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## Caregiver Conundrum Redux: The Entrenchment of Structural Norms

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## Caregiver Conundrum Redux: The Entrenchment of Structural Norms

# CAREGIVER CONUNDRUM REDUX: THE ENTRENCHMENT OF STRUCTURAL NORMS

NICOLE BUONOCORE PORTER<sup>†</sup>

## ABSTRACT

Scholars and feminists (and feminist scholars) have been debating ways to ameliorate the work-family conflict for several decades. For some of us writing in this area, it seems as if the debate is endless and ineradicable. Unfortunately, this Article does not end the debate with some brilliant solution. Instead, I attempt to explain why the “caregiver conundrum” is so unwieldy and unyielding. The reason, I argue, is because of the entrenchment of structural norms in the workplace. By structural norms, I am referring to employers’ rules and practices regarding hours, shifts, schedules, attendance, leaves of absence, etc.—basically, when and where the work is performed. In this Article, I argue that employers are very reluctant to make modifications to the structural norms of their workplace and courts are loath to force them to do so. Because many individuals with disabilities ask for modifications to the structural norms pursuant to the Americans with Disabilities Act, I use this body of law to demonstrate the entrenchment of these norms. And because these norms are so entrenched, I explain how proposed solutions, both litigation- and legislation-focused, will ultimately fail. Instead of the many solutions that have been proposed thus far, the only way to truly solve the caregiver conundrum is to dismantle the entrenchment of the structural norms.

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## INTRODUCTION

The debate regarding how to ameliorate work-family conflict (also known as caregiver discrimination, the “maternal wall,”<sup>1</sup> “family responsibilities discrimination,”<sup>2</sup> or my term, the “caregiver conundrum”<sup>3</sup>) has been raging for several decades, since at least the debate leading up to the passage of the Pregnancy Discrimination Act (PDA) in 1978.<sup>4</sup> Although not as old as the old-fashioned kind of sex discrimination (simply excluding women from workplaces),<sup>5</sup> the debate over eliminating caregiver discrimination is arguably more prevalent than discussion and debate about other types of sex discrimination under Title VII of the Civil Rights Act of 1964.<sup>6</sup>

Although (or maybe because) I have written several articles in this area,<sup>7</sup> I struggled with what more I, or anyone else, could say regarding this intractable problem. Always reform-oriented, I set out to determine

1. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 69–70 (2000).

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

3. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KAN. L. REV. 355, 356 (2010) [hereinafter Porter, *Why Care?*].

4. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012).

5. Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 260 (2013) (“Initially, women . . . attacked the most obvious forms of discrimination at work such as sex-based job classifications or harassment”). Family responsibilities discrimination is often referred to as a second-generation discrimination theory. *Id.*

6. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 4 (2010) (stating that work-family conflict is a media obsession); Williams & Bornstein, *supra* note 2, at 172 (stating that there has been a 400% increase in family responsibilities cases filed in the last ten years as compared to the prior ten-year period).

7. Nicole Buonocore Porter, *Embracing Caregiving and Respecting Choice: An Essay on the Debate over Changing Gender Norms*, 41 SW. U. L. REV. 1 (2011) [hereinafter Porter, *Embracing Caregiving*]; Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the “Maternal Wall” in the Legal Workplace*, 13 DUKE J. GENDER L. & POL’Y 55 (2006); Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for “Real” Workers*, 39 STETSON L. REV. 777 (2010) [hereinafter Porter, *Synergistic Solutions*]; Porter, *Why Care?*, *supra* note 3.

whether I have missed or should revisit some compelling solution. I came up empty-handed. As I reflected on *why* I was so pessimistic—why I believed every solution would fail—I realized that the inevitable failure of each solution had one thing in common: The entrenchment of structural norms in the workplace.<sup>8</sup>

This Article will proceed in three parts. Part I will briefly describe the caregiver conundrum and how it manifests itself in the lives of working men and women. Part II will provide a summary of the various solutions that have been proposed over the years, along with the accompanying criticism of those proposals. Part III will discuss the entrenchment of the structural norms of the workplace, using jurisprudence under the Americans with Disabilities Act (ADA)<sup>9</sup> to demonstrate the bias against modifications to the structural norms. This Part will also explain why, in light of the entrenchment of these practices, many of the proposed reforms would be unsuccessful. Finally, this Part will briefly discuss the only type of reform that might be successful in ending the caregiver conundrum—attacking the structural norms directly.<sup>10</sup>

### I. THE CAREGIVER CONUNDRUM

What is the caregiver conundrum? This is the term I use to describe caregiver discrimination or family responsibilities discrimination, as it is often called. I use the word “conundrum” to reflect the puzzle that is inherent in solving this problem. I define the term broadly to include all of the workplace norms, rules, and practices that make it difficult for working caregivers to successfully balance work and family.<sup>11</sup>

My focus has always been on what I refer to as “real”<sup>12</sup> workers—those who do not consistently meet their employers’ expectations regarding the hours and schedules worked because of their caregiving responsibilities.<sup>13</sup> As other scholars have also noted, long hours and inflexible workplaces make it difficult for many caregivers to successfully balance work and family.<sup>14</sup> Of course, I also recognize that caregivers (both men and women) who *are* ideal workers still suffer from discrimination based on stereotypes that assume that caregivers are not competent or commit-

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8. For an excellent discussion of the entrenchment of structural norms in the workplace, see CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE* (2010).

9. 42 U.S.C. §§ 12101–12213 (2006).

10. See also Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 5 (2005).

11. Porter, *Synergistic Solutions*, *supra* note 7, at 777.

12. Porter, *Why Care?*, *supra* note 3, at 357.

13. For a detailed description of the difficulties of caregiving, see Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 380 (2001).

14. See, e.g., Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 307 (2004).

ted. However, Title VII's sex discrimination provision adequately covers this type of discrimination through use of the stereotyping theory.<sup>15</sup>

The caregiver conundrum affects both women and men.<sup>16</sup> Because women still perform eighty percent of the child-care duties,<sup>17</sup> it is difficult for them to successfully balance work and family.<sup>18</sup> As stated by Michelle Travis, most workplaces are designed around the "full-time face-time norm" of long hours, unlimited overtime, and uninterrupted careers.<sup>19</sup> Thus, women's caregiving obligations affect their pay<sup>20</sup> and their opportunities for promotion.<sup>21</sup> Many women try to balance work and family by finding family-friendly workplace alternatives, although most of these workplaces lead to the marginalization of women's careers.<sup>22</sup>

15. See generally 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 (discussing some successful cases brought by caregivers who are discriminated against on the job); Williams & Bornstein, *supra* note 2, at 174–81 (discussing the stereotyping cases).

16. Kaminer, *supra* note 14, at 317–18 (discussing the harm to men of the ideal worker model). Interestingly, one study found that 90% of Americans favor tax incentives for employers to help them provide flexible workplaces. *Id.* at 311.

17. Williams & Bornstein, *supra* note 2, at 174. Of course, statistics vary, although only slightly. Travis states that American women perform two-thirds of housework and eighty percent of all child-care. Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 299 (2003). Keith Cunningham-Parmeter states that women do eighty percent of the child-care and seventy percent of the household work. Cunningham-Parmeter, *supra* note 5, at 255.

18. See, e.g., Steven I. Locke, *Family Responsibilities Discrimination and the New York City Model: A Map for Future Legislation*, 51 S. TEX. L. REV. 19, 22 (2009) (stating that 59% of caregivers have had difficulty balancing work and family and 57% of that number have had to take time off for caregiving).

19. Travis, *supra* note 10, at 10 (internal quotation marks omitted). Travis also argues that this norm has become not just descriptive of most workplaces but also normative—this is how good workplaces are designed. *Id.* A good example of this norm of hard work becoming entrenched is this quote from a senior manager reacting to a junior manager who reported a survey showing that employees wanted a more balanced work life:

Don't ever bring up "balance" again! . . . Everyone in this company has to work hard. We work hard. They have to work hard. That's the way it is. Just because a few women are concerned about balance doesn't mean we change the rules. If they choose this career, they're going to have to pay for it in hours, like the rest of us.

*Id.* at 19.

20. Cunningham-Parmeter, *supra* note 5, at 255 (stating that mothers earn 60% of the wages of fathers); Suk, *supra* note 6, at 59 (stating that there is a larger pay gap between men and women in the United States than in other countries where women have better paid maternity benefits).

21. Nicole Buonocore Porter, *The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women*, 8 FIU L. REV. 447, 460–61 (2013); see also Kaminer, *supra* note 14, at 313 (stating that mothers make career sacrifices to satisfy their caregiving responsibilities and caregiving affects their pay); Kessler, *supra* note 13, at 385–86 (stating that women are more likely to work in part-time or "mommy-track[ed]" jobs).

22. For instance, Michelle Travis discusses how telecommuting, which is frequently lauded as a family-friendly workplace benefit, often ends up hurting women because employers use telecommuting to pay women less or move them to independent contractor status, which takes away their benefits. Travis, *supra* note 17, at 296–302. Telecommuting also does not ease women's burden at home, as they often end up doing more homework when telecommuting. *Id.* at 312–14. Meanwhile, men who telecommute do less work at home and more market work. *Id.* at 313–14.

Scholars have emphasized the importance and self-fulfillment of working.<sup>23</sup> Some women, however, end up opting out of the workplace completely because of the difficulty in balancing work and family. When women opt out of the workplace, the negative effect is not limited to women and their families, but it also affects employers and society as companies lose valuable employees and diverse leadership.<sup>24</sup> Even more, allowing women to combine caregiving and work benefits children.<sup>25</sup>

Men also suffer from the caregiver conundrum, although differently from women.<sup>26</sup> According to Keith Cunningham-Parmeter, one of the new voices in the literature discussing men as caregivers, masculinities theory requires three negative performances of working men: non-nurturance, non-dependence, and non-expression.<sup>27</sup> This means they must avoid care work; establish themselves as breadwinners;<sup>28</sup> and remain silent regarding work-family conflicts.<sup>29</sup> Men are often discouraged from taking leave by their employers.<sup>30</sup> Even when they try to get involved in caregiving work, women often act as gatekeepers, supervising men in their care of the house and children, which can make men less willing to want to be caregivers.<sup>31</sup> Cunningham-Parmeter states that fathers in dual-earner couples are more likely to report work-life conflict than mothers.<sup>32</sup> And when their work and family conflict, men are more likely to silently accept workplace discipline rather than violate the “male code” by talking about their caregiving obligations.<sup>33</sup> Although

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23. See, e.g., Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CALIF. L. REV. 1285, 1306–07 (2005); Kaminer, *supra* note 14, at 314–16 (discussing the mental and economic benefits to women working); Kessler, *supra* note 13, at 381–84 (discussing the benefits of wage work for women and stating that women need to work to achieve economic stability); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1916–18 (2000).

24. Katelyn Brack, Note, *American Work-Life Balance: Overcoming Family Responsibilities Discrimination in the Workplace*, 65 RUTGERS L. REV. 543, 545 (2013); Kaminer, *supra* note 14, at 322–23 (discussing the harm employers face from failing to provide flexible workplaces).

