

# SYNERGISTIC SOLUTIONS: AN INTEGRATED APPROACH TO SOLVING THE CAREGIVER CONUNDRUM FOR “REAL” WORKERS

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## I. INTRODUCTION

In prior work,<sup>1</sup> I defined the “caregiver conundrum”<sup>2</sup> to include all of the workplace policies and norms that make it difficult for working caregivers to balance work and family successfully, especially those caregivers who are “real” workers.<sup>3</sup> Real workers are employees who get the job done—often very efficiently—but do not work as much as their non-caregiver counterparts, and sometimes they violate their employers’ attendance policies because they have children or other family members who need care.<sup>4</sup> Real workers cannot always work overtime with little notice, and they might find travel and relocation difficult because of their family responsibilities.<sup>5</sup> In sum, real workers are not “ideal” workers,<sup>6</sup> yet ideal workers are what most

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1. Nicole Buonocore Porter, *Why Care about Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. Kan. L. Rev. 355 (2010).

2. When I use the term caregiver, I am referring to both parents and those who care for adult family members who are sick, injured, or disabled.

3. Porter, *supra* n. 1, at 356 (introducing this “pressing” problem, the harm it causes, and its complex makeup).

4. *Id.* at 357.

5. *Id.* at 364–365.

6. “Ideal workers” is a phrase coined by Professor Joan Williams to refer to a worker “who works full[-]time and overtime and takes little or no time off for childbearing or child rearing.” Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 1 (Oxford U. Press 2000).

employers want and expect. Most employers build workplaces around norms and policies designed for employees who can work full-time and overtime with no interruptions throughout their entire career.<sup>7</sup> In other words, most workplaces are designed around men.

In my prior article, I argued that real workers need and deserve protection from discrimination, and I offered a new theoretical justification for protecting real workers.<sup>8</sup> Specifically, I argued that the communitarian theory—with its emphasis on the priority of responsibilities over rights, the value of raising children well, and the importance of working together to reach a common goal—provides the necessary justification for supporting broad reform efforts aimed at ending the caregiver conundrum for all workers.<sup>9</sup>

This Article seeks to solve the caregiver conundrum—something neither current law nor recent reform proposals have adequately accomplished—for all workers, including real workers. While much has been written on this issue, my proposal differs from other reform proposals in one major respect. Many proposals suggested by other scholars are piecemeal reforms. These proposals address only part of the problem for some of the workforce. They either focus on high-income professional women who want to work fewer hours—ignoring lower-income workers who need to work full-time and overtime, but still need flexibility and financial assistance—or they propose measures aimed at getting all women to work more hours, thereby ignoring caregivers who want to and can afford to spend more time doing the valuable work of caring for their loved ones.<sup>10</sup> I believe that we can and should protect all caregivers, regardless of the decisions they make in balancing work and family. The comprehensive reform proposed in this Article will not only attempt to honor the difficult choices caregivers make when trying to solve their own caregiver conun-

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7. *Id.*

8. *See generally* Porter, *supra* n. 1 (adopting communitarian theory to justify comprehensive reforms to protect real workers).

9. *Id.* at 380–383.

10. Porter, *supra* n. 1, at 358 n. 26 (identifying two schools of thought among scholars—“those who favor more choices for working mothers to balance work and family and those who favor more workplace equality for women and therefore believe women should be working more.”).

drum, but it will also use a synergy of solutions, demonstrating that the whole is truly greater than the sum of its parts.<sup>11</sup>

Reform must consider not just highly compensated, professional women but also lower-income laborers; not just full-time employees but also part-time employees; not just women who want to work fewer hours but also women who financially need to work full-time and overtime; not just pregnant women but mothers after their babies are born and before they leave for college; and not just ideal workers but real workers.<sup>12</sup> This Article will consider all of these competing perspectives and will propose an integrated solution to protect and benefit all working caregivers. In fashioning this reform, I propose using statutory provisions (both amendments to current statutes as well as new legislation) that will work together to avoid the pitfalls or deficiencies created by other proposals. Specifically, I seek to address the three main problems of the caregiver conundrum: the lack of workplace flexibility, the marginalization of part-time workers, and the unique financial difficulties facing many lower-income working caregivers.

Several goals guided me as I crafted this proposal. First, I wanted to solve the caregiver conundrum for all caregivers, including real workers for whom caregiving inevitably affects their work performance because of workplace norms designed around an ideal worker with no caregiving obligations. Second, I wanted to avoid drafting a proposal that would solve only one part of the problem. As stated above, many suggested proposals are “piecemeal reforms,” addressing one small but incomplete part of the solution. All of these proposals are beneficial, and readers versed in this area will recognize the efforts of many scholars interwoven with my efforts here. But my goal has always been an ambitious one—to arrive at a comprehensive solution for the caregiver conundrum. Finally, in arriving at this proposal, I sought to avoid a solution that would create “special treatment

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11. Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 Wash. & Lee L. Rev. 3, 8 (2005) [hereinafter Travis, *Recapturing*] (stating that there is no single tool that can be the answer for such a multi-faceted problem).

12. Porter, *supra* n. 1, at 414 (noting the societal necessity of solving this problem for real workers).

stigma”<sup>13</sup> against caregivers, which would inevitably turn into stigma against women because women comprise the vast majority of working caregivers.<sup>14</sup>

Part II will outline the problem, describing what I mean by the term “caregiver conundrum” and how it manifests itself for real working caregivers who cannot be ideal workers. This Part will briefly address why current law cannot solve the caregiver conundrum. I will also demonstrate why we cannot count on employers to solve this problem voluntarily, even though it is financially feasible for them to do so, and why we therefore need legislation in this area. Part III will present my synergistic solution for addressing the lack of workplace flexibility that working caregivers need. I will explain why my proposal avoids some of the “special treatment stigma” that plagues other solutions, and I will also explain why the communitarian theory provides the theoretical justification for allowing workplace flexibility for working caregivers. Part IV introduces the solution to the marginalization of part-time workers—a statutory enactment I refer to as the “Part-time Parity Act”—and provides the justification for this reform. Part V will discuss the statutory enactments that are necessary to avoid the “error of essentialism”—assuming that all working caregivers need more time away from work and ignoring the fact that many working caregivers need financial assistance to help them balance work and family. This Part will demonstrate how the communitarian theory helps to justify this publicly funded reform. Part VI will address some of the anticipated criticisms of my ideas. Finally, Part VII will conclude by emphasizing that public opinion must change for any comprehensive reform to succeed.

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13. When I refer to “special treatment stigma,” I am referring to two phenomena caused by giving special treatment, benefits, or accommodations to caregivers in the workplace. Porter, *supra* n. 1, at 359. The first is employers’ tendency not to hire or promote as many women due to the perceived increased costs of having to provide these benefits, and because it is mostly women who are caregivers in need of these benefits. *Id.* The second is the resentment felt by non-caregiver co-workers because of any “special treatment” given to caregivers. *Id.*

14. Michelle A. Travis, *Equality in the Virtual Workplace*, 24 Berkeley J. Empl. & Lab. L. 283, 299 (2003) [hereinafter Travis, *Virtual Workplace*] (stating that “women still have disproportionate responsibility for child rearing and domestic tasks.”).

## II. DESCRIBING THE CAREGIVER CONUNDRUM

This Part will describe what I refer to as the caregiver conundrum and how it manifests itself for those who are affected by it.<sup>15</sup> The caregiver conundrum arises due to a set of norms in the workplace that were shaped by and for men.<sup>16</sup> Most men could ignore the impact that workplace demands placed on their families because most men had wives who could pick up the slack.<sup>17</sup> Some employers believe that “[t]he workplace requires a commitment that does not readily accommodate other demands.”<sup>18</sup>

The caregiver conundrum affects caregivers in three primary ways. First, many (perhaps most) caregivers need and want more workplace flexibility to meet the demands of their families, yet most workplaces do not provide the flexibility needed. Second, caregivers who choose to work reduced hours or part-time in order to spend more time taking care of their families do so at the significant cost of marginalizing their careers and being underpaid for their efforts. Third, parents and other caregivers in the lower-income brackets might need flexibility or reduced hours to meet their caregiving obligations but are financially unable to take time off for caregiving needs. These caregivers may also have difficulty meeting their workplace requirements because of inadequate or unreliable daycare.

This Part will discuss these three facets of the caregiver conundrum and will conclude by discussing why current law does not remedy the caregiver conundrum and why we cannot expect employers to voluntarily implement the changes necessary to help working caregivers balance work and family.

### A. Lack of Workplace Flexibility

For many employees with caregiving responsibilities, the primary impediment to balancing work and family is time (or the

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15. As stated earlier, I have recently addressed the problem of the caregiver conundrum, and some of the following description of this problem is based on that prior work. See generally Porter, *supra* n. 1 (defining the caregiver conundrum broadly to include real and ideal workers).

16. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1221 (1989).

17. *Id.* at 1223.

18. *Id.* at 1222.

lack thereof).<sup>19</sup> As I have argued previously, “[t]he normal full-time and overtime work schedule of many jobs makes it difficult for many workers to meet the caregiving needs of their loved ones.”<sup>20</sup> Parents often struggle to find the time for school conferences; for doctor, dentist, and other appointments for their children; as well as for recitals, classes, and sporting events.<sup>21</sup> Some parents simply want to work fewer hours so they can be home more often, regardless of the age of their children.<sup>22</sup> Many employees have caregiving responsibilities for spouses, parents, or other adult relatives who are ill, injured, or disabled. But unfortunately, many workplaces do not allow much flexibility for employees to meet their caregiving obligations.<sup>23</sup>

Instead, workplaces are built on the somewhat mythical ideal worker norm. “[Ideal workers] could provide a full-time uninterrupted stream of market work.”<sup>24</sup> The ideal worker norm includes “full-time work with very long hours or unlimited overtime, rigid work schedules for core work hours, uninterrupted worklife performance (with severe consequences for time off during crucial, ‘up-or-out’ phases of career development), and performance at a

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19. Porter, *supra* n. 1, at 361 (describing the time crunch and some unsatisfactory legal solutions already attempted).

20. *Id.*

21. Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 Wis. L. Rev. 1443, 1471 (2001).

22. Meeting of April 17, 2007, Washington D.C. on Perspectives on Work/Family Balance and the Federal Equal Employment Opportunity Laws, The U.S. Equal Employment Opportunity Commission (2007) (statement of Joan C. Williams, Professor, University of California, Hastings College of Law) (available at <http://archive.eeoc.gov/abouteeoc/meetings/4-17-07/williams.html>) [hereinafter *Statement of Joan Williams*] (noting that children need care not only while they are infants but well into adolescence); Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. Cin. L. Rev. 433, 449–452 (2004) (presenting data suggesting “that rather than being mature enough to care for themselves, teenagers need adult supervision and parental involvement.”).

23. A survey of Working Mother magazine is instructive in this regard. Susan Gerstenzang, *The Best vs. The Rest*, Working Mother 78, 78 (Oct. 2007). While fifty-eight percent of all companies allow flex-time, only twenty percent allow job sharing; thirty-three percent allow telecommuting (on a part-time basis), and thirty-eight percent allow a compressed workweek. *Id.*; see also Equal Employment Opportunity Commission, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, <http://www.eeoc.gov/policy/docs/caregiving.html> (updated April 22, 2009) [hereinafter *EEOC Caregiver Guidance*] (discussing the prevalence of employers’ inflexible policies).

24. Travis, *Recapturing*, *supra* n. 11, at 11.

central location.”<sup>25</sup> Certainly, caregivers—most of whom are women—are allowed to meet this ideal worker norm, and many of these female caregivers do. If women are meeting the ideal worker norm, their employers should not and often do not discriminate against them.<sup>26</sup> But being allowed to work like men do and actually being able and willing to work like men do are two different things.<sup>27</sup> Several common workplace policies or norms exemplify this unattainable ideal worker norm.

The first norm is the strict attendance policies that many employers adopt—especially for lower-income, non-professional workplaces.<sup>28</sup> Some employers allow as few as six to eight absences or partial-day absences in an entire year.<sup>29</sup> Furthermore, some employers allow for little or no time off for longer-lasting leaves of absence.<sup>30</sup> These policies directly affect women who are pregnant and give birth while employed.<sup>31</sup> For instance, in one case, an employee lost her job pursuant to the employer’s policy of terminating employees with three or more absences within a

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25. *Id.* at 10.

26. *But see* Porter, *supra* n. 1, at 361 (discussing the discrimination suffered by ideal workers caused by cognitive bias and stereotyping).

27. *See* Nadine Taub, *The Relevance of Disparate Impact Analysis in Reaching for Gender Equality*, 6 Seton Hall Const. L.J. 941, 947 (1996) (discussing how women who are responsible for caring for young children are not necessarily helped by being given the opportunity to work like men do).

28. Abrams, *supra* n. 16, at 1220 (discussing the problems women with children face, namely “sick day” [policies] so stringent that child care problems . . . can threaten their job”). The 2008 Study of National Employers found that most employers offer flexible work options to only a small portion of employees while substantially fewer employers are willing to offer these benefits to all employees. Ellen Galinsky et al., *2008 National Study of Employers*, 2008 Fams. & Work Inst. 12–13, <http://familiesandwork.org/site/research/reports/2008nse.pdf> (accessed Feb. 19, 2010). The study also noted that non-unionized workers in the finance and professional services sectors are most likely to have workplace flexibility, and workers who are unionized or in goods-producing industries are least likely to have workplace flexibility. *Id.* at 35. Further findings indicate that only thirty-two percent of employers let some employees change starting and ending times on a daily basis; only three percent of employers allow most employees to work regular hours from home occasionally; only thirteen percent of employers let all or most employees shift between full-time and part-time hours within the same position; and only forty-five percent of employers offer short periods of time off during the workday to attend to family needs. *Id.* at 13.

29. *EEOC Caregiver Guidance*, *supra* n. 23.

30. Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 Duke J. Gender L. & Policy 7, 15 (2006) (stating that forty-nine percent of the workforce does not receive any paid leave).

31. Travis, *Recapturing*, *supra* n. 11, at 40 (discussing *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579 (7th Cir. 2000), where the employer had a very rigid work schedule and a no-absence policy).

ninety-day probationary period.<sup>32</sup> She lost her lawsuit challenging the policy because the court considered the employer's default attendance policy as an actual requirement of the job and therefore not subject to a disparate impact challenge.<sup>33</sup> In another case, the court dismissed the plaintiff's lawsuit after she was terminated one day before a scheduled maternity leave for being tardy due to severe morning sickness.<sup>34</sup> These cases reveal that if a pregnant woman has worked less than one year for her employer or if her employer is not large enough to be covered by the Family and Medical Leave Act (FMLA),<sup>35</sup> the employer can fire her because of pregnancy-related absences or leave,<sup>36</sup> and many employers do.<sup>37</sup> Courts have denied claims challenging the lack of leave policies, assuming that the workplace norm of an entirely uninterrupted work life is simply part of the job.<sup>38</sup>

After pregnancy, caregiving causes absences for many different reasons.<sup>39</sup> The employer's attendance policy must cover all caregiving-related absences, including days off because of illness of the worker's child, medical appointments (doctor, dentist, orthodontist, et cetera), daycare emergencies or unexpected school closures, conferences at school, performances at school, caring for

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32. *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 859 (5th Cir. 2002).

33. *Id.* at 862. For a discussion of this case and the disparate impact analysis, see Travis, *Recapturing*, *supra* n. 11, at 41–42.

34. Travis, *Recapturing*, *supra* n. 11, at 45 (discussing *Troupe v. May Dept. Stores*, 20 F.3d 734 (7th Cir. 1994)).

35. 29 U.S.C. §§ 2601–2654 (2006). See *infra* Part II(D)(2) for a discussion of FMLA requirements and limitations.

36. Selmi & Cahn, *supra* n. 30, at 22 (stating that “[w]ithout the FMLA, those who have no access to sick leave could be terminated if they were to call in sick”).

37. See Pamela Gershuny, *Family Values First When Federal Laws Collide: A Proposal to Create a Public Policy Exception to the Employment-At-Will Doctrine Based upon Mandatory Parenting Duty*, 21 Wis. Women's L.J. 195, 202 (2006) (discussing three cases in which mothers were fired for staying home to care for young children with ear infections: *Caldwell v. Holland of Tex., Inc.*, 208 F.3d 671 (8th Cir. 2000); *Brannon v. OshKosh B'Gosh*, 897 F. Supp. 1028 (M.D. Tenn. 1995); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa. 1994)); see also Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 Berkeley J. Empl. & Lab. L. 1, 57 (2007) (noting that if a woman works for an employer exempted from the FMLA, she has no right to sick leave if her employer chooses not to offer it).

38. Travis, *Recapturing*, *supra* n. 11, at 44 (demonstrating how courts have “rejected claims alleging that inadequate leave provisions disproportionately impact women due to pregnancy and childcare responsibilities.”).

39. Rachel Arnov-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 Tex. J. Women & L. 345, 355 (2003) (stating that caregivers are more likely to miss work than non-caregivers).

a sick parent or partner, et cetera.<sup>40</sup> Many caregivers find it difficult, if not impossible, to meet their employers' very strict attendance policies, and hence may find themselves making the impossibly unfair choice between keeping their jobs and doing what is required to care for their families.<sup>41</sup> The number of caregivers affected by stringent attendance policies is significant, and most of the caregivers are women in the lowest income brackets.<sup>42</sup> Some women are lucky enough to have a spouse, friend, family member, or neighbor who can help out when a child needs care, but many women do not. These days, women are less likely to have the support of family and friends nearby.<sup>43</sup>

Even in workplaces without strict attendance policies, high demands for face time make it difficult for caregivers to balance work and family.<sup>44</sup> Many caregivers have jobs that could be performed, at least in part, at home.<sup>45</sup> Other caregiving employees might be very productive and efficient, but employers value them primarily by their time spent at work.<sup>46</sup> Many companies use face time as a proxy for productivity and talent because they lack a system of formal evaluation.<sup>47</sup> Thus, even for employees who are not constrained by strict attendance policies, the full-time, face-

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40. While the FMLA covers some of these absences, it certainly does not cover all of them. *See infra* pt. II(D)(2) (examining the scope of the FMLA and its limitations).

41. Gershuny, *supra* n. 37, at 195 (stating that “[t]hese parents are caught between the devil and the deep blue sea: they can leave their children alone or be fired.”); Williams, *supra* n. 6, at 3 (noting that “women are hurt by the hard choices they face.”).

42. O’Leary, *supra* n. 37, at 57 (noting that “for a low-wage working woman who has an ordinary breakdown in childcare or a child at home with the flu, the hardship will be magnified by her low income and lack of control over her work schedule.”); Selmi & Cahn, *supra* n. 30, at 23 (emphasizing that “offering unpaid leave does little to alleviate the burdens on low-income workers.”).

43. *See* Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 Colum. Hum. Rights L. Rev. 561, 572 (2005) (noting that grandmothers, aunts, and friends who have historically provided daycare are no longer able to because they work full-time themselves); Gershuny, *supra* n. 37, at 201 (stating that “[i]n a highly mobile society, the mothers, aunts, grandmothers, and other female relatives, once available for help, are often miles away.”).

44. *See* Travis, *Recapturing*, *supra* n. 11, at 16 (arguing that emphasis on face time perpetuates the norm of separate spheres for men and women in the workplace).

45. *See generally* Travis, *Virtual Workplace*, *supra* n. 14 (examining the push towards decentralization of the workplace via telecommuting and the perpetuation of gender inequality in the digital age).

46. Travis, *Recapturing*, *supra* n. 11, at 16 (noting that the difficulty of assessing performance contributes to the misplaced reliance on time spent on work).

47. *Id.*

time norm makes it difficult for working caregivers to balance work and family.<sup>48</sup>

The second workplace norm that makes it very difficult for caregivers to succeed in the workplace is the mandatory overtime requirement. Studies indicate that ninety-five percent of mothers work fewer than fifty hours per week.<sup>49</sup> Employers (especially in many professional fields like law) often require more than fifty hours per week, making it easy to see how most mothers cannot meet this ideal worker norm.<sup>50</sup> Because many women in these types of jobs are married to men in high-powered, high-demand careers,<sup>51</sup> it is obvious how this overtime norm becomes very difficult for working parents. Even if the parents are wealthy enough to employ a full-time nanny, many mothers are uncomfortable delegating away most of the childcare.<sup>52</sup> Women who choose not to work overtime also pay a price in career costs.<sup>53</sup> Employees who do not meet the ideal worker, overtime norm will often receive lower (or no) bonuses or raises and will be passed up for promotion and advancement.<sup>54</sup> This is especially true in occupations that rely on billable hours (including lawyers and accountants, among others).<sup>55</sup> Therefore, the overtime norm is another way the caregiver conundrum manifests itself for working parents and other caregivers.

Finally, caregivers in some careers are disadvantaged because of expectations of travel or relocation.<sup>56</sup> Because working

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48. *Id.* at 10.

49. Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. Rev. 171, 177 (2006).

50. Williams, *supra* n. 6, at 71 (describing how “legal work makes dramatic demands on the practitioner’s time and makes it difficult or nearly impossible to have a life in which family obligations or other non-work activity may be experienced in a conventional way.”).

51. *Id.* at 71–72.

52. *Id.* at 124.

53. *Id.* at 54.

54. *Id.* at 59. Some women might even get fired for refusing to work overtime. In *Upton v. JWP Businessland*, 682 N.E.2d 1357 (Mass. 1997), the plaintiff, a divorced, single mother, was fired when she requested to be given more manageable hours than the employer required—8:15 a.m. until 10:00 p.m. Monday through Saturday. *Id.* at 1358; see also Abrams, *supra* n. 16, at 1227 (stating that many employers’ policies “may put women to a choice that a man rarely would have to make: risk losing a promotion by trying to combine work with parenting, or to delay parenting, perhaps beyond the point at which it is biologically advisable”).

55. Holly English, *Gender on Trial: Sexual Stereotypes and Work/Life Balance in the Workplace* 196–197 (ALM Publishers 2003).

56. See *Statement of Joan Williams, supra* n. 22, at nn. 97–98 (discussing cases where

mothers overwhelmingly remain the primary caregivers of their children, frequent travel obligations for work increases strain on their families.<sup>57</sup> Accordingly, many women avoid travel obligations;<sup>58</sup> and because many jobs require travel, a caregiver who is unwilling to travel, or puts limits on travel, will likely find job and promotion opportunities stymied.<sup>59</sup> Similarly, many women cannot relocate for their job because of their spouse's career. While this trend is changing slightly, it is still the case that many more women leave their jobs, homes, and communities to follow their husbands than the reverse.<sup>60</sup> A workplace that creates a norm requiring relocation in order to achieve success will inevitably discriminate against female caregivers.<sup>61</sup>

### B. Marginalization of Part-Time Workers

Even when caregivers attain the flexibility of a part-time or reduced-hour work schedule, they still suffer.<sup>62</sup> "Part-time work doesn't pay."<sup>63</sup> Women who work less than fulltime earn almost eighteen percent less than their full-time peers with equivalent jobs and education levels.<sup>64</sup> As Martha Chamallas noted, "part-time employment is decidedly second class."<sup>65</sup> And because it is

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women were discriminated against based on expectations of travel or relocation).

