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GENDER, FAMILY, AND WORK

By Marcia L. McCormick*

I. INTRODUCTION

We have prohibited sex discrimination for a relatively short period of time. By statute, sex discrimination in pay was prohibited in 1963,¹ and in other employment contexts in 1964.² The Supreme Court, not too much later, began to rule in a series of decisions that at least some sex-based decisions violated the Equal Protection Clause.³ As this relatively short history might suggest, the story of sex discrimination is complicated. Like race, sex is viewed as an immutable characteristic, often irrelevant to questions of ability or desert.⁴ Unlike race, however, sex differences are more often seen as legitimately based in biology, or in social norms that are not themselves problematic, and those differences have justified treating people differently.⁵

The conventional story on sex in Title VII is that it was added by a Southern Democrat as a way to defeat the bill.⁶ Who would vote to give

* Associate Professor, Saint Louis University School of Law. I would like to thank Hayley Collins, Chalana Scales-Ferguson, and John Bowen for excellent research assistance. Thanks also to Nicole Buonocore Porter, Nancy Levit, Ann McGinley, Angela Onwuachi-Willig, Wendy Green, Deborah Widiss, and Marcy Karin for helpful discussions on equality, difference, and policy choices. Finally, thanks to the editors of the *Hofstra Labor & Employment Law Journal* for their diligent work and excellent editing suggestions. Errors that remain are mine.

1. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d) (2006)).

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2006)); see also *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/facts/qanda.html> (last modified Nov. 21, 2009).

3. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 680 n.5 (1973) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process'"); *Reed v. Reed*, 404 U.S. 71, 75 (1971).

4. See *Frontiero*, 411 U.S. at 686.

5. See, e.g., Mark Thompson, *Women in Combat? Not So Fast, This Female Officer Says*, *TIME* (July 5, 2012), <http://nation.time.com/2012/07/05/women-in-combat-not-so-fast-this-female-officer-says/>.

6. See 110 CONG. REC. 2577 (1964) (containing comments suspicious of the sponsor's

rights to African Americans if it meant giving rights to women, too? That story has been debunked to some extent by historians,⁷ but the story and its resonance tells us something important about our ambivalence towards sex discrimination.

Our definition of sex is part of the problem. Every year that I teach employment discrimination, I ask my students the question, "What is sex?" As you might guess, many answer that sex is a genetic difference that causes certain biological differences. Many focus only on sex differences related to human reproduction, although the conversation tends to move into additional generalities about men in the aggregate and women in the aggregate, like differences in upper body strength, speed, or endurance. Eventually, the conversation moves into the territory of other behaviors that are often sex-linked if not biologically determined. When we go back to talking about the cases and whether particular employer decisions are discrimination after this discussion, the conversation becomes very complicated. In the abstract, the students agree that men and women should not be treated differently in employment. But where men and women are viewed as different, regardless of the reason for that difference, the question of whether their different treatment is the kind of discrimination we should prohibit becomes more difficult to agree on.

My students are no different from the rest of American society, and society's attitudes have not changed much in the last thirty years. You can see it most clearly with issues like pregnancy, birth, caregiving, and what counts as sex discrimination in connection with them.⁸ These are

reason for the amendment); see also William H. Chafe, *The Road to Equality: 1962-Today*, in NO SMALL COURAGE: A HISTORY OF WOMEN IN THE UNITED STATES 529, 547 (Nancy F. Cott ed., 2000); JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 233-34 (1991); ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 314 (1982).

7. MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 61 (1986) (describing Representative Martha Griffiths' (D.-Mich.) efforts to garner support to include sex in Title VII, which included having Congressman Smith introduce the bill); see also ROSALIND ROSENBERG, DIVIDED LIVES: AMERICAN WOMEN IN THE TWENTIETH CENTURY 187-88 (2008). Representative Griffiths and Senator Margaret Chase Smith successfully defeated an effort in committee to remove sex from the list of statuses protected by Title VII. KESSLER-HARRIS, *supra* note 6, at 314. For his part, the sponsor of the amendment denied that his motive for it was to defeat the bill. HOFF, *supra* note 6, at 233. Notwithstanding this evidence of support, less than a majority of the House actually voted for the amendment to add sex to Title VII. *Id.* at 233-34.

8. See, e.g., Judith L. Lichtman, Written Testimony at the EEOC Meeting on Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities (Feb. 15, 2012), available at <http://www1.eeoc.gov/eeoc/meetings/2-15-12/lichtman.cfm?renderforprint=1> (discussing continued discrimination against working women based on pregnancy and caregiver

areas in which women and men are differently situated. Women get pregnant, men do not. Women breastfeed babies, men do not. And even though it may not be biologically driven, the vast majority of caregivers of children or adults who cannot care for themselves are women.⁹ Whether the difference is based on biology or cultural factors, men and women are differently situated when it comes to pregnancy, birth, and caregiving. Figuring out what equality looks like when people are different is a project with which we continue to struggle.

No status is bounded by bright lines or as capable of scientific identification as we might think. It is surprisingly difficult to identify what “sex” means. Even scientists debate whether “sex” encompasses only the biological differences that are true for all or nearly all women, or also differences in behavior that are believed to be linked to sex.¹⁰ This poses real problems for our conceptions of equality. The norm against discrimination in the United States embodies formal equality, first and foremost, as a matter of constitutional interpretation, and, generally, as a matter of legislative policy and statutory interpretation.¹¹ As a result, even so-called benign classifications, classifications at least nominally aimed at benefitting social groups historically oppressed, have been struck down as violating the Constitution.¹² Our equality norm

status despite the legal protections that have been in place since 1964).

9. See *Fact Sheet: Women and Caregiving: Facts and Figures*, Family Caregiver Alliance, http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=892 (last visited May 13, 2013).

10. Compare LOUANN BRIZENDINE, *THE FEMALE BRAIN* 8 (2006) (arguing that the different behaviors of women and men are linked to neurological differences), with CORDELIA FINE, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE*, at xxiv-xxv (2010) (pointing out the weaknesses in research linking behavior to neurological differences and arguing that researchers’ biases make them construct findings to support those differences), and REBECCA M. JORDAN-YOUNG, *BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES*, at xii-xiii (2010).

11. Compare *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681-82, (2009) (Scalia, J., concurring), with *id.* at 2689-90 (Ginsburg, J., dissenting). The majority in *Ricci* uses formal equality principles to hold that consideration of the racial impact of a test was race discrimination. *Id.* at 2664. Justice Scalia’s concurrence suggests that a statute that requires the government to provide substantive equality or equality of results may violate the Equal Protection Clause. *Id.* at 2682. Justice Ginsburg’s dissent puts the city’s actions in the context of a long history of race discrimination, promoting the city’s actions as necessary for substantive equality. *Id.* at 2690. See also Rachel F. Moran, *Rethinking Race, Equality and Liberty: The Unfulfilled Promise of Parents Involved*, 69 Ohio St. L.J. 1321 (2008) (discussing color-blind and color-conscious approaches by the Supreme Court); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1473 (2004); J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 Va. L. Rev. 945, 946 (1975) (arguing that the Court should promote political equality and equality of opportunity, but refrain from promoting economic equality).

12. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-08 (1989) (applying strict scrutiny to a program that the government asserted was designed to benefit racial minorities, and

does not help us define equity among difference very well.

This Article for the thirtieth volume of the *Hofstra Labor & Employment Law Journal* looks at the last thirty years of discrimination law as it relates to issues of pregnancy, birth, and caregiving. Part II traces the legal developments over this time period and a bit beyond, and Part III summarizes the most recent developments and current debates. Part IV concludes and looks ahead. We are on the cusp of what could be real change in gender roles and work, but there remain tensions in gender roles alone and also linked with class and race that could hold us back.