25. Maxine Eichner argues that allowing parents to successfully combine caregiving and work assures that children's needs are met but not fetishized. She points to the tendency of late for parents to feel like they must spend every minute with their children, leading kids “to fall victim to the ‘over-appreciated child’ syndrome,” in which kids have difficulty functioning without constant attention. Eichner, *supra* note 23, at 1308–09; see also Kaminer, *supra* note 14, at 316–17.

26. Many scholars have written about men and caregiver discrimination. See, e.g., Cunningham-Parmeter, *supra* note 5; Martin H. Malin, *Fathers & Parental Leave*, 72 TEX. L. REV. 1047 (1994); Martin H. Malin, *Fathers & Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25 (1998); Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men & Responsibility*, 4 U. ST. THOMAS L.J. 573 (2007).

27. Cunningham-Parmeter, *supra* note 5, at 275.

28. Cunningham-Parmeter discusses how difficult it is for men to actually meet this breadwinner goal. *Id.* at 279–80. Society expects men to be able to support their families but the family wage is just a myth. *Id.* at 279, 281. Despite working more hours than other countries (men work 47 hours per week on average and women work 35 hours per week), it is still difficult for men to be the primary breadwinners. *Id.*

29. *Id.* at 275.

30. *Id.* at 290; see also Kessler, *supra* note 13, at 420–21 (discussing the fact that men suffer from hostility when they seek parental leave).

31. Cunningham-Parmeter, *supra* note 5, at 277–78.

32. *Id.* at 283.

33. *Id.* at 284.

Cunningham-Parmeter recognizes that women experience caregiver bias at work more than men, those men who do engage in caregiving experience severe consequences.<sup>34</sup>

Most scholars (although certainly not all)<sup>35</sup> believe that our current laws are ill-equipped to ameliorate the caregiver conundrum.<sup>36</sup> No federal statute specifically protects caregivers, although some states and localities do.<sup>37</sup> As many have argued, Title VII's sex discrimination provision, the PDA, and the Family and Medical Leave Act (FMLA)<sup>38</sup> provide only limited protection to workers who experience the caregiver conundrum.<sup>39</sup> Certainly, other than some limited access to leave under the FMLA, caregivers are not entitled to workplace accommodations for their caregiving.<sup>40</sup>

For some, it might be necessary for me to respond to the question: Why should anyone care that women, and sometimes men, make decisions regarding having children, caregiving, or both that affect their success and options in the workplace? Although several articles could be written about this very topic,<sup>41</sup> I will address it here only briefly. Scholars have argued that society has a responsibility to help make the combination of working and caregiving possible, in part because everyone benefits from caregiving work.<sup>42</sup> Although scholars disagree regarding whether there is societal value to actually having children, most agree

34. *Id.* at 292–93. And when employers engage in discrimination against male caregivers, courts are less likely to see it as discriminatory. *Id.* at 296. Part of the reason for this is because the masculine norms tend to be invisible. *Id.* “Cloaked in a veneer of ordinariness, masculinity silently establishes social positions by convincing people that the dominant male form is the way things ought to be.” *Id.* Courts are more willing to see discrimination against mothers as actionable because the stereotypes of either women as mothers but incompetent workers or competent workers but incompetent mothers are easy to see as discriminatory. *Id.* at 297–98.

35. *See infra* Part III.A.

36. Susan Bisom-Rapp, *Gauging Employer Reactions to the First Maternal Wall Suits: Commentary on Keynote Speaker Joan Williams's "Beyond the Glass Ceiling,"* 26 T. JEFFERSON L. REV. 27, 27 (2003) (stating that many law professors who wish to help men and women balance work and family are discouraged by the existing state of the law); Porter, *Synergistic Solutions*, *supra* note 7, at 790–95; Porter, *Why Care?*, *supra* note 3, at 370–80; Travis, *supra* note 10, at 5–6 (discussing the laws' inability to restructure the organizational structures of the workplace).

37. Locke, *supra* note 18, at 24–25, 29 (pointing to Alaska and Washington D.C. and 60 localities).

38. 29 U.S.C. §§ 2601–2654 (2012).

39. Kaminer, *supra* note 14, at 307 (stating that Title VII and the FMLA have failed to adequately protect working caregivers); Porter, *Synergistic Solutions*, *supra* note 7, at 790–95; Porter, *Why Care?*, *supra* note 3, at 370–80; *see also* Kessler, *supra* note 13, at 429.

40. Kessler, *supra* note 13, at 429; Porter, *Synergistic Solutions*, *supra* note 7, at 790–95; Porter, *Why Care?*, *supra* note 3, at 370–80.

41. I have addressed this very issue before. *See* Porter, *Why Care?*, *supra* note 3.

42. *See, e.g.,* Eichner, *supra* note 23, at 1309; Martha Albertson Fineman, *Contract & Care*, 76 CHI.-KENT L. REV. 1403, 1420 (2001); Kessler, *supra* note 12, at 445–47, 449 (discussing the debate regarding the autonomy over caregiving decisions, the autonomy myth, and the harm that comes from the autonomy myth); Porter, *Why Care?*, *supra* note 3, at 384–90; Williams & Segal, *supra* note 15, at 87–89.



that once that decision is made, taking good care of children is a responsibility, and one that benefits others.<sup>43</sup>

## II. PLETHORA OF PROPOSED SOLUTIONS

Broadly speaking, scholars have proposed solutions that fall into three general categories: litigation-based solutions, legislation-based solutions, and solutions aimed at changing gender norms.<sup>44</sup> Many solutions encompass more than one category. As an example, scholars propose using legislation to help change gender norms. The most common example of this strategy is a proposed statute that would incentivize men to take more leave to care for children (either newborn babies or children who are ill or disabled), encouraging them to be more involved in their children's lives.<sup>45</sup> This Part will discuss the three types of proposals along with the most often-cited criticisms of each.

### A. Litigation-Focused Solutions

The strongest proponent of using litigation as a solution to eradicating family responsibilities discrimination is Joan Williams. Williams's main argument (some might call it a mantra) is: "Designing 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."<sup>46</sup> Thus, she argues in favor of using a "discrimination model, linked with the business case" in order to eliminate family responsibilities discrimination.<sup>47</sup> Much of her scholarship focuses on addressing negative cases (and responding to those scholars who cite to negative cases), explaining why they were not litigated

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43. Eichner, *supra* note 23, at 1303; Kaminer, *supra* note 14, at 319–22 (arguing that children should be viewed as a public good); Porter, *Why Care?*, *supra* note 3, at 388–90.

44. Others might choose to add in a fourth solution: getting the state to support caregiving directly. See generally Eichner, *supra* note 22. Maxine Eichner disagrees with Martha Fineman's proposals to have the state directly subsidize care work. Instead, she argues that the state should support caregiving in a way that would allow individuals to combine caregiving and market work. *Id.* at 1287. She argues that the state should support caregiving because it is a societal obligation to protect the most vulnerable. *Id.* She, for the most part, agrees with Fineman's focus on the fact that people are not autonomous—dependency is inevitable, and once that view is accepted, the minimalist approach of the state and employers doing nothing becomes indefensible. *Id.* at 1291–92. Eichner, however, argues in favor of getting employers to make changes rather than the state providing direct subsidies in part because if the state directly subsidizes caregiving, this will only help caregivers in the short run—those caregivers will ultimately suffer from having dropped out of the workforce. *Id.* at 1306. On the other side of the debate, Mary Anne Case argues that children should not be considered a public good. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1775, 1782 (2001). She also states that not all parents are good parents so not all parents deserve a subsidy. *Id.* at 1778.

45. Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293, 297 (2007).

46. Williams & Segal, *supra* note 15, at 106.

47. *Id.* at 79 (internal quotation mark omitted). The idea behind using the "business case" is to point out to employers and courts that there are financial benefits to having family-friendly workplaces; thus, it is irrational for an employer to refuse to give employees family-friendly benefits. *Id.*

properly or did not have good facts.<sup>48</sup> For instance, she argues that the plaintiff in one case was not sympathetic because she would not work overtime after her baby was born.<sup>49</sup> Williams explains that another case failed because the plaintiff, whose termination was a product of her morning sickness, brought her claim under the PDA.<sup>50</sup> Williams points out that the PDA does not require employers to give more leeway to pregnant employees than it gives to other employees.<sup>51</sup>

Williams and her co-authors also discuss several positive cases, in which plaintiffs successfully sued under a disparate treatment theory. On my reading, almost all of the cases cited by Williams deal with plaintiffs being mistreated in the workplace because of employers' stereotypical assumptions regarding working mothers.<sup>52</sup> There were only two cases cited by Williams and her co-authors that did not involve ideal workers. The first case, *Walsh v. National Computer Systems, Inc.*,<sup>53</sup> involved a plaintiff who had to miss a significant amount of work because of her son's illnesses.<sup>54</sup> The plaintiff's boss threw a phone book at her when she informed him her son had an ear infection and demanded she find a new doctor.<sup>55</sup> In the second case, *Snodgrass v. Brown*,<sup>56</sup> a plaintiff was terminated due to too many absences.<sup>57</sup> Because the absences were caused by the employer's last-minute scheduling changes, and the plaintiff's subsequent inability to find childcare, she was able to survive summary judgment on her claim.<sup>58</sup> Other than these two cases, however, the other cases mentioned by Williams and her co-authors involve "ideal workers," employees who were assumed (erroneously) would not meet their employers' expectations because of their caregiving responsibilities.<sup>59</sup>

Scholars also argue that disparate impact cases can have some success.<sup>60</sup> Scholars point to three frequently cited cases: *Roberts v. U.S.*

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48. Williams & Bornstein, *supra* note 2, at 182–85; Williams & Segal, *supra* note 15, at 102–10.

49. Williams & Segal, *supra* note 14, at 103–05 (discussing *Chi v. Age Group, Ltd.*, No. 94 CIV. 5253 (AGS), 1996 WL 627580, at \*1 (S.D.N.Y. Oct. 29, 1996)).

50. *Id.* at 105–06 (discussing *Troupe v. May Dept. Stores, Inc.*, 20 F.3d 734 (7th Cir. 1994)).

51. *Id.*

52. *Id.* at 106–07.

53. No. 00-CV-82, slip op. at 2 (D. Minn. Aug. 27, 2002)).

54. *Id.* at 128 (citing *Nat'l Computer Sys.*, No. 00-CV-82, at 2).

55. *Id.* (citing oral comments by Jim Kaster, plaintiff Shirleen Walsh's attorney, at the New Glass Ceiling Conference, Washington College of Law, Washington, D.C. (Jan. 24, 2003) (transcript available from AM. U. J. OF GENDER SOC. POL'Y & L.)).

56. No. 89–1171–K, 1990 WL 198431 (D. Kan. Nov. 26, 1990).

57. *Id.* at \*14.

58. *Id.* at \*17.

59. See Williams & Segal, *supra* note 15, at 124–30.

60. Kessler, *supra* note 13, at 412; Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 581 (2002); Travis, *supra* note 17, at 288–89 (arguing that there is untapped potential in the disparate impact theory for eliminating workplace structures that discriminate against working caregivers); Williams & Bornstein, *supra* note 2, at 182–83; Williams & Segal, *supra* note 15, at 134.