57. Of course, many women with children are willing to travel and yet employers presume that they are unwilling to do so because of their caregiving responsibilities. See Williams & Bornstein, *supra* n. 49, at 177–178 (discussing a benevolent stereotyping case, *Trezza v. Hartford, Inc.*, 1998 U.S. Dist LEXIS 20206 at \*1 (S.D.N.Y. Dec. 28, 1998), where an employer assumed a working mother would be unwilling to travel).

58. Arnow-Richman, *supra* n. 39, at 355 (noting the time burden of travel that causes caregivers to avoid travel).

59. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated against on the Job*, 26 Harv. Women's L.J. 77, 122 (2003).

60. See Williams & Bornstein, *supra* n. 49, at 183 (explaining that "research shows that women are less able to uproot their families and move for their jobs"); cf. Travis, *Recapturing*, *supra* n. 11, at 20 (discussing studies that indicate that most women provide unwavering support for their husbands' careers).

61. When I was in private practice, one employer evaluated employees based on a five-point scale. Only employees who were willing and able to relocate achieved the highest score of five.

62. Shara L. Alpern, *Solving Work/Family Conflict by Engaging Employers: A Legislative Approach*, 78 Temp. L. Rev. 429, 435–436 (2005).

63. Judith Warner, Guest Columnist, *The Full-Time Blues*, NYTimes.com, <http://select.nytimes.com/2007/07/24/opinion/24warner.html> (posted July 24, 2007).

64. *Id.*

65. Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. Rev. 709, 711 (1986).

mostly women (specifically, women with children) who work part-time, treating part-timers like second-class citizens amounts to treating women like second-class citizens.<sup>66</sup>

A huge pay gap separates part-time employees from their full-time counterparts.<sup>67</sup> Several factors cause this disparity, including the fact that part-time workers are concentrated in undervalued occupations and employers have negative perceptions of part-time workers.<sup>68</sup> Employers believe that part-time employees are less productive, but studies indicate that the opposite is true—part-time workers have less fatigue, frustration, and boredom, a lower rate of absenteeism, and a high level of motivation to finish tasks.<sup>69</sup> Part of the reason part-time employees suffer from this reputation is simply because employers have a hard time seeing beyond the ideal worker's forty-hour work-week.<sup>70</sup> As pointed out by Chamallas, if the emphasis is on the value of a full-time work schedule, part-time employees will always be seen as half as worthy.<sup>71</sup> Because virtually all part-time workers are working mothers,<sup>72</sup> ending the caregiver conundrum must include fair and equitable treatment of part-time employees.

### C. Lack of Financial Resources

The caregiver conundrum is even more pronounced for lower-income workers, including many single mothers.<sup>73</sup> They often lack the financial means for adequate, reliable daycare,<sup>74</sup> which makes

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66. *Id.*

67. *Id.* at 715.

68. *Id.* at 718–719; *see also* Alpern, *supra* n. 62, at 434 (stating that it is common for employers to perceive “part-time employees as less committed in their careers”).

69. Chamallas, *supra* n. 65, at 720.

70. *Id.* at 722 (noting that forty is not a magic number—it was defined by men and for men when it was assumed that men had wives at home to take care of the family and housework).

71. *Id.* at 724.

72. *Id.* at 712 (stating that the term “part-time worker” is inseparable from “working mother”).

73. *EEOC Caregiver Guidance*, *supra* n. 23 (proposing that work/family conflicts are felt most profoundly by lower-income workers); *see generally* O’Leary, *supra* n. 37 (discussing the difficulties that lower-income, female workers face in obtaining family leave as compared with well-paid professionals).

74. *EEOC Caregiver Guidance*, *supra* n. 23 (noting that many lower-income workers cannot afford childcare); Dixon, *supra* n. 43, at 573 (explaining that most mothers lack the resources for childcare and miss out on educational and vocational opportunities due to this deficiency).

it more difficult for them to perform as ideal workers and to comply with their employers' stringent attendance policies.<sup>75</sup> The low-paying positions are also the least likely to offer any type of leave benefits, and these employees are much less likely to be entitled to FMLA leave.<sup>76</sup> This is because either they work for employers that are too small to be covered by the statute<sup>77</sup> or the employees have not worked for the employer long enough to be eligible for FMLA leave.<sup>78</sup> Even if employees are entitled to FMLA leave, many cannot afford to take a leave of absence because such leaves are often unpaid.<sup>79</sup>

In addition to inadequate leave policies and unreliable, sub-standard daycare, many employees in the lower-income brackets are not working enough to make ends meet.<sup>80</sup> Many suggested proposals to remedy caregiver discrimination involve allowing caregivers to work fewer hours.<sup>81</sup> These proposals fail to help caregivers who are involuntarily working in low-paying, part-time positions. These employees need full-time jobs with better pay, benefits, and other types of financial support.<sup>82</sup> Some of the suggested proposals to help these lower-income workers include: a national daycare system, a longer school day and year, additional coverage under the FMLA, and paid sick days or leaves of

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75. Selmi & Cahn, *supra* n. 30, at 13 (describing some of the benefits high-wage professionals possess—such as purchasing child care—that are not available to lower-income earners).

76. O'Leary, *supra* n. 37, at 7 (stating that “75% of low-income workers do not have any sick leave” and “40% of low-income working parents [have] no paid leave of any kind”).

77. Selmi & Cahn, *supra* n. 30, at 16 (noting that “low-income workers are more likely to work for smaller employers, who are not required by the FMLA to provide leave.”).

78. O'Leary, *supra* n. 37, at 8 (stating that “low-income women are less likely to have worked for the same employer for one year”).

79. Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. St. Thomas L.J. 573, 580 (2007); Selmi & Cahn, *supra* n. 30, at 15–16. The statute (FMLA) does not require paid leave, only unpaid leave, so whether to pay for such leave is in the employer's discretion. *Id.* at 16. One study noted that many employees do not take FMLA leave, even when they are entitled to it, because they cannot afford to be without their income. Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the Work Time Crunch*, 13 Cornell J.L. & Pub. Policy 615, 621–622 (2004).

80. Selmi & Cahn, *supra* n. 30, at 12 (dividing the labor market into three groups: “a small group of overemployed individuals and a larger group of underemployed individuals, including a substantial group of women, with a third overlapping group of individuals who are undercompensated for the hours that they work.”).

81. *Id.* at 19.

82. *Id.*

absence.<sup>83</sup> The bottom line is that one solution cannot solve the variety of ways the caregiver conundrum affects working caregivers.<sup>84</sup> Instead, we need a synergy of solutions, which will be discussed in Parts III–V.

#### D. Inadequacy of Current Law

No federal statute prohibits discrimination against working adults with caregiving responsibilities,<sup>85</sup> and only a few states provide any explicit protections.<sup>86</sup> While there may be several possible laws caregivers could use to challenge discrimination by their employers,<sup>87</sup> most will agree that there are three main statutes that are most often used—Title VII's prohibition against sex discrimination, the Family and Medical Leave Act (FMLA), and the Pregnancy Discrimination Act.<sup>88</sup> This Sub-Part will demonstrate the inadequacy of these current laws.

##### 1. Title VII's Disparate Treatment Theory

Title VII of the Civil Rights Act of 1964<sup>89</sup> states that it is unlawful to discriminate based on sex, as well as other protected categories including race, color, religion, and national origin.<sup>90</sup> The main difficulty with using Title VII to challenge employment decisions that disadvantage caregivers is that Title VII generally

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83. *Id.* at 18–19; *see also infra* pt. V (considering these proposals in the context of what I call the “error of essentialism”).

84. Alpern, *supra* n. 62, at 429 (agreeing that the scale and complexity of the problem requires more than a “single scheme”).

85. Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 *Thomas Jefferson L. Rev.* 1, 2 (2003). *See also EEOC Caregiver Guidance*, *supra* n. 23 (recognizing that “the federal EEOC laws do not prohibit discrimination against caregivers per se”).

86. Williams, *supra* n. 85, at 2–3 (discussing statutes passed in Alaska and Washington, D.C.).

87. *See e.g.* Williams & Segal, *supra* n. 59, at 122–123 (pointing to ten viable theories that plaintiffs who are suffering from caregiver discrimination can use).

88. 42 U.S.C. § 2000e(k) (2006).

89. 42 U.S.C. §§ 2000e–2000e-16 (2006).

90. *Id.* at § 2000e-2(a) (providing, “It shall be unlawful employment practice for an employer—(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”).

follows the equal treatment doctrine,<sup>91</sup> whereby an employer must treat women like men only if the women are similarly situated to the men.<sup>92</sup> The problem, of course, is that men and women are not alike.<sup>93</sup> First and most obviously, only women can get pregnant, give birth, and possibly breastfeed their children. More importantly, men and women are not similarly situated when it comes to child rearing. Women still perform the vast majority of child care and homemaking duties, which inevitably affects their work performance in terms of the number of hours they work or their face time at work.<sup>94</sup> This fact allows employers to treat women differently, i.e., worse than men. Accordingly, many scholars have criticized Title VII as being an ineffective tool to address caregiver discrimination.<sup>95</sup>

The only cases that are likely to be very successful under Title VII are those in which the mother performs as an ideal worker but is nevertheless discriminated against because of stereotypical beliefs regarding women's traditional roles.<sup>96</sup> As already discussed, the caregiving responsibilities of many moth-

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91. Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118, 1125 (1986); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal. L. Rev. 1279, 1297–1298 (1987).

92. Finley, *supra* n. 91, at 1142–1143 (noting that biological difference undermines the rationale for equality jurisprudence in areas like pregnancy).

93. *Id.*; Littleton, *supra* n. 91, at 1302 (attacking an assimilationist approach to equality jurisprudence as “fatally phallogocentric” because institutions are designed around male norms, thereby marginalizing women).

94. Joanna Grossman, *Job Security Without Equality: The Family Medical Leave Act of 1993*, 15 Wash. U. J.L. & Policy 17, 29 (2004); Williams, *supra* n. 6, at 50 (explaining that “[a]ll in all, in one-half to one-third of families, mothers are at home.”); Williams & Bornstein, *supra* n. 49, at 174 (stating that “eighty-two percent of American women become mothers during their working lives.”).

95. O’Leary, *supra* n. 37, at 10 (stating that Title VII did nothing to accommodate women’s and men’s roles as caregivers); Williams & Segal, *supra* n. 59, at 78 (citing to other authors who believe that Title VII will be ineffective in remedying the problem of work/family conflicts).

96. See *EEOC Caregiver Guidance*, *supra* n. 23 (explaining that “[b]ecause stereotypes that female caregivers should not, will not, or cannot be committed to their jobs are sex-based, employment decisions based on such stereotypes violate Title VII.”). See generally Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. Cin. L. Rev. 365 (2004) (discussing “maternal wall stereotyping” and the legal theories under which mothers and caregivers have been successful in the courts); Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 Employee Rights & Emp. Policy J. 287 (2003) (describing the different types of litigation that may occur when caregivers experience gender discrimination from employers and explaining how employment lawyers should “use evidence of stereotyping and cognitive bias in . . . gender discrimination litigation”).

ers prevent them from performing as ideal workers; therefore, litigation using Title VII's disparate treatment theory is an unpromising option.<sup>97</sup> While I do not think Title VII's disparate treatment theory is very promising, I do believe that the disparate impact theory (with some minor adjustments) has the potential to be more successful in challenging some of the workplace norms that operate to disadvantage working caregivers. Accordingly, that theory will be discussed later in this Article.<sup>98</sup>

## 2. *The Family and Medical Leave Act (FMLA)*<sup>99</sup>

Enacted in 1993, the FMLA was initially thought to be a major benefit for working caregivers. But most agree that the FMLA has provided only limited benefits to a limited group of workers.<sup>100</sup> First of all, only employers with fifty or more employees within a seventy-five mile radius are covered by the FMLA.<sup>101</sup> Second, the FMLA defines eligible employees to include only those who have worked for more than one year for the com-

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97. See Laura T. Kessler, *The Attachment Cap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Reform 371, 402, 407 (2001) (noting that plaintiffs are much less successful in cases "where the plaintiff's direct requests or her employment record reveals that she requires an accommodation for her family obligations"). Kessler also states:

[B]efore they are employed, or promoted, women have succeeded in convincing courts that they can conform to the male-worker norm. However, once employed, while some relatively privileged women may be able to pass as male "ideal workers," perhaps by putting off childbearing or delegating their caregiving and housework to the market, many women inevitably fail. When women are penalized for failing to conform or are disadvantaged vis-à-vis coworkers without caregiving responsibilities, Title VII and the model of formal equality on which it is based offers little protection.

*Id.* at 407; see also Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 Am. U. L. Rev. 305, 307, 327-328 (2004) (discussing the minimal success of litigants using "Title VII's disparate treatment theory of discrimination"); Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1938 (2000) (stating that our "employment discrimination laws are not capable of generating the structural transformations necessary to create the conditions in which work can provide equal citizenship for all").

98. *Infra* pt. III(B)(2).

99. 29 U.S.C. §§ 2601-2654 (2006).

100. Gershuny, *supra* n. 37, at 200-201 (noting that "[o]ther scholars point out the inadequacy of the FMLA in resolving the majority of conflicts between child-rearing or parenting and work"). Some state laws provide better protection and benefits than the FMLA, but the problems mentioned here still exist.

101. 29 U.S.C. § 2611(2)(B), (4)(A).

pany and have worked 1,250 or more hours in the past twelve months.<sup>102</sup> “These conditions, taken together, effectively limit the Act’s application to a minority of women workers, since women are more likely than men to work for small businesses, to work part-time, to work in occupations with little job security, and to interrupt their careers due to family responsibilities.”<sup>103</sup> Almost forty percent of employees are either ineligible or work for an employer too small to be a covered entity under the FMLA.<sup>104</sup> Furthermore, one-third of single parents and low-income workers have been employed for less than one year.<sup>105</sup> Because of these limitations of the FMLA, the vast majority of lower-income employees are not covered by the FMLA.<sup>106</sup> Another problem with the FMLA is that it only provides for *unpaid* leave, not paid leave.<sup>107</sup> Many women who need maternity leave or leave to care for a sick child cannot afford to take it because they cannot afford to live without their income.<sup>108</sup> Thus, it is easy to see why this statute, although a step in the right direction, still offers little assistance to lower-income workers.<sup>109</sup>

A further limitation of the FMLA is that it only provides leave for certain enumerated reasons, namely for the birth of a baby or to care for a child, spouse, or parent who “has a serious health condition.”<sup>110</sup> The FMLA “offers no protection for the types of routine childcare obligations and contingencies that most commonly conflict with work requirements.”<sup>111</sup> Accordingly, the FMLA is an incomplete solution at best.<sup>112</sup>

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102. *Id.* at § 2611(2)(A).

103. Kessler, *supra* n. 97, at 422 (emphasizing that the FMLA is “little more than a cruel joke for single mothers”).

104. Grossman, *supra* n. 94, at 37. To make matters worse, one study indicates that eighteen to twenty-one percent of all employers who are covered under the FMLA do not comply with it. Galinsky, *supra* n. 28, at 17.

105. O’Leary, *supra* n. 37, at 43–45.

106. *Id.* at 44–45.

107. 29 U.S.C. § 2612(c).

108. O’Leary, *supra* n. 37, at 45 (stating that seventy-five percent of employees reported they were unable to afford to take leave); Selmi, *supra* n. 79, at 580 (emphasizing the problems with the lack of paid sick leave); Selmi & Cahn, *supra* n. 30, at 16 (describing the disparity in outcomes between lower-income and high-income women).

109. Gershuny, *supra* n. 37, at 202 (noting that lower-income parents are more likely than higher-income workers to be fired when they miss work for childcare reasons).

110. 29 U.S.C. § 2612(a)(1). The statute also allows leave if the employee has a serious health condition. *Id.*

111. Smith, *supra* n. 21, at 1444. *See also* Kessler, *supra* n. 97, at 424 (listing the routine illnesses not covered by the FMLA, including “the common cold, the flu, earaches,

### 3. *The Pregnancy Discrimination Act (PDA)*<sup>113</sup>

As should be obvious from the title of this statute (which was an amendment to Title VII), the Pregnancy Discrimination Act (PDA) only protects women who are pregnant or who are recovering from childbirth.<sup>114</sup> Furthermore, the PDA only requires employers to treat pregnant employees in the same way they would treat other employees who are similar in their ability or inability to work.<sup>115</sup> In other words, a small employer who is not covered by the FMLA would not be required to provide any leave to pregnant employees as long as the employer similarly denies a leave of absence to an employee who, perhaps, breaks an arm or leg and cannot work for several weeks.<sup>116</sup> Many women get only one or two weeks to recover from childbirth before employers expect them to return to work. And if a small employer so chooses, it can deny any leave at all for the birth of a woman's

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upset stomachs, minor ulcers, headaches, and routine dental or orthodontia problems”).

112. Kessler, *supra* n. 97, at 429. As Kessler stated:

But women's typical caregiving responsibilities, i.e., caring for young but healthy children or elderly but not seriously ill parents; dealing with minor family illnesses; cooking and cleaning; transporting children or parents to routine medical appointments; and coping with unexpected family emergencies—all work that women disproportionately and invisibly perform within the family—does not even register as a blip on the radar screen of the American legal system.

*Id.*

113. 42 U.S.C. § 2000e(k) provides:

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; and 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 their ability or inability to work . . . .

114. Kessler, *supra* n. 97, at 398–399 (discussing the limitations of the PDA—namely, that it only covers “the immediate, physical events of pregnancy and childbirth” and does not provide any remedy for a woman who needs to nurse her baby or needs time off to care for a newborn).

115. 42 U.S.C. § 2000e(k); *see also* O'Leary, *supra* n. 37, at 28–29 (stating that the PDA is not a comprehensive piece of legislation for pregnancy because it only requires an employer to give leave benefits for pregnancy if he or she does so for other injuries).

116. *See EEOC Caregiver Guidance*, *supra* n. 23 (explaining that employers must treat pregnant employees in the same way the employer would treat other employees—“if an employer provides up to eight weeks of paid leave for temporary medical conditions, then the employer must provide up to eight weeks of paid leave for pregnancy or related medical conditions”).

child and require her to return to work immediately or risk being fired.<sup>117</sup>

### E. The Free Market Fallacy

Despite the fact that the caregiver conundrum remains a serious and significant problem, many critics will argue that more legislation is not necessary because employers do and will voluntarily take care of this problem, and to the extent they do not, the government should not interfere in the free market economy. As one example, economists argue that leave mandates “interfere with the free operation of labor markets.”<sup>118</sup> The argument is as follows:

[I]t is assumed that workers and firms will *voluntarily* agree to the provision of family leave if the expected benefits exceed the associated costs. Conversely, if costs surpass the benefits, workers will forego the leave in exchange for receiving higher compensation. By eliminating this flexibility, an employer mandate may make one or both parties worse off.<sup>119</sup>

One response to this argument is that family-friendly laws need to be nationally mandated to help level the playing field by spreading the costs among all employers.<sup>120</sup> For instance, some scholars argue that the excessive hour requirements might be the result of a coordination failure in labor markets.<sup>121</sup> If only one firm abandons a stringent excessive hour norm, that firm might

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117. This is true only if the employer would deny a leave of absence to other employees for other short-term illnesses or injuries. See e.g. Kessler, *supra* n. 97, at 395 (quoting *Troupe v. May Dept. Stores Co.*, 20 F.3d at 738, for the proposition that “[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees.”).

118. Christopher J. Ruhm & Jackqueline L. Teague, *Parental Leave Policies in Europe & North America*, in *Gender & Family Issues in the Workplace* 133, 136 (Francine D. Blau & Ronald G. Ehrenberg eds., Russell Sage Foundation 1997).

119. *Id.* at 136–137 (emphasis in original). These economists argue that “parental leave benefits could also increase occupational segregation, by raising the relative cost of employing women in some types of jobs.” *Id.*

120. *Id.* at 137, 154.

121. Renee M. Landers et al., *Work Norms and Professional Labor Markets*, in *Gender & Family Issues in the Workplace* 166, 192 (Francine D. Blau & Ronald G. Ehrenberg eds., Russell Sage Foundation 1997).

be inundated with employees desiring to work shorter hours.<sup>122</sup> If, on the other hand, all firms simultaneously abandon their high-hours norm, the employees desiring to work shorter hours will spread themselves out among firms.<sup>123</sup>

While more employers have taken steps to make their workplaces family friendly, most agree that employers, if left to their own devices, would not provide family-friendly benefits to employees voluntarily.<sup>124</sup> Scholars have provided various explanations for this fact. Rachel Arnow-Richman believes there are several reasons for employers' reluctance to institute family-friendly benefits, "including employer ignorance and institutional constraints, as well as unconscious discrimination against women" and a preference for short-term labor.<sup>125</sup>

Another reason employers might be reluctant to provide family-friendly benefits is simply apathy or what I call the "this is the way we have always done things around here" mentality. Michelle Travis states that one reason why default workplace norms remain remarkably resilient despite the mounting empirical evidence of their negative economic consequences is a phenomenon known as dissonance reduction—a way of reducing the discomfort experienced when new information conflicts with existing beliefs.<sup>126</sup> When one experiences dissonance, he or she will seek out information that will decrease the dissonance, and avoid or ignore information that will increase it. Accordingly, if he or she is exposed to contrary information, he or she will ignore, misinterpret, or discredit it.<sup>127</sup> Because many people believe in the full-time norms that dominate the workplace, they ignore or discredit data discussing the economic benefits of flexible work arrangements.<sup>128</sup> Elsewhere, Michelle Travis argues that employers might

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122. *Id.* at 192.

123. *Id.*; see also Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* 131–151 (Judith Fudge & Rosemary Owens eds., Hart Publishing 2006) (proposing reduced hours to around a thirty or thirty-five hour week).

124. Arnow-Richman, *supra* n. 39, at 379–380 (finding that employers who change voluntarily are "anecdotal anomalies").

125. *Id.* at 380.

126. Travis, *Recapturing*, *supra* n. 11, at 17. Travis defines "cognitive dissonance" as the "uncomfortable feeling that arises when one acts in a way that is at odds with one's beliefs or knowledge." *Id.*

127. *Id.* at 18.

