁹⁷⁴ The bill she introduced in April of 1985 included the idea that a commission would investigate the possibility of "wage remuneration" two years after the law went into effect, but by 1987, even that idea was dropped.

Even in liberal Northern states, feminist coalitions could not pass a state law that called for paid family leave. The one state in the 1980s that considered legislation for paid family leave was Massachusetts. The bill was introduced by a liberal feminist Democratic state legislator working with a feminist lawyer from NOW. They argued that unpaid leave did not meet the needs of low-income workers and that only a paid leave was worth fighting for. They initially proposed funding the leave through a state payroll tax, and then switched to the idea of extending temporary disability insurance to cover the leave. The bill was dead on arrival and never made it out of committee. Business was quickly united against the proposal; even in a solidly Democratic state, moderate and conservative Democrats were opposed. In studying the legislative history of family leave in Massachusetts, Anya Bernstein concluded that the Commonwealth might have

⁹⁷³ Edward Zigler, Meryl Frank and Barbara Emmel, "Introduction," *The Parental Leave Crisis*, xix; Cheryl O. Hayes, John Logan Palmer and Martha J. Zaslow, *Who Cares for America's Children?* (Washington, DC: National Academy, 1990), 254.

⁹⁷⁴ "Employers under pressure to clarify policies," *Lawrence Journal-World*, January 26, 1986.

passed family leave if the original feminist sponsors would have signaled that they were willing to abandon paid leave in order to secure the passage of legislation.⁹⁷⁵

The decision not to seek paid leave, in most states, and at the federal level, was pragmatic. But as a result, the legislation that passed strengthened the class divide in the 1990s version of a welfare state. Families that can afford to have a wage earner take substantial time off unpaid are usually two earner families, and frequently higher earning couples. Some supporters of FMLA believed that a more generous version would soon follow. More than twenty years after FMLA, the small number of states that have passed paid leave indicates that faith in incrementalism was misplaced. Republican detractors of the bill sometimes pointed out the class bias in unpaid leave and called it the “yuppie bill,” though most of them would have been even more vehemently opposed to proposals for paid leave.

Any feminist legislation with labor backing would have faced uphill struggle during the Reagan presidency. Feminists were on the defensive, fueling their desire for a legislative victory, but chastening them, encouraging the voices of those who believed in compromise. The Republican Party introduced rhetoric about family values in its platform in 1976. The term was amorphous and malleable, but could be used to decry a decline in American family related to divorce, drug use, women's employment, abortion, gay rights, teen pregnancy and the sexual revolution. Congress passed the FMLA twice only to have it vetoed by President George H. W. Bush. In the 1992 presidential campaign both sides tried to claim the mantle of family values. That year, 83% of surveyed adults said they backed the measure.⁹⁷⁶ By this time, the legislation was defined as a means of strengthening American families. How could one support family

⁹⁷⁵ Anya Bernstein, *The Moderation Dilemma*, 57-67.

⁹⁷⁶ Ana Devroy, "Bush Alternative Avoids Mandating Labor Rights," *Washington Post*, September 17, 1992.

values, defenders of the law asked, and oppose legislation on behalf of American families? Bill Clinton indicated that as president, he would sign the bill. He was elected, along with five new female Senators and twenty-four women in the House. The election of Clinton, and "the year of the Woman" in Congress, led some to think of introducing a more robust version of family leave, more like Schroeder's first bill, or even a bill with income replacement, but the consensus was that with the end in sight, it was best to provide many American families with relief as soon as possible which meant sticking with the bill as it had already passed twice.

The first piece of legislation President Clinton signed into law was the Family and Medical Leave Act. The FMLA guarantees up to twelve weeks of job protected leave for the birth or adoption of a child, the care of a sick child, an ill spouse or parent, or the sickness or disability of an employee him or herself. This requirement is only for unpaid leave, although if an employer offers paid disability leave, that can be a part of the twelve weeks. The federal requirement applies only to full-time workers and only in companies with more than fifty employees within a seventy-five mile radius. Employees have to have worked for the employer for 1,250 hours in the previous year before becoming eligible. An employee who is in the top 10% pay bracket and who is considered essential to company operations might not be eligible for this leave.⁹⁷⁷ Since women, in particular mothers, are more likely than men to work part time, and may be more likely to work for smaller companies, the US has the unusual circumstance that more men than women are covered by the key part of American maternity policy.

⁹⁷⁷ Family and Medical Leave Act, United States, Section 825.110.a and section 825.200; Anne-Marie Mooney Cotter, *Pregnant Pause: An Intersectional Legal Analysis of Maternity Discrimination* (Surrey, UK: Ashgate Publishing Group, 2010), 193-194. Recent changes mean eligibility for flight attendants and pilots is figured with a different measure of workplace attachment. Longer leaves are guaranteed for the care of a family member disabled by service in the armed forces.

The place of the FMLA within the American welfare state needs careful examination. The FMLA became law in the midst of angry stereotyping of women who received AFDC as lazy and manipulative. Welfare, opponents felt, encouraged women who couldn't support them to have babies in order to get more benefits. While allegations of welfare abuse saturated cultural media and congressional debates, the FMLA passed into law. A few years later, AFDC was largely dismantled by a new law whose very name, Personal Responsibility and Work Opportunity Act, signaled the distrust many Americans, including members of Congress and the Democratic president who signed it, had for poor women trying to raise children.⁹⁷⁸ As Nancy Folbre observed, welfare reform "was designed to punish those who accepted responsibility for the care of others. Its passage publicly declared that raising children was not work."⁹⁷⁹ Welfare reform shifted more power to the states in the provision of benefits to the poor. States in the forefront of family leave laws, like Wisconsin and Connecticut, were also among those with early and draconian welfare restrictions that in particular affected mothers and children.⁹⁸⁰

Despite the clear connection between social policies related to women's care of children in both welfare reform and family leave, throughout the nine years family leave was debated in Congress and in numerous state legislatures, this major expansion of the welfare state remained rather aloof from the ugly fray about "welfare reform."

Though it drew upon the social sciences and medicine and looked to foreign countries for inspiration and validation far more than the PDA did, the FMLA was still very much a child of

⁹⁷⁸ Ruth Sidel, *Keeping Women and Children Last: America's War on the Poor*. (New York: Penguin Books, 1998), 222 and passim; see also Susan J. Douglas and Meredith W. Michaels, *The Mommy Myth: The Idealization of Motherhood and How It Has Undermined Women*, (New York: Free Press, 2004), 173-202.

⁹⁷⁹ Folbre, *The Invisible Heart*, 120.

⁹⁸⁰ Sidel, *Keeping Women and Children Last*, 215, 221.

the approach developed by feminist litigators in the 1970s. Lise Vogel recognized the approach in her 1993 book *Mothers on the Job*.

Modest and indeed peculiar by European Standards, it does not center upon specific substantive benefits for mothers, not does it define its goals in terms of social welfare. Instead, its touchstone is an antidiscrimination principle: maternity cannot be the basis for unequal treatment of a woman.⁹⁸¹

Under the PDA, the condition of being pregnant could be compared to other temporarily disabling conditions, like a broken leg. With the FMLA, the condition of being a new mother could be compared to the condition of being another loving member of a family responsible for providing care. The FMLA likened maternity leave to paternity leave, included adoption and linked those periods of care to the care of an ill older child, or, eventually, to the care of ailing parents or sick spouses. Such a revolutionary and very creative conceptual shift created powerful supporters and a winning coalition. Once again, reformers hoped that more expansive and adequate remedies would soon follow from the initial legislation, but, as before, they would be disappointed.

⁹⁸¹ Vogel, *Mothers on the Job*, 66.

EPILOGUE:

OVERDUE: MATERNITY POLICY IN THE TWENTY-FIRST CENTURY

Since Rosie went to work there have been gains in the rights and benefits available to pregnant workers and new mothers. However these have been limited especially by being built on the foundation of government mandates and employer entitlements. American maternity policy remains stingy and strained, a gossamer safety net for new mothers and their families. To be sure, the FMLA greatly improved public discourse about maternity policy. Job protected leave to cope with one's own pregnancy or illness, the illness of some close family members or the care of newborn or newly adopted child are broadly popular. But because of the law's explicit definition of family and even more so because the law is tied to conditions in the labor market, the FMLA leaves about forty percent of workers and their families uncovered and ignores families with tenuous connections to the labor market. Employers, especially of low-wage workers, show little regard for the PDA, now thirty-six years old, and courts tend to interpret it very narrowly, to the disadvantage of pregnant workers. Moreover, the worldwide gold standard of maternity leave, paid job-protected leave, remains elusive for most American women. The Family and Medical Leave Act Survey of 2012 found that a third of workers on FMLA leave had no wage replacement but the U.S. Department of Labor National Compensation Survey suggested that eighty-eight percent of workers in the private sector had no paid family leave.⁹⁸² Both studies found rates of paid leave higher for higher earning professional or managerial employees in large companies. Low-wage workers find it especially difficult to

⁹⁸² Institute for Women's Policy Research, *Maternity, Paternity, and Adoption Leave in the United States* (Washington, DC: Institute for Women's Policy Research, 2013), 8, 9.

take unpaid leave, even when they are eligible for it, because they have few economic resources to substitute for their wages.⁹⁸³

Nearly all countries in the world have a provision for wage replacement for a pregnant worker when she has her baby. No other country protects as many of life's circumstances as the US does with the FMLA, but many European countries do guarantee paternity as well as maternity leave with wage replacement and in many places leave is guaranteed for a longer period than 12 weeks.⁹⁸⁴ America's maternity policy is weak by nearly any measure.

The PDA and the FMLA remain the national statutory part of American maternity policy. Efforts to strengthen the PDA, or to expand the FMLA, have been unsuccessful. While some states have stronger laws and more generous benefits, progress has been very slow. The Affordable Health Care Act, an important new piece of a national health care policy, establishes some rights for new mothers in the workplace and prohibits some common discriminatory practices. Recent changes to the Americans with Disabilities Act extend some protections to some pregnant workers. While there is now public space to talk about the needs of mothers in the workforce, the current political climate makes expansion of public benefits a hard sell. Neoliberal economics retains political ascendancy over the more social democratic model embraced by the New Deal and Great Society. Long after the dismantling of AFDC, welfare remains stigmatized, especially based on gender and race.

⁹⁸³ Council of Economic Advisors, "The Economics of Paid and Unpaid Leave," June 2014, The White House https://www.whitehouse.gov/sites/default/files/docs/leave_report_final.pdf (accessed July 18, 2015), 1; Joan Blades and Kristin Rowe-Finkbeiner, *The Motherhood Manifesto: What America's Moms Want—and What to Do about It* (New York: Nation Books, 2006).

⁹⁸⁴ It should be noted that legally protected maternity leave is limited to only some economic sectors in some countries and that many countries have a much larger irregular labor market that wouldn't be covered. In reality, many working women around the world are not fully covered by maternity benefits even if their country has such benefits on paper. Also, a handful of countries provide very low rates of wage replacement. Saying that the US and Papua New Guinea are the only countries without paid maternity leave is oversimplified.

Clearly the bright spot is how popular paid family leave is, especially among women. Paid family leave is emerging as a key issue in the presidential election of 2016.⁹⁸⁵ Leading Democratic candidates for the 2016 election declare support for more robust protections for working parents and their families.⁹⁸⁶ However, even if one of those candidates won, a congressional majority interested in meaningful new legislation seems unlikely.

The top tier of American workers secure social supports for maternity through employee fringe benefits. The presence of some women in high levels of management and in the field of human relations, along with slow but real changes in American fatherhood, have led many large and medium-sized companies to expand family-friendly practices. Some unions push for family benefits in contract negotiations and unions remain central to enforcing access to rights under company agreement, or under law. However, the economic downturn, a high unemployment rate, the growing gap between good and bad jobs, the weakness of American labor unions and a persistent glass ceiling for women in corporate positions all lessen the likelihood that the private welfare state will provide the basis for a comprehensive maternity policy. Feminists, next to the labor movement the most likely advocates of maternity policy, do much of the current work to expand maternity rights and protections, but currently a substantial portion of their resources and efforts are devoted elsewhere, to preserving abortion rights, confronting sexual violence in universities and the military and to pushing for marriage equality for same-sex relationships.

⁹⁸⁵ Anzalone Liszt Grove and the Feldman Group, "Voters Support Economic Justice Policies," American Women, February 7, 2014, <http://www.americanwomen.org/research/document/PUBLIC-RELEASE-AW-FEB-5-RELEASE.pdf> (accessed July 24, 2015); Tierney Sneed, "Paid Family Leave is Primed for a National Debate," *US News and World Report*, March 23, 2015, <http://www.usnews.com/news/articles/2015/03/23/paid-family-leave-is-primed-for-a-national-debate> (accessed July 31, 2015).