*Postmaster General*,<sup>61</sup> in which a plaintiff successfully challenged a sick leave policy that could not be used for the illness of a family member;<sup>62</sup> *Abraham v. Graphic Arts International Union*,<sup>63</sup> in which a pregnant plaintiff successfully challenged a ten-day leave limit;<sup>64</sup> and *EEOC v. Warshawsky & Company*,<sup>65</sup> where a plaintiff successfully challenged a sick leave policy that did not allow leaves of absence until the employee had been working for a year.<sup>66</sup> In responding to the employer's business necessity defense, Williams argues that litigants can point to the business case that family-friendly policies actually save money by decreasing attrition.<sup>67</sup>

Michelle Travis is one of the main proponents of using the disparate impact theory to restructure workplace norms. She states that disparate impact theory has "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."<sup>68</sup> Although Travis recognizes that many courts are not giving the disparate impact theory the transformative potential it could have,<sup>69</sup> some courts correctly recognize that the organizational structures of employers are "particular employment practices" subject to challenge under the disparate impact theory.<sup>70</sup> One benefit of disparate impact theory, according to Travis, is that the risk of special treatment stigma is less if the obligation to restructure workplace norms is based on the successful use of the disparate impact theory.<sup>71</sup> Travis notes that an accommodation mandate would only require an employer to make a change in schedule, hours, attendance, or overtime requirements for one particular employee who requested the accommodation, while the disparate impact theory would require the employer to eliminate the practice completely.<sup>72</sup>

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61. 947 F. Supp. 282 (E.D. Tex. 1996).

62. *Id.* at 287–89; Travis, *supra* note 17, at 357–58.

63. 660 F.2d 811 (D.C. Cir. 1981).

64. *Id.* at 819; Travis, *supra* note 17, at 356–57 (stating that this case was a positive case in which the court was willing to look beyond the act/omission distinction).

65. 768 F. Supp. 647 (N.D. Ill. 1991).

66. *Id.* at 647; Williams & Segal, *supra* note 15, at 135.

67. Williams & Segal, *supra* note 15, at 88–89 (stating that it costs \$200,000–\$500,000 to replace an attorney, and even replacing lower level employees is expensive—\$1,000 to replace a convenience store clerk and \$2,100 to replace a hotel industry employee); *see also* Travis, *supra* note 17, at 373. Of course, other scholars note the problems with the business necessity defense. *See, e.g.,* Smith, *supra* note 60, at 597. One problem is that courts frequently give too much weight to the short-term costs of family-friendly policies and workplaces, ignoring the long-term cost savings. Travis, *supra* note 17, at 363. *But see id.* at 362–63 (arguing that there is at least one case where, in dicta, the court held that courts should consider long-term benefits when looking at the business necessity defense).

68. Travis, *supra* note 10, at 37.

69. *Id.* at 39–46.

70. *Id.* at 39, 84–88 (discussing the positive disparate impact cases).

71. Travis, *supra* note 17, at 328–29.

72. *See id.* at 329–30; Travis, *supra* note 10, at 38.

Once the practice is eliminated, men and women—caregivers and non-caregivers—will all benefit.<sup>73</sup>

Williams acknowledges that litigation by itself cannot eliminate family responsibilities discrimination. Instead, a few successful cases can lead to social change.<sup>74</sup> She discusses law's expressive function and the influence of "rights talk," which allows women to stop blaming themselves for not being able to adequately balance work and family.<sup>75</sup> Furthermore, successful cases can positively influence key decision-makers, such as human resources personnel, in-house lawyers, and even some conservatives who believe in family values.<sup>76</sup> As Williams argues, the threat of litigation produces more social change than actual litigation, because employers often go beyond what the law requires.<sup>77</sup> As Williams summarizes: "The cases that are litigated will always be a small percentage of the potential cases—and they will tend to be the most egregious ones. Ultimately, the power of 'rights talk' stems less from the cases won than from the cases that never have to be fought."<sup>78</sup> The hope is that the threat of litigation and the business case for offering family-friendly benefits will motivate employers, who will therefore offer more effective family-responsive benefits.<sup>79</sup>

Of course, many scholars argue that litigation under our current legal regime is insufficient to make much of a dent in the caregiver conundrum, especially for those caregivers who are "real" workers—those whose caregiving obligations affect their ability to consistently meet their employers' workplace requirements such as strict schedules, long hours, mandatory overtime, face time requirements, stringent attendance policies, etc.<sup>80</sup> Williams is a little inconsistent here. At one point, she specifically states, "The first thing one needs in an employment discrim-

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73. Travis, *supra* note 17, at 330; see Travis, *supra* note 10, at 89 (discussing the "benefits that flexible work arrangements can have on recruiting, retention, absenteeism, and productivity"). However, there are other scholars who point out that there are few plaintiffs who have achieved success using a disparate impact theory. See, e.g., Smith, *supra* note 60, at 582.

74. See Williams & Segal, *supra* note 15, at 161 (stating that a couple of good cases can influence courts and attorneys); Bisom-Rapp, *supra* note 36, at 29.

75. Williams & Segal, *supra* note 15, at 113–14.

76. *Id.* at 120–22 (discussing "new institutionalism," which states that legal mandates can lead human resources personnel to go further than necessary in order to avoid liability).

77. Williams & Bornstein, *supra* note 2, at 186; Bisom-Rapp, *supra* note 36, at 30–31 (stating that employers, counseled by human resources management and in-house counsel, will develop compliance programs to eradicate discrimination to shield employers from liability).

78. Williams & Segal, *supra* note 15, at 121–22.

79. *Id.* at 161.

80. Porter, *Why Care?*, *supra* note 3, at 357–58 (describing "real" workers). Julie Suk also argues that litigation brought under an anti-stereotyping theory does not work for "real" women because any time caregiving detracts from work, the law allows the caregiver to be treated the same as if fantasy baseball detracts from one's work obligations. Suk, *supra* note 6, at 56. See also Kaminer, *supra* note 14, at 328 (stating that Title VII cannot be effective because it is limited to equal treatment and therefore cannot protect working caregivers who are not meeting the ideal worker norm); Kessler, *supra* note 13, at 407 (stating that Title VII only helps ideal workers but most women with children cannot succeed under this standard); Travis, *supra* note 10, at 7 (stating that scholars have moved away from anti-discrimination law for remedying caregiver discrimination).

ination suit is a 'good' plaintiff, i.e., someone who has done her job well . . . ."<sup>81</sup> After this statement, she devotes one paragraph to discussing how to litigate claims for those who do not conform to the ideal worker norm<sup>82</sup> and concludes by stating, "[I]t is clear that Title VII can be used to protect the rights of mothers who do not fit neatly into the ideal-worker category."<sup>83</sup> She refers to the lack of choices in the workplace as discrimination, but her discussion of the successful cases mostly involves ideal workers.<sup>84</sup>

Furthermore, even when successful, litigation is viewed as being too slow, too piecemeal,<sup>85</sup> too expensive, and too unpleasant for plaintiffs.<sup>86</sup> Travis argues that, although litigation helps in cases where employers stereotype women as not competent once they become mothers,<sup>87</sup> it is hard to allege intentional discrimination when complaining about the lack of family-friendly policies.<sup>88</sup>

### B. Legislation-Focused Solutions

Proposals calling for additional legislation fall into two general categories: proposals for additional anti-discrimination protection based on one's status as a caregiver and proposals for affirmative mandates. Affirmative mandates include proposed amendments to the FMLA or proposals for an accommodation mandate similar to the accommodation mandate for religious practices under Title VII or the reasonable accommodation provision under the ADA.<sup>89</sup>

#### 1. Adding Caregiver Status as a Protected Class

As discussed above, no federal law directly protects caregivers against discrimination. Only a couple of jurisdictions provide such pro-

81. Williams & Segal, *supra* note 15, at 107.

82. *Id.* at 107–08 (stating that women who are not ideal workers can litigate these claims if they can prove that the employer treated them poorly after they requested or used flexible work arrangements that the employer does allow).

83. *Id.* at 108. She also states that she hopes that the influence of ideal worker cases will help the real worker cases. *Id.*

84. Specifically, she states that if plaintiffs have failed to perform important requirements of the job, their cases will likely fail. *Id.* at 141. See also Locke, *supra* note 18, at 31–32 (pointing out that the EEOC guidelines on caregiver discrimination make clear that only ideal workers are protected); Kaminer, *supra* note 14, at 329–30 (arguing that, despite Williams's statements to the contrary, most of the cases she cites involve ideal workers).

85. Brack, *supra* note 24, at 559.

86. Even those scholars who generally argue in favor of litigation recognize that litigation is not ideal. For instance, Michelle Travis recognizes that lawsuits are not the ideal mechanism for change in part because they are costly. Travis, *supra* note 17, at 320. She also argues that litigating using a sex discrimination theory under Title VII runs the risk of characterizing work-family balance as a women's issue, which risks further entrenching stereotypes of women as caregivers. *Id.*

87. *Id.* at 335–36.

88. *Id.* at 337; see also Porter, *Synergistic Solutions*, *supra* note 7, at 790–91; Porter, *Why Care?*, *supra* note 3, at 372.

89. Scholars also argue in favor of paid leave mandates and subsidized day care. See, e.g., Porter, *Synergistic Solutions*, *supra* note 7, at 857; Eichner, *supra* note 23, at 1317.

tection: Alaska and Washington, D.C.<sup>90</sup> Scholars have discussed adding a protected classification to Title VII;<sup>91</sup> earlier proposals referred to “parental status” or “familial status,” but more recent proposals are broader, referring to “caregiver status.”<sup>92</sup>

Although Peggie Smith ultimately argued against adding parental status as a protected classification under Title VII, she was probably the earliest and most prominent scholar to discuss such a proposal in detail.<sup>93</sup> She discusses a statute proposed by President Clinton, entitled Ending Discrimination Against Parents Act (EDPA),<sup>94</sup> which would have prohibited discrimination against parents “based on the assumption that they cannot satisfy the requirements of a particular position.”<sup>95</sup> Although Smith recognizes the benefits of such a law,<sup>96</sup> she argues that it only would cover ideal workers<sup>97</sup> and that the cause of most work-life conflict is the structural limitations of the workplace.<sup>98</sup> Many parents are real workers with real conflicts who cannot always meet the hour and attendance requirements of the workplace.<sup>99</sup> Smith states: “To effect purposeful change on behalf of individuals with parental obligations, workplace practices must be restructured to value parenting as a social good that requires affirmative support.”<sup>100</sup>

Smith further argues:

Although a parental-status-based<sup>101</sup> approach to discrimination stands to promote a gender-neutral understanding of child care, and in the process, to advance the interests of all workers with parental obliga-

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90. ALASKA STAT. § 18.80.220(a)(1) (2013); D.C. Code § 2-1402.11(a)(1) (2013); *see also* Brack, *supra* note 24, at 554; Locke, *supra* note 17, at 29, 34–35 (mentioning that sixty localities also prohibit discrimination based on parental or familial status or caregiver status, including New York City).