128. *Id.*

be reluctant to adopt flexible workplace policies because they associate such policies with accommodating working mothers, which causes the employer to see such policies as “corporate welfare” rather than strategic business.<sup>129</sup> Kathryn Abrams provides another (perhaps simpler) hypothesis for why these workplace norms have proven so resistant to change. She points out that the executive employees who establish leave and benefit policies are often older men with unemployed wives who do not understand or appreciate the difficulties faced by working caregivers.<sup>130</sup> This is why she believes that legislation in this area is crucial.<sup>131</sup>

Another problem I have identified with expecting employers to make these changes on their own is the unpredictable effectiveness of such measures. Regardless of the research that indicates it is financially feasible and even beneficial in the long run for employers to provide family-friendly workplace policies, most employers cannot see that far into their financial future.<sup>132</sup> Furthermore, when employers do provide family-friendly benefits, their actions often lead to the exact problem they are trying to avoid—attrition. Many employers offer family-friendly policies but then do not adequately support such policies, making the employees who make use of them feel unhappy and underappreciated.<sup>133</sup> Those employees who feel guilty for using such family-friendly policies will often want to escape such guilt by quitting.<sup>134</sup> In some professions, the attrition among women who have children is very high, making employers less likely to want to invest in policies that will help these women successfully balance work and family.<sup>135</sup> It is a circular problem with seemingly no end.

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129. Travis, *Virtual Workplace*, *supra* n. 14, at 368.

130. Abrams, *supra* n. 16, at 1239.

131. *Id.* at 1239–1240.

132. Arnow-Richman, *supra* n. 39, at 384 (stating that “employers are less willing . . . to make costly initial investments in workers, due to the likelihood that their need for the skills in question will change or that, in better economic times, trained workers will be inclined to take their careers and skills elsewhere”).

133. Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the “Maternal Wall” in the Legal Workplace*, 13 *Duke J. Gender L. & Policy* 55 (2006) [hereinafter Porter, *Superwoman*]; *see also* Abrams, *supra* n. 16, at 1241 (stating that “employers must learn not to devalue the more flexible employment alternatives that they create”).

134. Porter, *Superwoman*, *supra* n. 133, at 79 (identifying some of the narratives of guilt surrounding women in the workplace).

135. *Id.* at 74.

The bottom line: despite the research indicating the benefits of offering a family-friendly workplace, most employers do not make more than token efforts to provide flexibility to allow their employees to balance work and family successfully. Yet this does not mean that it is inefficient for employers to provide these benefits. Research shows that, over the long run, it is financially feasible for employers to allow employees to balance work and life.<sup>136</sup> But because of the problems identified above, these benefits must be mandated through legislation.<sup>137</sup>

### III. SOLUTIONS WITHOUT STIGMA: WORKPLACE FLEXIBILITY

For many caregivers, the most difficult struggle when balancing work and family is the lack of workplace flexibility for the day-to-day caregiving tasks that have to be completed during working hours. Among other things, caregivers must transport their children to and from school or daycare, take their children or adult loved ones to medical appointments, and participate in their children's academic and extra-curricular activities. Some parents simply want to be home more often so that their children spend more time in their care and less time alone or being cared for by someone else.

Yet many workplaces do not offer the type of flexibility that allows employees to handle these family responsibilities.<sup>138</sup> Some employers require set work hours, disallowing flex-time to accommodate the varying schedules of parents and their children. Finally, many employers prevent employees from working less

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136. Travis, *Recapturing*, *supra* n. 11, at 12; *see also* Alpern, *supra* n. 62, at 449–451 (discussing the potential for employers to enhance productivity and profitability by providing family-friendly programs); Williams & Segal, *supra* n. 59, at 87–89 (discussing the financial benefits of family-friendly workplace policies).

137. Travis, *Recapturing*, *supra* n. 11, at 21 (stating that, even though employers have been and will likely continue to avoid voluntarily restructuring their workplaces, anti-discrimination laws potentially provide a way to combat the employers' tendencies).

138. Abrams, *supra* n. 16, at 1238 (describing the workplace-flexibility problem, some technical solutions to mitigate the problem, and the continuing need for academic attention); Selmi, *supra* n. 79, at 578 (noting that increased productivity in the workplace derives primarily from dual-earning families while addressing the costs and benefits of a rigid work schedule); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans without Disabilities*, 76 *Tenn. L. Rev.* 311, 352–353 (2009) [hereinafter Travis, *Lashing Back*]; *see also supra*, pt. II(A) (examining the workplace norms and conditions preventing flexibility from the worksite).

than full-time, making life difficult for caregivers who simply need or want more time with their loved ones.<sup>139</sup>

#### A. Why Not Mandate Accommodations for Working Caregivers?

Scholars have struggled to provide workable solutions to the workplace-flexibility problem. Some suggest that employers should provide special benefits or modifications to employees to accommodate their caregiving responsibilities.<sup>140</sup> These scholars generally propose using a model similar to the reasonable accommodation provision under the Americans with Disabilities Act (ADA)<sup>141</sup> or the accommodation mandate for religious practices under Title VII.<sup>142</sup>

One such scholar, Peggie Smith, argues that we should draw on lessons from religious accommodations to accommodate routine parental obligations.<sup>143</sup> In support of such a model, she states: “Similar to employees with routine parental obligations that clash with work, employees whose religious needs conflict with job demands require workplace flexibility to avoid having to choose between aspects of their religious identity and their jobs.”<sup>144</sup> Smith argues that employers should have to accommodate routine parental obligations that conflict with work obligations when employers can achieve the accommodation without incurring an undue hardship.<sup>145</sup>

Smith’s model would require an employee to show that she “(1) faces a compelling parental obligation that conflicts with an employment requirement; (2) has informed the employer about the conflict if possible; and (3) was discharged or disciplined for failing to comply with the conflicting employment requirement.”<sup>146</sup>

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139. *Supra* pt. II(A) (discussing workplace norms that limit flexibility in schedules and lifestyles).

140. See generally e.g. Befort, *supra* n. 79; Deborah Calloway, *Accommodating Pregnancy in the Workplace*, 25 Stetson L. Rev. 1 (1995); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 Colum. L. Rev. 2154 (1994); Kaminer, *supra* n. 97; Smith, *supra* n. 21; Kelly Timmerman, *Accommodating for the Work/Family Conflict: A Proposed Public Policy Exception*, 8 J. Gender Race & Just. 281 (2004).

141. 42 U.S.C. §§ 12101–12217 (2006).

142. *Id.* at §§ 2000e–2000e-17.

143. Smith, *supra* n. 21, at 1448.

144. *Id.* at 1445.

145. *Id.* at 1446.

146. *Id.* at 1466.

If the employee states a prima facie case based on the above criteria, the employer has the burden of establishing that it “(1) made a good faith effort to accommodate the employee’s parental obligations, or (2) that it was unable to reasonably accommodate the employee without experiencing an undue hardship.”<sup>147</sup>

To determine whether the plaintiff can prove a compelling parental obligation that conflicts with work, Smith proposes relying on unemployment compensation law, under which courts frequently examine parental obligations in determining whether an employee quit or was fired from work for good cause.<sup>148</sup> For instance, in those cases, courts look at the significance of the parental obligation at stake and the reasonableness of the employee’s efforts to meet that obligation. Thus, if an employee’s schedule changed unexpectedly, and he or she could not find suitable care for his or her children on short notice and the facts demonstrate that he or she gave a good-faith effort toward finding such care, the combination might be sufficient to meet the prima facie case.<sup>149</sup> Smith states that deciding whether a parental obligation is compelling is not always easy but that “some parental sacrifices are unacceptable: employees should not be forced unnecessarily to choose between the fundamental welfare of their children and employment.”<sup>150</sup>

Smith also argues for a slightly modified version of the undue hardship standard when analyzing whether an employer should have to provide a reasonable accommodation to an employee with parental obligations.<sup>151</sup> Smith notes that in providing accommodations to employees with parental obligations that conflict with their employment, employers should have to prove more than a *de minimis* burden in order to be relieved of their responsibility.<sup>152</sup> She states that “absent an undue hardship, it seems financially sound for an employer to accommodate a worker’s need for a short-term disruption from work rather than discharging that worker and seeking a replacement.”<sup>153</sup>

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147. *Id.*

148. *Id.* at 1467–1470. Most unemployment compensation statutes allow employees to collect unemployment if they are fired without good cause. *Id.*

149. *Id.*

150. *Id.* at 1471.

151. *Id.* at 1481 (citing *TWA v. Hardison*, 432 U.S. 63 (1977)).

152. *Id.*

153. *Id.* at 1483.

Other scholars have suggested providing reasonable accommodations to employees with childcare or elder-care responsibilities.<sup>154</sup> Some of these scholars suggest that caregiving advocates should adopt the ADA's regulatory framework and require employers to make reasonable accommodations to employees who want to work shorter hours for reasons involving child or elder care.<sup>155</sup> Another academic, Debbie Kaminer, proposes an accommodation model that blends the religious accommodation mandate under Title VII with the accommodation obligation under the ADA.<sup>156</sup> Kaminer first argues that we should develop an accommodation model for caregiving requirements that resembles the accommodation model for religious practices under Title VII.<sup>157</sup> She states that this model makes sense because, just as workplaces were designed around the Christian majority, ignoring other religions, workplaces were designed around men with wives at home, ignoring working caregivers.<sup>158</sup> But instead of using the undue hardship standard under the religious accommodation provision, the interpretation of which makes compliance very easy for employers to prove,<sup>159</sup> she recommends that we use the ADA's undue hardship standard ("requiring significant difficulty or expense").<sup>160</sup>

This accommodation model has its fair share of critics. For instance, some critics point out that accommodations are needed for disabilities because it is impossible to design a workplace that contemplates the needs of all employees with various disabilities. Thus, they contend that because employers could design

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154. Landers et al., *supra* n. 121, at 195; *see also* Befort, *supra* n. 79, at 634–635 (proposing a legislative solution mandating that employers permit employees to take paid leave after following certain steps, using money from a fund comprised of one-third contributions from employees, employers, and general revenue).

155. Landers et al., *supra* n. 121, at 195; *see also* Travis, *Virtual Workplace*, *supra* n. 14, at 324–326 (discussing, though ultimately dismissing, using the ADA's accommodation model for caregiving requirements in the workplace).

156. *See generally* Kaminer, *supra* n. 97 (examining how the religious accommodation mandate can provide the answer to parental accommodation issues extant under the FMLA and Title VII).

157. *Id.* at 333–334.

158. *Id.*

159. Under the religious accommodation provision, an employer does not have to provide an accommodation if the employer can show that it would result in an undue hardship for the employer; the Supreme Court interprets that standard to mean not more than a *de minimis* expense. *TWA v. Hardison*, 432 U.S. 63 (1977).

160. Kaminer, *supra* n. 97, at 356.

workplace policies that contemplate the needs of parents with caregiving responsibilities, accommodations for caregivers are unnecessary.<sup>161</sup>

Others have noted that the accommodation model is problematic primarily because it diverges from the equal treatment model.<sup>162</sup> Stephen Befort argues against using an accommodation model because it has not worked well in the ADA context. He states: “The judiciary has also been reluctant to give free rein to the different treatment view of the ADA’s reasonable accommodation mandate, vetoing, in a number of decisions, otherwise plausible accommodations because they appear to go beyond formal equality principles to resemble affirmative action measures.”<sup>163</sup> Rachel Arnow-Richman makes a similar argument:

In evaluating refusal to accommodate claims, courts frequently use the language of formal equality, emphasizing the absence of animus and the viability of the employer’s business justification in limiting the reach of the law. Because the purpose of accommodation is to move beyond issues of motivation and require affirmative conduct, this injection of traditional Title VII defenses within the accommodation framework seriously undermines the transformative potential of the accommodation strategy.<sup>164</sup>

Finally, the accommodation model is problematic because of the fear of backlash and resentment from non-caregiving employees.<sup>165</sup> Many believe that accommodating caregivers unduly privileges those who choose to become parents while forcing the non-parents to pick up the slack.<sup>166</sup> Put another way, accommodations in the workplace are likely to create what I call “special treatment stigma”—both co-employee resentment as well as employers’ reluctance to hire or promote employees who are

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161. Williams & Segal, *supra* n. 59, at 80. It has been noted that “[d]esigning workplace objectives around an ideal worker who has a man’s body and men’s traditional immunity from family caregiving discriminates against women. Eliminating that ideal is not ‘accommodation’; it is the minimum requirement for gender equality.” *Id.*

162. Arnow-Richman, *supra* n. 39, at 362–367; Befort, *supra* n. 79, at 618.

163. Befort, *supra* n. 79, at 624.

164. Arnow-Richman, *supra* n. 39, at 362.

165. *Id.* at 392.

166. *Id.*

entitled to accommodations.<sup>167</sup> Certainly, we have seen this stigma manifested under the ADA. Disability scholars widely agree that there is a backlash against the ADA, in part because of the special treatment that the reasonable accommodation provision is thought to afford to disabled employees.<sup>168</sup>

As I discuss below, I believe that the communitarian theory helps to address the special treatment stigma in the caregiving context by emphasizing the societal importance of providing parents with the opportunity and the means to raise their children well. While I personally believe this to be true, I recognize that it will be an uphill battle to get society to understand that helping caregivers balance work and family is the responsibility of us all because we all benefit from the work of caregivers. Accordingly, this proposal does not mandate that employers provide certain accommodations in the workplace. Instead, this proposal suggests a unique combination of provisions that will likely achieve the same goal as an accommodation mandate but without the stigma that would accompany forced accommodations for caregiving.

### B. Workplace Flexibility Act

To achieve workplace flexibility, I propose three provisions that interact to create a synergistic solution. First, I suggest we enact a process law that allows employees to request flexible schedules or other family-friendly accommodations free from fear of discrimination or retaliation. Next, I propose we amend the disparate impact theory of liability. Finally, I submit we offer tax incentives to employers who provide certain workplace flexibility measures. I will explain each in turn, along with why these three

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167. Porter, *Superwoman*, *supra* n. 133, at 64; *see also* Travis, *Virtual Workplace*, *supra* n. 14, at 327 (describing how stigma can develop out of the accommodation model).

168. Travis, *Virtual Workplace*, *supra* n. 14, at 326. Travis states that because ADA accommodations are seen as preferences by many, this has led to the backlash against the ADA. *Id.* Specifically, once an accommodation is labeled as a preference, it risks creating resentment by those who are not accommodated, leading to further stigmatization. *Id.* at 327. For a full discussion of the backlash against the ADA, *see e.g.* Ruth Colker, *The Disability Pendulum: The First Decade of the Americans with Disabilities Act* 96–125 (N.Y.U. Press 2005); Matthew Diller, *Judicial Backlash, the ADA, and Civil Rights Model of Disability*, in *Backlash against the ADA* 62, 64–65 (Linda Hamilton Krieger ed., U. Mich. 2003); Linda Hamilton Krieger, *Introduction to Backlash Against the ADA* 1, 5–19 (Linda Hamilton Krieger ed., U. Mich. 2003); Susan Gluck Mezey, *Disabling Interpretations: The Americans with Disabilities Act in Federal Court* 44–46 (U. Pitt. Press 2005).

provisions *acting together* can help solve the caregiver conundrum.

### 1. Process Law

The only positive mandate this workplace flexibility proposal includes is a “process law” that would allow an employee to request workplace flexibility from his or her employer and would prohibit employers from discriminating or retaliating against employees for making these requests. Furthermore, under this process law, employers would be required to consider the employee’s request and, within a reasonable period of time, accept or reject the employee’s request. If the request is rejected, the employer would have to give a reason for the rejection.

A similar law has been proposed in the United States House of Representatives, and rather than reinventing the wheel, I would adopt most of the proposed statute’s provisions. The Working Families Flexibility Act<sup>169</sup> allows employees to apply to an employer for a change in the terms and conditions of employment if the change relates to the number of hours worked, the terms of when the employee is required to work, or where the employee is required to work.<sup>170</sup> In the request, the employee needs to explain what effect the proposed changes will have on the workplace and how those effects can be addressed.<sup>171</sup> The proposed statute would require the Secretary of Labor to issue regulations mandating that the employer and employee meet within fourteen days of submission of the request and requiring that the employer give a written decision to the employee within fourteen days of the meeting.<sup>172</sup> If the employer rejected the request, it would need to explain its reason for doing so, and the employer could propose alternative arrangements.<sup>173</sup> The employee could then request reconsideration, and the process would be repeated.<sup>174</sup> Finally, the statute would make it unlawful for an employer to discharge, or

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169. H.R. 1274, 111th Cong. (Mar. 3, 2009).

170. *Id.* at § 3(a).

171. *Id.* at § 3(b)(3).

172. *Id.* at § 4(b)(1)(A)–(B).

173. *Id.* at § 4(b)(1)(C)–(D).

174. *Id.* at § 4(b)(1)(E), (H).

otherwise discriminate or retaliate against an employee for submitting an application under the Act.<sup>175</sup>

Other scholars have discussed the benefits of such process laws. For instance, Stephen Befort discusses how, even though the ADA's employment provisions have been generally unsuccessful, the requirement that disabled employees and their employers engage in an interactive process has proven very effective.<sup>176</sup> Befort states that the ADA's interactive process "launched a quiet revolution. . . . All over the United States, disabled employees and human resources managers are joining together to invent mutually acceptable workplace solutions in the form of reasonable accommodations."<sup>177</sup>

Rachel Arnow-Richman also advocates for a process law.<sup>178</sup> She argues that courts care about employers' responsiveness to the needs of historically excluded employees, pointing to employers' liability for failing to respond appropriately to complaints of sexual harassment and the obligations under the ADA to engage in an interactive process with employees needing accommodations for their disabilities.<sup>179</sup> She defines "incentivized organizational justice" as "approaches that leverage legal rules to encourage proactive personnel practices in particular and employer-administered policies for soliciting and responding to the needs of non-traditional employees."<sup>180</sup> Using the ADA's interactive process as an example,<sup>181</sup> she proposes a two-part "organizational justice" model for caregivers. The procedural part of the proposal would include a legislative amendment to the FMLA that would require employers to either engage in a good-faith, interactive process or face monetary penalties.<sup>182</sup> If the employer fails to engage in the

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175. *Id.* at § 5(a)-(b).

176. Befort, *supra* n. 79, at 691 (explaining that the interactive process requirement produced a "revolutionary change in workplace procedural norms by compelling an interactive dialogue between employees and employers for the purpose of identifying" accommodations for disabled employees).

177. *Id.* at 628.

178. Rachel Arnow-Richman, *Public Law & Private Process: Toward an Incentivized Organizational Justice Model of Employment Quality for Caregivers*, 2007 Utah L. Rev. 25, 27 (2007) [hereinafter Arnow-Richman, *Public Law*].

179. *Id.* at 45.

180. *Id.*

181. *Id.* at 55-56 (stating that "the underlying motivation for the approach is the notion that proactive employer behavior is an integral part of achieving equal employment quality for non-traditional workers.").

182. *Id.* at 56-58. Like my proposal here, Arnow-Richman's proposal would not force

process, the burden will shift to the employer to justify the termination decision, and the court will focus on the quality of the response rather than the employer's paper compliance.<sup>183</sup> Arnow-Richman argues: "The core purpose of these doctrinal changes would be to encourage compliance with the proposed interactive process amendment with the hopes that good process can lead to voluntary accommodation."<sup>184</sup> I agree with Arnow-Richman that such procedures allow employers and employees to work together toward mutually beneficial solutions, creating a positive atmosphere where both employers and employees feel they are working toward a common solution.<sup>185</sup>

But while I believe that a process law can be very beneficial, I do not think it can accomplish the goal of curing the caregiver conundrum. Even though some employers would see the benefit of granting employees' requests for workplace flexibility, many employers would not, and they would continue to deny requests, often without having a good business reason for doing so. It is for this reason that I propose we strengthen the disparate impact theory of liability.

## 2. Strengthen Disparate Impact Theory

If employers thought that their decisions to deny requests for flexibility could be more successfully challenged, they would likely be more willing to consider such requests. While the disparate impact theory has great potential for transforming the dominant workplace norms, this Sub-Part will discuss why it has not achieved its potential and what can be done to make the theory more accessible for challenging many of the workplace norms that disadvantage caregivers.

A disparate impact claim does not require the plaintiff to prove intentional discrimination but rather requires the plaintiff to prove that a characteristic-neutral policy or practice has a dis-

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the employer to accommodate the employee because she views forced accommodation as politically unviable. *Id.* at 55.

183. *Id.* at 56, 58–59. This "litigation penalty" would be a judicially created shift in the burden of proof in FMLA retaliation cases and Title VII failure to accommodate claims. *Id.* at 58. The employer would have the burden of proving that his or her decision was based on legitimate reasons.

184. *Id.* at 61.

185. Arnow-Richman, *Public Law*, *supra* n. 178, at 79–83.

proportionately negative effect on a particular class; here, the class is women.<sup>186</sup> It is easy to see why disparate impact claims could have great potential for challenging many of the workplace policies that make it difficult for caregivers to succeed.<sup>187</sup> Because women bear a disproportionate burden of caregiving, stringent workplace policies regarding hours, attendance, and face time will likely have a disproportionate effect on women.<sup>188</sup> Accordingly, courts could use the disparate impact theory to require employers to restructure existing workplace policies that disproportionately disadvantage women.<sup>189</sup> Indeed, if a disparately affected woman wins her case, a court may require her employer to eliminate the burdensome policy for all her co-workers.<sup>190</sup>

Congress codified the disparate impact theory in the Civil Rights Act of 1991, requiring plaintiffs to establish that “a respondent uses a particular employment practice that causes a disparate impact on the basis of . . . sex . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”<sup>191</sup> Even if the employer can demonstrate that the challenged practice is job related and consistent with business necessity, the plaintiff still has the opportunity to establish that there was an

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186. Williams, *supra* n. 6, at 105.

187. Travis, *Recapturing*, *supra* n. 11, at 37. “Because this model focuses on inequitable results and does not require discriminatory intent by the employer, this model holds great potential for addressing aspects of women’s inequality that stem from workplace organizational norms that create, retrench, or magnify women’s disproportionate conflicts between work and family.” *Id.*

188. See Abrams, *supra* n. 16, at 1227 (stating that “Herculean time commitments, frequent travel, and stringent limits on absenteeism” are some of the hiring criteria that disadvantage women, who are most often the primary caregivers of young children); Travis, *Recapturing*, *supra* n. 11, at 37 (acknowledging that traditional workplace norms disproportionately affect women).

189. Travis, *Recapturing*, *supra* n. 11, at 38; see also Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 751 (2006) [hereinafter Selmi, *Mistake*] (stating that “[i]f the disparate impact theory were applied with rigor to policies that adversely affect . . . women with childrearing responsibilities, it could conceivably invalidate many central, and common, employment policies, including routine work hours, most leave policies, and mandatory overtime” (footnote omitted)). To be clear, Selmi is not advocating for an expanded use of the disparate impact theory. In fact, he argues that the disparate impact theory was “ultimately a mistake” for advocates to embrace. *Id.* at 707.