⁹⁸⁶ Hillary Clinton released a video promoting paid family leave on Mother's Day, 2015. Paid family leave is also part of her plan for "Strengthening America's Families," under "The Four Fights," Hilary for America, <https://www.hillaryclinton.com/the-four-fights/strengthening-americas-families/>; Bernie Sanders, "It's Time to Support Real Family Values," Bernie 2016, June 17, 2015, <https://berniesanders.com/time-to-support-real-family-values/> (accessed July 31, 2015).

The Right to Keep One's Job

The law in theory and in practice is quite different. The Supreme Court's decision in *LaFleur*, the PDA, and the FMLA established a pregnant worker's right to keep her job despite her pregnancy or need for leave for childbirth. However, as Catherine R. Albiston writes, rights under the FMLA and the PDA "are not self-enforcing." Employers frequently ignore them and courts often interpret them very narrowly.⁹⁸⁷ Albiston, and the National Partnership for Women and Families, the National Women's Law Center, A Better Balance, MomsRising, the Center for WorkLife Law and Family Values @ Work, list case after case of pregnant workers who faced discrimination in the workplace and hard decisions at home when they tried to have both a healthy baby and a good job.⁹⁸⁸

In 2007, for example, the EEOC filed a case on behalf of sixty-five women who had worked for Bloomberg L.P. These women said that after becoming pregnant, they lost out on raises, had their salaries cut, were re-assigned to less important work and left out of crucial meetings. The judge threw out the EEOC statistical data and labeled their remaining evidence anecdotal. Beyond concluding that these women had no case, the judge also affirmed the employer's right to demand "all-out dedication" and to treat employees who did not demonstrate the expected level of commitment less favorably. Bloomberg's pregnant and new mother employees had made their own choices to let their careers slip, much like any worker who had

⁹⁸⁷ Catherine R. Albiston, *Institutional Inequality and the Mobilization of the Family and Medical Leave Act: Rights on Leave* (New York: Cambridge University Press, 2010), ix.

⁹⁸⁸ Albiston, *Institutional Inequality*; National Partnership for Women and Families, <http://www.nationalpartnership.org/> (accessed August 4, 2015); National Women's Law Center, <http://www.nwlc.org/> (accessed August 4, 2014); MomsRising, <http://www.momsrising.org/> (accessed August 5, 2015); A Better Balance, <http://www.abetterbalance.org/web/> (accessed August 5, 2015); Family Values @ Work, <http://familyvaluesatwork.org/> (accessed August 5, 2015); Dina Bakst and Phoebe Taubman, *Babygate: What you Really Need to Know about Pregnancy and Parenting in the American Workplace* (Bloomington, IN: iUniverse, 2013).

taken substantial time off from work. Bloomberg's policy was gender neutral, according to the judge. "The law," she wrote, "does not mandate 'work-life balance.'"⁹⁸⁹

We have observed how much the media have highlighted the plight of pregnant professionals.⁹⁹⁰ However, low-wage workers were far more likely to be victims of pregnancy discrimination. Joan Williams, law professor and director of the Center for WorkLife Law, told a reporter that "The openness of pregnancy discrimination in low-income contexts is just unbelievable. People tell their employers they're pregnant and they're fired 15 minutes later."⁹⁹¹ Tom Spiggle, another lawyer with expertise in litigating pregnancy and caregiver discrimination cases, titled his recent book *You're Pregnant? You're Fired*.⁹⁹² Stephanie Bornstein, one of the lawyers who helped write California's paid family leave law (discussed below) points out that low-wage workers are especially vulnerable to blatant pregnancy discrimination because their employers know that low-wage workers are unlikely to contact a lawyer and, since their earnings are so low, their cases may well not be worth pursuing even when they are strong cases.⁹⁹³

⁹⁸⁹ David W. Chen, "Judge Clears Bloomberg L.P. in Suit Brought by 65 Women," *New York Times*, August 18, 2011, A15; Tom Spiggle, *You're Pregnant, You're Fired: Protecting Mothers, Fathers and Other Caregivers in the Workplace* (Raleigh, NC: Morgan and Dawon Publishing, 2014), 66. Pregnancy and motherhood prevented women from advancing in management positions at Wal-Mart as well, according to the plaintiffs in the *Dukes v. Wal-mart* case that started in 2004. Liza Featherston, *Selling Women Short: The Landmark Battle for Worker's Rights at Wal-Mart* (New York: Basic Books, 2004), 116.

⁹⁹⁰ Also a *Price is Right* model who lost her spot on the show after becoming pregnant. Tamara Abraham, "Price is Right Model Who Sued Show for Discrimination against her Pregnancy could Lose \$7.7m Damages as Case Returns to Trial," *Daily Mail*, March 13, 2013, <http://www.dailymail.co.uk/femail/article-2292828/Price-Is-Right-model-sued-discriminating-pregnancy-LOSE-7-7m-damages-case-returns-trial.html> (accessed July 24, 2015).

⁹⁹¹ Joan Williams, quoted by Anna North, "What It's Like to Lose Your Job While Pregnant," BuzzFeed, April 2, 2013, <http://www.buzzfeed.com/annanorth/what-its-like-to-lose-your-job-while-pregnant#.qyVGkJ4j7>, (accessed 29 August 2015).

⁹⁹² Spiggle, *You're Pregnant? You're Fired*, iii.

⁹⁹³ Stephanie Bornstein, *Poor, Pregnant, and Fired: Caregiver Discrimination Against Low-Wage Workers* (San Francisco: Center for WorkLife Law, 2011), 15-17, <http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf> (accessed July 24, 2015).

Still, there were quite a few women who were willing to sue. In 2011, pregnancy discrimination was the most common claim in the database of 2,600 cases of family responsibility discrimination maintained by the Center for WorkLife Law at Hastings College of Law.⁹⁹⁴ African American and Hispanic workers experienced disproportionate pregnancy discrimination. In this data base, Stephanie Bornstein found workers who had been fired just days, hours, or on the spot after revealing their pregnancies. One low-wage worker received a voice mail about “Harry’s Rule” that “the first time any sign of that pregnancy shows through, you’re done.” Other workers lost jobs they had been offered once their employers learned of their pregnancies. A new mother lost her job after breastfeeding her premature baby on her scheduled break. Several women were pressured by bosses and supervisors to have abortions they did not want. Bosses told women they were being let go because they were pregnant. Women, especially single women, who revealed their pregnancies, experienced new or escalated sexual harassment on the job. Some workers were fired for absences that would have been covered by the FMLA but did not know how to insist on their legally protected rights.⁹⁹⁵ In addition to blatant discrimination, employers sometimes hold pregnant workers to higher standards than co-workers and create a paper trail of low performance reports, tardies or absences to justify terminating a pregnant employee. This is a “strategy of portraying pregnant workers as undependable and costly” in order “to legitimize their termination” and provide a defense should a woman manage to make her way to court.⁹⁹⁶ Reginald Byron and Vincent

⁹⁹⁴ Bornstein, *Poor, Pregnant, and Fired*, 2, 11.

⁹⁹⁵ Bornstein, *Poor, Pregnant, and Fired*, 2, 8, 10-14, 23-24, 27-28.

⁹⁹⁶ Chad Brooks, “Employers Still finding “legal” Excuses to Fire Pregnant Women,” *Business News Daily*, February 25, 2014, <http://www.businessnewsdaily.com/5970-firing-pregnant-workers.html> (accessed July 24, 2015).

Roscigno studied a set of Ohio Civil Rights Commission cases and found a clear pattern where employers “symbolically vilified” pregnant workers and then fired them.⁹⁹⁷

The grey area proved to be workplace accommodations that could let women continue to work while pregnant. African American women, Hispanic women and new immigrants are disproportionately represented in jobs whose regimentation and physicality can pose problems for healthy pregnancies.⁹⁹⁸ Low-wage workers, whose jobs are often physical and who generally have less freedom of movement and less autonomy in work process, are more likely to need some accommodation to work through a healthy pregnancy. Walmart employees report being denied adequate access to water during their shifts, resulting in fainting, dehydration and pregnancy complications. Restaurant workers were not allowed to use the bathroom when they needed to or to schedule work hours around prenatal appointments.⁹⁹⁹ Other workers, on their doctors’ advice, asked for stools to reduce ankle swelling or for work that did not involve heavy lifting or exposure to intense heat.¹⁰⁰⁰ Workers who sought accommodations have been summarily dismissed as no longer able or willing to fulfill job duties.¹⁰⁰¹ Sometimes the lack of

⁹⁹⁷ Reginald Byron and Vincent Roscigno, “Relational Power, Legitimation and Pregnancy Discrimination,” *Gender and Society* 28, no.3 (June 2014), 435.

⁹⁹⁸ National Women’s Law Center and A Better Balance. *It Shouldn’t Be a Heavy Lift: Fair Treatment for Pregnant Workers* (Washington, D.C.: National Women’s Law Center, 2013), 1.

⁹⁹⁹ National Women’s Law Center and A Better Balance. *It Shouldn’t Be a Heavy Lift*, 4; Christina Wilkie, “Workplace Pregnancy Bill Introduced Despite Opposition,” *Huffington Post*, Sept. 26, 2012, http://www.huffingtonpost.com/2012/09/25/workplace-pregnancy-bill-opposition_n_1914062.html (accessed August 29, 2015); Lauren Khouri, “Can We All Agree? Pregnant Workers Deserve Fair Treatment,” Our Blog, National Women’s Law Center, June 16, 2014, <http://www.nwlc.org/our-blog/can-we-all-agree-pregnant-workers-deserve-fair-treatment> (accessed July 24, 2015); David Stout, “Pregnant Woman Says She Was Fired for Taking Too Many Bathroom Breaks,” *Time*, December 4, 2014, <http://time.com/3619527/pregnant-fired-backroom-maxim-dawn-steckmann/> (accessed July 24, 2015).

¹⁰⁰⁰ National Women’s Law Center and A Better Balance, *It Shouldn’t be a Heavy Lift*, 8, 10, 12.

¹⁰⁰¹ National Women’s Law Center and A Better Balance. *It Shouldn’t be a Heavy Lift*, 11.

accommodations makes workers compromise their health in order to keep the jobs they need.¹⁰⁰²

In a cruel twist, much as when CalFed sought to use the PDA to undermine California's maternity leave law, some employers today use the FMLA to circumvent the PDA and dismiss pregnant workers. Rather than granting accommodations, some employers put pregnant women with modest health concerns on FMLA leave early in their pregnancies. These pregnant workers use up the twelve weeks of job protected leave while pregnant and run out of it before childbirth, by which time some lose their jobs as well.¹⁰⁰³

The courts' requirement of very specific kinds of comparisons to prove discrimination has hobbled and limited the import of PDA, especially in the area of workplace accommodations for pregnancy. Peggy Young, who started work at UPS in 1999 and became pregnant in 2006, found this out. Her doctor and midwife wrote recommendations that she not lift anything more than twenty pounds. Young was not worried, since she worked on the air mail run and rarely handled heavy packages. Furthermore, the other driver who shared the route had agreed to take any unusual heavier packages.¹⁰⁰⁴ However, rather than refer to Young's actual job duties, UPS referred to the general description for a UPS delivery driver, which included the ability to lift 70 pounds. UPS did have light work, to which they did sometimes transfer employees with other kinds of temporary disabilities, but they sent Young home until she was no longer pregnant. She

¹⁰⁰² Emily Martin, "Illinois Commits to Protect Pregnant Workers," Our Blog, National Women's Law Center, August 26, 2014, <http://www.nwlc.org/our-blog/illinois-commits-protect-pregnant-workers> (accessed July 24, 2013); Brigid Schulte, "States Move to Ensure Pregnant Workers Get Fair Chance to Stay on Job," *Washington Post*, September 8, 2014, <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/08/states-move-where-congress-wont-to-ensure-pregnant-workers-get-fair-shot-to-stay-on-job/> (accessed July 30, 2014).

¹⁰⁰³ National Women's Law Center and A Better Balance. *It Shouldn't be a Heavy Lift*, 4,8,10; Elizabeth Johnston and Emily Martin, "Pregnant Worker Seeks Justice in Court," Our Blog, National Women's Law Center, December 16, 2013, <http://www.nwlc.org/our-blog/pregnant-worker-seeks-justice-court> (accessed July 24, 2015).

