# AFTER *CALIFORNIA FEDERAL SAVINGS & LOAN ASSOCIATION V. GUERRA*: THE PARAMETERS OF THE PREGNANCY DISCRIMINATION ACT

Melissa Feinberg

Title VII of the Civil Rights Act of 1964[1] proscribes discrimination against any individual on the basis of sex. This statute reflects the modern view of equality that requires equal employment opportunities for men and women.[2] Sex differences may not be used as barriers to block women from positions deemed strictly male.[3] Nor may employers discriminate in compensation or benefits solely because of an employee's sex.[4]

Problems arise when the term "equal" is interpreted to mean "identical." Because of the physical differences between men and women, pregnancy poses the most difficult problems for applying principles of equality to the realities of difference.

In *California Federal Savings and Loan Association v. Guerra*,[5] the Supreme Court upheld a state law providing for "preferential" treatment for pregnant employees.[6] The Court ruled that preferential treatment is consistent with the principles of Title VII as amended by the Pregnancy Discrimination Act of 1978 (PDA).[7] This case provided a negative answer to the question whether the PDA mandates that pregnant employees receive identi-

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1. 42 U.S.C. § 2000e-17 (1982).

2. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1970)(a racial discrimination case that held objective of Title VII includes equality of employment opportunity). The Court first used Title VII to strike down a classification based on sex in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

3. 42 U.S.C. § 2000e-2(a) (1982) provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

4. *Id.*

5. 479 U.S. 272 (1987).

6. The preferential treatment at issue in this case was a qualified right to reinstatement after a pregnancy leave of no more than four months; this right was not required for any other workplace disability. *See infra* notes 54-58 and accompanying text.

7. 42 U.S.C. § 2000e(k) (1982).

cal treatment to those suffering other workplace disabilities.[8] *Guerra*, however, left many other questions unanswered. For example, do situations exist where disparate treatment will be not merely permitted but affirmatively required? How much latitude does the PDA leave to the states to legislatively grant pregnancy benefits? This Note explores the parameters of the PDA, focusing on the possible requirements the Act imposes on employers to accommodate pregnancy as well as the extent and breadth of those accommodations.[9]

## HISTORICAL DEVELOPMENT OF THE PDA

The assumption that the roles of worker and mother are incompatible often influences employer policies and attitudes towards pregnancy in the workplace.[10] Under this assumption, a woman's choice to become pregnant effectively constitutes a choice to become a mother and not a worker.[11] Therefore, according to this view, it is wrong to require employers to continue to support women after this choice is made.[12]

Implicitly supporting this reasoning, the Supreme Court in *Geduldig v. Aiello*[13] rejected an equal protection challenge to the exclusion of normal pregnancy disability benefits from the state disability insurance program.[14] The Court focused on the financial burden that inclusion of normal pregnancy coverage would impose and affirmed a state's right to preserve the self-supporting nature of the program.[15] Only in a footnote did the Court briefly raise and dismiss the argument that the program discriminated against women.[16] The Court stated that "the program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[17] With this footnote reference, the Court offhandedly dismissed the issue.[18]

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8. *Guerra*, 479 U.S. at 291.

9. Constitutional challenges to pregnancy classifications based on the equal protection clause are beyond the scope of this Note and are not addressed.

10. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

11. *Id.* at 1128-42. Finley examines in greater depth these underlying assumptions, including the voluntary nature of pregnancy, pregnancy as a special women's problem, natural roles ideology, aesthetic and moral qualms surrounding pregnancy, and pregnancy as a unique condition.

12. "The significance of this assumption [that pregnancy is voluntary] is that it has seemed somehow illogical to approach pregnancy as a disability or an illness . . . . In addition, it has seemed somehow unfair for employers to have to pay, under disability or illness policies, for a woman's expected choice to assume [her] natural role." *Id.* at 1136.

13. 417 U.S. 484 (1974).

14. *Id.* at 494.

15. *Id.* at 492-96. The Court framed the issue as whether the equal protection clause requires self-supported insurance programs "to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery." *Id.* at 494.

16. *Id.* at 496 n.20.

17. *Id.*

18. For an alternative equal protection analysis see Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 21-31 (1985)(the classifications are not pregnant women and non-pregnant persons, but, rather, those who have engaged in reproductive behavior and suffered workplace consequences and those who have engaged in reproductive behavior with no adverse workplace consequences).

The Court adopted this same reasoning in *Gilbert v. General Electric Co.*[19] In contrast to *Geduldig*, *Gilbert* involved a challenge to a disability policy based on Title VII violations, not on grounds of equal protection.[20] The Court reasoned that because pregnancy is unique to women, it can be excluded from disability policies without discrimination.[21]

Congressional disapproval of the limited interpretation of Title VII advanced by *Gilbert* resulted in the passage of the Pregnancy Discrimination Act of 1978.[22] The PDA amended Title VII to explicitly overrule *Gilbert* by affirming the opinions of the dissenting Justices in *Gilbert* and clarifying that pregnancy discrimination is, in fact, sex discrimination and is therefore prohibited by Title VII.[23]

## INHERENT CONTRADICTIONS IN THE PDA

Passage of the PDA did not conclusively resolve disputes over the role of pregnancy in the workplace because the PDA's two clauses are subject to contradictory interpretations. The PDA first provides that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."[24] And, secondly, the PDA requires that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in ability or inability to work."[25] These two clauses, read separately, lead to contradictory results in the areas of preferential treatment for pregnant workers,[26] inadequate leave times,[27] and no-leave policies.[28]

The first clause defines discrimination "because of sex" to include discrimination "because of pregnancy."[29] Logically then, no employer should ever be able to fire, refuse to hire or discriminate on benefits simply because the employee is pregnant.[30] The clause implies a Title VII violation whenever a woman, because she is pregnant, is forced to leave a job, or give up

19. 429 U.S. 125 (1976).