II. EQUALITY AND DIFFERENCE: A LOOK BACK

The 1960s and 1970s saw women activists focusing their energies and achieving victories in obtaining greater access for women to positions they had been excluded from, formally or by custom.¹³ This time period saw activists focused on formal equality, autonomy, choice, and removing barriers to women where men and women were similarly situated.¹⁴ That approach yielded quite a few victories in the courts, but

striking the program down on the ground that remedying historical societal discrimination was not, by itself, a compelling governmental interest); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 720-21, 733 (1982) (striking down the exclusion of men from a nursing program argued to be a way to increase opportunities for women). Of course, the policies at issue in those cases may not actually have benefitted people of color or women, at least in some senses. Even if they did, there may have been significant costs imposed as well. The policy barring men from the Mississippi University for Women's nursing program, for example, may have served to promote sex segregation in the health services fields, segregation that generally results in lower pay for jobs dominated by women. In addition, yet another so-called benign classification was struck down in the Title VII context. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (striking down a fetal protection policy that affected only women as a violation of Title VII). The fetal protection policy at issue in *Johnson Controls* "protected" women who could not prove they were infertile from higher paying jobs that exposed them to higher levels of lead, on the ground that the exposure ran the risk of injury to fetuses the women might be carrying. *Id.* at 190-92. The policy did not allow men to opt out of those jobs despite the link between male exposure to lead and health risks to fetuses fathered. *Id.* at 197. The ban on women serving in ground combat positions in the military seems to present a similar kind of "benefit." Women are protected from some kinds of casualties, but their ability to advance within the military is limited. See R. Cort Kirkwood, *Women in Combat: War For and Against Women*, THE NEW AMERICAN (Apr. 12, 2013, 6:00 PM), <http://www.thenewamerican.com/culture/item/15012-women-in-combat-war-for-and-against-women>. Of course, if the reason for the ban is not the danger to the women themselves, but instead the danger that male troops would face because they would risk more to be chivalrous to protect their sisters-in-arms, then maybe the policy would not be considered a "benign" classification.

13. Barbara Ann White, *Foreword: Traversing 2nd and 3rd Waves: Feminist Legal Theory Moving Forward*, 39 U. Balt. L.F. i, iv (2008).

14. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 19-20 (1999). See generally ALISON M. JAGGER, FEMINIST POLITICS AND HUMAN NATURE (1983) (analyzing the

activists learned an important lesson about its limitations in the mid-1970s in a series of cases about pregnant workers.

A. *The Early Years and the Supreme Court's Pregnancy Cases*

In *Geduldig v. Aiello*,¹⁵ the Supreme Court considered whether a California disability insurance plan for state employees violated the Equal Protection Clause when it denied disability benefits for time away from work for normal pregnancy and delivery.¹⁶ The Court used rational basis review to determine that the state made a defensible choice to not provide these benefits as a way to keep the contribution limits affordable for all employees.¹⁷ In reaching the conclusion that rational basis was the test to apply, the Court noted,

These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.¹⁸

In footnotes, the Court distinguished this case from the state policies found unconstitutional in *Reed v. Reed*¹⁹ and *Frontiero v. Richardson*,²⁰ reasoning that those cases had involved "discrimination based upon gender as such."²¹ Discrimination on the basis of pregnancy was not itself gender,

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The

feminist political theories of the sixties and seventies and their relations to contemporary politics and human nature).

15. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

16. *Id.* at 486-90.

17. *Id.* at 496.

18. *Id.* at 496-97 (footnotes omitted).

19. *Reed v. Reed*, 404 U.S. 71 (1971).

20. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

21. *Geduldig*, 417 U.S. at 496 n.20.

fiscal and actuarial benefits of the program thus accrue to members of both sexes.²²

In other words, because the distinction did not map perfectly onto sex—those who are pregnant at any point in time are only women, but those not pregnant are both women and men—the distinction was not sex discrimination.

The result in this case had been something of a surprise, and not only because of the Court's prior decisions in *Reed*²³ and *Frontiero*.²⁴ Earlier in the same term as *Geduldig*, the Court had held that a policy requiring teachers to take mandatory unpaid maternity leave as soon as their pregnancy began showing was unconstitutional.²⁵ The Court had relied on the Due Process Clause's right to privacy rather than the Equal Protection Clause,²⁶ but the appellees' brief in *Geduldig* tied that decision to an exploration of how pregnancy-based distinctions operated as "part of a continuum of discrimination" on the basis of sex.²⁷ Interestingly, the State of California framed its reply in terms of sex equality as well, arguing that "[a]ppellees do a disservice to women when they make pregnancy the *sine qua non* of being woman. Surely it is common observation that a large part of woman's struggle for equality involves gaining social acceptance for roles alternative to childbearing and childrearing"²⁸

At the time that *Geduldig* was decided, another case was winding

22. *Id.*

23. 404 U.S. 71 (holding that a statute preferring males over females when deciding between two equally suited individuals to administer a will was a violation of the Equal Protection Clause).

24. 411 U.S. 677 (holding that different treatment for the spouses of male and female uniformed service members constituted a violation of the Due Process Clause).

25. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

26. *Id.* at 639-40, 647-48, 651. The lower courts had used an equal protection rationale instead, and had split on whether the leave policy discriminated on the basis of sex. LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972) (holding that the policy constituted a classification on the basis of sex and finding no valid state purpose in the kind of mandatory leave at issue); La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971) (using rational basis and finding no violation of equal protection); see also LaFleur, 414 U.S. at 651 (Powell, J., concurring) (suggesting that Equal Protection doctrine was a better fit for this analysis); *id.* at 657 (Rehnquist, J., dissenting) (suggesting that rooting rights in substantive due process has no clear boundaries).

27. Brief for Appellees at 37, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (No. 73-650). That brief also made an argument that the state's rule burdened the fundamental right to privacy in matters of marriage and family. *Id.* at 53. The appellees' position was supported by amicus briefs from the EEOC, the AFL-CIO, the International Union of Electrical, Radio, and Machine Workers, and the ACLU, Center for Constitutional Rights, and National Organization of Women.

28. Reply Brief for Appellant at 2, *Geduldig*, 417 U.S. 484 (No. 73-640). However, this statement was in the context of the rights of childless women to equality. *Id.*

its way through the court system, this one involving General Electric, a private employer, and Title VII of the Civil Rights Act of 1964.²⁹ When the Supreme Court considered whether refusing to cover pregnancy under a disability policy was discrimination on the basis of sex under Title VII, it applied *Geduldig* and held that pregnancy discrimination was not sex discrimination.³⁰ The Court went even further, however. Title VII bars not just decisions motivated by an employee's protected class, but also practices that are neutral on their face but cause discriminatory effects.³¹ The Court held that excluding pregnancy from disability insurance coverage did not cause a disparate impact on the basis of sex.³² The Court reasoned that men and women were covered for the same risks, while "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks."³³

In coming to this conclusion, the Court rejected a regulation by the EEOC that had provided that temporary absences suffered in connection with a pregnancy or recovery from an event ending a pregnancy should be treated the same by an employer as any other temporary disability.³⁴ Because Congress had not given the EEOC the power to promulgate rules under Title VII, the Court held that its regulations were potentially persuasive evidence of the meaning of Title VII, but not entitled substantial deference.³⁵ In the end, the Court was not persuaded. The EEOC's regulation was promulgated in 1972, eight years after Title VII was originally enacted, and contradicted the original position taken by

29. *Gen. Electric Co. v. Gilbert*, 429 U.S. 125, 132-33 (1976). General Electric had filed amicus briefs in *Geduldig*, as well. Brief for General Electric Co., as Amicus Curiae, in Support of the Jurisdictional Statement, *Geduldig*, 417 U.S. 484 (No. 73-640); Brief for General Electric Co., as Amicus Curiae, *Geduldig*, 417 U.S. 484 (No. 73-640).

30. *Gen. Electric*, 429 U.S. at 134-36.

31. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 428, 436 (1971).

32. See *Gen. Electric Co.*, 429 U.S. at 136-38.

33. *Id.* at 139 (emphasis in original). Arguably, this reasoning misunderstands what disparate impact discrimination prohibits, but the Supreme Court has not always supported this theory of discrimination. Melissa Hart, *From Wards Cove to Ricci: Struggling Against the "Built-in Headwinds" of a Skeptical Court*, 46 WAKE FOREST L. REV. 261, 261 (2011); Marcia L. McCormick, *Disparate Impact and Equal Protection After Ricci v. DeStefano*, 27 WIS. J. L. GENDER & SOC'Y 100, 103, 124 (2012); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 953, 958-61 (2005); Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. 411, 415 (2010).

34. *Gen. Electric Co.*, 429 at 140-41 (citing 29 C.F.R. § 1604.10(b) (1975)).