¹⁰⁰⁴ Petitioner's Brief to the Supreme Court of the United States, *Peggy Young v. United Parcel Service, Inc.*, *Preview of United States Supreme Court Cases*, American Bar Association, [c. January 16, 2014], pp. 10-13, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/12-1226_pet.authcheckdam.pdf (accessed August 1, 2015).

returned to work when her baby was two months old, but during her long leave, she lost several months' pay and her health insurance.¹⁰⁰⁵

The Teamsters Union, which represented UPS drivers, had tried to get explicit protection of the right of pregnant workers to job transfers written into the contract, but UPS refused. UPS granted job reassignment and light work to employees injured on the job, those protected by the Americans with Disabilities Act (passed in 1990) and even those who had lost their driver's licenses. At trial, a shop steward testified that while alternative work assignments were routinely granted, those requested for reasons of pregnancy ran into problems.¹⁰⁰⁶ Young filed a complaint with the EEOC and eventually took UPS to court. The district court found summarily for UPS, holding that the criteria for reassignment were gender neutral and that UPS showed no animus towards pregnant women in their policies. On appeal, the Fourth Circuit agreed, holding that Young was unlike the categories of workers for whom UPS did make accommodations and so could not compare herself to them. The PDA did not apply.¹⁰⁰⁷

When courts limit the groups pregnant workers can be compared to, the problem is not only that pregnant workers do not automatically get the benefits or accommodations that other groups might. The bigger problem is that a pregnant woman alleging discrimination must point to a comparable worker who was treated more generously than she was treated by her employer. Removing many people from the comparable population might well mean she cannot find one, especially if she works for a small company, or one without a long history.¹⁰⁰⁸

¹⁰⁰⁵ Petitioner's Brief, *Peggy Young v. United Parcel Service, Inc.*, 10-13.

¹⁰⁰⁶ *Ibid.*, 4-10.

¹⁰⁰⁷ *Ibid.*, 14. Some employers also provide accommodations to disabled veterans that they may not afford other workers.

¹⁰⁰⁸ Deborah L. Brake and Joanna L. Grossman, "Unprotected Sex: The Pregnancy Discrimination Act at 35," *Duke Journal of Gender Law and Policy*, 21:67 (2013): 67-123.

In March 2015, the Supreme Court reversed the appeals court and sent the case back to be tried on its merits. It was a six to three decision, with all three female justices joining the opinion's author, Justice Breyer, and the Chief Justice, in believing that Young at least had a case under the PDA. The Court's decision did uphold the PDA, but it was a narrow endorsement of a pregnant worker's rights. The decision turned on the question of summary judgment. Justice Breyer did not actually find that UPS had discriminated against Young; he only said that Young had a case and should be allowed to make it.¹⁰⁰⁹

According to law professors Joanna Grossman and Deborah Brake, Breyer's decision was "splitting the baby" between Young's claim that she should get accommodations other workers got and UPS's defense that their policy was pregnancy neutral. Pregnant workers, Breyer wrote, should not receive "most favored nation" status, but Young had raised enough of a question that she should have the opportunity to show a discriminatory intent.¹⁰¹⁰ Grossman and Brake believe that Breyer's opinion recognizes that "the disfavored treatment of pregnancy often rests on the devaluation of pregnant employees as future mothers and unreliable workers." Because of this "stereotyping" employers reject making the "investments" in accommodation for pregnant workers that they would make for "other workers with similar impairments." Grossman and Brake write that the Court's "ruling restores important protections under the PDA that lower

¹⁰⁰⁹ Breyer also pointed out that amendments to the ADA that came after Young's case could make the Court's decision moot because presumably a future Peggy Young could access accommodations under the ADA that she had sought in this case under the PDA. Stephen G. Breyer, opinion for the majority, *Young v. UPS* 575 U.S. ____ (2015)

¹⁰¹⁰ In a concurring opinion, Justice Alito mused that UPS might have overstretched by providing accommodations to workers who lost their DOT certification. Specifically, Alito pointed out that this would include drivers with DUIs. Federal law required UPS to provide accommodations for disabled workers. UPS would be penalized if employees injured on the job couldn't work and then filed for worker's compensation. However, Congress had made no provision in favor of workers who lost their driver's licenses. True, the law would not allow them to drive, but the government did not require UPS to employ them if they could not do their jobs for that reason. Alito asserted that Young could compare herself to these drivers. Samuel Alito, Concurring opinion, *Young v. UPS* 575 U.S. ____ (2015).

courts had eviscerated, but it also leaves many questions unanswered.”¹⁰¹¹ While they think the court understands this central cause of pregnancy discrimination, Grossman and Brake point out that the nuance and narrowness of the decision is not likely to end discrimination against pregnant workers or reduce the flow of lawsuits.¹⁰¹² To Tom Spiggle, however, the Court’s decision that Young’s case should be heard was itself a victory considering how hard women find it to even bring pregnancy discrimination cases.¹⁰¹³

Public opinion is quite a bit in advance of the courts. The public reaction to Young’s case reveals the extent to which Americans now assume that pregnant women have rights at work. Seventy-nine percent of respondents to a Center for American Progress poll thought UPS should have provided her with accommodations. The poll showed African Americans, women and younger people were most likely to side with Young. However, even among older white Republican men from the South, a substantial majority thought she should have been able to keep her job.¹⁰¹⁴

¹⁰¹¹ Joanna L. Grossman and Deborah L. Brake, “Afterbirth: The Supreme Court’s Ruling in *Young v. UPS* Leaves Many Questions Unanswered,” *Verdict: Legal Analysis and Commentary from Justia*, April 20, 2015, <https://verdict.justia.com/2015/04/20/afterbirth-the-supreme-courts-ruling-in-young-v-ups-leaves-many-questions-unanswered> (accessed July 25, 2015).

¹⁰¹² Joanna L. Grossman and Deborah L. Brake, “Forceps Delivery: The Supreme Court Narrowly Saves the Pregnancy Discrimination Act in *Young v. UPS*,” *Verdict: Legal Analysis and Commentary from Justia*, March 31, 2015, <https://verdict.justia.com/2015/03/31/forceps-delivery-the-supreme-court-narrowly-saves-the-pregnancy-discrimination-act-in-young-v-ups> (accessed July 25, 2015).

¹⁰¹³ Tom Spiggle, “Why *Young v. UPS* is a Big Win for Pregnant Workers,” The Blog, *Huffington Post*, March 27, 2015, http://www.huffingtonpost.com/tom-spiggle/why-young-v-ups-is-a-big_b_6956498.html (accessed July 24, 2015). In his book, Spiggle compares the process of protecting pregnant workers’ rights via litigation to “salmon swimming upstream to spawn” where attorney fees, the risk of summary judgement in favor of the employer and the long drawn out process of a court case are equivalent to bears, eagles and dam turbines. Spiggle, *You’re Pregnant? You’re Fired*, 100.

¹⁰¹⁴ Center for American Progress, memorandum on Survey on Pregnancy Discrimination, November 24, 2014, p. 2, <https://cdn.americanprogress.org/wp-content/uploads/2014/11/YoungPollingMemo.pdf> (accessed July 24, 2015). After the district court and the appeals court sided with UPS, Young appealed her case to the Supreme Court. Eleven amicus curiae briefs were filed in support of Peggy Young. The brief by the National Women’s Law Center was signed by 123 members of the US Congress. Other briefs came from state and local legislators, several women’s organizations, 23 pro-life organizations, the NEA, health care providers and the US attorney general: National

Some members of Congress are also in advance of the courts. The Pregnant Workers Fairness Act was reintroduced in the US Congress in 2015 after 2012 and 2013 bills did not even make it to the floor. This year, for the first time, there is some bipartisan support.¹⁰¹⁵ While the legislation stagnates in the US Congress, states and cities have been passing laws to clarify pregnant workers' rights or to mandate that employers provide accommodations for pregnant workers who need them.¹⁰¹⁶ As so many times in the recent past, the workplace American mothers face depends a great deal on address and the workings of the private welfare state.

Women's Law Center, "Fact Sheet: Young v. United Parcel Service, Inc.," National Women's Law Center, November 2014, http://www.nwlc.org/sites/default/files/pdfs/young_v_ups_fact_sheet.pdf (16 January 2015), 2; SCOTUSblog, *Young v. United Parcel Service*, SCOTUSblog Case Files, <http://www.scotusblog.com/case-files/cases/young-v-united-parcel-service/> (accessed 16 January 2015).

¹⁰¹⁵ Emily Martin, "Democrats and Republicans Agree: Time for Fairness for Pregnant Workers," Our Blog, National Women's Law Center, June 04, 2015, <http://www.nwlc.org/our-blog/democrats-and-republicans-agree-time-fairness-pregnant-workers> (accessed July 31, 2015); Emma Niles, "Pregnant Workers Fairness Act Reintroduced in Congress," *Ms. Blog, Ms. Magazine*, June 5, 2015, <http://msmagazine.com/blog/2015/06/05/congress-reintroduces-pregnant-workers-fairness-act/> (accessed July 30, 2015).

¹⁰¹⁶ Alaska, California, Delaware, Illinois, Iowa, Hawaii, Louisiana, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, Texas, and West Virginia, as well as New York City, Providence, Philadelphia, Pittsburgh, and the District of Columbia. Martin, "Democrats and Republicans Agree"; National Women's Law Center and A Better Balance, *It Shouldn't be a Heavy Lift*, 17, http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (accessed January 15, 2015); Abigail Bar-Lev, "Nebraska Becomes the Thirteenth State to Protect Pregnant Workers' Job Security," Our Blog, National Women's Law Center, April 16, 2015, <http://www.nwlc.org/our-blog/nebraska-becomes-thirteenth-state-protect-pregnant-workers-job-security> (accessed July 24, 2015); Lauren Khouri, "Can We All Agree? Pregnant Workers Deserve Fair Treatment," Our Blog, National Women's Law Center, June 16, 2014 <http://www.nwlc.org/our-blog/can-we-all-agree-pregnant-workers-deserve-fair-treatment> (accessed July 24, 2015); Barbara Gault, Heidi Hartmann, Ariane Hegewisch, Jessica Milli and Lindsey Reichlin, *Paid Parental Leave in the United States: What the Data Tell Us about Access, Usage, and Economic and Health Benefits* (Washington, DC: Institute for Women's Policy Research, 2014), 6. When West Virginia, Illinois and Nebraska and Delaware passed their Pregnant Worker's Fairness Acts, their legislative majorities were not only bipartisan, they were unanimous. Emily Martin, "Illinois Commits to Protect Pregnant Workers," Our Blog, National Women's Law Center, August 26, 2014, <http://www.nwlc.org/our-blog/illinois-commits-protect-pregnant-workers> (accessed July 24, 2015); Bar-Lev, "Nebraska Becomes the Thirteenth State."

Job-Protected Leave

The president was also in advance of the courts, especially in rhetoric. Before the midterm election of 2014 the White House held a Summit on Working Families. Key Obama advisors and Michelle Obama were actively involved in the summit, which was designed to show the administration's commitment to women's concerns. The Summit released data showing that only one out of every five new mothers is covered by the FMLA.¹⁰¹⁷ A 2013 Department of Labor study found that forty percent of American workers are not eligible for the FMLA.¹⁰¹⁸ The FMLA applies only to full time workers at companies with fifty or more employees and excludes recent hires. Low-wage workers are less likely to be covered especially because they are likely to work part time, be new hires, change jobs, work for smaller companies, or work under the table. One study found that “56% of workers with a family income below 200% of the poverty level” were ineligible for FMLA leave.¹⁰¹⁹ Furthermore, there was the question of defining the kind of family eligible for protection under family leave. Only the recent Supreme Court decisions in

¹⁰¹⁷ Council of Economic Advisors, “The Economics of Paid and Unpaid Leave,” 4; Jacob Alex Klerman, Kelly Daley, and Alyssa Pozniak, “Family and Medical Leave in 2012: Technical Report,” Abt Associates, prepared for the United States Department of Labor, September 7, 2012, revised April 18, 2014,

<http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf> (accessed May 25, 2015).

¹⁰¹⁸ Brigid Schulte, “Landmark Family Leave Law Doesn’t Help Millions of Workers” *Washington Post*, February 10, 2013; Jennifer Ludden, “FMLA Not Really Working for Many Employees,” *Morning Edition*, National Public Radio, February 5, 2013, <http://www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many-employees> (accessed May 19, 2015).

¹⁰¹⁹ Bornstein, *Poor, Pregnant, and Fired*, 7. Some states guarantee job protected leave to additional workers. For instance, Maine’s family leave law extended to workplaces with 15 or more workers and employees with 20 or more coworkers are covered in Minnesota. California, Colorado, Connecticut, Hawaii, New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin and the District of Columbia also have family leave laws that are somehow more extensive than the federal FMLA. Institute for Women’s Policy Research, *Maternity, Paternity, and Adoption Leave*, 4.

United States v. Windsor (2013) and *Obergefell v. Hodges* (2015) made clear that legally married same sex couples were eligible.¹⁰²⁰ Cohabitators are not.