20. Justice Rehnquist, writing for the majority, quoted the *Geduldig* characterization of the classification as one between "pregnant women and nonpregnant persons," and held that *Geduldig*'s equal protection rationale was precisely on point in the area of Title VII discrimination claims. *Gilbert*, 429 U.S. at 135-36.

21. "There is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not." *Gilbert*, 429 U.S. at 135 (quoting *Geduldig*, 417 U.S. at 496-97).

22. 42 U.S.C. § 2000e(k) (1982).

23. "It is the Committee's view that the dissenting Justices correctly interpreted the Act." H.R. REP. No. 948, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749-50.

24. 42 U.S.C. § 2000e(k) (1982).

25. *Id.*

26. *Guerra*, 479 U.S. 272 (1987)(challenge to a policy requiring a limited right to reinstatement after returning from a pregnancy leave based on the second clause of the PDA).

27. Abraham v. Graphic Arts Int'l Union, 660 F.2d 811 (D.C. Cir. 1981). *See infra* notes 91-95 and accompanying text.

28. *Id.*

29. Congress placed the PDA within § 2000e, the "Definitions" section of Title VII.

30. This results from substituting the word "pregnancy" for the word "sex" into each clause of 42 U.S.C. § 2000e-2(a). *See supra* note 3.

seniority or benefits, whether due to an insufficient leave policy, a no-leave policy or overt discrimination.[31]

For all employment-related purposes, the second clause requires only that pregnancy disability be treated the same as other disabilities for all employees.[32] This passage suggests the contradictory conclusion that employers may fire a pregnant worker because of her pregnancy, if any disabled worker similar in ability to work would also be fired.[33] Essentially, this clause requires identical treatment and nothing more, or less. Hence, under an analysis emphasizing this second clause, a no-leave policy providing no disability leaves for any employee regardless of the character of the disability would not violate the PDA. This would be true even though the results of this identical treatment would inevitably be to equate pregnancy with dismissal.

Accordingly, separate examination of the two clauses of the PDA results in two contradictory mandates. The first requires that a pregnant worker never suffer an employment loss for the sole reason that she is pregnant.[34] The second, however, rejects this guarantee to pregnant workers, requiring instead that pregnant employees face the same workplace benefits and burdens faced by other, non-pregnant, disabled workers.[35]

## THE EQUAL TREATMENT/SPECIAL TREATMENT DEBATE

This tension between the two clauses of the PDA parallels the conflicting views of equality that form the equal treatment/special treatment debate. This is a debate which divides both feminist and civil rights groups.[36]

### A. *Equal Treatment—the Assimilist View of Equality*

The Assimilist view[37] initially separates the issues of child rearing from child bearing,[38] because, when viewed without stereotypes, men and women

31. *Abraham*, 660 F.2d 811 and Miller-Wohl Co. v. Commissioner of Labor and Indus., 692 P.2d 1243 (Mont. 1984) advanced this reading of the PDA. *See infra* notes 91-105 and accompanying text.

32. The second clause of the PDA requires equal treatment of pregnant employees as compared to other employees whose disabilities similarly affect their ability to work. *See supra* note 25 and accompanying text.

33. More forcefully, an isolated reading of this passage would actually require the termination of a pregnant worker simply because of her pregnancy if other disabled workers, similar in ability to work, would also be terminated.

34. *See supra* notes 29-31 and accompanying text.

35. *See supra* notes 32-33 and accompanying text.

36. *See, e.g.*, American Civil Liberties Union Brief in *Miller-Wohl*, 692 P.2d 1243. The Employment Law Center, Equal Rights Advocates, Inc., the Women's Law Section of the State Bar of Montana, the Montana Human Rights Commission, and the Montana Education Association supported the Montana Maternity Leave Act (MMLA).

37. This view emphasizes the similarity of men and women and urges sex-blind treatment of all workers based solely on their ability to work. Under this view, it is through assimilation into the current workforce structures that women will achieve equality. For discussion see Note, *Sexual Equality Under the PDA*, 83 COLUM. L. REV. 690, 704-07 (1983).

38. "Much of the disadvantageous treatment of pregnant wage earners by employers was based not on pregnancy itself but on predictions concerning future behavior of the pregnant woman when her child was born or on views about what her behavior should be. When shorn of its implications about future behavior by the separation of childbearing and childrearing, pregnancy can be analyzed

can equally undertake child rearing activities.[39] With child rearing removed from the analysis and treated sex-neutrally, the Assimilists then analyze pregnancy "as a purely physical event."[40] While pregnancy is of course unique, it does not have a unique impact on ability to work; functionally it is a disability similar to any other. In fact, the effects pregnancy has on a worker can be the same as the effects of many other physically disabling conditions.[41] This analysis emphasizes the similarity of the position of a pregnant worker to that of other disabled workers,[42] and reinforces a mutual stake in certain basic protections regardless of gender.[43] All workers have a right to similar protections, for all share similar concerns, including an interest in job security and protection from the fear of losing a job when an illness or pregnancy requires leave time.

Essentially then, the "equal treatment" analysis stresses the second clause of the PDA and treats pregnancy the same as any other disability. According to this view, if an employer has a no-leave policy, or a limited duration leave policy which is inadequate for the needs of pregnant employees or seriously ill or injured employees, the pregnant women are no more deserving of job guarantees and benefits than other similarly situated workers.[44] If the leave policies are inadequate, workers should lobby for adequate disability leave laws.[45] Special treatment, it is argued, makes women less desirable employees and would, therefore, increase rather than limit discrimination.[46] According to the Assimilist position, preferential treatment creates in women a special privilege in a situation where all individuals deserve reasonable disability protection.[47] Moreover, it perpetuates protectionist and paternalistic stereotypes about women's unique and separate reproductive role.[48]

### B. *Special Treatment—The Pluralist View of Equality*

For the Pluralists,[49] failure to recognize pregnancy as distinct from other conditions is equivalent to accepting male workers as the norm for employee.[50] Pregnancy is clearly unlike other disabilities in that it is a so-

as a purely physical event." Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 355 (1985).