35. *Id.* at 141-42 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

the EEOC's General Counsel.³⁶ The Court also interpreted the regulation as in conflict with one promulgated by the Wage and Hour Administrator of the Department of Labor under the Equal Pay Act.³⁷

B. The Pregnancy Discrimination Act

In response to the Court's decision, Congress enacted the Pregnancy Discrimination Act (PDA), adding the following clarification in the definition section of Title VII:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in [section 703(h)] of this title shall be interpreted to permit otherwise³⁸

The amendment was interpreted not just to clarify what Title VII required, but to wholly reject the definition of discrimination and the reasoning that the Court had used in *General Electric Co. v. Gilbert*.³⁹

36. *Id.* at 142-43. The prohibition on sex discrimination did not start as a priority for the EEOC. See Herman Edelsberg, Exec. Dir., Equal Emp't Opportunity Comm'n, Statement at the New York University Annual Conference on Labor (Aug. 25, 1966), in 62 LAB. REL. REP. (BNA) 253-55 (1966) (calling inclusion of sex a "fluke," referring to it as "conceived out of wedlock" and viewing men as entitled to female secretaries). Conversely, in 1972, Congress enacted the Equal Employment Opportunity Act, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e (2006)), which gave the EEOC the power to bring suits against employers. The legislative history for that statute contained significant amounts of testimony and information about sex discrimination. See ROSENBERG, *supra* note 7, at 188. It appears, however, that no one highlighted that legislative history to the Court, or if they did that the Court found it a reliable indicator of what Congress had meant in 1964. See *Gen. Electric Co.*, 429 U.S. at 145 (remarking that the 1972 guidance "contain[ed] no suggestion that some new source of legislative history had been discovered in the intervening eight years").

37. *Gen. Electric Co.*, 429 U.S. at 144-45.

38. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)).

39. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-79 (1983). Congress may have disagreed with the Court's approach in *Geduldig v. Aiello*, although the Court framed the issue as a belief that Title VII's prohibition of discrimination was not "coterminous" with that of the Equal Protection Clause. *Id.* at 677 (citing *Gen. Electric Co.*, 429 U.S. at 154 n.6 (Brennan, J., dissenting)). In any event, because *Geduldig* involved interpretation of the Constitution, Congress's views cannot control. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress cannot enlarge constitutional rights once the Court has defined them). Justice Rehnquist disagreed that the Pregnancy Discrimination Act could be read to have overruled the Court's entire approach and charged the majority with doing just that in its opinion without

In the Court's view, Congress had made clear that it had intended all along that making a distinction on the basis of pregnancy would be considered discrimination on the basis of sex.⁴⁰ Accordingly, the Court held that an employer's health insurance policy could not provide less pregnancy-related coverage for dependents of employees than it did for other conditions that required hospitalization.⁴¹ To do so was discriminating against male employees on the basis of sex.⁴² Female employees were insured against all common risks related to the health of their spouses, while male employees were not insured against one of the most common risks related to health of their spouses.⁴³ The amendment was also interpreted to allow employers to treat pregnant women more favorably than men or women unable to work for other reasons,⁴⁴ but employers could not substitute paternal views of what was best for women in situations where women could make their own choices.⁴⁵

C. *Post-PDA, Post-ERA*

The 1970s, as a whole, saw a big push by activists to effect a vision of equality that accounted for ways in which women's lives were different from men's. For example, Congress passed the Patsy T. Mink Equal Opportunity in Education Act in 1972.⁴⁶ Popularly known as Title IX, the Act prohibits recipients of federal funds from discriminating, including in employment, on the basis of sex.⁴⁷ Title IX has been interpreted very broadly to encourage girls and women to engage in activities traditionally associated with boys and men; it has not operated

explicitly saying so. *See Newport News*, 462 U.S. at 686 (Rehnquist, J., dissenting). Justice Rehnquist would have found that the amendment only protected female employees who became pregnant and did not affect male employees at all. *Id.* at 688-89. The Court has since appeared to validate Justice Rehnquist's view and reject the majority's claim that the PDA was Congress's way of saying what Title VII required all along. *See AT&T Corp. v. Hulteen*, 556 U.S. 701, 708-13 (2009); *see id.* at 717-23 (Ginsburg, J., dissenting).

40. *See Newport News*, 462 U.S. at 681.

41. *See id.* at 682-83.

42. *Id.* at 683.

43. *Id.* at 683-84.

44. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285-86 (1987).

45. *See, e.g., UAW v. Johnson Controls Inc.*, 499 U.S. 187 (1991) (holding that a policy which prohibited fertile women but not fertile men from certain jobs with high exposures to lead a violation of Title VII as amended by the PDA and that the goal of fetal protection did not make sex a bona fide occupational qualification for those jobs).

46. Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C. §§ 1681-1688 (2006)).

47. 20 U.S.C. § 1681.

solely as a traditional antidiscrimination provision.⁴⁸ Additionally, the seventies saw the passing of legislation promoting education and research to benefit women and girls, encouraging women to enter nontraditional fields, and prohibiting discrimination in credit.⁴⁹

That legislative push began to tail off shortly after the Pregnancy Discrimination Act was passed. Congress had finally passed the Equal Rights Amendment in 1972 and ratification by the states was in progress,⁵⁰ but that process stalled three states shy of the number needed in 1977.⁵¹ Even if the ERA had been ratified, however, it is not clear that it would have been interpreted any differently when applied to issues in which men and women were not similarly situated because its operative language used the term “sex,” which *Geduldig* held not to encompass pregnancy for purposes of the Fourteenth Amendment.⁵²

Despite the waning support for an expansion of the equality norm,⁵³ in the early 1980s, activists continued to push for changes to address situations in which women were, at least as a social matter, not like men. For example, Congress began considering broad legislation to provide economic support to women.⁵⁴ These Economic Equity Act provisions would have eliminated sex distinctions in many contexts, including benefits for members of the armed services; restructured several programs to make marital status irrelevant or to benefit spouses equally regardless of sex; restructured the tax code to recognize the contributions

48. See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J. L. REFORM 13, 15, 18-19 (2001).

49. See Women’s Educational Equity Act of 1974, Pub. L. No. 93-380, 88 Stat. 484, 554 (1974); Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1500 (1974).

50. H.R.J. Res. 208, 92d Cong. (1972).

51. Marcia L. McCormick, *Consensus, Dissensus, and Enforcement: Legal Protection of Working Women from the Time of the Triangle Shirtwaist Factory Fire to Today*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 645, 668 n.123 (2011).

52. *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974). Of course, the word “sex” does not appear in Title VII, but the Equal Protection Clause has been interpreted to prohibit some discrimination on the basis of sex, and that was the operative language the Court gave Title VII, just as if that language did appear there. See, e.g., *Gen. Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The ERA provided that “[e]quality of rights under the law shall not be denied or abridged . . . on account of sex.” H.R.J. Res. 208, 92d Cong. (1972). It is possible that the “equality of rights” language could have been interpreted to provide more substantive equality where women and men were not similar, but that conclusion is not clear.

53. Some of the credit for eroding this support must go to Phyllis Schlafly’s group STOP ERA, which advocated for traditional values and gender roles. HOFF, *supra* note 6, at 321-25 (describing Schlafly’s group); see SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 232-35 (1991) (crediting the rise of the New Right to passage of the ERA in 1972 and the recognition of a fundamental right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973)).

54. Economic Equity Act, H.R. 3117, 97th Cong. (1st Sess. 1981); Economic Equity Act, S. 888, 97th Cong. (1st Sess. 1981).

of homemakers; supported child care programs; and prohibited discrimination in insurance.⁵⁵ That legislation did not pass, but it did form the basis for child support and pension legislation that was enacted later in that decade.⁵⁶

D. Family and Medical Leave

In the late 1980s and early 1990s, efforts to address sex-linked social inequities enjoyed a resurgence, with efforts to pass comprehensive family leave legislation. Some employees had access to family leave at this time through union contracts, employer policies, or state statutes, but the leave tended to be only for mothers and tended to cover only the period of recuperation from birth.⁵⁷ Perhaps because of the lessons learned in the 1970s, activists framed such family focused legislation in terms specifically designed to allow flexibility but provide the same kinds of leave to both sexes.⁵⁸ In 1984, the Women's Legal Defense Fund drafted the Family and Medical Leave Act to give workers a period of unpaid leave from work to care for family or personal medical needs regardless of the sex of the worker.⁵⁹ It was first introduced in Congress in 1985.⁶⁰ The House voted it out of committee,

55. See H.R. 3117; S. 888. Summaries of the proposed Act can be found at *H.R. 3117 (97th): Economic Equity Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/97/hr3117#summary/libraryofcongress> (last visited May 14, 2013), and *S. 888 (97th): Economic Equity Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/97/s888#summary/libraryofcongress> (last visited May 14, 2013).