91. Brack, *supra* note 24, at 562 (stating that family responsibilities discrimination should be recognized under federal law and that the obvious solution would be to amend Title VII to include discrimination based on all types of caregiving).

92. *See, e.g.*, Stephanie J. Eifler, *Choosing Not to Choose: A Legislative Solution for Working Adults Who Wish to Be Successful Employees and Successful Caregivers*, 60 *DRAKE L. REV.* 1205, 1226–28 (2012) (proposing adding caregiver status as a protected class and defining it broadly to include providing care for a variety of family members, including grandparents or grandchildren, in-laws, and siblings).

93. Smith, *supra* note 60.

94. S. 1907, 106th Cong. (1st Sess. 1999).

95. Smith, *supra* note 60, at 587.

96. Namely that it would help with the absence of male comparators; would help with intersectional claims, and would help with disparate impact claims which often fail because there are too few male caregivers to prove the requisite statistics. *Id.* at 589–90, 593–94.

97. *Id.* at 598.

98. *Id.* at 594–95 (stating that structural barriers cause more of the problems with work-life balance than stereotypes).

99. *Id.* at 595.

100. *Id.*

101. Scholars used to refer to “parenting” when discussing caregiving or work-life balance. Most scholars now are increasingly recognizing that caring for sick, disabled, or elderly spouses, partners, parents, and other adult family members also contributes to work-family conflict. *See* Williams & Bornstein, *supra* note 2, at 171.

tions, such an approach remains wedded to a limited conception of equality, requiring only that employment decisions not reflect differences based on parenthood. Consequently, anti-discrimination legislation is satisfied so long as both women and men with parenting obligations are equally ill-treated.<sup>102</sup>

Smith also argues that protecting parents is not necessary because there is not much evidence that parents suffer from discrimination based on erroneous assumptions about their commitment to work.<sup>103</sup> To the extent they do, Smith believes that parents (specifically mothers) can bring cases under Title VII using a stereotyping theory.<sup>104</sup>

Since Smith's work, other scholars have revisited the issue of protecting parental status or caregiver status.<sup>105</sup> These scholars have argued that changes since Smith's article make protecting caregiver status more feasible and defensible.<sup>106</sup> The changes to which they refer are better research indicating that caregivers suffer from bias based on stereotypes and the U.S. Equal Employment Opportunity Commission's (EEOC) guidance regarding family responsibilities discrimination.<sup>107</sup> Even though Smith did not think that stereotypes were being used against mothers, the evidence now suggests otherwise.<sup>108</sup>

Scholars also argue that relying on sex discrimination under Title VII is problematic because it perpetuates the stereotype that caregiving is women's work.<sup>109</sup> Furthermore, stereotypes about mothers' competence and commitment also undermine the progress of laws allowing for accommodations for caregiving.<sup>110</sup>

Many of the authors proposing an anti-discrimination provision based on parenting or caregiver status recognize that anti-discrimination provisions are not enough without an accommodation mandate.<sup>111</sup> One

102. Smith, *supra* note 60, at 572–73 (footnote omitted). The last sentence of the quoted passage is confusing. If a statute prohibited discrimination based on parental status, it would most certainly violate the law to treat both men and women with parenting obligations badly. An employer would be required to treat parents in the same way as they treat non-parents. Perhaps what Smith means in this passage is that an employer would not be required to *accommodate* parenting obligations. Thus, an employer could penalize both mothers and fathers if they do not meet the attendance requirements because of their parenting obligations. But an employer could not, under a provision prohibiting parental status discrimination, decide not to promote mothers or fathers because of a belief that their caregiving obligations will get in the way of their work.

103. *Id.* at 573.

104. *Id.* at 575.

105. See, e.g., Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463 (2008).

106. *Id.* at 1465.

107. *Id.*

108. *Id.* at 1472–73.

109. *Id.* at 1468.

110. *Id.* at 1472–73. They also argue that if you prohibit parental status discrimination, this will make the law more supportive of workplace accommodations. *Id.* at 1480.

111. See, e.g., Eifler, *supra* note 92, at 1221; Farrell & Guertin, *supra* note 105, at 1465–66, 1479 (stating that there is a strong case for family responsibilities legislation working in tandem with

commentator argues that an anti-discrimination mandate protecting parents is not sufficient because employers can continue to ignore caregiving and treat parents and non-parents alike.<sup>112</sup> I discuss the proposals for accommodation mandates next.

## 2. Accommodation Mandate and Other Affirmative Mandate Solutions

Over the years, scholars have proposed various affirmative mandate solutions either as a supplement to anti-discrimination provisions or as stand-alone provisions. The most prominent among these are proposals to expand the right to leaves of absence;<sup>113</sup> proposals for a process law;<sup>114</sup> proposals for daycare care or other subsidies to help working caregivers;<sup>115</sup> and proposals for an accommodation mandate, the latter of these I turn to now.

One of the earliest proponents<sup>116</sup> of an accommodation mandate was Peggie Smith. Smith argues in favor of using the religious accommodation mandate under Title VII rather than the reasonable accommodation provision under the ADA.<sup>117</sup> She argues that the religious accommodation mandate is superior to the disability accommodation mandate because religious accommodations are about keeping employees in the workplace,<sup>118</sup> and because religious accommodations involve deferring to

accommodation laws); Locke, *supra* note 18, at 19; Elizabeth Roush, Note, *(Re)Entering the Workforce: An Historical Perspective on Family Responsibilities Discrimination and the Shortcomings of Law to Remedy It*, 31 WASH. U. J.L. & POL'Y 221, 248–52 (2009) (stating that an anti-discrimination provision is not enough without an accommodation mandate).

112. Locke, *supra* note 18, at 33.

113. See, e.g., Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, a New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 329–31 (2014) [hereinafter Porter, *FMLA*]; Porter, *Synergistic Solutions*, *supra* note 7, at 836–40 (discussing other scholars' proposals for subsidized paid leave).

114. See, e.g., Rachel Arnow-Richman, *Public Law & Private Process: Toward an Incentivized Organizational Justice Model of Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 27; Porter, *Synergistic Solutions*, *supra* note 7, at 804–06.

115. See, e.g., Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561 (2005); Debbie Kaminer, *The Child Care Crisis & the Work-Family Conflict: A Policy Rationale for Federal Legislation*, 28 BERKELEY J. EMP. & LAB. L. 495, 513 (2007); Porter, *Synergistic Solutions*, *supra* note 7, at 840–44.

116. Certainly other scholars have argued in favor of forcing employers to accommodate caregiving without going into specifics regarding what such an accommodation mandate might look like. See, e.g., Eichner, *supra* note 23, at 1292 (stating that caregiving is so important that it should be accommodated even if it means adding costs to employers).

117. Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1445–46 (2001); see also Kaminer, *supra* note 14, at 333 (advocating for an accommodation mandate for caregiving patterned after the religious accommodation mandate under Title VII); Kessler, *supra* note 13, at 457–58 (stating that a religious accommodation mandate is superior to an accommodation mandate under the ADA because religion and caregiving have some aspect of choice rather than being purely biological, such as most disabilities).

118. Smith, *supra* note 117, at 1464–65. Smith contrasts the ADA, which she argues is more about bringing people into the workplace rather than keeping them there. *Id.* Although getting individuals with disabilities employed was a major goal of the ADA, most ADA cases involve issues surrounding keeping individuals with disabilities employed. *Id.* at 1464.



employee choice when values conflict with work.<sup>119</sup> Smith's proposal involves requiring employers to accommodate employees when those employees have a compelling parental obligation that conflicts with a work requirement.<sup>120</sup> Smith uses unemployment compensation cases to help define a "compelling parental obligation."<sup>121</sup> If an employee quits or is terminated because of an unavoidable caregiving schedule conflict, courts will still allow the employee to collect unemployment. These obligations are compelling because they would cause a reasonable person to quit their job.<sup>122</sup> Once an employee has met this obligation, the employer can attempt to prove undue hardship. Smith advocates for an intermediate standard between the highly deferential *de minimis* standard used in religious accommodation cases and the difficult-to-prove undue hardship standard under the ADA.<sup>123</sup>

Other scholars have advocated for an accommodation mandate similar to the one contained in the ADA, or a model that combines aspects of the ADA model with features of the religious accommodation model under Title VII.<sup>124</sup> Finally, some scholars have argued for a universal accommodation mandate.<sup>125</sup> The argument in support of a universal accommodation mandate is that the stigma associated with getting special treatment in the workplace will dissipate if everyone is entitled to

119. *Id.* at 1464; *see also* Kaminer, *supra* note 14, at 334 (stating that the religious accommodation mandate makes sense because just as workplaces are built around those who are Christians, they are also built around those without caregiving responsibilities).

120. Smith, *supra* note 117, at 1465–66; *see also* Kaminer, *supra* note 14, at 340 (suggesting that employees must prove that they have a bona fide caregiving responsibility that conflicts with the workplace rules or norms).

121. Smith, *supra* note 117, at 1471–72

122. *Id.* at 1445. For instance, most employees would risk termination rather than leaving a young child home alone. But most employees would not risk termination to attend a field trip or a softball game. *Id.* at 1471. Smith would also require the employee to show a good faith attempt to resolve the conflict. *Id.* at 1472–73. Kaminer also argues in favor of a religious accommodation mandate, in part because many of the possible accommodations for religion are similar to the accommodations caregivers might need, such as schedule or shift changes. Kaminer, *supra* note 14, at 336–37.

123. Smith, *supra* note 117, at 1483.

124. *See, e.g.,* Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 634–35 (2004); Kaminer, *supra* note 14, at 333–358 (advocating for an accommodation mandate similar to the religious accommodation mandate but suggesting the more stringent undue hardship analysis under the ADA). Another commentator argues in favor of the adoption of a federal statute similar to a proposed New York City bill that would protect against discrimination based on caregiving status (defined broadly) and require that employers provide reasonable accommodations to caregivers unless the accommodation would cause an undue hardship, which is defined similar to the factors used in the ADA. Locke, *supra* note 18, at 34–36.

125. *See, e.g.,* Case, *supra* note 44, at 1768 (stating that if everyone was entitled to flexibility benefits, this would reduce the stigma parents suffer from getting special treatment); Nicole B. Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1135–38 (2014) [hereinafter Porter, *Mutual Marginalization*] (discussing but ultimately rejecting a universal accommodation mandate as being impractical); Michael Stein, Anita Silvers, Bradley A. Areheart & Leslie P. Francis, *Accommodating Every Body*, 82 U. CHI. L. REV. 689 (2014) (advocating for a universal accommodation mandate).

the special treatment (which, of course, means that the treatment is not special at all).<sup>126</sup>

There have been many critics of the accommodation model,<sup>127</sup> most prominently Joan Williams, who states: “You can’t solve an institutional problem with an individual accommodation.”<sup>128</sup> Williams argues that a religious accommodation model will fail because of a narrow interpretation of the accommodation mandate under Title VII’s religious accommodation provisions.<sup>129</sup> She also argues that the ADA has been read very narrowly.<sup>130</sup> Williams states that because there are an infinite variety of disabilities, an individual accommodation is the best we can do for those with disabilities, but

[i]n the work-family arena, there is not a dazzling array but a dyad. The question is whether workplaces will continue to be designed around the bodies and life patterns of men, with “accommodations” offered to women, or whether workplace norms will be redesigned to take into account the reproductive biology and social roles of women and family caregivers, as well.<sup>131</sup>

Thus, we do not need accommodations, according to Williams—we only need equality.<sup>132</sup>

126. See sources cited *supra* note 124.

127. See, e.g., Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX J. WOMEN & L. 345, 362–67 (2003); Befort, *supra* note 124, at 618, 624. There are also scholars who are skeptical about the success of an ADA-like accommodation model because the ADA itself has experienced a backlash in the courts. See Porter, *Synergistic Solutions*, *supra* note 7, at 802–03 & nn.165–68.