190. Travis, *Recapturing*, *supra* n. 11, at 38; see also Taub, *supra* n. 27, at 948 (stating that because the disparate impact approach “seeks to correct society’s male tilt, it does so in a way which promises to benefit all, not only women”).

191. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

“alternative employment practice” without such a disparate impact and that the employer refused to adopt it.<sup>192</sup>

When bringing disparate impact claims, women are likely to face three interrelated obstacles: (1) compiling the requisite statistics to show that the policy has a disparate impact on women,<sup>193</sup> (2) identifying a specific policy or practice that caused the adverse employment decision,<sup>194</sup> and (3) rebutting the employer’s defense that the policy is justified by a business necessity.<sup>195</sup> I will discuss each of these struggles in turn.

First, courts are inconsistent in addressing the requirement of compiling appropriate statistics to show that a policy has a disparate impact on women.<sup>196</sup> Many scholars have noted the difficulty of proving the requisite statistical disparity required for establishing a prima facie case in a disparate impact claim, especially with small employers.<sup>197</sup>

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192. *Id.* at § 2000e-2(k)(1)(A)(ii).

193. Kessler, *supra* n. 97, at 415–416 (noting that because men are not usually primary caregivers, women have a difficult time finding comparisons to prove a disparate impact); Selmi, *Mistake*, *supra* n. 189, at 769 (stating that establishing a statistically significant impact might be difficult unless the affected population is sufficiently large and diverse); Williams, *supra* n. 6, at 106.

194. Williams, *supra* n. 6, at 106; Kessler, *supra* n. 97, at 413 (noting that “[w]hile there are many identifiable, affirmative employer practices and policies that serve to disadvantage women in the workplace, they are so entrenched, so accepted as the norm, that they are virtually invisible”); O’Leary, *supra* n. 37, at 37–38 (acknowledging Kessler’s argument that certain employer decisions are not considered “policies” under disparate impact theory despite their often disparate impacts on women). *See also* *Dormeyer*, 223 F.3d at 584 (holding that a company’s absenteeism policy was not a rule or practice that disparately impacted pregnant women because the policy did not “impose eligibility requirements that [were] not really necessary for the job”).

Professor Travis has argued that if judges were following a “transformative approach” to disparate impact law under Title VII, they would distinguish a job’s required tasks from the norms dictating when and where the tasks have to be completed. Travis, *Recapturing*, *supra* n. 11, at 39. The courts could then see these norms as an employment practice subject to disparate impact review. *Id.* She notes, however, that most judges do not distinguish between actual job tasks and the norms regarding when and where work is to be performed, thereby defeating many disparate impact claims. *See id.* (“Under this approach, a woman who experiences disproportionate conflicts between work and family as a result of a default workplace structure will have no cognizable target for her disparate impact claim, which requires the plaintiff to challenge a particular employment practice.” (internal citation omitted)).

195. Kessler, *supra* n. 97, at 416–417 (noting that the business necessity defense is difficult to defeat because courts often defer to a business’ judgment); Williams, *supra* n. 6, at 105.

196. William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. Rev. 81, 113 (2009).

197. *E.g.* Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 Wm. & Mary L. Rev. 911, 989 (2005); *see also* Travis, *Virtual Workplace*, *supra* n. 14, at

Second, many commentators have discussed the requirement of identifying a “particular employment practice.” According to Michelle Travis, disparate impact theory has not reached its true transformative potential because most courts fail to distinguish actual job tasks from the default norms regarding when and where those job tasks are performed.<sup>198</sup> Accordingly, the courts fail to find a “particular employment practice” because the norm or policy being challenged is seen as part of the job itself.<sup>199</sup> For instance, in *Dormeyer v. Comerica-Bank Illinois*,<sup>200</sup> the court found no viable disparate impact claim by concluding that absenteeism policies that disproportionately affected pregnant women were not practices but instead legitimate job requirements.<sup>201</sup> Of course, this kind of reasoning seems to assume the ultimate question—whether such a default policy is legitimate or, in the words of disparate impact analysis, whether it is supported by business necessity. In this way, courts circumvent the statute by allowing the business necessity analysis to dictate whether the plaintiff can establish a particular employment practice that has a disparate effect in the first place.

Charles Sullivan recognizes that many have argued that courts will use the phrase “particular employment practice” to narrow the applicability of disparate impact liability.<sup>202</sup> In support of his counterargument, Sullivan points to *Watson v. Fort Worth Bank and Trust*,<sup>203</sup> where the Court held that subjective hiring or promotion practices could be subject to a disparate impact analysis.<sup>204</sup> Furthermore, he argues there is no basis in the disparate impact theory’s history of statutory codification for concluding that the term “particular” will be used to narrow the application of the disparate impact theory.<sup>205</sup> He also points out that because there has not been much precedent on the contours

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346 (noting that proving a prima facie case of disparate impact is difficult if the employer is so segregated that there are no comparable men to judge disparate impacts against).

198. Travis, *Recapturing*, *supra* n. 11, at 39.

199. *Id.* This, of course, ends up shielding many discriminatory structures from review because courts never get to the business necessity inquiry if they do not find that a default workplace norm is a particular employment practice. *Id.* at 39–40.

200. 223 F.3d 579.

201. Travis, *Recapturing*, *supra* n. 11, at 40 (discussing *Dormeyer*, 223 F.3d 579).

202. Sullivan, *supra* n. 197, at 976.

203. 487 U.S. 977 (1988).

204. Sullivan, *supra* n. 197, at 969, 979–980.

205. *Id.* at 978.

of disparate impact theory since the Civil Rights Act of 1991 was passed, there is little evidence that courts will try to limit the reach of the theory.<sup>206</sup>

Finally, scholars have discussed the relative ease employers will have in establishing business necessity for their practices, thereby defeating plaintiffs' disparate impact claims. Michael Selmi notes that because the business necessity inquiry is mostly subjective, courts are given broad discretion to decide the merits of the employer's practice and most often defer to the employer's judgment.<sup>207</sup> There is concern over the ability of judges "to recognize and reject proffered justifications that . . . incorporate a male tilt."<sup>208</sup>

For these reasons, I recommend we address all three problems with establishing successful disparate impact claims. To effectuate the minor changes suggested below, I propose that the United States Equal Employment Opportunity Commission (EEOC) implement regulations with the following proposed interpretations.

First, instead of requiring an employee to show that a policy or practice (or a workplace norm) has a statistically disproportionate impact on women in the current workplace, employees should enjoy the benefit of a rebuttable presumption—if an employee can prove that a workplace norm, policy, or practice would have a disproportionate effect on parents or caregivers *in general*, then the court should presume that it will have a disparate impact on women in that particular workplace even if there are not enough employees affected by the norm or policy to establish the requisite statistics.<sup>209</sup> An employer could rebut this presumption if it can show that a significant number of its male employees are primary caregivers. Other commentators have made similar arguments. Michelle Travis states:

When a facially neutral practice makes employment advancement incompatible with significant childcare

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206. *Id.* at 985.

207. Selmi, *Mistake*, *supra* n. 189, at 769.

208. Taub, *supra* n. 27, at 950.

209. *See id.* at 947–948 (stating that if you view the work-hour problem through a disparate impact lens and ask whether a neutral rule requiring rigid work hours has a greater impact on women than on men, you would most likely answer yes because of the disproportionate childcare responsibilities borne by women).

responsibilities, that practice will have a disparate impact on women because women currently perform the bulk of domestic work. Proving that women perform more carework than men should be the end of the inquiry for the prima facie case, just as proof that Black applicants had a lower high school graduation rate than White applicants ended the prima facie inquiry in *Griggs*.<sup>210</sup>

William Corbett advocates that Congress should allow a plaintiff to prove disparate impact by showing its effect either in the particular workplace or in an alternative relevant labor pool.<sup>211</sup> Charles Sullivan argues that current law does not even require a focus on an individual employer.<sup>212</sup> He notes that in *Griggs v. Duke Power Co.*<sup>213</sup> the Court did not look only at the specific employer when establishing the racial disparity; it looked at national statistics with regard to the requirement of having a high school education.<sup>214</sup> As Sullivan notes, the statutory language does not require a plaintiff to use a particular kind of proof to establish a disparate impact claim.<sup>215</sup> Accordingly, this interpretive tweak should be relatively uncontroversial.

Second, we need to redefine “employment practice” to include workplace norms that often go unnoticed. Currently, workplace norms such as long hours, mandatory overtime, or frequent travel obligations are not described as “practices” upon which a disparate impact lawsuit can be brought. Instead, they are frequently defined as simply the way the workplace is structured. Of course, this ignores the fact that this “structure” begins with a practice—someone in the company decides to institute a culture of long hours, and that culture manifests itself either in strict work rules (mandatory overtime or no options for less than full-time) or an informal policy that only those who work long hours will be considered for promotion.

Just because some of these default norms are not official policies written in ink does not mean they do not influence or even

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210. Travis, *Virtual Workplace*, *supra* n. 14, at 350 (referencing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

211. Corbett, *supra* n. 196, at 113.

212. Sullivan, *supra* n. 197, at 989.

213. 401 U.S. 424 (1971).

214. Sullivan, *supra* n. 197, at 989.

215. *Id.*

control the managerial decisions at the company. Furthermore, even when long-hour norms are part of official policies, courts may still decide that such policies are not employment practices but are just the way the workplace is structured. But the mere fact that *most* workplaces operate on a forty-hour workweek does not mean that doing so is not an employment practice. Employers *choose* (albeit sometimes simply by maintaining the status quo) to operate using a forty-hour workweek or they *choose* to require overtime, and they *choose* whether or not their employees can vary from these default rules. A decision to refuse to allow employees to work fewer than forty hours per week is just as much a particular employment practice as instituting a test that employees must take to qualify for a promotion.<sup>216</sup>

Some courts have been willing to analyze a lack of a policy in the same way they would analyze an actual policy that has a disparate impact. For instance, in one case challenging a ten-day limit on leaves of absence, the District of Columbia Circuit Court allowed the claim, stating that an employer violates Title VII just as much by lacking an adequate leave policy as it does by applying an existing policy in an unequal manner.<sup>217</sup> The court stated: “[I]t takes little imagination to see that an omission may in particular circumstances be as invidious as positive action.”<sup>218</sup> In one case decided after the disparate impact theory was codified into Title VII, the court allowed an employee’s disparate impact claim when she challenged the employer’s lack of sick leave to care for family members.<sup>219</sup> The court characterized the employer’s policy as one “denying parental leave,’ which was subject to disparate impact review,” and held that an “employer can . . . violate Title VII by failing to provide an adequate policy—a policy which on its face is neutral, but which has a disparate impact on women.”<sup>220</sup>

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216. Cf. Travis, *Virtual Workplace*, *supra* n. 14, at 355–356 (noting that courts are wrong to draw distinctions between affirmative employment practices and the absence of a policy because the statute makes no distinction between acts and omission).

217. Travis, *Recapturing*, *supra* n. 11, at 84–85 (discussing *Abraham v. Graphic Arts Intl. Union*, 660 F.2d 811 (D.C. Cir. 1981)).

218. *Abraham*, 660 F.2d at 819. This case was decided before the FMLA, which mandates leave, but only by employers with fifty or more employees, and only for employees who have worked more than one year for their employer. 5 U.S.C. § 6382(a)(1) (2006); 29 U.S.C. §§ 2611(2)(A)(i), 2611(4)(A)(i).

219. Travis, *Recapturing*, *supra* n. 11, at 86–87 (discussing *Roberts v. United States Postmaster Gen.*, 947 F. Supp. 282 (E.D. Tex. 1996)).

220. *Id.* at 87 (quoting *Roberts*, 947 F. Supp. at 289).

Despite these positive cases, we will not be able to solve the caregiver conundrum until the legislature forces all courts to recognize that these workplace norms actually are employment practices that can and do have a disparate impact on women.

Accordingly, the statutory phrase “particular employment practice” should be specifically defined in regulations implementing Title VII. A particular employment practice should include any rule, policy, custom, tradition, system, or norm regarding how employees are chosen for hire, department or shift placement, promotion, and where and when employees are expected to perform their work. As Travis states, “judges [should] distinguish a job’s actual required tasks from the malleable organizational norms governing the when, where, and how of task performance, and they [should] treat the latter as particular practices *regarding* the former.”<sup>221</sup> This minor tweak to the disparate impact model should effectuate Travis’ goal of using the disparate impact theory to transform the workplace. Because of the problems identified earlier,<sup>222</sup> judges do not usually interpret the disparate impact theory in a transformative way.<sup>223</sup> Yet as Travis points out, there is no reason to think that Congress intended to use “particular employment practice” to limit or exclude default workplace norms.<sup>224</sup> Instead, “[t]he term ‘particular’ was intended to exclude the use of bare statistical comparisons between the employer’s workforce and the relevant labor pool, not to exclude certain workplace practices from disparate impact review.”<sup>225</sup> Modifying the disparate impact model would hopefully bring us closer to using the disparate impact theory in a transformative way for workers with caregiving obligations.

Finally, once an employee has established that a workplace norm (such as long hours) is a particular employment practice that operates to disproportionately affect women workers because of their role as primary caregivers, the employer has the opportunity to prove the practice is supported by business necessity.<sup>226</sup>

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221. *Id.* at 39.

222. *Supra* n. 194 and accompanying text.

223. Travis, *Recapturing*, *supra* n. 11, at 39 (explaining that a transformative judgment would distinguish between required tasks and structural norms in the workforce).

224. *Id.* at 80.

225. *Id.* (arguing that Congress agreed with the Court’s interpretation of the word “particular” in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989)).

226. *Id.* at 88.

One reason why cases challenging workplace norms under a disparate impact theory fail is because courts give a great deal of deference to employers' explanations that a particular policy or workplace rule is necessary for their business. For instance, Selmi claims that "few courts appear willing to undo standard business practices without a far stronger statutory mandate."<sup>227</sup> He notes that because the business necessity defense is almost entirely subjective, it leaves "courts to make normative judgments regarding the merits of the challenged practice"<sup>228</sup> and that "courts routinely defer to employer practices in making those judgments."<sup>229</sup> But courts often do not require an employer to *prove* that a particular rule or policy is supported by business necessity—asserting that it is will often suffice.<sup>230</sup> Yet studies regarding the sustainability of family-friendly measures tell a different story.

Data shows that providing flexible work schedules, job sharing, and reduced hour options not only improves recruiting but also reduces absenteeism and turnover, which saves significant rehiring and retraining costs. Additionally, flexible work arrangements can increase worker productivity . . . [and] telecommuting . . . can reduce employers' overhead and other fixed costs.<sup>231</sup>

This data reveals that if courts actually required employers to *prove* business necessity with objective data, it might not be that easy for them to do so.<sup>232</sup>

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227. Selmi, *Mistake*, *supra* n. 189, at 751.

228. *Id.* at 769.

229. *Id.*

230. *See id.* at 751 (stating that disparate impact theory will often not work in pregnancy and childrearing cases because courts will be reluctant to find that "core business practices"—such as routine work hours and mandatory overtime—are not necessary to the employer's business).

231. Travis, *Recapturing*, *supra* n. 11, at 12; *see also* Alpern, *supra* n. 62, at 450 (noting the potential for employers to enhance productivity and profitability by providing family-friendly programs); Williams & Segal, *supra* n. 59, at 88–89 (discussing the financial benefits of family-friendly workplace policies).

232. Furthermore, courts should not focus exclusively on the short-term benefits of a particular workplace practice or norm that disadvantages caregivers. Instead, courts should look at the long-term costs of not providing some family-friendly benefits. *See* Travis, *Virtual Workplace*, *supra* n. 14, at 362–363 (arguing that courts should consider long-term costs in the context of exploitative telecommuting arrangements).

Accordingly, the EEOC should adopt regulations that include a specific statement regarding what an employer has to prove to meet the burden of proving its business necessity defense. The regulations should state that an employer cannot rely on mere witness testimony regarding the institutional culture or tradition regarding long-hour norms or other norms that deprive employees of all flexibility in the workplace. For instance, it would not be enough to allege that the work hours for all employees must be eight to five because the work hours have always been eight to five. The employer must prove that it considered other alternatives and found them to be cost prohibitive and unworkable.<sup>233</sup> Placing this burden on employers to demonstrate exactly why the traditional workplace norms should not be altered is appropriate because courts should not simply assume that a practice or norm is indispensable.<sup>234</sup> By requiring a more searching business necessity inquiry, employers will have to distinguish jobs that necessitate default norms from jobs for which tradition or workplace culture is dictating the default scheme.

Charles Sullivan makes a similar argument. With regard to the employer's opportunity to defend the disparity using the business necessity defense, Sullivan notes that "some commentators find the business necessity defense the main theoretical reason to avoid disparate impact,"<sup>235</sup> but he responds with the fact that employers will not need expensive validation tests if they are not dealing with a testing case.<sup>236</sup> In contrast to those who worry that the business necessity defense will negate the effectiveness of the theory, Sullivan believes that the business necessity defense is the "way out of the desert"<sup>237</sup> because it offers an opportunity for employers and courts to "explicitly weigh the necessity of current practices that are shown to enable bias."<sup>238</sup> In analyzing business necessity, he advocates for the following balancing test: Is the

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233. Travis recommends that courts should reject assumptions about the default workplace norms and should distinguish "job tasks from malleable organizational norms, and . . . treat the latter as a particular choice of practice regarding the former . . ." Travis, *Recapturing*, *supra* n. 11, at 77. The employer should be required to eliminate the norm unless he or she can support it with business necessity. *Id.*

234. *Id.* at 88.

235. Sullivan, *supra* n. 197, at 994.

236. *Id.*

237. *Id.* at 995.

238. *Id.*

“employer . . . dealing as effectively as possible with the phenomenon in light of the currently available alternatives?”<sup>239</sup> Another scholar states that the business necessity determination allows the opportunity to weigh “policies and practices unthinkingly based on traditional male roles against other traditionally female possibilities.”<sup>240</sup> When a traditionally male norm is questioned and compared with alternatives, it may not seem necessary at all.<sup>241</sup>

I am not the first scholar to suggest modifying the disparate impact theory,<sup>242</sup> nor am I the first to suggest the potential for disparate impact theory to restructure the workplace norms that make life so difficult for working caregivers.<sup>243</sup> But while some scholars extol the transformative virtues of the disparate impact theory, at least one proposes that the disparate impact theory was a mistake.<sup>244</sup> One of Michael Selmi’s primary arguments for concluding that the disparate impact theory was a mistake is that it “has produced no substantial social change and there is no reason to think that extending the theory to other contexts would [produce] meaningful reform.”<sup>245</sup> He argues that, except for cases

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239. *Id.* at 997.

240. Taub, *supra* n. 27, at 949.

241. *Id.*

242. See e.g. Corbett, *supra* n. 196, at 110–115 (offering several ways to “fix” disparate impact); Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 *Stan. L. Rev.* 2195, 2217 (2003) (discussing his proposal to eliminate the immutability requirement from disparate impact analysis); Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 *Yale L. & Policy Rev.* 95, 130–132 (2006) (detailing a proposal to implement a modified version of the Canadian approach to the disparate impact theory); see also Selmi, *Mistake*, *supra* n. 189, at 704 (stating that “scholars have offered numerous proposals to extend the disparate impact theory” and that “extending the disparate impact doctrine has long been one of the primary obsessions of liberal academics and advocates alike”). In fact, it has been said that “no theory has attracted more attention or controversy than the disparate impact theory, which allows proof of discrimination without the need to prove an intent to discriminate.” *Id.* at 702.

243. See Taub, *supra* n. 27, at 948–949 (discussing the benefits of disparate impact theory for challenging workplace norms that disadvantage caregivers); see generally Travis, *Recapturing*, *supra* n. 11 (arguing for a renaissance of disparate impact theory as a transformative force rather than a theory subordinated to workplace essentialism); Travis, *Virtual Workplace*, *supra* n. 14 (discussing how the results-oriented disparate impact theory provides a tool for attacking structural inequities in the workplace that perpetuate gender inequality).

244. See Selmi, *Mistake*, *supra* n. 189, at 782 (identifying “two critical mistakes” made by advocates of disparate impact theory—“that the theory would be easier to prove and that it was possible to redefine discrimination purely through legal doctrine.”).

245. *Id.* at 705.

involving employment tests, very few cases are successful,<sup>246</sup> and the “courts never fully accepted the disparate impact theory as a legitimate definition of discrimination . . . .”<sup>247</sup>

Instead of disparate impact theory, according to Selmi we need “a broad social movement designed to delineate the many ways in which intentional discrimination—defined so as not to be limited to animus-based discrimination—continues to influence life choices for so many individuals, particularly minorities and women.”<sup>248</sup> Selmi disagrees with the idea that we needed the disparate impact theory to move away from a focus on blame.<sup>249</sup> He states that without an element of blameworthiness, there can be no remedy.<sup>250</sup> Without blame, we bolster the defendant’s claims that the disparate effects are not the product of unlawful discrimination but are simply choices made by the parties so affected.<sup>251</sup> According to Selmi, leaving blame behind is even more problematic in that it implies that intentional discrimination is no longer a problem.<sup>252</sup> He states:

Ultimately the disparate impact theory had it all backwards: The theory could only have succeeded in a society that was committed to eradicating the deep effects of discrimination—subtle, intentional, societal, however defined—and yet, that sort of society would, just as clearly, not have needed the disparate impact theory, as there would have been a collective will bent on doing the work otherwise delegated to courts. Perhaps the ultimate mistake of the disparate impact theory was a belief that our society and courts were better than they are, and that the law alone could create a theory of discrimination and equality without broader social support.<sup>253</sup>

So why not abolish the disparate impact theory? Why am I advocating for not only keeping it but tweaking it in such a way as to hopefully expand its use, at least in the caregiving context?

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246. *Id.*

247. *Id.* at 706.

248. *Id.* at 772–773.

249. *Id.* at 773.

250. *Id.*

251. *Id.* at 774.

252. *Id.*

253. *Id.* at 781–782.

First of all, despite some of the successful cases brought in this area,<sup>254</sup> and despite Michelle Travis' convincing argument for the transformative potential of the disparate impact theory,<sup>255</sup> I do not think it will reach its true potential or make any significant changes in the workplace norms that cause the caregiver conundrum without some modifications. Second, there are many reasons to keep the disparate impact theory, even as it currently stands.