39. Rather than relying on traditional assumptions about the sex of the wage earner and child rearer, workplace policies should instead focus on the activity directly and leave other choices to those involved. *Id.* at 353.

40. *Id.* at 355.

41. Accident or illness may force a worker to miss the same number of days as those missed by a pregnant worker. In addition, injured or ill workers may require a less strenuous load while on the job, just as a pregnant worker may.

42. Williams, *supra* note 38, at 360-61.

43. *Id.* at 374.

44. *Id.* at 371.

45. *Id.* at 377-79.

46. Finley, *supra* note 10, at 1151.

47. Williams, *supra* note 38, at 371.

48. *Id.*

49. The Pluralist view recognizes men's and women's differences and acknowledges that in some circumstances disparate treatment may be necessary to achieve equality in result. *See* Note, *supra* note 37, at 707-09.

50. [I]n some situations, including those presented by pregnancy-related disabilities, equal treatment of the sexes actually results in inequality for women. In these situations, positive

cially necessary, desirable, biologically-rooted condition. Pluralists recognize this sex-based difference as a necessity, for equality cannot be achieved by treating identically those who are not alike. However, unlike the Assimilists, the Pluralists urge that these differences may be recognized within a context that is not hierarchical.[51] To affirmatively accommodate pregnancy into the workplace does not mean that women must necessarily be labelled as second class employees. Rather, the plurality of interests held by women and men must be recognized, and the differences embraced, within a context of equality. To ignore the differences between men and women and treat women like men is not to treat the sexes equally. Instead, equality requires that the differences be recognized and rendered irrelevant.

Analyzing the first clause of the PDA to determine that a no-leave policy discriminates against women emphasizes the Pluralist's view.[52] While the Pluralists agree with the Assimilists that an ideal society would provide workplace security to men and non-pregnant workers, they differ in that Pluralists do not feel compelled to fight legislation that is needed by women to accommodate pregnancy but that does not simultaneously provide job security for other temporary disabilities.[53] As pregnancy is a unique sex-based condition, failure to positively accommodate it in the workplace discriminates against women by conditioning their ability to choose to continue working upon their choice to have a child.

## SPECIAL TREATMENT AND THE PDA RECONCILED: *CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION V. GUERRA*

*California Federal Savings and Loan Association v. Guerra*[54] involved a challenge to a California law[55] that required employers to grant a reasonable

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action to change the institutions in which women work is essential in achieving women's equality because those institutions are, for the most part, designed with a male prototype in mind.

Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513, 515 (1983).

51. Note, *supra* note 37, at 707.

52. "Consistent with Pluralism, employers must adopt policies that recognize the unequal social burden that reproduction imposes on women." *Id.* at 721.

53. Krieger & Cooney, *supra* note 50, at 569-72.

54. 479 U.S. 272 (1987).

55. CAL. GOV'T CODE § 12945(b)(2)(West 1980) provides:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions either:

(l) To receive the same benefits or privileges of employment granted by that employer to other persons not so affected who are similar in their ability or inability to work, including to take disability or sick leave or any other accrued leave which is made available by the employer to temporarily disabled employees. For purposes of this section, pregnancy, childbirth, and related medical conditions are treated as any other temporary disability. However, no employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth, or related medical condition for a period exceeding six weeks. Nothing in this section shall be construed to require an employer to provide his or her employees with health insurance coverage for the medical costs of pregnancy, childbirth, or related medical conditions. The inclusion in any such health insurance coverage of any provisions or coverage relating to medical costs of pregnancy, childbirth, or related medical conditions shall not be construed to

pregnancy disability leave of up to four months regardless of the policy for other disabilities. Lillian Garland, a receptionist with California Federal Savings and Loan Association (California Federal), took a pregnancy disability leave in January, 1982.[56] When she requested to return four months later California Federal informed her that her job had been filled and that no similar positions were available.[57] When the California Department of Fair Employment and Housing served California Federal with a complaint,[58] the bank responded by filing this suit in District Court for the Central District of California. California Federal sought declaratory and injunctive relief on the grounds that federal law—Title VII—pre-empted California Government Code section 12945(b)(2).

The district court held that Section 12945(b)(2) discriminates against men on the basis of pregnancy.[59] In reversing this decision, the Ninth Circuit held that the district court's reasoning "defies commonsense, misinterprets caselaw, and flouts Title VII and the PDA."[60]

The Supreme Court granted certiorari and, in an opinion by Justice Marshall, answered the question whether the PDA mandates identical treatment for pregnant and other disabled workers or whether it permits preferential treatment for pregnancy. The Court held that employment practices that favor pregnant workers do not violate the PDA.[61] The Court examined the purpose of the PDA as manifested in its legislative history and historical context,[62] and concluded that Congress, faced with extensive evidence of pregnancy discrimination, adopted the PDA to extend Title VII's principles of equality of employment opportunities and removal of past employment barriers to cover pregnancy.[63]

The *Guerra* Court interpreted the words of the PDA by reading them in the context of legislative intent.[64] In the first clause of the PDA, Congress defines discrimination on the basis of pregnancy as sex discrimination and

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require the inclusion of any other provisions or coverage, nor shall coverage of any related medical conditions be required by virtue of coverage of any medical costs of pregnancy, childbirth, or other related medical conditions.

(2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. Nothing herein shall be construed to limit the provisions of paragraph (l) of sub. division (b).

56. *Guerra*, 479 U.S. 278.

