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## **Accommodation Subverted: The Future of Work/Family Initiatives in a 'Me, Inc.' World**

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## ACCOMMODATION SUBVERTED: THE FUTURE OF WORK/FAMILY INITIATIVES IN A “ME, INC.” WORLD

Rachel Arnow-Richman\*

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## I. Introduction

Looking at the state of women in the contemporary labor market and the laws that regulate them, I am reminded of the cryptic picture of a young lady combing her hair before a mirror, which, on closer inspection, dissolves into an image of an old woman.<sup>1</sup> The drawing is an optical illusion in which the same set of lines and shadings, examined from a different perspective, reveal an entirely different picture. With respect to women in the workplace, statistics show significant improvement in women’s participation in market work and their compensation relative to men. Yet beneath this pleasant picture lie significant disparities in the quality of women’s attachment to work and the progression of their careers.

Since the forces that underlie this “attachment gap” are multiple and complex, the vestiges of inequality that women confront today may, like the last pounds in a long diet, be the most difficult to lose.<sup>2</sup> Unsurprisingly, scholars have competing ideas as to how these inequalities should be approached and resolved. Some have focused on using federal discrimination laws to force employers to create more family-friendly work environments,<sup>3</sup> while others have argued for whole-scale reorganization of market work.<sup>4</sup> Some have focused on forcing men to pick up the slack at home,<sup>5</sup> while others have argued for greater state responsibility for family

1. To see a rendition of this image, visit <http://www.naute.com/illusions/youngold.phtml>.

2. 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, 386–87 (2001) (using the phrase “attachment gap” to characterize the disparity between the quality of women’s and men’s participation in market work in terms of benefits, stability, duration, and opportunity for advancement).

3. See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 101–13 (2000) [hereinafter WILLIAMS, UNBENDING GENDER] (outlining strategies for eliminating features of work structured on the life patterns of male workers under extant federal law including Title VII and the Equal Pay Act); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1226–33 (1989) (outlining possible approaches for challenging masculine norms using disparate impact and hostile environment causes of action under Title VII).

4. See, e.g., Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1954–56 (2000) (urging significant overhaul of current standards of work time and compensation to allow all workers, male and female, the ability to work at a livable pace).

5. See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1052 (1994) (calling for expanded interpretation of the FMLA to protect workers from harassment based on their request for leave in order to facilitate men’s involvement in family caregiving); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 778 (2000) (suggesting that men should be compelled to take family leave upon

dependency.<sup>6</sup> Despite their differences, however, many of these proposals share a demand for greater employer accommodation of caregiving—broadly defined as legally mandated affirmative behavior by employers designed to allow women the opportunity to participate fully in market work.<sup>7</sup> This strategy offers both a unifying theoretical concept and a vehicle for potentially altering workplace norms that systematically discriminate against women.

While much work has been done in developing a theory of how best to accommodate caregiving,<sup>8</sup> to date there has been only minimal critical attention to the pragmatic implications of the strategy.<sup>9</sup> This is surprising

birth or adoption of a child in order to eliminate discrimination against women rooted in employers' expectations that female employees will require more leave from work than male employees); cf. Daniel Greenwood, *Gender Workers/Market Equality*, 13 TEX. J. WOMEN & L. 323 (noting that to facilitate women's involvement in market work, "caretaking must be something that men can do, honorably and prestigiously").

6. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 9 (1995) ("Taking care of someone such as a child while [he or she is] young . . . is work, represents a major contribution to society, and should be explicitly recognized as such . . ."); Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1405–06 (2001) (arguing that the state should bear responsibility for dependency because caregiving is important and essential to the public).

7. While I define accommodation broadly, I set apart from this generalization those proposals that advocate government subsidies to families to support family caregiving. Whatever the benefits or viability of that system, it does not deal directly with the issue of employer responsibility for incorporating women into market work, which is the principal concern of this paper. Such proposals will, however, be briefly considered *infra*, Part V.A.

8. While caregiving has long been a significant concern of feminist legal scholars, the last several years have seen a renewed and perhaps increased focus on this topic in legal literature. See, e.g., WILLIAMS, *UNBENDING GENDER*, *supra* note 3; Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57 (2002); Lisa Bornstein, *Inclusions & Exclusions in Work-Family Policy: The Public Values & Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77 (2000); Martha Ertman, *Love and Work: A Response to Vicki Schultz's Life's Work*, 102 COLUM. L. REV. 848 (2002); Deborah L. Rhode, *Response Essay: Balanced Lives*, 102 COLUM. L. REV. 834 (2002); Schultz, *supra* note 4; Selmi, *supra* note 5; Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271 (2002); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443 (2001); Joan 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 (2003); Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. GENDER RACE & JUST. 411, 422–23 (2002); Symposium, *The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389 (2001); Symposium, *Workplace and the Family, Subversive Legacies: Learning from History/ Constructing the Future* (2002).

9. For an example of scholarship tackling the practical question of how mandated employer accommodation should be implemented, see, for example, Peggie R. Smith, *supra* note 8, at 1472–74, 1467 (proposing a legal model drawn from the religious accommodation provision of Title VII and unemployment compensation case law to achieve a variety of workplace accommodations such as reduced and flexible work arrangements). To the extent

given the abundant literature examining the jurisprudence of accommodation under existing directives aimed at other disadvantaged groups, in particular the disabled.<sup>10</sup> Accommodation has frequently been posited as an alternative to the formal equality principles that underlie much of contemporary discrimination law. Whereas most anti-discrimination initiatives place only negative directives on employers prohibiting differential treatment of similarly situated people, accommodation would require employers to take active steps to enable disparate groups to perform similarly.<sup>11</sup> These differing approaches may be harmonized on a theoretical level insofar as affirmative conduct is deemed by many to be a requisite step for achieving across-the-board equality in a meaningful sense.<sup>12</sup> Indeed, even Title VII of the 1964 Civil Rights Act, the first of the modern equal employment laws, incorporates the concept of accommodation in its prohibition against religion-based discrimination.<sup>13</sup>

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commentators have raised concerns about the implementation of employer accommodation, they have largely focused on the risk that such policies will essentialize women and exclude those who are not caregivers. See, e.g., 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, 1756 (2001) (criticizing theories of employer accommodation for benefiting men with wives at the expense of childless women and women in professions dominated by men with dependant spouses).

10. Under the Americans with Disabilities Act, employers must reasonably accommodate any qualified disabled employee or job applicant. See 42 U.S.C.A. § 12112(b)(5)(A) (1995); *infra* part III. A body of scholarship has examined judicial constraints on this directive and exposed a popular backlash against expansive use of this requirement to protect disabled workers. See, e.g., Linda Hamilton Krieger, *Foreword: Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000); *infra* Part IV.C.

11. The formal equality approach is embodied in legislation such as Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act; the Americans with Disabilities Act adds an accommodation directive to the traditional anti-discrimination model. Compare 42 U.S.C. §§2000e-2–2000e-3 (1994 & Supp. 2003) and 29 U.S.C. §623 (1999 & Supp. 2003) (“It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”), with 42 U.S.C. §12112(b)(5)(A) (1995) (“[T]he term discriminate includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . .”). The distinction between these types of directives will be further considered in Part II.B., *infra*.

12. See *infra* Part II.B.

13. See 42 U.S.C.A. §2000e(j) (1994) (“[T]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”). The duty to “accommodate” an employee’s religious beliefs derives from a 1966 EEOC interpretative regulation that was relied upon by courts and subsequently incorporated by amendment into the text of Title VII. See E.E.O.C. Reg. § 1605.1(b) (1966); *Kettle v.*

Yet examination of extant accommodation laws suggests that the relationship is far more complex: In developing a jurisprudence of accommodation, courts have routinely invoked principles of formal equality in making both procedural and substantive decisions about contemporary accommodation statutes that have limited the reach of those statutes and undermined their goals.<sup>14</sup> In these instances, accommodation and equality appear less like complementary kin than like competing principles in tension with one another. In the “optical illusion” created by federal employment statutes, the novel and progressive accommodation approach becomes distorted by an entrenched notion of formal equality.

This paper exposes the limitations of mandated accommodation as a unitary strategy for redressing workplace disadvantage attributable to caregiving, focusing on the subversion of accommodation by deeply rooted legal and cultural commitments to formal equality norms. In the pages that follow, I argue that the obstacles these equality norms pose to realizing true accommodation are likely to redouble in light of recent changes in the way people work, or what I describe as the emergence of a “Me, Inc.” work environment. In the “Me, Inc.” workplace, employers expect increased worker independence, demand significant extra-role contributions from employees, and offer only short-term job security. These developments are in tension with the concept of greater accommodation by employers or shared responsibility between co-workers for the caregiving needs of particular individuals.

The paper proceeds in four parts: Part II addresses the development of a loose consensus in favor of “equal accommodation” of family caregiving and how that approach attempts to overcome the historical distinction between “sameness” and “difference” feminism. Part III demonstrates how that goal has been undermined by judicial interpretation and application of accommodation mandates under the Americans with Disabilities Act (“ADA”) and the Family Medical Leave Act (“FMLA”). Court decisions pay lip service to the requirement of affirmative conduct, but often become mired in notions of employer animus and the presence or absence of non-discriminatory or performance-based rationales for employer conduct, hallmarks of the formal equality regime. Part IV offers thoughts on how the tension between accommodation and equality will play out in the new workplace, arguing that judicial resistance to accommodation is consistent with the way in which contemporary employers—and to some extent employees—view their social contract of employment. Part V therefore closes by suggesting that work/family initiatives focus not on discrete

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Johnson & Johnson, 337 F. Supp. 892, 894 (E.D. Ark. 1972) (recognizing affirmative duty of employer to reasonably accommodate the religious beliefs of its employee who requested Saturdays off to observe the Sabbath based on § 1605.1(b)).

14. See *infra* Part III.

accommodation mandates, but rather on working within existing discrimination and collective bargaining laws, supplemented by a government compensation system that creates incentives for employers to create efficient voluntary programs to assist caregivers.

## II. Feminist Discourse and the Transformative Potential of Accommodation

Although there is no consensus on the precise remedial efforts needed to address women's disadvantage, a consistent feature of the discussion is the recognition by most participants that some form of workplace accommodation beyond compliance with basic gender discrimination principles is needed to effectuate equal opportunity for caregivers.<sup>15</sup> This section describes the emergence of the accommodation concept within work/family dialogue and its relationship to traditional gender discrimination prohibitions. The section suggests that the development of an accommodation model for caregiving has the potential to unify feminists despite previous theoretical divisions over attention to women's "differences" and concludes that approaches to caregiving requiring affirmative employer conduct can coexist on a theoretical level with traditional anti-discrimination principles.

### A. *Caregiving and the Limits of Discrimination Law*

Both the effects of women's caregiving and the role of accommodation in discrimination law have long been issues of controversy within feminist discourse. Early second wave feminists eschewed the rhetoric of care in their quest for equality, fueling the sameness/difference debate that has polarized modern feminism.<sup>16</sup> Title VII of the 1964 Civil

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15. See *supra*, notes 6–8.

16. The crux of this historical debate is whether treating women equally merely requires that women be given the identical treatment and opportunities granted to men or whether the law must in some way recognize and account for real differences between men and women. See generally WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 217–32 (summarizing and harmonizing views of prominent "equality" and "special treatment" commentators); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1291–96 (1987) (distinguishing between "symmetrical" and "asymmetrical" approaches to sexual equality); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1143–44 (1986) (summarizing equal/special treatment debate as a dispute over whether the harm of discrimination lies in "not being treated as men are, or . . . not being treated as a woman"); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change, A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 791, 814–20 (1983) (describing and distinguishing between "rule equality," which relies on gender-neutral principles, and "result equality," which permits affirmative preferences for

Rights Act embraces a formal equality approach under which women and men must be treated alike in regard to terms and conditions of employment.<sup>17</sup> The avoidance of caregiving and disavowal of any need for affirmative behavior made sense in light of the troubled history of “preferential” treatment for women. In earlier times, invocations of women’s “ethic of care” were used to justify everything from maximum hours laws limiting women’s market work participation to outright bars on women participating in certain forms of work altogether.<sup>18</sup>

Title VII and the formal equality approach prohibit the use of such essentialist and stereotypical characterizations of women’s nature as a basis for limiting their access to market work, and they have been extremely successful in opening doors to women. They have proven less successful, however, in achieving equality of result across all job sectors and within industry-specific hierarchies.<sup>19</sup> This unfavorable picture is attributable to

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women). Mainstream equality feminism resisted attention to women’s caregiving responsibilities for fear that it would undermine the claim that men and women are fundamentally the same and legitimize adverse differential treatment of women. See generally Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605, 1607–10 (2000) (summarizing early feminist objections to the rhetoric of care, including claims that focus on care essentialized women’s experiences and allowed for continued marginalization of women within male institutions by failing to address societal devaluation of women’s caregiving).

17. 42 U.S.C.A. § 2000e-2(a) (1994) (“It shall be an unlawful employment practice for an employer to . . . refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .”). Based on this language, it would be a violation of the statute to provide any benefit to a woman that was not available to a man.

18. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (upholding an Oregon statute limiting number of hours that women could work per week because “healthy mothers are essential to vigorous offspring, [and] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race”); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (affirming state court decision upholding Illinois statute that prohibited women from practicing law because “[t]he constitution of the family organization, which is founded in the divine ordinance . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood”).

19. For example, as of March 2000, women comprised only 12.5% of corporate officers of Fortune 500 companies. See Alex Frangos, *Executive Positions: Fewer Women Reach Top of Corporate Ladder*, WALL ST. J., Nov. 15, 2000, at NE4; CATALYST, INC., RESEARCH, CENSUSES at <http://www.catalystwomen.org/research/censuses.htm> (last visited Sept. 29, 2003) (providing synopsis of research results of 2000 Catalyst Census of Women Corporate Officers and Top Earners). Women represented only 17% of partners or shareholders in public accounting firms in 1999 and only 15.63% of partners in law firms in 2001. See AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, WOMEN AND FAMILY ISSUES SURVEY OF PUBLIC ACCOUNTING FIRMS AND PROFESSIONALS APRIL 2000 at [http://www.aicpa.org/download/career/reprt\\_pubfirms.pdf](http://www.aicpa.org/download/career/reprt_pubfirms.pdf) (last visited Sept. 23, 2003); AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2001 at <http://www.abanet.org/women/glance.pdf> (last



many causes, perhaps not the least of which is ongoing animus-based discrimination against women.<sup>20</sup> But increasingly, attention has focused on the role of women's caregiving activities in influencing both decisions and choices about women's employment. Whereas women as a group are faring better in the marketplace relative to men, the statistics comparing mothers to fathers are far less favorable.<sup>21</sup> Despite increases in men's assumption of family caregiving and housekeeping responsibilities, women still perform the vast majority of these difficult and time-consuming tasks and suffer the consequent impact on their market employment.<sup>22</sup>

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visited Sept. 23, 2003). According to Department of Labor Statistics, in 2002 women represented only 10.8% of all "engineers," 30.8% of "mathematical and computer scientists," 0.05% of "mechanics and repairers," and less than 0.03% of workers in the construction trades. See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, CURRENT POPULATION SURVEY, CHARACTERISTICS OF THE EMPLOYED: EMPLOYED PERSONS BY OCCUPATION, SEX, AND AGE at <http://www.bls.gov/cps/cpsaa9.pdf> (last visited Sept. 18, 2003). Although the gender wage gap narrowed last year, full-time working women earned only 77.5% of what their male counterparts earned in 2002. See David Loehardt, *Gap Between Pay of Men and Women Smallest on Record*, N. Y. TIMES, Feb. 17, 2003, at A1 (summarizing Bureau of Labor Statistics).

20. See Schultz, *supra* note 4, at 1892–93 (arguing that employers view women as inauthentic workers who are appropriately excluded from certain professions and paid less than men who share their occupation); Selmi, *supra* note 5, at 745–46 (suggesting that employers discriminate against women by refusing them long-term assignments and access to mentoring opportunities based on the misperception that women will eventually leave the work force for family reasons).

21. Mothers' wages are 60% of those of fathers. Williams & Segal, *supra* note 8, at 78 (2003) (citing Jane Waldfogel, *The Family Gap for Young Women in the U.S. and Britain*, 16 J. LAB. ECON. 505, 507 (1998)); see also WILLIAMS, UNBENDING GENDER, *supra* note 3, at 14–15 (suggesting that nearly half the gender wage gap for women aged thirty is attributable to childbearing, and at least two-thirds reflects women's role as the primary caregiver). In 1998, only 34.7% of all women who were mothers of children under the age of 6 were employed on a full-time basis for the entire year. Phillip N. Cohen and Suzanne M. Bianchi, *Marriage, children, and women's employment: what do we know?*, Dec. 1999 MONTHLY LAB. L. REV. 22, 27 (presenting statistics for hours and weeks of paid work for women aged 25–54) available at <http://www.bls.gov/opub/mlr/1999/12/art3full.pdf> (last visited Sept. 23, 2003); see also Kessler, *supra* note 2, at 385–86 (summarizing statistics from early to mid-1990s demonstrating that women with children have significantly less job attachment than both men with children and women without children).

22. See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 14 (explaining economists' perspective that women "self-select" into jobs requiring lower skill levels and less education because they expect to leave the workforce to bear children); Kessler, *supra* note 2, at 378 (finding that women generally retain primary responsibility for housekeeping and childcare regardless of their work status); ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 3–4 (1989) (estimating that women work thirty more 24-hour days per year than men when they work outside of the home and remain the primary caregiver). I should note that in describing women's and men's comparative participation in market and family work, I make no conjecture as to the reason for women's disproportionate assumption of caregiving responsibilities. That is, I leave aside the hotly debated question whether women are caregivers by nature, whether they are socialized to be caregivers, or whether they choose caregiving in response to existing labor conditions. See,

Recognition of the correlation between women's family responsibilities and workplace disadvantage has forced feminists to confront and reconstruct both the issue of care and the limits of existing discrimination law.<sup>23</sup> The inadequacy of the traditional discrimination model in addressing caregiving appears most starkly in the infamous *General Electric v. Gilbert* decision concerning employer treatment of pregnancy.<sup>24</sup> There the Supreme Court concluded that the exclusion of pregnancy-related benefits from an employer's health plan did not constitute sex discrimination because pregnancy is not a condition that affects all women.<sup>25</sup> The ruling was subsequently superceded by the Pregnancy Discrimination Act (PDA), but the legacy of its logic persists.<sup>26</sup> Under the PDA, employers must treat pregnancy the same as other disabling conditions that affect both men and women (or only men).<sup>27</sup> There is no requirement under the statute that employers actually provide for pregnancy in terms of benefits or leave, and employers are free to treat all employees "equally badly."<sup>28</sup> The PDA does not address women's

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*e.g.*, Dowd, *supra* note 8, at 90 (suggesting that societal views of appropriate female roles are a driving force behind women's frequent assumption of primary family responsibilities and long-term departures from market work); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2162 (1994) (suggesting that women respond to workforce conditions that presuppose they will eventually leave to have children by actually doing so). Neither do I wish to essentialize women by suggesting that all women engage in caregiving. The statistics merely reflect that caregivers as a group are doing poorly relative to other employees, but since most caregivers are women, caregiving plays an important role how women fare as a whole.

23. See generally Abrams, *supra* note 16, at 1611–14 (heralding a more nuanced and contextualized treatment of caregiving in emerging feminist scholarship); Becker, *supra* note 8, at 59–62 (describing the "new generation" of care theorists who argue that women are disproportionately poor relative to men because their caregiving contribution to society is undervalued).

24. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

25. See *id.* at 136.

26. The PDA is an amendment to Title VII which provides that discrimination on the basis of "sex" includes discrimination on the basis of pregnancy. See 42 U.S.C.A. § 2000e(k) (1994).

27. See *Byrd v. Lakeshore Hosp.*, 30 F.3d 1380, 1383 (11th Cir. 1994) (finding discrimination where pregnant employee who took sick leave was terminated while other temporarily disabled or sick employees in similar positions were not); *United States v. Bd. of Educ.*, 938 F.2d 790, 798–99 (7th Cir. 1993) (holding that the employer's maternity leave policy was discriminatory because it prohibited pregnant teachers from combining paid sick leave with unpaid maternity leave but allowed non-pregnant sick teachers to do so).

28. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); see also *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 860 (5th Cir. 2002) (finding no unlawful discrimination because "[a]lthough [employer]'s policy results in the dismissal of any pregnant or post-partum employee who misses more than three days of work during the probationary period, it equally requires the termination of any non-pregnant employee who misses more than three days"); *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 980

affirmative needs for benefits or leave related to pregnancy, a condition that they alone experience and the results of which disadvantage only them, irrespective of the unavailability of health care or leave for other “disabilities” that men and women share.

The difficulties of applying formal equality principles in the pregnancy context are more intractable with respect to caregiving that arises outside the event of childbirth. The premise of Title VII is that similarly situated employees should be treated equally and not on the basis of immutable, protected characteristics such as race or gender. Pregnancy challenges this premise because men and women cannot be similarly situated with respect to that condition. In view of the fact that pregnancy is “unique” (and temporary), courts have been willing to sanction special treatment of pregnancy that might otherwise be viewed as antithetical to equality principles. Thus, in *Federal Savings & Loan v. Guerra*, the Supreme Court interpreted the PDA as permitting employers to provide more generous leave to pregnant employees than to non-pregnant disabled employees despite the plaintiffs’ claim that the practice discriminated against men.<sup>29</sup> Caregiving is not amenable to the same judicial sleight of hand. Both men and women are capable of providing care and performing most other forms of family work.<sup>30</sup> Employer consideration of a woman’s caregiving responsibilities in rendering personnel decisions is not discrimination on the basis of sex, by definition, because caregiving, while performed predominantly by women, is not an immutable characteristic

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(S.D. Iowa 2002) (finding against pregnant employee fired for absenteeism related to her pregnancy because she “failed to meet her burden to produce any evidence that similarly situated non-protected class employees were treated more favorably than she”).

29. See *Cal. Fed. Sav. & Loan v. Guerra*, 479 U.S. 272 (1987) (concluding that the PDA, while not requiring any accommodation of pregnancy, did not prohibit such accommodations, thereby saving an employer from a finding that it had discriminated on the basis of sex (in favor of women and to the detriment of men) by providing more generous leave to pregnant employees than to non-pregnant disabled employees).