56. See HOFF, *supra* note 6, at 273-74, app. at 402; see also Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 466, 98 Stat. 1305, 1306 (codified at 42 U.S.C. § 666 (2006)) (requiring states to strengthen their support laws, to enact guidelines for the appropriate amount of support, and provide greater assistance to collect that support, providing grants to improve interstate enforcement of child support orders); Retirement Equity Act of 1984, Pub. L. No. 98-397, § 102, 98 Stat. 1426, 1429 (1984) (amending the Employee Retirement Income Security Act and the Internal Revenue Code to ensure that women who took time off of the workforce for childrearing and surviving and divorced spouses were treated more equitably by the retirement plan of their own employer or their former spouses' employer).

57. See Donna R. Lennhoff, Att'y, Family and Medical Leave in the United States: Historical and Political Reflections 3 (Oct. 1, 2004), available at <http://www.hhh.umn.edu/centers/wpp/afterbirth/pdf/lenhoff.pdf>.

58. *Id.*

59. *Id.*

60. Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1986); 131 CONG. REC. S8318 (daily ed. Apr. 17, 1985) (statement of Rep. Patricia Schroeder); Donna R. Lennhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward a Family Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 58 (1994).

but Congress adjourned before the bill could be voted on.⁶¹ The legislative drives continued through two vetoes by President Bush until President Clinton finally signed it into law in 1993 as the Family and Medical Leave Act.⁶²

The Act required that large employers⁶³ afford their employees up to twelve weeks of unpaid leave to care for a new child, a parent, child, or spouse with a serious medical issue, or themselves for their own serious medical issue.⁶⁴ The leave would be available to both men and women in recognition of the fact that many families are headed by single parents, in the majority of two-parent families parents of both sexes work, more families are caring for aging relatives, the bulk of caregiving responsibility traditionally falls to women which reinforces employer and employee decisions that injure women economically, and both men and women experience serious medical emergencies.⁶⁵ Benefits accrued before the leave was taken could not be affected, employees would keep their health insurance benefits while on leave, and employees had to be restored to their prior position or one equivalent in material respects.⁶⁶ To further protect the right to leave and encourage employees to take it, employees were protected from retaliation and interference with their efforts to take leave.⁶⁷ The Secretary of Labor was given the power to investigate employer compliance, and the Secretary and employees were provided with causes of action to enforce employee rights to be free from retaliation or interference with leave in federal or state court.⁶⁸

The Act also created a bipartisan commission, The Commission on Leave, to review family and medical leave issues.⁶⁹ The Commission on Leave issued its report, *A Workable Balance: Report to Congress on*

61. Lennhoff & Withers, *supra* note 60, at 59.

62. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601-2654 (2006)); Lennhoff & Withers, *supra* note 60, at 40.

63. Covered private-sector employers were those with an average of fifty or more employees for at least 20 weeks of the year within a seventy-five mile radius of any particular worksite. 29 U.S.C. §§ 2611(2)(B)(ii), (4)(A)(i).

64. 29 U.S.C. § 2612.

65. Lennhoff & Withers, *supra* note 60, at 48-51; 29 U.S.C. § 2601.

66. § 2614.

67. § 2615. The statute sets these rights out in separate subsections, suggesting that they are slightly different things, paralleling the interference language to section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2006). See Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 358, 374 (2003) (arguing that retaliation and interference use different standards and that the broader protection against interference could be used to combat sex role stereotypes).

68. 29 U.S.C. §§ 2616-2617.

69. 29 U.S.C. §§ 2631-2636.

Family and Medical Leave Policies, in 1996.⁷⁰ That report revealed that just under half of private sector workers had access to FMLA leave, and employers not covered by the FMLA provided less family or medical leave and at relatively lower rates.⁷¹ Covered employers reported few administrative burdens or increased costs and no noticeable effect on productivity, profitability, or growth of business.⁷² The report also described who was taking the leave and for what reasons: only about 16.8% took leave for a reason covered by the FMLA, 3.4% needed it but did not take it, and 40% anticipated needing to take leave in the following five years.⁷³ The majority of employees who took leave for a reason covered by the FMLA took it because of their own serious health needs, and the median length of time taken was ten days.⁷⁴ More than half of those who took leave were able to do so with full or partial payment under their employer's sick, vacation, or disability pay policies.⁷⁵ The Department of Labor followed up with a survey in 2000, the findings of which were substantially similar.⁷⁶ In April of 2011, the Department of Labor issued a request for comments on its proposal to conduct a new survey.⁷⁷

In addition to the survey to track how leave was being used, the Department of Labor has examined how effective and how onerous on businesses its administration of the law has been.⁷⁸ In its examination in

70. U.S. COMM'N ON FAMILY & MED. LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES (1996), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=key_workplace.

71. *See id.* at xvi.

72. *Id.* at xvii-xviii.

73. *Id.* at xix. Only about 1% of workers total designated their leave as "FMLA leave." *Id.* Of those who did not take the leave but needed it, most cited the inability to afford to take leave that was unpaid. *Id.*

74. *Id.* at xx.

75. *Id.* at xxi.

76. *See* Jane Waldfogel, *Family & Medical Leave: Evidence from the 2000 Surveys*, MONTHLY LAB. REV., Sept. 2001, at 17. The gap between leave policies in covered employers and those in noncovered employers did narrow a bit. *Id.* at 18-19. Reported ease of administration declined significantly, but a vast majority reported no noticeable negative effect on business productivity, profitability, or growth. *Id.* at 19. The same proportion of private-sector workers, just under half, had access to FMLA leave. *Id.* at 20. Nearly an identical proportion of employees took leave for an FMLA-covered reason, although that reason shifted a bit from the employee's own serious health needs to caring for a new child or caring for an ill child, spouse, or parent. *Id.* The vast majority of those who could have but did not take FMLA leave was due to the fact that it was unpaid. *Id.* And while more women than men took leave, that gap shrunk a bit, and the rates at which men and women took time off to care for a new child were almost even. *Id.* at 21.

77. Comment request, 76 Fed. Reg. 32991-92 (June 7, 2011)

78. *See, e.g.*, VICTORIA LIPNIC & PAUL DECAMP, DEP'T OF LABOR, FAMILY AND MEDICAL LEAVE ACT REGULATIONS: A REPORT ON THE DEPARTMENT OF LABOR'S REQUEST FOR

2007, the Department estimated that awareness of the availability of FMLA leave had increased and as a result, its use had also increased slightly since the earlier surveys.⁷⁹ Overall, employees were grateful for the leave, although at least some desired expanded benefits, for example: paid leave, a longer period of leave, and/or leave to care for additional family members, including same sex spouses, in some states, or nonmarital same sex partners.⁸⁰ Employers reported few problems with caregiver leave, but expressed frustration with unscheduled intermittent leave taken by employees with chronic health conditions.⁸¹ They also documented ways that accommodating this group created the greatest costs, quantifiable and unquantifiable, to business even though the size of the group itself was small.⁸² In addition, the overlap with the protections of Americans with Disabilities Act for employees with chronic health conditions added to the administrative demands on employers.⁸³ This issue has been labeled the “Absence Abuse” problem.⁸⁴

E. Post-FMLA Issues: Paid Leave and FMLA Compliance

While the Family and Medical Leave Act created a basic structure that expanded opportunities for workers to be both workers and caregivers, and began to dismantle some stereotypes linking sex and caregiving, it does not serve many workers well because either they are not covered or the leave it provides is unpaid.⁸⁵ Some states have begun to try to fill the gaps there. Some states cover smaller employers,⁸⁶ some

INFORMATION 45 (2007), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1320&context=key_workplace.

79. *Id.* at ii (estimating that between 8 and 17.1 percent of covered and eligible workers took leave in 2005).

80. *Id.* at iv.

81. *Id.* at iv-vi, viii.

82. *Id.* at ix-xii.

83. *Id.* at ix-x.

84. See e.g., *Absence Abuse and Medical Leave*, U.S. CHAMBER OF COMMERCE, <http://www.uschamber.com/issues/labor/absence-abuse-and-medical-leave> (last visited Feb. 3, 2013).

85. It appears that up to 26 percent of covered employers also do not provide the leave the FMLA requires. KENNETH MATOS & ELLEN GALINSKY, FAMILIES & WORK INST., 2012 NATIONAL STUDY OF EMPLOYERS 6, 17 (2012), available at http://familiesandwork.org/site/research/reports/NSE_2012_.pdf.