Married same sex couples might actually be the easiest to absorb into current policies. Other family relationships—elderly great aunts with no children of their own, cousins injured in car crashes far from home, nephews whose own parents cannot always provide necessary care, grandparents who raised grandchildren when their own children failed and now need those young adults to care for them, sisters undergoing treatment for breast cancer, brothers with Down Syndrome who need help managing their health care and fictive kin, no matter how deep and long-lasting the love and moral responsibility--are not protected by a statute imagined to support a nuclear family. Any number of immigrant and minority groups in America have more expansive definitions of family relationships and responsibilities.¹⁰²¹ Fictive kin relationships and multigenerational care are much more common among them. Narrow definitions of nuclear family also disadvantage the poor, who are more likely to have children out of wedlock and to build their fragile networks of family support where they can.¹⁰²²

Wage Replacement During Leave

Many of the architects, and opponents, of the FMLA imagined the FMLA as a stepping stone towards paid leave. Pat Schroeder's first bills had included provisions for studying paid

¹⁰²⁰ Supreme Court of the United States Blog, "United States v. Windsor," <http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/> (accessed September 1, 2015); Supreme Court of the United States Blog, *Obergefell v. Hodges*, <http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/>. (accessed September 1, 2015).

¹⁰²¹ Laura Briggs, *Somebody's Children: The Politics of Transracial and Transnational Adoption* (Durham, NC: Duke University Press, 2012), 90.

¹⁰²² There is legislation in Congress right now to expand the list of family relationships protected by the FMLA, to cover workers at smaller companies and to allow part-time workers job protected family leave. Gault et al., *Paid Parental Leave*, 7. New York Representative Carolyn Maloney has been particularly active in proposing family leave legislation.

leave, but even this tentative foray was quickly cut to make the bill more passable. In state campaigns, only Massachusetts activists, based in the National Organization for Women, pressed for a paid leave bill and, as Anya Bernstein observed, that likely constrained efforts to pass family leave in that state before the federal FMLA. In 1999, Bill Clinton directed his Department of Labor to allow states to use their unemployment insurance plans to experiment with provisions for paid parental leave. Limited to parental leaves, this possibility came to be dubbed “baby UI.” Almost immediately, 13 states considered bills that would have taken advantage of this option. In 2001, there was legislation introduced in 26 states and the following year, in 28. Nearly all these bills failed.¹⁰²³

Activists in Massachusetts were among the first to try to take advantage of this path. In 2000, the legislature in Massachusetts passed paid parental leave only to have the bill vetoed by the Republican governor, Paul Cellucci.¹⁰²⁴ Feminists and labor unions, including the Massachusetts AFL-CIO, ranked paid leave as a top priority. The following year, after Cellucci left office to become ambassador to Canada, there seemed an even better chance. The Massachusetts Senate passed paid leave again in 2001. While paid leave had strong bipartisan support in the Senate, opposition was stiff in the Massachusetts House. The speaker instead proposed a bill with tax credits for companies that offered paid leave. Another factor in state politics seemed a more favorable omen. Acting governor Jane Smith had campaigned with Cellucci while pregnant with her first daughter. Pregnant a second time when Cellucci resigned,

¹⁰²³ Steven K. Wisensale, “California’s Paid Leave Law: A Model for Other States?” in *Families and Social Policy: National and International Perspectives*, edited by Linda Haas and Steven K. Wisensale (Binghamton, NY: Haworth Press, 2001), 181-182. George W. Bush, whose father had twice vetoed the FMLA, rescinded the brief policy of allowing states to explore unemployment insurance as a route to paid leave. This is probably one of the reasons that three of the first four states that passed paid leave had another funding mechanism already in place.

¹⁰²⁴ Steven K. Wisensale, *Family Leave Policy: The Political Economy of Work and Family in America* (Armonk, NY: M.E. Sharp, 2001), 253

Swift become the first governor ever to give birth in office.¹⁰²⁵ After delivering twins, she drew full salary during what she called a “working maternity leave.”

Swift’s “working maternity leave” sent all kinds of mixed messages about the needs and capabilities of brand new mothers. She joined meetings via conference calls from her hospital bed both before and after a caesarian section. Clearly, her maternity leave was profoundly constrained by work responsibilities.¹⁰²⁶ But the resources available to her as she struggled to maintain a promising career while having a family marked inequality between high paid professionals, who might well get full pay and some flexibility in the weeks after childbirth, and most working women, who faced lost wages when they had their babies. Swift, who would trim state programs some \$300 million dollars while governor, was reluctant to see widespread expansion of social welfare in the form of paid parental leave. Yet, it was impossible for her to ignore the demand while she was, herself, on a paid maternity leave.¹⁰²⁷ She drew up some limited plans of her own based on income levels and involving a complicated system of loans to some new parents. In the meantime, the AFL-CIO announced plans to turn paid leave into a ballot initiative, but ran into problems collecting the necessary signatures. An economic decline in Massachusetts and the election of Mitt Romney as governor pushed paid leave, once more, out of political possibility in Massachusetts.¹⁰²⁸

¹⁰²⁵ “First Woman Takes Reins in Massachusetts,” *Los Angeles Times*, April 11, 2001.

¹⁰²⁶ Pamela Ferdin, “Mass. Governor Begins Debated Maternity Leave,” *Washington Post*, May 17, 2001; Elizabeth Mehren, “Personal Life Again Dims Political Star,” *Los Angeles Times*, August 19, 2001.

¹⁰²⁷ Ferdin, “Mass. Governor Begins Debated Maternity Leave”; Elizabeth A. Sherman, “Gender Politics in Massachusetts: Progress for Paid Family Leave.” *New England Journal of Public Policy* 17, no. 1 (2001): 60, 67, 76.

¹⁰²⁸ Sherman, “Gender Politics in Massachusetts,” 78.

California was path-breaking in terms of legislation for paid leave, as it had been in terms of legislation for maternity unpaid leave. In 2002, California became the first state to pass paid family leave. The California program, now called Paid Family Leave (PFL) built upon California's already existing temporary disability insurance. Tapping into an existing successful program minimized the costs of setting up and administrating the plan and provided confidence of its success. New Jersey and Rhode Island followed California, in 2007 and 2014 respectively, in adding paid family leave to their state temporary disability programs.

The passage of the legislation showed the importance of a labor/feminist coalition. Labor and women's groups forged a broad coalition much like the one that pushed the FMLA years before and took control of the narrative. When paid family leave passed in California, Democrats controlled both houses of the California legislature and also the governor's office. The governor, Gray Davis, had a good working relationship with organized labor. The attempt to get paid leave faced tremendous opposition from employers but it was a high priority for the state AFL-CIO and for various feminist organizations. A prominent employer, the founder of Kinko's, supported the effort and wrote an influential op-ed piece in favor of the legislation.¹⁰²⁹ Although business concerns succeed in halving the proposed leave from twelve weeks to six and removing the employer contribution entirely, the broad coalition of groups outflanked the business lobby.¹⁰³⁰ Netsy Firestein and Nicola Dones, labor activists involved in the effort to get California's PFL,

¹⁰²⁹ Netsy Firestein, and Nicola Dones, "Unions Fight for Work and Family Policies—Not for Women Only," in *The Sex of Class: Women Transforming American Labor*, edited by Dorothy Sue Cobble, 140-154 (Ithaca: Cornell University Press, 2007), 145-146.

¹⁰³⁰ Ruth Milkman and Eileen Appelbaum, *Unfinished Business: Paid Family Leave in California and the Future of the U.S. Work-Family Policy* (Cornell: ILR Press, 2013), 36-37, 39.

observe that “California’s paid family leave bill became law faster than even its most ambitious supporters expected.”¹⁰³¹

The architects and proponents of California’s paid family leave sought to address several weaknesses in the national FMLA. PFL, for instance, covers part time workers. There are no carve-outs for small companies. New hires can tap PFL as long as they have some covered employment earlier. Even self-employed workers can use PFL if they pay into the state temporary disability fund. The wage replacement provided in California is the highest of the four states that have passed paid family leave. California’s PFL covers care for same sex spouses as well as opposite sex spouses, children and parents. As of 2014, the program expanded to cover care of a parent-in-law, a grandparent, a grandchild or a sibling.¹⁰³² This expansion is important because the California program had previously had to reject a large number of claims filed by workers caring for close family members not recognized as close by the initial law.¹⁰³³

Despite these substantial improvements in coverage, a major weakness of California paid family leave is that this insurance against lost wages does not provide any job protection. Many eligible workers would get job protection under either the FMLA or California’s family leave law. But those who are not covered might not be able to take their paid state leave, that they have made payroll tax contributions to, because they feared losing their jobs. New Jersey’s paid leave program also neglects job protection although Rhode Island managed to include job protection in their paid family leave.

¹⁰³¹ Firestein and Dones, “Unions Fight for Work and Family Policies,” 147.

¹⁰³² State of California Employment Development Department, “FAQs—Paid Family Leave (PFL) Eligibility,” State of California Employment Development Department, http://www.edd.ca.gov/disability/FAQ_PFL_Eligibility.htm; (accessed August 30, 2014); Gault et al, *Paid Parental Leave*, 6.

¹⁰³³ Milkman and Appelbaum, *Unfinished Business*, 45.

California now has a baffling array of possible protections and resources for pregnant workers and new mothers. The state's temporary disability insurance can cover a worker disabled by pregnancy or childbirth for up to fifty-two weeks, depending on the duration of her disability. Howard Berman's 1979 California law still guarantees new mothers job-protected leave even when an employer does not provide it for other reasons. California also passed an unpaid family leave law in 1991 that is slightly different than the FMLA and the FMLA also covers many California workers. A different law allows employees to use sick leave for the care of certain family members. All of this on top of the PFL. Some of these leaves run concurrently and some sequentially and not everyone is entitled to all types. Attempting to clarify these laws, Ruth Milkman and Eileen Appelbaum devised a chart that shows some possible combinations. It's confusing. Milkman and Appelbaum think this is one reason that employees at larger firms with benefits officers are more likely to take advantage of PFL; they have someone to explain the rules.¹⁰³⁴ Most companies that already offered some family leave benefits want their employees to use the state plans because the state system subsidizes more generous private benefits. Smaller employers, or those without substantial fringe benefit plans, have less of an incentive and less of a structure to inform their workers about their entitlement. Once again, low-wage workers are at the bottom of the information chain. So far, the take-up rate for PFL has been lower than expected, in part because many workers do not seem to know about it.

By world standards, of course, the duration of paid leave in these state plans is limited. California and New Jersey cover six weeks. Rhode Island covers eight. Washington state passed

¹⁰³⁴ Milkman and Appelbaum, *Unfinished Business*, 48.

a paid leave plan in 2007, but due to a lack of funding mechanism, it has not been implemented yet. If its plan begins to operate, it will only provide five weeks of pay to covered workers.¹⁰³⁵

President Obama proposed a fund in the Department of Labor to help states set up paid family leave programs.¹⁰³⁶ The District of Columbia and several cities provide for paid family leave.¹⁰³⁷ In 2015, the New York Assembly passed paid leave and a bipartisan bill in Nebraska appeared to have strong backing. Connecticut, Vermont and New Hampshire all have task forces studying paid leave and paid family leave bills have also been introduced in Hawaii, Colorado and Wisconsin.¹⁰³⁸ In total, more than twenty- seven states have recently considered legislation that would have addressed pay during family leave. There have also been efforts to get more workers access to paid sick days they can use for themselves or to care for a sick child. Currently, four states and some cities mandate paid sick days.¹⁰³⁹

Three states that have paid family leave are important as proof that paid leave is possible without economically crippling the economy or driving out businesses. Furthermore, because of the large populations of California and New Jersey, the three states operating paid leave

¹⁰³⁵ Institute for Women’s Policy Research, *Maternity, Paternity, and Adoption Leave*, 3-4.

¹⁰³⁶ Council of Economic Advisors, “The Economics of Paid and Unpaid Leave,” 20;

¹⁰³⁷ Nolo: Law for All, “Paid Family Leave in California, New Jersey, Rhode Island, Washington and the District of Columbia,” Nolo: Law for All, <http://www.nolo.com/legal-encyclopedia/paid-family-leave-states-29854.html> (accessed May 19, 2015); US Department of Labor. “Cities and States are Leading on Leave,” DOL Factsheet: Paid Family and Medical Leave, US Department of Labor, <http://www.dol.gov/wb/PaidLeave/PaidLeave.htm> (accessed May 19, 2015); Jessica Lee and Baird Helgeson, “Minneapolis Passes Paid Parental Leave for Employees,” Blog MPLS, *Minneapolis Star Tribune*, May 1, 2015, <http://www.startribune.com/minneapolis-passes-paid-parental-leave-for-employees/302170281/> (accessed May 19, 2015).

¹⁰³⁸ A Better Balance, “The Need for Parental Leave,” A Better Balance, <http://www.abetterbalance.org/web/ourissues/familyleave> (accessed 19 May 2015); Nolo, “Paid Family Leave.