30. Perhaps the only exception is men’s obvious inability to breastfeed infant children. Scholars have argued that breastfeeding should be treated as an aspect of pregnancy and consequently entitled to equivalent protection. See, e.g., Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL’Y & L. 471, 480–81 (2001); Isabelle Schallreuter Olson, *Out of the Mouths of Babes: No Mother’s Milk for U.S. Children: the Law and Breastfeeding*, 19 HAMLIN L. REV. 269, 302–03 (1995); Jendi B. Reiter, *Accommodating Pregnancy and Breastfeeding in the Workplace: Beyond the Civil Rights Paradigm*, 9 TEX. J. WOMEN & L. 1, 19–20 (1999); Corey Silberstein Shdaimah, *Why Breastfeeding Is (Also) a Legal Issue*, 10 HASTINGS WOMEN’S L.J. 409, 420 (1999). Courts, however, have generally not adopted this view. See, e.g., *McNeill v. New York City Dep’t of Corrs.*, 950 F. Supp. 564, 570 (S.D.N.Y. 1996) (finding employer justified in terminating employee who requested accommodation of short breaks during the workday to breastfeed her newborn); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990) (noting that breastfeeding is not a medical condition relating to childbirth and finding no discrimination where employer denied female employee six week sick leave to wean infant who, for medical reasons, could not bottle-feed).

related to gender. Indeed, arguing otherwise risks re-entrenching existing norms that shoulder women with the majority of caregiving work to their ultimate disadvantage in the marketplace.<sup>31</sup>

More problematic, however, is the controversial relationship between caregiving and work performance. Discrimination law primarily targets the irrational consideration of factors unrelated to an individual's qualifications for work. While scholars dispute the extent to which women's caregiving responsibilities affect employers' bottom line,<sup>32</sup> at least in some instances, women are hampered by caregiving in ways that non-caregivers (male and female) are not in fulfilling common work obligations. Caregivers are less likely to be able to work overtime, they may be unable to travel for business for extended periods or at limited notice, and they are more likely to be absent from work.<sup>33</sup> The legal framework for assessing basic discrimination claims accepts existing work requirements as the baseline for evaluating performance and consequently views caregiving's impact on performance as a legitimate non-discriminatory reason for an adverse employment decision.<sup>34</sup> Within this regime, if an employer can produce

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31. See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 221 (arguing that laws designed to protect caregiving should be gender neutral because "[a] law that uses sex as a proxy . . . otherwise becomes [yet another] social sanction to police women back into the caregiver role and men out of it"); Kessler, *supra* note 2, at 467 (warning that "[i]f women assert that they deserve rights because gender socialization or biological forces dictate their caregiving, they will receive rights only during the limited circumstances when society considers their agency to be bounded").

32. Compare Selmi, *supra* note 5, at 745–46 (suggesting that disadvantageous treatment of women is attributable more to employers' false perceptions about women's commitment level than to any real effect of caregiving on women's work performance), with Issacharoff & Rosenblum, *supra* note 22, at 2157 (suggesting that employing women who bear children is necessarily costly for employers even if no paid leave is provided insofar as employer must continue employment benefits, hire temporary replacements, and absorb costs resulting from the interruption in performance).

33. See Case, *supra* note 9, at 1761 (citing evidence that working women with children under the age of six are absent twice as often as men or workers without children); Joan Williams, Symposium, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1471 (2001) (suggesting that 92% of working mothers are unable to work the overtime required by most higher-paying jobs).

34. The basic proof structure for Title VII disparate impact claims comes from the *McDonnell Douglas-Hicks-Burdine* trilogy of Supreme Court cases. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–03 (1973); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–56 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508–12 (1993). Under these decisions, once the plaintiff sets forth a prima facie case of discrimination (by showing that she was treated less favorably than a similarly situated male employee), the burden shifts to the defendant employer to produce a legitimate non-discriminatory explanation for the adverse conduct, which the plaintiff must disprove. See *McDonnell Douglas*, 411 U.S. at 803–04; *Burdine*, 450 U.S. at 253; *Hicks*, 509 U.S. at 509. This means that an employer can successfully defend against a mother's claim of sexually discriminatory termination by truthfully asserting that it fired the plaintiff for refusing to work overtime despite the fact that she did so because of her caregiving responsibilities.

evidence to support a business-related basis for its decision, for instance its financial inability to allow extra time off for childrearing, the employee cannot succeed unless she proves that the asserted reason is a pretext masking animus toward women.

Such performance-based obstacles not only arise in the context of “intentional” or disparate treatment-type discrimination claims but in the “unintentional” discrimination or disparate impact context as well. The success of a disparate impact claim rests on the plaintiff’s ability to demonstrate a statistical disparity in the representation of a particular class of employees without regard to animus.<sup>35</sup> Such claims therefore are uniquely situated to target systemic practices that work to exclude women.<sup>36</sup> However, even where such exclusion is demonstrated, employment practices that are supported by legitimate business reasons, such as those related to productivity or cost, are not considered discriminatory despite the fact that they disproportionately burden women as a group.<sup>37</sup> Thus, the effects of caregiving on women’s performance, evaluated against existing work requirements, pose significant hurdles to success within a discrimination framework even where animus issues are removed from the calculus.

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35. See 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (1994) (“An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin . . . .”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (“Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

36. See *Abrams*, *supra* note 3, at 1226–27 (noting that disparate impact litigation could target a variety of job criteria that prevent women from succeeding at work, including stringent absenteeism limits and demanding travel and time commitment requirements); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 484–89 (2001) (discussing how developing disparate impact law may be used to encourage employers to establish criteria for decision making and institute review mechanisms to weed out systemic bias in subjective decision making processes).

37. See 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (1994) (plaintiff establishes a disparate statistical impact where “the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity”); *Chambers v. Omaha Girls Club, Inc.*, 629 F. Supp. 925, 950–51 (D. Neb. 1986) (finding no actionable disparate impact in employer practice of terminating single pregnant women where practice furthered club’s goal of “fostering growth and maturity of young girls”); *Personnel Adm’r. of Mass. v. Feeney*, 442 U.S. 256, 265 (1979) (finding no disparate impact in state’s use of veterans preference in hiring as the practice was “justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations”). See generally *Abrams*, *supra* note 3, at 1227–28 (explaining business necessity defense and the difficulties of proof it presents for employees seeking to attack barriers to successful employment of primary parents).

### B. "Equal Accommodation" of Caregiving

In light of the limitations of traditional discrimination law, focus has shifted to accommodation and the potential for affirmative conduct that will assist caregivers. The Family Medical Leave Act of 1993, the first and only federal statute aimed at redressing work/family conflict, requires employers to provide a fixed accommodation of twelve weeks unpaid leave plus reinstatement to employees with particular family caregiving responsibilities.<sup>38</sup> The statute recognizes that the lack of employer policies to accommodate working parents requires legislative action establishing minimum employer obligations, and it is one of very few federal employment laws that grants substantive entitlements to certain terms of employment.<sup>39</sup>

Contemporary political initiatives have typically built on FMLA entitlements by calling for mandated accommodations beyond the leave provided for by statute. Since its passage, the FMLA has been extensively criticized for failing to sufficiently address women's caregiving needs.<sup>40</sup> The Family and Medical Leave Improvements Act, introduced in Congress in 1997, would have expanded the reach of the statute to require leave for parents attending school-related events.<sup>41</sup> Scholars have also called for

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38. See 29 U.S.C.A. § 2612(a)-(c) (West Supp. 2003).

39. See 29 U.S.C.A. § 2601(1999 & Supp. 2003) (noting in preamble that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting"). Other minimum employment terms mandated by federal laws are largely limited to the wage and hour requirements of the Fair Labor Standards Act and work safety rules imposed by the Occupational Safety and Health Act. See 29 U.S.C. § 206 (1999) (establishing a minimum wage); *Id.* at § 207 (requiring employers to pay one and a half times the regular rate of pay for every hour over forty worked by an employee in one work-week); 29 U.S.C. § 212 (1998 & West Supp. 2003) (making it illegal for employers to engage in oppressive child labor or knowingly trade with others who employ oppressive child labor); 29 U.S.C. § 654(a) (1999 & West Supp. 2003) (requiring employers to provide working conditions free from recognized hazards likely to cause death or injury and to follow promulgated occupational safety and health standards).

40. The FMLA provides only unpaid leave for the discrete life events of birth, adoption, and serious family illness and is therefore unhelpful to a large number of working caregivers. See 29 U.S.C.A. § 2612(a)-(c) (West 1999 & Supp. 2003). Consequently, scholarly critique of the statute's parsimonious benefits has become a cottage industry. See, e.g., Bornstein, *supra* note 8, at 81 ("[B]y providing only emergency or short-term coverage . . . [in] gender-neutral language . . . the benefits provided by the Act are more symbolic than they are real."); Rhode, *supra* note 8, at 845 (noting that "twelve weeks falls far short of what child development experts believe is minimally necessary" for the amount of time a mother should remain at home with her child after birth); Selmi, *supra* note 5, at 765-66 ("[T]here is no indication that the FMLA has greatly, or even mildly, facilitated the balancing of work and family commitments.").

41. See H.R. Rep. No. 105-109 (1997). The Family and Medical Leave Improvements Act would have entitled employees to take FMLA leave to "participate in school activities directly related to the educational advancement of a son or daughter of the employee, such

increasing basic employee entitlements, for instance by requiring employers to provide some amount of paid leave for FMLA qualifying events.<sup>42</sup> Others have suggested legislation requiring employers to “reasonably accommodate” caregiving in the way that Title VII and the Americans with Disabilities Act require reasonable accommodation of religion and disability, respectively.<sup>43</sup> Under such directives, employers could be required to provide such accommodations as flexible work schedules, on-site daycare, work sabbaticals, or other types of “family friendly” work policies as appropriate to suit employees’ individual needs.<sup>44</sup>

Importantly, support for accommodation, whether in a legislatively fixed or individually tailored form, has emerged despite the historical divide between sameness and difference feminism. Accommodation has avoided the pitfalls of this debate by distancing itself from the controversial claim of preferential treatment for women. Instead of “special treatment” for mothers, the pursuit of accommodation for caregiving seeks “equal accommodation” of all workers.<sup>45</sup> The integrity of the FMLA and other proposals that would mandate substantive benefits or require reasonable

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as parent-teacher conferences or interviewing for a new school” and an additional twenty-four hours of leave in any twelve-month period to “accompany the son or daughter of the employee to routine medical or dental appointments, such as checkups or vaccinations.” *See id.* The bill also would have expanded the FMLA’s coverage to include employers with twenty-five or more employees. *See id.* The current law applies only to those with fifty or more. 29 U.S.C. § 2611(4)(A)(i).

42. *See, e.g.,* Jeremy I. Bohrer, *Recent Development: You, Me, and the Consequences of Family: How Federal Employment Law Prevents the Shattering of the “Glass Ceiling,”* 50 WASH. U. J. URB. & CONTEMP. L. 401, 420 (1996) (suggesting that employers pay at least a portion of FMLA leave in order to accommodate those employees who could not otherwise afford to take time off); Selmi, *supra* note 5, at 770–71 (recommending that federal law be amended to require employers to pay six weeks of FMLA qualifying leave per worker).

43. *See, e.g.,* Kessler, *supra* note 2, at 457–59 (suggesting that the ADA and the religious accommodation provisions of Title VII “offer promising models of substantive equality on which to build a theory of workplace accommodation for family caregiving responsibilities”); Pegg R. Smith, *supra* note 8, at 1445–73 (proposing a model of employer accommodation of family caregiving that would follow the procedural framework associated with religious accommodation claims under Title VII and rely on unemployment compensation case law to determine when an employee has a compelling family obligation that conflicts with work); *see also* Finley, *supra* note 16, at 1175–76 (urging that employers bear the costs associated with workers’ childbearing and childrearing needs).

44. *See, e.g.,* Pegg R. Smith, *supra* note 8, at 1474–78 (suggesting possible workplace accommodations for family caregivers, including granting lateral job transfers, facilitating voluntary substitute and swap arrangements between co-workers, and permitting flexible work schedules).

45. *See* WILLIAMS, UNBENDING GENDER, *supra* note 3, at 221 (arguing that laws designed to protect caregiving should be gender neutral); Kessler, *supra* note 2, at 456–57 (urging that support for caregiver rights should be grounded in the need for a fully functioning and lasting society so that both women and men will receive those rights whenever they engage in caregiving).

accommodation rests on applying those directives to both male and female workers with children, as well as to male and female workers with family caregiving responsibilities other than parenting. Indeed, the text of the statute notes the importance of having both fathers and mothers participate in childrearing and family caregiving, and scholars consistently contend that men's assumption of family work is essential to eliminating women's workplace disadvantage.<sup>46</sup> In this way, work/family initiatives steer the debate away from gender discrimination and toward the presumptively gender-neutral issues of family life and health.

On a doctrinal level, accommodation and equality are increasingly posited as equivalents in the realization of workers' civil rights. Such is the case under the ADA, which treats the failure to accommodate disability as a form of discrimination within a traditional equality framework. The statute makes disability a protected characteristic, so that an adverse employment decision based on prejudice or stereotype regarding the disability is unlawful.<sup>47</sup> Yet even where an employee's disability legitimately impacts performance, the employer has no defense against a differential treatment claim if the employer is capable of reasonably accommodating the employee in a way that will enable him or her to perform equally.<sup>48</sup> Thus, an indefensible failure to act affirmatively

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46. See 29 U.S.C.A. § 2601(a)(2) (1999 & Supp. 2003) (noting that "it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions"); Kessler, *supra* note 2, at 421 (criticizing men for not taking as large a role in parenting as had been anticipated following the enactment of the FMLA); Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 26–27 (1998) (arguing that children, mothers, and fathers benefit when fathers take part in the childrearing process and advocating for changing the focus of workplace accommodations to include accommodating the caregiving responsibilities of men); Selmi, *supra* note 5, at 777–78 (arguing that men must take leave in order to disabuse employers of the notion that only women provide caregiving which results in allegedly rational statistical discrimination against them).

47. See 42 U.S.C. § 12112 (1995); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 312–13 (2001) (noting that the "standard anti-discrimination formula" for prohibiting discrimination on the basis of disability under the ADA was borrowed from the Civil Rights Act of 1964); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 5–6 (1996) (noting that six of the seven prohibitions under the ADA are "borrowed virtually intact from the language of Title VII and case law, and their interpretation with respect to claims by disabled individuals seems to flow directly from their interpretation in their original context"); see also Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 904–05 (2000) [hereinafter Travis, *Leveling the Playing Field*] (noting that the ADA protects individuals with disabilities from stereotypes, prejudice, and misperceptions).

48. 42 U.S.C. § 12112(b)(5)(A) (1995) (The term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered



substitutes for the invidious motivation associated with a traditional equality claim.<sup>49</sup>

Recent scholarship has called into question the division between what have historically been thought of as negative directives, like the operative portions of Title VII, and the affirmative requirements imposed by the accommodation-oriented statutes of the last decade.<sup>50</sup> Christine Jolls has argued that affirmative conduct and negative conduct are not distinct categories, but rather lie on a continuum with “traditional” equality-based discrimination laws and accommodation mandates at either end.<sup>51</sup> Professor Jolls focuses on Title VII disparate impact claims, which permit employees to challenge practices that disproportionately impact protected groups despite the absence of an intent to discriminate. In cases involving employer grooming rules, English-only policies, and certain pregnancy cases challenging limited leave policies, courts have required employers to alter facially neutral practices supported by a business-related rationale.<sup>52</sup>

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entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”).

49. See Karlan & Rutherglen, *supra* note 47, at 10 (noting that “the ADA embraces both a ‘sameness’ and a ‘difference’” model of discrimination); Travis, *Leveling the Playing Field*, *supra* note 47, at 905 (suggesting that a reasonable accommodation right creates equal opportunities by breaking down norms created by nondisabled workers and allowing those with disabilities to compete on an equal playing field).

50. The argument that accommodation and equality directives embody fundamentally distinct goals has been frequently asserted in scholarship comparing the entitlements afforded under the ADA to the anti-discrimination prohibitions of Title VII. See, e.g., Issacharoff & Nelson, *supra* note 47, at 310 (describing the ADA’s accommodation requirement as a “marked departure from [the nondiscrimination commands] of prior employment law” in the form of required redistribution under the accommodation mandate); Karlan & Rutherglen, *supra* note 47, at 9 (explaining that Title VII holds employment practices unlawful only when they prevent individuals from performing the job as the employer defines it, whereas the ADA requires the employer to take positive steps to change the job or work environment to meet the needs of eligible disabled employees); Peggie R. Smith, *supra* note 8, at 1460 (“Whereas traditional anti-discrimination doctrine embodies a negative concept of liberty understood as the right to be left alone, the accommodation principle . . . is premised on positive liberty, imposing upon employers an affirmative duty to accommodate the needs of employees.”); see also Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643–44 (2001) (summarizing arguments that because accommodation laws mandate special treatment for distinct groups they are inconsistent with Title VII’s requirement of equal treatment for all workers).

51. Jolls, *supra* note 50, at 644–45.

52. See, e.g., EEOC v. Trailways, Inc., 530 F. Supp. 54, 59 (D. Colo. 1981) (exempting black employees from shaving despite employer’s explanation that having clean shaven employees is important to company image); Lanning v. S.E. Pa. Transp. Auth., 181 F.3d 478, 485, 491–94 (3d Cir. 1999) (disapproving a policy requiring employees to run 1.5 miles in twelve minutes because it disproportionately excluded women, despite recognition of the employer’s need to impose minimal physical standards on its officers); EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911, 912–14 & n.7 (N.D. Ill. 1999) (finding English only rule discriminatory); EEOC v. Warshawsky & Co., 768 F. Supp. 647, 651–55 (N.D. Ill. 1991) (finding employer policy of terminating any first-year employee requiring

Implicit in the business rationale defense is the idea that the employer must have a substantial interest in the objectionable practice to justify its disparate effect and that a minor interest will not relieve an employer of liability.<sup>53</sup> Since the remedy in disparate impact cases may require the employer to refrain from applying the objectionable practice to the protected class, such rulings are in effect accommodation mandates—they force the employer to confer benefits on or create exceptions for a particular group of employees.<sup>54</sup>

Research specifically addressing caregiving and women's workplace disadvantage has similarly collapsed the equality/accommodation distinction. Joan Williams, in her numerous contributions to this area of scholarship, has suggested that issues of systemic bias against women may be attacked by reinterpreting basic equality rules to include analysis of existing work structures.<sup>55</sup> According to Professor Williams, jobs that require full time hours plus overtime are designed based on a prototypical male employee with no family responsibilities and in this way discriminate against women who diverge from the "ideal worker" norm.<sup>56</sup> In analyzing disparate treatment as well as disparate impact claims, courts must deconstruct employers' allegedly "legitimate" reasons for packaging work in ways that disadvantage caregivers.<sup>57</sup> Such a position does not demand that the law place direct obligations on employers, but it in effect incorporates an accommodation requirement by moving the baseline for what courts may accept as neutral justifications for employer business practices. Under this approach, the failure to reconsider and ultimately alter work practices in response to changing workforce demographics constitutes a form of unlawful discrimination against women, who serve as the primary caregivers in most families.

Thus the concept of accommodating caregiving has been mainstreamed. Under the FMLA, and in many proposals for additional reform, caregiving benefits are framed as worker rights rather than

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long-term sick leave disparately impacted women who could become pregnant despite the employer's assertion that the policy reduced turnover). *See generally* Jolls, *supra* note 50, at 653–63 (summarizing these and other disparate impact cases in which courts have held employers liable despite the presence of a legitimate business rationale for the challenged job practice).

53. *See generally* Jolls, *supra* note 50, at 665–66.

54. *See id.* at 652.

55. *See, e.g.,* WILLIAMS, UNBENDING GENDER, *supra* note 3, at 213 (urging that the ultimate goal of equality is to "deconstruct domesticity, and reconstruct market work and family entitlements").

56. *See id.* at 1 (defining the "ideal worker" as one who "works full time and overtime and takes little or no time off for childbearing or child rearing," in other words, the traditional male employee).

57. *See id.* at 109 (arguing that the ability to work in an environment defined by and structured around male bodies and norms cannot be a legitimate job qualification).

preferential treatment for women. At the same time, employment discrimination scholarship has emphasized the connection between equality and accommodation concepts, creating the potential for greater support for caregiving benefits, which can in turn address the problem of systemic discrimination against women.

### III. Equal Accommodation in Action: Title VII's "Legitimate Non-Discriminatory Reason" Defense Meets the Refusal to Accommodate Claim

The previous section suggested that accommodation offers a unifying and intellectually consistent framework for moving beyond formal equality in addressing caregiving. Yet the convergence of equality and accommodation brings together two very different regulatory approaches with distinct practical effects that may pose difficulty in application. Crucial to evaluating the potential for caregiving accommodation is understanding where and how existing accommodation laws deviate in application from their aspirational missions. Such deviations are inherent in interpreting accommodation laws against a background regime in which equality norms predominate.<sup>58</sup> In evaluating refusal to accommodate claims, courts frequently use the language of formal equality, emphasizing the absence of animus and the viability of the employer's business justification in limiting the reach of the law. Because the purpose of accommodation is to move beyond issues of motivation and require affirmative conduct, this injection of traditional Title VII defenses within the accommodation framework seriously undermines the transformative potential of the accommodation strategy.

The following section looks at two instances in which equality prevails at the expense of accommodation, concluding that existing jurisprudence does not embrace the type of aggressive changes to employer behavior necessary to meaningfully support employee caregiving. The subversive effects of equality have both a substantive and procedural dimension. On the substantive side, courts have accepted the existing structure of work as a baseline in delineating the extent of accommodation required under the ADA, refusing to require systemic changes perceived to benefit some workers over others. On the procedural side, courts have placed the burden on employees to prove that a refusal to restore them to their jobs under the FMLA was improperly motivated in order to obtain the

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58. The interaction and counteraction between legal mandates and pre-existing human forces has frequently been the subject of law and sociology scholarship. See Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. OF EMP. & LAB. L. 476, 492 (describing how social norms capture and assert themselves within laws designed to transform them). I will return to this concept in more detail in Part IV.B.

benefits mandated by the statute. These results suggest that rather than raising the bar on what is considered equal employment opportunity, accommodation has been held down by the more narrow view of equality that it aims to overcome.

*A. Delineating the Reach of Individualized Accommodation under the Americans with Disabilities Act*

The Americans with Disabilities Act is a particularly appropriate source for examining the practical interaction between accommodation and equality because it is a hybrid equality-accommodation statute. It provides that no covered employer shall discriminate against a “qualified individual with a disability”, that is, a person who “with or without reasonable accommodation, can perform the essential functions of the employment position.”<sup>59</sup> In defining discrimination, the statute provides that the failure to make a reasonable accommodation that would enable an employee to perform the job constitutes discrimination, unless the employer can prove that doing so would be “unduly burdensome.”<sup>60</sup>

As applied, however, the ADA has not effectuated wide-scale changes in the structure of employment. While the ADA makes disability a protected characteristic, it preserves performance-related disability as a legitimate, “non-discriminatory” business concern. To bring an ADA claim, an employee must establish the same prima facie case required of a typical disparate-treatment plaintiff under an equal treatment model of proof.<sup>61</sup> The employee must show that she is a member of the protected class (disabled), that she is a qualified individual, and that she was subjected to an adverse employment decision.<sup>62</sup> “Qualified individual,” in this context, is defined as “a person who can perform the essential functions of the job with or without reasonable accommodation.”<sup>63</sup> Thus the reasonableness of any accommodation and the question of the legitimacy of any performance-related defense is embedded in the threshold demonstration the plaintiff must sustain in order to insist on affirmative employer conduct.

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59. 42 U.S.C.A. § 12111(8) (West 1995 & Supp. 2003 1A), § 12112(a) (1995 & West Supp. 2003 1A).

60. 42 U.S.C.A. § 12112(b)(5)(A) (West 1995 & Supp. 2003 1A).

61. See, e.g., *Giordano v. City of New York*, 274 F.3d 740, 750 (2d Cir. 2001); *Walton v. Mental Health Ass’n of S.E. Pa.*, 168 F.3d 661, 667–68 (3d Cir. 1999); *Mason v. United Airlines, Inc.*, 274 F.3d 314, 317 (5th Cir. 2001); *Pugh v. City of Attica*, 259 F.3d 619, 625–26 (7th Cir. 2001); *Lowery v. Hazelwood Sch. Dist.*, 244 F.3d 654, 657 (8th Cir. 2001).

