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(Re)Entering the Workforce: An Historical Perspective on Family Responsibilities Discrimination and the Shortcomings of Law to Remedy It

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(Re)Entering the Workforce:
An Historical Perspective on Family
Responsibilities Discrimination and the
Shortcomings of Law to Remedy It

Elizabeth Roush*

INTRODUCTION

Much of the literature addressing the current problems of work-life balance and discrimination against those with family responsibilities begins with an origin story: how the recent rise in allegations of discrimination against caregivers and the very issue of work-life balance itself are rooted in “women’s recent entry into the workforce,” or in “the decline of the traditional breadwinner-homemaker family.” What proponents of these stories fail to notice, though, is that their ideas of the “workforce” or the “traditional” family are of very recent vintage; this historical myopia leads them to analyze improperly the problem of work-life balance and to suggest the wrong solutions. Their misconception is widespread, and often results in stereotyping and ill treatment by employers toward workers with family or caregiving responsibilities, especially women.

Work-life balance issues have become a fertile source of discussion in mainstream news and opinion; scholarship; blogs; and between friends.¹ New terms such as “mommy wars” and “opting out” are just two evocations of the strong feelings elicited by the topic on all sides.² As individuals struggle to deal with these issues,

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1. Some of the more fertile sites of this discussion include the Wall Street Journal’s blog, “The Juggle,” <http://blogs.wsj.com/juggle/> (last visited May 23, 2009); and MomsRising Blog, <http://momsrising.org/momsblogging> (last visited May 23, 2009).

2. The term “opt out” was popularized by Lisa Belkin, who used it to refer to the

the demands of family frequently collide with the demands of work. In addition, employers often assume that the demands of family do or should inhibit some employees' ability to work away from home. Family responsibilities discrimination (FRD), the common result of these employer assumptions, has become a hot area of litigation.³ The number of cases has exploded in recent years, based on new uses of existing sex and disability discrimination laws.⁴ Compared to other discrimination theories, the results have been very plaintiff-friendly.⁵

This Note argues that the story about "women's recent entry into the workplace" is a flawed one, and that this misunderstanding of the historical interaction between work and caregiving has led to flawed analyses and proposed solutions from many scholars and popular

phenomenon of highly educated and successful women leaving the paid workforce to stay at home with their children. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42; see also Tracy Thompson, *A War Inside Your Head*, WASH. POST MAG., Feb. 15, 1998, at 12 (discussing the term "mommy wars").

3. Joan Williams and her group at the University of California-Hastings's Center for Work-Life Law have been prolific in their studies and analyses of this growth in litigation. See, e.g., Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 172 (2006); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 122-61 (2003); Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Carers" in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31, 31-32 (2006).

This Note is limited to discussion of federal anti-discrimination law, though many states independently have taken action to combat FRD. See WorkLife Law, Public Policy: Family Responsibilities Discrimination, <http://www.worklifelaw.org/FRD.html> (last visited May 23, 2009) (describing states' and cities' attempts to address FRD); see also Stephanie Bornstein & Julie Weber, *Addressing Family Responsibilities Discrimination*, POL'Y BRIEFING SERIES (Sloan Work & Family Research Network & WorkLife Law, Chestnut Hill, Mass.), Issue 16, 2008, available at <http://www.worklifelaw.org/pubs/policybrieffrd.pdf> (summarizing recent state efforts to address FRD).

4. See, e.g., Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. LAW. 293 (2007); Williams & Segal, *supra* note 3, at 122-61; Williams & Westfall, *supra* note 3, at 33-52; Williams & Bornstein, *supra* note 3, at 174-85; see also *infra* Parts II-II.B.

5. FRD claims generally are more successful for plaintiffs than are other employment discrimination claims. According to Mary Still of the Center for WorkLife Law, a study of over 600 FRD cases revealed a plaintiff-win rate of 50%, as compared to a 20% plaintiff-win rate for employment discrimination claims generally (or even a rate as low as 1.6% in one 2005 study of race and gender discrimination cases). MARY C. STILL, CTR. FOR WORKLIFE LAW, UNIV. OF CAL. HASTINGS COLLEGE OF THE LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 13 (2006), http://www.uchastings.edu/site_files/WLL/FRDreport.pdf.

authors. Recognizing that only recently have women's and caregivers' carework become "invisible" as part of the economy sheds light on the best solutions to FRD.⁶ Solutions that seek simply to equalize the treatment of all employees, without regard for the necessity of carework to the continued functioning of the economy and society, will not succeed. What is needed is recognition and accommodation of domestic work and carework as indispensable parts of the real economy. We can no more cease or shunt aside caring for children, the disabled, and the elderly than we can stop working for a living, yet traditional approaches to discrimination and work law ask workers to pretend that they have no care obligations.⁷ The traditional approaches also tend to perpetuate the problems of sex discrimination by reifying a model of the "ideal worker,"⁸ who has a seemingly unfettered ability to engage solely in "visible"

6. See *infra* Part II.D. Katharine Silbaugh also argues that the economic shift from household production to waged work converted domestic labor and carework into acts of economically valueless "love," rather than work. Professor Silbaugh advocates a legal recognition of carework as the "real," economically valuable work that it is. Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

7. Joan Williams argues that the "ideal worker" in the waged workforce is one who has no visible family responsibilities. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 4-6 (2000). This "ideal worker," in our social and cultural setting, prototypically is a man with a "dependent" wife at home. Women can also be "ideal workers," though they often confront discrimination because of their failure to conform to gender stereotypes, and often also face a scenario in which they effectively work two jobs: one paid at the workplace and one unpaid at home. The "ideal worker" model impoverishes the lives all workers and their families in that it forces an unbalanced, inefficient model on their lives. Men are disallowed the balance of family involvement, while women face heavy burdens on their choice to work outside the home. As Professor Williams writes:

Many Americans feel caught between two conflicting ideals: the norm of the ideal worker who is totally available for, and devoted to, work, and the norm of family care that mandates that adults be available to their children and to elderly or ill parents or relatives. When we talk about work-family conflict, what we are really talking about is not a matter of individual choice or an issue of ordering an individual's priorities, but a clash of these two cherished social ideals. An all-or-nothing workplace disadvantages most women (eighty-one percent of whom have children by their mid-forties) and an increasing number of men who want to participate in child rearing, by forcing them to "choose" between being either a bad worker or a bad parent. This clash, which affects virtually all Americans at some point in their working lives, is bad for men, worse for women, and worst of all for children.

Joan Williams, *The Politics of Time in the Legal Profession*, 4 U. ST. THOMAS L.J. 379, 383 (2006) (citations omitted).

8. See *supra* note 7.

remunerative work. Because of social and cultural realities, those who do carework tend to be women, and those who are “ideal workers” tend to be men.

Part I of this Note analyzes the law of FRD; reviews scholarly analyses of the problem and potential solutions to it; introduces an historical perspective on American work, life, and gender; and discusses the newest attempt of the legal system, in the form of EEOC enforcement guidance, to deal with the problem. I evaluate these aspects of FRD’s history in Part II, and in Part III attempt to formulate a new approach to the topic that integrates aspects of the legal and scholarly approaches to FRD with an historical perspective.

I. HISTORY

Employer-defendants in FRD cases commonly argue that the plaintiff is alleging “parent or caretaker discrimination, which is not proscribed by Title VII.”⁹ This is narrowly true;¹⁰ however, many courts use either traditional direct evidence of discrimination or newer stereotyping evidence to find that parents and other caregivers—usually mothers¹¹—are discriminated against because of their sex and parental status.¹² The Family and Medical Leave Act

9. See *Walsh v. Nat’l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) (citing *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997)).

10. The Eighth Circuit in *Piantanida* presents the analysis starkly: “an individual’s choice to care for a child . . . is a social role chosen by all new parents who make the decision to raise a child.” *Piantanida*, 116 F.3d at 342.

11. Fathers can be victims of FRD, as well, especially via gender stereotypes about parenting roles. See *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (finding that an employer’s refusal to classify male police officer as primary caregiver was a violation of § 1983’s assurance of equal protection when based on gender stereotypes).

12. There are a variety of theories under which plaintiffs bring FRD-type claims. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (discussing sex-plus discrimination); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (discussing sex-plus discrimination); *Walsh v. Nat’l Computer Sys., Inc.*, 332 F.3d 1150 (8th Cir. 2003) (discussing hostile work environment); *Fisher v. Vassar Coll.*, 70 F.3d 1420 (2d Cir. 1995) (discussing sex-plus discrimination); *Barbano v. Madison County*, 922 F.2d 139 (2d Cir. 1990) (discussing sex discrimination); *Fuller v. GTE Corp./Contel Cellular*, 926 F. Supp. 653, 657 (M.D. Tenn. 1996) (discussing disparate impact); see also Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 832 (2002) (noting that the “similarly situated” requirement “frustrates the purposes of a prima facie case” and “fails to account for the fact that the employer’s intent can be proven in a variety of ways”; that “courts can always recognize distinctions between employees, sometimes

(FMLA),¹³ the Americans with Disabilities Act (ADA),¹⁴ and the Pregnancy Discrimination Act (PDA)¹⁵ also support claims of FRD. In addition, scholars have developed a number of proposals to combat FRD,¹⁶ and the EEOC recently issued new enforcement guidance on the topic.¹⁷ An historical perspective on domestic work and carework also provides insight into the problem.¹⁸

A. Discrimination Theories That are Used to Support FRD Claims

1. Prima Facie Case

One way many plaintiffs approach an employment discrimination claim is by the traditional rule of *McDonnell Douglas Corp. v. Green*.¹⁹ Under *McDonnell Douglas* (a racial discrimination case),

making it unnecessarily difficult for a plaintiff to establish a prima facie case”; and that it can “improperly exclude certain types of employees from the protection of the employment discrimination laws”); Claire-Therese D. Luceno, Note, *Maternal Wall Discrimination: Evidence Required for Litigation and Cost-Effective Solutions for a Flexible Workplace*, 3 HASTINGS BUS. L.J. 157 (2006) (arguing that stereotyping evidence should be accepted by courts in addition to comparator evidence).

13. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2008) [hereinafter “FMLA”]; see *infra* note 43 and accompanying text.

14. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2008) [hereinafter “ADA”].

15. Pregnancy Discrimination Act, 42 U.S.C. § 2000(e) (2008) [hereinafter “PDA”]. Pregnancy discrimination claims also can reach FRD situations. In *Walsh v. National Computer Systems, Inc.*, the Eighth Circuit held that the fact that a woman was capable of becoming pregnant again after maternity leave supported a jury verdict finding pregnancy discrimination by her employer, though she was not pregnant at the time of the discrimination. 332 F.3d 1150, 1160 (8th Cir. 2003). Walsh’s supervisor had treated her with “hostility” following her return from maternity leave, scrutinizing her work hours, vacation and sick leave, and forcing her to “make up” time missed for care of her child, all in contrast to the way other workers at her level were treated. The Eighth Circuit refused to recognize discrimination on the basis of her parenthood, but affirmed the jury verdict because Walsh put on evidence that “it was her potential to become pregnant in the future that served as a catalyst for [the supervisor’s] discriminatory behavior.” *Id.* at 1154–55 (8th Cir. 2003). See also *Wagner v. Dillard Dep’t Stores*, 17 Fed. Appx. 141, 149 (4th Cir. 2001) (holding that a “stereotypical assumption” that pregnant women would miss work did not justify failure to hire); *Sheehan v. Donlen Corp.*, 173 F.3d 1039 (7th Cir. 1999), discussed *infra* note 44; *Williams & Westfall*, *supra* note 3, at 33–36, 42–50 (analyzing recent case law; courts’ narrowing doctrines and strategies to avoid them; and uses of existing statutes to challenge practices disadvantaging caregivers).

16. See *infra* notes 46–71 and accompanying text.

17. See *infra* notes 85–103 and accompanying text.

18. See *infra* notes 73–84 and accompanying text.

19. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

the plaintiff must show a prima facie case, which then triggers the defendant's burden to present a non-discriminatory reason for the unfavorable treatment.²⁰ The Supreme Court articulated the requirements of a prima facie case, noting that the elements are flexible, depending upon the circumstances of the employment in question: (1) the plaintiff is a member of a protected group; (2) he or she is qualified for a job for which the employer sought applicants, is qualified for a promotion the employer was willing to make, or was qualified for the job he or she held; (3) he or she was passed over for hiring or promotion, or was fired; and (4) that the position continued to exist, with the employer seeking employees for it.²¹ The *McDonnell Douglas* reasoning has been extended to sex discrimination under Title VII.²²

Most employment discrimination plaintiffs, including those alleging FRD, can meet this burden. Once a prima facie case has been made, and after the employer has offered a legitimate reason for the detrimental treatment, the burden shifts back to the plaintiff to show that the proffered reason is a pretext for unlawful discrimination.²³ In the wake of *St. Mary's Honor Center v. Hicks*, however, the plaintiff must affirmatively prove that discrimination was the cause of the detrimental treatment, rather than simply disproving the reason given by the employer.²⁴ The principal method of rebutting an employer's stated reason—and one that was a sticking point for many plaintiffs²⁵—was the requirement that a similarly situated employee (a “comparator”) of a different protected characteristic than the plaintiff's²⁶ was treated more favorably.²⁷

20. *Id.* at 802.

21. *Id.*

22. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981).

23. *McDonnell Douglas*, 411 U.S. at 804.

24. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 518–19 (1993).

25. Applying *McDonnell Douglas*, the Second Circuit in *Fisher v. Vassar College* held that a “plaintiff must show that married men were treated differently from married women.” *Fisher v. Vassar College*, 70 F.3d 1420, 1446 (2d Cir. 1995) (citing *Bryant v. Int'l Sch. Serv., Inc.*, 675 F.2d 562, 575 (3d Cir. 1982)). Comparator evidence was particularly important to courts in “sex-plus” cases: “If Vassar was as unlikely to promote married men as it was to promote married women, then the only thing one could say is that Vassar discriminated against married people. But marital status alone is not a ground for bringing a suit under Title VII.” *Fisher*, 70 F.3d at 1447.

26. For example, if a woman with children alleged FRD, she would have to show a

2. Mixed-Motive

Another theory under which plaintiffs may allege employment discrimination is mixed-motive. Under this theory, explained in *Price Waterhouse v. Hopkins*,²⁸ the plaintiff need only show that a protected characteristic was a “motivating factor” in the employer’s detrimental decision. Once shown, the employer bears the burden of persuasion that it would have made the same decision without consideration of the protected characteristic.²⁹

After *Price Waterhouse*, there remained an open question: what kind of evidence would suffice for plaintiffs to show that the protected characteristic was a motivating factor?³⁰ The 1991 Civil Rights Act³¹ and *Desert Palace v. Costa*³² clarified this issue, and, in so doing, established mixed-motive as a plaintiff-friendly theory. Under *Desert Palace*, plaintiffs need only demonstrate the existence of the unlawful factor in the decision, and need not use “direct evidence or some other heightened showing.”³³ Circumstantial

similarly situated man with children who was treated better than she. This was a sticking point because in many situations there is no apt comparator, or because the employer might have treated all employees with children badly, which does not violate sex discrimination laws unless based on the employees’ sex.

27. *Fuller v. GTE Corp./Contel Cellular*, 926 F. Supp. 653, 657 (M.D. Tenn. 1996); *Lidge*, *supra* note 12; *Luceno*, *supra* note 12 (arguing that stereotyping evidence should be accepted by courts in addition to comparator evidence). *See also Lettieri v. Equant Inc.*, 478 F.3d 640, 646 (4th Cir. 2007) (holding that to establish a prima facie case, plaintiff must show proper comparator evidence).

28. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

29. *Price Waterhouse*, 490 U.S. *Id.* at 244–45. The Court in *Price Waterhouse* held that the defendant’s showing that it would have made the same decision without consideration of the protected characteristic relieved the employer of liability. *Id.* at 245–46 (stating that employer’s showing is “most appropriately deemed an affirmative defense”). However, in the Civil Rights Act of 1991, Congress superseded this holding; Section 107 states that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m). Liability attaches as soon as the plaintiff carries his or her burden; the employer’s “defense” only limits the plaintiff’s remedy.

30. Justice O’Connor’s concurrence limited her agreement with the plurality opinion in *Price Waterhouse* to cases in which a plaintiff has shown “direct” evidence of unlawful motive. *Price Waterhouse*, 490 U.S. at 276.

31. 42 U.S.C. § 2000e-2(m).

32. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

33. *Id.* at 99.

evidence, which usually is all the evidence that would be available concerning the motivation of an employer, clearly is sufficient for plaintiffs under *Desert Palace*, and, because of the 1991 Civil Rights Act, is sufficient to establish employer liability.³⁴

B. Stereotyping Evidence

Stereotyping evidence is the newest employment discrimination weapon plaintiffs have used in FRD cases, and it has been quite successful. Courts have recognized evidence of employers' reliance on sex stereotypes as effective in determining when an employer has violated Title VII,³⁵ and they recently have extended the use of that evidence to FRD.³⁶ An employer may carry cultural stereotypes about proper gender and caregiving roles that affect employment decisions. This may take the form of, among other examples, a belief that a married female employee with children should not work, and firing her because of that belief; an assumption that an employee with a disabled relative would desire lighter job duties, and assigning those duties without the employee's request or consent; or a presumption that workers with caregiving responsibilities will not be productive or dedicated to their jobs, and accordingly "micro-managing" or refusing to hire them. Employment actions taken on the basis of stereotypes need not be motivated by dislike or an intent to harm the employee to be unlawful.³⁷ Especially in FRD cases, where sex and

34. See *supra* note 29.

35. Stereotyping evidence can be used in conjunction with other statutory claims, such as those under the FMLA. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2008); see *infra* note 43 and accompanying text.

36. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Price Waterhouse*, 490 U.S. 228; *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004); *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004); *Luceno*, *supra* note 12.

37. See, e.g., *Lettieri v. Equant Inc.*, 478 F.3d 640, 649 (4th Cir. 2007) (determining that the employee was rejected for promotion-transfer because supervisor "believed that women should not live away from home during the work week"); *Lust*, 383 F.3d at 583 (stating that employer's assumption that mother-employee would not want to be transferred because of children was a violation of Title VII).

caregiving stereotypes often are the root of discriminatory behavior, stereotyping evidence is very important.³⁸

The landmark case using stereotyping evidence to show discrimination is *Price Waterhouse v. Hopkins*,³⁹ in which a female employee was denied admission to partnership at Price Waterhouse because she did not live up to partners' stereotypes of femininity.⁴⁰ A plurality of the Supreme Court held that the employer's reliance on sex stereotypes in evaluating a female candidate showed the employer's improper, discriminatory reason for the denial of partnership.⁴¹ This reasoning has been extended to FRD cases under Title VII,⁴² the FMLA,⁴³ and the PDA.⁴⁴ Interpreting FMLA to

38. Where FRD is alleged, classical "comparator" evidence often is ineffective. Instead, it is employer stereotypes about caregiving and its relationship to sex, rather than the mere sex of the worker, that lead to disadvantageous treatment. Luceno, *supra* note 12.

39. *Price Waterhouse*, 290 U.S. 228.

40. *Id.* at 254–55.

41. *Id.* at 255–58.

42. In *Back v. Hastings on Hudson Union Free School District*, the Second Circuit held that a plaintiff alleging stereotyping discrimination need not show "that the defendants treated similarly situated men differently." 365 F.3d 107, 121 (2d Cir. 2004). "[S]tereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive." Responding to the argument that sex-plus-parenthood discrimination was not discrimination because of gender, but rather because of family status, the Second Circuit said that "at least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based." *Id.* (citing *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730–31 (2003) (discussed *infra* note 43)).

In *Lust v. Sealy*, the Seventh Circuit recognized stereotyping evidence in upholding a jury verdict in favor of a woman who was passed over for a promotion in which she had indicated interest, where the rationale for her non-promotion was that it would require relocating her family. 383 F.3d 580, 583 (7th Cir. 2004).