86. Five states, Maine, Minnesota, New Jersey, Oregon, and Vermont along with the District of Columbia provide family and medical leave to workers at workplaces with fifty or fewer employees. NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF LAWS THAT HELP NEW PARENTS 49 (2012), available at

extend leave to workers with less time on the job,⁸⁷ and some have an expanded definition of family.⁸⁸ Some states even provide a way for the leave to be partially paid. In nine states and the District of Columbia, workers whose employers provide sick leave must be allowed to use that sick leave to care for at least some family members.⁸⁹ Connecticut and the District of Columbia require employers to provide paid sick leave for employees.⁹⁰

Three states provide mechanisms for paid family leave: California (Family Temporary Disability Insurance),⁹¹ New Jersey, (Temporary Disability Benefits Law),⁹² and Washington (Family and Medical Leave Insurance Act.)⁹³ Washington's leave insurance system is not operational because it has not been funded yet.⁹⁴ Three more states cover medical leave, including pregnancy-related leave, through state-funded temporary disability insurance:⁹⁵ Hawaii Temporary Disability

<http://www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052>.

Another nine, California, Connecticut, Hawaii, Iowa, Louisiana, Massachusetts, Montana, New Hampshire, and Washington require that smaller employers provide the same kind of leave for pregnancy-related absences only. *Id.*

87. Seven states, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, and Wisconsin, plus the District of Columbia mandate family and medical leave for employees who work less than is required for the FMLA. *Id.* Another seven, California, Iowa, Louisiana, Massachusetts, Montana, New Hampshire, and Washington mandate leave for workers who worked fewer hours, but only for leave related to pregnancy. *Id.*

88. Nine states—California, Connecticut, Hawaii, Maine, New Jersey, Oregon, Vermont, Washington, and Wisconsin—and the District of Columbia *Id.*

89. *Id.* In Minnesota, an employee may only use sick leave in the case of his or her own illness or injury, or that of a child. *Id.* Eight other states (California, Connecticut, Hawaii, Maine, Maryland, Oregon, and Wisconsin plus the District of Columbia) allow its use for more close relatives. *Id.*

90. *Id.*

91. S.B. 1661, ch. 901, 2002 Legis. Serv. (Cal. 2002); CAL. UNEMP. INS. CODE § 3300-03 (West 2011); see also Natalie Koss, *The California Family Temporary Disability Insurance Program*, 11 AM. U. J. GENDER & SOC. POL'Y & THE L. 1079, 1079 (2003) (describing the legislation).

92. N.J. STAT. ANN § 43:21-25 (West 2011).

93. WASH. REV. CODE § 49.86.005-.903 (West 2011).

94. The Joint Task Force on Family Leave Insurance issued a fractured report in 2008, with the majority recommending that funding come from the state's general fund. JOINT TASK FORCE ON FAMILY LEAVE INSURANCE, FINAL REPORT 4-8 (2008), available at <http://www.leg.wa.gov/JointCommittees/FLI/Documents/FinalReport.pdf>. The legislature has delayed implementation, and there are currently competing proposals to repeal the insurance program entirely and to expand and fund it similarly to the California and New Jersey plans. Chris West, *Bill Would Repeal State's Family Leave Act*, THE CAPITOL RECORD (Jan. 28, 2013), <http://capitolrecord.tvw.org/2013/01/bill-would-repeal-states-family-leave-act/#.UQxAaR00WS0>.

95. EMP'T & TRAINING ADMIN., DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, 8-1 to 8-9 (2012), available at <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2012/disability.pdf>.

Insurance,⁹⁶ New York State Disability Insurance,⁹⁷ and Rhode Island Temporary Disability Insurance.⁹⁸ Puerto Rico also has a commonwealth-funded temporary disability insurance plan.⁹⁹

Despite these developments for caregiving and medical leave, significant calls for improvement remain because so many employees remain unable to take advantage of it.¹⁰⁰ Only nine percent of employers offered fully paid maternity leave in 2012, and eleven percent of working fathers or non-birth mothers in the private sector have access to paid leave to care for a new child.¹⁰¹ Low-wage workers were the least likely to have access to any sort of paid leave and were least able to take advantage of the unpaid leave under the FMLA.¹⁰²

Additionally, while the statute may be helping to legitimize taking family and medical leave by both sexes, progress does not seem to have translated into more people taking leave, and it has not always translated into making leave acceptable.¹⁰³ Family and medical leave were purposely framed in a gender-neutral manner as a way to promote sex equality.¹⁰⁴ The framers of the law saw allowing leave regardless of

96. HAW. REV. STAT. § 392-21 (1993). The insurance program provides partial wage insurance for the employee's own non-work-related sickness or injury and includes pregnancy. *About Temporary Disability Insurance*, HAWAII.GOV, <http://labor.hawaii.gov/dcd/home/about-tdi/> (last visited Jan. 31, 2013).

97. N.Y. WORKERS' COMP. LAW §§ 200-42 (McKinney 2006); *About Disability Benefits*, N.Y. STATE INS. FUND, <http://ww3.nysif.com/DisabilityBenefits/AboutDisabilityBenefits.aspx> (last visited Jan. 31, 2013).

98. R.I. GEN. LAWS §§ 28-39-1 to 28-41-33 (2003). Pregnancy is treated like any other condition that temporarily disables a worker from working. *Temporary Disability Insurance Frequently Asked Questions*, R.I. DEP'T OF LABOR & TRAINING, <http://www.dlt.ri.gov/tdi/tdifaqs.htm> (last visited Jan. 31, 2012).

99. P.R. Laws Ann. tit. 11, § 210 (2009).

100. See generally Jennifer Ludden, *FMLA Not Really Working for Many Employees*, NAT'L PUB. RADIO (Feb. 5, 2013, 3:24 AM), http://www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many-employees?utm_source=npr&utm_medium=facebook&utm_campaign=20130205.

101. EXPECTING BETTER, *supra* note 86, at 11. The number of employers who offered paid maternity leave had fallen from sixteen percent in 2008 and twenty-seven percent in 1998. *Id.*

102. *Id.* at 12. There appears to be a relatively high level of dissatisfaction among employers and at least some employees about coworkers taking FMLA leave—at least intermittent leave. LIPNIC & DECAMP, *supra* note 78, at 47. In situations of intermittent leave with no advance notice, employees more often have to cover the work of their absent coworkers. *Id.* Depending how the employer covers the work of the missing employee, the same may be true of planned leave for long blocks of time. *Id.*

103. See Waldfogel, *supra* note 76, at 17 (reporting that in 2000, statistics about rates of leave takers had not changed very much). The data from 2000 are a bit out of date, and it is possible that a new survey would show different rates.

104. See Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728-37 (2003) (finding that caregiver leave was designed this way to disrupt the effects of gender stereotypes); see also Coleman v. Ct. App. Md., 132 S. Ct. 1327, 1339-49 (2012) (Ginsburg, J., dissenting) (explaining

gender as a way to break down gendered associations in two ways. First, by expanding who is encouraged to engage in caregiving, and second by encouraging workers to take leaves for all of their serious illnesses or injuries.¹⁰⁵

Expanding caregivers was viewed as an important way to break down the association between caregiving and sex. Caregiving traditionally has been viewed as women's work, and women viewed as naturally nurturing.¹⁰⁶ By giving all workers leave and job protection, men would be encouraged to engage in more caregiving, and the more caregiving they did, the less caregiving would be associated with either sex.¹⁰⁷ Additionally, special rules were built in to promote sex equality in caregiving for older adults. The FMLA allowed leave only to care for one's own parent or grandparent, not a spouse's parent or grandparent.¹⁰⁸ Thus, women couldn't necessarily be the default caregivers of older family members in their extended family.¹⁰⁹

Second, women were viewed as more physically fragile and as having greater need for leave because of pregnancy, birth, and recovery.¹¹⁰ By encouraging men to take leave for their own serious illnesses and injuries, the policy would show how men and women were similar in their vulnerabilities to illness or injury and temporary inability to work.¹¹¹ Additionally, historical developments had shown that prohibiting discrimination on the basis of pregnancy had reinforced views that women were more expensive to employ and less committed to work.¹¹² Men taking leave in greater numbers would help dilute that view.

The perceptions the activists sought to disrupt had real economic consequences for women. Perceptions of women as naturally nurturing hindered their ability to pursue jobs that were thought to involve aggression, conflict, competition, or risk.¹¹³ Women themselves seemed

how the self-care provisions were also designed to disrupt patterns of sex discrimination).

105. See *Hibbs*, 538 U.S. at 737; Lenhoff & Withers, *supra* note 60 at 49-50.

106. *Hibbs*, 538 U.S. at 729, 731; Lenhoff & Withers, *supra* note 60, at 49.