¹⁰³⁹ National Partnership for Women and Families, “Current Paid Sick Days Laws,” National Partnership for Women and Families, July 8, 2015, <http://www.nationalpartnership.org/research-library/work-family/psd/current-paid-sick-days-laws.pdf> (accessed July 24, 2015).

programs do cover a little over 15% of Americans.¹⁰⁴⁰ However, because there are so few states with existing temporary disability insurance programs, California, New Jersey and Rhode Island have limited utility as models.

Federal bills for paid family leave have been introduced repeatedly in the US Congress since the passage of the FMLA. Currently, the Family and Medical Leave Insurance (FAMILY) Act proposes running paid leave through Social Security and funding it by payroll taxes on employees and employers. Intended to cover up to 12 weeks of partial wage replacement, the FAMILY Act does not exempt small businesses and does not have the same high standard of labor force commitment that the FMLA does before covering workers.¹⁰⁴¹

Ironically, Netflix and Google are more enlightened employers than the US Government. Federal employees do not have paid family leave. There is a bill in Congress that would provide six weeks of paid parental leave for the birth or adoption of a child, but similar legislation has been introduced several times before, going back all the way to Senator Langer's bill in 1948. It seems unlikely to pass the current Congress. Just this past January 2015, President Obama issued a directive to allow new parents to take up to six weeks of sick leave for the birth or adoption of a child. Employees who have not yet accrued the six weeks can take it as an advance.¹⁰⁴²

In the absence of state mandates and provisions, it is large employers that have led the way, publically making commitments to family friendly policies. In 2015, Netflix, Facebook, Microsoft, Adobe, Nestle, Accenture, Johnson & Johnson, Vodafon and Change.org all

¹⁰⁴⁰ Council of Economic Advisors, "The Economics of Paid and Unpaid Leave," 10.

¹⁰⁴¹ Gault et al., *Paid Parental Leave*, 6-7.

¹⁰⁴² Eric Yoder, "Democrat Bill would Give Federal Workers Paid Parental Leave," *Washington Post*, January 26, 2015; Steven Mufson and Juliet Ellperin, "Obama Expands Parental Leave for Federal Workers," *Washington Post*, January 15, 2015; Gault et al., *Paid Parental Leave*, 7.

expanded their paid leave programs available to pregnant women and new parents.¹⁰⁴³ Nearly all of *Working Mother's* annual list of “100 best companies” offer paid maternity leave and many also have paid paternity leave or paid family leave.¹⁰⁴⁴ However, the Institute for Women’s Policy Research looked more closely at the length of paid maternity leaves and found that only 20% of the “100 Best Companies” provided 12 weeks or more of paid leave. Almost the same number of the “100 Best Companies” provided two weeks or less of wage replacement, woefully short of international standards.¹⁰⁴⁵

New mothers are divided by region, education, and class in the kind of maternity coverage available to them. For instance, those in the South and the Mountain West are least likely to have paid leave, either through state coverage or private fringe benefits. *Babygate*, a 2013 guide to “pregnancy and parenting in the American workplace,” devotes *half of its pages* to differences among the states because large and small differences in protections and benefits make it impossible to say briefly what American workers might expect when they are expecting.¹⁰⁴⁶

¹⁰⁴³ Claire Cain Miller and David Streitfeld, “Big Leaps for Parental Leave, if Workers Actually Take It,” *New York Times*, September 1, 2015; Kia Kokalitcheva, “Netflix Just Announced a Game-Changing Parental Leave Policy,” *Fortune*, August 4, 2015, <http://fortune.com/2015/08/04/netflix-maternity-paternity-leave/> (accessed August 4, 2015); Rachel Gillett, “Netflix, Google, Facebook, and 13 other Companies with Extremely Generous Parental Leave Policies in America,” *Business Insider*, August 5, 2015, <http://www.businessinsider.com/generous-parental-leave-policies-in-america-2015-8> (accessed August 7, 2015); Emily Peck, “Netflix now Giving Employees ‘Unlimited’ Maternity, Paternity Leave,” *Huffington Post*, August 4, 2015, http://www.huffingtonpost.com/entry/netflix-unlimited-maternity-paternity-leave_55c12b26e4b0138b0bf44b98?kvcommref=mostpopular (accessed August 4, 2015); Debra L. Ness, “Extraordinary: Facebook Says ‘Not on Our Watch’ to Poverty Wages, Family Unfriendly Policies,” National Partnership for Women and Families, May 13, 2015, <http://www.nationalpartnership.org/blog/general/extraordinary-facebook-says-not-on-our-watch-to-poverty-wages-family-unfriendly-policies.html> (accessed August 3, 2015).

¹⁰⁴⁴ Institute for Women’s Policy Research, *Maternity, Paternity, and Adoption Leave*, 5.

¹⁰⁴⁵ Institute for Women’s Policy Research, *Maternity, Paternity, and Adoption Leave*, 5-6.

¹⁰⁴⁶ Dina Bakst, Phoebe Taubman and Elizabeth Gedmark, *Babygate: What You Really Need to Know about Pregnancy and Parenting in the American Workplace* (Bloomington, IN: iUniverse, 2013), 131-247.

Class is an even stronger predictor of access to leave than address. Using data from the 2011 American Time Use Survey, President Obama’s Council of Economic Advisors found that when they looked at paid leave “total compensation inequality is greater than the inequality implied by take-home wages.” Women were slightly less likely than men to have access to paid leave. African American workers were less likely to have access to paid leave than white workers. Hispanic workers were far less likely to have paid leave. Lack of wage replacement for Hispanic workers was even more pronounced than the wage gap would predict. “College-educated workers are twice as likely to have access to paid leave as workers without a high school degree.”¹⁰⁴⁷ Some sectors of the economy were less likely than others to offer paid leave. Only 25% of workers in leisure and hospitality, a feminized sector full of low-wage workers, offer paid leave while 80% of workers in the financial activities sector reported access to paid leave.¹⁰⁴⁸

Shortly after Netflix announced its “unlimited” (for a year) fully paid parental leave policy, stories began to point out that the new policy applied only to the company’s creative workforce, the highly educated and high-tech talent that draws hefty salaries and might be snapped up by competitors. DVD division employees, who are paid hourly, are not covered and neither are part-time employees. Former Secretary of Labor Robert Reich points out that, to Netflix, these workers are “replaceable.”¹⁰⁴⁹ Netflix is replicating wage inequality within its benefits package. While some of these other high tech firms might award benefits further down their hierarchies, the trend in high profile family policies has been in companies that employ an

¹⁰⁴⁷ Council of Economic Advisors, “The Economics of Paid and Unpaid Leave,” 1, 11-12.

¹⁰⁴⁸ Council of Economic Advisors, “The Economics of Paid and Unpaid Leave,” 13,

¹⁰⁴⁹ Robert Reich, “The Fraud of the New ‘Family-Friendly’ Work,” *Huffington Post*, August 17, 2015, http://www.huffingtonpost.com/robert-reich/the-fraud-of-the-new-fami_b_7998734.html (accessed August 17, 2015).

elite workforce—in tech, finance and at prestigious law firms. Some new parents have it better than ever, but many new parents still have nothing.

In public rhetoric, the business community is divided between family friendly companies, with high tech companies leading the way, and national business organizations who continued to oppose expansions in leave, especially paid leave. In 2007, Randy Johnson, the vice president of the US Chamber of Commerce, promised that the Chamber would wage “all-out war” against any proposal for paid leave.¹⁰⁵⁰ Despite opposition from businesses, studies repeatedly show either no effect, or a positive effect on businesses because of reduced turnover, improved employee morale, and increased productivity. In the states that now have paid leave, most businesses that already had that benefit quickly coordinated their plans with state coverage at a cost savings to the company. Fears that replacement costs would be detrimental, especially to small businesses, have not come to pass and predictions of widespread employee abuse of paid family leave proved unfounded. Occasionally, business opponents still raise the specter of freeloaders,¹⁰⁵¹ but since the FMLA and especially since California’s PFL, researchers have looked for false claims and have not found them.¹⁰⁵²

Right before she went on maternity leave, for the fifth time, Susan Wojcicki wrote a strong op-ed in the *Wall Street Journal* asserting that “Paid Maternity Leave is Good For Business.” Wojcicki, CEO of YouTube, offered the experience of her parent company, Google,

¹⁰⁵⁰ Kent Hoover, “Worker Laws on Congress’ Radar,” *Triangle Business Journal*, September 10, 2007, <http://www.bizjournals.com/triangle/stories/2007/09/10/smallb4.html> (accessed July 30, 2015).

¹⁰⁵¹ A couple of business representatives claim that employees use FMLA to recover from the Superbowl. Jeff Nowak, “Suffering From Super Bowl Induced FMLA Leave,” *FMLA Insights*, February 7, 2011, <http://www.fmlainsights.com/suffering-from-super-bowl-induced-fmla-leave/> (accessed June 10, 2015); Ludden, “FMLA Not Really Working.” There’s also a novel about an unfulfilled lawyer who would really like to pursue her cycling career full time and hatches a plan to fake a pregnancy and take advantage of her firm’s generous paid maternity leave to take her bike on a three week stage road race. Trish Felice Cohen, *Maternity Leave* (Tallahassee, FL: Bella Books, 2013).

¹⁰⁵² Gault et al, *Paid Parental Leave*, 10-11; Milkman and Appelbaum, *Unfinished Business*, 56, 60-61.

where increasing paid leave cut the attrition of pregnant workers and new mothers by 50%. Proud of her company, Wojcicki also endorsed a federal policy on paid maternity leave. Leaving paid leave up to individual companies means that those that provide it “shoulder the entire cost,” which would put them at a competitive disadvantage. A laissez-faire approach to family policy, however, also seems unjust for women workers because of the unevenness and randomness of coverage. Wojcicki knows she is lucky—lucky to work for Google, lucky to be a high level executive and lucky to live in California. To Wojcicki, chance is a poor basis for maternity policy. She concludes that “support for motherhood shouldn’t be a matter of luck; it should be a matter of course.”¹⁰⁵³

Obstetric Medical Coverage

National maternity policy is about access to health care as well as benefits and protections at work. The provision of medical care for childbirth was one of the earliest social welfare programs in many countries. It was also the largest experiment in maternity policy in the United States during WWII when EMIC covered the births of one out of every seven babies. Aside from the years EMIC operated, however, provision for obstetric care either operated through private health insurance plans, with the accompanying problems discussed in Chapter Five, or as programs for the poor. Programs for the poor end up being the residual maternity policy for many working women who have jobs without insurance, who do not work enough to be eligible for insurance their employers offer, or whose insurance coverage is inadequate. Medicaid, passed by Congress in 1965, and the Children’s Health Insurance Program (CHIP), begun in 1996, cover medical care for low income pregnant women, new mothers and their

¹⁰⁵³ Susan Wojcicki, “Paid Maternity Leave is Good for Business,” *Wall Street Journal*, December 16, 2014.

babies. Right now, Medicaid pays for most of the health care costs for about 48% of all births and a higher percentage of births in some states. Nearly 70% of babies born in Louisiana had medical care bills paid by Medicaid. Half of Illinois' new arrivals did too.¹⁰⁵⁴

Before the Affordable Health Care Act, about one fifth of American women in their reproductive years were uninsured. Beginning in 2014, the Affordable Care Act has expanded some health care coverage for pregnant women. States can increase the number covered by Medicaid programs and more people can afford to buy their own insurance. Before the ACA, plans in the individual insurance market generally excluded pregnancy coverage except with the purchase of an additional expensive maternity rider.¹⁰⁵⁵ Even if obstetric coverage was available, women already pregnant were unable to purchase individual plans covering their pregnancies. Lack of insurance coverage could be very costly. In 2007, the March of Dimes estimated that an uncomplicated pregnancy and delivery could cost \$10,652. Even moderate complications, like a routine caesarian section, could quickly drive the price tag up over \$30,000.¹⁰⁵⁶

The ACA requires insurance companies to include obstetric care in their plans in the individual market. This led to some insurance clients, and many conservative opponents of Obamacare, to complain vociferously about thirty-year-old men and fifty-year-old women

¹⁰⁵⁴ Anne Rossier Markus, Ellie Andres, Kristina D. West, Nicole Garro and Cynthia Pellegrini, "Medicaid Covered Births, 2008 through 2010, in the Context of the Implementation of Health Reform," *Women's Health Issues* 23, no. 5 (2013): e273, e276; Medicaid, "Pregnant Women," Medicaid.gov: Keeping America Healthy, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Population/Pregnant-Women/Pregnant-Women.html> (accessed June 25, 2013). For variation by state, also see Henry J. Kaiser Family Foundation, "Births Financed by Medicaid," State Health Facts, Henry J. Kaiser Family Foundation, <http://kff.org/medicaid/state-indicator/births-financed-by-medicaid/>, (accessed June 25, 2013).

¹⁰⁵⁵ Such was the case even with the individual insurance coverage available to members of the National Organization for Women in New York State in 1992. My sister was looking for an individual plan that would include maternity coverage and I suggested she buy through NOW. We were both surprised to find that NOW's plan excluded maternity.