43. The FMLA presents another avenue by which caregivers can pursue FRD claims. The Supreme Court found in *Nevada Department of Human Resources v. Hibbs* that one of Congress's purposes in enacting the FMLA was to address States' reliance on "invalid gender stereotypes in the employment context. . . . Reliance on such stereotypes cannot justify the States' gender discrimination in this area." 538 U.S. 721, 730 (2003). The Court found that "stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave." *Id.* at 736. States had provided family leave policies for women as a result of stereotyped beliefs "that women's family duties trump those of the workplace," and accordingly gave unequal benefits to men and women parents; Congress meant to eliminate the use of these stereotypes to justify discriminatory policies. *Id.* at 731–32 n.5. The very stereotypes the Court recognized as motivating the passage of the FMLA were those that reinforced the notion that family responsibilities are women's responsibilities. "By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-

protect against stereotype-based discrimination, the Supreme Court found that:

These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.⁴⁵

C. Alternative Approaches to FRD Issues

Scholars have written much about FRD and its possible remedies. It might seem that one way to overcome the problems of FRD within the current system of employment laws would be to establish parental or caregiver status as a protected characteristic—akin to race, sex, and religion—but Peggie Smith argues that this would be no better

sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes." *Id.* at 737. See also Katharine Silbaugh, *Is the Work-Family Conflict Pathological or Normal under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 216 (2004) ("[E]ven if the trend in the FMLA cases [toward broad readings of its requirements] reflects a greater understanding of the kind of public-private partnership necessary for a healthier work-family climate, more legislation is necessary to deal with work interruptions that sometimes arise out of a worker's care giving role.").

44. The PDA also is aimed at addressing stereotypes concerning pregnancy and women's family responsibilities. As the Seventh Circuit found:

[a] reasonable jury might conclude that a supervisor's statement to a woman known to be pregnant that she was being fired so that she could "spend more time at home with her children" reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake.

We note with respect to stereotypes that pregnancy discrimination law is no different from other sorts of anti-discrimination law

Sheehan v. Donlen Corp., 173 F.3d 1039, 1044–45 (7th Cir. 1999). The Seventh Circuit in *Sheehan* cited the House's Report on the Pregnancy Discrimination Act: "[T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace." *Id.* at 1045 (quoting Prohibition of Sex Discrimination Based on Pregnancy, H. R. Rep. No. 95-948, at 3 (1978), as reprinted in 1978 U.S.C.C.A.N. 4717, 4751).

45. *Hibbs*, 538 U.S. at 736.

than current sex-based anti-discrimination efforts.⁴⁶ Professor Smith points out that the major vulnerability of a Title VII claim based on a new caregiver-status protected characteristic would be that, as long as non-caregivers are required to work in family-unfriendly conditions, employers could argue that this requirement was necessary for their business, even though caregivers arguably would be more distressed by the requirement.⁴⁷

The problem with creating a new protected characteristic is that the anti-discrimination approach would not require accommodation, but only non-discrimination. While non-discrimination between caregivers and non-caregivers is an important goal, the more fundamental problem, Professor Smith argues, is that employers are not required to accommodate caregiving needs,⁴⁸ which are beneficial and necessary to society as a whole.⁴⁹ Professor Smith instead would

46. Peggie R. Smith, *Parental-Status Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 572–73 (2002). Professor Smith discusses Title VII litigation’s limitations, insofar as Title VII litigation is framed only in terms of traditional evidence of discrimination. This framework has been found wanting in its ability to address FRD, and has been largely superseded—in litigation and in the new EEOC guidance—by a focus on evidence of sex stereotyping about parental roles. *See id.* at 571–72, 576–80. However, her observation that “anti-discrimination legislation is satisfied so long as both women and men with parenting obligations are equally ill-treated,” still rings true. *Id.* at 572–73.

Though Professor Smith uses “parental status” throughout her work, I have continued to use “caregiver status” where appropriate, since the analysis would work in the same way, and use of “caregiver” increases the notion’s usefulness for purposes of this Note. Where it is clear that Professor Smith’s argument requires “parent,” as opposed to “caregiver,” I reflect her usage.

47. *Id.* at 596–97.

48. Professor Smith’s accommodation prescription is challenged by Joan Williams and Nancy Segal, who argue that accommodation might be a good approach if it were not for experience with the courts’ narrowing of accommodation requirements, as seen in religion and disability discrimination cases. Williams and Segal argue that a structural approach is more aptly suited to a problem such as FRD, which requires changes in some of the fundamental assumptions about work itself, not just nondiscriminatory entry into the workplace by workers with a protected characteristic. Williams & Segal, *supra* note 3, at 83–85.

49. Smith, *supra* note 46, at 598–99. Professor Smith aptly addresses the limitations of discrimination theory:

[T]he anti-discrimination principle demands that employers wear blinders when rendering employment decisions, so as to block out forbidden characteristics. While such attribute-masking has proven instrumental in dismantling discrimination premised on attributes such as race, gender, and age, use of this technique in the context of parenting would surely prove counterproductive. Employees with child care obligations are often disadvantaged in the workplace *precisely because employers presently turn a blind eye* towards their needs and assume that they have no parental

expand the reach of the FMLA, which “provid[es] workers with concrete benefits as opposed to simply prohibiting discrimination.”⁵⁰ FMLA requires accommodation, which Smith argues is more appropriate to the work-family conflict’s nature and requirements.⁵¹ FMLA indirectly addresses discrimination by challenging “gendered norms and assumptions that have disadvantaged the class of women as primary caretakers, not the class of parents.”⁵²

Naomi Schoenbaum advocates an “information-shifting” approach to employment discrimination problems, including sex- and race-based FRD, in an effort to make caregiving “relevant” to the workplace.⁵³ She examines how current “employment law regulates what information is available to employers during the hiring process” in an effort to diminish the possibilities for discrimination.⁵⁴ While perhaps somewhat effective in discouraging discriminatory hiring decisions, this focus on employer ignorance about an employee’s personal life “play[s] a role in defining and determining which of an

responsibilities. Instead of adopting measures to codify employer disinterest in the parental status of workers, legislatures must do the exact opposite: they must insist that employers acknowledge the pervasiveness of parenting-work conflicts, with an eye towards adopting strategies to help alleviate those conflicts. Irrespective of whether one approaches work/parenting conflicts from the perspective of gender discrimination or parental discrimination, the problem remains the same: the anti-discrimination model accepts the basic premise of existing workplace structures and seeks only to eliminate discriminatory defects within those structures. It does not aim to create a new structure, one capable of valuing and maintaining a strong, healthy parent-child bond that will enrich both the family unit as well as the larger community. Creating such a structure requires a departure from an equal treatment understanding of equality in favor of a model that respects and accommodates the familial interests of all workers.

Id. (emphasis added) (citations omitted). For further discussion on the role of adequate information in addressing FRD and work-family conflict, see Schoenbaum, *infra* notes 53–60 and accompanying text.

50. Smith, *supra* note 46, at 613. Professor Smith also notes the limitations of the FMLA, especially its requirement only of unpaid leave and its application only to serious medical conditions. *Id.* at 615.

51. *Id.* at 616–17.

52. *Id.* at 617. Professor Smith would expand the FMLA by increasing the period of mandated leave to twelve weeks and extending coverage to more workers, as well as pursuing generally more flexible workplaces and reduced work weeks for all workers. *Id.* at 617–19.

53. Naomi Schoenbaum, *It’s Time that You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an “Information-Shifting” Model*, 30 HARV. J.L. & GENDER 99, 101–02 (2007).

54. *Id.* at 100.

employee's traits are and are not relevant to the employment relationship."⁵⁵

Because the law has deemed employees' personal lives irrelevant to the employment relationship, employers are free to act as though employees have no personal responsibilities, and the workplace is not required to accommodate those responsibilities.⁵⁶ The family is pushed into the private sphere, which Schoenbaum argues is devalued and feminized, and which is thus viewed as beyond the reach of "justice." She writes that "[p]lacing the family outside the political sphere denies the ways in which economic life is intertwined with the private sphere and how legislation and judicial action (and inaction) shape the family."⁵⁷ This sharp cultural and legal distinction between public and private life, reinforced by the ignorance model of discrimination laws, is a strong root of systemic sex discrimination.⁵⁸

Schoenbaum's practical solution to this problem is to reintroduce personal information into the employment relationship once the specter of discriminatory hiring has passed, and thus combat the prevailing norm of the (artificially) autonomous worker. She looks to the accommodations for personal needs present in Title VII and FMLA, and finds that both prioritize individualism and autonomy over "human interdependence." While Title VII requires employers to accommodate employees' religious needs, it makes no accommodation for family needs; while FMLA accommodates family needs when they are discrete, there is no accommodation for day-to-day family care. "[T]he FMLA expresses a view of dependence as anomalous and aberrant, thereby reinforcing the individualistic nature of the model employee and ignoring the reality of women's lives"⁵⁹ Schoenbaum argues that the ADA's "information-shifting" model, in which employers must "reasonably

55. *Id.*

56. *Id.* at 101–02.

57. *Id.* at 113.

58. *Id.* at 121 ("[A]lthough maintaining the allocation of family responsibilities beyond the easy reach of legal interrogation keeps the burden of . . . carework on women, it also has negative consequences for men by rigidifying gender roles.") (citation omitted).