The most obvious reason to keep the theory is because, even if we conclude that it has too many problems or is not effective enough to justify its use, "one can only imagine the political firestorm that would be generated by a proposal to legislatively abolish disparate impact."<sup>256</sup> William Corbett states that "it would be seen as retrenchment in [United States] employment discrimination law, and that is too large a price to pay."<sup>257</sup> Scholars also point to the effectiveness of the disparate impact theory in some European countries as proof that the theory has the potential to be more successful.<sup>258</sup> Travis suggests that just because courts are failing to give the disparate impact theory its full transformative potential does not mean we should abandon the theory as a "tool for transforming the workplace."<sup>259</sup>

Charles Sullivan makes a convincing argument for keeping the disparate impact theory, even arguing that our obsession with disparate treatment (while ignoring disparate impact) has caused the current crisis.<sup>260</sup> Sullivan recognizes that his position directly opposes scholars who have argued for an emphasis on disparate treatment theory to get rid of structural discrimination.<sup>261</sup> He also notes the dearth of disparate impact caselaw since the theory was codified in the Civil Rights Act of 1991<sup>262</sup> and recognizes the lack

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254. Travis, *Recapturing*, *supra* n. 11, at 82–88 (discussing some of the successful disparate impact cases).

255. *Id.* at 84–91.

256. Corbett, *supra* n. 196, at 110.

257. *Id.*

258. Travis, *Recapturing*, *supra* n. 11, at 82–83 (praising the Court of Justice of the European Communities and courts in the United Kingdom for their approach to disparate impact cases).

259. *Id.* at 84.

260. Sullivan, *supra* n. 197, at 912.

261. *Id.* at 941–952.

262. *Id.* at 954.

of a convincing theory to support disparate impact liability.<sup>263</sup> Of course, Sullivan also questions why we need a theory for disparate impact liability; after all, it has been codified by Congress, and it therefore can stand on its own.<sup>264</sup> Sullivan also notes the obvious limitations of the theory—lack of jury trial and limited remedies.<sup>265</sup> But despite all of those limitations, Sullivan remains convinced that the critics of disparate impact theory are wrong.

Because Sullivan believes that disparate impact tackles the structural discrimination problems of the workplace better than disparate treatment theory, he recommends “a return to, and a revival of the disparate impact theory.”<sup>266</sup> He argues that we should apply disparate impact theory as it is written in the statute and that we can use *Watson v. Fort Worth Bank & Trust*<sup>267</sup> to challenge “subjective or discretionary employment practices.”<sup>268</sup> He points out that all nine Justices agreed with the passage in *Watson* that allowed the disparate impact theory to be used for “subconscious stereotypes and prejudices,”<sup>269</sup> and all nine agreed that the Civil Rights Act of 1991 codified *Watson*.<sup>270</sup>

I agree with Sullivan and other scholars that disparate impact theory could potentially transform default norms of the

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263. *Id.* at 964–967. Sullivan reviews and ultimately dismisses as unconvincing several different theories for disparate impact liability. *Id.* One theory is that disparate impact liability is only needed when the employer has obviously covered up intentional discrimination. *Id.* at 964–965. Yet this theory would limit a court to invoking disparate impact based upon a factual finding of intent. *Id.* at 965. Second, disparate impact could be used to address the segregation in the South in the years immediately following the enactment of Title VII. *Id.* But presumably, if that were the case, Congress would not have codified the disparate impact theory in the Civil Rights Act of 1991. Third, disparate impact theory could be justified when it is used in situations where there is a history of subordination and discrimination against the protected group. *Id.* at 965–966. But again, the theory has never been limited in this way. Finally, Sullivan suggests that disparate impact theory could be seen as “eliminating unnecessary obstacles to human advancement, without regard to whether beneficiaries have been [subject to discrimination in the past.]” *Id.* at 966. In other words, there should not be obstacles that are not “conducive to employer productivity.” *Id.* Of course, the problem with this rationale is that we are an at-will nation, and employers should be able to do what they want with their businesses so long as it does not conflict with Title VII. *Id.*

264. *Id.* at 967.

265. *Id.* at 968.

266. *Id.* at 984–985.

267. 487 U.S. 977 (1988).

268. Sullivan, *supra* n. 197, at 985 (quoting *Watson*, 487 U.S. at 991).

269. *Id.* at 986 (quoting *Watson*, 487 U.S. at 990).

270. *Id.* at 987 (noting that “women and racial minorities get the short end of the stick in a wide range of workplaces” and that “disparate impact analysis focuses on this reality and asks the employer to justify it by its business needs.”).

workplace, but the model would require the minor interpretive tweaks I have suggested here to allow it to reach its full potential.<sup>271</sup>

Even with a process law and a disparate impact theory with some teeth, some employers will remain unconvinced that making the workplace more hospitable to caregivers is beneficial to the employers or is the right thing to do.<sup>272</sup> These employers might try to evade their obligations by not hiring or promoting as many women, especially women who are of child-bearing age or who already have children. Of course, Title VII prohibits discriminatory hiring or promotion decisions based on sex,<sup>273</sup> but failure-to-hire claims are not brought very often and are easy to defend.<sup>274</sup> Because hiring decisions are so subjective and because many candidates often apply for the same position, it is easy for an

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271. See e.g. Travis, *Recapturing*, *supra* n. 11, at 79 (stating that when codifying the disparate impact theory in the Civil Rights Act of 1991, Congress implicitly endorsed the transformative potential of the disparate impact theory by excluding structural aspects of the workplace that “act as ‘barriers’ and ‘built in headwinds’ for women with caregiving responsibilities.”).

272. Furthermore, as other scholars have pointed out, relying on litigation is not the best way of achieving anything; it is expensive, exhausting, and many people with valid claims will choose not to face the difficulties posed by litigation. Abrams, *supra* n. 16, at 1196 (pointing out the “enormous costs, in hostility and ostracization,” that women face with litigation and stating that it is a “crude tool for achieving the often subtle changes in understanding that produce equal treatment or regard for women”).

273. 42 U.S.C. 2000e-2(a). Moreover, the EEOC has recently issued guidelines indicating its position that even though caregivers are not a protected class under Title VII, discrimination based on a person’s status as a parent or a potential parent is often the equivalent of discrimination based on sex because employers are usually only reluctant to hire mothers and not fathers. *EEOC Caregiver Guidance*, *supra* n. 23, at II(A)(2).

274. Matt A. Mayer, *The Use of Mediation in Employment Discrimination Cases*, 1999 J. Disp. Resol. 153, 163 (1999) (noting that employment discrimination claims have shifted from failure to hire claims to wrongful termination claims). “In 1966, failure to hire claims outnumbered wrongful termination claims by fifty percent.” *Id.* “[B]y 1985, termination claims outnumbered failure to hire claims by [three hundred percent.]” *Id.* Part of the reason that failure to hire claims are not brought more often is because the potential plaintiffs do not have as much vested in the discriminating employer. *Id.* If an applicant is searching for a job, she is likely to be looking at several different places, and even if she suspects discrimination as the reason she was not hired by one of the employers, she is not likely to have an incentive to bring a lawsuit. Chances are good that she will find another job before she has much of an incentive to file a lawsuit.

Moreover, because she has not worked for the company, she will feel less of a sense of entitlement than if she is hired and later fired for a discriminatory reason. The endowment effect explains this fact, theorizing that individuals value entitlements they possess more than ones they do not. See e.g. Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. Rev. 1227, 1228 (2003) (explaining why someone might value the job they have more than a job they do not yet have and be more likely to sue if they lose their job than if they do not get a job for which they have applied).

employer to assert a non-discriminatory reason for its decision to hire one candidate over another candidate. Unless an employer is foolish enough to ask incriminating questions, make incriminating comments, or leave a smoking gun paper trail, it is unlikely that the employer's discriminatory hiring decision will ever be discovered. Because this proposal requires very little in the way of an affirmative mandate,<sup>275</sup> I am hopeful that employers will not have much of a tendency to discriminate against women in hiring decisions. But because that remains a possibility, the third piece of the workplace-flexibility puzzle is to provide tax incentives to employers who voluntarily provide a family-friendly workplace for their employees.

### *3. Tax Incentives for Workplace Flexibility Measures*

In order to counteract some employers' tendencies to discriminate against all women, women with children, or women of child-bearing age, I propose that the tax code be amended to provide tax incentives to employers who can demonstrate that they provide a flexible workplace aimed at making it easier for caregivers to balance work and family.<sup>276</sup> Incentivizing, rather than forcing, employers to adopt family-friendly workplaces is preferable because it will reduce the special treatment stigma. Furthermore, "the provision of a monetary cushion to overcome concern about the cost of these changes will likely produce a more accepting attitude towards both these programs and the employees who [use] them."<sup>277</sup> Finally, because tax incentives encourage employers to make the programs available to all

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275. The only affirmative mandate is to engage in an interactive process to allow employees to request workplace flexibility. The employer is not obligated to grant all or even some requests, although it is hoped that employers will voluntarily choose to do so once they understand the benefits of providing workplace flexibility.

276. Other authors have also pointed to the advisability of using tax credits to alleviate the stigma that attaches to "special treatment" in the workplace. Professor Smith points to "the advisability of spreading the costs of accommodating parental obligations between employers and society through . . . a system of employer tax credits." Smith, *supra* n. 21, at 1485–1486; see also Alpern, *supra* n. 62, at 448–450 (arguing that tax credits "express a societal interest in the well-being of families and engage employers in the process of restructuring the workplace to better accommodate the schedules of all workers.").

277. Alpern, *supra* n. 62, at 449–450.

employees, and not just caregivers, this part of the proposal will hopefully lessen the resentment felt by co-workers.<sup>278</sup>

I am not a tax law expert, so the details of this proposal would have to be filled in by someone else, but I imagine a program that would allow employers to receive tax incentives for offering two or more family-friendly programs or benefits. There are several types of benefits that could fall into this category; the following list is not exclusive: flex-time, reduced hours, job sharing, paid caregiving leave, on-site daycare, work from home arrangements, a certain number of paid hours or days off for caregiving tasks or elder-care needs.

Obviously, the details of this proposal—how much money in tax incentives would need to be provided to encourage employers to provide a family-friendly workplace as well as which measures would allow an employer to receive the tax incentives—are left for another day. The one issue that deserves a brief mention here is how to avoid the problem of employers offering these benefits on paper without actually hiring employees who might use them (mostly women with children) and without actually letting employees use them. There are two possible solutions to this problem. One would be to offer tax incentives based on quotas for hiring women or women with children. But such an affirmative action program would likely be met with substantial resistance. The other solution is to provide the tax incentives based on usage rates for the family-friendly workplace policies that the employer offers.<sup>279</sup> While this solution raises some problems of proof, it is both a necessary and sufficient way of ensuring that the tax incentives work to truly encourage employers to offer and allow family-friendly policies.

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278. *Id.* at 450.

279. *See also id.* at 449. Alpern notes:

With tax savings linked to the number of employees who choose to participate in the programs, rather than merely the establishment of programs, employers have an incentive to create programs that can serve a larger percentage of workers. Use-based tax savings can also prevent the official establishment of family-friendly programs that employees are unofficially discouraged from utilizing.

*Id.*

### C. Theoretical Response to Special Treatment Stigma: Communitarian Theory<sup>280</sup>

Despite my efforts to eliminate the effects of special treatment stigma by the three-part workplace flexibility reform discussed above, I recognize that a main criticism of this proposal will continue to be concern over the stigma that flows from having special legal protections for working caregivers.<sup>281</sup>

In my prior work, I argued that the communitarian theory has two responses to special treatment stigma.<sup>282</sup> First, as a general matter, communitarians emphasize a departure from a preoccupation with rights and a focus on responsibility towards others. Communitarians believe we have a responsibility to everyone in our community. Second, and more specifically, the emphasis on the societal value of parents raising their children well can lead to a greater understanding of the need to help caregivers balance work and family. I will address each response in turn.

One central tenet of communitarianism is that an overemphasis on individual rights has hurt American communities and society.<sup>283</sup> Communitarians believe that rights come with responsibilities.<sup>284</sup> They believe that rights alone do not make a good society.<sup>285</sup> In fact, they believe our preoccupation with rights has hurt America.<sup>286</sup>

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280. A more detailed discussion of using the communitarian theory to justify broad protection for working caregivers can be found at Porter, *supra* n. 1. This Sub-Part is based on my earlier work in that article.

281. Keep in mind, however, that no part of my suggested reform thus far benefits only caregivers. While various parts of the proposal are designed to help caregivers, non-caregivers could also request flexible work arrangements, and employers could choose to allow non-caregivers to use flexible work arrangements.

282. This is my interpretation of how I think communitarian theorists would respond to this specific issue. I have not seen this issue addressed directly by those who claim to be communitarians.

283. Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities & the Communitarian Agenda* 3–14 (Crown 1993).

284. *Id.* at 1. For instance, according to communitarians, it is wrong to refuse or avoid jury service while simultaneously demanding the right to be tried by a jury of one's peers. *Id.* at 10.

285. David Abraham, *Are Rights the Right Thing? Individual Rights, Communitarian Purposes and America's Problems, Review Essay of Mary Ann Glendon*, *Rights Talk: The Impoverishment of Political Discourses*, 25 Conn. L. Rev. 947, 950–951 (Spring 1993) (pointing out that an emphasis on individual rights has led to inequality of wealth, an increase in children living in poverty, “sociopaths outnumber[ing] strollers on many . . .

Instead of an emphasis on rights, the central value of communitarianism is belonging.<sup>287</sup> Communitarians believe that the community bears the responsibility of “each individual member of the community.”<sup>288</sup> As stated in Communitarian Amitai Etzioni’s book,<sup>289</sup> “We adopted the name *Communitarian* to emphasize that the time ha[s] come to attend to our responsibilities to the conditions and elements we all share, to the community.”<sup>290</sup>

One of the problems with special treatment stigma is that it pits one group against another; in this case, it pits caregivers against non-caregivers (and usually women against men). Communitarian theory teaches that there are other interests at stake—children and adult loved ones who need care.<sup>291</sup> Communitarian theory helps us to understand that we all benefit from parents’ choice to procreate. After all, society needs procreation to continue, and employers need procreation to continue to have employees in the future.<sup>292</sup> Furthermore, one crucial lesson

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streets,” and the fact that “infant and black male mortality rates both compare unfavorably” with third-world countries); *see also id.* at 956 (noting that “those located in situations of dependency—mothers, children, the old, the sick, and the poor . . . are worse off in the United States than in any comparable country.”).

286. *Id.* at 953 (discussing how the focus on rights produces “negative synergy,” as every claim for rights produces a counter-claim for rights, resulting in “individual absolutism, group egotism[,] and the disappearance of social obligation.”).

287. Philip Selznick, *The Idea of a Communitarian Morality*, 75 Cal. L. Rev. 445, 454 (1987); Barbara Bennett Woodhouse, “*It All Depends on What You Mean by Home*”: *Toward a Communitarian Theory of the “Nontraditional” Family*, 1996 Utah L. Rev. 569, 573 (criticizing “laws and policies that [esteem] individual freedoms over equally important values of commitment and responsibility that bind individuals” together).

288. Nancy Kubasek & Melissa Hinds, *The Communitarian Case Against Prosecutions for Prenatal Drug Abuse*, 22 Women’s Rts. L. Rep. 1, 12 (Fall/Winter 2000).

289. Amitai Etzioni is responsible for the contemporary communitarian movement, which began in 1990 when he and William Galston met with a group of ethicists, social philosophers, and social scientists to discuss society’s lack of community and emphasis on rights at the sacrifice of responsibilities. Etzioni, *supra* n. 283, at 14–15.

290. *Id.* at 15 (emphasis in original); *see also* Abraham, *supra* n. 285, at 956 (claiming that the United States’ “[e]mphasis on individual autonomy—choice—makes collective action, whether as a family, a neighborhood, or a trade union, much more difficult than in Europe”); Woodhouse, *supra* n. 287, at 585 (discussing the “soft communitarian . . . perspective that stresses the need to foster communities of mutual responsibility and support.”).

291. *See* Susan J. Stabile, *Can Secular Feminists and Catholic Feminists Work Together to Ease the Conflict Between Work and Family?*, 4 U. St. Thomas L.J. 432, 436 (2007) (noting the conflict between Catholic feminists’ emphasis on collective goals of family and belonging, and individual goals of women). Stabile counters the view of some feminists, who appear to be primarily focused on the needs of the employee, with her view that it is not only about the well-being of the women but of the larger family unit. *Id.* at 458.

292. Finley, *supra* n. 91, at 1137–1138 (emphasizing the importance of this process to

learned from communitarianism is that everyone lives “with the consequences of children who are not brought up [well].”<sup>293</sup> Studies indicate that children who spent too much time taking care of themselves were more likely to engage in risky behavior, such as abusing controlled substances, and were more likely to have anger management problems.<sup>294</sup> Etzioni believes that many of today’s problems are attributed to lack of parenting, including gangs, drug abuse, “a poorly committed work force, and a strong sense of entitlement.”<sup>295</sup> Communitarian Mary Ann Glendon agrees. She argues that “current patterns of family behavior are not optimal . . . for children.”<sup>296</sup> She also notes the mounting evidence connecting child raising conditions with “crime rates [and] national competitiveness . . . .”<sup>297</sup>

Accordingly, the communitarian theory supports the effort here to develop modest reform that will help to transform workplaces into environments that are more compatible with the needs of working caregivers. If we recognize that raising children well takes more commitment from parents than an ideal worker’s schedule will allow and that raising children well benefits society, we should be willing to help caregivers balance work and family.<sup>298</sup> Specifically, we should support workplace flexibility measures because they allow caregivers to meet their caregiving needs and become better parents. Etzioni believes that reassessing the value of children will stimulate the change of heart necessary to support efforts that help parents successfully raise their children.<sup>299</sup> He states: “Above all, what we need is a *change in orientation* by both parents and workplaces. Child raising is

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employers and lamenting the Supreme Court’s lost opportunity to recognize the importance of procreation).

293. Etzioni, *supra* n. 283, at 54, 69 (observing that “[t]he community—that is, all of us—suffers the ill effects of absentee parenting.”).

294. *Id.* at 69; *see also* Dowd, *supra* n. 22, at 449–452 (discussing the negative effects on teenagers who are left alone without parental involvement); Kaminer, *supra* n. 97, at 316–317 (describing problems that children may encounter as a result of their parents’ absence).

295. Etzioni, *supra* n. 283, at 69.

296. May Ann Glendon, *Rights Talk* 127 (The Free Press 1991) (pointing to a study indicating that “a whole generation of American teenagers was ‘less healthy, less cared for, [and] less prepared for life than their parents were’”).

297. *Id.* at 127.

298. Dixon, *supra* n. 43, at 648 (stating that “society as a whole benefit[s] when children are . . . better prepared to contribute as productive members of society.”).

299. Etzioni, *supra* n. 283, at 72.

important, valuable work, work that must be honored rather than denigrated by both parents and the community.”<sup>300</sup> Because the support many parents need is workplace flexibility, employers and co-workers should be willing to provide this support so that parents are able to take on the important responsibility of raising their children and attending to their other caregiving roles.<sup>301</sup>

Co-workers cannot provide direct support to caregivers, but they can avoid sabotaging an employer’s efforts to satisfy a working caregiver’s flexibility needs.<sup>302</sup> In addition to the most compelling reason for co-workers to support caregivers’ efforts—that is, the benefit to society when parents are given the tools to successfully raise their children—there are two other reasons why non-caregiving co-workers should care about the caregiver conundrum. First, flexibility and benefits given to caregivers often have positive spillover effects for non-caregivers.<sup>303</sup> Employers might choose to make workplace flexibility available to everyone—not just caregivers. Second, non-parents could find themselves engaging in caregiving at any point. Even if they do not “choose” to have children, they do not get to choose their parents, and many of these parents could become dependent as they age, forcing their children into caregiving roles.<sup>304</sup> Not only could many workers find themselves engaging in caregiving without affirmatively making the choice to do so, but fulfilling this role does benefit society. Perhaps the benefit to society of caring for adults is not quite as compelling as the benefits of caring for children, but the

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300. *Id.* at 257 (emphasis in original).

301. See Stabile, *supra* n. 291, at 465 (stating that “we all share the obligation to promote the conditions necessary for all humans to flourish.”). She defines the scope of the responsibility by focusing on family and “what is necessary for family to serve its function in the world.” *Id.*

302. Porter, *supra* n. 1, at 399.

303. Travis, *Recapturing*, *supra* n. 11, at 91 (explaining how successful disparate-impact, sex-discrimination cases can create spillover benefits to other employees besides just female caregivers); see also Travis, *Lashing Back*, *supra* n. 138, at 335–336 (arguing that benefits given to disabled employees have positive spillover effects for individuals without disabilities).

304. Martha Albertson Fineman, *Contract and Care*, 76 Chi.-Kent L. Rev. 1403, 1439 (2001). I have made a similar argument with respect to disabilities. Porter, *supra* n. 1, at 399–400 (discussing the communitarian theory as a justification for some of the burdens on non-disabled workers created by providing reasonable accommodations to disabled employees). Vicki Schultz makes a similar point using disability law as an analogy. She points out that accommodations that help with disabilities often help those without and that a “them vs. us” mentality is an illusion because we will all become disabled (defined broadly) at some point in our lives. Schultz, *supra* n. 97, at 1931–1932.

advantages of having loved ones caring for adults include better health outcomes and increased happiness.<sup>305</sup> Furthermore, society needs the thirty-three million unpaid family caregivers to continue giving that care.<sup>306</sup> The long-term care system would collapse without the work of unpaid family caregivers, and nursing homes would “burst at the seams.”<sup>307</sup> Finally, we all benefit from allowing caregivers to balance work and family because as we age or become disabled and need care, we will reap the benefits of having institutional structures in place that will allow our loved ones to care for us without sacrificing their jobs.

Etzioni also points out how the benefit of raising children well can enrich employers, who should in turn have some responsibility for helping caregivers balance work and family.<sup>308</sup> He explains that what corporations often complain about with regard to their employees is a deficiency in character and “an inability to control impulses, defer gratification, and commit to the task at hand.”<sup>309</sup> If parents have more time to teach children the values to overcome these deficiencies in character, these children will become more productive adult employees.<sup>310</sup> This, in turn, benefits employers, and therefore employers should be willing to invest in their own future by investing in the parents who raise the workers of the future.<sup>311</sup>

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305. K. Nicole Harms, *Caring for Mom & Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California's Paid Family Leave Law*, 10 Wm. & Mary J. Women & L. 69, 83–85 (2003) (discussing the benefits of having elders cared for by family members).

306. Jane Gross, The New Old Age Blog, *Who Cares for the Caregivers?*, The New Old Age Blog, NYTimes.com (Oct. 14, 2008), <http://newoldage.blogs.nytimes.com/2008/10/14/who-cares-for-the-caregivers/?pagemod> (Oct. 14, 2008).

307. *Id.*

308. Etzioni, *supra* n. 283, at 67–68; see also Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies & Liberal Theory*, 59 Ohio St. L.J. 133, 168 (1998) (stating that we need to look at all of the interests at stake in the conflict between work and parenting, including “the social value of parenting and the necessity of parenting” for any community to sustain itself).