62. See, e.g., *Giordano*, 274 F.3d at 747; *Walton*, 168 F.3d at 668; *Aldrup v. Caldera*, 274 F.3d 282, 286 (5th Cir. 2001); *Pugh*, 259 F.3d at 626; *Lowery*, 244 F.3d at 657; *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001).

63. 42 U.S.C.A. § 12111(8) (West 1995 & Supp 2003 1A).

Cases demonstrate that in meeting these prerequisites, plaintiffs have had only limited success in challenging existing work structures or position requirements. This is surprising since, unlike Title VII, which examines discrimination within a static work environment, the ADA contemplates that courts will look beyond existing job structures and requirements in evaluating the legitimacy of an asserted business-related basis for an employment decision and, where reasonable, require employers to alter practices that adversely affect disabled workers.<sup>64</sup> In fact, the statute expressly defines reasonable accommodation to include, among other things, “job restructuring, part-time or modified work schedules, [and] reassignments.”<sup>65</sup> Yet most accommodations provided under the statute tend to be modest and relatively inexpensive, such as the acquisition of technology, the physical alteration of work equipment, or the hiring of a reader or assistant.<sup>66</sup> These accommodations affect the way in which the employee performs the job but do not alter the core characteristics of the position.

Requested accommodations that target more systemic obstacles to disabled employees, such as work pace, bundling of job functions, and hours and attendance requirements, have frequently been unsuccessful where they touch on business judgment about the nature of work. For instance, in cases involving overtime work, courts generally accept employer assertions about the hours required to complete the job, treating existing practices as a justification for the norm. The Washington Supreme

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64. See Issacharoff & Nelson, *supra* note 47, at 315 (noting that ADA imposes a duty to alter the workplace environment even where disabled employee is not as productive as nondisabled employee); Travis, *Leveling the Playing Field*, *supra* note 47, at 913 (noting the focus of the ADA accommodation mandate is on alleviating the performance impact on disabled employees caused by an operational environment modeled on the narrow conception of a non-disabled employee).

65. 42 U.S.C.A. § 12111(9)(B) (West 1995 & Supp 2003 1A).

66. See Peter David Blanck, *Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co.*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 278 (1996) (noting that between 1993 and 1996, 99% of accommodations required little to no cost, 72% required no cost, 17% required less than \$100, 10% required less than \$500, 1% required more than \$500, and the average cost was approximately \$45); Mary L. Dispenza, Note, *Overcoming a New Digital Divide: Technology Accommodations and the Undue Hardship Defense Under the Americans with Disabilities Act*, 52 SYRACUSE L. REV. 159, 164 (2002) (noting that in the ten years since the passage of the ADA, the cost associated with requested accommodations of assistive devices or changes in the physical nature of the workplace environment has been modest); Keith Nelson, Comment, *Legislative and Judicial Solutions for Mental Health Parity: S. 543, Reasonable Accommodation, and an Individualized Remedy under Title I of the ADA*, 51 AM. U. L. REV. 91, 126 (2001) (providing examples of inexpensive accommodations such as construction of a special platform for security personnel’s better accessibility to television monitors, using ergonomic furniture, providing chairs, and relocating an HIV infected worker to a mold-free work environment).

Court decision in *Davis v. Microsoft Corp.* provides a particularly lucid example.<sup>67</sup> In that case the plaintiff was a systems engineer who regularly worked between sixty and eight hours per week and was responsible for two major clients.<sup>68</sup> After being diagnosed with hepatitis C, he requested an accommodation that would allow him to reduce his work-week to forty hours per week in order to reduce stress and ensure adequate rest.<sup>69</sup> Microsoft temporarily allowed Davis to drop one account, but ultimately concluded it could not maintain the arrangement on a permanent basis without hiring additional staff, an accommodation it deemed “not reasonable.”<sup>70</sup>

Davis brought a claim under the Washington equivalent of the ADA, claiming that Microsoft failed to reasonably accommodate his disability by refusing to allow him to continue working forty hours per week.<sup>71</sup> The court found against him, concluding that Davis was incapable of performing the essential functions of the job.<sup>72</sup> The court credited Microsoft’s defense that the extensive overtime Davis had formerly worked was an essential function that Microsoft was not obligated to eliminate.<sup>73</sup> Taking the existing work practices as its baseline, the court noted the unrebutted evidence “that all systems engineers within the department had consistently worked 60-80 hours per week for years.”<sup>74</sup> According to the court:

Microsoft demonstrated that the structure of the position does not lend itself to a regular, 40-hour work-week. Systems engineers travel extensively and set up computer demonstrations under deadlines. Problems frequently occur during the set-up process, requiring the engineer to work long hours to ensure that the computers are properly functioning in time for presentations. Reasonable minds could not differ that overtime in the systems engineer position were [sic] essential functions . . . .<sup>75</sup>

The court in no way questioned the wisdom of the employer’s work expectation or considered the norms that underlie an eighty-hour work

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67. 37 P.3d 333 (Wash. Ct. App. 2002).

68. *Id.* at 335.

69. *Id.*

70. *Id.*

71. *Id.* at 335–36.

72. *Id.* at 337.

73. *Davis*, 37 P.3d at 337.

74. *Id.*

75. *Id.*; see also *Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1305–06 (11th Cir. 2000) (finding mandatory overtime work to be an essential function of the job and denying employee’s ADA claim where employer had a policy of processing all customer orders within 24 hours and employee’s coworkers worked an average of 216 overtime hours each in the year preceding employee’s termination).

week, a requirement that would systematically exclude employees with any number of disabilities.

Similar resistance is apparent in cases involving requests to eliminate or reduce the intensity of job demands other than hours. Courts generally find that employers need neither reduce standards to accommodate disability, where such standards are selected for business reasons, nor reallocate job functions in a manner that would require additional staff or add responsibilities to other employees. In *Milton v. Scrivner*, for instance, the plaintiff-employees were grocery selectors whose jobs consisted primarily of taking orders and moving merchandise within a warehouse.<sup>76</sup> When the company implemented new production standards, the plaintiffs were unable to perform to pace as a result of previously sustained workplace injuries and were terminated by the company.<sup>77</sup> The Tenth Circuit concluded that the plaintiffs were not entitled to relief under the ADA.<sup>78</sup> Citing evidence that the new production standards had been implemented “to improve Scrivner’s competitiveness” and were “aimed at increasing efficiency and productivity,” the court concluded that the ability to meet the new productions standards imposed by the company was an essential function of the job.<sup>79</sup> Because these standards applied uniformly to all employees in the plaintiffs’ position, the plaintiffs were deemed unentitled to any deviation in standards.<sup>80</sup> The court refused to second-guess the employer’s determination of the content, nature, and functions of the job.<sup>81</sup>

The point here is not that these decisions are wrongly decided, for indeed they are consistent with current law. In considering an accommodation approach to caregiving, however, such cases serve to highlight the difficulty of effecting meaningful changes in work environment notwithstanding the existence of an affirmative mandate. On its surface, the ADA embodies a commitment to accommodation that could revolutionize employers’ treatment of caregivers if transported to that context. A statute that by its terms contemplates accommodation through job restructuring and modified work schedules could conceivably challenge features of work rooted in the “ideal worker” norm and demand employer flexibility in the areas that most disadvantage caregivers. Such an approach could eliminate the performance impact defense to terminating or refusing to hire caregivers that would pertain under a traditional discrimination analysis. Yet despite the ADA’s accommodation mandate, courts are reluctant to allow plaintiffs to deviate from an existing norm that

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76. *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1119–20 (10th Cir. 1995).

77. *Id.* at 1120.

78. *Id.* at 1121.

79. *Id.* at 1124.

80. *Id.*

81. *Id.*

other employees have maintained, and they tend to retreat to equality principles in the face of what would otherwise be legitimate reasons for employer adverse action.

*B. Establishing Entitlement to Mandated Benefits under the Family Medical Leave Act*

That court application of accommodation under the ADA fails to realize the statute's potential is perhaps unsurprising in light of the individualized nature of the required accommodation. By mandating only affirmative conduct that is "reasonable," the statute invites interpretation that will necessarily reflect dominant norms and expectations about work.<sup>82</sup> An alternative vehicle for requiring accommodation is substantive benefit legislation that sets out specific employer obligations designed to address workplace disadvantage. It is this approach that has been adopted in addressing work/family balance under the Family Medical Leave Act.

Of course, the accommodation provided by the FMLA is a limited one. The product of significant political compromise,<sup>83</sup> the FMLA provides only unpaid leave and offers no additional assistance or benefits other than the continuation of health care coverage, for which the employee must pay.<sup>84</sup> For this reason, FMLA leave has benefited only a small portion of those employees who experience qualifying events.<sup>85</sup> These

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82. The amorphous nature of the requirement also makes compliance difficult for employers and creates uncertainty that encourages costly litigation. See Issacharoff & Nelson, *supra* note 47, at 339 (noting that the ADA accommodation requirement calls for an individualized inquiry into the abilities of each employee and his or her actual job demands).

83. See Carolyn Lochhead, *House Passes Family Leave by 102 Votes/GOP Senators Threaten to Stall by Linking it to Gays in the Military*, S.F. CHRON., Feb. 4, 1993, at A1 (describing partisan tension in Congress over passage of family leave bill); William J. Kilberg, *The Clinton Administration Labor Agenda*, 18 EMP. REL. L.J. 543, 543-45 (1993) (noting that the FMLA was vetoed twice by President George H. W. Bush before being signed into law by President Clinton in 1994). For a history of the Act's passage, see generally RONALD D. ELVING, *CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW* (1995).

84. See 29 U.S.C.A. § 2612(c) (1999 & Supp. 2003) (allowing employer to provide unpaid leave); *id.* at § 2614(c)(1) (requiring only that employer retain employee's health care coverage during leave and providing that employee must continue to bear expenses for benefits that he or she paid for while working). The mandated allowance under the FMLA replicates what many employers had voluntarily provided to employees prior to the Act's passage through sick leave, parental leave programs, and temporary disability plans. See generally Selmi, *supra* note 5, at 762-63.

85. See COMMISSION ON FAMILY & MED. LEAVE, *A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES* 88 (1996), available at <http://www.dol/esa/regs/compliance/whd/fmla/family.htm> (last visited July 19, 2002) [hereinafter *A WORKABLE BALANCE*] (reporting that out of the 55% of covered and eligible employees, only 2% took leave under the FMLA between 1995 and 1996); Rhode, *supra*



employees are likely to be white-collar, married women whose income is secondary to a male breadwinner who maintains primary responsibility for the family's financial support.<sup>86</sup> Neither does that statute address the full range of caregiving responsibilities that employees coping with childbirth or serious family illness are likely to experience. An employee who returns from FMLA leave following the birth of a child is not entitled to any accommodation to assist her in balancing her job and the care of a three-month-old infant.<sup>87</sup>

That FMLA benefits are relatively modest is understandable given that the statute represents a first effort to address caregiving and considering the equality-based concerns that arise from any government initiative that provides assistance to some individuals but not to others. The adoption of substantive benefits legislation in this area retains important symbolic and precedential value and has provided crucial job protection to at least a subset of workers coping with qualifying events.<sup>88</sup> What is more troubling

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note 8, at 845 (suggesting that only 7% of eligible employees actually take FMLA leave largely due to the fact that workers cannot afford the loss of pay); Selmi, *supra* note 5, at 764 (summarizing studies suggesting that utilization of FMLA leave at covered workplaces is below 4%). The statute's worker eligibility requirements and definition of covered employers also significantly limits the availability of leave. See Selmi, *supra* note 5, at 760–61 (noting that roughly 66% of the workforce is covered by the FMLA with approximately 55% of employees eligible to take leave) (citing A WORKABLE BALANCE, *supra*).

86. See Peggie R. Smith, *supra* note 8, at 1452–55 (suggesting that women in dual income families are more likely to leave work to care for a child than single women who cannot afford unpaid leave); cf. Tamar Lewin, *Men Assuming Bigger Share at Home, New Survey Shows*, N.Y. TIMES, Apr. 15, 1998, at A18 (reporting results of polls demonstrating that over four-fifths of mothers in dual-income families say that they are more likely to be the parent to take time off of work to care for a child).

87. See Bornstein, *supra* note 8, at 81 (“[B]y providing only emergency or short-term coverage . . . [in] gender-neutral language . . . the benefits provided by the [FMLA] are more symbolic than they are real.”); Rhode, *supra* note 8, at 845 (noting that “twelve weeks falls short of what child development experts believe is minimally necessary” for the amount of time a mother should remain at home with her child after birth); Selmi, *supra* note 5, at 765–66 (asserting that “there is no indication that the FMLA has greatly, or even mildly, facilitated the balancing of work and family commitments”); Williams, *Our Economy of Mothers and Others*, *supra* note 8, at 430 (critiquing the FMLA for “account[ing] for only three months of child-rearing, a task that lasts twenty years”); see also Malin, *supra* note 5, at 53–54 (arguing that FMLA coverage should extend for a reasonable time under the circumstances, rather than terminating the moment the employee's qualifying event ends).

88. See Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 39–40 (1994) (describing the FMLA as “a major milestone in the legal support of family life because it explicitly recognizes that family life events have an impact on the workplace, and requires the workplace to accommodate these events—albeit in a fairly modest way”); Peggie R. Smith, *supra* note 8, at 1443 (noting that the FMLA has served as a “safety net” for at least some employees). But see Selmi, *supra* note 5, at 766 (noting the danger that the passage of weak federal legislation may lead states to remove family leave issues from their

is the way in which courts have retreated from accommodation principles in applying the statute and interpreting the crucial reinstatement right. While the statute appears to create a substantive right to job reinstatement, courts have limited that entitlement by placing a burden on the plaintiff to prove a discriminatory denial of reinstatement akin to demonstrating animus under Title VII.<sup>89</sup>

Analyzing the role of traditional equality principles in the application of the FMLA requires some initial exposition of its legislative provisions. With respect to reinstatement, the statute provides that any employee who takes family medical leave must be restored to his or her position or an equivalent position upon the expiration of the leave.<sup>90</sup> Because qualifying employees receive no pay, this guarantee is the principal benefit afforded under the statute. However, the right to reinstatement is qualified. The restored employee is not entitled to “any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.”<sup>91</sup> The interpretative regulations explain that the employer may deny reinstatement to an employee on FMLA leave if that employee would have been terminated or her job eliminated had she continued working.<sup>92</sup>

Some courts have interpreted this statutory language as a requirement that the employee prove an unlawful motivation for the employer’s denial of reinstatement, an approach inconsistent with the substantive entitlement created by the statute and its interpretative regulations.<sup>93</sup> This confusion among courts as to the procedural implications of the reinstatement limitation stems from the fact that the FMLA contains both an anti-

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legislative agenda and stymie private efforts to obtain stronger benefits for caregivers).

89. *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1016, n.10 (7th Cir. 2000).

90. 29 U.S.C.A. § 2614(a)(1)(A)-(B) (1999) (“[A]ny eligible employee who takes leave under section 102 for the intended purpose of the leave shall be entitled, on return from such leave (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.”).

91. *Id.* at § 2614(a)(3)(B).

92. 29 C.F.R. § 825.216 (2001) (“If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer’s responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off.”).

93. *See, e.g.*, *Hunt v. Rapides Healthcare Sys., L.L.C.*, 277 F.3d 757, 768–69 (5th Cir. 2001); *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1017 (7th Cir. 2000). This allocation of proof contradicts the Department of Labor regulations interpreting the reinstatement limitation. *See* 29 C.F.R. § 825.216 (2001) (“An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.”); *see also* Malin, *supra* note 5, at 50 (asserting that the purpose of the FMLA’s reinstatement guarantee and the legislative history of the Act indicate that the proviso regarding employees who would otherwise have been terminated creates an affirmative defense which the employer must prove).

retaliation provision and a non-interference directive. Section 105(a)(1) prohibits employers from interfering with, denying, or restraining employee rights to these benefits.<sup>94</sup> Section 105(a)(2) makes it unlawful for an employer to “discharge or in any other manner discriminate against any individual for opposing any practice made unlawful” under the Act.<sup>95</sup> While the latter section, read literally, applies only to oppositional conduct, courts have interpreted the section to prohibit any form of retaliation against employees who utilize or qualify for benefits under the statute.<sup>96</sup> Thus, an employee’s claim of refusal to reinstate could be understood either as a charge that the employer unlawfully denied or interfered with a substantive entitlement or as a charge that the employer discriminated against the employee by refusing reinstatement on the basis of an unlawful motive.<sup>97</sup>

The conflicting implications of this distinction can be seen in the Seventh Circuit’s decision in *Rice v. Sunrise Express, Inc.* There, the plaintiff took a seven-week FMLA qualifying leave as a result of a serious health condition.<sup>98</sup> Two days after indicating her intent to return to work, her employer informed her that she would be laid off as of her targeted return date, claiming a need to reduce staff as a result of a decrease in business and a simultaneous computer upgrade.<sup>99</sup> The employer argued that Rice had been selected for layoff over other clerks because she

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94. *Id.* at § 2615(a)(1) (1999 & Supp. 2003).

95. 29 U.S.C.A. § 2615(a)(2) (1999 & Supp. 2003).

96. *See, e.g.,* *Hunt v. Rapides Healthcare Sys., L.L.C.*, 277 F.3d 757, 768–71 (5th Cir. 2001) (evaluating employee’s claim based on reassignment to a part-time shift position following her return from FMLA leave under the anti-retaliation provisions of the Act); *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 798–800 (11th Cir. 2000) (treating employee’s allegation that she was terminated as a result of her request for FMLA leave as a retaliatory discharge claim); *see also* 29 C.F.R. § 825.220(c) (2002) (“An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave . . . [and] cannot use the taking of FMLA leave as a negative factor in employment actions . . .”).

97. *See generally* Michael L. Murphy, Note, *The Federal Courts’ Struggle with Burden Allocation for Reinstatement Claims under the Family and Medical Leave Act: Breakdown of the Rigid Dual Framework*, 50 CATH. U. L. REV. 1081, 1084–85 (2001) (explaining the two alternative ways that courts have characterized failure to reinstate claims). Because the claims so closely resemble one another, courts often determine which analysis to apply based on how the pleadings are drafted or on superficial factual distinctions such as the timing of termination. *Compare* *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 62 (1st Cir. 2002) (framing claim as retaliation where employer terminated plaintiff upon her return to work) *with* *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1017 (7th Cir. 2000) (framing claim as interference where plaintiff terminated while still on leave). *See also* Murphy, *supra* at 1118–19 (noting that cases with identical facts “can be treated as either a denial of a substantive right, retaliation, or both, depending on the form and content of the pleading and the way the court decides to view it”).

98. *Rice*, 209 F.3d at 1011.

99. *Id.*

“wasted time taking smoke breaks, playing computer games, and talking on the telephone.”<sup>100</sup> Rice, however, had never been disciplined, reprimanded, or warned during her two-year employment with the company, and other employees, including one owner, testified that her work performance was satisfactory.<sup>101</sup> Rice also asserted that one owner told her she had been selected for layoff because she was “already off.”<sup>102</sup>

On appeal from a verdict for the plaintiff, the employer claimed that the district court improperly instructed the jury that the *employer* had the burden of establishing that Rice would have been laid off even if she had not been on FMLA leave.<sup>103</sup> The Seventh Circuit agreed, holding that the plaintiff must prove she would have retained her position had she not been on leave. In so doing, the court lifted the shifting burden-of-proof structure associated with the proof of garden-variety discrimination claims under Title VII. It held that once the employer produces evidence that the benefit in question would not have been available had the plaintiff continued working, the plaintiff bears the ultimate burden of proving that the employer’s characterization is “insufficient” and that her FMLA leave is the real reason for the termination.<sup>104</sup>

This interpretation of the burden-of-proof implications of the reinstatement limitation contradicts the statute’s accommodation-oriented approach to caregiving. The essence of substantive benefit legislation is that it places an affirmative obligation on the employer such that the failure to provide the benefit is actionable regardless of motive. While the *Rice* court appeared to distinguish between denial of rights claims and equality-based assertions of unlawful retaliation,<sup>105</sup> it proceeded to conflate those analyses by forcing the parties to a showdown on the issue of animus.<sup>106</sup>

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100. *Id.*

101. *Id.*

102. *Id.*

103. The jury was instructed that “a defendant is entitled to seek to prove, by a preponderance of the evidence, that the employee would have been laid off during the period of her FMLA leave, even if she had not taken such leave.” *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1016, n.10 (7th Cir. 2000).

104. *Id.*

105. *See id.* at 1016–17 (distinguishing between 105(a)(1) and (a)(2) claims and characterizing the plaintiff’s claim as alleging interference with FMLA rights under the former provision).

106. *See Malin, supra* note 5, at 51 (“The issue under the FMLA is not whether an employee returning from leave was the victim of discrimination. . . . Rather the issue [is] whether the plaintiff [has] been restored to her former job or an equivalent position.”). Professor Malin has argued that the FMLA is “modeled on section 8(a)(1) of the National Labor Relations Act (NLRA) which prohibits employer interference, restraint or coercion” of employees’ exercise of rights to organize or engage in other concerted activities. *See id.* at 52; 29 U.S.C.A. § 158(a)(1); *cf. Murphy, supra* note 97, at 1127 (suggesting that the FMLA resembles the Fair Labor Standards Act, which permits both a claim for deprivation of substantive entitlements, such as overtime pay, and a claim for retaliation based on the

The criticisms here do not concern the substance of the statutory limitation against restoring employees whose jobs were genuinely eliminated, but rather call into question the way in which that provision is applied. In *Rice*, the Seventh Circuit in effect resurrects the legitimate non-discriminatory reason defense that informs most of Title VII analysis, forcing the plaintiff to prove pretext in response to a denial of benefits. The practical implications of that approach can be severe, as the facts in *Rice* suggest. Disputes about the reason for an employer's denial of reinstatement will frequently be the central issue in an FMLA claim and without a more favorable proof allocation, the non-interference provision of the statute will offer little protection to employees seeking to exercise FMLA rights.<sup>107</sup> Since it is the employer whose motivation is at issue, it is the employer who is privy to the answer and the evidence needed to prove it.<sup>108</sup> This is equally true in Title VII claims in which the plaintiff bears the burden of proof, but in the discrimination context, there is no reason to assume an employer will base decisions on gender, race, or another immutable characteristic.<sup>109</sup> In a family leave situation, on the other hand, there are many reasons why an employer would be inclined to eliminate an employee on leave, either because of convenience, because the employee's absence indicates she is expendable, or because the employer fears the employee will have ongoing family responsibilities that will impact her work.<sup>110</sup> The significance of the FMLA reinstatement requirement is that it grants the employee an unequivocal benefit not conditioned on motive. By placing the burden on the employee to disprove the employer's basis for its decision, the court undercuts the very advantage that an accommodation approach intends to create.

Thus the legitimate non-discriminatory-reason defense to adverse employer behavior lives on in the realm of accommodation. By their terms

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exercise of statutory rights). I discuss the implications of this comparison and Professor Malin's particular recommendations in greater detail in Part V.B.1, *infra*.