128. Williams & Segal, *supra* note 15, at 82 (quoting ANNE WEISBERG, CATALYST, WOMEN IN LAW: MAKING THE CASE 18 (2011)).

129. *Id.* at 84. Although the one thing that Williams does not acknowledge or explore is that it is commonly believed that the reason that courts narrowly construed the accommodation mandate under the religious accommodation provisions was because of First Amendment concerns, which are not present in the caregiving context. Mary Anne Case also discusses the narrow construction given to the religious accommodation mandate under Title VII. Case, *supra* note 44, at 1769.

130. Williams & Segal, *supra* note 15, at 84. This was true at the time Williams published this piece, in 2003. But the ADA was amended in 2008 and dramatically increased the coverage of the statute. Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 541 n.74 (2013) [hereinafter Porter, *Martinizing*].

131. Williams & Segal, *supra* note 15, at 84–85. I have always found this statement by Williams frustrating. The ways in which caregivers balance work and family are highly variable and highly individual depending on a variety of factors, including the job, the age and health of the children, the marital status and presence or absence of other family members, and the daycare/school situation. Some caregivers need more lenient attendance policies to account for things like sick children and routine doctor’s appointments; some need flexible schedules; some need a straight shift rather than a rotating shift; and, if you include pregnant women, some may need many of the same physical modifications of the job that individuals with disabilities need; see also Kaminer, *supra* note 14, at 337 (arguing that caregiving needs vary greatly).

132. Williams & Segal, *supra* note 15, at 85. Other authors argue that the problem with an accommodation mandate is that it assumes all women need accommodations when many do not and thus it perpetuates the idea that women are in need of special treatment. Farrell & Guertin, *supra* note 105, at 1478.

Michelle Travis also argues that litigation is better than an accommodation mandate, because special legislation to benefit caregivers runs the risk of essentializing women and makes it too easy to accept gender norms of women as caregivers.<sup>133</sup> Although she recognizes the benefit to an accommodation mandate,<sup>134</sup> she argues that the problem with it is that most people do not see an accommodation as a form of equal opportunity; instead, they see it as a form of affirmative action.<sup>135</sup> If employers were forced to accommodate caregivers, this would likely cause resentment by other employees, and might cause employers to be more reluctant to hire and promote women—who are most often the caregivers.<sup>136</sup>

### C. Changing Gender Norms

Many scholars argue that for women to be equal, either men must assume equal caregiving responsibility or institutions must be adjusted to accommodate caregiving.<sup>137</sup> In recent years, several scholars have argued that it is not only employers that cause the problem working caregivers face.<sup>138</sup> According to these scholars, the problem lies with the division of labor between men and women at home.<sup>139</sup> In other words, women are only disadvantaged in the workplace because they are stuck doing the vast majority of caregiving in the home.<sup>140</sup> If men picked up some of the workload at home, women would be able to be more successful employees.<sup>141</sup> A few scholars believe it is unfair to ask employers or the state to

133. Travis, *supra* note 17, at 322–23.

134. *Id.* at 324–25 (“In theory, a gender-neutral caregiving accommodation duty has the potential to ameliorate the work/family conflicts felt disproportionately by women, without essentializing either women’s or men’s roles with regard to paid or unpaid work.”).

135. *Id.* at 326 (pointing to the fact that the ADA is less effective because it is seen as a social welfare statute rather than an anti-discrimination statute).

136. *Id.* at 327; Bisom-Rapp, *supra* note 36, at 28; Case, *supra* note 44, at 1761 (stating that if we force employers to provide additional benefits to women with children, they will simply hire fewer women); see also Porter, *Mutual Marginalization*, *supra* note 125. Mary Anne Case also discusses the potential backlash if caregivers are given special benefits because employers often make other employees pick up the slack without paying them any more. Case, *supra* note 44, at 1757.

137. Eichner, *supra* note 23, at 1289.

138. Case, *supra* note 44, at 1754–56 (questioning whether employers should be responsible for ameliorating work-family conflict); Selmi, *supra* note 26, at 577.

139. Case, *supra* note 44, at 1756 (stating that resistance from men who do not want to do their fair share of the work at home is part of the problem and the reason why women have trouble balancing work and family); Eichner, *supra* note 23, at 1295 (stating that many scholars believe that getting men to do more would change things for women and would eliminate the leisure gap between men and women).

140. Cunningham-Parmeter, *supra* note 5, at 255 (“Women will not attain full equality at work until men do more at home.”); see Case, *supra* note 44, at 1785–86 (stating that fathers should be forced to kick in before everyone else is asked and that fathers should not be free-riding—men’s resistance to doing more work at home is not a good reason to put the burden on employers).

141. Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433, 433 (2004) (“Indeed, the assumed result of work/family balance is that it would help achieve equality: families would be treated equally, caregivers would be supported equally, and children and family members would receive necessary and important care equally.”).

assist caregivers when men are not being asked to do their fair share.<sup>142</sup> The rationale of these scholars is that when employers give more benefits to caregivers, either leaves of absence or flexible work schedules, employers will often make other employees pick up the slack, and often those employees are childless women.<sup>143</sup>

Of course, stating that men should do more at home does not and cannot automatically lead to men doing more at home.<sup>144</sup> It is difficult to regulate how much childcare and housework men do.<sup>145</sup> Thus, scholars have proposed legislation aimed at shifting the gender norms. For instance, several scholars have proposed incentivizing men to take leave so that they can help more at home.<sup>146</sup> It is also hoped that, if men spend more time on leave caring for children, employers will stop believing that women cost more to employ because of more frequent leaves of absence.<sup>147</sup>

By almost all accounts, this has proven to be an unsuccessful strategy. Swedish law uses this strategy by reserving some leave only for men. Yet men often do not take the full amount of leave to which they are

142. Case, *supra* note 44, at 1756 (arguing that we should not shift the burden to employers, when men are to blame); Dowd, *supra* note 141, at 442 (stating that many agree that men should play an equal or at least a stronger part in children's lives); Eichner, *supra* note 23, at 1296 (pointing to Mary Anne Case as an example of a scholar who argues in favor of getting men to do more and against requiring employers to accommodate caregiving). Eichner points to some scholars, Mary Anne Case and Katherine Franke, who argue that feminists should stop assuming that motherhood is natural for all women and should be promoting alternative paths for women. Eichner, *supra* note 23, at 1297. These feminists argue that we should stop seeing procreation as a biological imperative and instead see it as a cultural preference. *Id.* at 1298. I agree with some of their argument but once someone has made a decision to have children, caring for them well is community enhancing. *But see id.*; Porter, *Why Care?*, *supra* note 3, at 389. Moreover, I agree with Eichner that if the goal is to dissuade women from having children, the likely result is "dismal failure: if having women bear large costs in terms of economic and social inequality would deter them from having children, humanity would already be threatened with extinction." Eichner, *supra* note 22, at 1299.

143. Case, *supra* note 44, at 1757–58.

144. See, e.g., Cunningham-Parmeter, *supra* note 5, at 254 (stating that the goal of getting men to do more work at home has not been realized); Travis, *supra* note 17, at 312.

145. Eichner, *supra* note 23, at 1296 (stating that proposals to get men to do more work at home fail on a practical level); Cunningham-Parmeter, *supra* note 5, at 256 (stating that men "tal[k] the talk" regarding wanting to spend more time caregiving but do not actually do more work); Case, *supra* note 44, at 1761 (stating that men do not take more leave not because of feared stigma but because they can get women to do it). Case also argues that when men do help out at home, they tend to do just the fun tasks rather than the menial tasks. *Id.* at 1761–62. *But see* Cunningham-Parmeter, *supra* note 5, at 283–84 (describing the stigma men face when they take on caregiving roles).

146. Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293, 296 (2007); Arienne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407, 434 (2012); Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 61 (2004); Chuck Halverson, Note, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 271 (2003); Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 410–11 (1999); Michelle A. Travis, *The Future of Work-Family Policy: Is "Choice" the Right Choice? Review of Women and Employment: Changing Lives and New Challenges*, 13 EMP. RTS. & EMP. POL'Y J. 385, 419 (2009).

147. See Suk, *supra* note 6 (stating that Sweden has attempted this approach).

entitled.<sup>148</sup> There are a couple of possible explanations for this result. First and primarily, men and women are socialized to believe that caregiving is women's work. Thus, taking any significant time off work when a new baby is born or when a child is sick feels like a gender norm violation for many men. Men also might believe (again, because of the way they have been socialized) that they are not competent at caring for children, especially babies.<sup>149</sup> Finally, lessons from masculinities theory teach us that men suffer workplace penalties when they engage in gender non-conforming behavior such as caring for their children.<sup>150</sup>

Moreover, some scholars believe that even if men did more work at home, this would not necessarily make things better, because we still live in a society that structures work around employees without any dependency obligations.<sup>151</sup> In other words, even if men did more work at home, as long as employers continue to devalue caregiving work, those who perform it will still suffer in the workplace.<sup>152</sup> There is also an argument to be made that focusing on changing gender norms in the home ignores all of the single mothers running households, many of whom are minorities.<sup>153</sup>

### III. THE ENTRENCHMENT OF STRUCTURAL NORMS

In this Part, I will argue that all of the above-proposed solutions have been and will continue to be unsuccessful because of the entrenchment of employers' structural norms. I will use ADA jurisprudence to demonstrate that employers are reluctant to give employees with disabilities modifications to the structural norms of the workplace, even though those employers are often willing to accommodate employees with disabilities in other ways. I then argue that, because of this entrenchment, many of the proposals for ending the caregiver conundrum will fail. Finally, I propose that the only way to alleviate the problem is to attack the entrenchment of structural norms directly.

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148. *Id.* at 64. Even if men take leave immediately after the baby is born, when the leave is incentivized, this does not lead these men to continue to do more caregiving as the child ages. *Id.* at 63–65. Although Suk states that the Sweden approach to incentivize men into taking more leave has not been successful at eradicating gender norms, Sweden does have higher rates of female labor participation and a smaller pay gap between men and women. *Id.* at 63.

149. In my opinion, it is easy to feel insecure about parenting newborn babies, especially if the baby is the parents' first.

150. See generally Cunningham-Parmeter, *supra* note 5.

151. Eichner, *supra* note 23, at 1296.

152. *Id.* at 1296–97. However, I question whether it would be possible for employers to penalize all employees with children if both men and women took on equal caregiving responsibilities.