¹⁰⁵⁶ Medical bills associated with the birth of my daughter in 2002 amounted to over \$30,000. This delivery had relatively minor complications and the cost was covered by insurance and CHIP.

having to pay for maternity coverage in their individual insurance plans even though they would never get pregnant. Supporters of the ACA pointed out that men usually have something to do with pregnancies, that a goal of the act is to improve American health care statistics, like a high infant mortality rate for an advanced nation, and that insuring adequate prenatal and obstetric care will reduce costly NICU bills that, for the uninsured, are spread to other hospital patients. Fundamentally, though, the inclusion of obstetric coverage in individual insurance plans, even those purchased by men, operates under basic insurance principles. Even the very sickest patients do not need care for every condition covered by their plans. Allowing some clients to select out of coverage they think they do not need raises the cost to others. Women who purchased individual coverage before the ACA paid for prostate care and testicular cancer coverage. Pregnancy alone was treated differently in the individual market, even thirty years after the PDA mandated that group plans cover pregnancy.¹⁰⁵⁷ The ACA fixes this exclusion.

The ACA also mandates some obstetric care under the mandatory preventative services available without a co-pay and even if a subscriber has not yet met their annual deductible. This includes prenatal vitamins, breastfeeding support and a variety of screening tests, like those for gestational diabetes and Rh factor.¹⁰⁵⁸ Furthermore, the ACA requires employers to provide a suitable space and appropriate time for breastfeeding mothers to pump and store their milk.¹⁰⁵⁹

¹⁰⁵⁷ Garance Franke-Ruta, “Why is Maternity Care Such an Issue for Obamacare opponents?” *The Atlantic*, November 22, 2013; Michael Hiltzik, “Yes, Men Should Pay for Pregnancy Coverage and Here’s Why,” *Los Angeles Times*, November 1, 2013.

¹⁰⁵⁸ Michelle Andrews, “Parents’ Insurance Covers Children up to age 26—but not for Pregnancy,” *Washington Post*, August 6, 2012.

¹⁰⁵⁹ National Partnership for Women and Children, “Why the Affordable Care Act Matters for Women: Better Care for Pregnant Women and Mothers,” National Partnership for Women and Children, August 2014, <http://www.nationalpartnership.org/research-library/health-care/better-care-for-pregnant-women.pdf> (accessed July 30, 2015)

Many young workers who lack access to employer-sponsored insurance because they have entry level positions, temporary jobs and/or work interrupted by education now benefit from the popular ACA provision that allows adult children up to age twenty-six to remain on their parents' health insurance. However, that insurance might not include maternity coverage. While the Supreme Court, in *Newport News v. EEOC*, established that health insurance offered to dependent spouses must include obstetric coverage, the court did not extend this to dependent children. While some insurance policies have covered comprehensive care for dependent children, others have long refused to cover maternity expenses for dependents other than spouses. This problem, faced by a surprised Seagram's employee in the 1950s, still troubles many parents of pregnant teens. Extending the ages of covered children will likely increase the number of young adults who themselves become parents while on their own parents' insurance plans. They will also have to figure out coverage for the new baby who won't be covered by grandparent's insurance. Some will be able to turn to CHIP and Medicaid to cover obstetric care and their child, but others will still be in limbo between a system that privileges established employees with good jobs and traditional nuclear families and grudgingly provides coverage for the poor, regardless of family definition.¹⁰⁶⁰ Drawing on the *Newport News v. EEOC* decision and the PDA, the National Partnership for Women and Children and the National Women's Law Center are pushing ACA administrators and the courts to mandate maternity coverage for dependents of subscribers. The outcome is yet unclear.

There is one final wrinkle with ACA maternity coverage. Pregnancy is not one of the limited number of events that allow someone to purchase or change plans outside of the open

¹⁰⁶⁰ Andrews, "Parents' Insurance Covers Children."

enrollment period.¹⁰⁶¹ Strictly from the perspective of the insurance industry, this makes sense. But socially it makes no sense in terms of maternal and infant health or in terms of reducing gender inequality and the social burden of reproduction on women.

Finally, the ACA did not replace a health care system based on employer provided fringe benefits. While changes in health insurance, like higher co-pays and deductibles, may have spurred public interest in health care reform, the ACA has not halted employer efforts to reduce their health care costs. Companies are significantly cutting back on health coverage, including health care coverage for spouses. In 2013, 24% of employers did not offer spousal coverage or charged extra for it. A year later the percentage had increased to 45%.¹⁰⁶²

Work of Mothers as Mothers

For decades after World War II, maternity policy was hamstrung by public views that mothers should not hold paying jobs. By the 1980s, economic pressures and feminist organizing combined to make women, even married mothers of small children, an important part of the labor force. As more women became identified as serious, fundamental, legitimate workers, maternity reform concentrated on the workplace as well. When work became widely acknowledged as a right, it quickly became a duty and undercut the notion that any mothers should be socially supported as mothers. Many analysts have tracked increasingly punitive and demeaned public assistance to American mothers as part of the story of American race relations. But it also seems that the very successes of expanding the rights of women workers may have

¹⁰⁶¹ Phil Galewitz, “Pregnant and Uninsured? Don’t Count on Obamacare Coverage,” *Shots: Health News from NPR*, February 18, 2015, <http://www.npr.org/sections/health-shots/2015/02/18/387191283/pregnant-and-uninsured-dont-count-on-obamacare-coverage>. (accessed July 10, 2015).

¹⁰⁶² Charlotte Huff, “Here Comes the Bride. . . There Goes the Benefits,” *Workforce*, April 9, 2014.

exacerbated distrust for “welfare” and stigmatized women who depended on state assistance, ultimately cutting back on very same public welfare provisions that earlier reformers had imagined expanding to include more social support for maternity.

The same president who signed the FMLA also signed legislation that severely restricted welfare programs by doing away with Aid to Families with Dependent Children. Programs that had been the residual supports for pregnant workers and new mothers when they were out of work due to their own conditions or their family responsibilities were now less available. Many pregnant workers and new mothers could still not claim benefits they needed, like wage replacement and health coverage, by virtue of their jobs, but welfare reform also made it harder to claim that support as poor mothers.¹⁰⁶³

Current national maternity policy includes Temporary Assistance to Needy Families (TANF) passed in 1996, and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), which began in 1972. These programs can provide money and food for pregnant women, new mothers and their young children. Currently, about half of all babies born in the United States receive some benefits through WIC.¹⁰⁶⁴ Tax policies give some support for child care costs for working people. But welfare policy overall now is characterized by an effort to get recipients into the workforce as quickly as possible regardless of their caregiving responsibilities. Once established that pregnant women and mothers could combine work and family, American policy came to assume that all women should work and that the poor needed few social supports for their contributions as mothers. Instead, they needed jobs.

¹⁰⁶³ Ruth Sidel, *Keeping Women and Children Last: America's War on the Poor* (New York: Penguin Books, 1998), 201-227.

¹⁰⁶⁴ Victor Oliveira, Elizabeth Racine, Jennifer Olmsted and Linda M. Ghelfi, “The WIC Program: Background, Trends, and Issues,” Economic Research Service, United States Department of Agriculture, *Food Assistance and Nutrition Report*, 27 (September 2002), i, 2, 11, 27.

There is a serious mismatch between the kinds of jobs most available to women leaving welfare and the kinds of family responsibilities many of them have. After examining the operation of class in the Center for WorkLife Law's database of 2600 cases of family responsibility discrimination, Stephanie Bornstein sees a serious flaw in efforts to get poor mothers off public assistance programs. She thinks the basic problem is not with the mothers and their ability to find jobs. Rather, they have difficulty retaining their jobs, building seniority and moving up a job ladder in the face of work-life conflicts that stem from inflexible job demands and their family responsibilities. Poor women are more likely to be single parents. They are more likely to be raising a child with either health problems or disabilities that require more of a parent's time (sometimes contributing to a family's poverty). They are also more likely to be providing personal care to an elderly family member than middle-class women.¹⁰⁶⁵ The burden of care work falls heavily upon them. Bornstein thinks that "some low-income workers lose jobs not due to lack of workplace readiness, but because of discrimination based on family responsibilities." The problem is not poor mothers, but the jobs they can get and the workplace discrimination against them.¹⁰⁶⁶ Bornstein points to the need for paid family leave, paid sick leave, an end to on-call scheduling, and workplace flexibility for low income workers. It's easy to see from the stories she collected that low income workers also need higher wages, more child care options, and reliable transportation networks as part of a comprehensive maternity policy.

When low-wage workers cannot get the flexibility and benefits they need at work, their families suffer. Concern about maternal and infant health, especially that of the poor, motivated the social justice feminists who worked on maternity policy in the 1940s. The Children's

¹⁰⁶⁵ Bornstein, *Poor, Pregnant, and Fired*, 5-7.

¹⁰⁶⁶ Bornstein, *Poor, Pregnant, and Fired*, 3, 30,31.

Bureau's approach to the "whole child" led Martha Eliot and Charlotte Silverman to prioritize questions of class and access to resources when they evaluated the needs of pregnant workers. When maternity policies emerged as questions of civil rights, the class analysis receded. However, maternity policy has a significant health effect. After the PDA, pre-term birth and low birth weight babies declined in New York, California and New Jersey as those states began covering pregnancy under their temporary disability insurance programs. This effect was stronger for African Americans, indicating that the PDA benefited poor women.¹⁰⁶⁷ The FMLA seems to have had a similar effect nationally although birth outcomes following the FMLA improved most for college-educated women, who, after all, are more likely to be eligible for FMLA and more able to take an unpaid leave.¹⁰⁶⁸ At the White House Summit on Working Families, the President's Council of Economic Advisors pointed to research that had shown women with maternity leaves started and continued breastfeeding more often than women with no maternity leave. The health benefits of breastfeeding to infants are well understood and there seems likely to be a health benefit to mothers as well. Sick children have shorter hospital stays if their parents had family leave. Children whose mothers had had maternity leave did better in school, earned more as adults and had lower rates of teen pregnancy than children whose mothers had not had maternity leave.¹⁰⁶⁹ Mothers who had paid leave suffered less from

¹⁰⁶⁷ Jenna Sterns, "The Effects of Paid Maternity Leave: Evidence from Temporary Disability Insurance." *Journal of Health Economics* 43 (May 2015): 85-102; Bartel, Ann, Charles Baum, Maya Rossin-Slater, Christopher Ruhm and Jane Waldfogel, "California's Paid Family Leave Law: Lessons from the First Decade," prepared for the US Department of Labor, June 23, 2014: 8-9, <http://www.dol.gov/asp/evaluation/reports/PaidLeaveDeliverable.pdf> (accessed September 7, 2015).

¹⁰⁶⁸ Rossin, Maya. "The Effects of Maternity Leave on Children's Birth and Infant Health Outcomes in the United States." *Journal of Health Economics* 30, no.2 (2011): 221-239; Other countries also found declines in infant mortality when they increased leaves in their maternity policies. Council of Economic Advisors, "The Economics of Paid and Unpaid Leave"; Moises Velasquez-Manhoff, "Should You Bring Your Unborn Baby to Work," *The Atlantic*, March 2015, <http://www.theatlantic.com/features/archive/2015/02/should-you-bring-your-unborn-baby-to-work/384977/>. (accessed August 4, 2015).

¹⁰⁶⁹ Council of Economic Advisors, "The Economics of Paid and Unpaid Leave," 8.

postpartum depression.¹⁰⁷⁰ Other research has found a link between family leave and childhood immunization rates.¹⁰⁷¹ The lack of paid maternity leave exacerbates social inequality.

Feminist economist Nancy Folbre points out that while caring labor (both unpaid and paid) is devalued in the market, the marketplace, in fact, depends upon it. Workplace policies that undermine the work of social reproduction will ultimately also be their own downfall, but in the meantime, women who assume most of the caring roles within the family are punished in the labor market and their families suffer.¹⁰⁷² Other scholars have also noted that the work of mothers for their families is socially productive work despite the problem we have seeing it that way. When we look at maternity policy and employment practices relating to pregnancy and motherhood, when we examine what Eileen Boris and S. J. Kleinberg call the “gamut of women’s endeavors,” we see the “intersections between labors, care work and public policy” without which we cannot understand, let alone solve, either gender inequality or inequality among women.¹⁰⁷³

In 2012, Anne-Marie Slaughter’s article, “Why Women Still Can’t Have it All,” became one of the most widely read articles in the history of *The Atlantic*. People who read this article also talked about it, in the media, at work, with their friends and in their families.¹⁰⁷⁴ Her new book, *Unfinished Business*, just out in the fall of 2015, will undoubtedly fuel more conversations

¹⁰⁷⁰ Pinka Chatterji and Sara Markowitz, “Family Leave After Childbirth and the Mental Health of New Mothers,” *Journal of Mental Health Policy and Economics* 15, no. 2 (June 2012): 61-67.