107. Lenhoff & Withers, *supra* note 60, at 49-50; see also *Hibbs*, 538 U.S. at 730-34 (alternating between an explanation of how lack of leave for fathers discriminated against men and how it reinforced stereotypes of women).

108. See 29 U.S.C. § 2611(7) (2006) (defining parent to be a biological parent or person who stood *in loco parentis* of the employee when the employee was a child); 29 U.S.C. §2612 (2006).

109. Lenhoff & Withers, *supra* note 60 at 50.

110. See *Coleman v. Ct. App. Md.*, 132 S. Ct. 1327, 1347-48 (2012) (Ginsburg, J., dissenting) (summarizing testimony before Congress).

111. See *id.*, at 1348-49 (Ginsburg, J., dissenting); Lenhoff & Withers, *supra* note 60, at 49.

112. See *Coleman*, 132 S. Ct., at 1341-44 (Ginsburg, J., dissenting).

113. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (involving promotion to a

to choose certain career paths and kinds of jobs, those that were female dominated already and generally lower paying, because they were or believed they would be primarily responsible for caregiving, and thought those kinds of careers and jobs would allow more flexibility.¹¹⁴ The pay and achievement gap for women, whether a result of choices or discrimination, made women in heterosexual couples who could afford it the more likely partner to take caregiving leave or quit working entirely.¹¹⁵ This reinforced the perception that caregiving was women's work and that women were not committed workers.¹¹⁶

III. RECENT DEVELOPMENTS AND THE CURRENT DEBATES: CAREGIVER DISCRIMINATION, NURSING MOTHERS, AND WOMEN'S HEALTH

Despite the fact that family and medical leave legislation has been framed in a gender neutral manner, leave, people's attitudes towards it, and people's attitudes towards caregiving remain fairly gendered.¹¹⁷ Moreover, amendments to the Americans with Disabilities Act, the newly enacted Patient Protection and Affordable Care Act, and women's health issues generally are causing renewed debate about what equal treatment requires when men and women in the aggregate are different

traditionally male position that required a level of assertiveness); EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (involving a pattern and practice claim that Sears kept women out of commission sales jobs, a claim the EEOC lost).

114. Pamela M. Frome et al., *Why Don't They Want a Male-Dominated Job? An Investigation of Young Women Who Changed Their Occupational Aspirations*, 12 EDUC. RES. & EVALUATION 359, 365 (2006), available at <http://www.rcgd.isr.umich.edu/garp/articles/frome06.pdf>.

115. See E. Jeffrey Hill et al., *Studying "Working Fathers": Comparing Fathers' and Mothers' Work-Family Conflict, Fit, and Adaptive Strategies in a Global High-Tech Company*, 23 FATHERING 239, 252 tbl. 2 (reporting that among employees worldwide in 2001, 8% of fathers said they had taken unpaid family leave, while 49% of mothers had; 39% of fathers said they would in the future, while 55% of mothers said they would); see generally ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 52-53, 87-92 (2001).

116. See *id.*

117. See ELLEN GALINSKY ET AL., *FAMILIES & WORK INST.*, 2008 NATIONAL STUDY OF THE CHANGING WORKFORCE: TIMES ARE CHANGING: GENDER AND GENERATION AT WORK AND AT HOME 9-21 (rev. Aug. 2011), available at <http://www.pewsocialtrends.org/files/2012/04/Women-in-the-Workplace.pdf> (reporting significantly changing roles in caregiving and changing attitudes towards gender roles in caregiving, but a continuing substantial minority, 39% in 2008, endorse traditional gender roles); EILEEN PATTEN & KIM PARKER, *PEW SOCIAL & DEMOGRAPHIC TRENDS, A GENDER REVERSAL ON CAREER ASPIRATIONS* 7 (2012), available at <http://www.pewsocialtrends.org/files/2012/04/Women-in-the-Workplace.pdf> (reporting that while the public was generally supportive of women having more active roles in the workplace, a substantial minority of 37% said that the trend of mothers of small children working outside of the home was a bad thing for society; only 38 % said it hadn't made a difference; and only 21 % saw it as a good thing).

from each other.

A. Caregiver or Family Responsibilities Discrimination

Title VII, the Americans with Disabilities Act, and the Family Medical Leave Act would seem to prohibit most discrimination against women who are pregnant or nursing, or against anyone who has caregiving responsibilities for a parent, child, or spouse. Title VII, as amended by the Pregnancy Discrimination Act, clearly prohibits terminating, demoting, harassing, or otherwise discriminating against an employee because of her pregnancy or a condition related to pregnancy.¹¹⁸ It also requires employers to treat pregnancy the same as they do other temporary disabilities and to provide men and women the same terms, conditions, and privileges of employment, including fringe benefits.¹¹⁹ The FMLA requires covered employers to provide unpaid leave to men and women to care for a new child or close family member with a serious health need and prohibits employers from retaliating against employees who seek or take the leave, and from interfering with employee rights to take the leave.¹²⁰ It also provides protection for pregnant employees who take leave to recover from and treat pregnancy complications.¹²¹ The ADA supplements these statutes to add even more protection by requiring employers to accommodate temporary health conditions that substantially limit major life activities.¹²² This clearly covers complications that may arise from pregnancy or birth, but also may cover limitations that a healthy pregnancy may cause.¹²³ Despite the ADA's apparent coverage of significant discrimination against pregnant women and caregivers of both sexes, discrimination motivated by sex stereotypes has grown.

118. 42 U.S.C. §§ 2000e(k).

119. *See id.*; *see also* Cal. Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987) (affirming that Congress intended the Pregnancy Discrimination Act to be "a floor beneath which pregnancy disability benefits may not drop-not a ceiling above which they may not rise" and thus it does not prohibit employment practices favoring pregnant women); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (finding that discrimination against female spouses in the provision of fringe benefits is also discrimination against spouses of male employees).

120. 29 U.S.C. §§ 2612, 2615 (2006).

121. *See* 29 U.S.C. § 2612 (2006).

122. *See* Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012) (arguing that since individuals with temporary physical limitations comparable to pregnancy may now receive ADA accommodations, courts should conclude that the ADA's goal of accommodating previously excluded persons extends to pregnancy).

123. *See id.*

The Equal Employment Opportunity Commission has seen an increase in sex discrimination cases that present issues of discrimination against women and men because of their caregiving activities.¹²⁴ The increase prompted the EEOC to issue guidance on caregiver discrimination in 2007.¹²⁵ In addition, the EEOC held a public meeting in February of 2012 on the issues of caregiver and pregnancy discrimination.¹²⁶ Several experts testified and suggested that women were paying a price for having children, becoming pregnant, and being perceived as potential mothers.¹²⁷ Men too were paying a price for potentially taking on too much caregiving responsibility.¹²⁸

Several experts testified about the penalties for workers and the increasing demands for caregiving. Stephen Benard, a professor of sociology at Indiana University testified about research demonstrating that mothers suffered a wage penalty that was due at least in part to negative stereotypes of mothers.¹²⁹ Sharon Terman from the Legal Aid Society-Employment Law Center testified about growing discrimination against pregnant low-wage workers, especially women of color, including harassment, termination, forced unpaid leave, denial of even minimal accommodations such as bathroom breaks or lifting restrictions, and denial of reinstatement after giving birth.¹³⁰ Lynn Feinberg from the

124. Testimony of Joan Williams, Professor of Law, UC Hastings Foundation Chair, Director Center for WorkLife Law, on Discrimination on the Basis of Pregnancy and Caregiving to the U.S. Equal Emp't Opportunity Comm'n (Feb. 15, 2012), *available at* <http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm> [hereinafter Written Testimony of Joan Williams] ("The Center for WorkLife Law has documented a nearly 400% increase in caregiver discrimination suits filed between 1999 and 2008 over the previous decade . . .").

125. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES, NO. 915.002 (2007), <http://www.eeoc.gov/policy/docs/caregiving.html>; *Employer Best Practices for Workers with Caregiving Responsibilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last updated Jan. 19, 2011); *Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/policy/docs/qanda_caregiving.html (last updated May 23, 2007). These documents are currently being evaluated in light of the amendments to the Americans with Disabilities Act, which became effective January 1, 2009. *Id.*

126. Press Release, U.S. Equal Emp't Opportunity Comm'n, Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities Widespread Problem, Panelists tell EEOC, (Feb. 15, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/2-15-12.cfm>.

127. *Id.*

128. *Id.*

129. *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 15, 2012) (Written Testimony of Dr. Stephen Benard, Professor of Sociology, Ind. Univ.), *available at* <http://www.eeoc.gov/eeoc/meetings/2-15-12/benard.cfm>.