153. Kessler, *supra* note 13, at 421.

A. *The ADA's Example of the Entrenchment of Structural Norms*

This subpart will provide a summary of cases under the ADA that illuminate the entrenchment of the structural norms of the workplace.<sup>154</sup> The ADA requires employers to provide reasonable accommodations to individuals with disabilities as long as those accommodations would allow the employee to perform the essential functions of the job.<sup>155</sup> Even though the ADA contemplates employers providing variations from the regular hour and shift norms of the workplace,<sup>156</sup> many employers refuse to do so, and many courts affirm employers' refusal by granting those employers' motions for summary judgment.<sup>157</sup> Most courts do this by stating that the structural norms of the workplace (the when and where the work is performed) are essential job functions.<sup>158</sup> Once a job function is deemed essential, an employer does not have to provide a reasonable accommodation that would allow the elimination of that job function.<sup>159</sup>

One structural norm, rotating shifts, is frequently litigated. Employees with various disabilities sometimes request a waiver from the requirement of working rotating shifts, arguing that a straight shift is required for managing the disability. For instance, in *Bogner v. Wackenhut Corp.*,<sup>160</sup> the plaintiff, who had epilepsy and suffered from occasional seizures, asked to work only the day shift, as his doctor advised that it would limit the recurrence of his seizures.<sup>161</sup> The court held that rotating shifts were an essential function of the job, and therefore it was unreasonable to allow the plaintiff to avoid working rotating shifts as an accommodation.<sup>162</sup>

Similarly, in *Kallail v. Alliant Energy Corporate Services*,<sup>163</sup> the plaintiff, whose job required rotating shifts, had Type I diabetes and related complications.<sup>164</sup> Because of the difficulties associated with managing her diabetes, the doctor advised, and the plaintiff requested, to work a

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154. See also ALBISTON, *supra* note 8, at 9 (“Despite th[e] accommodation mandate, . . . ADA claimants have had little success obtaining changes to the schedule of work to allow for absences because of illness or medical treatment, even though schedule adjustments are far less expensive than changes to physical structures.”).

155. See generally Travis, *supra* note 10, at 22 (discussing the reasonable accommodation mandate under the ADA and the importance of defining the essential job functions).

156. 42 U.S.C. § 12112(b)(5)(A) (2012) (defining discrimination to include not making reasonable accommodations to the known disabilities of employees); *id.* § 12111(9) (defining reasonable accommodations to include “part-time or modified work schedules”).

157. Travis, *supra* note 10, at 47–49 (stating that courts are ignoring the reasonable accommodation mandate of the ADA when they define the structural norms of the workplace to be “essential job functions” and therefore immune to challenge); see also *id.* at 21 (stating that employers have been and will likely continue to be resistant to voluntarily restructuring the workplace despite affirmative mandates to the contrary).

158. *Id.* at 23–24.

159. *Id.* at 22–23.

160. No. 05-CV-6171, 2008 WL 84590 (W.D.N.Y. Jan. 7, 2008).

161. *Id.* at \*1.

162. *Id.* at \*6.

163. 691 F.3d 925 (8th Cir. 2012).

164. *Id.* at 927–28.

straight day shift.<sup>165</sup> The court accepted the employer's argument that working rotating shifts was an essential function of the job, thereby denying the plaintiff a remedy.<sup>166</sup>

In *Dicksey v. New Hanover County Sheriff's Department*,<sup>167</sup> the plaintiff was a deputy sheriff and detention officer who suffered from a seizure disorder.<sup>168</sup> When he was transferred to a job that worked rotating shifts, his doctor advised that he would be better able to control his seizure disorder if he worked a straight shift.<sup>169</sup> The day after the plaintiff requested a straight shift as an accommodation for his disability, he was terminated.<sup>170</sup> The court held that the employer should not have to reallocate essential functions of the job (working a rotating shift) or create a new position (a straight day-shift position).<sup>171</sup>

Finally, in *Rehrs v. Iams Co.*,<sup>172</sup> the plaintiff, who suffered from Type I diabetes, began having trouble managing his diabetes when his company implemented a rotating-shift schedule for all warehouse technicians.<sup>173</sup> He suffered a heart attack and went on leave.<sup>174</sup> When he was ready to return to work, his doctor submitted a letter requesting that the plaintiff be placed on a fixed day-shift schedule because his diabetes had become difficult to control.<sup>175</sup> He was allowed to work this schedule until the employer learned that this would be a permanent schedule change, at which point he was put on short-term disability leave.<sup>176</sup> The court found that the rotating shift was an essential function of the job and that allowing the plaintiff to work a straight day shift would have placed a "heavier or unfavorable burden on other technicians."<sup>177</sup> I was unable to find a case where the court required the employer to allow a disabled plaintiff to obtain a waiver from a rotating shift requirement.<sup>178</sup>

165. *Id.* at 928.

166. *Id.* at 931, 933.

167. 522 F. Supp. 2d 742 (E.D.N.C. 2007).

168. *Id.* at 744-45.

169. *Id.* at 745.

170. *Id.*

171. *Id.* at 748-49.

172. 486 F.3d 353 (8th Cir. 2007).

173. *Id.* at 354-55. For the first two years of his employment, he worked a fixed schedule from 4 p.m. to midnight. It was only after January of 2000 when Proctor & Gamble acquired Iams that it began the rotating shift schedule, which consisted of two daily twelve-hour shifts. *Id.* at 354.

174. *Id.* at 355.

175. *Id.* at 355.

176. *Id.* Interestingly, shortly after this time, Proctor & Gamble outsourced the operation of the Aurora facility to Excel, which operates the facility using a straight-shift schedule. *Id.*

177. *Id.* at 357.

178. For other cases on this issue and other structural norm issues, see Nicole B. Porter, *The New ADA Backlash*, 82 TENN. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2399724###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399724###).

In addition, some employees with disabilities ask for accommodations regarding the number of hours required.<sup>179</sup> For instance, in *Meinen v. Godfrey Brake Service & Supply, Inc.*,<sup>180</sup> after the plaintiff was hospitalized and subsequently diagnosed with multiple sclerosis,<sup>181</sup> the company created two part-time positions to cover the department where the plaintiff worked and retained a position for the plaintiff when he could return to work.<sup>182</sup> When the plaintiff returned to work, he could not work more than four hours per day.<sup>183</sup> The employer eventually terminated the plaintiff.<sup>184</sup> The court held that creation of a part-time position is not a reasonable accommodation.<sup>185</sup>

The court in *White v. Standard Insurance Co.*,<sup>186</sup> held that full-time employment is an essential function of the job, and therefore the plaintiff, whose back pain limited her ability to work to four hours per day or less, was not qualified.<sup>187</sup> The court relied on the employer's evidence that it had never employed someone in the plaintiff's position on a part-time basis and that the employer's written job description stated that the position was full time.<sup>188</sup>

Working at home is another frequently requested accommodation for individuals with disabilities and one that working caregivers might also need. In the disability field, the majority rule is that working from home is not a reasonable accommodation.<sup>189</sup> As stated in the well-known case of *Vande Zande v. Wisconsin Department of Administration*<sup>190</sup>:

Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not re-

179. Of course, variation from the working hours is also a modification that working caregivers would need. For a discussion of ADA cases involving hours worked, see Travis, *supra* note 10, at 24–28.

180. No. CIV. 10–5077–JLV, 2012 WL 1038676 (D.S.D. Mar. 26, 2012), *report and recommendation adopted in part, rejected in part* by *Meinen v. Godfrey Brake Service & Supply, Inc.*, No. CIV. 10–5077–JLV, 2012 WL 4364669 (D.S.D. Sept. 24, 2012).

181. *Id.* at \*1.

182. *Id.* at \*2.

183. *Id.* at \*7.

184. *Id.* at \*3.

185. *Id.* at \*10. I find it interesting (and somewhat infuriating) that even though the ADA lists “part-time or modified work schedules” as possible reasonable accommodations, courts easily ignore this by stating that the accommodation requested is not a modification to the current position, allowing the employee to reduce his hours, but rather is the creation of an entirely new part-time position.

186. 529 F. App'x 547 (6th Cir. 2013).

187. *Id.* at 549–50.

188. *Id.* at 550.

189. Porter, *Martinizing*, *supra* note 130, at 549–51 (gathering cases regarding working from home); see also Travis, *supra* note 10, at 29–31 (stating that most courts are following the rule in *Vande Zande* that working from home is not a reasonable accommodation).

190. 44 F.3d 538 (7th Cir. 1995).



quired to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home.<sup>191</sup>

Attendance policies and leaves of absence policies are also considered structural norms of the workplace. In several cases, excessive absences have meant that an employee is not qualified to perform the essential functions of the job, and courts have often held that requests for leaves of absence are unreasonable accommodations.<sup>192</sup>

Courts have held that a business does not have “to endure erratic, unreliable attendance by its employees,” even when that conduct is due to an alleged disability.<sup>193</sup> In *Brown v. Honda of America*,<sup>194</sup> the defendant alleged that the plaintiff’s “inability to reliably attend work render[ed] her unable to perform the essential functions of her job” in the employer’s factory.<sup>195</sup> Similarly, in *Lewis v. New York City Police Department*,<sup>196</sup> the court found that the plaintiff’s regular absences, missing a total of 207 days of work in seventeen months, established that she was not a qualified individual.<sup>197</sup>

In another attendance case, *Basden v. Professional Transportation, Inc.*,<sup>198</sup> the Seventh Circuit held that the plaintiff was not qualified when she violated the employer’s very strict attendance policy, which only allowed eight absences in a year and did not differentiate between absences for medical and other reasons.<sup>199</sup> Because the plaintiff had been employed for less than one year, she was not entitled to FMLA leave.<sup>200</sup> The court held that because “[a]n employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance,” her inability to come to work regularly meant that she was not able to perform the essential functions of the job and was therefore not a qualified individual.<sup>201</sup> The court held that even a thirty-day leave of absence to allow her to get diagnosed and

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191. *Id.* at 544.

192. *See, e.g.*, *Robert v. Board of Cnty. Comm’rs of Brown Cnty.*, 691 F.3d 1211, 1218–19 (10th Cir. 2012); *Zimmerman v. Gruma Corp.*, No. 3:11–CV–01990–L, 2013 WL 3154118, at \*13, \*15 (N.D. Tex. June 21, 2013); *Fuentes v. Krypton Solutions, LLC*, No. 4:11cv581, 2013 WL 1391113, at \*4 (E.D. Tex. Apr. 4, 2013) (stating that excessive absences makes him unqualified and that an indefinite leave of absence is not a reasonable accommodation); *EEOC v. Ford Motor Co.*, No. 11–13742, 2012 WL 3945540, at \*5 (E.D. Mich. Sept. 10, 2012) (holding that plaintiff is not qualified because of excessive absences and working from home is not a reasonable accommodation).

193. *Brown v. Honda of Am.*, No. 2:10–cv–459, 2012 WL 4061795, at \*5 (S.D. Ohio Sept. 14, 2012).