57. *Id.*

58. California Fed. Sav. & Loan Ass'n v. Guerra, 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984).

59. *Id.*

60. California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 393 (9th Cir. 1983). The Ninth Circuit asserted that the district court misplaced its reliance on Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). *Newport News* struck down a health plan which excluded pregnancy from an otherwise complete benefit package for the spouses of employees. Because the spouses of male employees were less fully covered than the spouses of female employees, the Court held that the program discriminated against men.

61. *Guerra*, 479 U.S. 272.

62. *Id.* at 284-85.

63. *Id.* at 288 (quoting *Griggs*, 401 U.S. at 429-30).

64. "[W]e must examine the PDA's language against the background of its legislative history and historical context." *Id.* at 284.

expressly disapproves of the reasoning of *Gilbert v. General Electric Co.*[65] which found no sex discrimination in the exclusion of pregnancy benefits from an otherwise inclusive disability policy.[66] The second clause of the PDA, rather than limiting the first, states that pregnancy must be treated the same as other disabilities and illustrates how to apply the PDA to underinclusive disability plans.[67] Quoting the Ninth Circuit in *California Federal Savings & Loan Association v. Guerra*,[68] the Court held that Congress intended the PDA to serve as "a floor beneath which disability benefits may not drop—not a ceiling above which they may not rise."[69] According to this analogy, the PDA mandates that pregnancy be treated at least as well as other disabilities and, more importantly, does not limit more favorable treatment for pregnant employees.[70]

Although the *Guerra* Court adopted the floor/ceiling language of the Ninth Circuit, it did so with reservations.[71] Certain limitations to special treatment exist which would invalidate "preferential" policies based on archaic stereotypes or generalizations about the needs and abilities of pregnant workers.[72] Additionally, the Court's emphasis on the limited nature of the benefits provided by California Government Code Section 12945(b)(2)[73] leaves it unclear how the Court would handle a more extensive statute.[74]

In his concurring opinion, Justice Stevens agreed that the PDA does not prohibit special treatment for pregnant workers.[75] However, he reached this conclusion by arguing that the PDA should not be read in isolation, but rather must be read as an integral part of Title VII.[76] As the PDA appears in the definition section of Title VII, general Title VII principles ought to apply to the area of pregnancy discrimination.[77] Justice Stevens relied on *Steelworkers v. Weber*[78] where although the plain words of Title VII stressed neutrality, the Court upheld special treatment of the members of the protected class.[79] Since *Guerra* and *Weber* are both Title VII cases, in Stevens'

65. 429 U.S. 125 (1976).

66. *Id.* at 147.

67. *Guerra*, 479 U.S. at 284. For an example of the PDA striking down an underinclusive disability benefit plan, see, e.g., *Gilbert*, 429 U.S. 125 (employer's disability plan provided for nonoccupational sickness and accident benefits to all employees but excluded all disabilities arising from pregnancy).

68. *Guerra*, 758 F.2d 390.

69. *Guerra*, 479 U.S. at 285 (quoting *Guerra*, 758 F.2d at 396).

70. *Id.* at 286-87.

71. "Accordingly, subject to certain limitations, we agree with the Court of Appeals' conclusion . . . ." *Id.* at 285.

72. *Id.* at 284-85. An example of a paternalistic classification is found in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). In *LaFleur*, the Court struck down a policy imposing a mandatory maternity leave for all pregnant school teachers to begin five months before delivery. *See infra* notes 135-39 and accompanying text.

73. CAL. GOV'T CODE § 12945(b)(2) covers only the actual period of physical disability caused by pregnancy. *See supra* note 55.

74. *Guerra*, 479 U.S. at 289-90.

75. *Id.* at 292-94 (Stevens, J., concurring).

76. *Id.*

77. *See supra* note 29.

78. 443 U.S. 193 (1979) (striking down a facially neutral employment test with a racially discriminatory impact).

79. *Id.* at 204.

view, they should be decided the same way.[80] Therefore, Justice Stevens concluded that the PDA does allow for some preferential treatment.[81] He stated, however, that special treatment must be limited to instances where that treatment is consistent with the goals of Title VII.[82]

Considered together, the majority opinion in *Guerra* and Justice Stevens' concurring opinion provide strong support that the PDA does not mandate identical treatment of pregnancy with that of other workplace disabilities.

## QUESTIONS LEFT UNANSWERED AFTER *GUERRA*: WHAT ARE THE PARAMETERS OF THE PDA?

### 1. *The PDA as a Floor: What Does the PDA Minimally Require of Employers?*

*Guerra* provided the Supreme Court with its first opportunity to address a state law requiring employers to make positive efforts to accommodate pregnancy into the workplace.[83] In the course of its opinion, the Court repeated the language of the Ninth Circuit and affirmed that Congress intended the PDA to serve as "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[84] As *Guerra* involved the possibility of a ceiling, the Court did not articulate exactly where the "floor" created by the PDA lies.[85] Therefore, it is unclear exactly what action the PDA positively requires of employers.[86]

#### a. *Does the PDA require only strict facial neutrality?*

It is possible that, while the PDA allows some special treatment of pregnancy, all that is minimally required is strict facial neutrality—a policy which makes no explicit reference to pregnancy for either detrimental or beneficial treatment. This approach denies the applicability of a disparate impact approach to pregnancy disability.[87] In fact, the majority of courts

80. "[S]ince the Court in *Weber* interpreted Title VII to draw a distinction between discrimination *against* members of the protected class and special preference *in favor of* members of that class, I do not accept the proposition that the PDA requires absolute neutrality." *Guerra*, 479 U.S. at 294 (Stevens, J., concurring)(emphasis in original).

81. "I do not read the Court's opinion as holding that Title VII presents no limitations whatsoever on beneficial treatment of pregnancy." *Id.* at 294 n.3 (Stevens, J., concurring).

82. *Id.* at 295.