59. *Id.* at 119 (citation omitted). Schoenbaum notes that she is "in no way advocating that women should bear a disproportionate amount of child-, elder-, and homecare responsibilities, but failing to acknowledge and attempt to remedy this continuing truth exacerbates the burden on women." *Id.* at n.112.

accommodate” an employee’s known disabilities, provides a possible solution to these deeply rooted problems.⁶⁰

Laura Kessler takes another approach. She challenges the facial distinction between FRD and sex discrimination, and argues that FRD in fact is a form of sex discrimination. Her position undermines several of the main non-discriminatory explanations for work-family conflict and its impact on women that employers, pundits, courts, and scholars put forth.⁶¹ Gender bias may be more subtle in the current world of anti-discrimination laws, but one of its most common forms is FRD, because parental responsibilities amplify the visibility of employees’ genders, and caregiving triggers its own set of stereotypes.⁶²

Kessler debunks two popular theories—the accident theory and the opt-out theory—that purport to explain neutrally that women’s ability to work outside the home is disproportionately (and negatively, career-wise) affected by carework responsibilities.⁶³ Under the accident theory, espoused by Professor Amy Wax, workplace discrimination, if it does occur, “operates at an unconscious level,” so it cannot be effectively addressed by litigation or regulation.⁶⁴ Much popular attention has been given recently to the “opt-out” or choice theory, which asserts that women’s secondary

60. *Id.* at 139–41. These problems are deeply rooted, as Schoenbaum aptly identifies their bases in liberal political theory that assumes an autonomous individual in its constructions of social good. This autonomous individual is a fiction, built upon hidden “private” labor. *Id.* at 116–23.

61. Laura Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. 313 (2007).

62. *Id.* at 314–18.

63. *Id.* at 320–22. Kessler also briefly discusses, in a separate section, the “time-lag” theory, which posits that there are fewer women at the top levels of work because anti-discrimination laws have only relatively recently made it possible for women to enter many areas of paid work, and so we should expect that it would take at least a generation for those first women to work up to the highest levels. *Id.* at 329–30. She makes two points to undermine the validity of this as an acceptable theory. The first is that the “pipeline is leaky,” meaning that, as women progress in their careers, they are increasingly more likely than men to drop out or stagnate, so that, given current trends, we won’t be able to expect parity between women and men, or even between the number of women entering a field and those at the top. “Therefore, some part of the glass ceiling is likely the product of ongoing, present discrimination.” *Id.* at 330. The second point is that, if there is a time-lag effect, those at the top (men) should, because they have benefited from the legal exclusion of women, take affirmative steps to combat women’s current cultural exclusion. *Id.*

64. *Id.* at 320 (citing Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999)).

place in the workforce has been independently chosen by them, because they prefer the responsibilities of family to those of the workplace.⁶⁵

As Kessler notes, these explanations are simplistic because they assume that “individuals make decisions unaffected by the larger structures and institutions in society.”⁶⁶ Larger structural explanations undoubtedly have an impact both on “accidents” and the supposed choices women make. Kessler identifies three major structural explanations that underlie the neutral (or anti-woman) explanations for women’s secondary place in the working world. The first is gender bias at work, which teaches women that their work will never be as valued as men’s; this has the effect of changing the calculations of some women, who choose to “opt out” if they can.⁶⁷ A related structural factor is culturally based expectations about gender that “influence[] what individuals deem possible or appropriate,” so women tend to choose education and career paths that lead to second-tier work.⁶⁸ Finally, the persistent wage differential between men and women⁶⁹ probably leads women and heterosexual couples to “marginalize [women’s] wage labor” in a way that supports a decision to leave or minimize paid work.⁷⁰

All of these structural factors identified by Kessler operate to influence or constrain women’s choices, undermining the “accident”

65. Kessler, *supra* note 61, at 320–21. As Kessler and others have pointed out, Belkin’s (and others’) opt-out stories focus on well paid, highly educated, married women, who have the financial resources and support to “opt out” if they wish to do so. This does not explain why women’s achievement gap cuts across all wage and education levels. In addition, Kessler notes, most women with children do not opt out; the majority of mothers work outside the home. Kessler, *supra* note 61, at 321–22.

66. Kessler, *supra* note 61, at 322.

[These stories] are not neutral, empirical descriptions of the world. They are stories that incorporate political and moral judgments about the proper relationship of individuals to the larger society. They fundamentally embrace the liberal and neoliberal assumption that individuals are independent, autonomous, unencumbered beings . . . [and] hide the significant role of powerful institutions such as employers, the state, and the family in women’s secondary status at work.

Kessler, *supra* note 61, at 331. *See also* Schoenbaum, *supra* note 53, at 116–23.

67. Kessler, *supra* note 61, at 322–23.

68. Kessler, *supra* note 61, at 323.

69. Kessler argues that “human capital explanations simply do not explain the entire differential in pay between women and men in the same jobs.” Kessler, *supra* note 61, at 323.

70. Kessler, *supra* note 61, at 323–24.

and, especially, the “opt-out” ideas.⁷¹ Ultimately, Kessler argues, scholars, legislatures, courts, and the public need to keep structural discrimination in mind when evaluating work law and legal approaches to family responsibilities, rather than using the tropes of “accident” or “choice” to avoid making substantive changes.⁷²

D. An Historical Perspective

The historical perspective on work and family is one that largely has been ignored in the world of legal scholarship,⁷³ but it can be

71. Employment law also plays a role, in that “[w]omen make decisions about wage work within the context of our country’s inadequate employment discrimination laws and family leave policies.” Kessler, *supra* note 61, at 324. Kessler argues that the employer-friendly interpretations and limitations on Title VII, the PDA, and FMLA; unregulated mandatory overtime; and the refusal of legislatures to recognize a right to flexible work all support the status quo, and discourage those women who would choose to engage in paid work. Kessler, *supra* note 61, at 324–27. Kessler does note the “promising” recent progress in FRD litigation, especially in the work of Joan Williams and the Center for WorkLife Law, asserting that it may be the “most realistic” of the approaches to the problem. Kessler, *supra* note 61, at 325–26.

Another view of how employment law indirectly affects decisions about wage work is offered by Nancy Dowd, who critiques the apparent—but false—“neutrality” of the law toward work and family life. Dowd argues that the law encourages mutually reinforcing visions of both the family and work that reify a “traditional” male-breadwinner, female-caregiver family. Given the power of the legal context, it is clear that any changes in FRD or work-life policy in general need to be rooted in the law. Nancy Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 469–75 (1990).

72. Williams and Segal, though criticizing Kessler’s suggestion in another article that the best solution for FRD is accommodation, also argue for a structuralist approach; one based in “rights talk,” which, they argue, has the potential to change the structural and cultural assumptions that underlie FRD and work-life conflict. Williams & Segal, *supra* note 3, at 113–22.

73. There have been some notable legal studies that analyze, from an historical perspective, the changes in conceptions of work, home, and gender. Katharine Silbaugh’s work is among them. Silbaugh argues, like the earliest feminists, that housework is real work, without assuming that either waged work or housework (what I would label domestic labor or carework/caregiving) is a better route for women. Silbaugh, *supra* note 6. Her historical analysis relies, in part, on Jeanne Boydston’s work, discussed *infra* notes 74–84 and accompanying text, to show how housework was transformed in the public mind from “labor into love,” by the increasing focus on the male-centered cash economy. Silbaugh, *supra* note 61, at 23. With the rise of cash-based economics and the norm of waged work, Silbaugh argues, non-waged labor ceased to be seen as work. The rising “cult of domesticity” turned women’s housework into acts of love, rather than labor. As she puts it, echoing Boydston, “[t]he idea that women serve an essential moral and spiritual role developed, but it accompanied the idea that women were economic dependents without cash. Their emotional role was praised, but their material labor was obscured.” Silbaugh, *supra* note 6, at 23–24.

helpful in understanding the causes of, and hence, some possible remedies for, family responsibilities discrimination. Jeanne Boydston's work is especially pertinent here.⁷⁴ Boydston argues that the "gradual emergence in the United States of an industrial economy," beginning in the colonial era, coincided with "the departure of any general social acknowledgement of [women's] material value to the family [and with it] . . . the traditional basis of a wife's claim to some voice in the distribution of economic resources and to social status as a 'productive' member of society."⁷⁵ As the work performed by women, which included both certain "productive" work and carework, was devalued, carework generally became an "invisible" part of the economy; this "invisibility" can be seen as the root of workplace FRD.

Boydston recognizes that this shift was due not only to industrialization itself, but also to "changing relations of gender and labor in the preindustrial period."⁷⁶ Her research shows that between the early settlement of the American colonies and the middle of the seventeenth century, the social recognition of women's domestic

Reva Siegel's work on the early women's movement focuses on the movement's mid- to late-nineteenth century efforts to reestablish women's household work as real labor. Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 *YALE L.J.* 1073 (1994). The early women's rights movement took as one of its primary goals legislation recognizing joint property in marital assets, which, Professor Siegel asserts:

amounted to an effort to secure compensation for wives' contribution to the family economy—in terms unbiased by assumptions of gender caste, as market measures of value were. Consider again the justification for the claim offered at the 1851 Worcester convention: "That since the economy of the household is generally as much the source of family wealth as the labor and enterprise of man, therefore the wife should . . . have the same control over the joint earnings as her husband . . ." The movement was in effect asserting that a wife's labor contributed as much to family wealth as the income earned by a husband from his labors—notwithstanding what the market might measure as its worth.

Id. at 1130 (internal citation omitted). Professor Siegel looks to the ways in which even laws allowing women access to their own wages, though seen as progressive to the modern eye, served to delegitimize women's caregiving and domestic labor: "legislatures emancipating a wife's 'separate' or 'personal' labor [outside the home] intended to exclude work performed for the family." *Id.* at 1181.

74. JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* (Oxford 1990).

75. *Id.* at xi.

76. *Id.* at 4.

work changed dramatically, even while the work itself remained largely the same.⁷⁷ This deep shift, caused by

[A] growing sense of constriction in material opportunity and the emergence of essentially commercial habits of mind. These shifts in the culture of colonial society heightened the association of *men*, and thus non-carework, with the symbols of economic activity and profoundly weakened the ability of women, and thus caregivers in general, to lay claim to the status of ‘worker.’⁷⁸

This “served to slowly undermine the *visibility* of housework,”⁷⁹ such that, on “the eve of the Revolutionary crisis, colonists had largely ceased to *perceive* housewifery as a part of the real economy.”⁸⁰

The “constriction in material opportunity,” a result of declining amounts of available land and increasing population, led to “an

77. *Id.* at 4–29. Boydston finds that, over this period, and across the differences between rural and urban life:

[W]omen remained responsible for cooking, cleaning, fire-tending, food storage, the manufacture of a wide range of household items, the care of household linens and clothing, and child rearing, while their husbands still provided direct labor to the family in the form of household repairs, some domestic manufacture (mending shoes, for example, or wood-working), and perhaps some shopping.