194. *Id.*

195. *Id.* at \*4.

196. 908 F. Supp. 2d 313 (E.D.N.Y. 2012).

197. *Id.* at 328.

198. 714 F.3d 1034 (7th Cir. 2013).

199. *Id.* at 1036–37.

200. *Id.* at 1039.

201. *Id.* at 1037.

begin treatment for multiple sclerosis was an unreasonable accommodation.<sup>202</sup>

These cases are just a small sample of the cases that demonstrate how difficult it is for individuals with disabilities to obtain modifications to the structural norms of the workplace.<sup>203</sup> Because these structural norms are so intractable, I next argue that this entrenchment will lead to the failure of many of the proposals to solve the caregiver conundrum.

## *B. The Effect of the Entrenchment of Structural Norms on Proposals to End the Caregiver Conundrum*

### 1. The Failure of Litigation-Focused Proposals

It is easy to see why the entrenchment of structural norms leads to the futility of sex discrimination claims brought under a disparate treatment theory.<sup>204</sup> Disparate treatment theory works well in stereotyping cases where the plaintiff is performing as an ideal worker but the employer erroneously believes that the plaintiff lacks commitment or competence.<sup>205</sup> But in many cases, where the plaintiff is a real worker rather than an ideal worker, employers can successfully use the entrenchment of structural norms to defeat disparate treatment claims.<sup>206</sup> Because disparate treatment theory only requires that an employer treat employees the same when they are similarly situated, if a caregiver cannot meet a stringent attendance policy or cannot work overtime as the job requires (as just a couple of examples of entrenched structural norms), she is not going to be seen as similarly situated to her male counterparts.<sup>207</sup>

Although many scholars (including myself) have argued that disparate impact theory has the potential to dismantle the structural norms of the workplace,<sup>208</sup> others have expressed skepticism about disparate

202. *Id.* at 1038–39; see also Travis, *supra* note 10, at 34–36 (discussing cases where regular attendance is held to be an essential job function and therefore reasonable accommodations are not required).

203. For a fascinating discussion of the history behind our country's time norms, see generally ALBISTON, *supra* note 8. *But see* Travis, *supra* note 10, at 68–73 (discussing ADA cases where the courts correctly hold that the structural norms are not essential functions and require employers to defend their structural norms using an undue hardship analysis).

204. See, e.g., Bisom-Rapp, *supra* note 36, at 28 (stating that workplace norms are “too entrenched to be dislodged through litigation”).

205. See generally Williams & Bornstein, *supra* note 2; Williams & Segal, *supra* note 15.

206. Porter, *Why Care?*, *supra* note 3, at 372; Smith, *supra* note 55, at 598. Even Williams, who is in favor of litigation-focused solutions, recognizes that employees who are not performing up to snuff—i.e., not ideal workers—are not good candidates for family responsibilities discrimination (FRD) litigation. Williams & Segal, *supra* note 15, at 107.

207. Suk, *supra* note 6, at 57 (stating that family responsibilities discrimination only works under a sameness theory); Kaminer, *supra* note 14, at 328; Porter, *Synergistic Solutions*, *supra* note 7, at 791; Porter, *Why Care?*, *supra* note 3, at 370–71.

208. Porter, *Synergistic Solutions*, *supra* note 7, at 806–07; Travis, *supra* note 17, at 341 (stating that disparate impact is well-suited to address inequality because employers have to eliminate the offending practice if it is found to cause a disparate impact); Travis, *supra* note 10, at 77–78.

impact's promise.<sup>209</sup> The primary problem<sup>210</sup> is the employer's business necessity defense.<sup>211</sup> Even when a plaintiff can prove that a practice has a statistically greater disadvantage for women than men because of women's caregiving roles, the employer has the opportunity to prove that the practice is job-related and consistent with business necessity.<sup>212</sup> Assume that a single mother is fired because she cannot work rotating shifts due to her caregiving responsibilities. Even if she can demonstrate that the rotating shift requirement has a disproportionate effect on women over men,<sup>213</sup> the employer will then be given the opportunity to defend the practice. As we saw in the discussion above regarding cases under the ADA, courts have consistently held that rotating shifts are an essential function of the job, and therefore employers are not required to provide reasonable accommodations that would eliminate an essential function.<sup>214</sup> There is no reason to think that plaintiffs would fare any better under a business necessity analysis. If courts hold that rotating shifts are an essential function of the job, they are just as likely to hold that rotating shifts are job-related and consistent with business necessity.<sup>215</sup>

209. Smith, *supra* note 117, at 1458; Smith, *supra* note 60, at 582–85 (discussing the problems with disparate impact theory).

210. To be clear, there are certainly other problems with using disparate impact theory to challenge workplace practices that make it difficult for caregivers to successfully balance work and family. Travis discusses many of the primary problems. The first is the difficulty in demonstrating that a "particular employment practice" caused the disparate impact. Travis, *supra* note 17, at 348. Employers often try to defend disparate impact claims by arguing that certain decisions are not "practices" or are too complex and multi-faceted to be a "particular employment practice." *Id.* at 342–43 (internal quotation marks omitted); Kaminer, *supra* note 14, at 330. As stated by Laura Kessler, "[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." Kessler, *supra* note 13, at 413. Travis also notes the difficulty in proving the requisite statistics if the court requires a comparison to male employees. Travis, *supra* note 17, at 346; *see also* Kaminer, *supra* note 14, at 331; Smith, *supra* note 60, at 582–83. Travis also notes that some courts make it difficult for plaintiffs to prove causation, because they often blame the disparate impact on choices made by women. Travis, *supra* note 17, at 349. Travis responds that as long as women can prove that they do more care work, that should be the end of the inquiry, even if the reason they do more care work is based on gender norms in their families. *Id.* at 350. She makes an interesting and apt comparison to *Griggs v. Duke Power Co.*, where the plaintiffs only had to prove that fewer black employees had high school diplomas than white employees. *Id.* (discussing 401 U.S. 424 (1971)). Another problem with disparate impact cases is that sometimes courts use the act/omission distinction, claiming that the lack of a leave policy, for example, cannot be a particular employment practice that causes a disparate impact. *Id.* at 355; *see also* Dormeyer v. Comerica Bank—Illinois, 223 F.3d 579, 583–84 (7th Cir. 2000) (holding that the lack of a leave policy cannot be the basis of a disparate impact claim).

211. *See, e.g.*, Travis, *supra* note 17, at 362–63 (stating that courts give too much weight to short-term cost savings); Kessler, *supra* note 13, at 416–17. *But see* Williams & Segal, *supra* note 15, at 79 (stating that the business case for family-friendly benefits helps challenge the employer's business necessity defense); Kaminer, *supra* note 14, at 331–32.

212. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

213. She would also have to demonstrate that the rotating shift is a "particular employment practice," rather than just part of the job, which, as described in the note above is difficult to do. *See supra* note 210.

214. *See supra* Part III.A.

215. *See* Travis, *supra* note 10, at 36–38 (stating that the disparate impact analysis is analogous with the essential job function analysis under the ADA). Other scholars agree that disparate impact is unlikely to be successful. For instance, Susan Bisom-Rapp is skeptical that litigation can change the

I am compelled to respond to statements made by Joan Williams, who is arguably the strongest proponent of using litigation to induce social change. Williams criticizes those who argue that Title VII is an empty remedy. Williams questions whether scholars are being useful when they suggest more expansive reform, such as some of the solutions discussed above.<sup>216</sup> She states: “While scholarship and free inquiry should flourish, having feminists devote their energies to the excavation of case law that will be used to defeat women’s claims in court seems an odd role for feminist jurisprudence.”<sup>217</sup> I have two responses to this statement. First, it is not odd for feminists to debate and disagree about the best way to achieve equality, justice, or whatever goal feminists might have. This debate has been ongoing for years. The debate surrounding the *Cal-Fed* case<sup>218</sup> is a perfect example. Feminists vehemently and very publicly disagreed about whether a California statute, requiring employers to give women pregnancy leave without requiring equal leave for other illnesses or injuries, was preempted by the Pregnancy Discrimination Act.<sup>219</sup>

Second, and more importantly, I find such a statement by Williams to be akin to saying that scholars must agree with her or not discuss the subject at all. While some scholars do advocate for litigation as a way to ameliorate work-family conflict,<sup>220</sup> certainly plenty of prominent scholars believe that there is more than one way to solve the problem.<sup>221</sup> And

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structural norms of the workplace that make it difficult for caregivers to balance work and family. She argues that employers feel the pull from the status quo in favor of management prerogative. Bisom-Rapp, *supra* note 36, at 30–31. She also states that employers do not see themselves as biased and therefore “want the freedom to manage operations as they see fit.” *Id.* at 31. Peggie Smith also argues that it is difficult to get courts to depart from the norm of “comprehensive commitment.” Smith, *supra* note 60, at 598.

216. See *supra* Part II.B.

217. Williams & Segal, *supra* note 15, at 112.

218. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272 (1987).

219. See generally Patricia A. Shiu & Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker’s Right to Job-Protected, Paid Leave*, 21 YALE J.L. & FEMINISM 119, 133–40 (2009). The debate was between so-called “special treatment” feminists, who argued that in order for women to be treated equally in the workplace, they needed to be afforded “special treatment,” including paid leave benefits when they had a baby. *Id.* “Equal treatment” feminists were worried that if women are given “special treatment” in the workplace, this would perpetuate stereotypes of women as the weaker sex in need of special benefits in the workplace and will make employers more reluctant to hire them. *Id.*

220. See, e.g., Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO J. ON POVERTY L. & POL’Y 1, 4 (2012); Travis, *supra* note 10, at 7–8; Travis, *supra* note 17, at 288–89.

221. See, e.g., Arnow-Richman, *supra* note 114, at 27 (arguing that we should find ways of incentivizing employers to provide family-friendly workplaces); Bisom-Rapp, *supra* note 36, at 27 (stating that law professors who wish to help men and women balance work and family are discouraged by the existing state of the law); Schultz, *supra* note 23, at 1885 (arguing for measures like a reduced workweek in addition to litigation-focused solutions); Selmi, *supra* note 26, at 577 (arguing that men, as opposed to employers, should be more responsible for ameliorating work-family conflict); Suk, *supra* note 6, at 12–17 (expressing skepticism of the ability of Title VII to end caregiver discrimination); see also Bisom-Rapp, *supra* note 36, at 28 (stating that workplace norms are “too entrenched to be dislodged through litigation” and that Joan Williams is one of the few scholars that takes a positive stance towards litigation). Even Michelle Travis, who argues in favor of litigation,

frankly, there is only so much that can be said regarding using litigation to eliminate family responsibilities discrimination. When Williams questions whether feminists are being helpful when they advocate for reform besides litigation, she is, in my opinion, stifling the discussion, which might be stifling new voices, especially junior scholars who might be reluctant to disagree with her.