83. In addition to California, other states legislatively mandate a variety of workplace accommodations for pregnancy. For example, see CAL. GOV'T CODE § 12945(b)(2)(West 1980)(right to reinstatement after a pregnancy leave of up to four months); CONN. GEN. STAT. ANN. §§ 46a-60(a)(7)(West Supp. 1986)(reasonable leave for pregnancy disability, same or comparable job on return); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1976)(nonprobationary employees entitled to eight weeks of pregnancy leave); Montana Maternity Leave Act, MONT. CODE ANN. §§ 49-2-310,-311 (1985)(employer must provide reasonable maternity leave and reinstatement to same or similar job).

84. *Guerra*, 479 U.S. at 285 (quoting *Guerra*, 758 F.2d at 396).

85. At issue in *Guerra* was whether a benefit legislated for pregnancy was more than what was allowable under the PDA and not whether the PDA required more. *Id.* at 279.

86. *Id.* at 292 n.32. The Court explicitly refused to address the legitimacy of a disparate impact approach to pregnancy discrimination. *See infra* notes 87-105 and accompanying text.

87. A disparate impact analysis looks beyond the explicit language of an employment policy to find discrimination. If a policy appears neutral but, in effect, places a heavier burden on one group,

ruling on the issue have held that strict facial neutrality is all that the PDA requires and allows.[88]

The facial neutrality interpretation of the PDA maintains that Title VII only requires employers to treat pregnant employees no differently than other employees.[89] This interpretation places a greater emphasis on the second clause of PDA, evaluating workers exclusively on the basis of their ability to work.[90] Logically then, an employer could dismiss an employee because of her pregnancy, if the employer could also dismiss another employee who required leave time for other reasons. Thus, when an employer has a no-leave policy or a very limited leave policy, employers need not treat pregnant workers any differently; they would lose their jobs just as any disabled employee would.

b. *Does the PDA require a disparate impact analysis?*

Some courts have, however, adopted the disparate impact analysis to strike down facially neutral leave policies.[91] For example, in *Abraham v. Graphic Arts International Union*[92] the D.C. Circuit Court of Appeals held that a policy which results in the termination of a pregnant employee because of insufficient leave time violates the PDA.[93] A lack of adequate leave policy has a disparate impact on women, for, under this type of policy, pregnancy becomes virtually tantamount to a dismissal.[94] This drastic effect on women employees of child bearing age clearly is not faced by men and is sufficient, under a disparate impact analysis, to constitute a violation of the PDA.[95]

In *Brown v. Porcher*[96] the Fourth Circuit Court of Appeals used similar reasoning to require disability benefits for pregnant women.[97] The court found the South Carolina Employment Security Commission's policy of denying unemployment compensation to women solely because they left their last employment on account of pregnancy to violate federal law[98] regardless

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it may be found to be discriminatory. The disparate impact approach renders invalid "practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431.

88. Marifino v. St. Louis County Cir. Ct., 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983); Conners v. University of Tenn. Press, 558 F. Supp. 38 (E.D. Tenn. 1982); Barone v. Hackett, 28 Fair Empl. Prac. Cas. (BNA) 1765 (D.R.I. 1982).

89. Because *Guerra* allows preferential treatment, this reading would require only that pregnant employees be treated no worse than other employees. *Guerra*, 479 U.S. at 291-92.

90. *See supra* notes 32-33 and accompanying text.

91. *Abraham*, 660 F.2d 811, Brown v. Porcher, 502 F. Supp. 946, 956 n.19 (D.S.C. 1980), *aff'd*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983)(PDA prohibits denial of pregnancy benefits regardless of the treatment of other disabilities).

92. 660 F.2d 811 (D.C. Cir. 1981).

93. *Id.* at 819.

94. In *Abraham*, a union established leave policies for regular full-time employees, but, as the plaintiff was a full-time temporary worker, she was given only ten days sick leave. The normal period of pregnancy leaves is six weeks. *Id.* at 819 n.64.

95. "[T]he ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter." *Id.* at 819.

96. 660 F.2d 1001 (4th Cir. 1981).

97. *Id.* at 1003.

98. The statute at issue was 26 U.S.C. § 3304(a)(12) (1982) which provides: "No person shall be denied [unemployment] compensation . . . solely on the basis of pregnancy or termination of pregnancy."

of how the commission treats employees with other disabilities.[99] Hence, courts have held both inadequate disability benefits and inadequate leave time policies to violate federal law because of the unequal effect the policies have on pregnant women.[100]

More recently, in *Miller-Wohl Co. v. Commissioner of Labor and Industry*,[101] the Montana Supreme Court, in upholding the Montana Maternity Leave Act (MMLA),[102] argued in part that the MMLA is valid under the PDA and, in fact, may even be required by the PDA.[103] Using a disparate impact analysis, the Court found that a no-leave policy for employees with less than one year tenure poses a drastic effect on women who become pregnant, an impact never faced by men.[104] Inevitably, childbirth involves a period of disability.[105] Failure to consider this fact in fashioning a leave policy constitutes discrimination on the basis of pregnancy.[106] Under the PDA, this constitutes gender-based discrimination and is therefore prohibited.[107]

Although the *Guerra* Court ruled that preferential treatment is permissible,[108] it did not address whether preferential treatment may, in some instances, be required by the PDA.[109] Yet, the Court's language provides some clues as to how it might hold when faced with the issue. The majority opinion, quoting from the House Report, adopted the interpretation that the PDA does not require employers to institute new benefit programs where none previously existed.[110] In addition, absent general availability, the House Reports do not require paid sick leave.[111] Unpaid leaves may be instituted voluntarily but are not mandatory.[112] The majority's acceptance of

99. *Brown*, 660 F.2d at 1003-04.

100. *Abraham*, 660 F.2d at 819; *Brown*, 502 F. Supp. at 955.