309. Etzioni, *supra* n. 283, at 67.

310. See *id.* at 67–68 (observing that, in general, the community will reap what it sows).

311. See Finley, *supra* n. 91, at 1175 (stating that employers should bear some of the costs of accommodating caregiving “because childbearing and rearing are crucially important social functions that are connected to and have major impacts on the work world.”). It would seem that not many employers subscribe to the view that they can benefit from investing in the workforce of the future by investing in the parents who are raising those children. One study of employers revealed that only one percent of employers implement work/life balance initiatives in order to ensure the strength of tomorrow’s workforce. Galinsky, *supra* n. 28, at 32. Note, however, that this study also indicated that employers

One final caveat—while I believe there is a good deal of merit to the communitarian’s emphasis on the importance of raising children well, we should not try to define the substantive contours of what it means to be a good parent. We can adopt legal reforms that support parenting without mandating what parents should do.<sup>312</sup>

#### IV. ENDING THE MARGINALIZATION OF PART-TIME WORKERS

If, as stated above, we understand how valuable caregiving is, we should also support a caregivers’ choice to work part-time in order to spend more time on caregiving tasks. Yet this choice often comes with significant consequences, both financially and in terms of job advancement and satisfaction. This Sub-Part will address these problems by advocating for a statute I refer to as the “Part-Time Parity Act.”

##### A. Part-Time Parity Act

As discussed earlier,<sup>313</sup> “Part-time work doesn’t pay.”<sup>314</sup> Part-time workers suffer from reduced pay, diminished or non-existent benefits, and lack of promotion opportunities.<sup>315</sup> Because “part-time worker” is almost synonymous with “working mother,”<sup>316</sup> ending the caregiver conundrum must include fair and equitable treatment of part-time employees.

Unfortunately, recognizing the problems faced by part-time workers does not move us forward to a solution. Litigation within the current legal regime will not be able to resolve completely the

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do have some benevolent motives for initiating family-friendly policies. *Id.* (noting that seven percent of studied employers implement these policies because “it is the right thing to do,” six percent do so because the company considers itself a caring organization, and four percent do so because the company considers itself a family organization).

312. See Eichner, *supra* n. 308, at 175–176 (noting that parents should be able to parent as they see fit, with recognition that what it means to be a good parent can “vary enormously both within and between cultures and over time”).

313. See *supra* pt. II(B) (discussing the marginalization of part-time workers).

314. Warner, *supra* n. 63.

315. See *e.g.* Alpern, *supra* n. 62, at 435 (discussing the consequences of the current workplace structure on mothers).

316. Chamallas, *supra* n. 65, at 712 (stating that the term “part-time worker” is inseparable from “working mother”).

inequities faced by part-time employees.<sup>317</sup> A woman working part-time could bring a pay discrimination claim under either the Equal Pay Act (EPA)<sup>318</sup> or Title VII, but she is likely to encounter difficulties with both claims.

In bringing a pay discrimination claim under the EPA, the plaintiff must first prove his or her prima facie case—that he or she is receiving unequal pay for substantially equal work.<sup>319</sup> The problem here is that, even if a woman does the exact same work as a full-time male counterpart, the employer might allege that she is not performing “equal work” because she is working fewer hours. Caselaw is split on this issue, with some courts refusing to allow a comparison between a part-time employee and a full-time employee, alleging that part-time employees are simply not similar enough to full-time employees,<sup>320</sup> while at least one court allowed the claim to go forward.<sup>321</sup>

Even assuming a plaintiff meets this burden, he or she will have to survive his or her employer’s defense. The EPA allows employers to allege one or more affirmative defenses once the plaintiff can establish unequal pay for equal work. The four affirmative defenses apply when the pay disparity is made pursuant to one or more of the following: a seniority system; a merit system; a system that “measures earnings by quantity or quality of production”; or, “a differential based on any other factor other than sex.”<sup>322</sup> This last affirmative defense is the catch-all provision, and the defense is most often asserted by employers in EPA

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317. See generally Chamallas, *supra* n. 65 (discussing the problems of part-time workers from a feminist perspective).

318. 29 U.S.C. § 206(d) (2006).

319. 29 C.F.R. § 1620.13(a) (2009).

320. See e.g. *Asher v. Riser Foods, Inc.*, 1993 WL 94305 at \*4 (6th Cir. Mar. 30, 1993) (refusing the plaintiff’s EPA claim because she worked part-time, which justified her employer’s refusal to give her benefits); *LaRocco v. Nalco Chemical Co.*, 1999 WL 199251 at \*13 (N.D. Ill. Mar. 30, 1999) (stating that “there is an inherent difficulty” in comparing part-time employees with full-time employees because “full-time employees are . . . not similarly situated to part-time employees.”); *EEOC v. Altmeyer’s Home Stores, Inc.*, 672 F. Supp. 201, 214 (W.D. Pa. 1987) (stating that “[t]here can be no comparison between one who worked full[-]time and one who worked part[-]time.”).

321. *Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 620–622 (E.D. Va. 2003) (allowing the issue of whether the plaintiff, who was working reduced hours—approximately three-quarters of full-time hours—performed substantially equal work to her full-time counterpart to go to the jury).

322. 29 U.S.C. § 206(d).

claims.<sup>323</sup> With this defense, employers will allege that paying part-time employees less than full-time employees is lawful because it is not based on sex; it is based on the employee's part-time status, and part-time status is a "factor other than sex." Courts generally allow pay disparities between full-time and part-time employees as long as there is no suspicion of discrimination based on the sexual composition of the part-time and full-time employees and as long as there is a substantial difference in the number of hours worked.<sup>324</sup> Caselaw suggests that defendants can succeed in asserting the fourth affirmative defense when a part-time female employee is being paid less than a full-time male employee.<sup>325</sup>

Women who work part-time will also have difficulty bringing claims under Title VII. In bringing a disparate treatment claim, a female plaintiff might have difficulty proving that she is "similarly situated" to a male, full-time employee, just as she would have a difficult time proving that she performs "equal work" to the male comparator.<sup>326</sup> Furthermore, through the Bennett Amendment<sup>327</sup> and the Supreme Court's opinion in *Washington v. Gunther*,<sup>328</sup> the four affirmative defenses under the EPA are

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323. EEOC, *Chapter 10: Compensation Discrimination*, EEOC Compliance Manual 10-IV.F.2 (Dec. 5, 2000) (available at <http://www.eeoc.gov/policy/docs/compensation.html>) [hereinafter EEOC, *Compensation Discrimination*] (discussing the requirement imposed on employers to establish that a gender-neutral factor is responsible for the disparity when asserting the defense of "factor other than sex").

324. *Id.* at 10-IV.F.2.h (stating that they will scrutinize pay differences between part-time and full-time employees very closely and that employers should have to show that they had a business reason for paying part-time employees less); Chamallas, *supra* n. 65, at 741; *cf. Lovell*, 295 F. Supp. 2d at 620–622 (allowing plaintiff's EPA claim to go to the jury in part because she worked three-quarters of a regular, full-time schedule). The Department of Labor allows lower wages for those who are working fewer than twenty hours. Chamallas, *supra* n. 65, at 739–740.

325. Chamallas, *supra* n. 65, at 744–749.

326. *But see Lovell*, 295 F. Supp. 2d at 627 (allowing plaintiff's Title VII claim to survive summary judgment). The EEOC has stated that the similarly situated standard under Title VII is more relaxed than the "equal work" standard under the EPA. EEOC, *Compensation Discrimination*, *supra* n. 323, at 10-II, 10-V.

327. The Bennett Amendment states:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

42 U.S.C. § 2000e-2(h).

328. 452 U.S. 161 (1981).

incorporated into Title VII.<sup>329</sup> Thus, if an employer could successfully defend an EPA claim using the “any factor other than sex” defense, it would similarly be able to defend a Title VII claim. Furthermore, it is unclear whether plaintiffs can bring disparate impact claims for wage-based discrimination. Some have argued that dictum in the Supreme Court’s opinion in *Gunther* precludes the use of a disparate impact theory for pay discrimination claims under Title VII.<sup>330</sup>

The Part-Time Parity Act will alleviate the marginalization of part-time workers in two ways. First, it would mandate that employers pay part-time employees proportional wages and fringe benefits at a proportional rate to full-time employees performing substantially equal work. But unlike the current state of the law, the proposal would not allow an employer to defend the action by stating that part-time work is not substantially equal or that paying part-time employees less than full-time employees should be protected by the fourth affirmative defense under the EPA.<sup>331</sup>

Obviously, if the hours are trivial or sporadic, the argument that part-time employees are not performing substantially equal work to full-time employees becomes stronger. Accordingly, there must be some minimum number of hours that an employee would have to work in order to qualify for protection under this provision. That minimum number should be much less than the current forty hours that many employers use. I propose that if an employee averages fifteen hours per week for over fifty weeks per year and is otherwise performing substantially equal work as a full-time employee, he or she should be entitled to the protections of this provision.

Proportional benefits should also be required. There is no logical reason that an employer cannot have a system where vacation days, sick days, leaves of absence, and healthcare costs are pro-rated to reflect the number of hours worked. Other scholars have suggested similar proposals,<sup>332</sup> and these proposals

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329. *Id.* at 176.

330. *Id.* at 178–181. Chamallas, *supra* n. 65, at 748; Charles B. Craver, *If Women Don’t Ask: Implications for Bargaining Encounters, The Equal Pay Act, and Title VII*, 102 Mich. L. Rev. 1104, 1120–1121 (2004).

331. *See supra* n. 323 and accompanying text (discussing the requirement that an employer establish that a gender-neutral factor is responsible for the disparity when asserting the defense of “factor other than sex”).

332. Williams, *supra* n. 6, at 99; *see generally* Schultz & Hoffman, *supra* n. 123 (ad-

are not as novel as many people think. In a series of cases, the Court of Justice of the European Communities (ECJ) held that treating part-time workers less favorably than full-time workers with respect to wage rates and benefits was subject to disparate impact review and that marginalizing part-time workers had a disparate impact on women, who made up the majority of the part-time workforce.<sup>333</sup>

This Act would also protect part-time workers by addressing the issue of promotions and advancement. Part-time employees suffer not only from unequal pay but also from the stigma of being considered half as dedicated. They are often passed up for promotion or advancement and, in certain work environments, are given more mundane and unfulfilling work. Ending the caregiver conundrum for all working caregivers, even for those who work less than full-time, must include helping part-time employees advance in the workplace without discrimination.

Of course, I do not suggest that all part-time employees can be considered for promotions and advancement on the same terms as their full-time counterparts. One can imagine many positions that would require a full-time schedule (and even require overtime). But there are some positions for which working reduced hours would not affect the job at all. The easiest example is a law firm. What many law firms call “part-time” is actually an “eighty percent” arrangement, where the attorney receives eighty percent of the full-time pay in exchange for having a billable hour quota that is eighty percent of the full-time billable hour quota.<sup>334</sup> These attorneys are working full-time hours by most people’s standards (in order to bill eighty percent of the full-time quota at most firms would require at least forty hours per week), and yet many firms take these attorneys off the partnership/promotion track completely.<sup>335</sup> There is no reason that attorneys working reduced hours should be unable to advance in the legal workplace at a proportional pace to their full-time counterparts. If an attorney has billed eighty percent of the full-time billable hour quota for his or her entire career, it should take him or her twenty percent

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dressing various perspectives on the current workweek and proposing a reduced workweek).

333. Travis, *Recapturing*, *supra* n. 11, at 82.

334. Porter, *Superwoman*, *supra* n. 133, at 67.

335. Abrams, *supra* n. 16, at 1242.

more time (assuming a fairly set yearly track towards partnership) to make partner.<sup>336</sup> Completely denying him or her the promotion will perpetuate the status of caregivers in the workplace as “second-class citizens.”

Accordingly, the Part-Time Parity Act would contain a provision rejecting an employer’s defense to a claim for failure to promote based on sex discrimination when the employee was working less than full-time, except in certain circumstances. One of those circumstances would be if the employer could demonstrate that the position required a certain number of hours and that the employee worked substantially fewer hours and was not willing to increase them.<sup>337</sup> Another defense the employer could raise is that it considered the employee for the promotion or advancement but at a proportional pace to his or her part-time schedule. But simply refusing to promote or advance all employees working less than full-time would violate the Part-Time Parity Act.<sup>338</sup>

#### B. Justification for the Part-Time Parity Act

While this Article is devoted to all caregivers—both men and women, parents, and other caregivers—this part of the reform is uniquely designed to end the marginalization of women in the workforce when they choose to (or are forced to) work part-time.<sup>339</sup> While my argument for protecting caregivers is primarily because of the value of caregiving work (to families and society as a whole),<sup>340</sup> I also desire to eliminate the rampant disadvantages

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336. This is just a hypothetical—it is actually quite unusual for an attorney to work reduced hours right from the very beginning of his or her legal career.

337. This last point should be obvious, but some employers would not ask the part-time employee if he or she would be willing to increase his or her hours in order to be considered for promotion, falsely assuming that his or her decision to be a part-time employee means he or she does not desire career advancement. Contrary to some employers’ beliefs, some employees who request a part-time schedule might be willing to increase to full-time hours for the right position or opportunity.

338. Another scholar has made a suggestion similar to the Part-Time Parity Act discussed here. Kaminer, *supra* n.97, at 353 (stating that employers should provide proportional pay and benefits for part-time employees and “meaningful opportunities for promotion.”).

339. Obviously, this provision would also protect part-time employees who are men, but the overwhelming majority of part-time employees are women with children.

340. *See supra* pt. III(C) (explaining the communitarian theory and its impact on the special-treatment stigma).

that flow to women because of the caregiver conundrum. As one scholar stated, the costs of discrimination against caregivers is high: “The economic and social subordination of women that flows from the history of workplace incompatibility with their child-bearing role has contributed to the economically and psychologically damaging phenomenon known as the feminization of poverty.”<sup>341</sup> The caregiver conundrum does not just affect women’s financial well-being; it can also affect their physical well-being. Studies show that women have a much higher level of stress than men do and that this stress represents a threat to women’s health.<sup>342</sup> Whether the reader is concerned with the well-being of our future generations or with workplace equality for women, remedying the caregiver conundrum for all workers achieves both goals.<sup>343</sup> Ending the marginalization of part-time workers is a significant and necessary step toward ending the caregiver conundrum.

In response to some critics who will wonder why parenthood and caregiving deserve special treatment, it is important to remember that there are many other social programs and policies that force employers to spend money in a way that benefits some, but not all, employees.<sup>344</sup> Examples include unemployment, workers compensation, and perhaps the best example, military leave.<sup>345</sup> Military leave provides an apt analogy because, although there are some women who need it, mostly men take it, and the law requires employers to reinstate employees who have been on military leave for up to five years.<sup>346</sup> Those in the military are

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341. Finley, *supra* n. 91, at 1176. Discrimination against caregivers also harms children, increasing their poverty and leading to increased child abuse. Gershuny, *supra* n. 37, at 213–214.

342. Linda Babcock & Sara Laschever, *Women Don’t Ask: Negotiation and the Gender Divide* 181 (Princeton U. Press 2003).

343. See also Gillian Lester, *A Defense of Paid Family Leave*, 28 Harv. J.L. & Gender 1, 18 (2005) (arguing that gender inequality matters not only for the important social goal of achieving equality to help women flourish but also because it can “improve child and elder welfare.”); Stabile, *supra* n. 291, at 458 (stating that there is a two-fold concern over the workplace’s failure to acknowledge the family responsibilities of workers: (1) women have something unique to contribute to the workplace and should not be discriminatorily excluded; and (2) “the importance of promoting the well-being of the family”).

344. See Arnov-Richman, *supra* n. 39, at 379 (describing caregiving benefits as a logical outgrowth of other types of benefit packages).

345. Finley, *supra* n. 91, at 1175–1176 (describing the male institutions deemed important enough for employers to shoulder social responsibility).

346. Uniformed Services Employment and Rights Reemployment Act of 1994, 38 U.S.C.

provided this “special treatment” because they are engaging in what many believe is socially desirable behavior. So are caregivers. The fact that most caregivers are women and that our current system operates to discriminate against them is simply another reason for protecting caregivers. Some of the most significant financial and career disadvantages women face stem from the marginalization of part-time employees. Ending this marginalization is one significant part in this synergy of solutions for ending the caregiver conundrum for all employees.

### V. ERROR OF ESSENTIALISM

“Essentialism is a belief in the . . . essence of something . . . . To ‘essentialize’ something is to assume that all examples of that particular thing share the same inherent, invariable, and defining characteristics.”<sup>347</sup> In the context of this Article, the term essentialism refers to the idea that there is a common, underlying attribute or experience shared by all women, regardless of race, occupation, income level, marital status, class, et cetera. In other words, essentialism assumes that being a woman is more important than everything else that makes us different. An assumption of many feminist scholars is that any proposal that will help any woman is beneficial. For instance, many scholars (including myself) have written about the difficulties faced by female attorneys, especially those who are also mothers.<sup>348</sup> Some of us acknowledge that by focusing on attorneys, we are ignoring an enormous percentage of the population. We might choose to do so because it is a topic with which we are intimately familiar or for other reasons. These proposals are not unjust, but they cannot be used as models for all other working mothers.

Anti-essentialist scholars criticize essentialism because it ignores the reality of many women. Many proposals aimed at ending caregiver discrimination have focused on the lives of middle-to upper-class women, who are also frequently professional women, ignoring the reality that most women do not fall into that

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§ 4312(a) (2006); see also Finley, *supra* n. 91, at 1176 (discussing military leave and comparing the relative social importance of male and female activities).

347. Travis, *Recapturing*, *supra* n. 11, at 9 (footnote omitted).

348. See e.g. Porter, *Superwoman*, *supra* n. 133 (discussing the unique challenges female lawyers face in the workplace as a result of becoming mothers).

group of individuals. Some commentators who have been working on the issue of caregiver discrimination criticize proposals that benefit only professional caregivers or women who are married to high-income men and who therefore do not need to work full-time. These scholars point out that some caregivers need more time and flexibility, but cannot afford to take it and cannot afford to work less than full-time.<sup>349</sup> The proposals in this Part seek to end the error of essentialism, recognizing that not all caregivers simply need more time—some also need more financial support.

#### A. Subsidized Paid Leave

The most significant, albeit certainly not the only, problem posed by the lack of paid leave (or even unpaid leave for those not protected by the FMLA) arises when a woman has a baby.<sup>350</sup> As mentioned earlier, under the PDA, an employer must provide leave only to the extent that it provides leave for other types of leaves of absence.<sup>351</sup> The FMLA requires unpaid leave but only to those employees who have worked for their employer for one year and whose employer employs fifty or more employees.<sup>352</sup> Almost forty percent of all employees are not legally entitled to *any* leave for the birth of a baby, and many who are entitled to leave cannot afford to take it.<sup>353</sup> Denying women leave for the birth of their babies has deleterious effects on the women, their families, their employers, and society. If a woman cannot have pregnancy leave (or is only entitled to one or two weeks of leave), she is left with the difficult decision between returning to work before she has had a chance to properly heal from childbirth and bond with her baby, or losing her job.<sup>354</sup> Both options, obviously, have serious effects on the mother and her family. This untenable choice also

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349. See *supra* pt. II(C) (examining the effect of the caregiver conundrum on lower-income workers).

350. Of course, pregnancy leave is only one type of leave that caregivers need. They might also need extended leaves of absence (shorter absences are discussed *infra* Part V(D)) when a child, spouse, or parent is seriously ill or hospitalized from an illness or accident. As will be seen, this proposal would cover those types of leaves as well.

351. See *supra* pt. II(D)(3) (discussing the Pregnancy Discrimination Act).

352. See *supra* pt. II(D)(2) (discussing the Family and Medical Leave Act).

353. See *supra* n. 104–105 and accompanying text (describing the limitations of the FMLA).

354. Stabile, *supra* n. 291, at 453 (discussing the needs of the mother's relationship with her baby after delivery rather than just the medical needs of the mother).

has negative effects on the employer, who either loses out on a valuable employee, for whom the employer has invested time and resources to hire and train, or the employer has an employee who is not physically or emotionally prepared for the workforce, which is bound to have negative effects on the employee's performance. Finally, society suffers regardless of the choice a woman is forced to make in these circumstances. Society suffers when mothers do not have the time to properly bond with their babies before they return to work because, as discussed earlier,<sup>355</sup> society is harmed when parents do not raise their children well—and getting a good start on this process requires time to bond.<sup>356</sup> Society also suffers when women lose their jobs. More and more women either are single mothers or are in a family where both spouses need to work to survive. The number of women and children living under the poverty line is significant, and society pays the cost of this poverty.

There are also significant benefits to providing leave for other types of caregiving needs. First, there are significant benefits to the family members when the employee is able to take paid time off to care for a seriously ill family member. In the findings of a bill introduced in the United States House of Representatives on March 25, 2009, titled "Family Leave Insurance Act of 2009,"<sup>357</sup> it was noted that when Americans "provide direct care for their family members[, it] prevent[s] the worsening of illnesses and promote[s] stronger recovery."<sup>358</sup> Second, providing paid leave benefits businesses through "increased employee retention and productivity."<sup>359</sup> Third, as was argued earlier,<sup>360</sup> the communitarian theory emphasizes that society benefits when parents take good care of their children, and providing care during extended illnesses certainly qualifies as taking good care of children.

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355. See *supra* pt. III(C) (discussing communitarian theory and the importance of raising children properly).

356. Porter, *supra* n. 1, at 388 (adopting the Etzioni position of moral and social responsibility).

357. H.R. 1723, 111th Cong.

358. *Id.* at § 2(3) (stating, for example, that "the length of a child's stay in the hospital decreases by [thirty-one] percent when parents are able to be present"); see also Lester, *supra* n. 343, at 34 (stating that paid leave "improve[s] the welfare of children and elders who receive care from these workers.").

359. H.R. 1723, 111th Cong. at § 2(5).

360. See *supra* pt. III(C) (discussing communitarian theory and the importance of raising children properly).

Lastly, providing leave can have tangential benefits for other segments of society. “A 2008 Harvard Law study on foreclosure trends found that [forty-nine] percent of all . . . foreclosures were caused in part . . . by a medical crisis[,] including loss of work due . . . to caring for an ill family member.”<sup>361</sup>

It is clear that we will not be able to end the caregiver conundrum for all workers without a form of paid family leave. Of course, the details of a paid leave program are complicated and need to be resolved. Many scholars have weighed in on the debate regarding how a family leave program should be funded, who should be covered, how much leave should be provided, and for what reasons leave should be granted.<sup>362</sup> Despite this wealth of scholarship, I find the provisions in the proposed legislation, the Family Leave Insurance Act of 2009, to be very comprehensive and very much in line with what I envision.<sup>363</sup> It is beyond the scope of this Article to provide all the details of a paid leave proposal, but I will present the highlights.

