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## Equality

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### Moving Beyond the Pregnant/Non-Pregnant Dichotomy in Pregnancy Discrimination Law Based on the Lived Experiences of New Mothers

Saru M. Matambanadzo, *The Fourth Trimester* [<http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1121&context=mjlr>], 48 *U. Mich. J.L. Reform* 117 (2014).



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**Ann Tweedy** [[http://www.pw.org/content/ann\\_tweedy](http://www.pw.org/content/ann_tweedy)]

In *The Fourth Trimester*, Saru Matambanadzo braids personal narratives of her own pregnancy and birthing experience with legal analysis and with concepts and research from nursing and midwifery to craft a rich and courageous critique of current employment law’s application to pregnant women and new mothers.

Matambanadzo’s thesis is that the law erroneously treats pregnancy as a discrete nine-month timeframe when in fact the physical and emotional effects of pregnancy linger, extending “into the first three months after delivery, and sometimes beyond.” (P. 124). She also addresses the shortcomings of laws that protect against pregnancy discrimination more generally. *The Fourth Trimester* concretely illuminates the ways in which the limitations of the current framework of federal law disadvantage workers who become pregnant and give birth by, for example, failing to adequately support breastfeeding and to provide the time needed after birth for the mother-infant dyad to become less interdependent.

Matambanadzo’s compelling arguments add a new dimension to legal scholarship on pregnancy in that they challenge not only the treatment of pregnant workers but also the firmly ingrained notion of pregnancy itself. Indeed the dichotomy between pregnant and not pregnant is paradigmatic in American culture—so much so that

it exemplifies other black and white dichotomies, as illustrated by the expression that one cannot be “almost pregnant.” Matambanadzo successfully convinces the reader to rethink the notion of pregnancy itself.

Moreover, by using personal narratives to do so, she liberates us from the old questions of whether pregnancy discrimination is really sex discrimination and whether pregnant women are really similarly situated to non-pregnant persons (*i.e.*, men). Instead, by taking the risk, in the vein of Critical Race Theory storytelling, of illustrating the physical and emotional aftereffects of birth in a deeply personal and vulnerable way, Matambanadzo dramatically shows us why pregnancy discrimination, including discrimination against new mothers, is a social justice issue. She enriches this analysis with information about how the current protections for pregnant workers under federal law, inadequate as they are, disproportionately benefit upper-middle and upper-class women, especially white women.

Among the most intractable problems with a discrimination law jurisprudence constructed upon a suspect-class framework is that, given the historic and ongoing lack of diversity in the judiciary, and the federal judiciary in particular, the judges deciding cases and ruling on dispositive motions often lack any experience with the type of the discrimination complained of or even with cultural subordination generally. This makes it difficult for such judges to comprehend the harms caused by discrimination. As Matambanadzo reminds us, another intractable problem is that the comparator in pregnancy and other sex discrimination cases is generally a male, presenting plaintiffs complaining of pregnancy discrimination with the often impossible task of proving that they are similarly situated as workers to a hypothetical man who was more favorably treated.

Matambanadzo gives us the tools to begin to attack both problems. By interspersing her legal analysis and discussions of nursing and midwifery literature with sections she calls “Arias” describing in detail the physical problems and intense emotional and physical interdependence she and her daughter experienced in the months after the daughter’s birth (as well as Matambanadzo’s physical challenges during pregnancy), she gives us—and particularly readers who have not been pregnant or given birth—a window into what it is really like to be pregnant and to have a baby.

I found this approach to be quite risky. Matambanadzo’s use of personal narrative made me aware that, in pregnancy and other gender-related contexts, my own immediate impulse is to try to prove that I can do whatever is generally expected of someone in my professional position rather than to demand or request an accommodation, however warranted. As we can see from studying equality feminism, this impulse is widespread—as well as understandable. By rejecting it—and instead telling us, for example, about the “painful dry twist” that caused her wrists, hips, and ankles to throb during her last three months of pregnancy as well as after her daughter’s birth—Matambanadzo exposes us to the physical pain that can accompany pregnancy and birth, thus allowing those who have never been pregnant to viscerally imagine some of the challenges it poses. Moreover, by setting out in detail the difficulties of her particular pregnancy and its aftereffects, Matambanadzo calls into question the validity of using a male comparator for an experience that is paradigmatically (although not exclusively) female.<sup>1</sup> [#footnote\_0\_571] She helps normalize the experiences of pregnancy and new motherhood.

Matambanadzo’s coupling of these personal “Arias” with thoughtful critiques of the federal statutes that provide limited protections for pregnancy and, in some cases, new mothers, such as the Pregnancy Discrimination Act,

the Family Medical Leave Act, the Fair Labor Standards Act, and the Americans with Disabilities Act, allows readers to concretely consider what the lacunae in federal law mean for new mothers and pregnant workers.

I also appreciated the fact that Matambanadzo draws on a conceptual framework based on the disciplines of nursing and midwifery. I find interdisciplinary legal scholarship to be very valuable in general, and the use of literature from these fields is of course particularly well-suited to shed light on pregnancy laws. Who better to ask about the nature of pregnancy and birth than those who care for pregnant and new mothers? And yet I have rarely if ever seen legal scholars—much less courts—draw on this literature in analyzing laws relating to pregnant workers and workers who are new mothers. It is perhaps a function of the legal academy's elitism that it has failed to give adequate attention to this literature. Although midwives and maternal nurses are highly-trained specialists, both professions are traditionally female and as a result may lack the prestige that they deserve.

Matambanadzo's use of this literature and of her own experiences helps ground her piece in the lived experience of pregnant women and new mothers. And the realities of such lived experience are exactly what is missing from the volumes of the Federal Supplement and the Federal Reporter in which pregnant women, breastfeeding mothers, and other new mothers are denied the accommodations they need to continue to both nurture their children and serve as productive workers.

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1. As Matambanadzo suggests, trans\* men can become pregnant too. Matambanadzo, 48 U. Mich. J.L. Reform, at 23 & n.117. [[↩ #identifier\\_0\\_571](#)]

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