107. See Malin, *supra* note 5, at 52 (observing that "[r]equiring plaintiffs who are denied their restoration rights to prove discrimination will do exactly what Congress sought to prevent: it will deter employees from taking family leave out of fear for the security of their jobs").

108. See *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1019 (7th Cir. 2000) (Evans, J., dissenting) ("On a practical level, it makes sense to require the employer to bear the burden of proof on [the denial of reinstatement] issue. The employer is in control of the evidence.").

109. See Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 749 (2002) (suggesting that discrimination on the basis of race, sex, religion, or similar characteristics, as opposed to other forms of differential treatment, may be conclusively presumed irrational).

110. Cf. Issacharoff & Rosenblum, *supra* note 22, at 2191-92 (suggesting that the prospect of women's need for family leave and the costs it may entail creates an incentive for employers to discriminate against women in the hiring stage).

and intent both the ADA and FMLA are accommodation statutes that require employer action that might otherwise contradict business judgment: Employers must suffer the cost and inconvenience involved in holding a position open for a caregiver on leave or altering the work environment to allow a disabled individual to perform. On an aspirational level, such redistributive aims are consistent with a vision of “true equality” in which employees of different classes and with different needs have the same ability to access and maintain employment in the manner enjoyed by mainstream workers. In practice, however, equality and accommodation do not always complement one another. Like the sketch of an old/young woman invoked in the introduction to this paper, equality and accommodation share the same space and operate along the same lines, but they form different pictures. In other words, the same statutory language can enforce formal equality or effect affirmative accommodation, but the results will be different depending on which strategy ultimately prevails.

#### IV. Why Not Accommodate? Social Welfare and Workplace Culture in a “Me, Inc.” World

The emergence of accommodation within the statutory canon has had a real, albeit modest, impact on the lives of some protected workers, and it has had important consciousness-raising effects. However, the previous section’s examples of judicial interpretation of existing laws suggest that deference to business judgment, a common feature of court decisions rendered in access-oriented equality claims, continues to assert itself within the accommodation regime. As a consequence, accommodation laws have not significantly altered dominant work structures or norms. This bodes poorly for accommodation of caregiving, which would require changes in such systemic features of work as the forty-hour work-week, mandatory overtime, and required travel.

The following section seeks to better understand the relationship between the resistance to accommodation exhibited in the case law and the ongoing call from scholars and activists for greater employer accommodation of caregiving by setting the problem within a social context. The desirability of employer-supported accommodation rests on two assumptions: (i) basic features of the contemporary workplace represent choices about work structure that can and should be changed; and (ii) it is reasonable to expect employers to absorb the costs associated with making those changes or with providing necessary benefits to employee caregivers.

These assumptions are complex by any standard, but they appear especially problematic when examined against the history of government intervention in the workplace and the nature of modern employment

relationships. This section begins by examining voluntarily-provided employer benefits, which have been the dominant mode of addressing employee lifecycle needs for the majority of the twentieth century. Such an allocation of rights and responsibilities at work was enabled by a particular “social contract” of employment, one in which employers and employees anticipated a long-term symbiotic relationship often governed by a collective bargaining agreement. In contrast, today’s work relationships are defined by a “Me, Inc.” work culture—an employment environment in which workers are increasingly independent, short-term employment relationships predominate, collective action is all but absent, and employer reliance on contingent labor has dramatically expanded. In an economy where employees’ futures depend not on their current employer but on the value of their human capital within the external labor market, the incentives for voluntary accommodation of employees’ lifecycle needs are generally absent.

These changes at work complicate the call for employer accommodation of caregiving. To the extent that private mechanisms have failed to adequately respond to workers’ needs, it is tempting to fill the gap with government mandates. But that top-down approach shows insufficient consideration for contemporary expectations about the way people work. The emerging “Me, Inc.” workplace makes it harder, not easier, for employers (and employees) to relinquish the particular structures that are most detrimental to caregivers, and it creates an environment where tensions between “ideal workers” and those with caregiving needs are likely to be exacerbated. The imposition of extensive employer-funded accommodation in this context may overreach and spawn backlash. The following section explores these issues and attempts to provide a realistic evaluation of the potential for accommodation in the current work culture.

#### *A. Welfare Capitalism and the Role of Private Benefits*

The focus on employer accommodation of caregiving in addressing work/family conflict flows naturally from the historical treatment of social welfare issues in the United States. Voluntarily-provided employment benefits preceded significant governmental involvement in citizen welfare and have played an ongoing role in shaping American public policy. Prior to the passage of social security legislation in 1935, government welfare initiatives were limited primarily to poverty relief administered at the local level.<sup>111</sup> Public assistance was viewed as charity and, accordingly, stigmatized.<sup>112</sup> Consistent with the ideology of the industrial age, it was

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111. See generally NICHOLAS BARR, *THE ECONOMICS OF THE WELFARE STATE* 28 (3d ed. 1998).

112. See *id.* (observing that public assistance eligibility generally required the recipient

thought that every able-bodied (and implicitly male) person should be capable of providing for himself.

As a result, companies rather than the federal government took the lead in establishing safety-net programs for employees. By the turn of the twentieth century, America had become an industrial society in which many businesses and manufacturing industries were operating in an expanded or national market.<sup>113</sup> Inspired by both benevolence and pragmatism, leading capitalists initiated programs and institutions, ranging from profit-sharing to the creation of company towns, in an effort to accommodate the life needs of their employees.<sup>114</sup> While some of these leaders were influenced by communitarian visions of industrial society, ultimately they were motivated by the desire to foster peaceful working relationships.<sup>115</sup> In the late 1880s, brief but severe periods of economic depression and worker unrest contributed to an increasingly organized labor movement.<sup>116</sup> Private social welfare programs were a means of stimulating productivity and worker loyalty; consequently, they could help prevent work stoppages and forestall unionization.

“Welfare capitalism” was thus the logical outgrowth of 19<sup>th</sup>-century ideology, an increasingly industrialized economy, and a laissez faire government. In the 1930s, the Great Depression forced the federal government to reconsider its role in citizen welfare; however, the private model for delivering services and benefits had already been established. Consequently, the Social Security Act took an employment-centered approach to welfare.<sup>117</sup> Outside the exceptional situation of a citizen

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to take the pauper’s oath and resulted in disenfranchisement in many states).

113. See EDWARD D. BERKOWITZ & KIM MCQUAID, *CREATING THE WELFARE STATE: THE POLITICAL ECONOMY OF 20TH-CENTURY REFORM* 11–12 (rev. ed. 1992) (noting how localized and informal mechanisms of providing social services were ill-equipped to respond to welfare needs of workers in a nationally-integrated industrial market).

114. See *id.* at 14–29 (describing efforts of industrial pioneers Nelson Olsen Nelson, Edward Filene, and Henry Dennison in establishing cooperative communities for employees).

115. See *id.* at 14–16 (noting that “these earliest benevolent ‘feudalisms’ owed little to philanthropy and even less to ideology,” but rather were aimed at keeping workers happy and productive for the benefit of the employer’s bottom line); Mary E. O’Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1421, 1428 (1993) (discussing how benevolent employers considered themselves morally obligated to provide for their factory workers the way landowners in the previous agricultural economy were expected to provide for agrarian laborers).

116. See BERKOWITZ & MCQUAID, *supra* note 113, at 13 (noting that over 10,000 American industrial plants were subject to labor strikes during this time period, three times as many as had occurred in the preceding five years).

117. See Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 533 (2001) (suggesting that public benefits structure reinforced the prevailing internal labor market system in which employees tended to remain with a single employer on whom they



incapable of self-support, benefits were based on the amount of each individual's workforce participation.<sup>118</sup> Both social security retirement and unemployment compensation were funded through payroll contributions; the Act did not provide for supplementation from general federal revenues.<sup>119</sup> The structure embodied the prevailing idea that social welfare was not an entitlement but should be earned through reciprocal contributions to the market system.<sup>120</sup> It also reflected a sentiment of voluntarism, preferring private initiatives coupled with a minimal and decentralized public presence, to a comprehensive federally-controlled welfare system.<sup>121</sup>

This allocation of responsibility for workers' extra-employment needs between the government and the private sector remained largely unchanged during the 20<sup>th</sup> century. Other than the adoption of Medicaid and Medicare in 1965, growth in government provision of social welfare benefits, both through Social Security and other federally administered programs to date, has been modest at best.<sup>122</sup> In contrast, voluntary adoption of non-cash benefits as a form of employment compensation expanded exponentially during the 1940s and has continued to grow until recently.<sup>123</sup> These

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depended for compensation and welfare benefits throughout their lives).

118. The original Social Security Act established three programs: retirement benefits, unemployment compensation to workers based on labor market earnings, and assistance to impoverished dependent children—the precursor to Aid to Families with Dependent Children. See 42 U.S.C. § 401 et seq. (1999) (retirement benefits); 42 U.S.C. § 501 et seq. (1999) (unemployment compensation); 42 U.S.C. § 601 et seq. (1999) (assistance to impoverished children).

119. See generally Ann Shola Orloff, *The Political Origins of America's Belated Welfare State*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 40 (Margaret Weir, et al. eds., 1988) (describing program structure).

120. See O'Connell, *supra* note 115, at 1434–35 (noting that despite the fact that the collection of contributions and dispensation of benefits occurred through public channels, the private sector set wages and the extent of wage-earning labor market participation was the key determinant of the recipient's benefit entitlement); Amy Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL'Y & L. 477, 479–80 (2001) (describing operative norm of self-reliance under which society expects able-bodied persons to support themselves and receive assistance only when necessary and only after having previously contributed to the collective).

121. See BARR, *supra* note 111, at 41 (describing the American system as based on a "residual" welfare model in which government intervention only occurs when market or family breaks down); O'Connell, *supra* note 115, at 1433 (noting that voluntary welfare programs were deemed superior to public programs because government action is associated with compulsion while private activities are viewed as a matter of choice).

122. The Social Security Act was amended in 1939 to include survivors and dependents of workers as beneficiaries. See 42 U.S.C.A. §§ 401–410a (1999). It was again amended in 1956 to provide for disability coverage. See 42 U.S.C.A. §§ 420–33 (1999).

123. BETH STEVENS, *COMPLEMENTING THE WELFARE STATE: THE DEVELOPMENT OF PRIVATE PENSION, HEALTH INSURANCE AND OTHER EMPLOYEE BENEFITS IN THE UNITED STATES* 24 (1986) (noting that by 1982, 97% of employees of medium and large employers had health insurance, 96% had life insurance, and 84% had pensions).

developments are attributable to a combination of historical factors, including wartime fiscal policies, an increase in private collective bargaining, and dominant work norms that viewed employment as a long-term symbiotic relationship. At the outset of World War II, faced with a sudden labor shortage, the federal government set out to prevent inflation by limiting wage increases and taxing excess corporate profit.<sup>124</sup> But in so doing, it created incentives for employers to provide extra compensation to workers in the form of non-cash benefits, which were not subject to the wage limit and would in turn limit the companies' taxable profits. Not surprisingly, by 1950 the number of workers covered by employer-provided health insurance had multiplied almost twelve times the number covered prior to World War II, from 5.6 million to just below 60 million, and the number of workers covered by employer pension plans more than doubled.<sup>125</sup> Unions in particular were quick to see the advantages of negotiating for non-cash benefits, which would create positive results for their constituencies despite the absence of meaningful wage increases; therefore, benefits became a standard feature of collective bargaining agreements.<sup>126</sup>

The 1940s and 1950s also saw the height of a unique social contract of employment that significantly contributed to the idea that employee social welfare was appropriately addressed through private channels.<sup>127</sup> Employers' and employees' expectations of their relationship in the mid-twentieth century grew out of the management and human resources theories of the previous generation. Beginning with Frederick Taylor's theory of scientific management in the 1910s, early industrial engineers advocated for a highly systemized approach to labor organization characterized by sharply differentiated jobs within a hierarchical structure

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124. *Id.* at 18–19 (describing programs instituted by the National War Labor Board to maintain a steady economy and good working relationships between employers and employees). See O'Connell, *supra* note 115, at 1437–38 (describing effects of the Revenue Act of 1942, which imposed an 80% tax on corporate profits).

125. STEVENS, *supra* note 124, at 23.

126. See *id.*

127. The term "social contract" is used here to refer not to an employment contract in the legal sense, but rather to the mutual expectations of the parties, what is sometimes called the "psychological contract" of employment. See Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1200–01 (2001); Stone, *supra* note 117, at 549–50 (explaining that most employees have a psychological bond with their employer based on mutual obligations that are usually implicit, covertly held, and rarely discussed). While there is no legal mechanism for enforcing such understandings, parties tend to comply with them. See Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1917 (1996) (noting that companies often retain long-term employees and limit termination to for-cause situations although they have the legal right to fire workers at will); *infra* Part IV.B.

of advancement and promotion.<sup>128</sup> Jobs tended to be low skill and repetitive, and workers were relatively dependent on management for internal firm-specific training.<sup>129</sup> To combat the inevitable problem of turnover and low morale, employers compensated by promising long-term job security, providing progressive wage increases, and offering extra-wage benefits and services.<sup>130</sup> Workers who performed adequately and consistently according to pre-designated standards could look forward to consistent employment and rising pay. Both employees and employers envisioned a fair exchange of long-term holistic compensation for long-term loyal work.

By the 1940s and 1950s unions had adopted this symbiotic vision of the workplace and molded their agenda accordingly.<sup>131</sup> Discrete job categories and defined career ladders ensured reliable work and protected against excessive employer demands and cross-utilization of workers.<sup>132</sup> A particular social contract of employment solidified, guided by the idea that employment relationships should withstand the various human and economic changes that occur over the course of an employee's life. The result was a developing cultural expectation that employers were the appropriate party to insure against an employee's lifecycle needs by providing health care coverage, disability benefits, life insurance, pensions, and other benefits in exchange for reliable work.

### *B. Employer Incentives in an External Labor Market*

In many respects, caregiving benefits are comparable to other forms of social welfare historically provided to workers by their employers. Caregiving is an inevitable part of an employee's lifecycle, even among

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128. See PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE* 59–64 (1999) (describing characteristics of labor management systems initiated by Henry Ford and Frederick Taylor during mid-twentieth century that were characterized by strong centralized management, pay schemes determined by seniority and defined performance measures, regimented job hierarchies, and a culture of promotion from within); Stone, *supra* note 117, at 529–32 (describing “scientific management” approach to labor management as based on three principles: (1) taking knowledge away from workers and locating it in management; (2) finding and enforcing the “one best way” to approach any task through time and motion studies; and (3) establishing defined career ladders with limited ports of entry).

129. See Arnow-Richman, *supra* note 127, at 1199; Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 100 (2003); Stone, *supra* note 117, at 531–32 (describing the goal of Fordist assembly line as “to embody the skills in the technology itself so that the workers needed to acquire little human capital to make the system work”).

130. See Arnow-Richman, *supra* note 127, at 1199; Stone, *supra* note 117, at 531–32.

131. See Stone, *supra* note 117, at 534 (describing how maintaining key features of scientific management inured to the benefit of unions and their constituencies).

132. See *id.*

employees who never become parents, and accommodating caregiving needs would appear a logical outgrowth of disability, healthcare, and other forms of insurance that are a standard feature of employee benefit packages.<sup>133</sup> Indeed, one could imagine a system of caregiving benefits developing at the same time that other workplace benefits became commonplace, had women not been so absent from the workplace. Given that the demographics of the workplace are changing, an important initial question in forging a response to the contemporary caregiving crisis is whether employers can be expected to voluntarily augment their provision of caregiving-related benefits or make other changes at work in response to heightened demand for this type of accommodation by a new generation of workers.<sup>134</sup>

Unfortunately, there is ample reason to believe that an entirely private solution to work/family conflict will not be forthcoming. While some employers have made meaningful changes to their leave and benefits plans incident to the large-scale entry of women into the paid labor force, they are a distinct minority.<sup>135</sup> Moreover, many of these changes are limited and piecemeal efforts that, like the FMLA, provide modest relief to some individual employees, but fail to effect wholesale changes in work structure that would enable long-term integration of professional goals and

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133. While the need for caregiving accommodation is associated principally with the pregnancy and childrearing responsibilities of mothers, it is of equal necessity to employees of both genders who must deal with illnesses of spouses, partners, and parents. See Case, *supra* note 9, at 1766 (drawing parallels between accommodating workers engaged in childcare and accommodating workers with seriously ill spouses and elderly parents). Indeed, the majority of FMLA leave taken by employees since the Act's passage has been for purposes of contending with a serious health condition of the employee or a family member, rather than for birth or adoption of a child. See Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 408 (1999) (summarizing 1997 government studies indicating that 59% of employees who took leave under the FMLA in an eighteen-month period immediately following the Act's passage did so to care for themselves, not to give birth or care for a newborn).

134. The number of mothers participating in market work, particularly those with young children, has increased dramatically since the mid-twentieth century. By 1994, 62% of women with children under age six were members of the labor force, as compared to only 12% of women with children under age six were in the labor force in 1950. FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 10 (Employee Benefit Research Institute, 5th ed. 1997). See also MINDY FRIED, TAKING TIME: PARENTAL LEAVE POLICY AND CORPORATE CULTURE 17–18 (Ronnie J. Steinberg ed., 1998) (noting that as of 1994 women were filling 67% of new jobs created and that of women in the workforce, 80% would become pregnant during their working lives).

135. The Bureau of Labor Statistics provides analytical studies of employee benefits since the mid-1990s. As of 2000, only five percent of employers offered flexible scheduling for parents, only five percent provided assistance with childcare, and only two percent provided funds for childcare or on-site childcare. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES 2000 at <http://bls.gov/ncs/ebs/sp/ebb10019.pdf> (no date available).

caregiving responsibilities.<sup>136</sup> Instances of employer-initiated structural changes of this variety remain rare, serving more as anecdotal anomalies than as models for widespread change.<sup>137</sup>

This constrained response to caregiving needs in the face of increased attention to women's disadvantage at work can be attributed to many causes, including employer ignorance and institutional constraints,<sup>138</sup> as well as unconscious discrimination against women.<sup>139</sup> The most compelling influence on the extent of voluntary accommodation, however, may well be an emerging blueprint for workplace relationships that challenges the norm of employer responsibility for employee life needs, which would otherwise support the call for accommodation of caregiving. The advent of a globalized and decreasingly industrialized economy in the last several decades has effected a variety of changes in the way employers and employees view their obligations to one another. The secure and predictable jobs associated with the 1940s and 1950s have diminished, giving way to a variety of "precarious employment" relationships in which workers have significantly diminished expectations of long-term employment.<sup>140</sup> In response to the pressures of ongoing technological

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136. WILLIAMS, UNBENDING GENDER, *supra* note 3, at 5 (describing company-initiated caregiving policies as a "pyrrhic victory: a set of mommy-track policies that offer flexibility at the price of work success").

137. *See, e.g.*, Sturm, *supra* note 36, at 492–99 (describing Deloitte & Touche's firm-wide implementation of a "Women's Initiative" in response to significant attrition by women accountants, which included instituting a flexible work time policy that does not require the employee to exit the partnership track, creating greater transparency in assignment of work, providing sensitivity training for coworkers, and requiring partners to meet accountability standards).

138. *See* WILLIAMS, UNBENDING GENDER, *supra* note 3, at 5 (noting that companies often refrain from implementing policies that would favor working mothers for fear of liability under federal anti-discrimination laws); Sturm, *supra* note 36, at 478 (noting that employers generally take an ad hoc approach to human resource problems and do not necessarily have the organizational systems in place to recognize the potential connection between fairer personnel policies and corporate efficiency).

139. *See* Selmi, *supra* note 5, at 745–46 (describing how employers may engage in subtle practices of discrimination such as not mentoring young women or not granting female employees long-term work assignments based on a general misperception about women's commitment to work). For in-depth treatment of the notion of "unconscious discrimination" see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187 (1995) (discussing theory of social cognition that describes how cognitive structures and processes involved in categorization and information processing often result in stereotyping); Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1131 (1999) (characterizing "inadvertent bias" as the result of decision-makers' reliance on "reflexive or unthinking distortions in the application of neutral and seemingly reasonable criteria to the assessment of employees from disfavored groups").

140. Katherine Stone uses the term "precarious employment" to refer to any individual employed with no express or implicit promise of job security. *See* Stone, *supra* note 117, at 542 (2001). *See also* CAPPELLI, *supra* note 128, at 17 ("The old employment system of

change, increased international competition, and rapidly fluctuating market demands, employers have developed a preference for short-term labor that allows them to fill immediate personnel needs while maintaining future flexibility.<sup>141</sup>

This change accompanies a shift away from the social contract of employment that predominated in the mid-twentieth century workplace, and has important implications for voluntary accommodation of caregiving.<sup>142</sup> The previous social contract, which envisioned an exchange of long-term security for loyal work, accords with what has been called the “lifecycle” model of employment.<sup>143</sup> That model contemplates that employers will make significant investments in employees at the outset of the employment relationship, usually in the form of employer-funded training. In economic terms, the employee is overpaid during the period in which she receives training to the extent her marginal product is less than the wages she receives.<sup>144</sup> Over time, however, the employee becomes more skilled and more productive, ultimately creating value in excess of her wages and thereby permitting the employer to recoup its initial investment.<sup>145</sup> Structuring the relationship in this way makes sense from

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secure, lifetime jobs with predictable advancement and stable pay is dead.”); Arnow-Richman, *supra* note 127, at 1200 (noting that because employers can no longer offer long-term employment they frequently hire workers for a discrete purpose and then let them go when their task or project is completed); Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1432 (2001) (noting that “any expectation that employment security for any segment of the workforce could be earned through long and loyal service is now illusory”); Green, *supra* note 129, at 100–02 (noting growth in temporary employment agencies and rise of part-time and independent contractor relationships in response to corporate demand for institutional flexibility); Schultz, *supra* note 4, at 1920 (noting how newer companies are subcontracting out internal services, and relying on contingent and overtime employment rather than maintaining or adding permanent employees).

141. For a more detailed discussion of the causes of these trends and their effect on the work relationship see generally CAPPELLI, *supra* note 128, at 4–5; Arnow-Richman, *supra* note 127, at 1198–1202; Green, *supra* note 129, at 99–104; Stone, *supra* note 117, at 553–72.

142. For an explanation of the social contract of employment associated with the post-War period in the United States as well as a definition of that term, see note 127, *supra* Part IV.A and accompanying text.

143. This term comes from Stewart Schwab’s concept of “life-cycle” justice, which he uses to reconcile apparent inconsistencies in courts’ treatment of unjust dismissal suits. See Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 10–11 (1993) (suggesting that courts manipulate wrongful discharge law to protect workers at the beginning and end of their careers when they are most vulnerable to employer opportunism, while maintaining the presumption of at-will employment in suits by mid-career employees, who are less at risk).

144. See *id.* at 14. See generally GARY BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION 18–29 (1964) (modeling employer incentives to invest in firm-specific training for workers); CAPPELLI, *supra* note 128, at 46–47 (summarizing Becker’s analysis).

145. This generally occurs during mid-career when the employee has mastered the

the perspectives of both the employee and the employer: The parties share equally in the costs and benefits of training over the course of the employee's career, provided that the relationship continues.<sup>146</sup> The employee gains long-term job security; the employer gains a more valuable and experienced worker.