130. *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving*

American Association of Retired Persons testified about the rise in caregiving of older family members and the way that discrimination against caregivers of older relatives might differ from that against caregivers of children.¹³¹ Joan Williams from the Center for WorkLife Law testified about the way that men who ask for caregiving leave are discriminated against for violating male gender norms.¹³²

Several experts testified about legal developments in the field. Emily Martin of the National Women's Law Center testified that the courts had generally been hostile to discrimination claims by pregnant women because the courts interpreted the Pregnancy Discrimination Act to allow employers to differentiate between on-the-job injuries and off-the-job injuries in disability policies, thus refusing to recognize disparate impact claims in a pregnancy context, and using the Americans with Disabilities Act as a reason to excuse employers from accommodating pregnant workers.¹³³ Williams detailed the ways that courts have used a requirement that a plaintiff provide a comparator (i.e. someone outside the plaintiff's class who is nonetheless identical to the plaintiff), to inappropriately limit the applicability of Title VII to caregiver discrimination cases and other ways in which the courts have seemed to exhibit the same stereotypes that Title VII, the FMLA and the ADA were designed to combat.¹³⁴

Responsibilities, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 15, 2012) (Written Testimony of Dr. Sharon Terman, Senior Staff Attorney, Gender Equity and LGBT Rights Program, Legal Aid Soc'y - Emp't Law Ctr.), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm>.

131. *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 15, 2012) (Written Testimony of Lynn Feinberg, Senior Strategic Policy Advisor, Indep. Living/Long-Term Care, AARP Pol'y Inst.), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/feinberg.cfm>.

132. *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 15, 2012) (Written Testimony of Joan Williams, Professor of Law, UC Hastings Found. Chair, Dir. Ctr. for WorkLife Law), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm>; see also Joan C. Williams, Robin, Devaux, Patricija Petrac & Lynn Feinberg, *Protecting Family Caregivers from Employment Discrimination*, AARP PUB. POL'Y INST. (August 2012), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/protecting-caregivers-employment-discrimination-insight-AARP-ppi-ltc.pdf. Joan Williams and the Center for Worklife Law at UC Hastings have been particularly instrumental in identifying discrimination against caregivers and by showing how that discrimination violates Title VII. For some examples of their efforts, see *Publications*, WORKLIFE LAW, <http://worklifelaw.org/frd/> (last visited Feb. 3, 2013) (click "Publications" and expand titles under "Family Responsibilities Discrimination").

133. *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 15, 2012) (Written Testimony of Emily Martin, Vice President and Gen. Counsel, Nat'l Women's Law Ctr.), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/martin.cfm>.

134. Testimony of Joan Williams, *supra* note 124; see also JOAN WILLIAMS, UNBENDING

Others focused their remarks on efforts for reform or on clarifications of how the overlapping laws in this area interact. Maryann Parker of the Service Employee International Union testified that unions could help protect women, particularly low-wage workers, by improving their work environment generally, helping to enforce their legal rights, and by helping employers tailor compliance to the needs of the particular workplace.¹³⁵ Deane Ilukowicz from Hypertherm, a manufacturing company, testified that although her company had won awards for its work environment and worker-supportive policies, the patchwork of laws that govern employer conduct in this area, laws which are enforced by different agencies, leaves employers with little guidance on how to comply.¹³⁶ Judith Lichtman, from the National Partnership for Women and Families, advocated for ways in which the agencies could work together.¹³⁷ For instance, all the agencies should enter into a memorandum of understanding to coordinate efforts related to caregiver discrimination; the EEOC should update its guidance and make caregiving discrimination a litigation priority; the Department of Labor's Office of Federal Contract Compliance Programs should update its regulations, unchanged since 1978, and prioritize enforcement of these cases.¹³⁸ Lichtman also urged the Department of Labor's Wage and Hour Division to implement the recommendations from its surveys on the FMLA and publicize the new right to breaks for nursing mothers enacted under the Patient Protection and Affordable Care Act.¹³⁹ Lichtman also calls for the Department of Justice and Office of Personnel

GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1-2, 14-15 (2000); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 150, 167 (1989) (noting that limitations are evident in recent Title VII Supreme Court decisions which could be avoided if the Court were to "require that legislation neither be based upon nor promote or perpetuate social/cultural constructs of gender.").

135. *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 15, 2012) (Written Testimony of Maryann Parker, Assoc. Gen. Counsel, Serv. Emp. Int'l Union), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/parker.cfm>.

136. *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 15, 2012) (Written Testimony of Deane Ilukowicz, Vice President of Human Res., Hypertherm, Inc.), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/ilukowicz.cfm>.

137. *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 15, 2012) (Written Testimony of Judith L. Lichtman, Senior Advisor, Nat'l P'ship for Women and Families), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/lichtman.cfm>.

138. *Id.*

139. *Id.*

Management to ensure that state governments and the federal government, respectively, operate as model workplaces.¹⁴⁰

B. Lactation Rooms and Breaks

Women and men are not necessarily similarly situated physically or socially when it comes to issues surrounding pregnancy, birth, or caring for a newborn. Thus, it is probably not a surprise that the laws that prohibit sex discrimination have not necessarily been considered to address discrimination against breastfeeding mothers or to require accommodation of breastfeeding.¹⁴¹ The EEOC's position is that discrimination against women who are breastfeeding violates Title VII.¹⁴² That position has not been adopted by most courts that have considered the situation, however. Most federal courts to have considered claims under Title VII involving adverse employment actions taken against women because they were breastfeeding or refusals to allow breastfeeding women to express milk found that the actions were not discrimination on the basis of sex.¹⁴³ Much of the reasoning in these cases echoes that of the Supreme Court in *Geduldig v. Aiello*.¹⁴⁴ Even though only women can breastfeed, non-breastfeeders include both men and women, and in these cases, there were no similarly situated men who could be said to have been treated better.¹⁴⁵ The language of the Pregnancy Discrimination Act was no help; lactation happens after pregnancy and childbirth and is a normal bodily function rather than a "medical condition related to pregnancy or childbirth."¹⁴⁶

140. *Id.*

141. The Family and Medical Leave Act would not prohibit discrimination on the basis of breastfeeding or accommodation to enable breastfeeding unless the discrimination or accommodation involved a leave request. The Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 10 (codified as amended at 29 U.S.C. § 2612 (Supp. V 2006)). The Americans with Disabilities Act likely does not reach the issue, either, because breastfeeding itself is not necessarily an impairment of a major life activity, although complications like mastitis, a breast infection, might rise to that level. Nicole Kennedy Orozco, Note, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 1281, 1298 n.117 (2010).

142. See Brief of Plaintiff-Appellant at 7-8, *EEOC v. Houston Funding Ltd.*, II, 2013 WL 2360114, at *4 (5th Cir. May 30, 2013)(finding "the EEOC has stated a *prima facie* case of sex discrimination with a showing that Houston Funding fired Venters because she was lactating and wanted to express milk at work.").

143. See Orozco, *supra* note 141, at 1303-07.

144. *Geduldig v. Aiello*, 417 U.S. 484, 494-497 (1974).

145. See Orozco, *supra* note 141, at 1306.

146. See *id.*; see also *Puente v. Ridge*, No. M-04-267, 2005 U.S. Dist. LEXIS 46624, at *11-12 (S.D. Tex. July 6, 2005); *Martinez v. NBC Inc.*, 49 F. Supp. 2d 305, 309, 311 (S.D.N.Y. 1999); *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 U.S. Dist. LEXIS 7680, at *30

Although discrimination claims have not been wholly successful under Title VII, some employees have protections under state law. Six states and the District of Columbia explicitly prohibit discrimination against women who breastfeed or who are lactating.¹⁴⁷ In addition, twenty-three states plus the District of Columbia and Puerto Rico either require employers to provide reasonable breaks and a clean, private space to express milk for women who are lactating or prohibit discrimination against women who use their breaks for this purpose.¹⁴⁸

Federal law does provide some explicit support for nursing mothers. The Patient Protection and Affordable Care Act amended the Fair Labor Standards Act to require employers to provide a nursing mother who is not exempt from the overtime provisions reasonable break time and facilities to express milk for one year after her child's birth.¹⁴⁹ Employers with fewer than fifty employees do not have to comply if compliance would be significantly difficult or expensive considering the size, financial resources, nature, or structure of the

(D. Or. Apr. 9, 1999); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990).