101. 692 P.2d 1243 (Mont. 1984)(upholding the Montana statute against a preemption challenge). The United States Supreme Court vacated and remanded the *Miller-Wohl* decision for further consideration in light of *Guerra*, 479 U.S. 272. Miller-Wohl Co. v. Commissioner of Labor & Indus., 479 U.S. 1050 (1987). On remand, the Montana Supreme Court reinstated the *Miller-Wohl* decision reported at 692 P.2d 1243, holding that: "Try as we may, we cannot discern the reasons why the United States Supreme Court vacated our decision in the light of [*Guerra*]. If anything *Guerra* supports our decision that neither the Civil Rights Act nor the amendment under the [PDA] preempted the [MMLA]. The United States Supreme Court majority offered no other reason for vacating the judgment in favor of the Commissioner and Buley." Miller-Wohl Co. v. Commissioner of Labor & Indus., 744 P.2d 871, 872 n.2 (1987).

102. MONT. CODE ANN. §§ 49-2-310, -311 (1983).

103. The Montana Supreme Court ruled that the PDA does not preempt MMLA because a policy of granting pregnancy leaves only to those employees employed for a limited period of time would violate both statutes. *Miller-Wohl*, 692 P.2d 1243.

104. The employer's restricted leave policy, although facially neutral, nevertheless "poses a drastic effect on women employees of childbearing age, an impact no male would ever encounter." *Id.* at 1252.

105. The average woman requires six weeks of pregnancy leave for a normal pregnancy. H.R. REP. No. 948, 95th Cong. 2d Sess. 5, 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4753.

106. *Miller-Wohl*, 692 P.2d at 1252.

107. 42 U.S.C. § 2000e(k) (1982).

108. *Guerra*, 479 U.S. 272.

109. "[W]e need not decide and therefore do not address the question whether § 12945(b)(2) could be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers." *Id.* at 292 n.32.

110. *Id.* at 287 (quoting H.R. REP. No. 948, 95th Cong. 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4752.

111. H.R. REP. No. 948, 95th Cong. 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4753.

112. "H.R. 6075 in no way requires the institution of any new programs where none currently

these statements in the legislative history suggests that use of a disparate impact analysis to require leave and benefit policies for pregnant employees will not be successful.[113]

The argument advanced by Justice Stevens in his concurring opinion in *Guerra*, however, may lead to a contrary result.[114] Justice Stevens stressed the PDA's position within the framework of Title VII.[115] Rather than passing the PDA as an independent statute, Stevens argued that Congress passed it to amend Title VII to include pregnancy discrimination within the definition of sex discrimination, thereby extending the protections of Title VII to include pregnancy.[116] Stevens applied the general Title VII principles expressed in *Steelworkers v. Weber*.[117] According to *Weber*, Title VII does not prohibit all preferential treatment of the disadvantaged class intended to receive protection from the statute.[118]

Adopting this reasoning, it is clear that a disparate impact approach may be used to find that facially neutral policies are, in fact, in violation of the PDA. This is because general Title VII case law recognizes discrimination claims grounded in disparate impact.[119] Such claims were first accepted by the Supreme Court in *Griggs v. Duke Power*,[120] where the Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[121] As Title VII affords both a disparate treatment and a disparate impact cause of action,[122] interpreting the PDA within the definitional section of Title VII would require recognition of a disparate impact cause of action for pregnancy discrimination.[123]

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exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work." H.R. REP. No. 948, 95th Cong. 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4752.

113. The Court discussed the explicit language in the legislative history expressing congressional intent not to require preferential treatment, *see supra* note 111, and held that the discussion of whether the PDA requires preferential treatment presupposed that Congress did not intend to prohibit such treatment. The Court neither accepted nor rejected the argument that the PDA does not require special treatment. *Guerra*, 479 U.S. at 286-88.

114. *Guerra*, 479 U.S. at 292 (Stevens, J., concurring).

115. *Id.* at 292-94.

116. "We recognize that enactment of H.R. 6075 will reflect no new legislative mandate of the Congress nor effect changes in practices, costs, or benefits beyond those intended by Title VII of the Civil Rights Act. On the contrary, the narrow approach utilized by the bill is to eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination." H.R. REP. NO. 948, 95th Cong. 2d Sess. 3-4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4751-52.

117. 443 U.S. 193 (1979)(Race-conscious affirmative action does not violate Title VII. The Court interpreted the plain words of the statute in the context of its legislative history and purpose.).

118. "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Weber*, 443 U.S. at 204.

119. *Griggs*, 401 U.S. 424.

120. *Id.*

121. *Id.* at 431.

122. *Id.*

123. The EEOC Guidelines on Discrimination Because of Sex took this approach:

> Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity. 29 C.F.R. § 1604.10(c) (1988).

In deciding whether the Court will adopt a disparate impact analysis to require leave and benefit policies for pregnant employees, it is unclear whether the Court will look to specific language in the PDA's legislative history, or view the PDA through the accepted principles of Title VII. What is clear is that without a disparate impact cause of action, women will continue to face a penalty in the workplace if they choose to have children, a penalty men do not face. The implicit message sent by a leave policy inadequate to allow a female employee to keep her job through a pregnancy is that the roles of worker and mother are incompatible. Facially neutral policies with disparate impacts perpetuate the stereotype that women, limited by their biological reproductive role, can never be men's equal in the workplace. To repudiate this stereotype, purportedly the purpose of Title VII, the Court must interpret the PDA to prohibit policies with disparate impact on women.

*Guerra* referred to the PDA as a minimum floor of protection for women.[124] To further the purpose of Title VII, this floor must enable women to return to their jobs after a reasonable leave for the period of physical disability associated with pregnancy and childbirth. Only if the PDA allows women, as well as men, the ability to choose to have a family without forfeiting employment will it truly lift the barriers to equality of opportunity.[125] The floor of rights must protect women from ever having to forfeit a job to have a child.