Accommodation of caregiving holds comparable potential for achieving mutual gain over the course of the employment relationship. While the advantages for the employer are less apparent, accommodations, like training, can improve worker productivity and future commitment, particularly in situations involving reductions in work time. The number of hours an employee works does not necessarily correlate with increased work product, and reduced-time workers are often more efficient than those working full-time and overtime schedules.<sup>147</sup> Of course, some work time and workload reductions can be substantial enough to cause temporary losses in productivity, such as when an employee requires extended leave. However, such accommodations can still produce future gains for the employer inasmuch as they instill loyalty and organizational commitment in those workers who benefit from them. Evidence suggests that accommodated individuals are likely to both remain with their employers and work harder at their jobs, when they are able to do so, out of a desire to

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relevant skills and achieved peak productivity. Often compensation will be structured so that the value recouped by the employer will exceed its initial investment in anticipation of other losses that may come in late career when the employee's productivity declines. See Schwab, *supra* note 143, at 14; Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 6 (2001).

146. See Schwab, *supra* note 143, at 15 (describing "self-enforcing" nature of long-term employment relationships predicated on shared responsibility for training); cf. CAPPELLI, *supra* note 128, at 21 (noting how under traditional lifetime employment model employees voluntarily pursued company goals, both out of obligation and the belief that such behavior was in their long-term interest, while companies reaped the benefit of stability, commitment, and a well-developed, organizationally specific skill set); *supra* note 127 and accompanying text.

147. See Reed Abelson, *Part-time Work for Some Adds Up to Full-Time Job*, N.Y. TIMES, Nov. 2, 1998, at A1 (noting how some employees are able to reduce hours in the office without reducing work load simply by "learning how to work smarter"); Robert Johnson, *Employers Now Vie to Hire Moms with Young Children*, ENTERPRISE, WALL ST. J., Sept. 19, 2000 at B2 (noting that some employers find it beneficial to offer flexible or part-time hours and even seek to target mothers of small children as employees because such employees often work harder and are more productive than workers with traditional schedules); Elaine St. James, *More Employers Offer Flexible Work Policies*, WASH. TIMES, Jan. 30, 2001, at E2 (noting decision of one company to make flexible scheduling available to all employees after discovering that managers working flexible schedules generated millions of dollars more in new business than their full-time counterparts). See generally WILLIAMS, UNBENDING GENDER, *supra* note 3, at 84-94 (discussing anecdotal examples of family friendly work policies that not only proved financially feasible but added to the company's bottom line).

“pay back” the company.<sup>148</sup> In this respect, accommodation of caregiving can be considered an investment much like the provision of training at the outset of an employment relationship.<sup>149</sup> The employer incurs a possible loss at the point of accommodation but reaps the benefit in the future.<sup>150</sup> Thus, over the long term, both employers and employees could benefit from a policy of voluntary employer accommodation.

The problem, however, is that with the demise of the reciprocal social contract of employment, employers are less inclined to view employment relationships as permanent and have only limited incentive to invest in the long-term productivity of individual workers. This is most apparent in the

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148. See Johnson, *supra* note 147, at B2 (reporting that company and staffing agency presidents believe that providing leave for child-related needs generates employee loyalty and that employees often perform better and are more productive in appreciation of company flexibility); *Part Timers Have Impact*, WASH. POST, Nov. 30, 1997, at H04 (reporting results of Catalyst employee survey finding that 78% of full-time workers and 98% of part-time workers believed offering employees flexible work programs encourages employees to stay on). Efforts to improve employee loyalty by providing work/life accommodations were crucial to employers in the late 1990s when the labor market was tight and employee attrition high, particularly in high-tech fields. See Tam Pui-Wing Tam, *Silicon Valley Belatedly Boots up Programs to Ease Employees' Lives*, WALL ST. J., Aug. 29, 2000, at B1 (describing various family friendly and work/life programs instituted by Silicon Valley companies in order to improve employee job satisfaction and retention). Such efforts remain critical, however, during economic downturns when companies cannot afford to offer salary increases or other costly benefits to their workers. See Steve Jones, *When the Perks Fade: In a Sour Economy, Managers Have to Get Creative in their Struggle to Keep Employees Motivated*, WALL ST. J., Apr. 11, 2002, at B12 (describing flexibility and work leave initiatives designed by employers to counteract negative morale due to downsizing); Melinda Ligos, *Personal Business: Career Arc: How to Scale Back the Hours, but Not the Career*, N.Y. TIMES, Jan. 14, 2001, at 10 (noting that in a slowing economy employers are likely to continue offering work flexibility “at the current pace while cutting back on other perks like bonuses or overtime”).

149. While accommodation may not always be supplied at the outset of the relationship the way training is, the caregiving needs of employees tend to be cyclical. With respect to accommodations required for pregnancy and childrearing, these are likely to be most needed early in the employee's career.

150. Loss is possible rather than inevitable because accommodation in some instances may actually save the employer money, such as when the accommodation requested is modest and the alternative for the employer is to let the worker go and incur the loss of any initial investment in that individual plus replacement costs. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 31 (1997) (finding in a study of the policies and practices of a major company that it cost the employer \$40,000 for each skilled worker it had to replace); WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 88 (suggesting that the cost of replacing a skilled worker is typically 0.75 or 1.5 times the worker's annual salary). See generally Steven T. Barnett, *Employee Loyalty Should be Seen as a Valuable Business Asset*, SEATTLE POST INTELLIGENCER, Mar. 4, 2002, at E1 (enumerating sources of costs attendant to employee attrition which include “[s]earching for a new candidate, selection and hiring costs, training, reduced production until the employee becomes proficient, customer service lapses, and decreased productivity by team members or others who work with the new employee until he or she gets up to speed”).



trends in employer provision of in-house training. In the current economy, employers are less willing than in the past to make costly initial investments in workers, due to the likelihood that their need for the skills in question will change or that, in better economic times, trained workers will be inclined to take their careers and skills elsewhere.<sup>151</sup> Instead, employers are outsourcing the skills-acquisition process or are looking for employees who come to the job with the requisite training or experience.<sup>152</sup> In the same way, employers lack the incentive to provide potentially costly accommodations where they do not anticipate being able to spread the expense of those accommodations over the course of the employee's career. The prevailing expectation is that employers will extract as much work product as possible from the employee at the outset of the relationship, while her function and skills are relevant, giving only limited attention to long-term productivity.<sup>153</sup> This makes sense from the perspective of the employer who may find it difficult to assess its long-term needs or the transferability of an employee's skill set to the employer's future undetermined endeavors.<sup>154</sup> Even in situations where the requested

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151. See CAPPELLI, *supra* note 128, at 47 (noting that high turnover rates and uncertainty about companies' future needs in terms of skill sets and human resources create disincentives to investing in worker training).

152. See *id.* at 176–77 (describing development of practical training niche among colleges and proprietary institutions and employers' growing reliance on these part-time and executive programs).

153. See *id.* at 176 (noting that while it is important for new economy companies to keep their work teams active and intact during the course of a particular product's development, employers have only limited concern with the long-term tenure of employees after a project's completion).

154. Of course, it appears to offer little in the way of reciprocal benefits to employees. See *id.* at 13 (suggesting that in the reduced supervision management structures of the new workplace “[o]rganizations are demanding more for employees but offering them less”); Stone, *supra* note 117, at 568–69 (noting “fundamental paradox” of new workplace wherein employers seek to “motivate employees to provide commitment to quality, productivity, efficiency, and firm goals while dismantling the job security and job ladders that [previously] characterized large organizations”). Arguably there is a degree of mutuality in short-term employment relationships, despite the loss of job security, insofar as the employee gains exportable skills and experience that he or she can leverage in the external labor market, what is sometimes described as the “new” social contract of employment. See CAPPELLI, *supra* note 128, at 29 (noting that “[t]he most crucial part of the [new] deal—and the one apparent element of reciprocity—is the promise on the employer's side to help support the development of employee skills” that will yield some security in the external labor market); Arnow-Richman, *supra* note 127, at 1202 (“[T]he new understanding is that the employee's lifelong relationship will be with the market rather than the company . . . .”); Stone, *supra* note 117, at 525 (“One of the most important terms of the new psychological contract is the promise of employers to give employees general skills and training. This is known as the promise of employability security, and it is treated as a substitute for the former promise of employment security.”). Accommodation of caregiving, however, would hold little place in such an understanding. Rather each employer in the string of employers over the worker's career would expect full-scale performance for the duration of the

accommodation is inexpensive or costless, efforts to achieve voluntary changes at work may be hampered by institutional preferences for the status quo. Particularly in difficult economic times, where employers can choose from a steady stream of unencumbered workers, there is little reason for companies to make significant changes in work structure without the prospect of immediate gain.

This prediction regarding employers' unwillingness to institute voluntary plans to meaningfully accommodate caregiving is buttressed by larger trends in the provision of private benefits. There has been growing recognition of the desirability of reducing individuals' dependence on employers for other types of benefits such as health insurance and retirement funds. Recent increases in the number of Americans without health insurance has focused renewed national attention on the viability of universal healthcare and prompted grassroots initiatives for publicly orchestrated coverage in a number of states.<sup>155</sup> Employers on the whole are scaling back insurance programs, eliminating eligibility among lower-level employees, requiring higher premium payments from covered workers, and in some cases canceling health plans all together.<sup>156</sup> The role of rising unemployment in the growing numbers of uninsured individuals, as well as those with inadequate retirement savings, highlights the challenge of tying social welfare benefits to a single employer in a fluid labor market. A system that relies on the employer as the platform for delivering benefits and services works well for individuals who remain with a single employer for the life of their career; but it fails those who move in and out of the workforce or make frequent movements between paying jobs. Consequently, policymakers on a national level have considered making significant changes in the structure of the retirement system that would

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individual's tenure with that organization.

155. See *Council Backs Principles for Universal Health Care*, PORTLAND PRESS HERALD, Mar. 4, 2003, at 2B (noting Portland city council's approval of resolution supporting goal of universal health care in Maine and offering preliminary principles for developing system); Liz Kowalczyk, *Consultants Urge Universal Health Care in Mass. Plan to be Proposed to Legislature Would Cost up to \$6B Extra*, BOSTON GLOBE, Dec. 20, 2002, at D1 (describing report of Massachusetts state legislature advisory committee identifying means of ensuring health care coverage for all state residents, including creation of a "public 'single payer agency'"); Bernard Wysocki, Jr., *Oregon to Vote on Hot-Button Issue of Universal Health Care*, WALL ST. J., Oct. 29, 2002, at B1 (describing 2002 Oregon ballot initiative that proposed making the state the sole payer of residents' medical bills using funds collected through payroll and income taxes).

156. See Kelly K. Spors & Sarah Lueck, *More People Lack Health Insurance*, WALL ST. J., Sept. 30, 2002, at A2 (reporting the number of individuals without health insurance began rising again in 2000 following a short decline between 1998 and 1999); Michael Waldholz, *Perscriptions: Health-Care Cost Explosion Will Trickle Down to Workers*, WALL ST. J., Dec. 12, 2002, D6 (describing how companies are passing increased health insurance costs onto employees and in some cases eliminating coverage and are likely to continue to do so as costs increase).

shift the burden of saving away from employers and onto individual workers. In early 2003, President Bush proposed the institution of several new individual retirement vehicles with tax-free payouts designed to encourage personal long-term investing, and the administration has toyed with the idea of eliminating tax deductions that companies now enjoy when contributing to employee retirement plans.<sup>157</sup>

Therefore, by all accounts, the nature of employment is changing from an institution of long-term interdependence to one in which workers make “spot” commitments to multiple employers over the life of their career.<sup>158</sup> Where employers do not anticipate permanent relationships with their workers, they will necessarily have limited incentive to voluntarily invest in individual accommodations. Indeed, the trend in the provision of traditional benefits appears to be chipping away at the historical idea that the employer should be the party primarily responsible for the life needs of its workers. Within this emerging understanding of the employer’s role in the social welfare system, it would be unwise to leave the issue of workplace accommodation of caregiving wholly to market forces.

### C. Norms and Culture in the “Me, Inc.” Workplace

Since full-scale voluntary accommodation of caregiving is unlikely to be forthcoming, government mandated accommodation emerges as a logical alternative. The use of government directives in this context is consistent with contemporary legislative efforts to achieve equal opportunity at work through the ADA and the FMLA<sup>159</sup> and does only limited injustice to the prevailing notion that government intervention in employer behavior is a mechanism of last resort.<sup>160</sup> Perhaps more importantly, recent changes in the way people work suggest opportunities for employers to facilitate integration of their employees’ job performance and caregiving responsibilities. Increased access to technology, combined with greater job flexibility, makes telecommuting, flex-time, and other

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157. See Mary Williams Walsh, *Shifting the Burden of Funding Pensions*, N.Y. TIMES, Feb. 20, 2003, at C1 (describing Bush account proposal as “meant to produce fundamental changes in the way Americans think about saving for retirement and to shift the primary responsibility from the business community to the individual”).

158. See Dau-Schmidt, *supra* note 145, at 3 (defining a “spot market” for labor as one in which employers purchase only needed hours of labor on a short-term or daily basis and workers are paid on a monetary basis for the product given without any additional benefits or in-kind compensation); Issacharoff & Rosenblum, *supra* note 22, at 2169 (describing labor “spot market” as a “market in which a quantum of work [is] exchanged for a corresponding quantum of pay”).

159. See *supra* Part II (describing the accommodation mandates contained in these laws).

160. See *supra* Part IV.A. and accompanying text (describing “residual” role of government in issues of employee access to social welfare benefits).

creative work schedules more viable for employers.<sup>161</sup> The swell of alternative work arrangements and independent contractor relationships means at least some individuals have greater ability to set their own terms and conditions of employment, including the quantity and type of work they take on and the hours in which they perform it.<sup>162</sup> For these reasons, it would seem that mandated accommodation of caregiving would occasion only modest intrusions into employer autonomy.

That vision, however, fails to account for corresponding developments in work culture that foster a sentiment of individualism among workers and raise the bar on performance standards in ways that are likely to undermine accommodation efforts. In the new economy, employers have a significant interest in obtaining the maximum contribution and commitment from their employees for the length of their tenure. Specifically, employers seek and reward workers who engage in “extra-role” behavior, defined as discretionary activity that goes beyond bare work requirements.<sup>163</sup>

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161. See Green, *supra* note 129, at 101 (noting that “there is general agreement that the employment relationship in both white- and blue-collar sectors of the American workplace is on the whole becoming more contingent, flexible, and individualized than in years past”); Stone, *supra* note 117, at 523 (noting that employers are offering “flexible forms of work . . . [and] have discovered the value of having workers who possess a variety of skills that can be deployed on many different job assignments”). Opportunities for work flexibility, particularly the availability of telecommuting arrangements, are generally assumed to be favorable for women and caregivers. See, e.g., WILLIAMS, UNBENDING GENDER, *supra* note 3, at 85–86; Rhode, *supra* note 8, at 844. See generally Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261 [hereinafter Travis, *Telecommuting*] (summarizing arguments of telecommuting proponents who suggest that flexible work arrangements decrease the gendered division of paid labor by enabling women to combine wage work and domestic responsibilities and consequently to pursue high level managerial and executive positions).

162. See, e.g., Travis, *Telecommuting*, *supra* note 161, at 271 (noting that for some workers, primarily male employees with bargaining power, telecommuting offers greater autonomy, flexibility, and job satisfaction); Schultz, *supra* note 4, at 1921 (describing an “ideal” view of the new decentralized employment relationship under which “people would be free to become nomadic entrepreneurs, who move from firm to firm and even position to position in order to exploit good opportunities”); cf. Green, *supra* note 129, at 104 (suggesting that contemporary organizational changes may eliminate some sources of race and gender discrimination by “offer[ing] promise that employers will finally see what women and minorities can accomplish with a more flexible account of individual strengths and weaknesses”).

163. CAPPELLI, *supra* note 128, at 46. See also FREDERICK F. REICHELDT, THE LOYALTY EFFECT: THE HIDDEN FORCE BEHIND GROWTH, PROFITS, AND LASTING VALUE 92 (1996) (describing desirable employees as those whose self-motivation yields surpluses for the employer and customers); Aron-Richman, *supra* note 127, at 1207 (discussing employers’ focus on motivating “above-average performance” that will increase firm productivity and success); Green, *supra* note 129, at 144 (describing trend toward “an involvement-centered workplace that values individual skills and achievement over prescribed hierarchical status”); Stone, *supra* note 117, at 557 (describing employers’ interest in encouraging “organizational citizenship behavior” of its workers).

Companies expect their employees to self-educate, initiate new ideas, and assist their employers in achieving better products, services, and methods of production, in much the same way that the companies' executives and shareholders would.<sup>164</sup> Indeed, many of the hallmarks of modern management technique, including the decentralization of decision making, the creation of stock option compensation plans and employee stock purchasing programs, the professionalization of titles, and the initiation of internal and peer-based dispute resolution programs represent ways of incentivizing entrepreneurial behavior and treating workers as owners.<sup>165</sup> The goal is to empower workers to act as their own profit-maximizing entities, who will contribute directly to the employer's ultimate success.

This means that while employment relationships are becoming shorter in duration, they are simultaneously becoming more demanding. In such an environment, principles of equality and merit-based treatment are likely to intensify to the detriment of employees balancing caregiving responsibilities. For instance, contemporary managers and employees have long believed that degree and intensity of work are indicators of success and that long work hours, generally expected to be performed at the work site, are essential to advancement.<sup>166</sup> Indeed, time spent at work has been steadily increasing since the 1960s, and Americans work significantly more paid labor hours per year than employees in most Western countries.<sup>167</sup> Although this reliance on quantity as a measure of work quality is doubtlessly a job practice rooted in ideal worker norms—and may be

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164. See Stone, *supra* note 117, at 556 (“[Managers] want employees to innovate, to pitch in, to have an entrepreneurial attitude toward their jobs, to behave like owners”); *cf.* Arnow-Richman, *supra* note 127, at 1209 (noting that “[modern] companies need employees who will be innovative, hard-working, and loyal to their projects and their co-workers”); Green, *supra* note 129, at 107 (noting that “[t]he new workplace . . . places responsibility with the individual employee to define his or her own career path and to seek out the training, networking, and mentoring needed for achievement”).

165. See Stone, *supra* note 117, at 558–59 (offering examples of these types of management and compensation initiatives and explaining their role in fostering organizational citizenship behavior).

166. See FRIED, *supra* note 134, at 34 (noting that out of a sample of employees surveyed, all believed they were expected to work over forty hours per week); HOCHSCHILD, *THE TIME BIND*, *supra* note 148, at 19 (quoting personnel handbook given to new employees at one company which stated, “Time spent on the job is an indication of commitment. Work more hours.”). See generally Belinda M. Smith, *supra* note 8, at 274–81 (describing how time norms regarding the number of hours worked, when hours are worked, and the extent of leave available to employees structure employment and control workers).

167. See FRIED, *supra* note 134, at 33 (noting that employees are working twenty eight-hour days, or 163 hours more than they did thirty years ago, almost an entire month); WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 71 (summarizing 1990s studies finding that Americans and Canadians work twenty percent longer hours than twenty years ago); Belinda M. Smith, *supra* note 8, at 276–77 (summarizing studies comparing hours worked in the United States with work schedules of employees in European and other industrialized countries).

subject to challenge as such—it is likely to be a particularly difficult one to uproot.<sup>168</sup> The problem of “face time” is just one aspect of a larger signaling problem in an economy significantly comprised of service- and information-driven businesses. In the era of scientific management, in which work roles were clearly defined and outputs were in the form of movable goods, assessments of work performance were objective and could be obtained with relative ease.<sup>169</sup> In the contemporary economy, performance is more difficult to monitor due to frequent changes in standards, fluidity of job assignments, as well as the intangible nature of the work product.<sup>170</sup> Thus, employers encourage “tournament” style behavior through implicit promises of above-average compensation and bonuses for those employees who outperform their peers.<sup>171</sup> Even where employees as a group are invested with significant discretion, they are likely to be competing with one another and simultaneously resentful of workers perceived as underperforming to the detriment of the team.<sup>172</sup>

This description of the contemporary work environment reflects additional disincentives to voluntary employer accommodation insofar as employers believe the intensification of existing performance standards and the ethic of employee self-reliance are essential to productivity. What is more problematic, however, is that it also creates heightened expectations for worker performance, which in turn establish the baseline against which any mandated accommodation will ultimately be judged. As discussed in Part III, cases arising under the Americans with Disabilities Act frequently reject accommodations for disabled employees that would require altering an established work pace or overtime expectation; this experience suggests that whether a given method of accommodation is deemed reasonable depends largely on established standards of performance.<sup>173</sup> While such

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168. See FRIED, *supra* note 134, at 136–38 (suggesting that emphasis on hours worked, although discriminatory toward working mothers, is so ingrained that there appear to be few ways of overcoming this assumption). For a discussion of how the expectation of long hours might be legally challenged as a discriminatory job practice, see WILLIAMS, UNBENDING GENDER, *supra* note 3, at 101–13 (proposing use of disparate impact analysis to oppose job practices based on a “male worker norm”).

169. See Stone, *supra* note 117, at 530 (describing scientific management’s reliance on time and motion studies to identify scientifically accurate “piece rate” for each task and enable foremen to ensure that each specific job task was precisely performed).

170. See Green, *supra* note 129, at 103 (noting that in a decentralized workplace with blurry job boundaries, performance evaluations tend to be amorphous, subjective, and highly dependent on firsthand observation and interaction).

171. See Schwab, *supra* note 143, at 17 (discussing how employers may promise large payouts for hard-working employees as a means of weeding out shirkers where day-to-day monitoring of workers’ efforts is difficult).

172. See Schultz, *supra* note 4, at 1923 (describing how teamwork fosters negative competition and creates peer pressure as effective, if not more effective, than traditional top-down supervision in stimulating worker productivity).

173. See, e.g., *Davis v. Microsoft Corp.*, 37 P.3d 333, 335–36 (Wash. Ct. App. 2002)

results are contrary to the goals of accommodation, there is little reason to hope that the direction of the law will change soon. The United States Supreme Court recently addressed the relationship between disability accommodation and employer seniority policies in *U.S. Airways v. Barnett*, holding in favor of the employer and against accommodation.<sup>174</sup> The Court concluded that the employer was not obligated to retain a disabled worker in an open position to which he had been temporarily reassigned where the position would otherwise be subject to seniority-based “bidding” under the employer’s personnel policies.<sup>175</sup> While the employer’s rationale for denying the accommodation differs factually from the precise objections that might be asserted in a caregiving context, the opinion is telling in its respect for the employer’s asserted need to administer its policies and standards fairly and equally among all employees. The import of the holding for caregiving is clear: According to the Court, the legal right to accommodation ends where the rights of another worker are impacted. Thus to the extent non-caregivers are working harder, it is all the more unlikely that courts will insist on accommodations that involve reductions in work quantity or pace or deviations from existing standards.