Id. at 15.

There were differences between city and country life, but they focused less on the types of tasks allotted to each sex than on practical differences between the ways food and other necessities were obtained:

On farms, men were responsible for providing grain and fuel and the permanent structures of the homestead. They managed the pastures and the out-buildings; made some of the equipment used by themselves and their wives; saw to the care and maintenance of their own tools; and supervised the work of older sons and male servants. Women were responsible for providing fruits, vegetables, dairy products, and fowl; for manufacturing various goods needed by the family; for managing the distribution of goods in the household; for the daily care of the house proper, the home lot, and much of their own equipment; and for training and supervising infants, older daughters, and female servants. In the business of meeting their separate obligations to the family, both men and women grew food for the family, engaged in commerce and manufacturing, and provided maintenance services.

Id. at 11–12.

78. *Id.* at 20–21.

79. *Id.* at 20 (emphasis added).

80. *Id.* at 18.

increased cash dependency” and “increased market contact,”⁸¹ both of which created a “widespread dissociation of wives and wives’ work from the symbols of economic value.”⁸² Women came to be seen as mere dependents of men, performing work that was merely private and domestic, unrelated to the larger economy.⁸³ Boydston tracks the growing invisibility of women’s work through the antebellum era, noting that although such work made possible the great advances of industrialization, it was systematically marginalized and “pastoralized.”⁸⁴ Over this period, carework became something that was done by dependents—not by producers—and lost its status as valued work; caregivers themselves were marginalized from the “real” economy.

81. *Id.* at 22–23.

82. *Id.* at 24. “[T]he developing reliance on money weakened the visible parallels between men’s and women’s work and reinforced the apparent contrasts between their contributions to household life.” Because the legal system placed money (regardless of whose work earned it), in the hands of men, women were not associated with it; the rise of money thus signaled a decline in the visibility of women’s work. *Id.* at 26–27. See *infra* note 84. Boydston goes on to argue that in the period following the colonial era, up to the antebellum period, the nation’s market orientation deepened, changing both the material and ideological frameworks in which women’s work (and other domestic work or carework) was understood and made invisible to the “real” economy. JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC 27–29* (Oxford 1990).

83. The shift in the meaning and use of the word “economy” over this period is illustrative. Boydston finds that, at the beginning of the period “[a]ll labor that contributed to the material viability of family life—whether it was growing food or cooking it, tending livestock or tending children—was ‘economic.’” *Id.* at 18. “‘Economy,’ then, was the process of ‘stewarding’ (or conserving or enriching) material resources to the end that the general welfare of both household and community was strengthened.” *Id.* at 20. The “last half of the colonial period” was marked by “the emergence of a new cultural understanding of what constituted ‘economic’ and what constituted ‘non-economic’ terrain. Eventually, the core cultural definition of ‘economy’ itself—the household—would change.” *Id.* at 27.

84. Boydston uses the term “pastoralization” in the sense defined by Raymond Williams, who found that “the pastoral myth functioned to obscure the ravages to the rural peasantry attendant upon the formation of a landed gentry.” *Id.* at 147. Pastoralization of domestic labor, then, functions to “naturalize” the social realities of housework and to hide their origins and effects—to make it invisible as labor. *Id.* at 147–50. This idea is restated another way in Silbaugh’s “labor into love” formation. Silbaugh, *supra* note 6.

E. EEOC Guidance

The EEOC recently issued⁸⁵ new enforcement guidance⁸⁶ “intended to assist employers, employees, and Commission staff in determining whether discrimination against persons with caregiving responsibilities constitutes unlawful disparate treatment” under federal anti-discrimination laws, especially Title VII and the ADA.⁸⁷ The Guidance recognizes that many family caregivers—especially among low-income families, whose members have less bargaining power and must “face inflexible employer policies”⁸⁸—have difficulty managing the competing responsibilities of family and work.⁸⁹ The “Questions and Answers” accompanying the Guidance explicitly state that the Guidance does not create a new protected class.⁹⁰

What is new under the Guidance, however, is an explicit agency statement that disparate treatment of workers with family responsibilities that is rooted in stereotypes about a protected characteristic violates Title VII and the ADA. In short, stereotyping evidence can show sex or disability discrimination related to family responsibilities.⁹¹ The Guidance gathers recent case law⁹² recognizing

85. EEOC Enforcement Guidance does not have the same status as do agency regulations made pursuant to a congressional delegation of lawmaking authority. *See infra* note 122; *see also* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937 (2006) (analyzing the Supreme Court’s lack of explicit deference to EEOC Guidance); Rebecca Hanner White, *The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 *UTAH L. REV.* 51 (explaining the level of deference given by courts to EEOC Guidance); Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 *OHIO ST. L.J.* 1533 (1999) (noting that EEOC agency interpretations such as Enforcement Guidance receive little deference from courts).

86. Equal Employment Opportunity Comm’n, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, No. 915.002 (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> [hereinafter “Guidance”].

87. Equal Employment Opportunity Comm’n, Questions and Answers about EEOC’s Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007), available at http://www.eeoc.gov/policy/docs/qanda_caregiving.html [hereinafter “Q & A”].

88. Guidance, *supra* note 86, at 5.

89. *Id.*

90. Q & A, *supra* note 87.

91. Guidance, *supra* note 86; Q & A, *supra* note 87. Attorneys in the field were quick to notice and analyze the Guidance. *See, e.g.*, Carmelyn P. Malalis & Linda A. Neilan, *A*

stereotyping evidence to prove sex discrimination related to caregiving, and also notes that “[s]ex-based stereotyping about caregiving responsibilities is not limited to childcare and includes other forms of caregiving, such as care of a sick parent or spouse.”⁹³ In addition, the EEOC states that “while comparative evidence is often useful, it is not necessary to establish a violation.”⁹⁴ The Guidance compiles and summarizes the most important FRD case law, but does not establish any new rules.⁹⁵

Employers can be liable for sex or disability discrimination⁹⁶ in several ways under the Guidance’s consolidation of Title VII and ADA FRD law: female caregivers might be adversely treated because of stereotypes;⁹⁷ women may be adversely treated because they are

Crackdown on Caregiver Discrimination TRIAL, Aug. 2007, at 32; Michael Newman & Shane Crase, *Family Responsibilities Discrimination* FED. LAW., Sept. 2007, at 14; Lynne Anne Anderson & Laura S. Grosshans, *Family Responsibilities Discrimination: What You Need to Know*, THE METROPOLITAN CORP. COUNS., July 2007, at 30, available at <http://www.metrocorp.counsel.com/pdf/2007/July/30.pdf>; Robert J. Chovanec, *Stereotyping, Jury Trials and Manager Training*, HUM. RES. ALERT (WARNER, Norcross & Judd), Winter 2007, available at http://www.wnj.com/hr_alert_winter_2007.

92. Guidance, *supra* note 86, at nn.31–32, 34, 37–39.

93. *Id.* at 6 (citing Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003)).

94. Guidance, *supra* note 86, at 8 (citing Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 121 (2d Cir. 2004)).

95. The EEOC, of course, is not empowered to do so. See Wern, *supra* note 85. The Guidance notes that “Title VII does not prohibit discrimination based solely on parental or other caregiver status, so an employer does not generally violate Title VII’s disparate treatment proscription if, for example, it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers.” Guidance, *supra* note 86, at 11.

96. Disability-caregiver discrimination against a worker can occur because of the worker’s association with a disabled person, in addition to the more obvious discrimination against the disabled person herself. See, e.g., Guidance, *supra* note 86, at 27–28, 31.

97. See *id.* at 8–21. The Guidance thoroughly discusses discrimination against female caregivers, perhaps recognizing that they make up the bulk of FRD claims (and thus the bulk of the case law on which the Guidance relies), or perhaps because the evidence and analysis applicable to female caregiver discrimination applies equally to other forms of caregiving.

Under the Guidance, women might be able to show that they were discriminated against on the basis of sex by use of evidence showing the use of stereotypes about caregivers, better treatment for non-caregivers, or unfavorable treatment connected with caregiving or pregnancy. *Id.* at 9–10. The Guidance specifically notes three types of sex-based FRD.

The first of these is better treatment of male caregivers than of similarly-situated female caregivers. *Id.* at 10–11.

The second type of sex-based FRD is stereotype-motivated disparate treatment of female caregivers, which may include situations in which the employer has a mixed motive in the disparate treatment. Employers may not use their own gender-based assumptions about the

pregnant or may become pregnant;⁹⁸ male caregivers may be adversely treated on the basis of sex-role stereotypes;⁹⁹ women of color may be adversely treated on the basis of either sex or race stereotypes, or a combination of the two types;¹⁰⁰ the caregivers of those with disabilities may be adversely treated;¹⁰¹ and all caregivers may be subjected to a hostile work environment.¹⁰² The Guidance also notes that employees are protected from retaliation for complaining about stereotyping or filing or participating with an EEOC charge investigation. This retaliation can take “any form . . .

actual or proper role of woman caregivers to justify treating them unfavorably. *Id.* at 11–18. Employers may not assume, based on the knowledge that women perform more household tasks, that female employees will be “less dependable” than male employees. *See id.* at 12–13. In addition, supervisors should not give unfavorable assignments to caregivers because of assumptions about their dedication to work, or treat them less favorably because of their participation in a flexible schedule program on the basis of a similar assumption. *See id.* at 14–16. Finally, so-called “benevolent” employment decisions, intended to “help” women be better caregivers, are disallowed. *See id.* at 16–18.

The third type of sex-based FRD is subjective performance evaluations influenced by a supervisor’s preconceived notions about caregivers’ ability to do good work; this is also disallowed in the Guidance. *See id.* at 19–21.