### 2. *The PDA as a Ceiling: Are There Limits on a State's Ability to Legislate Pregnancy Benefits?*

#### a. *Alternative rationales advanced to uphold state-mandated pregnancy benefits.*

The majority opinion in *Guerra* held that the PDA is not a "ceiling;" it imposes no limits on state-mandated or voluntary benefits for accommodating pregnancy in the workforce.[126] The majority opinion advances two rationales to support this holding. The first and primary argument interprets the PDA in light of its purpose, which is not to limit preferential treatment of pregnant employees but rather to remove employment barriers that have existed in the past.[127] The alternative rationale urges that even if the PDA prohibits disparate preferential treatment for pregnant employees, state laws providing for such preferential treatment would not be pre-empted by the PDA. Accordingly, federal law pre-empts state law only if compliance with both is strictly impossible.[128] As California employers can always raise the level of their benefits for other disabilities to the level of benefits statutorily mandated for pregnancy,[129] section 12945(b)(2) is not pre-empted by Title

124. *Supra* notes 84-85 and accompanying text.

125. Equality of opportunity requires that sex-specific variations not be used to disadvantage women.

126. *Guerra*, 479 U.S. at 285 (The PDA is a floor and not a ceiling on benefits.).

127. *Id.* at 284-90.

128. *Id.* at 290-92.

129. Employers could extend the limited right of reinstatement after pregnancy which is mandated by CAL. GOV'T CODE § 12945(b)(2) to all disabled employees.

VII.[130]

Similarly, in *Miller-Wohl*, the ACLU and NOW amicus briefs contended that the Montana Maternity Leave Act (MMLA) conflicted with the PDA, but urged the court to order employers to raise the benefits for non-pregnancy related disabilities to comply with both laws and remove the conflict between them.[131] The Montana Supreme Court held that Title VII did not preempt the MMLA and deferred the question of extension to the legislature.[132]

In *Guerra*, the Court rationalized that no pre-emption occurs as long as benefits statutorily mandated to protect pregnant employees could conceivably be extended to other disabled employees. Pushed to its logical limit, this rationale renders any benefit conferred only on pregnant employees safe from a preemption challenge. It is always conceivable that an employer could confer the benefit on non-included employees and, in so doing, could hypothetically comply with both statutes.[133]

These alternative rationales for upholding state-mandated pregnancy accommodations reflect some judicial hesitancy about requiring benefits only for pregnancy, regardless of whether or not an employer provides those same benefits to other disabled workers. This hesitancy, together with the more cautious language of Justice Stevens' concurrence in *Guerra*, suggests that the Supreme Court may recognize a ceiling on the states' ability to mandate benefits for pregnancy, regardless of the existence of comparable benefits for other equally disabling conditions.[134]

Despite *Guerra*'s floor-ceiling analogy, if the PDA imposes a ceiling either on the states' ability to legislate benefits for pregnant employees or on an employer's ability to voluntarily enact policies regarding pregnancy, the *Guerra* decision is unclear as to the exact location of that ceiling. It is clear, however, that after *Guerra*, a limited right to reinstatement after a pregnancy disability leave does not reach this ceiling, but reinstatement is little more than a minimum requirement; in fact, it is barely off the floor.[135]

b. *Would the bestowal of concrete pregnancy benefits violate the PDA?*

Courts have upheld statutes mandating reasonable pregnancy leaves with a right to return to the same job unless the job is no longer available due to business necessity.[136] It is uncertain, however, whether courts will

130. *Guerra*, 479 U.S. at 290-92.

131. The amici argue "this Court should extend MMLA's provisions in a nondiscriminatory fashion rather than invalidate the statute and deny all Montana citizens a benefit the legislature intended to confer." *Miller-Wohl*, 692 P.2d at 1248.

132. *Id.* at 1255. Montana has yet to vote to extend the benefits of MMLA to all disabilities.

133. For example, a statute requiring minority employees to receive bonuses with no mention of white employees would not violate Title VII because conceivably the employer could extend the bonuses to non-minority employees as well.

134. *Guerra*, 479 U.S. at 292-95. "I do not read the Court's opinion as holding that Title VII presents no limitations whatsoever on beneficial treatment of pregnancy." *Id.* at 294 n.3 (Stevens, J., concurring).

135. *Guerra*, 479 U.S. 272; *Miller-Wohl*, 692 P.2d 1243. *See supra* notes 122-24 and accompanying text.

136. *Guerra*, 479 U.S. 272; *Miller-Wohl*, 692 P.2d 1243.

uphold state laws that require granting concrete pregnancy benefits against Title VII challenges. Concrete benefits may include bestowing paid pregnancy leaves, leaves with a duration exceeding the period of physical disability, or paid pregnancy incentives.

The *Guerra* decision provides two frameworks with which to analyze special treatment policies. These frameworks conflict when applied to specific concrete benefits such as paid leaves. The first standard, found in the majority opinion, invalidates any special treatment based on archaic or stereotypical generalizations about the needs and abilities of pregnant workers.[137] The second standard, found in Justice Stevens' concurrence, upholds only those special treatment policies that are consistent with the principles of Title VII.[138]

Protective labor legislation, such as maximum hour restrictions for women only, and restrictions on the amount of weight women can carry at work illustrate examples of the stereotypes prohibited by the first *Guerra* standard.[139] Regulations based on the premise that "women as a class are inherently weaker physically than men" are contrary to the principles of Title VII.[140] Moreover, this first standard invalidates mandatory pregnancy leave policies where pregnancy does not affect the employee's ability to work.[141] The majority in *Guerra* further asserted that extending differential treatment beyond the actual physical disability associated with pregnancy, childbirth, and related medical conditions reflects stereotypical assumptions, and, hence, fails the test.[142]