In fact, the culture of the “Me, Inc.” workplace and the changes in employer expectations described here offer a context for understanding the courts’ reluctance to broadly construe accommodation laws consistent with their aspirational mission. A developing body of law and sociology scholarship has explained this disconnect in the jurisprudence of disability accommodation through the heuristics of capture and retrenchment.<sup>176</sup> In her insightful work on this subject, Linda Hamilton Krieger distinguishes between formal laws that reinforce existing social norms (such as most criminal laws) and those laws designed to transform existing practices and institutions (such as non-discrimination and accommodation mandates).<sup>177</sup> Professor Krieger suggests that where transformative laws seek changes

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(upholding employer’s decision not to accommodate a Hepatitis C-infected employee who requested to work 40 hours a week with no overtime where all other employees were expected to work overtime); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1121 (10th Cir. 1995) (ruling in favor of employer who had adopted a new production standard where two employees could not keep pace and were subsequently fired); *Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1305–06 (11th Cir. 2000) (finding mandatory overtime work to be an essential function of the job in denying employee’s ADA claim where employer had a policy of processing all customer orders within 24 hours and employee’s coworkers worked an average of 216 overtime hours each in the year preceding employee’s termination); *supra* Part III.A.

174. *U.S. Airways v. Barnett*, 122 S. Ct. 1516, 1517–18 (2002).

175. *See id.* at 1517.

176. *See, e.g.*, Krieger, *supra* note 58, at 486–88 (describing problem of “socio-legal retrenchment,” which occurs when pre-existing norms “capture,” or subtly assert themselves within, new laws designed to stimulate social change).

177. *See id.* at 478–79 (defining “normal law” and “transformative law”).

that sharply conflict with normative systems that continue to enjoy significant popular support, the dominant norms may subtly reassert themselves within the legal regime designed to replace them.<sup>178</sup> This “capture” effect not only constrains implementation of the transformative law, but also risks legitimating and reifying the very norms it aims to undermine.<sup>179</sup>

This explanation of the inter-relationship between law and human forces is important not only for what it predicts in terms of judicial interpretation of legally mandated accommodation, but also because it suggests the potential for counter-productive societal responses from within institutions targeted by transformative law. This response can take the form of “backlash” against those who stand to benefit from new legal requirements, resulting in marginalization or, worse, segregation, which subverts efforts to achieve substantive equality.<sup>180</sup> Emerging research on contemporary employers’ voluntary use of telecommuting workers provides an alarming illustration. While telecommuting was once heralded as an ideal solution for integrating work and family, studies suggest that employers have implemented the practice in two different ways with disparate effects on male and female employees.<sup>181</sup> In one form, employers offer telecommuting as an option for high-level autonomous professionals (a class dominated by men), while in another form, employers impose telecommuting on lower-wage clerical workers (a class dominated by women), who are often independent contractors unentitled to other employment benefits.<sup>182</sup> In this way, employers have co-opted the transformative potential of the virtual workplace, rewarding entrepreneurial employees who conform to ideal worker standards, while marginalizing caregivers who are compelled to accept employment casualization in order to accommodate family obligations.

The intransigence of the existing normative structure is apparent not

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178. *See id.* at 485–92.

179. *See id.* at 486 (suggesting that judges are influenced by “taken-for-granted background rules” that “systematically skew the interpretations of transformative legal rules so that those rules . . . provide a vehicle for the reassertion and relegitimation of the very norms and institutions [they] were designed to undermine”).

180. *See id.* at 497 (defining “backlash” as overt and confrontational manifestations of socio-legal capture that occur when “the application of a transformative legal regime generates outcomes that conflict with norms and institutions to which influential segments of the relevant populace retain strong conscious allegiance”).

181. *See* Travis, *Telecommuting*, *supra* note 161, at 265 (asserting that “[c]ontrary to predictions, research on the performance of paid work at home indicates that, for many women, telecommuting is actually increasing gender inequalities both in the workplace and at home”).

182. Travis, *Telecommuting*, *supra* note 161, at 271–75 (reviewing empirical research documenting different uses of telecommuting by employers and their disparate effect on women workers).



only in the behavior of employers, but also in the reactions and sentiments of employees. Popular constituencies, as much as institutional forces, may undermine the equalizing effect of accommodation because employer-supported accommodation is perceived by non-accommodated workers as preferential treatment in tension with merit-based decision making. The palpable backlash against race-based affirmative action policies is a prime example. While the non-discrimination principle of Title VII, once perceived as groundbreaking, has largely been mainstreamed, there is continued resistance to reliance on the same principles of inclusion to support affirmative behavior toward historically mistreated groups.<sup>183</sup> A common perception is that affirmative action imposes a system of preferences that advantages some (assumed to be unworthy) over others (assumed to be worthy), resulting in unfair outcomes under dominant formal equality norms.<sup>184</sup> Accommodation of caregiving invites similar backlash. While mandated accommodation beyond the unpaid leave currently required by federal law is more hypothetical than real, objections are already being levied against it. Commentators have suggested that accommodating caregivers unduly privileges those who choose to become parents, while impliedly holding non-parents (in particular unmarried and homosexual individuals) to higher performance standards, in effect requiring them to pick up the slack for their accommodated co-workers.<sup>185</sup> Such rhetoric presages a work environment in which caregivers as a group (and conceivably women by extension) are essentialized and penalized, in

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183. A prime example of this was California voters' passage of "Proposition 209," a ballot initiative amending the state constitution to prohibit race-conscious admissions policies in California state schools, employment, or contracting. See CAL. CONST. art. I, § 31 (2003) "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."). See generally Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1336-39 (1997) (describing the scope of the proposition); *Community News File; South-Central Los Angeles; Jackson Leads Bus Tour to Fuel Opposition to Proposition 209*, L.A. TIMES, Oct. 21, 1997, at B4 [hereinafter *Community News File*] (describing extensive popular controversy over the proposition). More recently, the University of Michigan, supported by numerous amici curiae, won limited approval from the United States Supreme Court for their race-conscious admission policies. See *Grutter v. Bollinger*, 123 Sup. Ct. 2325, 2342-47 (2003). It remains to be seen what, if any, effect this decision will have in the employment context.

184. See generally Krieger, *supra* note 58, at 495-96 (describing socio-legal backlash against affirmative action based on perception that such practices disdain merit-based assessment and result in unfair outcomes).

185. See, e.g., ELINOR BURKETT, *THE BABY BOON: HOW FAMILY FRIENDLY AMERICA CHEATS THE CHILDLESS* 25-61 (2000); Case, *supra* note 9, at 1758 (expressing fear that requiring employer responsibility for caregiving benefits will result in "a taking . . . from one group of female employees (childless women who will remain childless), for the benefit predominantly of another group of male employees (those with wives and children)").

much the same way minority group members frequently suffer stigma in the wake of contemporary criticisms of affirmative action.

In sum, contemporary changes in the work environment, while offering the promise of more flexible work practices, may create more roadblocks than pathways to successful accommodation of caregiving. Even if the dangers of judicial interpretation can be circumvented to some extent—such as through the adoption of fixed rather than flexible accommodation mandates—there remains the significant problem of ground-level repercussions against novel legislative efforts to assist caregivers. Where work culture is moving swiftly toward a model of increased worker independence and ingenuity, legally-mandated accommodation may exacerbate distinctions between those employees who demonstrate extraordinary commitment (as conventionally understood) and those perceived as needing special leeway.

## V. The Future of Accommodation and Other Work/Family Initiatives

The preceding part provided both an explanation and a prediction regarding the efficacy of accommodation initiatives. Given the changing nature of the employment relationship, it is unlikely that employers will adequately accommodate caregivers of their own accord and equally unlikely that government-mandated accommodation will meaningfully integrate caregivers into the existing work regime. This part returns to the initial question of how accommodation of caregiving can exist successfully in a social environment dominated by equality norms. In light of the intransigent nature of work/family conflict, it is unrealistic to expect any initiative to fully eliminate caregivers' disadvantage, and it may be that feminists must ultimately be satisfied with something less than complete results-based equality. Acknowledging this difficulty, the next section offers a modest critique and proposal: The project of removing women's disadvantage due to caregiving may best be served by working within the private model of employment, using government action merely to incentivize employer initiatives and supply residual benefits, rather than by fashioning an altogether new regime that might well prove to be unattainable.

### A. *The Continuum of Responses: Change Work or Change Caregiving?*

The social developments traced in Part IV suggest that work/family initiatives must account more fully for the environment in which caregiver exclusion occurs and, in particular, the dynamics that magnify existing inequality. Feminist legal scholars have already done much to envision a new intersection between government, work, and caregiving in response to

the changing nature of market employment as well as changes in contemporary family composition.<sup>186</sup> These contributions can loosely be characterized along a continuum of efforts that aim on one end to drastically alter the structure of work and on the other end to forge a new understanding of family caregiving and dependency.

Martha Fineman, for instance, in her most recent contribution to the work/family dialogue, emphasizes how vast changes in the composition of the family and the nature of work highlight the need for direct government support for caregiving. Drawing on her extensive writings on the legal regulation of intimate relationships,<sup>187</sup> Professor Fineman argues that background social structures, such as the dominance of a nuclear family, are eroding, exposing the universal nature of dependency and requiring a reallocation of responsibility between public and private resources.<sup>188</sup> Historically, wives provided “voluntary” full-time family care and employers provided a family wage and social insurance to husbands, leaving the state merely to facilitate services or intervene at the point of breakdown.<sup>189</sup> Professor Fineman suggests that developments such as the entry of women into the workplace, the rise of no-fault divorce, and the decline in long-term employment with adequate benefits call for significant state involvement in the social welfare of its citizens.<sup>190</sup> If families and employers are not providing adequately or fairly for the needs of all people, the government should do so through direct subsidies to caregivers as well as by securing necessary social goods for each citizen regardless of the market value of his or her labor.<sup>191</sup>

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186. Indeed, the extant legal literature on work/family conflict is far too rich to comprehensively consider here. In light of my focus on the influence of changing work dynamics on the viability of accommodating caregiving, I will concentrate in this Section on two scholars who directly tackle these workplace changes in formulating their proposals. See, e.g., Fineman, *Contract and Care*, *supra* note 6, at 1432–34; Schultz, *supra* note 4, at 1920–27.

187. See, e.g., FINEMAN, *THE NEUTERED MOTHER*, *supra* note 6; Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387 (1993); Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits on Privacy*, 23 CONN. L. REV. 955 (1991).

188. See Fineman, *Contract and Care*, *supra* note 6, at 1428 (“[B]oth family and workplace have changed so fundamentally over the past several decades that it is impossible to continue to view them as background to a privatized and individualized society . . . [and] it would be unjust to consider these institutions, as they now exist, as adequate to their historic assigned tasks.”).

189. See *id.* at 1423 (describing “traditional social policy thinking” under which “the private family is responsible for dependency; the market for distribution of social goods; and the government for . . . supervising it all . . .”).

190. See *id.* at 1428–34 (describing significant changes in the contemporary family and workplace that affect the balance of home, market, and state responsibilities).

191. See *id.* at 1436–39 (proposing a restructured society in which the state facilitates distribution of income and benefits to all citizens).

In contrast, Vicki Schultz responds to these social changes by demanding greater government intervention in the allocation and compensation of market work. Recognizing the profoundly important role that work plays in shaping personal identity and citizenship, Professor Schultz proposes market work as the primary foundation for a stable democratic order and the appropriate site for redistributive regulatory efforts.<sup>192</sup> While discrimination laws have enabled certain groups to obtain access to work, they are not capable of generating the structural transformations needed to create viable and sustainable working conditions under which all citizens can work and support themselves.<sup>193</sup> That goal has been further undermined by the increasingly tenuous nature of employment and other workplace trends that threaten to devalue not only women and minorities, but all workers, apart from a privileged few.<sup>194</sup> To combat this problem, Professor Schultz urges a state-orchestrated overhaul of market work, including job creation and training opportunities to enable full employment, the enactment of living wage legislation (coupled with wage subsidies if needed), and the reduction of the full-time work-week for all employees.<sup>195</sup> Only by fully re-imagining work in this way, can paid work as an institution realize its potential as a platform for equal citizenship.

These competing frameworks for responding to social fluctuations grow out of a broader debate within work/family scholarship. While the historical distinction between equality and difference feminism has diminished,<sup>196</sup> a comparable division has emerged between scholars emphasizing the need for gender equality in attachment to paid work and scholars focusing on the need to demarginalize caregiving practices traditionally performed by women.<sup>197</sup> Under what has been called the

192. See Schultz, *supra* note 4, at 1928 (noting that “paid work is the only institution that can be sufficiently widely distributed to provide a stable foundation for a democratic order” and that because of this, society chooses to organize itself around employment).

193. *Id.* at 1938.

194. See *id.* at 1919–27 (noting that in the new economic order marked by flexible capitalism and global competition “almost all workers are in danger of becoming ‘women,’ in the sense that they are experiencing the problems and dilemmas that women have traditionally faced with respect to paid work,” such as lack of job security and wage inequality).

195. See *id.* at 1942–60.

196. See *supra* Part II.A.

197. See generally WILLIAMS, UNBENDING GENDER, *supra* note 3, at 226–31 (summarizing viewpoints of several scholars and drawing comparisons to the special treatment/equal treatment debate); Joan Williams, “It’s Snowing Down South”: *How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 815 (2002) [hereinafter Williams, *Snowing Down South*] (describing recent dialogue between feminists scholars as a “new round . . . [that] follows a familiar pattern. Feminists committed to making traditionally masculine gender performances available to women are pitted against feminists committed to decreasing the costs of conventionally feminine gender performances.”).

“universal breadwinner” model of equality, reforms target the workplace and aim to establish appropriate benefits and services to enable women to participate meaningfully in the paid labor market; while under the so-called “caregiver parity” model of equality, reforms target caregiving itself, seeking to revalue women’s traditional role (largely through public subsidies) so that caregivers can support themselves and enter and exit employment costlessly.<sup>198</sup> The difference is substantial on a theoretical level. From the caregiver parity perspective, a universal breadwinner model over-emphasizes the value of market work and entrenches, or at best ignores, the social structures that devalue caregiving;<sup>199</sup> from the universal breadwinner perspective, a caregiver parity model segregates caregivers in a way that is antithetical to true equality.<sup>200</sup>

While the tension between these choices is intellectually compelling, its resolution is far less relevant to the core task of eliminating women’s marginalization and workplace disadvantage than extant work/family scholarship would suggest. The growing emphasis on equal

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198. I borrow the terms “universal breadwinner” and “caregiver parity” from Nancy Fraser’s important discussion of the inapplicability of family wage ideology to a post-industrial society. NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 51–59 (1997). See also Marion Crain, “Where Have All the Cowboys Gone?” *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L. REV. 1877, 1929–31 (1999) [hereinafter Crain, “Where Have All the Cowboys Gone?”] (adopting this terminology). In so doing, I do not suggest that all work/family proposals can be placed beneath one of these two umbrellas; certainly many work/family scholars have characterized the strains of this discussion somewhat differently. See, e.g., WILLIAMS, UNBENDING GENDER, *supra* note 3, at 226–31 (distinguishing between “maternalists” and “equal parenting” advocates); Laura Kessler, *Women’s Family Caregiving as a Cultural and Political Practice: Bridging the Maternalist/Nonmaternalist Divide in the Discourse Over Care Work* 6–8 (working draft on file with author) (characterizing the sides of the debate as “maternalist” and “nonmaternalist”). Neither do I suggest that Professor Schultz’s or Professor Fineman’s ideas may be labeled in this manner, for their nuanced approaches do more to bridge the debate in my view than to advance either side. However, I avail myself of Fraser’s terminology at this point in order to capture the distinction between identifying the inaccessibility of paid work as the primary source of caregiver inequality verses targeting the historical undervaluation of caregiving as the core concern, conscious of the fact that I oversimplify somewhat in the process.

199. See FRASER, *supra* note 198, at 54 (arguing that under the universal breadwinner model, the “ideal-typical citizen” is “nominally gender-neutral” but still “implicitly masculine”); Crain, “Where Have All the Cowboys Gone?,” *supra* note 198, at 1930 (noting that the universal breadwinner model “privileges men’s traditional sphere, paid employment, and does nothing to accord social value to women’s traditional work, carework”).

200. See FRASER, *supra* note 198, at 58 (“[I]t is hard to imagine how ‘separate but equal’ gender roles could provide genuine equality of respect today.”); Crain, “Where Have All the Cowboys Gone?,” *supra* note 198, at 1931 (noting that the caregiver parity model “encourages couples to keep one partner on the breadwinner track and to relegate the other to the caregiver track, rather than to alternate or share carework . . . institutionaliz[ing] the gendered division of labor”).

accommodation, and by consequence equal parenting, removes in large degree the danger of reinforcing the gendered nature of market and family work, which animates the debate between the universal breadwinner and caregiver parity models of reform. If the universal breadwinner approach aims to empower women to act as ideal workers, defined by current standards of work performance premised on male norms, then certainly it risks diminishing the cultural and social value of women's historical role as caregivers. On the other hand, if efforts at reforming market work aim to enable all people to participate equally in paid work, as Vicki Schultz urges, then the model implicitly acknowledges the value of caregiving—both men's and women's caregiving—as well as the personal leisure and civic activities of all individuals which justify time away from employment.<sup>201</sup> Similarly, while a caregiver parity approach that subsidized only women's caregiving might reify notions of women's appropriate domestic role, a model that adequately rewarded all forms of care, as Martha Fineman advocates, can encourage universal acceptance of dependency and care and enable autonomous choices by both men and women about how to spend their time.<sup>202</sup>

If that is the case, the residual question posed by the breadwinner/caregiver debate is simply whether work or family is ultimately a better platform for significant social reform. Professors Schultz and Fineman, for instance, provide alternative accounts of the appropriate structure for a re-imagined welfare state, the former maintaining work as the primary site of government intervention and the latter embracing a novel form of direct regulation of family care. Yet both are self-described utopian visions that are extraordinarily unlikely to be realized in the immediate future.<sup>203</sup> The established value of family privacy and the absence of precedent for placing care within the public realm pose significant obstacles to Fineman's model, as does the questionable ability of the government to fund and supervise such extensive and novel social

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201. See Schultz, *supra* note 4, at 1955 (arguing that men as well as women desire and can benefit from reductions in work hours and greater participation in family and civic life).

202. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 6, at 234–35 (using the concept of the “mother/child” dyad as a metaphor for the interrelationship between “caretaker” and “dependent” and asserting that “men can and should be Mothers . . . in the stereotypical nurturing sense of that term”).

203. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 6, at 232 (recognizing that “rethinking on this scale is a quite grandiose objective, requiring massive reconsideration of many assumed roles and institutions . . . It is certainly utopian to assume that such an endeavor would be undertaken, or . . . that it would result in a significant shift in the way we . . . order intimacy.”); Schultz, *supra* note 4, at 1883 (proposing “to describe some of the central elements of a utopian vision in which women and men from all walks of life can stand alongside each other as equals, pursuing our chosen projects and forging connected lives”).

programming.<sup>204</sup> Similarly, Schultz's model, though more in keeping with the existing social welfare model, would require a degree of governmental control over private employment that would hardly be tolerated and which may well be economically infeasible. Indeed it is the norms underlying our existing socio-political system—norms that are intensifying in the emerging economy—that form both the inspiration for proposing these revolutionary initiatives as well as the chief obstacles to their successful implementation.

The point here, however, is not to critique either approach, but rather to harmonize underlying theoretical goals or at least obviate the need to resolve them. The project of theorizing a restructured workplace and more equitable distribution of family work has caused conflict among feminists, which is, at best, antithetical to the realization of long-term goals and, at worst, holds up the process of implementing interim reform measures.<sup>205</sup> What is needed at the moment is not a universal framework for a reconfigured social order so much as workable measures to provide immediate assistance to caregivers, both those who work and those who do not. What is most important is that such measures be financially and politically viable, that they provide real rather than symbolic relief, and that they reduce the risk of popular and judicial backlash. The next section of this paper turns to the task of delineating examples of this type of relief.

### *B. Change Within Constraints*

I begin by acknowledging my own bias in favor of reforms targeting workers and the terms and conditions of employment, which strike me as more politically viable and less socially divisive than direct regulation of caregiving. Government intervention in employment relationships currently exists in at least three forms: substantive laws establishing minimum labor standards and anti-discrimination principles; enabling laws establishing systems of social insurance premised on workforce participation; and collective bargaining laws facilitating employee representation and negotiation of employment terms. Efforts to eliminate caregiver disadvantage logically should begin by building on this established infrastructure. In terms of substantive law, activists must continue the project of using existing discrimination laws and the Family

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204. See Issacharoff & Rosenblum, *supra* note 22, at 2215 (noting that while “[t]he simplest model to provide for maternity benefits is a governmental program funded through general revenues,” the history of social benefits legislation in the United States suggests that the political viability of such a program “approaches absolute zero”).

205. See Williams, *Snowing Down South*, *supra* note 197, at 817 (cautioning that “[i]f [feminists] insist on sanctifying the ‘One True Way,’ we will only deflect our energy away from achieving gender change into the sameness/difference debate and other fights among feminists”).

Medical Leave Act expansively to provide the broadest possible relief to caregivers. To move beyond that level, efforts should be directed toward establishing a publicly administered system of caregiver wage replacement and revitalizing worker organization.

Before pursuing these ideas further, some preliminary points must be made. Each of the suggestions enumerated above is a vast subject in itself that both deserves and has received attention beyond what can be addressed here. Drawing from a variety of proposals, I aim to delineate a multi-faceted agenda for reform that maximizes existing legal protections and begins the process of creating additional sources of benefits and opportunities for accommodation in a manner as consistent as possible with established channels of government intervention. Undoubtedly, some will find my agenda too limited and argue that even if such proposals were fully embraced, caregivers would continue to suffer systemic disadvantage in the labor market. Even so, if modest measures of the type urged here are implemented in their entirety and ultimately prove inadequate, then the groundwork has been laid to support more aggressive reform. Until such aggressive reform becomes possible, the following section provides a framework for taking the first steps.

### 1. Enforcing Anti-Discrimination Principles and Minimum Labor Standards

While it is certain that existing federal law regulating the workplace does not adequately address the range of obstacles to advancement encountered by working caregivers, it is also certain that these laws could be used more aggressively. An agenda aimed at assisting caregivers should begin by supporting efforts to bolster and expand the limited rights provided under conventional discrimination law and the Family Medical Leave Act (FMLA). The success of such efforts will depend on—and doubtlessly be constrained by—the interpretations and opinions of individual judges whose views may be colored by established gender and workplace norms.<sup>206</sup> However, there are at least some viable legal strategies that could make existing benefits and protections more meaningful to a subset of caregivers, and these strategies should be zealously pursued.

With respect to Title VII, Joan Williams's scholarship has demonstrated how theories of liability, such as "sex plus" disparate treatment, may be used to redress discrimination against mothers (and in some cases, fathers) where such parents experience differential treatment or

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206. *Cf. supra* Part IV.C. (discussing how mainstream normative views assert themselves within judicial interpretations of novel laws).



are criticized for failure to conform to traditional gender roles.<sup>207</sup> Such strategies are particularly effective in cases where the employer makes openly stereotypical statements about working mothers or caregiving fathers or renders decisions based on unfounded assumptions about a mother's dedication to her job or ability to perform competently.<sup>208</sup> Emerging research on the nature of cognitive bias is likely to make such strategies viable in more subtle cases as well. Social cognition theory suggests that group-specific stereotypes result from normal cognitive processing, in which individuals rely on seemingly benign categorizations and generalities to assist in selecting and storing information.<sup>209</sup> Once formed, those stereotypes function as schemes for evaluating group members and may unconsciously influence employers' decision, as well as the process by which they obtain and interpret information on which their decisions are based.<sup>210</sup> If that is the case, disparate treatment analysis may be useful for cases of differential treatment in which there is no direct evidence of discriminatory animus, at least in situations where the caregiver's performance does not provide a separate justification for the employer's adverse decision.<sup>211</sup>

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207. See, e.g., WILLIAMS, UNBENDING GENDER, *supra* note 3, at 101–02; Joan 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, 124–33 (2003).