The Family Leave Insurance Act would provide up to twelve weeks of paid leave to employees who need time off for the same reasons as are listed in the FMLA (new baby, employee’s own serious health condition, or the serious health condition of a family member).<sup>364</sup> The one notable difference is that the list of family members has been expanded to include (in addition to the spouse, son or daughter, and parent) domestic partners, grandchildren,

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361. H.R. 1723, 111th Cong. at § 2(6).

362. See e.g. Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. Pa. J. Lab. & Emp. L. 293 (2007) (addressing leave legislation and suggesting ways to eliminate current gender inequalities within the system); Eric Daniel, *Family & Medical Leave Act Reform: Is Paid Leave the Answer?*, 51 Clev. St. L. Rev. 65 (2004) (addressing the current shortfalls of the FMLA and proposing reform to include paid-leave programs); Nancy Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 Harv. J. on Legis. 335 (1993) (discussing family leave and suggesting ways to improve the system currently in place); Arline Friscia, *Reflections on Legislation: The Worker-Funded Leave Act: The Time Is Now to Help Build Stronger Families with a More Stable Economy*, 26 Seton Hall Legis. J. 73 (2001) (discussing the New Jersey Family Leave Act and the FMLA, as well as proposing additional legislation relating to family leave); Lester, *supra* n. 343 (explaining the benefits of the government paid, family-leave provision); Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 Yale J.L. & Feminism 1 (2002) (making recommendations for the incorporation of comprehensive family policy).

363. To be fair, this statute is likely based on an amalgamation of many different proposals of other scholars.

364. 29 U.S.C. § 2612(a)(1).

grandparents, or siblings.<sup>365</sup> Employees would have to be employed for at least 625 hours in the last six months (compared to the one-year, 1,250 hour provision in the FMLA) in order to qualify for paid leave.<sup>366</sup> Once qualified, they would receive a financial benefit based on a graduated income scale—one-hundred percent of weekly pay if the yearly salary is \$20,000 or less; seventy-five percent pay for income between \$20,000 to \$30,000; fifty-five percent pay for income between \$30,000 to \$60,000; and forty percent pay for income over \$60,000.<sup>367</sup> Many more employees will be entitled to paid leave under this program than were entitled to leave under the FMLA because the Act defines “employer” to include any employer with two or more employees.<sup>368</sup> The effect on small employers is not as devastating as one might think because the Act treats small employers (defined as those with fewer than twenty employees) differently with regard to the financing of the program. Workers who take leave would receive payments from a federal “family leave insurance fund,” funded by employers and employees, who each pay premiums equal to 0.2 percent of each worker’s earnings, except that small employers would pay only a 0.1 percent premium.<sup>369</sup>

The funding mechanism of the proposed Act is fairly consistent with other paid leave proposals. Most scholars seem to agree that it would be unworkable to require employers alone to fund a paid-leave mandate. Not only would it be cost prohibitive for many small employers, but it would also likely lead to special treatment stigma, causing employers to discriminate against women in hiring and promotions because women are more likely to take leaves of absence, making them appear more expensive to employers.<sup>370</sup> On the other hand, justifying publicly supported family leave is also not an easy feat. Critics will argue that the public should not have to pay for the caregiving “choices” made by

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365. H.R. 1723, 111th Cong. at § 103(a)(3). Interestingly, this Act, just like the FMLA, does not include parent-in-laws, presumably with the hope that omitting that protection will force men to take leave to care for their parents rather than passing that obligation on to their wives.

366. H.R. 1723, 111th Cong. at § 101(1)(A).

367. *Id.* at § 103(C)(1).

368. *Id.* at § 101(2)(B).

369. *Id.* at § 306.

370. Ayanna, *supra* n. 362, at 320 (explaining that women will continue to appear more expensive as long as a disparity exists between the time men and women take off).

parents and other caregivers.<sup>371</sup> Of course, the Family Leave Insurance Act would also provide leave for an individual's own serious health conditions (for which the concept of "choice" is usually irrelevant) and for an employee to care for an ill or disabled parent or grandparent (where the concept of "choice" is not completely irrelevant but is also not completely autonomous).<sup>372</sup> But we still need to address the choice criticism when that criticism is directed at parents who often, but not always, do make the choice to have children. This criticism is addressed later, in Part V(C), when I explain how the communitarian theory undermines the criticism that the public should not have to help support the caregiving "choices" of employees.

### B. National Daycare

In order to help caregivers achieve equality in the workplace, they need to have access to reliable, affordable daycare. This need is even more pronounced for lower-income workers. Scholars have proposed various solutions for the daycare deficiency in this country. For instance, Heather Dixon has argued that a national daycare system funded entirely by the government is essential to achieving gender equality in this country.<sup>373</sup> There are several arguments in support of this idea. First, regardless of marital status, there is often an economic need for a mother to work outside of the home.<sup>374</sup> Second, all women, even those without children, are affected by the lack of affordable daycare by way of a "motherhood penalty."<sup>375</sup> The "motherhood penalty" refers to a penalty imposed on women who do not have children "because the image of mothers as unproductive and unreliable workers is projected on all women . . ."<sup>376</sup> Third, gender equality cannot be achieved if daycare is unaffordable because it will prevent women

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371. Porter, *supra* n. 1, at 383.

372. This is so because we do not get to choose our parents. We might have a choice about which sibling is going to take care of a parent, but that choice is often limited by family size and geographical restrictions. *Infra* pt. V(C).

373. Dixon, *supra* n. 43, at 567.

374. *Id.* at 569–572.

375. *Id.* at 574.

376. *Id.*

from holding the types of positions in the workplace that are meaningful to achieving gender equality.<sup>377</sup>

In addition to the policy goal of achieving gender equality, the creation of a national daycare system would benefit children, most notably by providing “an opportunity for all children to develop the skills that will enable them to succeed when they begin school.”<sup>378</sup> Other policy goals of a national daycare system include improving child safety, making basic nutrition and health services available to all children, and reducing child neglect and abuse.<sup>379</sup>

Even if we could agree on the need for consistent, affordable, and reliable daycare, there would still be the issue of how to fund it. In her article, Dixon argues that the costs of the national daycare system must be funded exclusively with public money in order to achieve gender equality and that the national daycare system should be funded by everyone regardless of whether or not they use the program.<sup>380</sup> Dixon compares a system of national daycare to the public school system in that even if a family chooses to send their child to private school, or does not have children at all, these facts do not erase the responsibility of funding the public school system.<sup>381</sup> The argument in support of publicly funding the public school system, which Dixon argues should also apply to national daycare, is that the system benefits society as a whole, and for that reason, all taxpayers should be responsible for the costs.<sup>382</sup> Dixon states that society would benefit from a national daycare system for the following reasons: children would receive benefits from high-quality, reliable daycare; the economy would improve from the increase in worker productivity;

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377. *Id.* at 575–576.

378. *Id.* at 631.

379. *Id.* at 639–641. Some incidental benefits of a national system are job creation, increased workforce productivity, and increased socialization of children at early ages. *Id.* at 644–645. See Jean H. Baker, *Child Care: Will Uncle Sam Provide a Comprehensive Solution for American Families?*, 6 *J. Contemp. Health L. & Policy* 239, 275 (1990) (stating that the goals of having the federal government involved in the child care issue include insuring a safe environment for children and helping women achieve equality within the workplace); see also Barbara Reisman, *The Economics of Child Care: Its Importance in Federal Legislation*, 26 *Harv. J. on Legis.* 221, 474 (1989) (listing improved education, increased productivity, and increased employer and worker satisfaction as some potential benefits of a national child care system).

380. Dixon, *supra* n. 43, at 646.

381. *Id.* at 646–647.

382. *Id.* at 648.

and women could continue to work and receive fringe benefits through their employment, thus improving public health and reducing the public cost of providing such services.<sup>383</sup> In other words, “society as a whole benefits economically when children receive good early child care . . . .”<sup>384</sup>

Not only would the government’s funding of a national day-care system help advance the goals mentioned above, but one scholar has proposed that it would also affect the public’s attitude toward child care.<sup>385</sup> Debbie Kaminer suggests that increased federal funding and regulation of daycare could result in a shift in societal norms whereby the public would begin to view child care as important, and this in turn could provide more support to the mothers who use the child care system to enable them to work.<sup>386</sup> This could help solve the problem of “working mothers today [who] may feel that they are criticized by society for performing as ‘ideal workers’ and for being too ‘career-oriented.’”<sup>387</sup>

On the other side of the debate, there has been much opposition to government funding of child care, whether it be for a national daycare system or another type of child care program. One scholar, who is opposed to the government financing child care, rejects the idea that because the government pays for public school it should also pay for daycare because “daycare is not the same as school.”<sup>388</sup> He proposes that “compulsory” school could start earlier, perhaps at the age of three, but school starting earlier than that would be daycare, which “is a substitute for at-home parental care.”<sup>389</sup> He proposes that a personal allowance be given to every person, regardless of whether they have children, which can be used for child care if the individual so desires.<sup>390</sup> Government funding of child care has also been opposed by Christian conservatives who believe that women should stay at home to take care of their children.<sup>391</sup> Scholars have also advanced eco-

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383. *Id.* at 648–649.

384. Debbie Kaminer, *The Child Care Crisis and the Work-Family Conflict: A Policy Rationale for Federal Legislation*, 28 Berkeley J. Empl. & Lab. L. 495, 513 (2007).

385. *Id.* at 498.

386. *Id.* at 521.

387. *Id.*

388. Edward B. Foley, *Meeting the Basic Needs of Children: Defining Public and Private Responsibilities*, 57 Ohio St. L.J. 485, 507 (1996).

389. *Id.*

390. *Id.* at 508.

391. Kaminer, *supra* n. 384, at 525–526 (describing the Christian conservative move-

conomic arguments against the government funding of daycare programs. One argument is that “tax-payers should not be responsible for financing an individual’s private choice to have children.”<sup>392</sup> Some disfavor government funding and regulation of child care because of “their general opposition to government interference with the market.”<sup>393</sup> Other arguments against federal government involvement in child care include the ideas that “increased federal involvement will impinge on a family’s private choice of a child care provider[,]”<sup>394</sup> the government will be rewarding a mother’s choice to return to work instead of staying home with her children, and a national daycare system would be hard to implement.<sup>395</sup>

One scholar has suggested that a national system of daycare should be kept separate from welfare programs.<sup>396</sup> Under this theory, the quality of provided child care would be equal among the classes and would not operate in such a way as to segregate the poor from the wealthy.<sup>397</sup> This scholar points out that the federal government’s current approach to helping families with child care facilitates segregation of lower-income families from middle- and upper-income families.<sup>398</sup> For example, tax credits are more likely to benefit middle- and upper-income families rather than lower-income families who are less likely to incur tax liability, making them ineligible for the tax credit.<sup>399</sup> The argument is that our goal in implementing a national daycare system should be “child-centered,” not looked at “as a means to either a work-enabling, gender-equalizing, or poverty-combating end . . . .”<sup>400</sup>

I agree with the scholars who believe in the benefits of a publicly funded national daycare system. If we want to end caregiver conundrum for all caregivers, including lower-income caregivers, we must give them the tools necessary to balance work and family. Paid leave and paid sick days will help lower-income workers

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ment’s historical influence on childcare).

392. *Id.* at 530.

393. *Id.*

394. Baker, *supra* n. 379, at 242.

395. *Id.* at 243.

396. Thomas R. Marton, *Child-Centered Child Care: An Argument for a Class Integrated Approach*, 1993 U. Chi. L. Sch. Roundtable 313, 333 (1993).

397. *Id.*

398. *Id.*

399. *Id.* at 329–330.

400. *Id.* at 333–334.

balance work and family. But without adequate, reliable daycare, lower-income workers will continue to find it difficult to be reliable, productive employees.

The key to implementing the system is to help the caregivers who need to work full-time to make ends meet—but have been unable to do so because of inadequate child care—without forcing other caregivers into working full-time if they choose not to. As is discussed more fully below, I disagree with the premise that all women need to work like men, i.e., full-time and overtime, in order to achieve equality.<sup>401</sup> If we are focused on the needs of children and families (and ultimately of society) as the communitarian theory teaches, we should not be fixated on women having to work full-time. If the focus of a national daycare program is getting women to work full-time, we are undervaluing the importance of caregivers' work. As stated earlier, my philosophy is to honor most choices made by caregivers when balancing work and family. This means I support caregivers who need or want to work full-time, and we should support these parents with high quality, affordable, and reliable daycare. Yet I would not support a system where caregivers are forced, or even encouraged, to use daycare because there is value in parents spending more time with their children or having a loving family member care for their children.

Implementing a national daycare system is very complicated, and while I believe that a national daycare system must be part of the eventual reform to end caregiver discrimination, this Article cannot address all of the issues surrounding this reform. But regardless of the details of how such a system might work, the most significant obstacle will be justifying why the public should pay for the choices individuals make to have children.

### C. Communitarian Theory's Justification for Publicly Funded Support for Caregivers

Unlike some of the other proposals in this Article, the proposals in this Part—specifically, the paid leave proposal and the national daycare proposal—advocate for the use of public funds to help caregivers successfully balance work and family. As stated earlier, the main criticism of such proposals is that we should not

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401. *Infra* pt. VI(A).

use public funds to support the “choices” made by caregivers. Here, I will address that issue—the rhetoric of choice.<sup>402</sup>

Caregiving has not been adequately supported and protected in the workplace because many believe that parenting is a freely made choice and thus should be treated accordingly.<sup>403</sup> For instance, Law & Economics’ “rational choice theory” emphasizes the choices parents and other caregivers make.<sup>404</sup> Simply stated, rational choice theory posits that all humans are motivated by self-interest; if a person engages in an action, it must be in his or her self-interest.<sup>405</sup> Accordingly, “[v]iewed through the lens of rational choice theory, women’s cultural caregiving is a mere choice, for which the state owes no support and employers owe no accommodation.”<sup>406</sup> Communitarian theory addresses this rhetoric of choice.

Communitarianism is “a set of ideas centered [on] . . . issues of community, moral education, and shared values.”<sup>407</sup> It rests on the proposition that we have a “mutual responsibility to each other as citizens,” and a stable political community depends on this shared responsibility.<sup>408</sup> Perhaps most importantly for this Article’s purpose, communitarians believe that one of the most important communities to which we belong is our family. Communitarians have very strong views about the importance and role of the family.<sup>409</sup> They believe that we all learn moral values

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402. For a fuller discussion of how the communitarian theory addresses the rhetoric of choice, see generally Porter, *supra* n. 1. This discussion is derived in large part from that prior work.

403. Kessler, *supra* n. 97, at 375 (stating that “the influence of rational choice theory . . . [has] served to construct women’s caregiving as a freely chosen endeavor that is underserving of protection from discrimination within the workplace.”).

404. *Id.* at 441.

405. *Id.*

406. *Id.* at 442.

407. Wendy Brown-Scott, *Changing Images of the State: The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 Harv. L. Rev. 1209, 1210 (1994).

408. *Id.* There are others who believe that personal good is achieved through participation in and contribution to the common good. Stabile, *supra* n. 291, at 434–435. While I am not a Catholic feminist, there is some overlap between Catholic feminism and communitarian theory. Catholic feminists, according to Susan Stabile, believe that everyone is both an autonomous individual and a member of various communities—what matters is how we strike the balance. *Id.* at 438. Of course, Catholic feminists also believe that “absolute equality” is not always the aim because becoming fully human means something different for men than for women. *Id.* at 445–446. While I agree that this is descriptively true, I do not believe it is normatively true.

409. See e.g. Selznick, *supra* n. 287, at 450 (stating that “charity begins at home.”). I believe it is possible to learn from these beliefs even without embracing all of them all of

through the communities to which we belong.<sup>410</sup> Communitarian Etzioni states: “Families and communities are the ground-level generators and preservers of values and ethical systems. No society can remain vital or even survive without a reasonable base of shared values. . . . They are generated chiefly in the family . . . .”<sup>411</sup>

Accordingly, Etzioni believes that parents have a moral responsibility to the community to invest themselves in the proper upbringing of their children.<sup>412</sup> He believes there is a parenting deficit in society today, which he blames on both parents working too much and spending too little time at home.<sup>413</sup> Other scholars agree that when parents spend less time with their children, it has significant effects on the emotional and intellectual development of the children.<sup>414</sup>

Understanding the importance of caregiving—not just for the parents who raise the children, but for the rest of society—helps us understand how a focus on the “choices” parents make is flawed. As communitarian theory teaches us, parenting and other caregiving is not simply a choice—it is a responsibility, and caregivers’ fulfillment of that responsibility benefits everyone.<sup>415</sup> Recognizing this fact provides the response to employers and co-workers who might wonder why they should care about the “choices” parents make—raising children well is not merely a choice; it is a responsibility.

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the time. In other words, I follow the familiar mantra “take what is useful and throw out the rest.” As I address the communitarian platform regarding families, I will also explain where I part company with some communitarian beliefs. When I refer to the communitarian “platform” regarding families, I am referring primarily to the *Responsive Communitarian Platform: Rights & Responsibilities*, in Etzioni, *supra* n. 283, at 251–267. I do not assert that all communitarians would agree with what I describe as the communitarian platform regarding families.

410. Brown-Scott, *supra* n. 407, at 1211 (stating that we have “lost sight of the importance of civic duty and the role of the family, the school, the church, and the community in identifying and inculcating shared moral values.”).

411. Etzioni, *supra* n. 283, at 31.

412. *Id.* at 54. This is true even if people are caring for children who they did not necessarily choose to have. Selznick, *supra* n. 287, at 451 (stating that “[p]arents are responsible for the children they have, not for those they might have liked to have or only for those they chose to have.”).

413. Etzioni, *supra* n. 283, at 55.

414. Befort, *supra* n. 79, at 633.

415. Kaminer, *supra* n. 79, at 316–317 (noting that society benefits from parental choices to raise the next generation).

Similarly, a caregiver's "choice" to tend to the care of an adult family member who is elderly, sick, or disabled is also a responsibility. In many ways, one can view the decision to care for adult family members as even less of a "free choice" than the decision to have children. We do not get to choose our parents, nor do we choose when parents, spouses, or other family members become ill or otherwise need care. Instead, in many cases, there is little choice about who will care for the relative; the only question is how the caregiver will balance his or her caregiving role with his or her job. Even if a caregiver has the financial resources available to have full-time, in-the-home care or to place the relative in a nursing home, there will still be some caregiving responsibilities. Moreover, many individuals do not have the option of having full-time care for a loved one. They cannot afford such care. When we view caregiving as the responsibility it is, rather than as a choice, it is much easier to justify the reform proposals that advocate using public funds to help caregivers fulfill their responsibilities to their loved ones.

#### D. Paid Sick Days

Some of the most troubling stories of work/family conflict involve a caregiver having to make the impossible decision between leaving a child alone and losing his or her job.<sup>416</sup> Employees tell heart-wrenching stories of losing their jobs in these situations. One firing occurred when an employee's child was in a car accident and had to be taken to the emergency room, and another when an employee stayed home with her child who had the flu.<sup>417</sup> The consequences of leaving children unattended can be even worse than losing one's job. In one example, a mother left her one-year-old and nine-year-old children alone because the babysitter did not arrive and her employer had threatened termination if she did not report to work. While she was gone, the children died in a fire.<sup>418</sup> In another case, a toddler who was left

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416. Healthy Families Act, Sen. 910, 110th Cong. § 2(9) (Mar. 15, 2007) (as introduced).

417. 9to5, National Association of Working Women, *10 Things That Could Happen to You if You Didn't Have Paid Sick Days: And the Best Way to Make Sure They Never Happen to Anyone* 4, 7 (available at <http://1000voicesarchive.org/resource/228/10things.pdf>).

418. Nina Bernstein, *Daily Choice Turned Deadly: Children left on Their Own*, N.Y. Times 1 (Oct. 19, 2003).

alone fell from a balcony and died.<sup>419</sup> Caregivers should not be forced to choose between their jobs and taking care of their minor children. It is precisely this type of neglect (leaving children unattended) that can lead to serious consequences—not just for the child and his or her family—but for all of society.<sup>420</sup> Because the consequences of leaving children unattended are so serious, parents should not be forced to make a decision between the welfare of their children and financial security.<sup>421</sup> When parents lose their jobs, it negatively affects the children who may grow up in poverty and who are more likely to suffer from abuse at the hands of their distraught parents.<sup>422</sup>

Similarly, there are other (albeit less significant) benefits to providing leave to caregivers for routine illnesses and appointments beyond what is covered under the FMLA. First, it is in society's best interest for parents to take care of their children's health.<sup>423</sup> Even routine health check-ups benefit society by providing necessary immunizations, detecting health issues, and treating health problems before they become bigger health issues that might take up more of the employee's time and healthcare resources.<sup>424</sup> Second, society benefits when sick and contagious children stay home rather than go to daycare and school, where they can infect other children.<sup>425</sup> Third, employers might benefit from providing leave for these more routine absences. As the law currently stands, employees have an incentive to make minor illnesses seem like a serious health condition so as to trigger FMLA

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419. *Id.*

420. Sen. 910, 110th Cong. at §§ 2(5)–2(8) (stating that paid sick leave will “help businesses by promoting productivity and reducing employee turnover.” “[P]resenteeism—the practice of employees coming to work despite illness—costs \$180,000,000,000 annually in lost productivity.” *Id.* at § 2(8)).

421. The Healthy Families Act makes a similar point. *See* Sen. 910, 110th Cong. at §2(9) (stating that “[t]he absence of paid sick days has forced Americans to make untenable choices between needed income and jobs on the one hand and caring for their own and their family's health on the other.”).

422. Gershuny, *supra* n. 37, at 198–199 (pointing out that “[n]early one-fourth of children in this nation live in poverty.”); *see id.* at 213–214 (noting that as a parent's income plummets, the parent is more likely to degrade and abuse the children).

423. Sen. 910, 110th Cong. at § 2(15) (noting the national interest in ensuring that workers can prosper at work while maintaining their health and the health of their families).

424. *Id.* at § 2(4).

425. *Id.* at § 2(5).

protection.<sup>426</sup> The FMLA regulations define a serious health condition to include an illness that lasts for more than two days and that requires the continuing care of a physician, which is often interpreted as requiring one or two appointments with the doctor.<sup>427</sup> Because of these requirements, an employee has an incentive to have his or her child stay out longer than is necessary and to waste medical resources in situations where the child's condition might not require repeated visits to the doctor.<sup>428</sup> Accordingly, employers might benefit if these absences for routine appointments and illnesses were protected because employees might be more likely to return to work sooner, rather than making shorter leaves of absence last longer to trigger coverage under the FMLA.