98. *See id.* at 21–24. “Title VII prohibits an employer from basing an adverse employment decision on stereotypical assumptions about the effect of pregnancy on an employee’s job performance, regardless of whether the employer is acting out of hostility or a belief that it is acting in the employee’s best interest.” *Id.* at 22. Even if a pregnant worker temporarily is unable to perform certain physical tasks, she should be treated no differently than other temporarily restricted workers. *See id.* at 22.

99. *See id.* at 24–25. Quoting *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003), the Guidance notes that the Supreme Court recognized “mutually reinforcing” stereotypes that harm men as caregivers, as well as women. These stereotypes can “lead to the perception that a man who works part time is not a good father,” because of his departure from the “breadwinner” stereotype. *See* Guidance, *supra* note 86, at 24. In addition, men may not be denied required family leave or available part-time work arrangements on the basis that they are not mothers. *See id.* at 25.

100. *See id.* at 25–26. Women of color may be particularly susceptible to FRD, given that employers may combine their stereotypes about female caregivers with those about women of color. *See id.* at 25–27.

101. *See id.* at 27–28. Under the Guidance’s interpretation of the ADA, employers may not assume that disabled persons’ caregivers will be less reliable employees and use those stereotypes to treat them unfavorably. *See id.* at 27–28.

102. *See id.* at 28–31. The Guidance reiterates that it is unlawful to subject employees with caregiving responsibilities to “offensive comments or other harassment because of” a protected characteristic, and that the “same legal standards that apply to other forms of harassment prohibited by the EEO statutes also apply to unlawful harassment directed at caregivers or pregnant workers.” *See id.* at 28.

that would be reasonably likely to deter someone from engaging in protected activity.”¹⁰³

II. ANALYSIS

FRD has been remarkably vulnerable to attacks by plaintiffs, relative to other employment law claims.¹⁰⁴ While courts were less receptive to traditional interpretations of the employment discrimination statutes for FRD claims, the more recent judicial recognition of stereotyping discrimination theories has made recovery more likely for employee-plaintiffs. Unlike a plaintiff who frames a complaint as satisfying the prima facie burden of *McDonnell Douglas*¹⁰⁵ and *Hicks*¹⁰⁶—and who therefore must affirmatively prove discrimination and disprove all possible neutral reasons for the discrimination¹⁰⁷—a mixed-motive plaintiff under *Desert Palace*¹⁰⁸ need only show that his or her protected characteristic was a part of the decision to take a detrimental action, without “direct evidence” or a comparator.¹⁰⁹ This is a much easier burden to meet.

In addition, the recent recognition of stereotyping as an incarnation of sex, pregnancy, family and medial leave, and disability discrimination,¹¹⁰ has opened the door for courts to more effectively reach FRD. Since family responsibilities and caregiving status are not themselves protected characteristics, it is important that the law recognize stereotypes about sex that relate to caregiving as discrimination.

There remain obvious shortcomings in the law’s ability to deal with these work-family conflicts. First among these is that, while the prospect of litigation may have a deterrent effect on employers’

103. Guidance, *supra* note 86, at 31 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006)).

104. *See Still, supra* note 5.

105. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *See supra* notes 19–23 and accompanying text.

106. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993). *See supra* note 24 and accompanying text.

107. *See supra* text accompanying note 24.

108. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

109. *Id.* at 99. *See* text accompanying notes 31–34.

110. *See supra* notes 35–45 and accompanying text.

decisions to engage in overt and intentional FRD, employees must actually initiate litigation in order to recover—bearing at least a fifty percent risk of losing if they do so.¹¹¹ Many employees who are subject to FRD will not exert the time and expense to challenge an employer’s action. Moreover, litigation does not strike at the cultural and social roots of FRD. Without addressing the causes of FRD, all that can be accomplished is the minimization of overt discrimination against caregivers.¹¹²

Many commentators are on the right track, with helpful suggestions for moving beyond the status quo to combat FRD. Smith,¹¹³ Schoenbaum,¹¹⁴ and Kessler¹¹⁵ call for more information about an employee’s “private” life and responsibilities to be recognized as relevant to the workplace. Smith argues that the FMLA model requiring employer accommodation of caregiving is the appropriate direction, preferable to continued reliance on discrimination theory, which forces employers to wear “blindness” about employees’ “private” lives.¹¹⁶ Schoenbaum elaborates on the idea that under current law employees’ caregiving responsibilities are irrelevant to the workplace, arguing that this rigid delineation of work life and home life devalues and feminizes caregiving.¹¹⁷ Kessler’s approach is also important, as it adds to our understanding of the theories that often are put forth as benign or legally unreachable explanations of FRD and work-family conflict. She helps to dismantle the claims that the law is inadequate and inappropriate for dealing with “personal” or “private” issues.¹¹⁸ Each of these studies

111. *See supra* note 5.

112. Judges and juries themselves are products of our culture, and often bear the same misunderstandings of history as do employers and the general population. Especially in the arena of employment, “basic fairness concerns may dominate decisionmaking Simply put, judges believe that they do not need an agency telling them who has or has not suffered wrongful discrimination” Wern, *supra* note 85, at 1579. Judges, like all people, are informed by the “common sense” of cultural understandings. So long as historical myths perpetuate and inform people’s understandings of work, gender, and caregiving, litigation will remain a subpar remedy.

113. *See supra* note 46.

114. *See supra* note 53.

115. *See supra* notes 61–72.

116. *See* Smith, *supra* notes 46–52 and accompanying text.

117. *See* Schoenbaum, *supra* notes 53–60 and accompanying text.

118. *See* Kessler, *supra* notes 61–72 and accompanying text.

reveals how the idea that caregiving is irrelevant to one's "real" employment both promotes and excuses FRD.

The new case law-based Guidance¹¹⁹ is a step toward tackling FRD. By establishing the applicability of stereotyping discrimination theories to FRD, the EEOC shows its support for combating FRD,¹²⁰ and possibly increases the likelihood that judges and attorneys will take the claims more seriously.¹²¹ However, because EEOC

119. See Guidance, *supra* note 86; see also *supra* notes 86–103 and accompanying text.

120. The Guidance, by including disabilities discrimination in the category of actionable FRD claims, and by explicitly including men as potential victims of FRD, performs an important function of partially "de-gendering" carework. While the Guidance acknowledges that women are the most common victims of FRD because of their social and cultural status as primary caregivers, it helps to deconstruct the idea that only women have responsibilities for caregiving.

121. Most of the attorneys who have published practitioner-oriented analyses of the Guidance have focused on its terms, and have not delved deeply into employers' practical responses to it. See *supra* note 91. However, several attorneys discussed interpretations of and approaches to the Guidance. On the management side, the emphasis is on retraining managers in order to avoid being found liable for discrimination, not necessarily on teaching managers to avoid FRD itself. Chavanec advises that:

[E]mployers should also make sure that managers know that a stray comment, a badly timed discharge or an unexplained difference in treatment between a person with a protected characteristic and someone else can result in a very expensive, time-consuming and risky legal proceeding. Managers who understand and internalize these rules are much less likely to land their employers in court. . . . That's why training, role-playing, and regular reinforcement are good things when it comes to protecting your managers against self-inflicted discrimination claims. You can't keep someone from making a false discrimination claim, but you can avoid creating evidence that makes you look guilty even though you're not.

Chavanec, *supra* note 91.

Another common piece of advice addressed to employers reiterates the fact that the Guidance creates no new legal theories, and stresses that decisions can still be made on the basis of family responsibilities, so long as those decisions are not tied to sex or race. See, e.g., Susan L. Nardone, *New EEOC Enforcement Guidance Addresses Unlawful Discrimination Against Workers with Caregiving Responsibilities*, July 6, 2007, http://www.gibbonslaw.com/news_publications/articles/php (click "Employment Law"; then find article by title; Courtney L. Tawresey, *EEOC Issues Guidance Concerning Disparate Treatment of Employees with Caregiving Responsibilities*, Dec. 1, 2007, <http://www.rothgerber.com/showarticle.aspx?Show=933>) ("The guidance does not prohibit an employer from legitimately assessing the employee's actual work performance and taking action, even where the poor work performance may be directly tied to caregiving responsibilities. Nor is there any prohibition against treating all caregivers, men and women alike, differently or less favorably."). For the most part, though, the management-side attorneys advise (at least in published sources) that employers should look to whether their policies need revision, and recommend that employers genuinely try to help caregivers balance work with caregiving. See, e.g., Anderson & Grosshans, *supra* note 91.

interpretations have been subject to a relatively low level of deference in the courts,¹²² and because of the problems inherent in

On the plaintiffs' side, attorneys tend to emphasize the success rate of FRD claims, and to explain the varied theories under which employees may win FRD suits. *See* Malalis & Neilan, *supra* note 91, at 35. In addition, they emphasize the need for change in the work world, and litigation's role in effecting that change. *See* Malalis & Neilan, *supra* note 91, at 38 ("By aiding employees subjected to FRD, trial lawyers can help change how workers who are caregivers are treated.").

122. Traditionally, courts have been deferential to agency interpretations of the statutes they administer. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that, where Congress has not spoken directly to an issue of statutory interpretation, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. 837, 843 (1984). While the "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *Id.* at 843 n.11. "There is an express [or implied] delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843-44. The only limit on agency determinations is that they may not be "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. This "principle of deference to administrative interpretations" recognizes that statutory construction often involves a choice among conflicting policy goals, a decision better made by the agency whose task it is to enforce congressional intent than by courts. *Id.* at 844-45.

On the other hand, one commentator, Theodore Wern, has described the EEOC as a second-class agency. Wern, *supra* note 85, at 1535 (citing Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 144-46 (1999); Jamie A. Yavelberg, *Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations after EEOC v. Aramco*, 42 DUKE L.J. 166, 200 (1992)). Wern's study shows that the rate of Supreme Court deference to EEOC interpretations is lower than the overall rate of Supreme Court deference to agency interpretations under the *Chevron* rule. *Id.* at 1549-50. Wern notes first that "under Title VII, the EEOC [unlike other agencies] is authorized to promulgate only interpretive or procedural guidelines and not regulations with the force of law." *Id.* at 1552.