208. See, e.g., *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (finding that plaintiff had sufficient proof to defeat summary judgment where she was asked by managers about her ability to balance her caregiving with work and where they expressed concern over her desire to have another child); *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at \*3–6 (S.D.N.Y. Dec. 28, 1998) (finding in favor of plaintiff where employer made statements about the laziness of working mothers and failed to consider plaintiff for a promotion, assuming without asking that she would not want the job because of her family). See generally Williams & Segal, *supra* note 207, at 123–30 (summarizing other Title VII cases holding in favor of employees where facts involved explicit stereotypical comments or demeaning behavior targeting mothers).

209. Linda Hamilton Krieger, *supra* note 139, at 1188 (noting that “stereotypes . . . are cognitive mechanisms that all people, not just prejudiced ones, use to simplify the task of perceiving, processing, and retaining information about people in memory”).

210. The implication is that stereotypes do not assert themselves solely at the point at which an adverse employment decision is rendered, but rather influence the employer's perception of an employee long before any action is taken; this means that employer reliance on pernicious stereotypes is frequently unintentional and unconscious. See *id.*

211. See Williams & Segal, *supra* note 207 at 94–101 (describing how cognitive bias leads to discrimination against women and mothers). A legitimate concern has been voiced by Laura Kessler that social cognition theory helps only those caregivers who are able to perform as ideal workers, but are denied opportunities based on unfounded assumptions about their abilities, while forsaking less privileged women caregivers who are unable to meet male work standards. Telephone interview with Laura T. Kessler, Associate Professor, University of Utah, S.J. Quinney College of Law (Feb. 2003) (describing the strategy of pursuing workplace equality through aggressive use of discrimination laws bolstered by social cognition theory as “trickle-down feminism”). Cf. Kessler, *supra* note 2, at 402 (noting that the small percentage of successful plaintiffs under discrimination law are the

Similarly, more can be done to achieve employee-friendly interpretations of the FMLA. As discussed in Part III, several courts have misapplied the burden of proof associated with FMLA failure-to-reinstate claims by requiring plaintiffs to demonstrate that their employer's behavior was discriminatorily motivated.<sup>212</sup> Such an interpretation undermines both the key benefit provided by the statute and its purpose in enabling employees to take leave without loss of job security. In his work on family leave and fathers, Martin Malin has suggested that failure-to-reinstate claims should be analyzed as violations of FMLA section (a)(1)'s prohibition against interference, restraint, or denial of employee rights, not as discrimination or retaliation claims.<sup>213</sup> Section (a)(1), Professor Malin asserts, is modeled on section 8(a)(1) of the National Labor Relations Act, which prohibits interference with employee rights to engage in concerted behavior.<sup>214</sup> That section has never been interpreted to require a showing

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exceptional women who do not require any type of accommodation while, unsurprisingly, many women need accommodations to meet the demands of a full-time job and their duties as caregiver). To be sure, Professor Williams advocates, in addition to her disparate treatment strategy, the use of disparate impact litigation targeting systemic obstacles to women's advancement such as physical requirements, mandatory overtime, and the unavailability of leave or part-time work, all of which are based on the expectation of a male worker. See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 104–10 (proposing the use of disparate impact litigation to challenge the structure of promotion tracks, physical build, and lifting requirements that are designed around male bodies and male work schedules). However, the likelihood of succeeding with such claims before the federal bench is minimal at best. See Kathryn Abrams, Book Review, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 755 (2000) (noting that “[w]here feminists see gendered work requirements, many employers see the job as it has always been done . . . [and] courts may share this more prevalent view”); cf. *supra* Part IV.C (noting the likelihood of judicial backlash in interpreting transformative work/family accommodation laws). Although the expansive use of Title VII helps only a minority of women caregivers, pursuing these claims does not inevitably jeopardize simultaneous efforts to achieve accommodation of non-ideal caregivers by other means. For instance, the success of comparable disparate treatment claims in the context of race discrimination—as where qualified African-American candidates are excluded based on unfounded stereotypes about their ability to perform—would not be said to diminish the theoretical basis for eradicating systemic obstacles to minority advancement, such as culturally-biased entry exams, where either the business rationale for the practice in question is insufficiently persuasive when scrutinized or the practice in question could be reconfigured or replaced by a less biased measure.

212. See, e.g., *Rice*, 209 F.3d at 1018. See generally, *supra* Part III.B.

213. See Malin, *supra* note 5, at 52 (“The issue under the FMLA is not whether an employee returning from leave was the victim of discrimination . . . . Rather the issue [is] whether the plaintiff [has] been restored to her former job or an equivalent position.”). *Id.* at 51.

214. *Id.* at 52. Compare 29 U.S.C. § 158(a)(1) (1998) (“It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”), with 29 U.S.C. § 2615(a)(1) (1998) (“It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title[.]”) See generally, *supra* Part III.B. note 107 and accompanying text.

of employer discrimination, but rather looks at the objective justifications for the employer's behavior and balances those interests against their negative effects on employee rights.<sup>215</sup> Applying a comparable approach in the FMLA context would not only remove the difficulties inherent in proving animus, it would open the door to broader applicability of the statute in general. Like section 8(a)(1) of the NLRA, the FMLA prohibition against interference could be construed as reaching a range of employer practices, including the promulgation of facially neutral policies and rules that discourage use of leave, or expressions of hostility or harassment against FMLA eligible employees that do not necessarily result in a tangible employment action.<sup>216</sup>

## 2. Of Incentives and Insurance: Beyond "Baby UI"

Assuming legal strategists can squeeze the maximum amount of

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215. Most of the decisive cases arise in the context of employer rules that interfere with the dissemination of union campaign materials. *See, e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 572–73 (1978) (finding that employees' off-work distribution of pamphlets containing both organizational and political messages could not be precluded by employer who "made no attempt to show that its management interests would be prejudiced in any [manner]" by distribution); *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (remanding with directions to weigh competing interest of the employer in keeping picketers away from its private property against the employees' interest in exercising their right to engage in concerted activity to determine whether violation of section 8(a)(1) had occurred); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (noting that "when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize"); *Republic Aviation v. NLRB*, 324 U.S. 793, 802 n.8 (1945) (affirming NLRB decision asserting that some dislocation of employer property rights may be necessary to safeguard worker collective bargaining rights and that an employer violates section 8(a)(1) by prohibiting employee solicitation during work time if the restriction is an unreasonable impediment to the exercise of those rights); *cf. Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 423–24 (1999) (balancing the interests of the employees in handing out and receiving union literature with the employer's right to express its opinion in finding no section 8(a)(1) violation).

216. *See Malin, supra* note 5, at 1091–93 (drawing on law of sexual harassment under Title VII and asserting that because the FMLA does not require a showing of discrimination, even less pervasive employer behavior should be actionable if it deters employees from taking leave). Such an interpretation would be particularly helpful to male caregivers who suffer harassment for failure to conform to the stereotype of a full-time breadwinner, which in turn helps women workers by enabling a better division of caregiving responsibilities within traditional families. *See id.* at 1089 (describing how a hostile work environment deters fathers from taking leave because, as primary income providers, fathers will be reluctant to jeopardize their jobs by taking a leave that their employers disapprove of); *Selmi, supra* note 5, at 711–12, 773–75 (noting that because men do not take parental leave, women are forced to take more days off, work fewer hours, and suffer from a weaker workforce attachment and arguing that men should be compelled to take parental leave upon birth or adoption of a child to correct this problem and change prevailing gender norms).

protection out of existing legislation, there remains the significant problem of the absence of any form of wage replacement for working caregivers. The issue of wage replacement is critical in making any system of leave or work reduction viable for employees at all economic levels. It is also crucial to the goal of equalizing responsibility for caregiving between men and women in traditional families, where the income of the male head of household is considered indispensable and the woman's expendable.<sup>217</sup> Some legal scholars advocating paid caregiving leave have focused on the dichotomous options of requiring employers to provide it or directing government subsidies to those who perform unpaid care work.<sup>218</sup> Another option, somewhat less explored in the current literature, is the implementation of a government facilitated compensation system for caregiving leave that could be jointly-funded by employer and employee dollars.<sup>219</sup>

It may seem odd in a paper purporting to offer a pragmatic analysis of caregiving initiatives to argue for something akin to social welfare insurance in light of recent efforts to eliminate unemployment compensation for parents with new children. In June 2000, in response to an executive order of former President Bill Clinton, the Department of Labor (DOL) issued the Birth and Adoption Unemployment Compensation (BAA-UC) regulations, initiating the first federally subsidized program of wage replacement for parents in the United States.<sup>220</sup> Under this

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217. See Malin, *supra* note 5, at 1073–74 (noting that where the only available parenting leave is unpaid, “[t]raditional sex roles that assign primary caregiving responsibilities to the mother and primary breadwinning responsibilities to fathers ensure that . . . the mother will tend to monopolize the leave. [This is] . . . economically rational for many couples in which the father earns the higher income . . . .”); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1197 (1994) (“Without the inducement of paid caretaking leave, few men are likely to withstand the combined economic and peer pressure against significant workplace absences.”). But see Selmi, *supra* note 5, at 771–72 (suggesting that paid leave alone will not induce substantial numbers of men to take long-term caregiving leave where these men can use accrued vacation to fulfill their apparent preference for short-term leave).

218. See *supra* note 42 and accompanying text (discussing call for paid FMLA leave); Part V.A., *supra* (discussing Fineman's call for state funded wage replacement for caregivers).

219. For scholarship discussing the potential for a social insurance system to compensate caregivers, see, for example, Issacharoff & Rosenblum, *supra* note 22, at 2214–20 (proposing “an insurance model for pregnancy leave based on the unemployment insurance system” under which pregnant women would be entitled to twelve weeks of post-partum benefit, a portion of which would be paid to their employers to ease dislocation costs); Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1 (2002) (reviewing various methods of funding caregiving leave and recommending use of temporary disability insurance supplemented by other programs).

220. See 20 C.F.R. § 604.1–604.21 (2003) (codification of DOL's final rule); President's Memorandum on New Tools to Help Parents Balance Work and Family, 35 Weekly Comp. Pres. Doc. 978, 979 (May 31, 1999) available at 1999 WL 12654559 (directing the

experimental program, states were given the authorization to provide unemployment compensation on a voluntary basis to employees taking approved leave for purposes of caring for a newborn or newly adopted child without jeopardizing their federally approved status.<sup>221</sup> Many praised “Baby UI” as an appropriate and viable means of assisting working parents, and sixteen states introduced legislation altering their state programs to take advantage of the initiative.<sup>222</sup> However, the enthusiasm quickly dwindled. A coalition of business interests immediately filed suit challenging the regulations as inconsistent with federal unemployment compensation law and an inappropriate use of executive power.<sup>223</sup> Within six months of the final rulemaking, general elections yielded a new Republican administration unsupportive of the DOL initiative.<sup>224</sup> Perhaps most significantly, sharp economic decline, following the economic boom of the late 1990s, placed previously abundant state unemployment coffers at sudden risk of depletion.<sup>225</sup> In December 2002, the DOL issued a Notice

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Secretary of Labor to propose regulation that enable States to develop innovative ways of using the UI system to support parents on leave following the birth or adoption of a child). For more information about the origin of the Presidential directive and the process by which the BAA-UC regulations were enacted, see generally, Curtis Carpenter, Comment, *LPA, Inc. v. Herman's Unanswered Question: Is the Clinton Administration's Birth and Adoption Unemployment Compensation Regulation Consistent with the Federal Unemployment Tax Act?*, 37 NEW ENG. L. REV. 63, 68–73 (2002).

221. See 20 C.F.R. § 604.2 (2003). Federal “permission” is necessary because a state unemployment insurance system that does not meet the requirements of federal law is ineligible for federal bailout funds and employers participating in a non-recognized state system are not permitted to count their contributions against federal tax obligations imposed under the Federal Unemployment Tax Act. See 26 U.S.C. § 3302(a)(1) (2000) (allowing credit for taxes paid under certified state law); 26 U.S.C. § 3304(a) (2000 & West Supp. 2003 1A) (enumerating requirements for federal approval of state unemployment laws). For an overview of the structure of the Social Security Act’s unemployment insurance system and its relationship to state administered programs in this context, see generally Ulrich, *supra* note 219, at 32–36; Carpenter, *supra* note 220, at 79–82; Comment, *The Birth and Adoption Unemployment Compensation Experiment: Did the Department of Labor Go Too Far?*, 106 DICK. L. REV. 367, 370–74 (2001).

222. See Ulrich, *supra* note 219, at 38 (identifying and describing state legislative bills seeking to amend state unemployment law to take advantage of BAA-UC).

223. See Carpenter, *supra* note 220, at 76–79 (discussing suit). The lawsuit was ultimately dismissed on procedural grounds, see *LPA, Inc. v. Chao*, 211 F. Supp. 2d 160, 162 (D.D.C. 2002), but many of the substantive arguments raised by the plaintiffs in opposition to the regulations appear in the recent DOL Proposed Rulemaking calling for the regulations’ repeal. See 67 Fed. Reg. 72122, 72122 (Dec. 4, 2002) (noting that the lawsuit “cause[d] the Department to scrutinize the underlying statutory authority for BAA-UC”).

224. See Kirstin Downey, *Funding Curbs on Parental Leaves Sought; Labor Dept. Wants Change*, WASH. POST, Dec. 12, 2002, at E4; Christopher Marquis, *Bush to End Rule Allowing Jobless Money for New Parents*, N.Y. TIMES, Dec. 4, 2002, at A22.

225. See Russell Gold, *State Trust Funds for Unemployment are Being Depleted*, WALL ST. J., Jan. 24, 2002, at A2; Kirstin Downey Grimsley, *State Funds for Jobless Run Low in Slowdown*, WASH. POST, Nov. 16, 2001, at E1.

of Proposed Rulemaking reversing its position of two years ago and proposing to remove the regulations, which no state has ever implemented.<sup>226</sup>

While this recent history could suggest that a federal system of wage replacement is not viable, it can also be read as commenting primarily on the use of the unemployment system as a vehicle for achieving paid family leave rather than as a rejection of the underlying concept. The merger of paid leave and unemployment insurance raises several debilitating inconsistencies. The principle difficulty is the state law “able and available” provisions that require eligible recipients of unemployment funds to be actively seeking replacement work.<sup>227</sup> While the DOL went to lengths to finesse this point in its regulations, the fact remains that an employee requiring leave from a current position to care for a new child is neither able to work nor in need of new employment.<sup>228</sup> This doctrinal point received perhaps the most attention from “Baby UI” critics, yet its force lies in the broader objections that it reflects regarding the structure and purpose of unemployment insurance. The current system is designed to provide relief for workers who are experiencing temporary periods of unemployment occasioned through no fault of their own, while at the same time creating incentives for employers to limit layoffs. The latter goal is accomplished by “experience rating” employers so that their tax obligation roughly reflects the amount of unemployment they cause.<sup>229</sup> Although the

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226. See 67 Fed. Reg. 72122, 72122 (Dec. 4, 2002) (“Upon completion of this review [of DOL regulations], our conclusion is that the BAA-UC experiment is poor policy and a misapplication of federal UC law.”).

227. The “able and available” requirement for UI eligibility is not found in the federal legislation implementing the unemployment compensation program, but rather is an interpretation of the requirement that an individual be unemployed and continue to be unemployed for the duration of his or her receipt of compensation. See generally 67 Fed. Reg. 72122, 72123 (Dec. 4, 2002) (describing origin of the requirement); Carpenter, *supra* note 220, at 89–91 (discussing FUTA’s legislative history and comparing definitions of “unemployed” in other statutory sources in justifying the “able and available” requirement). It has, however, become a standard feature of state unemployment law.

228. The DOL takes the position in its final rule that providing compensation to parents with work histories promotes long-term work attachment and analogizes to other instances in which UI recipients are not “able and available” for new employment due to illness, participation in job training, jury duty, or because the individual is on a temporary layoff. See 65 Fed. Reg. 37210, 37213–14 (June 13, 2000). In its notice of the proposed removal of the regulations, however, it indicates that these positions are inconsistent. See 67 Fed. Reg. 72122, 72122 (Dec. 4, 2002) (“[T]he UC program is designed to provide temporary wage replacement to individuals who are unemployed due to lack of suitable work. However, the intended recipients of BAA-UC generally do not meet [the able and available] test as they have initiated their separation from the workforce and it is their personal situation, rather than the lack of available work, that has removed them from the labor market.”).

229. For a brief explanation of the mechanics of “experience rating” in unemployment insurance and its limitations, see Gillian Lester, *Unemployment and Wealth Redistribution*, 49 UCLA L. REV. 335, 344–45 (2001).

DOL regulations recommend that employers not be “charged” for use of funds under “Baby UI,” such a solution is merely cosmetic.<sup>230</sup> Employers, as a group, are still held responsible for departures that are not only outside their control, but in the case of pregnancy and some forms of caregiving, are often the result of voluntary behavior by the employee.<sup>231</sup> While this may ultimately prove good policy, it in no way follows from the bedrock assumptions of the existing system.<sup>232</sup>

Indeed what is most problematic about folding paid leave into the unemployment system is that it equates caregiving with involuntary departures from work that both employers and employees try to avoid.<sup>233</sup> Other than in the case of family illness, employees’ need for caregiving leave is not an exogenous market event that one insures against, but rather something that the employee chooses, and ideally something that employers should enable through some form of deferred compensation. Thus, an appropriate wage replacement program should be distinct from unemployment insurance and premised on a different concept of responsibility. California, for instance, recently enacted a system of paid leave for FMLA eligible events that operates through its temporary disability insurance program.<sup>234</sup> Funded entirely through employee

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230. See 65 Fed. Reg. 37210, 37215–16 (June 13, 2000) (allowing states to determine whether to count BAA-UC payments against employer accounts and suggesting that BAA-UI recipients be treated comparably to other UI recipients whose separation is beyond an employer’s control for purposes of assessing employers’ tax responsibilities).

231. Cf. Lester, *supra* note 229, at 367–68 (noting that work absence caused by family illness, while not voluntary, is attenuated from the typical hazards of working life and may be the result of the worker’s shifting personal priorities, making a system structured around the risk of involuntary layoff a poor vehicle for insuring against such events).

232. *Id.* at 338 (“[A]t its core, UI is a scheme to provide compensation for involuntary unemployment. No amount of tweaking, clarifying, or redefining of terms can alter the fact that job loss is the critical moment for triggering reciprocity.”); Ulrich, *supra* note 219, at 41–42 (noting that “UI’s basic pillars—separation from the employer, the ‘able and available’ and ‘seeking work’ requirements, and refusal of ‘suitable employment’—would all have to be waived” if UI were expanded to cover absences due to family risks and suggesting that it is “better to start on a clean slate” in creating a caregiver wage replacement program “than to work within the confines of a system that was designed for a different purpose”).

233. See Lester, *supra* note 229, at 385 (questioning “whether other forms of support for working families might achieve similar goals [to expanding UI] without requiring a worker to quit in order to collect benefits,” and noting that “[d]irect provision of childcare subsidies, or subsidies to firms willing to provide on-site daycare, seem preferable to tacking assistance . . . onto a program targeted at involuntary job loss”).

234. See S.B. 1661 (Cal. 2002), Cal. Legis. Serv. Ch. 901. See also Lenhoff & Withers, *supra* note 88, at 53–54 (advocating use of state temporary disability programs to provide wage replacement for family caregivers); Ulrich, *supra* note 219, at 13–16 (advocating use of state disability insurance and the creation of new programs to provide compensation for a range of family/medical events and other work interruptions that fall outside the parameters of unemployment compensation).

contributions, the program grants eligible workers up to six weeks of partial wage replacement for purposes of caring for a new child or a seriously ill family member.<sup>235</sup> Other states that mandate the provision of temporary disability insurance are considering similar laws.<sup>236</sup>

Modeling a program on temporary disability rather than unemployment insurance, however, does not mean that paid caregiving leave must be funded solely by employees. To the contrary, such an approach perpetuates the view that caregiving is a private event beyond the concern of the labor market, which could undermine efforts to obtain other forms of employer accommodation. More importantly, the failure to include any form of employer contribution requirement in a government-administered system of paid caregiving leave foregoes an opportunity to incentivize positive employer behavior that could reach beyond wage replacement. One of the limits of both “Baby UI” and the California disability program is that they provide compensation only to workers absent due to FMLA eligible events.<sup>237</sup> Such a choice is understandable from an administrative perspective. It is difficult to conceive of a social insurance system that would also mandate leave or other forms of employer accommodation, and certainly the availability of wage replacement does not address the problem of work culture or the marginalization of caregivers within their work settings.<sup>238</sup> However, if employers are at least partially responsible for contributing to the compensation fund, government can offer them an opportunity to reduce their obligation by providing direct benefits to employees. Already, several state disability programs allow employers to “opt out” by providing private benefits that are at least as

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235. See S.B. 1661 (Cal. 2002), Cal. Legis. Serv. Ch. 901.

236. See, e.g., S.B. 858 (Haw. 2003) (proposing expansion of temporary disability insurance to provide wage replacement to employees unable to work due to the serious health condition of a family member). See generally Ulrich, *supra* note 219, at 48–49 (summarizing substance of state legislative initiatives seeking to create or expand temporary disability insurance programs to provide wage replacement for caregivers absent or on leave from work).

237. Cf. Ulrich, *supra* note 219, at 10–16 (expansively defining the type of “family risks” that an employee might experience beyond FMLA eligible events, such as employer changes in work requirements that conflict with family obligations; short absences for emergency care or appointments; and longer absences occasioned by changes in family structure, relocation, or the need to provide continued care for a family member; and proposing a comprehensive system of job-protected leave and/or wage replacement for those events using a combination of unemployment compensation, temporary disability benefits, and new programs).

238. Indeed, the standard eligibility requirements associated with the existing unemployment system, including assessments of prior workforce attachment based on earnings levels and hours or weeks worked during a designated base period, operate to exclude many part-time, reduced-time, and returning employees. See *id.* at 46–48; Ulrich, *supra* note 219, at 40–41.



generous as those provided by the state system.<sup>239</sup> It is possible to extend this model by tying employer contribution rates to other forms of caregiving accommodation as well. States could devise a rating system that would assess such things as the provision of leave time, assistance with childcare, availability of reduced or flexible work hours, and other benefits for caregivers, taking into account not only what the employer offers its workforce but also the extent to which employees actually take advantage of those benefits.<sup>240</sup> In effect, the criteria would form a type of “reverse experience rating” through which employers that provide—and encourage employees to use—generous work/family benefits would be taxed less than those that offer only limited or illusory accommodations to caregivers.<sup>241</sup>

In sum, an ideal system of caregiver wage replacement would be based primarily on deductions from employee wages, while still requiring some contribution from employers. Existing efforts to augment state disability programs in the face of the imminent repeal of “Baby UI” evidence potential support for such a system. Although a paid leave program should have its own funds, it could be modeled on or even take advantage of the administrative infrastructure for existing programs like unemployment insurance and workers’ compensation. Most importantly, a government-facilitated wage replacement program can incorporate incentives that encourage employers to adopt creative forms of caregiver

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239. See Ulrich, *supra* note 219, at 44–48 (describing structure, administration, and requirements of existing state temporary disabilities insurance programs).