¹⁰⁷¹ Mark Daku, Amy Raub and Jody Heymann, “Maternal Leave Policies and Vaccination Coverage: A Global Analysis,” *Social Science & Medicine* 74, no. 2 (January 2012): 120-124.

¹⁰⁷² Nancy Folbre, *The Invisible Heart: Economics and Family Values* (New York: New Press, 2002).

¹⁰⁷³ Eileen Boris and S.J. Kleinberg, “Mothers and other Workers: (Re) Conceiving Labor, Maternalism, and the State,” *Journal of Women’s History* 15, no. 3 (Autumn 2003): 108.

¹⁰⁷⁴ Anne-Marie Slaughter, “Why Women Still Can’t Have it All,” *The Atlantic*, July/Aug 2012.

about work-family balance and a motherhood penalty. The book is inspired by her own choices after two years in a high ranking state department job and her decision to pursue work more amenable to her family responsibilities. However, Slaughter also credits changes in the American family, in particular growing numbers of same sex couples with children, for illuminating how gender roles have buttressed and also masked the calculation of who provides the care within families and how that care is valued. She also acknowledges that some workers and care providers have far fewer choices over how to provide both care and financial support to their families.

Slaughter says that seeing work and family as a “woman’s problem” is part of the problem. She advocates re-defining issues of work and family as problems of “care.”¹⁰⁷⁵ In the best line from the book, Slaughter sums up the national importance of care at the same time she links its fate to macroeconomic workforce trends and the political and social successes of the women’s movement. She writes, “We used to have an infrastructure of care: it was called women at home.”¹⁰⁷⁶

The Politics of Family Leave

At least, American maternity policy has become a central political issue. In June 2014, the White House held what was billed as “the First White House Summit on Working Families.” Over 1,500 people attended in person and the event included webcasts to reach a greater

¹⁰⁷⁵ Anne-Marie Slaughter, *Unfinished Business: Women Men Work Family* (New York: Random House, 2015), 54-60.

¹⁰⁷⁶ Slaughter, *Unfinished Business*, 232.

audience. The day of the summit, the President wrote an op-ed for *Huffington Post*.¹⁰⁷⁷ Obama also mentioned Paid Family Leave in his State of the Union Address in January 2015¹⁰⁷⁸ and on Labor Day, 2015, he ordered federal contractors to allow employees paid sick leave for their own illnesses or for the care of sick dependents.¹⁰⁷⁹ In the spring of 2015, he sent Secretary of Labor Thomas Perez and White House senior advisor Valerie Jarrett on the road in what the Labor Department called the “Lead on Leave Tour.” This tour started in Seattle, where paid leave was passed by the state legislature, but not yet implemented. Heavily promoting the tour on social media, Perez tweeted about his stops with the twitter handle #LeadOnLeave and posted photos from the tour on Instagram as well. The tour was accompanied by an animated You-Tube video about Jennifer, an American and Andrea, a German, facing very different options as they prepared to welcome new babies into their families.¹⁰⁸⁰

A poll conducted in early 2014 by the Feldman Group found that voters supported family friendly policies, including paid family leave. More importantly, voters polled by Feldman Group said that a candidate’s support for paid family leave could make a difference in who they voted for. Hispanic voters were especially likely to rank paid leave as important for their election

¹⁰⁷⁷ Barak Obama, “Family Friendly Policies are Not Frills—They’re Basic Needs,” *Huffington Post*, June 23, 2014, http://www.huffingtonpost.com/barack-obama/family-friendly-workplace_b_5521660.html?1403532355 (accessed June 23, 2014).

¹⁰⁷⁸ Michelle Andrews, “Is It Time to Make Medical and Family Leave Paid?” *Shots: Health News from NPR*, National Public Radio, April 22, 2015, <http://www.npr.org/sections/health-shots/2015/04/22/401239857/is-it-time-to-make-medical-and-family-leave-paid> (accessed July 30, 2015).

¹⁰⁷⁹ Bill Chappell, “Obama Orders Federal Contractors to Provide Paid Sick Leave,” *National Public Radio*, September 7, 2015, <http://www.npr.org/sections/thetwo-way/2015/09/07/438340379/obama-orders-federal-contractors-to-provide-paid-sick-leave> (September 7, 2015).

¹⁰⁸⁰ U.S. Department of Labor, “It’s Time to Lead on Leave,” <https://www.youtube.com/watch?v=9bDdaO6AINo> (accessed September 7, 2015); U.S. Department of Labor, “It’s Time for American to #LeadOnLeave,” <http://www.dol.gov/featured/paidleave/> (accessed September 7, 2015).

choices. Support was also high among African Americans. Tellingly, even a majority of Republican women indicated support for paid family leave.¹⁰⁸¹

As of August 2015, Hillary Clinton and Bernie Sanders, contenders for the presidential nomination of the Democratic Party, have both made paid family leave a central issue in their campaigns. Paid family leave is discussed as one of Clinton's "Four Fights" and is a top issue for Sanders. There is less discussion of the issue among Republican candidates. Donald Trump, as of September 2015 polls the leading Republican, embroiled himself in a hullabaloo over a new mother's right to a break during work to pump milk for her baby. The only serious treatment by a Republican candidate has come from former Hewlett-Packard executive Carly Fiorina. In an op-ed shortly after the first Republican Presidential debate, Fiorina laid out her strong opposition to federally mandated paid family leaves. Along with the requisite concern over burdening small businesses and a dig at government inefficiency, Fiorina maintained that businesses know what is best for their own employees and will offer paid leave if that is the best thing for them and their employees. She also warned that mandating paid family leave will encourage discrimination against women workers as companies seek to minimize foreseeable disruptions. Fiorina's solution was to promote such strong economic growth that all businesses will, of their own accord, offer paid leave to retain qualified workers.¹⁰⁸²

While the rest of the Republican field has been relatively quiet on the issue, paid family leave will certainly be a key part of the general election. Writing in July 2015, NPR political reporter Danielle Kurtzleben thinks that family leave will be a top issue for Democrats in the

¹⁰⁸¹ Anzalone Liszt Grove and the Feldman Group, "Voters Support Economic Justice Policies," American Women, February 7, 2014, <http://www.americanwomen.org/research/document/PUBLIC-RELEASE-AW-FEB-5-RELEASE.pdf> (accessed July 30, 2015).

¹⁰⁸² Carly Fiorina, "The Status Quo Isn't Working for Women in America," *Huffington Post*, August 13, 2015, http://www.huffingtonpost.com/carly-fiorina/the-status-quo-isnt-working-for-women-in-america_b_7983718.html (accessed August 13, 2015).

2016 race and that unions, especially, will use the issue to focus organizing. She predicts conservative groups will be forced to respond.

Comedian John Oliver seems to think so, too. The Mother's Day 2015 episode of *Last Week Tonight* placed US provisions in an international context and highlighted moving stories of new mothers making hard choices about their babies and their jobs. Oliver also called out politicians who pay lip service to motherhood and yet oppose laws to benefit mothers. This segment ends with a slick skit somewhere between a Hallmark commercial and a political ad.

The warm voiceover proclaims:

Mothers. We owe everything to them. This Mother's Day, we have just one thing to say to all the mothers out there: "Get the Fuck back to work!"...Because remember not only can you balance work and family, you *have* to. What we're saying is, "You deserve the very best, moms. You're just not going to get it."¹⁰⁸³

In the fall of 2015, the selection of Paul Ryan as Speaker of the House of Representatives was framed by his own claims to a work-family balance. He demanded House Republicans recognize he would continue to go home on weekends (instead of fundraising and stumping for Republican candidates) before he would even consider taking the job. He said, "I cannot and I will not give up my family time."¹⁰⁸⁴ Personal desires notwithstanding, Ryan will be unlikely to lead a new embrace of federal policy on the issue. While he gives his own staff some amount of paid family leave to welcome new children, he has opposed legislation to mandate it for workers in general.¹⁰⁸⁵ Ryan, politically powerful and well off compared to most of us, is not a typical

¹⁰⁸³ John Oliver, *Last Week Tonight*, Comedy Central, May 10, 2015.

¹⁰⁸⁴ Paul Ryan, quoted in Danielle Kurtzleben, "Eyeing the Speakership, Paul Ryan Asks for Family Times," *All Things Considered*, NPR, October 22, 2015, <http://www.npr.org/2015/10/22/450937827/eying-the-speakership-paul-ryan-asks-for-family-time>, (accessed Nov 23, 2015).

¹⁰⁸⁵ Laura Barron-Lopez and Dana Liebelson, "Paul Ryan Gives His Staff Paid Family Leave. No, He Doesn't want it Guaranteed for You," *Huffington Post*, Oct. 23, 2015, http://www.huffingtonpost.com/entry/paul-ryan-family-time-leave_562a4a09e4b0443bb563a5b6, (accessed Nov. 23, 2015).

working American. Also, he was just asking to keep his weekends, not to have a schedule that would accommodate school pick-ups, childhood illnesses, parent-teacher conferences, sport practice and events or the school play, let alone the demanding provision of personal care needed by young children or some ill or elderly family members. Clearly Ryan has a spouse playing the role of lead caregiver as well as the resources to hire help. But Ryan does signal a shift in public discourse about the responsibilities of jobholders to their families. It's a shift he recognized himself when he told a reporter that "as dads it's probably different than the older generation, the way we operate in our families."¹⁰⁸⁶ Kurtzelben, who covers work-family issues for NPR, recognizes that Ryan will not be a force behind getting the FAMILY Act passed. Nonetheless, she thinks that his very public negotiations over the speaker expectations mean something. "Ryan," she says "is doing something that—if lots more men did it—could revolutionize how Americans think about work."¹⁰⁸⁷ Tactically, Ryan's prominent posturing also offers supporters of paid family leave an opening when they raise concerns about what family values really mean.

A Pregnancy Test

Looking at maternity coverage helps us see factors that affect all parts of American social supports, like the interaction between public benefits and the private welfare state, gender, race and class differences in access, regional variation, the reciprocal relationship between workplace inequalities and benefits, political barriers to meeting the needs of citizens, employment instability and Americans' multiple social roles. American maternity policy is rife with ironies

¹⁰⁸⁶ Paul Ryan, quoted in Sam Stein, "Paul Ryan Won't Pursue Family Leave Legislation," *Huffington Post*, Nov. 1, 2015, http://www.huffingtonpost.com/entry/paul-ryan-paid-family-leave_56363c45e4b00aa54a4e7ec6 (accessed Nov. 23, 2015).

¹⁰⁸⁷ Danielle Kurtzleben, "Can Paul Ryan Have it All?" *It's all Politics NPR*, Oct. 22, 2015, <http://www.npr.org/sections/itsallpolitics/2015/10/22/450550272/can-paul-ryan-have-it-all>, (accessed Nov. 23, 2015).

and often seems to be a case of two steps forward and one step back. Even the hard fought victories for women workers contained hidden weaknesses. Progress for some pregnant employees has accompanied growing class inequality among women. Gender inequality at work and home persists despite gender neutral formulations of maternity policy. Fatherhood is clearly changing, but the change is glacially slow.

Recently Marissa Mayer, CEO of Yahoo, announced she is pregnant with twins. Her announcement included a prediction that when they are born, her maternity leave will be like the one she took with her son three years ago--two weeks long and with substantial work throughout. Three years ago, having just taken over at Yahoo, Mayer was under a lot of scrutiny for a variety of reasons. No small number of commentators expressed concern that her truncated leave was personally inadvisable and moreover sent the wrong message to employees and to industry in general that new mothers did not really need much leave and that if they were committed to their careers and their company, they would be back at work soon. These commentators worried about a culture antagonistic to the needs of families and the pressures facing working mothers and they thought that instead of challenging that culture, Mayer's two-week working leave fed into it.