## 2. The Failure of Legislative Solutions

### a. Protecting Caregiver Status

As discussed above, one possible solution that has been debated for many years is either amending Title VII or enacting another statute to protect caregivers from discrimination based on their caregiver status.<sup>222</sup> However, the entrenchment of structural norms will limit the success of this type of legislation. As stated above, disparate treatment claims will only work in cases where the employer is either intentionally discriminating based on parental or caregiver status (a relatively rare occurrence) or the employer is making stereotypical decisions about the commitment or competence of caregivers (a much more likely occurrence).<sup>223</sup> But in order to actually help those caregivers who have difficulty meeting the hours and attendance requirements of the employer because of their caregiving responsibilities, employees would need to bring a disparate impact claim, arguing that the employer's practice (either long hours, strict attendance, rotating schedules, etc.) had a disproportionate effect on caregivers over non-caregivers. Of course, proving the statistical disparity might not be that difficult, but just as it would be difficult to challenge the employer's business necessity defense in a sex discrimination disparate impact claim, it would also be difficult challenging the employer's business necessity defense in a caregiver discrimination disparate impact claim.<sup>224</sup> In fact, the defense would be identical. And just as employers have succeeded in proving that the structural norms of the workplace are essential functions of the job in ADA claims, they will likely succeed in proving that the structural norms of the workplace are job-related and consistent with business necessity.

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recognizes that anti-discrimination law is not the entire answer to ameliorating work-family conflict. Travis, *supra* note 10, at 7–8 (stating that there is not one answer to such a multi-faceted problem); Travis, *supra* note 17, at 319.

222. See *supra* Part II.B.1. These proposals used to refer specifically to “parental status” discrimination or “family status” discrimination. See Smith, *supra* note 117. But more recent proposals recognize the need for a more inclusive statute that would protect all kinds of caregivers, including those who are caring for sick, disabled, or elderly adult family members, such as spouses, partners, parents, or other relatives. See, e.g., Locke *supra* note 18, at 19–20.

223. See *supra* Part II.B.1.

224. Smith, *supra* note 60, at 596–97.

### b. Accommodation Mandate and Other Affirmative-Mandate Statutes

Because of the difficulty surrounding litigation under either a sex discrimination or a caregiver discrimination theory, many scholars have proposed various solutions involving affirmative mandates rather than anti-discrimination provisions.<sup>225</sup> Although there is some utility in increased access to leaves of absence under the FMLA<sup>226</sup> and national or subsidized daycare, most scholars<sup>227</sup> agree that in order to accommodate the various needs of most caregivers, an individualized accommodation mandate is necessary.<sup>228</sup>

It would seem that an individual accommodation mandate could have the most promise for ending the caregiver conundrum. However, even assuming there was some chance that such a provision could become law (which most scholars agree is very doubtful), the entrenchment of structural norms would doom an accommodation mandate in much the same way that the entrenchment of structural norms has doomed the accommodation mandate of the ADA as applied to structural norms cases.<sup>229</sup> As the cases above demonstrate, courts are very reluctant to require employers to provide reasonable accommodations to disabled employees when those accommodations involve variations of or waivers from the structural norms of the workplace.<sup>230</sup> Courts are reluctant to require employers to provide waivers from rotating shifts, reluctant to require employers to provide leaves of absence or waivers of attendance policies, and reluctant to require employers to allow employees to work from home or have part-time work schedules.<sup>231</sup> There is no reason to think an accommodation mandate for caregivers would fare any better than the accommodation mandate for individuals with disabilities. In fact, there is

225. See *supra* Part II.B.2.

226. Increased access to FMLA can mean several things: It can mean increasing the number of employees entitled to FMLA leave; expanding the reasons for which employees can take leaves of absence; expanding the definition of "family" in the FMLA—expanding the group of individuals for whom an employee can rightfully take leave to care for; increasing the amount of leave to which employees are entitled; and providing for some wage-replacement during leaves of absence. Porter, *FMLA*, *supra* note 113, at 16–17. See also Smith, *supra* note 60, at 616–17 (arguing that a positive FMLA-type mandate is better than an anti-discrimination provision protecting parental status).

227. Of course, as stated above, Joan Williams believes that accommodation mandates are not needed in the caregiving context because caregivers do not need individual solutions. Williams & Segal, *supra* note 15, at 84–85. As I mentioned above, see *supra* note 131, I disagree that all caregivers need the same thing in the workplace. Some caregivers require better access to leaves of absence; some need flexible starting and ending times; some need reduced-hour or part-time work schedules; some need more lenient attendance policies so that they can tend to sick children or cover for sick baby-sitters; some need a waiver from rotating or evening shifts; some need waivers from overtime or travel requirements; and some simply need occasional time off of work to take loved ones to doctors' appointments or to attend mandatory school meetings.

228. See *supra* Part II.B.2.

229. In prior work, I demonstrated that employers are more willing to provide accommodations for the physical functions of the job than accommodations regarding the structural norms of the job. Porter, *supra* note 178.

230. See *supra* Part III.A.

231. See *supra* Part III.A.

some reason to believe that employers might be more reluctant to provide accommodations to caregivers because the number of caregivers is likely to exceed the number of individuals with disabilities in the workplace.<sup>232</sup> Thus, the entrenchment of structural norms in the workplace will likely doom an accommodation mandate for caregivers.

### 3. Even if Men and Women Performed Equal Work in the Home . . .

In addition to my skepticism about the likelihood of changing gender norms, even if men were to take on more caregiving tasks—perhaps by providing better protections for men who are discriminated against for taking on those tasks—there remains the problem of the entrenchment of structural norms. Even if parents divide responsibilities equally, parenting well will still take more time than the ideal worker norm allows. It is true that there will be fewer career penalties if two parties divide the sick kid days, doctors' appointments, etc. evenly, but unless the parents have extremely healthy children, reliable nannies and back up daycare for when the nanny is sick, or both, there will be times that one of the parents will need to leave work early, not work overtime, or not go on a business trip, not to mention taking leaves of absence when a new child arrives. As long as employers continue to insist on the ideal worker norm, getting men to do more caregiving will not completely solve the caregiver conundrum.

### C. Attacking the Structural Norms Directly

As I have argued above, because the entrenchment of structural norms means the failure of most proposed solutions, it seems to me the only other option is to attack the structural norms directly—to dismantle them.<sup>233</sup> I make this argument with full knowledge that it has no possible chance of succeeding, although some employers have successfully accomplished this. First of all, let me be clear about what I mean. Many scholars have discussed using litigation or an accommodation mandate to break down employers' structural norms.<sup>234</sup> I have already discussed why

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232. See Porter, *Mutual Marginalization*, *supra* note 125, at 41 (making this argument although pointing out that with the expanded definition of disability under the ADA, the number of individuals with disabilities is likely to increase dramatically). Although, as argued by some, not all women with caregiving responsibilities need accommodations and the problem with an accommodation mandate is that it assumes all women do need accommodations, thereby perpetuating stereotypes. Farrell & Guertin, *supra* note 105, at 1478.

233. See ALBISTON, *supra* note 8, at 240 (“[R]ights strategies that target institutional arrangements directly not only seem to produce better outcomes, but also avoid reifying gender and disability [arrangements that support inequality in the workplace]”); Smith, *supra* note 60, at 595 (“To effect purposeful change on behalf of individuals with parental obligations, workplace practices must be restructured to value parenting as a social good that requires affirmative support.”); Travis, *supra* note 10, at 5.

234. See *supra* Parts II.A & B.

I do not believe litigation or accommodation mandates are sufficient.<sup>235</sup> Thus, I am now referring to attacking those norms directly. Because of space constraints, I cannot discuss each of the ideas below in detail, and frankly, I am skeptical about any of them working. But, trying to look outside the box, I will suggest some possibilities.

One solution discussed by scholars is a reduced-hour workweek.<sup>236</sup> If the standard workweek were thirty-two hours instead of forty hours, this would go a long way towards ameliorating work-family conflict. In conjunction with this, we would need an increase in overtime pay (perhaps double time rather than time and a half) and would need to completely eliminate or drastically decrease the number of employees who are exempt from overtime under the Fair Labor Standards Act (FLSA), and therefore not entitled to overtime pay. This would force employers to hire more employees to even out the workload among those employees, rather than require some employees (usually the non-caregivers) to pick up the slack (often without extra pay)<sup>237</sup> of the caregivers.

An even more drastic measure would require employers to provide a very generous paid leave benefit package to all employees, and those employees would be forced to take the leave, or they would lose their pay during those weeks. Imagine that every employee is entitled to and forced to take four weeks of leave per year (for any reason). This would go far towards eliminating the stigma of those who ask for leave.

Finally, perhaps at the most draconian level, a system could be established where every employer has to certify that they either offer a certain amount of flexibility, such as offering flexible start and end times, occasional telecommuting options, reduced-hours options, etc., or that they can prove that the nature of the job precludes such flexibility.<sup>238</sup> I recognize that none of these are viable solutions. Outside the law, we should be encouraging employers to understand that efficiency and equality demand that they should seek to dismantle their structural norms without being forced to do so.<sup>239</sup>

## CONCLUSION

Despite the efforts of many, the caregiver conundrum remains very difficult to solve. Men and women who have caregiving responsibilities

235. *Supra* Parts III.B.1 & 2; *see also* Smith, *supra* note 60, at 598 (stating that it is difficult to get courts to depart from an employer norm of comprehensive commitment).

236. *See, e.g.*, Schultz, *supra* note 23, at 1955–56.

237. *Case, supra* note 44, at 1757–58.

238. A less draconian version of this would be to offer tax incentives for such family-friendly benefits. *See* Porter, *Synergistic Solutions, supra* note 7, at 821–22.

239. *See, e.g.*, Smith, *supra* note 60, at 617–18 (stating that we should make efforts to restructure the workplace); Williams & Segal, *supra* note 15, at 79 (discussing the business case for family friendly benefits). As stated by Maxine Eichner, work and caregiving are not incompatible if we change the way employers operate. Eichner, *supra* note 23, at 1308.



still find balancing work and family difficult and this affects their job prospects, pay, promotional opportunities, and their sanity.<sup>240</sup> Although scholars have spent many years debating various solutions, including litigating under our current laws, enacting new laws, and changing gender norms at home and in the workplace, these solutions have been unsuccessful. In this Article, I have identified the reason so many proposed solutions have failed and will continue to fail—the entrenchment of structural norms. Employers are very reluctant to change the practices of the workplace that most contribute to the caregiver conundrum: long hours; mandatory overtime; rotating shifts, inflexible shifts; stringent attendance policies; and inadequate leave policies. As demonstrated through the jurisprudence under the ADA, courts rarely force employers to modify their structural norms. Thus, I argued that the entrenchment of the structural norms is what will doom any possible solutions to the caregiver conundrum. The only answer to this puzzle is to dismantle the structural norms directly. I recognize how difficult it would be to force employers to modify their structural norms, so there remains much work to be done to convince employers that efficiency and equality dictate that they should voluntarily dismantle their structural norms.<sup>241</sup>

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240. I use “sanity” tongue in cheek. I do not mean to suggest that all or even most working caregivers are actually insane.

241. This is one place where the work of scholars like Joan Williams is very helpful. She has done a very good job of highlighting the “business case” for family friendly workplaces. *See, e.g., Williams & Segal, supra* note 15, at 79, 81–82.