Accordingly, I propose we adopt the Healthy Families Act (proposed in the Senate in 2007), which would require employers to provide seven days of paid, job-protected leave.<sup>429</sup> The Healthy Families Act recognizes that employees need time to meet their own healthcare needs and time to care for family members.<sup>430</sup> Under the Healthy Families Act, an employer is required to allow seven days of paid leave for an absence resulting from illness or injury, obtaining medical diagnosis or care, procuring preventative medical care for the employee,<sup>431</sup> or for an "absence for the purpose of caring for a child, a parent, a spouse, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship"<sup>432</sup> who is ill or in need of medical diagnosis or care.<sup>433</sup> The statute requires that an employee make a reasonable effort to schedule leave for routine medical needs "in a manner that does not unduly disrupt the operations of the employer."<sup>434</sup> The statute has detailed provisions regarding the obligations of employers and

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426. Porter, *supra* n. 1, at 378 (explaining that only serious health conditions, as opposed to minor illnesses, are covered under the FMLA).

427. 29 U.S.C. § 2612(a)(1)(C); 29 C.F.R. § 825.115 (2009).

428. Gershuny, *supra* n. 37, at 203–204; *see also* 29 U.S.C. § 2611(11) (defining "serious health condition").

429. Sen. 910, 110th Cong. § 5(a)(1).

430. *Id.* at § 2(1).

431. *Id.* at § 5(d)(1)–(2).

432. *Id.* at § 5(d)(3).

433. *Id.* at § 5(d)(3)(A)–(B).

434. *Id.* at § 5(e).

employees and enforcement procedures, which need not be discussed here.

I agree with most of the statute's provisions; however, the statute lacks a provision to allow an employee to miss work when they have no responsible person with whom to leave a child under the age of twelve,<sup>435</sup> despite having made reasonable efforts to find such a responsible person. The Healthy Families Act would protect an employee who needs to be home with a sick child, but it does not cover emergency situations such as when an in-home babysitter or nanny becomes too ill to care for the child or otherwise fails to show up for work, or when the child's school or daycare is unexpectedly closed. Because parents should not be forced to choose between neglecting their children or losing their job, these absences should also be covered. There will likely be a dispute regarding what constitutes reasonable efforts to find alternative care arrangements, as well as who is a responsible person, but those details are better left for another day.

## VI. RESPONSE TO THE CRITICS

I anticipate that critics of my proposal will fall into two main camps: (1) those who disagree with some of my solutions because they see them as merely perpetuating a gendered family life and workforce rather than attempting to change gender norms; and (2) those who think my proposal is either too costly for employers or that it places too much of a burden on co-employees. This Part will discuss each of these criticisms in turn.

### A. Why Not Try to Change Gender Norms?

One of the biggest debates among scholars in this area is whether to focus on measures aimed at obtaining more equality for women in the workplace or on those aimed to give women more flexibility so that they can better meet their parenting and other caregiving obligations.<sup>436</sup> The reform effort outlined in this Article should achieve both goals—increasing women's equality in the workplace and giving women more flexibility. For example,

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435. Undoubtedly, this age limit could be debated, but this issue can be resolved or negotiated by policy makers.

436. Porter, *supra* n. 1, at 391–398 (detailing the opposing positions).

the workplace flexibility I propose is aimed at helping women achieve flexibility in the workplace without being terminated or marginalized.<sup>437</sup> Measures such as implementing a national day-care system aim to help women work more, providing them with more equality in the workplace.<sup>438</sup>

I am certain that many scholars would criticize my efforts aimed at giving women more flexibility, especially my proposal regarding part-time work, because those measures do nothing to change gender norms. For instance, Vicki Schultz, in her influential essay *Life's Work*, argues that paid work is important for all adults,<sup>439</sup> and we therefore should “adopt strategies that promote gender integration across both paid and unpaid work in order to improve the lives of [everyone.]”<sup>440</sup> She believes that unpaid leave, part-time jobs, or “special accommodations” that help caregivers balance work and family stigmatize the users and only work to further entrench patterns of gender segregation.<sup>441</sup> Schultz believes that we need to do a better job of spreading household and caregiving work between the sexes.<sup>442</sup> She states that women end up doing more work in the home because women are often in low-paying and low-status positions, which reduces their ability to obtain more equality at home.<sup>443</sup> She argues that the problem is that women lack the bargaining power to get men to be more egalitarian in the house and that women working (versus not working) will give them more bargaining power.<sup>444</sup>

Schultz also argues that working is beneficial for women and discusses research indicating that most people are happiest when they combine work and family.<sup>445</sup> She states that juggling work

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437. *Supra* pt. III(B) (discussing the Workplace Flexibility Act).

438. *Supra* pt. V(B) (discussing national daycare).

439. Schultz, *supra* n. 97, at 1883 (stating that employment is important because it “provides us with the wherewithal to sustain ourselves, economically and socially, so that we may enter into intimate relationships with the security that permits us to love (and leave) freely, without need of recompense.”).

440. *Id.* at 1884.

441. *Id.* at 1936–1937.

442. *Id.* at 1900 (stating that we need to “acknowledge the hidden labor that is performed in households, and . . . create society-wide mechanisms for allocating its costs rather than continuing to impose them” on women only).

443. *Id.* at 1896.

444. *Id.* at 1905–1906.

445. *Id.* at 1910; *see also* Babcock & Laschever, *supra* n. 342, at 182 (discussing studies indicating that “paid employment is associated with reduced depression among . . . husbands and wives.”).

and family does not just create hardships—it also has many rewards, including the security that one gets by having economic equality.<sup>446</sup> She states that “in a market economy, people who are paid for what they do receive more respect from others, have more bargaining power in their relationships, and have a stronger sense of their value and place in the world than those who are not paid.”<sup>447</sup>

One of her solutions suggests reducing the workweek for all workers—to design all jobs to look like those that caregivers would need.<sup>448</sup> She claims that the history of the family-wage thinking has created a world where women are still struggling for low-paying, temporary, or part-time positions that do not provide a living wage or benefits.<sup>449</sup> Instead, she envisions a set of rights that build upon her “fundamental premise that every adult citizen is entitled to safe employment that pays her or him a living wage, and to the basic societal support necessary to pursue such employment.”<sup>450</sup> She thinks we should abandon part-time work and instead redefine normal working hours to allow all men and women to “work at a livable pace.”<sup>451</sup> Schultz states,

Instead of seeing the family as the primary sphere of importance and identity (at least for women), and advocating that work be shrunk or made more flexible so that preconceived family roles can be fulfilled, we should recognize the fluidity of experience and consciousness that occurs across these and other realms. Work is not inherently in conflict with family or civic life. In fact, working can make us better parents and citizens by expanding the knowledge and experience we bring to those roles.<sup>452</sup>

I agree with Schultz’s vision of “men as committed caregivers and women as authentic workers.”<sup>453</sup> But I disagree with the feasibility of her ideas. First, I do not believe that women working more will create egalitarian relationships between men and

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446. Schultz, *supra* n. 97, at 1911.

447. *Id.* at 1945.

448. *Id.* at 1917.

449. *Id.* at 1918.

450. *Id.* at 1940.

451. *Id.* at 1956.

452. *Id.* at 1959–1960.

453. *Id.* at 1917.

women when it comes to household work and childcare responsibilities. In psychologist Virginia Valian's book *Why So Slow? The Advancement of Women*,<sup>454</sup> she explains why the gender norms surrounding household labor are so hard to change.<sup>455</sup> Valian claims that almost all heterosexual couples live with grossly inadequate divisions of labor.<sup>456</sup> This is true even when women work the same number of hours as men and regardless of how much money women make.<sup>457</sup> Yet, despite this inequality, women feel guilty about not doing enough and fail to recognize the inequity as being unfair.<sup>458</sup> Valian states, "[m]en and women are in basic agreement: women should do most of the household work."<sup>459</sup> Valian attributes this inequality to the fact that women are socialized to see house labor as a responsibility that is performed with love and pleasure and that one should not be talking about equity when discussing a "labor of love."<sup>460</sup> Valian also claims that because of our biological roles with women as the first nurturers of children, we would recreate the gender norms and sexual division of labor even if we wiped the slate clean and started from scratch.<sup>461</sup>

Second, I doubt that legislation reducing the workweek would ever be enacted. Finally, even if we did reduce the workweek, I do not think that men would automatically become more committed caregivers. I suspect that decreased work hours would hurt companies, allow women to stay the same in terms of their overall hours worked inside and outside the home (since many women currently are not working full-time or overtime), and would ulti-

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454. Virginia Valian, *Why So Slow? The Advancement of Women* 39 (The MIT Press, 1999).

455. *Id.*

456. *Id.* (claiming that women who work perform thirty-three hours (or two-thirds) of the housework, and men work an average of fourteen to eighteen hours).

457. *Id.* at 41. Valian alleges that a man's proportion of work becomes higher as his wife earns more money, but this fact appears to be related to her doing less (and hiring out more) rather than him working more hours. *Id.* at 42.

458. *Id.* at 39.

459. *Id.* at 40.

460. *Id.* at 43.

461. *Id.* at 118. But even though Valian believes that gender norms are difficult to change, she is also critical of the positions taken by many who assume that work/life balance is just a female problem. She states that "we do not ask why combining work and family is a female problem rather than a human problem, and thus [we] do not address it as a human problem." *Id.* at 45.

mately benefit men who would work fewer hours at the workplace without significantly increasing their working hours at home.<sup>462</sup>

Other scholars have made arguments for reform that is focused on equalizing the sexes in the workplace and thereby changing the gender norms in the home. For instance, some argue that we should encourage, incentivize, or even mandate that men take leaves of absence for childbirth or other caregiving requirements.<sup>463</sup> The arguments made in favor of requiring or incentivizing men to take leaves of absence are two-fold. First, if men take leaves of absence with the same frequency as women, employers will no longer discriminate against women, who are currently viewed by employers as the majority of leave-takers.<sup>464</sup> Second, forcing men to take leaves of absence will change the gender norms between men and women and will give women more bargaining power in the relationship.<sup>465</sup> Of course, there is a third benefit of men taking more leave—the benefit to children.<sup>466</sup>

The goal of changing gender norms is laudable but strikes me as both unrealistic and unnecessary.<sup>467</sup> The idea that we can change gender norms and have men perform more of the household labor is unrealistic because these norms are firmly entrenched in our society from a very young age.<sup>468</sup> As previously discussed, even if we wiped the slate clean, we would likely recreate gender schemes and the division of labor simply based on the primacy of childbirth and nursing. These biological differences that force women into a nurturing role would be seen as real

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462. Perhaps even more jocularly cynical, it is possible that the true beneficiaries of a reduced workweek would be golf courses, bars, and the video-gaming industry.

463. See e.g. Ayanna, *supra* n. 362, at 293 (arguing that in order to equalize gender in the workplace, men should be required to take leaves of absence at an equal level as women; the way to do this is to appeal to men's pocketbooks by paying them to take leaves of absence).

464. *Id.* at 297.

465. *Id.* at 295, 305.

466. For some, the benefit to children would be the primary reason for supporting measures that would get men to take more leave—not the equalization of the sexes. Stabile, *supra* n. 291, at 460.

467. Certainly, I would be thrilled to see a change in the gender norms. Studies show that women have much higher levels of stress because of their additional obligations at home. Babcock & Laschever, *supra* n. 342, at 181 (discussing a study where male managers' stress levels dropped dramatically at 5:00 p.m., while female managers' stress levels increased at 5:00 p.m. as they transitioned into their second shifts as mothers).

468. See Valian, *supra* n. 454, at 38 (describing how even different rituals of play for boys and girls inculcates children with cultural norms).

gender differences, with women being seen as more nurturing.<sup>469</sup> It is also unreasonable to think that men will “suddenly develop a taste for house and childcare.”<sup>470</sup>

I also believe that changing gender norms is unnecessary to achieving equality for women, and all caregivers, in the workplace. By arguing that men need to do more caregiving in order for it to be valued, we are conceding a major argument—that caregiving is not valued because it is done by women.<sup>471</sup> As stated by Kathryn Abrams, there is an elaborate set of norms that devalues the choices and behaviors of women.<sup>472</sup> “Difference is generated . . . when those who have the power to select the instruments of measurement judge others by their own norms. . . . In a society constituted by male norms, anything female is not only distinguished, but also devalued.”<sup>473</sup> We are also succumbing to the idea that men should be the norm and that women are judged only in reference to their similarity to men. In other words, only when women are seen by employers to be more like men will they achieve equality.<sup>474</sup> Any difference is seen as inferiority. It has never been clear to me why men have to do something for it to be valued or why women performing a task takes away the task’s value.<sup>475</sup> Other scholars share the view that we need to value the behaviors and experiences of women but not by making men and women more alike. Rather, we need to challenge male norms by introducing female perspectives.<sup>476</sup> Abrams

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469. *Id.* at 118.

470. Travis, *Virtual Workplace*, *supra* n. 14, at 312 (quoting Karen Gunter, *Women and the Information Revolution: Washed Ashore by the Third Wave*, in *Women, Work and Computerization: Breaking Old Boundaries—Building New Forms*, 333, 445 (Alison Adams et al., eds., Elsevier 1994)).

471. Similarly, Catholic feminist Susan Stabile points to the “value of a woman’s maternal and family role.” Stabile, *supra* n. 291, at 448. Of course, Stabile also believes that a woman’s relationship with her children is, and normatively should be, qualitatively different from a man’s relationship with his children. *Id.* While I believe this to be true as a descriptive matter (because of the way we are socialized), I do not believe that we need to accept this difference, normatively. I certainly do not subscribe to the idea that we should force or even encourage women to be the primary caretakers of children.

472. Abrams, *supra* n. 16, at 1185.

473. *Id.* at 1189.

474. *Id.* (stating that men and women are not similar because “male control of the workplace has permitted male norms to prevail.”)

475. See Stabile, *supra* n. 291, at 450 (stating that “the centrality of the place of women in family does not lessen the value of [their] participation in the workplace.”)

476. Abrams, *supra* n. 16, at 1192 (suggesting an integrated approach that transforms male norms by introducing female perspectives).

argues that we need to recognize socially created gender differences and that there is value in crediting women with advantageous qualities.<sup>477</sup> She cautions that “highlighting difference[s] [between men and women] is a strategy for change, not a reason for acquiescence in the status quo.”<sup>478</sup> Furthermore, recognizing gender differences is not a strategy for retreating from the workplace but for transforming it.<sup>479</sup> As previously discussed, there is significant value in caregiving, and we should value that role even if it remains true that it is mostly women who fill that role.

### B. Too Costly for Employers

Another criticism to this reform is that it will put too much financial burden on employers. Even though employers would not be at a competitive disadvantage with other American employers (because they would all be subject to the same laws), there is a concern that additional employer mandates will put American companies at a competitive disadvantage in the global marketplace or that small businesses will be unable to afford any of the needed reform.

It is true that any employer mandate might cost employers money. But many of the needed reforms are relatively inexpensive and, to the extent they cost money, that cost is often offset by increased employee morale, loyalty, and retention.<sup>480</sup> Some of the reforms that would be relatively inexpensive and even result in a net gain to employers (when considering decreased attrition) are measures like flex-time, work from home arrangements, job sharing, and the process law, which requires employers to engage in an interactive process regarding requests for workplace flexibility.<sup>481</sup> Recall that my proposal does not mandate a certain level

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477. *Id.* at 1193.

478. *Id.* at 1194.

479. *Id.* at 1195.

480. See Travis, *Recapturing*, *supra* n. 11, at 89–90 (stating that in some cases, a less exclusionary practice can produce positive results on recruiting, retention, absenteeism, and productivity, and therefore, cost concerns are misplaced because redesigning workplace norms is more rational).

481. *Supra* pt. III(B) (discussing the Workplace Flexibility Act); see also Travis, *Recapturing*, *supra* n. 11, at 89–90 (discussing the positive economic results of accepting a less exclusionary workplace policy).

of flexibility benefits—it only requires a process law—and employers get tax credits for offering flexibility benefits, which will help offset any costs of providing these benefits.

Some of the reform measures will impose some costs on employers that might not be offset by decreased attrition, but the measures are not likely to be cost prohibitive. I am referring here, for example, to the requirement of providing seven days of paid leave. This obviously costs money but should not be cost-prohibitive. I would also place the Part-Time Parity Act in this category. To be sure, some employers have been exploiting part-time employees for a long time, and these employers will be forced to change their workplace practices significantly. But for most honest employers, the increased costs of paying proportional wages and benefits to part-time employees should be manageable.<sup>482</sup>

Most importantly, however, the measures that would likely be considered expensive, such as paid leave or national daycare, would have to be subsidized and supported by the public. Because all of society benefits from the caregiving tasks performed by working caregivers, the public should be involved in supporting this socially desirable behavior.

### C. Too Much Burden on Co-Workers

Finally, some might argue that remedying the caregiver conundrum would put an undue burden on other employees. To that criticism, I have a few responses. First, the idea of reform is not to force co-employees to take on the work of the caregiving employees.<sup>483</sup> Part of the reform encourages or incentivizes employers to offer more flexibility to caregiving employees, but that does not mean employees that obtain such flexibility do not

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482. See Travis, *Recapturing*, *supra* n. 11, at 89 (stating that even in cases where a less exclusionary practice would impose some costs on the employer, these concerns are “misplaced if the short-term costs are offset by [the] long-term gains from restructuring to . . . a larger labor pool.”). Even if there is no long-term gain from restructuring, Travis correctly points out that courts and Congress have recognized that “employers must bear some expense to create equal employment opportunities.” *Id.* at 90. See also Taub, *supra* n. 27, at 950 (stating that “[t]he necessary commitment [to equality] must include a willingness to incur and impose the sometimes substantial costs of eliminating the male tilt.”).

483. Kaminer, *supra* n. 97, at 362 (stating that employers should not be as concerned about complaints by co-workers; they should be concerned about actual burdens being placed on co-workers).

have to meet legitimate performance requirements. The whole premise of family-friendly workplace policies that provide financial benefits is that they can be implemented without negative consequences to the productivity of the workplace. Furthermore, even if employers are meeting some of the needs of caregiving employees, it is unlikely that employers would naturally place extra burdens on co-workers. Analogously, there seems to be a reluctance to do so in the disability context. For instance, employers are reluctant to infringe on another employee's seniority rights by reassigning an employee with a disability instead of the more senior, non-disabled employee.<sup>484</sup> To safeguard against this possibility (no matter how remote), any law reform that would give benefits to caregivers should include a provision that can be analogized to the proviso in the EPA that forbids an employer from complying with the EPA by lowering wages of men.<sup>485</sup> Here, employers should be forbidden from complying with legal requirements or voluntarily giving flexibility benefits to caregivers by forcing co-workers to pick up the slack. For instance, employers should not be able to force a non-caregiving employee to work more hours because a caregiving employee is allowed to leave early for caregiving reasons. One way to keep employers from working some employees too much to compensate for the employees who are working reduced hours is to require employers to pay proportional benefits that vary with the number of hours worked. This would obviously help part-time employees, but it would also help eliminate an employer's tendency to force employees to work overtime because they would have to pay increased benefits to those employees.<sup>486</sup>

## VII. CONCLUSION

I recognize that this synergy of solutions requires a significant change in attitude—by employers, co-employees, and society

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484. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002).

485. 29 U.S.C. at § 206(d)(1).

486. Schultz, *supra* n. 97, at 1956. One piece of pending legislation has a provision similar to the one I am proposing here. The Healthy Families Act, discussed earlier, states that “[a]n employer may not eliminate, reduce, or redesignate any leave in existence on the date of enactment of [the Healthy Families Act] . . . .” Sen. 910, 110th Cong. at § 5(g)(2). While not completely equivalent, this provision keeps an employer from “punishing” employees in light of additional legislative mandates.

(including the government). I am not naïve enough to believe that this change in heart will happen immediately or easily. But proposing and justifying comprehensive reform is an important first step. As others have noted, the challenge will be to create programs that will help re-educate employers and other employees so we can end the devaluation of family-friendly work alternatives.<sup>487</sup>

Ultimately, any legal reform similar to that proposed here should be accompanied by a very good public relations campaign targeted towards working Americans to emphasize the importance of giving parents the tools they need to balance work and family successfully.<sup>488</sup> We need to emphasize that “the well-being of children is . . . economically in the best interest of society at large.”<sup>489</sup> Many believe that this type of public relations campaign was missing when the ADA was passed, creating a situation where there was overwhelming support in Congress but no support from the public or the judges who would be interpreting the ADA.<sup>490</sup>

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487. Abrams, *supra* n. 16, at 1243 (emphasizing that programs without a shift in normative attitude is not enough).

488. See Schultz, *supra* n. 97, at 1941 (suggesting that any expansive reform will be difficult and will require “expansive new politics to mobilize popular support strong enough to overcome many concentrated interests.”); see also Ayanna, *supra* n. 362, at 321 (arguing that we could get support for charging the public for paid leaves of absence if we “promoted [it] as a policy to safeguard the welfare of children.”). In some ways, this issue resembles the environmental issue. For a long time, the reaction to environmental advocacy was one of apathy. People failed to make changes when there was no immediate benefit to making those changes. Furthermore, there was a sense that one’s actions would not make that much of a difference. Recently, however, the public has come together (to some extent) to support green efforts. Society is now willing to make changes, recognizing that the changes are necessary to make the world a better place for future generations. Similarly, helping parents raise their children well will make the world a better place in the future. Advocates for my proposal simply need to convince employers and employees that supporting parents now is important for our future.

489. Ayanna, *supra* n. 362, at 323.

490. Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation under the Americans with Disabilities Act*, 55 Ala. L. Rev. 951, 989–990 (2004). For a discussion of the failure of the ADA, see Colker, *supra* n. 168, at 96–125 (concluding that “ADA Title I is not being fairly administered by the judiciary throughout the fifty states.”); Diller, *supra* n. 168, at 64–65 (commenting on a perceived judicial backlash aimed at the ADA); Kreiger, *supra* n. 168, at 5–19 (suggesting that the judicial backlash against the ADA can be understood by examining the relationship between formal legal rules and informal social norms); Mezey, *supra* n. 168, at 44–46 (noting that scholars and advocates consider the Supreme Court as primarily responsible for the restricted implementation of the ADA).

Accordingly, we need a vigorous public discourse regarding the problems caused by the caregiver conundrum—to caregivers, their families, employers, and society. We need to convince the public that the caregiver conundrum is a serious problem in our society and in need of a serious solution. This Article has argued that such a solution needs to be broad and comprehensive. More importantly, the various parts of reform must work together, creating a synergy of solutions that will allow us to cure the caregiver conundrum for all employees, without the stigma of special treatment and without leaving large classes of working caregivers unprotected. The communitarian theory justifies such comprehensive reform. Hopefully, this Article demonstrates that such a synergistic solution is not only justifiable but possible.