There might be something to that. Robert Reich is worried that the new generous paid leaves in tech and finance industries, at prestigious law firms and in some other highly competitive sectors are phantom benefits anyway. He thinks that corporate culture which blurs the lines between work and home will discourage employees from taking more than the minimum leave because they fear being seen as not serious about their jobs. Drawing on a sample pool of his former graduate students, he muses, "These young men won't take paternity leave and these young women won't even get pregnant—because it looks bad."¹⁰⁸⁸ It will take a

¹⁰⁸⁸ Reich, "The Fraud of the New 'Family-Friendly Work.'"

while to see what happens at Netflix and if the women and men who work there feel like they can take a long parental leave. The real tech industry executive to watch might not be Mayer anyway. It might be Mark Zuckerberg, whose wife will have a baby later this year. Facebook offers four months paid parental leave. At the end of November 2015, Zuckerberg announced, in a Facebook post of course, that he intends to take two months parental leave when his daughter is born.¹⁰⁸⁹

The story of Melissa Mayer's maternity leaves, like those of Jane Swift before her, is about class and how inequalities in social supports accompany income inequalities. Constrained and truncated as their maternity leaves were, they were paid at full salary. While Berry Brazelton did not craft their leaves as examples of "bonding," the kinds of jobs they had did not pose risks to their own recovery from childbirth. If you are chairing a meeting, maybe you can phone it in from a hospital bed, but if you are flipping burgers, making up hotel beds, teaching a class of thirty, unmolding giant plastic barrels or driving a truck, you just can't. In addition to having the flexibility and independence that comes with many professional positions, or with being the boss, well paid professionals are also more able to buy services and products that make combining work and parenting easier. Mayer certainly had baby nurses, nannies and housekeepers and a specially built nursery at work as well as a private office where, if she pumped her breasts while answering e-mail, no one would know, nor should they care.¹⁰⁹⁰ Her receptionist couldn't. One established professional observed, even in the 1980s, "it's easier to be

¹⁰⁸⁹ Emily Peck, "Why Mark Zuckerberg's Paternity Leave is a Win for Women," *Huffington Post*, Nov. 24, 2015, http://www.huffingtonpost.com/entry/mark-zuckerberg-paternity-leave_56532428e4b0258edb320a15, (accessed Nov. 24, 2015); Miller and Streitfeld, "Big Leaps for Parental Leave."

¹⁰⁹⁰ Velasquez-Manhoff, "Should You Bring Your Unborn Baby to Work". See also the story of Facebook executive Fidji Simo's work during bedrest because of pregnancy complications. Fidji Simo, "What a Leader Looks Like," *Huffington Post*, July 30, 2015, http://www.huffingtonpost.com/fidji-simo/what-a-leader-looks-like_1_b_7906284.html (accessed July 30, 2015).

an executive parent than it is to be a clerical parent”¹⁰⁹¹ and Slaughter pointed out, early on in her new book, that “Money buys a safety net.”¹⁰⁹²

But, Mayer’s story is also about women’s access to the pinnacles of professional careers and the differences it might make to have more women at the top. When Urie Bronfenbrenner wrote about family leave in the 1980s, he suggested that pregnant women and new mothers would not fare well in American workplaces *until* there were substantial numbers of women in influential positions in business and in the government. Certainly, it is important to have mothers in the corridors of power. In her best-selling book *Lean In*, Sheryl Sandberg illustrates the difference executives can make when they understand the issues facing pregnant women and new mothers because they’ve walked in those shoes with ankles swollen in the last months of pregnancy. When Sandberg was pregnant with her first child, she found Google’s sprawling parking lots an impediment to her attempts to manage pregnancy at work. Because she was a high level executive, she had the power to establish special parking spaces for expectant mothers. Before she was pregnant herself, she simply never thought about it, and neither had any of the other never-pregnant Google executives.¹⁰⁹³ Shortly after she came back full time from her two-week truncated working maternity leave, Marissa Mayer doubled paid family leave at Yahoo from eight weeks to sixteen.¹⁰⁹⁴ There is something to be said about image and culture, but

¹⁰⁹¹ Joani Nelson-Horchler, “Executive Super Moms,” 34.

¹⁰⁹² Slaughter, *Unfinished Business*, 4.

¹⁰⁹³ Sheryl Sandberg, *Lean In: Women, Work and the Will to Lead* (New York: Random House, 2013), 3-4.

¹⁰⁹⁴ Rebecca Grant, “Silicon Valley’s Best and Worst Jobs for New Moms (and Dads),” *The Atlantic*, March 2, 2015, <http://www.theatlantic.com/technology/archive/2015/03/the-best-and-worst-companies-for-new-moms-and-dads-in-silicon-valley/386384/> (accessed August 20, 2015). Word has it that Mayer also knows how to make “diaper cakes,” multi-tiered gift baskets of diapers, onesies and baby toys sure to be a hit at baby showers. It’s not clear this makes a policy difference, but she is almost certainly a rare tech industry executive with such skill and experience. Lisa Miller, “Can Marissa Mayer Really Have it All?” *New York Magazine*, October 15, 2012, <http://www.cnn.com/2012/07/18/opinion/coontz-yahoo-marissa-mayer/> (accessed September 7, 2015).

policy also counts. Having mothers in powerful positions might bring some change in the gendering of the workplace and in the social roles of women and men.

Such effects on inequality among women seem less clear. Even the most successful efforts to level access to paid leave have proven insufficient at closing this class gap. While paid family leave has undoubtedly made a world of difference to some low skilled workers in California, overall, the employees who have benefitted most from PFL seem to be those workers who already had some provisions for job secure paid leave from their employers. Written very broadly to cover nearly all workers, PFL nevertheless came to be yet another marker of inequality because those who already have job-related benefits can tap into PFL more easily.

Slaughter's book is mostly about cultural and personal transformations. Her policy recommendations, confined to the last chapter, are not very specific. Her most specific suggestion, agreeing with Bronfenbrenner, is to "vote for more women."¹⁰⁹⁵ Pointing to studies that show "women in politics do in fact pay more attention to caregiving issues," she thinks a critical mass of women will mean more than just the sum of those female voices. Slaughter describes an experiment that showed men were themselves more likely to raise issues relating to care if assigned to groups with substantial numbers of women.¹⁰⁹⁶

Slaughter lauds "farsighted entrepreneurs" for recognizing the long-term value of workplace policies that create room for the care responsibilities of their employees. Interestingly, one of the model employers she features is the Pentagon.¹⁰⁹⁷ She's less specific about how to create a legal and regulatory climate that will secure these benefits more broadly. Slaughter

¹⁰⁹⁵ Slaughter, *Unfinished Business*, 237.

¹⁰⁹⁶ *Ibid.*, 237-239.

¹⁰⁹⁷ *Ibid.*, 241.

endorses an eclectic do-everything approach to the problems and suggests a benefit if “different states can adopt different solutions.”¹⁰⁹⁸ Reflective of the American federal system, this retreat behind state variation has a long history in the American welfare state, dating back to worker’s compensation laws and mother’s pensions. As Daniel Nelson explained, crafting unemployment insurance on the basis of state variation placated a variety of potential critics at the same time as it circumvented a Supreme Court hostile to the New Deal.¹⁰⁹⁹ Certainly, the passage of various family leave bills in different states, and the lack of economic disasters following that legislation, created a positive momentum for the FMLA.¹¹⁰⁰ There’s precedent for what Slaughter suggests.

However, this study offers a cautionary tale. State variation and local control often worked to the disadvantage of individual pregnant workers. State-by-state struggles for wage replacement during family leave, however laudable, fails to define the problem as one of citizenship rights and also reduces benefits to an accident of address. Many states have benefits more expansive than those provided by the FMLA. Three states have paid family leave benefits. These are states that already had paid state temporary disability insurance programs that date back to an earlier period when state by state variation in unemployment insurance allowed them to first build up a surplus fund and then to create a new benefit. State TDI programs were a post WWII policy phenomenon that did not spread very widely. The new paid family leave provisions piggy back on the structure, funding mechanism and administration of those existing programs. The one state that did not already have TDI when it passed family leave, Washington, has been unable to fund or operate it and so no Washington parents have yet benefited from their law. Of

¹⁰⁹⁸ Slaughter, 236.

¹⁰⁹⁹ Nelson, *Unemployment Insurance*.

¹¹⁰⁰ Wisensale, “Approaches to Family Policy in State Government: A Report of Five States”; Bernstein, *The Moderation Dilemma*.

states and territories without paid family leave, only New York, Hawaii and Puerto Rico would have the advantage of an existing TDI program upon which to tack family leave.¹¹⁰¹ Puerto Rico already has a different law providing wage replacement to new mothers. In the midst of a severe economic crisis, the territory is unlikely to expand any social programs in the near future. It does look like New York might be the next state to pass paid family leave. The New York legislature passed paid leave in 2015. Still, this path to paid family leave will dead-end very soon precisely because of state by state variation. Washington, and not New York, is the state to watch for a usable pattern. Paid Family Leave was scheduled to begin in Washington in October 2015, but has been delayed indefinitely.¹¹⁰²

The inadequacies of the FMLA and state paid leave programs are not really the heart of the issue. In the final measure, the story of American maternity policy's shortcomings is about the underlying dangers of the American public-private hybrid welfare state. Employee fringe benefits in the postwar period contributed to the primacy of work in the conceptualization of American citizenship. These benefits elevated the importance of a good job and defined what a good job was. The good jobs, in turn, reinforced gender, racial and class inequality among Americans. The civil rights movement accepted this situation, and defined its goal as opening up "the American workplace." The private welfare state grew during a period of expanding employment, rising wages and good jobs. Even outside the current and hopefully temporary economic downturn, the American economy is not the same one it was sixty years ago.

¹¹⁰¹ Colorado has a TDI program for state employees. Institute for Women's Policy Research, *Maternity, Paternity, and Adoption Leave*, 2.

¹¹⁰² Personal Communication, Washington State Department of Labor and Industries, (360) 902-4930, Nov. 23, 2015.

Strategies centered on job-related benefits are sensitive to economic expansion and contraction. The postwar period offered the undoubtable rewards of the vigorous private sector--good jobs with good benefits--the very heart of mid-century citizenship. But shortly after, this approach was ill-equipped to confront the stagflation of the mid-to-late 1970s, automation, and the shift in job growth to non-union areas or off-shore. Likewise, the election of Ronald Reagan spelled an end to federal enforcement of civil rights regulations as the administration starved enforcement agencies and appointed antagonistic officials. As unions struggled to survive amidst declining jobs and aggressive concessionary bargaining, their abilities to push anti-discrimination and expansion of fringe benefits waned. Layoffs hit new entrants, including women and many minority men harder than they hit white men.¹¹⁰³ Broad economic and political changes broadsided the civil rights approach and methods just as they began to pay off in sweeping changes in American attitudes. This is a major reason why the PDA and the FMLA are insufficient. Tied to traditional family formations and even more firmly grounded in good full time jobs and stable employment, fringe benefits, the PDA, the FMLA and state paid leave plans are a narrow path through which to provide the social supports citizens need.

Pregnant workers and new mothers are the canaries in the coal mine of the American social welfare system--they are the first signs of much deeper social problems and inequalities. Most women will only have a few children. The longest pregnancies are just over nine months long and babies grow up fast. In any workplace, even a feminized one, there are likely to be only a few pregnant workers at any time. This transience is partly why there has not really been a movement of pregnant workers and new mothers themselves to demand priority in social policy

¹¹⁰³ Nancy MacLean, *Freedom is not Enough*, 288-289.

and employee fringe benefits.¹¹⁰⁴ However, it is precisely because pregnancy inhabits the margins of policies and experiences that we should pay attention to it. Advocates for maternity policies have repeatedly analogized the needs of pregnant workers and new mothers to those of other, more standardized, beneficiaries of public and private social supports. In the early years of the twentieth century, mother's pensions were like soldier's pensions because mothers and soldiers both performed a service to the state. When private fringe benefits grew, maternity was slighted because employers resisted comparing the needs of working mothers to those of their imagined ideal worker. Feminist lawyers in the 1970s found equivalents in men with heart attacks and broken legs. Proponents of the FMLA cast a net wide to place a new mother in company with lots of loving family members. But, this is all backwards. Instead of asking who else is getting which benefits that could help a pregnant worker or new mother, we should ask how other parts of American social policy resembles that concerning maternity.

The US has had a maternity policy since World War II but it has never had one that covered all citizens. Instead, it has one that provides coverage to some but not others. Tying social provisions to a stable employment relationship with one employer or to means testing by government means subjecting what a lot of people in the world think of as human rights to manifold risks, like that of disability, firing, professional development, the vagaries of the market, job growth, and the success of a particular business or the stigma of means testing. I have also shown, again and again, that to avail themselves of rights they had in a private welfare system, many workers needed the intervention of advocates. From the 1940s to the 1970s, unions were the watchdogs of whatever weak and fragmented maternity policy there was when they took cases to arbitration under the terms of their collective bargaining agreements, raised the

¹¹⁰⁴ With the possible exception of MomsRising.

issue at the bargaining table and supported attempts to expand public welfare programs. Later, feminist or civil rights groups also provided legal assistance for cases going to the EEOC or the courts. Economic and political changes that have weakened American unions may have also weakened the ability of people who are already covered to make sure that they can use that coverage. In a circular way, the role unions played in constructing and operating this private welfare state now boxes them in and also boxes in the extent of social benefits to American citizens. Facing a backlash against women's rights, feminists are also engaged in rear-guard defense of reproductive rights and are regularly dismissed by media as man-hating and out of fashion. The leading advocates for maternity policy have been weakened.

Social benefits are public goods, even public rights. Depending on national rules, anti-discrimination laws, health care and social welfare legislation for all is the only means of securing the basic needs for broad sectors of the American people. That, I think, is the pregnancy test of the American welfare state.

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