The Court has yet to address a Title VII challenge to paid pregnancy leaves. In a situation where an employer provides job security to pregnant employees, it could be argued that paid leaves would not be paternalistic. Unlike protective legislation which statutorily prohibits women and not men from carrying out some workplace assignment that they are in fact physically capable of performing, paid pregnancy leaves do not arise from the same stereotypical generalizations about women's needs. Paternalistic policies prevent female employees from achieving their goals based on the argument that the employer or the state is better able to act in her best interest than she is. By contrast, paid leaves merely allow female employees to carry out their own choices to have children without experiencing any workplace losses. The leaves are a recognition of the societal value placed on parenthood and the social utility of minimizing the disincentives inherent in a policy which makes economic loss the price of pregnancy. Paid leaves, therefore, reflect the worth society accords pregnancy, regardless of whether

137. *Guerra*, 479 U.S. at 284-90.

138. *Guerra*, 479 U.S. at 294-95 (Stevens, J., concurring).

139. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971)(overturned restrictions on the weight women were permitted to carry at work); *see also* Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972)(invalidated a California statute requiring rest breaks for women employees only).

140. *Burns*, 346 F. Supp. at 998.

141. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). In this case, the Court struck down a policy mandating unpaid maternity leaves for school teachers five months before delivery despite the teachers' ability and willingness to continue working. The Court did so on due process grounds because the irrebutable presumption that women were unable to work was unrelated to any individual teacher's capacity to work.

142. *Guerra*, 479 U.S. at 290.

an employer provides complementary leaves for other disabilities. Rather than paternalistically denying a woman a choice out of some notion of "her own good," paid leaves support the pregnant worker's own decision. As they are not rooted in notions of paternalism, paid pregnancy leaves satisfy the majority standard.[143]

The second standard,[144] however, requires that preferential treatment for pregnancy be consistent with the goals of Title VII, so as "to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[145] This second standard implies a distinction between a policy that removes a burden and one that gratuitously dispenses a benefit. This distinction, however, is often difficult to discern.

In the case of paid pregnancy leaves, it is questionable whether a limited period of unpaid leave would be the kind of penalty that would impinge on equality of employment opportunity. While the "floor" of the PDA which guarantees that no woman will lose her job due to pregnancy clearly does nothing more than remove a workplace burden faced by pregnant workers, paid pregnancy leave appears to dispense a benefit beyond the removal of barriers. Granting a positive, concrete benefit to pregnant employees and not to other employees similarly unable to work possibly stretches the meaning of the "same treatment" language of the PDA beyond the limits that the Court is willing to acknowledge.[146]

On the other hand, it is possible that paid pregnancy leaves serve merely to remove a socially imposed burden that women, and not men, face.[147] It is only women that confront the burden of missing, on the average, six weeks[148] without pay for exercising their right to have a child. For men, there is no conflict between choosing to have a child and the possible loss of employment income for exercising that choice. This burden constitutes a penalty that must be eliminated in order to prevent women from being disadvantaged in the workplace as a result of a sex-specific difference. Hence, paid pregnancy leave time divests pregnancy of all employment impact by eliminating burdens that disadvantage pregnant employees. Paid pregnancy leave, therefore, furthers the purposes of Title VII and should be considered within the ceiling of limitations on benefits imposed by the PDA.[149]

## CONCLUSION

This Note has attempted to flesh out the floor-ceiling analogy used by

143. *Id.*
144. *See supra* note 137.
145. *Id.* at 295 (Stevens, J., concurring).
146. ". . . and women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes." 42 U.S.C. § 2000e(k)(1982)(emphasis added).
147. *See* Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985).
148. *See supra* note 105.
149. In *Newport News* the Court made it clear that Congress found no violation in requiring greater dollar expenditures for women than men to achieve equality for both sexes. *Newport News*, 462 U.S. 669.

the *Guerra* Court in holding that the PDA serves as a floor and not a ceiling to pregnancy benefits. The minimum floor created by the PDA must eliminate imposing upon women a choice between a job and a pregnancy. In this way, facially neutral policies which, in effect, force this choice are contrary to the mandate of Title VII, as amended by the PDA. This mandate requires the removal of pregnancy discrimination from the workplace.[150] The way to accomplish this goal is not to ignore the differences in the sexes, not to ignore pregnancy, but, rather, to incorporate it into employment frameworks as a normal and expected occurrence. To ignore pregnancy, and to treat men and women identically with its regard, is to discriminate. Thus, employer policies that benefit only pregnant employees must be upheld when the policy's impact is focused narrowly on eliminating those burdens society imposes on women for exercising the fundamental right of reproduction. Eliminating these differences justifies differential treatment.

Although the *Guerra* Court's analogy suggests that Title VII imposes no ceiling on possible benefits conferred on pregnant employees, it must necessarily impose a ceiling at that point where benefits not only cease to remove barriers but actually extend benefits beyond those necessary for furtherance of the goal of equal opportunity in the workplace.[151] In this way pregnancy leaves which extend beyond the physical disability of pregnancy and childbirth,[152] and pregnancy bonuses and incentives which apply only to women will not be permitted.

State legislatures should feel free to legislate pregnancy benefits within the parameters of the PDA to eliminate the socially imposed burdens currently faced by pregnant employees. Pregnancy is a normal, socially desirable occurrence. This must be recognized and pregnancy must be incorporated into the very structures of the workplace. For as long as women continue to suffer harsh workplace consequences for exercising their right to have a family, the goal of equal employment opportunity for the sexes will not be attained.

150. *Guerra*, 479 U.S. 272.

151. *See supra* notes 136-49 and accompanying text.

152. Non-gender specific parenting leaves, however, are permissible. *See* Williams, *supra* note 38 and accompanying text.