Initially, the Supreme Court treated the EEOC with "great deference." *Id.* at 1552-54 (citing *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 604 (1981); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

However, the Supreme Court soon noted that "because Congress 'did not confer upon the EEOC the authority to promulgate rules or regulations pursuant to [Title VII],' courts may accord 'less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law.'" *Id.* at 1554-55 (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976)).

Congress's failure to confer normal authority to promulgate regulations with the force of law upon the EEOC is only applicable to Title VII. The Age Discrimination in Employment Act (ADEA) and ADA both contain explicit grants of rulemaking authority. *Id.* at 1556. On the other hand, "[a]lthough the EEOC did receive rulemaking authority under the ADEA and ADA, the agency may still choose to promulgate interpretive rules, for which it does not exercise its delegated authority." *Id.* at 1556 n.124. The Guidance falls into this category; it is grounded in Title VII and the ADA, but has the force of law of neither.

using litigation as the sole anti-discrimination strategy, it seems unlikely that the Guidance will have a major impact on the success of FRD claims or on the overall incidence of FRD.

Boydston's historical analysis helps us understand that the distinction between carework and market work is a new one, and supports the argument that change beyond that provided by employment discrimination litigation is needed. The historical analysis is important because it deconstructs the "common sense" assumption that it is natural for caregiving and family work to be sharply distinguished from, and deemed irrelevant to, work outside the home.¹²³ This assumption, rooted in the invisibility of women's, and—more generally—caregivers' work, is destructive in that it asks workers to choose between dissociating themselves from their caregiving responsibilities or giving up market work altogether in order to engage in caregiving. While it may be possible for some families to have a member solely devoted to caregiving, it is not economically feasible for most to do this.

Boydston's work shows that, as recently as the eighteenth and nineteenth centuries, the concepts of economic work and domestic work were not so strictly separated; workers were seen as being able to engage in both, and both were seen as necessary to the survival of the family and society generally. Before carework and domestic work became "invisible" and part of solely the "private" sphere, they were considered part of the real economy. It is this sense of indispensability that is missing from current understandings of the interaction between market work and carework. Employers now are free to ignore carework as irrelevant and unproductive, and to punish employees for real or perceived intrusions of the family into the

Wern attributes part of the EEOC's second-class status to its failure to promulgate rules with the force of law where it may (such as under the ADA), and to its tendency to issue "interim" rules that leave the EEOC's interpretation in doubt and thus subject to judicial reinterpretation. *Id.* at 1580.

123. Reva Siegel's work is especially pertinent here. See Siegel, *supra* note 73. She notes that "[s]ome may find it difficult to imagine that a debate over wives' household labor occurred in the nineteenth century, but our 'common sense' intuitions about the normal subjects of political debate were formed in the aftermath of the industrial revolution, rather than at its inception." Siegel, *supra* note 73, at 1076. Her article aims to "reconstruc[t] the social universe in which it still could be argued that wives' work was work, and a debate over the legal status of wives' household labor made 'common sense.'" Siegel, *supra* note 73, at 1076.

waged workplace. Courts, legislatures, and the public continue to draw upon the recent invention of distinct waged work and carework workplaces in order to explain away the reasons that families have a difficult time balancing home and work responsibilities. Moreover, they refuse to require the market workplace to accommodate the public good of caregiving, seeing it as a “private” issue.

III. PROPOSAL

A first step toward combating FRD already has been taken. Stereotyping evidence of employment discrimination¹²⁴ is a sound way to attack the ways that gender, caregiving, and waged work intersect with one another. In addition, this evidence highlights to courts, employers, and employees that the fundamental problem is cultural and social; if not for certain cultural and social understandings about the relationship between gender, caregiving, and waged work, FRD would be far less prevalent.

The new Guidance¹²⁵ is a good illustration of the issue, and gives notice to employers and employees that stereotypes about caregiving are legally passé. Unfortunately, the Guidance is unlikely to have much effect beyond this, for several reasons. First, the EEOC’s enforcement guidance does not have the force of law under Title VII.¹²⁶ Second, courts grant little deference to the EEOC.¹²⁷ Finally, the Guidance creates no new categories of protection or requirements for employers.¹²⁸

Strategies aimed at making it easier for FRD plaintiffs to win in discrimination litigation are not enough. Accommodation and information, as proposed by Smith,¹²⁹ Schoenbaum,¹³⁰ and Kessler¹³¹ are necessary remedies; however, even accommodation is not itself sufficient, as it treats caregiving as a *problem* for the “real”

124. See *supra* notes 36–45 and accompanying text.

125. Guidance, *supra* note 86. See *supra* notes 85–103 and accompanying text.

126. See Wern, *supra* note 85.

127. See *supra* note 122.

128. See *supra* notes 90–95 and accompanying text.

129. Smith, *supra* note 46. See *supra* notes 46–52 and accompanying text.

130. Schoenbaum, *supra* note 53. See *supra* notes 53–60 and accompanying text.

131. Kessler, *supra* note 61. See *supra* notes 61–71 and accompanying text.

workplace to deal with. Merely requiring accommodation for caregiving may well lead to employers' pre-screening job applicants to seek those who are least likely to present caregiving "problems" that must be accommodated.¹³² More fundamentally, though, the issues of FRD and work-life balance include underlying assumptions about "work" and "home" that cannot be addressed solely through anti-discrimination or even pro-accommodation legislation.¹³³

As with so many historically rooted problems, to solve the problems of FRD and work-life balance, we need to tell a new story. The current narrative paints an inaccurate picture of a sharp, gendered divide between "work" that brings in the family's financial resources, and "home," where love and caregiving are central but economically valueless.¹³⁴ The real story, for most of Western

132. Schoenbaum would continue to hide caregiver status during the hiring phase in order to avoid such pre-screening. Schoenbaum, *supra* note 53, at 99–100. However, given the sophistication of management at using behavioral interviewing techniques and the like to find other supposedly "hidden" information about prospective employees, this seems to offer little protection.

133. As Williams and Segal put it:

The question is whether workplaces will continue to be designed around the bodies and life patterns of men, with "accommodations" offered to women, or whether workplace norms will be redesigned to take into account the reproductive biology and social roles of women and family caregivers, as well.

What women need, in other words, is not accommodation but equality. Equality is not achieved when women are offered equal opportunity to live up to ideals framed around men. True equality requires new norms that take into account the characteristics—both social and biological—of women.

Williams & Segal, *supra* note 3, at 84–85 (citations omitted). A broader way of framing this question is to ask whether workplaces will continue to be designed around the myth that workers can or should be completely autonomous and free from caregiving. Saying that this means they are "designed around the bodies and life patterns of men" can be seen merely as a shorthand for such an idea, as it has been men who were most able to fit that artificial paradigm.

134. In arguing that housework's real economic value has been undermined by its treatment as "love," Silbaugh advocates the law's recognition of the economic value of housework. She wants the tax code and divorce law to recognize the economic contributions of caregivers. This may well be an important step to increasing the "visibility" of carework and toward dismantling the "ideal worker" trope. It differs from my argument, though, in that it focuses on how to alleviate the negative effects women suffer as a result of their caregiver status. It does not advocate a position for women or men in the spectrum of carework or waged work, instead taking the world as it is. See Silbaugh, *supra* note 6.

My argument is more concerned with the effects on waged workers and on society as a whole when caregiving is under-valued, invisible, and constrained. The two arguments are complementary, in that both solutions probably are necessary to overcome the problems of both the inadequate visibility of carework and the inability of many who are both careworkers and

history, is revealed by Boydston, in which “work” and “home” were one and the same, and in which caregiving and domestic work, while largely gendered, were understood to be productive. This perspective, which recognizes the economic and human necessity of carework to our continued existence, holds out some promise of remedy.

Of course, telling a new historical story, one that is at odds with the one that is comfortably embedded in our collective memory, is a difficult task. It begins with scholars’ and professors’ active rejection of the prevailing “common sense” belief in a sharp dichotomy of “work” and “home,” and extends to media portrayals of the problems of work-life balance that are more accurate.¹³⁵ Too many legal scholars and media pundits start from the assumption that America in the middle of the twentieth century was representative of historical reality for all preceding periods. This assumption must change. Historical change does not flow only in one direction; the fact that, in popular myth, a certain work-family dynamic prevailed in the mid-twentieth century does not mean that all preceding periods held regressively more concentrated versions of that period’s norms.

Historical scholarship already recognizes that change flows multi-directionally. The legal world needs to catch up to this higher level of intellectual rigor. It is not true that there always has been, or always must be, a sharp divide between “work” and “home.” The law must

market workers to meet the “ideal worker” standard. Silbaugh herself notes the distinction; she takes the position that it is as important to focus on improving the consequences that flow from the uneven distribution of home labor as it is to focus on altering that distribution or accommodating it in the wage labor market. The importance of focusing on the status of home labor is supported by the real differences among women and the variation in their preferences. Silbaugh, *supra* note 6, at 14–15.

135. This may include the “rights talk” suggested by Williams & Segal, *supra* note 3, at 113–22. They write that rights talk “redefines work-family conflict, so that it is no longer seen as a personal inability to balance one’s responsibilities, but as a structural problem that requires a structural solution.” Williams & Siegel, *supra* note 3, at 114.

[“Rights talk”] fuels social and institutional change in complex and iterative ways that are not limited to the courtroom. “Rights talk” can change what people feel they are entitled to from their employers; what employers feel they need to provide to their employees; what type of diversity training is provided; what financial advisors may recommend to improve the bottom line; what human resource personnel recommend to recruit and retain good employees; and what corporate counsel advise their clients to do in order to comply with the law and avoid liability.

Williams & Siegel, *supra* note 3, at 121.

recognize this. The law, unlike historical scholarship, is well positioned to change these understandings by changing the underlying story.