240. Cf. Selmi, *supra* note 5, at 775–76 (proposing a federal contract set-aside program for which a contractor would become eligible only if a threshold percentage of its male and female employees have availed themselves of the contractor’s paid leave program); Ulrich, *supra* note 219, at 50 (praising the “play or pay” model of social insurance that exempts employers from contributions for providing equal or better benefits than the minimum state requirement as creating incentives for employers to provide different and more expansive programs).

241. Cf. Selmi, *supra* note 5, at 777 (noting that under a contract set-aside program for employers with good records of employee utilization of paid leave programs, employers would be less likely to penalize employees for taking advantage of leave time and would even encourage leave in order to benefit from the policy). In contrast, if a caregiving insurance program were experience-rated in the traditional sense, that is, if employers were taxed proportionate to their employees’ use of benefits, employers would have an incentive to avoid hiring workers who are likely to avail themselves of caregiving benefits (women), or to pass the cost of the program onto those workers in the form of lower wages. See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 227–29, 291 (2000) (discussing the relationship between accommodation mandates and anti-discrimination laws and suggesting that where anti-discrimination laws are difficult to enforce, as in highly segregated occupations, accommodation mandates benefiting women will result in decreases in women’s wages or employment levels); Ulrich, *supra* note 219, at 26–27 (advocating that employer-funded caregiving benefits be funded through a non-experience rated social insurance program in order to ensure that any resulting cost shifting by employers is borne equally by all employees).

accommodation, thereby providing additional benefits to caregivers in a manner consistent with our existing social welfare system.

### 3. The Role of Collective Action

Because this paper has called for only modest government action in the specific area of wage replacement for absent caregivers, private employer behavior will remain critical in achieving equality for caregivers at work. Earlier, this paper expressed the view that relying solely on voluntary employer accommodation to widely redress caregiver disadvantage would be unwise; yet a combination of legal and social reform efforts hopefully can, in many instances, enhance voluntary conduct by employers to achieve meaningful results. In large part, voluntary initiatives should flow naturally from the adoption of an incentive-based compensation system, as previously described. However, ensuring that employer efforts are effective will require increased dialogue between companies and their workforce through which appropriate work/family initiatives can be identified, implemented, and monitored. Enabling that type of communication requires the invigoration of traditional collective bargaining as well as the development of new forms of worker concerted action.

Focusing on collective action poses many challenges, the foremost being the profound decline in union membership over the last half-century. As a percentage of the non-agricultural workforce, union membership fell from a height of between thirty-three and thirty-five percent during the years 1944 to 1954 to roughly thirteen percent of workers by the year 2002.<sup>242</sup> The numbers are somewhat better for public sector workers, and unions do maintain a stronghold in particular industries.<sup>243</sup> Overall, however, they do not command a serious position in negotiating terms of employment for most modern workers, in contrast to their historical influence in this domain.<sup>244</sup> Moreover, even at their height, unions did a

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242. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *Union Members in 2002*, at <http://www.bls.gov/news.release/union2.nr0.htm> [hereinafter *Union Members in 2002*] (reporting that the rate of labor union membership declined from 20.1% in 1983, the first year the Department began comparing labor statistics, to 13.2% in 2002). See generally Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 U. MICH. J.L. REFORM 447, 450–54 (2000) (briefly describing the rise and fall in union membership since the 1935 passage of the NLRA).

243. The most recent statistics show that, as of 2002, forty percent of the public workforce was unionized in comparison with less than ten percent of the private workforce. See *Union Members in 2002*, *supra* note 242.

244. A number of theories have been put forth to explain this phenomenon, including increased resistance by employers, structural economic changes, changing worker composition and preferences, the absence of legal reform, and unions' own lack of

poor job at helping women workers.<sup>245</sup> In the collective bargaining process, unions pressed for higher pay by calling for a “family wage,” one that would support a housewife and children, and often perceived women as insufficiently attached to market work to become deeply involved in collective action.<sup>246</sup> In these ways, unionism explicitly embraced the gendered division between paid and family work and achieved gains for a predominantly male constituency at the expense of women wage earners.

Notwithstanding its checkered history, collective action is essential to the realization of greater caregiver equality for the simple reason that collective action offers a bottom-up approach to institutional change that can empower caregivers and avoid the risks associated with novel legislative efforts. While some have questioned the redistributive effects of accommodation mandates,<sup>247</sup> collective action has long been an accepted

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commitment to organization. See, e.g., Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical View and Critical Assessment*, 43 B.C. L. REV. 351, 362–77 (2002) (discussing, among other influences, the rise of a globalized and service-oriented economy, increased use of contingent labor, and the diversification of the workforce); Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–31 (2002) (noting labor law’s insulation from internal and external revision due to a broad federal preemption doctrine and political impasse over congressional reform efforts, among other factors); Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 YALE L.J. 1907, 1912–13 (1993) (emphasizing the role of employer union avoidance techniques). See generally CHARLES B. CRAVER, CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 34–55 (1993) (surveying various causes of unions’ decline).

245. See Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Labor*, 89 MICH. L. REV. 1155, 1160–62 (1991) [hereinafter Crain, *Feminizing Unions*] (describing how organized labor initially discriminated outright against women and later ignored their interests once mainstream unions became nominally open to women); see also Befort, *supra* note 244, at 365–66 (recognizing that women’s interests have not been at the forefront of unions’ agenda, resulting in an 18.9% union participation rate by women compared to 31% by men in 1980); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1800–01 (1986) (suggesting that women are underrepresented in organized labor compared to their expressed interest in collective representation); cf. Rubin J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 94 HASTINGS L.J. 79, 92–94 (2002) (describing unions’ historical exclusion of people of color, women, and immigrants who formed their own minority caucuses).

246. See Crain, *Feminizing Unions*, *supra* note 245, at 1162–65 (discussing stereotypical assumptions about family structure and women’s workforce attachment that informed union bargaining and campaigning efforts). Such patterns contributed to the image of unions as a stronghold of white male privilege in lower-level manufacturing work that continues to pervade the popular conception of organized labor. See Weiler & Mundlak, *supra* note 244, at 1912 (noting the common assumption that “collective bargaining is an institution primarily suited for male, blue-collar, production workers in the goods-producing industries that were the bastion of unionism in its heyday”).

247. See, e.g., Issacharoff & Nelson, *supra* note 47, at 347–55 (critiquing the ADA’s imposition of an unfunded and unspecified redistributive requirement that arbitrarily burdens individual employers); Krieger, *supra* note 58, at 504–05 (discussing the popular

democratic vehicle for pursuing such goals because it incorporates different constituencies and yields voluntary exchange.<sup>248</sup> The interactive character of collective action also enables issues of cost to be addressed in nuanced ways that cannot be achieved through legislation of general applicability,<sup>249</sup> and it avoids the problem of judicial retrenchment by bringing questions of feasibility and reasonableness in-house.<sup>250</sup> At the same time, collective action gives legitimacy to employer decisions that might otherwise be perceived as benefiting some workers at the expense of others, reducing the risk of internal backlash. Through collective action, workers can forge coalitions across disparate groups, tying the interests of mothers to those of non-traditional caregivers as well as to those of workers seeking flexibility for personal reasons other than caregiving.<sup>251</sup> Finally, while the primary concern here is enhancing the work experience of caregivers in a modest but immediate way, collective action can ultimately build social support for future legislation targeting caregiving in stronger terms, and it offers the residual advantage of an established infrastructure for improving other terms and conditions of employment for all workers.<sup>252</sup>

Accomplishing these ends requires the revitalization of the defeated culture of unionism and the rectification of labor's long disregard for

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conception that the ADA privileges those capable of claiming disability status in ways that may or may not effectuate corrective justice in individual cases).

248. See Stone, *supra* note 117, at 615–16 (discussing the role of unions in the democratic process as vehicles for translating private interests into matters of shared public concern); cf. Crain, *Feminizing Unions*, *supra* note 245, at 1185 (noting that both feminism and organized labor aim to transform existing social institutions in order to redistribute power and resources to traditionally oppressed groups).

249. See Sturm, *supra* note 36, at 522–23 (describing limitations of rule-based approach to employer regulation that is unable to take account of workplace context and the value of internally generated systems attuned to the culture of specific organizations).

250. On Linda Hamilton Krieger's theory of retrenchment, see *supra* Part IV.C. Professor Krieger argues that the risk of retrenchment in connection with transformative legal efforts is reduced where (1) the transformative rules derive from the efforts and input of those who will be governed by them, (2) the rules are enforced through alternative dispute resolution mechanisms rather than litigation, and (3) the rules are openly and fully debated before enactment. Krieger, *supra* note 58, at 501–02. The collective bargaining process meets all of these requirements.

251. See Crain, *Feminizing Unions*, *supra* note 245, at 1156 (noting unions' potential for opening channel of communication between women workers, including working class women and women of color); cf. Selmi, *supra* note 5, at 778 (suggesting that only when caregiving becomes an issue for all workers, not just women, will family leave become part of the standard employment benefits package).

252. See Crain, *Feminizing Unions*, *supra* note 245, at 1156 (suggesting that “feminized labor unions could, through collective bargaining and political lobbying for legislation to protect unorganized workers, politicize gender issues and transform the structures of work and family”); Stone, *supra* note 117, at 616 (noting that unions are the only organized group with an interest in pressing for social legislation regulating employment); cf. Krieger, *supra* note 58, at 501–03 (emphasizing the importance of grassroots-level discussion and consensus-building in effectuating successful transformative legislation).

women in organization and bargaining. While such tasks are challenging, they fortunately coalesce. As Vicki Schultz points out most poignantly, in a world of tenuous employment “almost all workers are in danger of becoming ‘women.’”<sup>253</sup> The itinerant nature of many careers, the decline in job security and employer-provided benefits, the absence of training, the increase in average work hours, and the ever-intensifying competition that characterizes many employment positions all parallel the obstacles and disadvantages that women have historically battled in trying to be taken seriously as market workers. More importantly, these realities make the modern work site ripe for organization. Indeed, what is most distressing about the rapidly dwindling union presence is that, in the “Me, Inc.” world, we need unions more than ever.<sup>254</sup>

Just how unions and the law of collective action should respond in meeting the challenges of the current century is a vast project that has been tackled by many legal scholars, and the paragraphs that follow will therefore consider only briefly the central themes of a targeted reform effort.<sup>255</sup> The core goal of such an initiative must be to enable employee organization and representation to better reflect contemporary work patterns. One component will be enhancing opportunities for collective action by contingent workers, many of whom are mothers who lack any employment benefits.<sup>256</sup> Although the National Labor Relations Board recently sanctioned the integration of temporary and permanent employees in a single bargaining unit, this is only a partial solution.<sup>257</sup> There remain

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253. Schultz, *supra* note 4, at 1919.

254. See Stone, *supra* note 117, at 616 (“[T]he new workplace threatens to exacerbate problems of income inequality and employment discrimination, and unions are the only significant organized groups that can combat these problematic tendencies.”).

255. For more extensive discussion of possible forms of labor law and union reform, see generally Befort, *supra* note 244, at 432–52; Stone, *supra* note 117, at 631–53; Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177 (2001). On extending union efforts and the reach of labor law to specific employee constituencies in the current labor market, see, for example, Crain, *Feminizing Unions*, *supra* note 245, at 1211–19 (on the viability of a feminist union agenda); Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CAL. L. REV. 1767, 1834–46 (on using labor unions to protect the interests of minority workers); Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 495 (2002) (on the applicability of unionization to high-tech employees); Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 46, 47–48 (on organizing domestic and home care workers).

256. See Crain, *Feminizing Unions*, *supra* note 245, at 1215–17 (noting that women, and in particular working mothers, incline toward the flexibility of part-time and temporary positions, which are likely to fall outside the definition of employee or outside the community of interests represented by a bargaining unit of permanent employees under current law).

257. *M.B. Sturgis, Inc. v. NLRB*, 331 N.L.R.B. 1298, 1304 (2000) (holding that consent requirements for multi-employer bargaining do not apply to units that combine jointly

the significant logistical difficulties of how to organize and bargain for workers who are deemed outside of the “community of interest” represented by the employers’ core workforce.<sup>258</sup> By definition such individuals are short-term workers with interests diverse from one another who may have placements with multiple employers.<sup>259</sup> Moreover, independent contractors, an important subset of temporary employees, are wholly excluded from coverage under federal labor laws, unable to bargain even with a third party employment agency.<sup>260</sup>

These obstacles may be addressed in part through statutory amendment or judicial decision.<sup>261</sup> Yet beneath the doctrinal issue of which workers are subject to the laws lie broader questions about the role of bargaining units in a fluid work environment. Katherine Stone has suggested that because most modern workers lack job security, temporary and “permanent” employees share similar interests and are appropriately grouped in the same bargaining unit.<sup>262</sup> At the same time, the mobility of all workers suggests that the attachment of any employee to his or her current employer may not be the best basis on which to structure a bargaining relationship. Professor Stone has written convincingly of the potential for a new form of “craft unionism” that may better suit the structure of modern work relationships.<sup>263</sup> In a craft-oriented union, employees would organize on the basis of a shared skill or occupation rather than with respect to a particular employer. Such entities could protect workers across employment lines, for instance, by negotiating minimum terms and portable benefits, while responding to employers’

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employed and solely employed employees of a single-user employer).

258. *See id.* at 1306 (reinstating community of interest tests and noting that application of the rule will not always result in jointly-employed employee inclusion in solely-employed employee units).

259. On the challenges of organizing contingent workers without access to integrated bargaining units, see generally Bitá Rahebi, *Rethinking the National Labor Relations Board’s Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105, 1114–15 (2000).

260. *See* 29 U.S.C.A. § 152(3) (1998) (“The term ‘employee’ . . . shall not include . . . any individual having the status of an independent contractor . . .”).

261. *See, e.g.*, Befort, *supra* note 244, at 45–55 (advocating adoption of an “economic realities” test for determining employee versus independent contractor status); Crain, *Feminizing Unions*, *supra* note 245, at 1216–17 (urging expanded definition of “employee” under the NLRA and Board adoption of a “disparity of interests” test that would place burden on employer to demonstrate impropriety of an integrated bargaining unit).

262. *See* Stone, *supra* note 117, at 629 (“As the new psychological contract displaces the old assumption of steady long-term employment, the distinction between temporary and permanent employees becomes more and more arbitrary.”).

263. Stone, *supra* note 117, at 633–40; *see also* Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. OF LABOR & EMP. L. 493 (2002).

desire for greater human resource flexibility.<sup>264</sup>

Implicitly, then, re-imagining unions involves more than regrouping employees and employers in alternative bargaining units; it calls for a new union agenda. A labor organization premised on fluid work patterns necessarily relinquishes demands for long-term job security. As Professor Stone notes, many of the traditional foci of union bargaining, including demands for job security, defined positions, and predictable promotion ladders, fundamentally conflict with the way management operates and the way success is measured in the new workplace.<sup>265</sup> Pursuing those demands not only antagonizes employers, it fails to resonate with many employees whose paramount concerns may be access to training, severance, and other benefits (including benefits for caregiving), more so than long-term job security with one employer.<sup>266</sup>

In addition, while unions rethink their focus, they must also make allowances for vehicles of worker-management communication that fall outside of the traditional bargaining model. To do so requires reform of the much debated National Labor Relations Act section 8(a)(2) prohibition against employer-dominated labor organizations.<sup>267</sup> In its current form, section 8(a)(2) has been interpreted to preclude the type of employee representation programs that many modern employers favor as a means of discussing product quality and efficiency, as well as for obtaining general suggestions about the workplace.<sup>268</sup> Such interaction is essential to

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264. For instance, unions could facilitate an embedded contract system in which individual employees negotiate their own terms of employment within a framework established by the union and applicable to all unionized employers in the industry. See Stone, *supra* note 117, at 635 (discussing example of the “Basic Agreement” used by the International Alliance of Theatrical and Stage Employees, which is supplemented by a “cover sheet,” or appendix, containing individual terms).

265. See Stone, *supra* note 117, at 617–21.

266. See *id.* at 615 (suggesting that contemporary unions should strive to enforce the new social contract of employment, including employer promises of training, and ensure that employers do not try to usurp employees’ human capital).

267. 29 U.S.C.A. § 158(a)(2) (1998) (“It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”). See generally Befort, *supra* note 244, at 444–46 (summarizing competing proposals for repeal and partial repeal of § 8(a)(2)). The 1997 “TEAM” Act, which would have reformed the prohibition, passed both houses of Congress only to be vetoed by President Bill Clinton under pressure from organized labor. See generally Estlund, *supra* note 244, at 1541 (briefly discussing legislative history of the “TEAM” Act and its demise); Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1706–10 (1999) (reviewing the text of the “TEAM” Act and its revisions between the 104th and 105th Congresses).

268. See, e.g., *Electromation, Inc., v. N.L.R.B.*, 309 N.L.R.B. 990, 997 (1992) (finding § 8(a)(2) violation where employer established “action committees” comprised of employees and members of management which discussed such subjects as absenteeism/attendance, no-smoking policy, pay progression, and company “communication

convince employers of the viability of restructuring work while maintaining production standards and limiting costs.<sup>269</sup> It may also be the only means through which employers and employees will communicate about such issues in a work environment where a more formal labor organization, even one with a revitalized bargaining agenda, is unlikely to take root.<sup>270</sup>

The potential for collective action in addressing work/family concerns is apparent in several union efforts already underway. In 1994, for instance, Hotel Employees and Restaurant Employees Union (“HERE”) Local 2 in San Francisco succeeded in negotiating a reimbursement plan with the city’s unionized hotels to compensate employees for child and elder care expenses.<sup>271</sup> Participating employers contribute a set amount to the plan’s fund for every hour worked by a union member.<sup>272</sup> Payment is distributed on a quarterly basis to employees who incur expenses in six coverage areas, including newborn care, formal and informal child care, elder care, youth programs, and college preparation courses.<sup>273</sup> The scope and structure of the plan illustrates some of the advantages of privately created and administered initiatives over government mandated programs. The design of the plan’s funding system reflects the work patterns of the industry with employer contributions based on hours paid rather than total wages and employee eligibility based on hours worked within the preceding weeks rather than on long-term, full-time employment.<sup>274</sup>

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network”).

269. Many scholars and commentators have voiced support for § 8(a)(2) reform for purposes of increasing employees’ voice in workplace decisions. *See, e.g.*, Befort, *supra* note 244, at 447–48 (recommending reform through mandated works councils, comparable to those supported by Western European countries, that would supplement traditional unionism); LeRoy, *supra* note 267, at 1708–09 (recommending adoption of a revised version of the “TEAM” Act); Weiler, *supra* note 255, at 200 (proposing that § 8(a)(2) be limited to barring only company-dominated unions that engage in collective bargaining rather than any employee organization that deals with the employer).

270. *See* Befort, *supra* note 244, at 443–44 (noting that “if labor law reform can fix only a small part of the [gap between employees desiring and obtaining representation], some other, alternative voice mechanism needs to be established”); Weiler, *supra* note 255, at 200 (suggesting that workers should be permitted to achieve representation through “an improved labor law marketplace” in which employees can chose between committees or unions).

271. *See* Carlise King et al., *Child Care Choices for Working Families: Examining Child Care Choices of Hotel Employees and Restaurant Employees Union Local 2 Members Working in San Francisco’s Hospitality Industry*, at 3, <http://www.laborproject.org/> (n.d.).

272. The contribution rate is \$0.18 per hour for every hour worked. *Id.* at 9.

273. *See id.*

274. The Plan eligibility requirements provide:

“(1) You must be employed regularly three hours or more per day, five or more days per week in at least three of the four full payroll weeks immediately preceding the first day of the month for which contributions are due; or



Moreover, the plan covers a range of caregiving expenses that union members incur beyond those associated with the life events that trigger FMLA leave. It is in these ways that a negotiated plan can be far more specific to the needs of its constituency than a universal compensation fund ministering to a multitude of industries and employers. Indeed the HERE plan is amenable to frequent re-evaluation and change: Plan trustees, in conjunction with several California non-profits, recently issued a participant study evaluating use of the system and making recommendations for improvement.<sup>275</sup>

Thus, despite the challenges faced by organized labor, collective actions must play a central role in facilitating work/family benefits for employees. The first step is to enable labor law and encourage unions to better respond to existing workplace dynamic and appeal to the sensibilities of modern workers. If the broader problems of organized labor can be addressed—and indeed they must in light of the need for employee representation in establishing the terms and conditions of the new social contract of employment—unions can certainly make meaningful progress for caregivers by negotiating benefits and accommodations to complement any existing or future legal entitlements.

## VI. Conclusion

The goal of this paper has been to identify a pragmatic agenda for improving the situation of working caregivers in order to further the project of achieving workplace equality for women. Of central concern has been the viability of legal initiatives premised on accommodation, or the idea that government should compel employers to provide benefits to caregivers or make work more accessible to them. The ideological basis of mandated accommodation may be consistent with formal equality principles, and certainly models of accommodation exist within the established arsenal of employment claims. However, those laws have been less than successful in changing systemic patterns of exclusion.

This paper has argued that these modest results are unsurprising and, further, that they pre-vision the type of limited success that can be expected from legislative efforts requiring accommodation of caregiving. Mandated

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(2) You must be regularly scheduled for and work at least two (2) full shifts (six or more hours) per payroll week, in at least three of the four full payroll weeks of the employer immediately preceding the first day of the month for which contributions are due.”

CHILD CARE COORDINATING COUNCIL OF SAN MATEO COUNTY, LOCAL 2/HOSPITALITY INDUSTRY CHILD AND ELDER CARE PROGRAM, <http://www.thecouncil.net/l2eligible.html> (n.d.).

275. King, *supra* note 271, at 6.

accommodation as a vehicle for achieving change clashes fundamentally with a core commitment to formal equality and market integrity that is firmly ensconced in our culture and is currently redoubling in intensity. In the “Me, Inc.” economy, where employees are expected to act as autonomous companies peddling their labor as a commodity, mandated accommodation is not only politically infeasible, it invites significant judicial and popular backlash that could seriously impair its effectiveness if enacted.

Perhaps many of us, this author included, wish that it were not so. We wish we lived in a world where workers had secure relationships of mutual dependence with their employers, where caregiving was as respected as market work, and where all individuals had the ability to earn a living wage while preserving time to cultivate attachments to family and community and to pursue activities of leisure and personal fulfillment. But the question is not the desirability of that world order; the question is whether it can be legislated. I fear that it cannot. When I think of the enactment of transformative laws to drastically restructure work, I think of the optical illusion that I invoked at the outset of this paper. I think about the viability of superimposing a novel and aspirational life view over a well-entrenched preexisting one, and I know that no matter how one looks at the young woman in the drawing, the old one eventually peeks through.

So I call here for modest steps, steps that are in keeping with our historical conception of the relationship between government and the market and the evolving respect for worker independence and self-motivation. These include the aggressive use of existing legal protections, the establishment of a federally administered wage replacement system that incentivizes voluntary employer accommodation, and the revitalization of the culture of collective action to take advantage of these new incentives. While these measures will not eliminate caregiver disadvantage, they can have an immediate, meaningful impact on many workers and may ultimately facilitate grassroots change that can support more aggressive legislative efforts in the future. In the long run, less may be more.