Carework needs to be visible once again. No more is this purely the argument of those concerned about women's economic, social, and political economy;¹³⁶ it is the concern of all workers whose lives are impoverished by the "ideal worker" norms, and of all caregivers whose caregiving and market work is devalued.¹³⁷ The rush "home" by many workers—especially mothers—away from the waged workforce, is a symptom of the inadequate recognition of carework in the workplace and the law. If the workplace and society were more accommodating and "seeing" of the necessity of carework, caregivers (who in fact are most employees) would be better able to engage in both caregiving and market work. This may take the form of legally mandated leave periods, flexible work, or governmental benefits for caregivers, who perform an essential function that benefits society at large. In addition to these legal supports, the new cultural discourse about the rigid and largely unexamined requirements of the workplace must continue to expand, informed especially by historical understandings of the relationship between work and home.

Since our economy no longer is reliant on home production,¹³⁸ as

136. Because of the decline in position that women suffered as a result of their reclassification as "dependents," the early women's movement largely was concerned with "valuing" domestic labor. See Silbaugh, *supra* note 6, at 24–25.

137. It is certainly of interest to those who are concerned about racial and class equality, as well as the well-being of men. See *infra* notes 142–44.

138. Another way of looking at the problem is to realize that, beginning with the post-Civil War industrial era, there began a declining economic need to have a full-time domestic worker in each family. Since most goods that formerly were made at home could be more efficiently purchased in the cash economy, caregivers' and domestic producers' tangible economic contributions gradually were reduced. This is not to say that they made no economic contribution; the domestic and caregiving work that they provided undoubtedly was necessary and helped to support wage-earning members of the family. However, their contribution was no longer as concretely real or obvious as it formerly had been. Though this Note largely has assumed that household labor is economically productive, it must be conceded that there no longer are as many arenas in which a typical American household worker actually can contribute to the financial well-being of the household, but caregiving and a great deal of household maintenance remain important, and unlikely to decline.

The decline in actual home production of tangible goods coincided with a century-long move toward viewing women as the "dependents" of men, rather than as partners in work, which Boydston identifies. It is not hard to see why women were ready to move for greater social, political, and economic equality, and for the renewed ability to engage in market work

it largely was in the period Boydston studies, it is important that all adults who are willing and able have the opportunity to engage in waged work. Without this, we may see a return to the not-so-distant past of women's economic subordination, as they and other caregivers are driven from the means of economic independence.¹³⁹ We are firmly entrenched in a money-based, waged-work economy, but we must learn to deal with the timeless demands of caregiving, which will always be with us. A proper historical perspective will help legal scholars to arrive at new ways of conceptualizing work and home, leading to more balanced lives for all workers.

CONCLUSION

Legally mandated employer accommodation and government support of Americans' caregiving responsibilities would be good for everyone, whether caregivers or not. Historically informed discourse about the proper positions of work and family life will help these reforms succeed and will promote even more egalitarian policies and practices. Their most obvious effect would be to make it easier for

without stigma; they had been reduced in the cultural psyche from their historic position as economically important, productive members of the family, to economic "dependents" whose only contribution was in what was seen as valueless—and laborless—caregiving. This vision of caregiving remains, though women have been able to move (back) into the visible workforce (where they had been through most of human history). Now, though, their visible workplace is set up along the model of the "ideal worker," who has no family responsibilities. They must pretend as though they have no caregiving responsibilities—they must carry out both the "visible" and "invisible" work.

139. Katharine Silbaugh puts it this way:

We have seen the consequences of home responsibilities on women's prospects for equal participation in the wage labor market revealed and debated in the employment law context. But interference with equal paid labor force participation is not the only problem with the gendered distribution of home labor. The distribution of labor is problematic because the status of home labor in law is inferior to that of wage labor. . . . [T]he legal consequences of home labor do not bring the kind of financial rewards, security, and recognition that accompany paid labor.

Silbaugh, *supra* note 6, at 14. If women are to retain the social and legal rights that the women's rights movement won, they must retain the ability to engage in the labor that society sees as productive. This is true both in a practical sense, as women who are able to provide for themselves financially are far less likely to be oppressed, and in a more abstract cultural sense, as Boydston's work shows that the decline in social recognition of women's work coincides with a decline in women's power.

caregivers to earn a living while tending to their family responsibilities.

There are other benefits that are less tangible, but no less important. Accommodation, support, and discourse would raise public awareness and recognition of the economic and social importance of caregiving. The social importance and legitimacy attached to an activity largely is a function of how it is treated in the law, in the economy, and in cultural assumptions. If these forces were to recognize the necessity and value of caregiving, the public would come to recognize that value as well. The awareness of caregiving's undeniable public benefits, coupled with a more accurate historical understanding of caregiving and domestic labor, will facilitate solutions of some of the problems of our society that are hardest to reach.¹⁴⁰ One of these problems is gender inequity for women¹⁴¹ and for men.¹⁴² The class¹⁴³ and racial¹⁴⁴ divisions¹⁴⁵ of caregiving and

140. I am in no way arguing that the problems that I list are the most fundamental or pressing—clearly poverty, lack of opportunity, racism, and crime are among the largest, most concrete problems of American society. However, I posit that a recognition of the social value of caregiving and its historical position will go toward alleviating some of these problems, in indirect ways. As parents find it easier to work *and* raise children, as employment is broadened by increased use of part-time or flextime policies, as the idea of “family values” is expanded to include support for poor and minority families, we may find that some of these larger problems are reduced.

141. It is undisputed that women do most of the domestic labor and caregiving in this country, and that most of these caregivers also work in the marketplace. For an analysis of the amount of time women in various groups spend on housework, see Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1581 nn.40–41 (1996) (noting that women spend 50 hours a week on housework and perform 70–80 percent of household chores); ARLIE HOCHSCHILD & ANN MACHUNG, *THE SECOND SHIFT* (2003).

A rule that requires employer accommodation and government support for caregivers, as well as increased historical understanding of domestic labor, will improve the situation of most women in several ways. First, women's “second shift” of work at home will be recognized, accommodated, and supported financially; this will result in greater respect for their caregiving work and thereby their massive contribution to society. Second, if women are empowered in their ability to work in the marketplace while engaging in caregiving, they will be more likely to do both. This ability should lead to increased opportunities for women to find both satisfaction and the most efficient use of their skills, and perhaps a leveling of the income and success gaps that women face in the workplace. Moreover, if caregiving is recognized as a legally and economically important task (rather than merely the expression of “love” by dependents who could do no other work as well), the burden of caregiving may become more equal across genders. Finally, men may no longer lose status if they engage in it, and women will benefit by a more equitable distribution of labor.

142. Caregiving and market work both are productive activities, and both also are, to many people, personally enriching. Men's lives long have been impoverished by the ahistorical

assumption that their only legitimate role was as a “good provider” of financial support. *Cf.* John Leland, *More Men Take the Lead Role in Caring for Elderly Parents*, N.Y. TIMES, November 29, 2008, at A1, available at <http://www.nytimes.com/2008/11/29/us/29sons.html?partner=permalink&exprod=permalink> (discussing rise in number of men caring for elders, while showing the difficulties these men encounter because of their confrontation of the breadwinner stereotype and feminization of caregiving). Recognition of and respect for caregiving as a social and economic necessity by law, economics, and cultural memory will enable men to engage more easily in more caregiving than they currently do, because it will carry less of a social and economic price.

143. For many American families, there is no option of having a mother who “opts out” of the workforce. These families bear the brunt of FRD, as their members are more likely to be in jobs that have little tolerance for absenteeism or flexibility in scheduling, and they are unable to afford the cost of a parent dropping out of the workforce. The problem obviously is compounded for single parents. In addition, the cost of quality childcare places many of these parents in a bind, as childcare takes a large chunk of a lower income, while it is not possible—as it is for many higher-income families—to make the economically rational choice for a lower-paid parent to quit work. Legal and economic accommodation and support for caregiving would help these families to juggle the time and money demands of work and caregiving. For some families, this support may take the form of subsidized child care. *See* Dowd, *supra* note 71, at 456–61.

144. A new understanding of caregiving may help to alleviate racial inequities in this country. While this Note has attempted to remain race-neutral, race neutrality is nearly impossible to achieve (and perhaps undesirable, since “neutrality” often is code for adherence to the dominant culture); this Note is unintentionally imbued with the perspective of whites. Social support for caregiving in all its forms, not just “traditional” white nuclear families (which family form has been supported by our tax and other laws, *see* Symposium, *Women, Equity and Federal Tax Policy*, 16 N.Y.L. SCH. J. HUM. RTS. 1 (1999)), is necessary. Research shows that family forms and trends tend to be different across racial groups, a fact caregiving policies need to recognize and accommodate, rather than punish. A history of nontraditional families “disadvantages black women not because achieving the ‘traditional’ family form is desirable, but because the alternative family forms which black women are likely to experience are not the product of diversity or choice, and are inadequately supported.” Dowd, *supra* note 71, at 466–67.

145. Dorothy Roberts has identified a distinction between “spiritual” and “menial” housework that perpetuates racial and class divides while advantaging white, upper-class women. Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 55–56 (1997). Professor Roberts writes:

Some work in the home is considered spiritual: it is valued highly because it is thought to be essential to the proper functioning of the household and the moral upbringing of children. Other domestic work is considered menial: it is devalued because it is strenuous and unpleasant and is thought to require little moral or intellectual skill. While the ideological opposition of home and work distinguishes men from women, the ideological distinction between spiritual and menial housework fosters inequality among women. Spiritual housework is associated with privileged white women; menial housework is associated with minority, immigrant, and working class women. Recent welfare reform laws, which require poor women to leave home to assume menial jobs, highlight the importance of identifying and shattering this dichotomy in women’s domestic labor.

Id. at 51.

domestic labor also may be lessened by a new (and yet historical) approach to caregiving.

These hopes for a better understanding of the place of caregiving may seem idealistic and unattainable, but society needs change in the law and cultural understandings surrounding caregiving. Balance between paid work and family responsibilities is an important, yet largely unattainable goal for many people. At the same time, both market economics and a concern for human flourishing should prompt us to make changes that will enable all people to engage in fulfilling work that is the highest and best use of their skills while retaining the ability to form and maintain families.