147. COLO. REV. STAT. § 8-13.5-104 (2008 & Supp. 2012); CONN. GEN. STAT. ANN. § 53-34b (West 2011); D.C. CODE § 2-1402.82 (2011 & Supp. 2012); HAW. REV. STAT. § 378-2 (2011); ME. REV. STAT. ANN. tit. 26, § 604 (2009); MONT. CODE ANN. § 39-2-215 (2011); N.Y. LAB. LAW § 206-c (McKinney 2011); *see also* Orozco, *supra* note 141, at 1296-97 (noting that while some states have a simple prohibition on discrimination against mothers who express milk in the workplace, other states have more specific and extensive provisions such as prohibiting adverse employment action and the like).

148. These jurisdictions and the relevant statutes include: Arkansas (ARK. CODE ANN. § 11-5-116 (2009)); California (CAL. LAB. CODE § 1030 (West 2011)); Colorado (COLO. REV. STAT. §§ 8-13.5-101-104 (2008 & Supp. 2012)); Connecticut (CONN. GEN. STAT. ANN. § 31-40w (West 2012)); District of Columbia (D.C. CODE § 2-1402.82 (2011)); Georgia (GA. CODE ANN. § 34-1-6 (2008)); Hawaii (HAW. REV. STAT. §§ 367-3, 378-2 (2011)); Illinois (820 ILL. COMP. STAT. 260 (2011)); Indiana (IND. CODE §§ 5-10-6-2 (public employers only), 22-2-14-2 (2008)); Maine (ME. REV. STAT. ANN. tit. 26, § 604 (2009)); Minnesota (MINN. STAT. § 181.939 (2010)); Mississippi (MISS. CODE ANN. § 71-1-55 (2006)); Montana (MONT. CODE ANN. § 39-2-215 (2011)); New Mexico (N.M. STAT. ANN. § 28-20-2 (West 2007)); New York (N.Y. LAB. LAW § 206-c (McKinney 2011)); Oklahoma (OKLA. STAT. tit. 40, § 435 (2010)); Oregon (OR. REV. STAT. §653.077 (2007)); Puerto Rico (P.R. LAWS ANN. tit. 3, § 1466 (3) (2007), P.R. LAWS ANN. tit. 29, § 478a (2009)); Rhode Island (R.I. GEN. LAWS ANN. § 23-13.2-1 (2008)); Tennessee (TENN. CODE ANN. § 50-1-305 (2008)); Vermont (VT. STAT. ANN. tit. 21, § 305 (2008 & Supp. 2012)). Three states, North Dakota, Texas, and Washington, do not mandate leave or prohibit discrimination by employers, but instead allow employers to market themselves as infant or mother friendly if they provide breaks and facilities or other policies to support lactating employees. N.D. CENT. CODE § 23-12-17 (2012); TEX. HEALTH & SAFETY CODE ANN. § 165.003 (West 2011 & Supp. 2012); WASH. REV. CODE ANN. § 43.70.640 (West 2011).

149. 29 U.S.C. § 207(r) (2006 & Supp. V 2007-2012). The leave time need not be paid unless an employer provides pay for other similar breaks. 29 U.S.C. § 207(r)(2) (2006 & Supp. V. 2007-2012); WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #73: BREAK TIME FOR NURSING MOTHERS UNDER THE FLSA, (Dec. 2010), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf>.

business.¹⁵⁰ The Department of Labor's Wage and Hour Division enforces this statute, and while employees are protected by the FLSA against retaliation, it does not appear that they have a private cause of action to enforce the provision.¹⁵¹

C. Reproductive Health, Title VII, and the Patient Protection and Affordable Care Act's Contraceptive Mandate

As the discussion surrounding pregnancy and caregiving shows, issues related to women's reproductive systems are not always seen as issues equality theory can address because women and men are viewed as differently situated. For some time, there have been questions about whether Title VII requires employers who provided prescription coverage as part of their health insurance plans to provide coverage for contraception for women.¹⁵² Those questions arose with new vigor with the enactment of the Affordable Care Act's provisions which mandated coverage of women's reproductive health and the Health and Human Services Secretary's determination that prescription contraception had to be included as part of that coverage.¹⁵³

The only highly effective contraception that women alone can

150. 29 U.S.C. § 207(r)(3)(2006 & Supp. V 2007-2012).

151. See 29 U.S.C. §§ 211, 217 (2012)(concerning enforcement by the Wage and Hour Division). The FLSA provides for a cause of action to recover unpaid compensation, but since there is no compensation or other penalty necessarily connected with the leave time, it is not clear that this action will lie for a violation of the break time provision. See 29 U.S.C. § 216(b); Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80,073, 80,078 (Dep't of Labor Dec. 21, 2010); see also *Salz v. Casey's Mktg. Co.*, No. 11-CV-3055-DEO, 2012 WL 2952998, at *3 (N.D. Iowa July 19, 2012).

152. See generally Allison L. Cantrell, Comment, *Weaving Prescription Benefit Plans into the Birds and the Bees Talk: How an Employer-Provided Insurance Plan that Denies Coverage for Prescription Contraception is Sex Discrimination Under Title VII as Amended by the ADA*, 39 CUMB. L. REV. 239 (2009).

153. According to an article in the *New York Times*, dozens of suits have been filed challenging the mandate on the grounds that contraception generally violates the employer's freedom of conscience, or coverage for contraception considered to be an abortifacient violates the employer's freedom of conscience. Ethan Bronner, *A Flood of Suits on the Coverage of Birth Control*, N.Y. TIMES, Jan. 27, 2013, at A1. The courts are split on whether the coverage mandate violates the Religious Freedom Restoration Act. *E.g.*, *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (granting preliminary injunction because mandate unlikely to be narrowly tailored to further a compelling governmental interest); *Hobby Lobby Stores, Inc., v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) (holding that plaintiff's rights to conscience were not substantially burdened upon by the mandate); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012) (granting a stay pending appeal of the district court's holding that the mandate did not violate RFRA, thus granting temporary relief from the HHS mandate).

control is only available by prescription.¹⁵⁴ Thus, refusing to cover contraception when other drugs are covered affects women in a way unique to their sex, just like pregnancy. The ability to become pregnant or potential pregnancy may be a medical condition related to pregnancy within the meaning of Title VII,¹⁵⁵ but courts are split on the issue.¹⁵⁶

Infertility may be thought to fall even more clearly into the “medical condition related to pregnancy” language, but the courts have generally held that denial of insurance coverage for infertility treatment is not a violation of Title VII.¹⁵⁷ Both men and women can suffer from fertility problems, and the treatment may at times be the same regardless of whether male or female infertility causes an inability to conceive.¹⁵⁸ Where an adverse employment action is taken against a female employee because of sex-specific infertility treatment, however, the employer has likely violated Title VII.¹⁵⁹ In that situation, the employer is motivated by a medical condition related to pregnancy for that particular woman.

D. The Labor and Employee Rights Legislative Agenda for Reform

When President Obama first took office, the labor and employment community foresaw big reforms in employment and labor law. On the agenda was legislation to make organizing and collective bargaining easier,¹⁶⁰ proposals to extend antidiscrimination protection to sexual orientation and identity¹⁶¹ and to extend family and medical leave to

154. See OFFICE OF WOMEN'S HEALTH, FED. DRUG ADMIN., BIRTH CONTROL GUIDE (Aug. 2012), [available at](http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf) <http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf>. Spermicide is available over the counter, but it has a 28 percent failure rate. *Id.* at 9. Relatively recently, two new contraceptives have been approved for use without a prescription. Female condoms are available without a prescription, but they have a 21 percent failure rate. *Id.* at 5. Plan B, with a 13% failure rate, also prevents ovulation and may prevent implantation of an embryo after unprotected sex are available over the counter. *Id.* at 16. None of these are as effective as birth control pills taken daily, estrogen and progestin delivered via patch or cervical ring, shots or implanted rods that release progestin, or Intra-Uterine Devices. *See id.* at 10-20.

155. See *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 198-99 (1991) (holding that the potential to become pregnant falls within the language of the Pregnancy Discrimination Act).

156. See *Cantrell*, *supra* note 152 at 244-245 (discussing the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)).

157. See, e.g., *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003).

158. See *id.* at 347; *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996).

159. See *Hall v. Nalco*, 534 F.3d 644, 647-48 (7th Cir. 2008).

160. See Employee Free Choice Act, H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

161. See Employment Non-Discrimination Act, S. 1584, 111th Cong. (2009); H.R. 3017,

same sex partners and other family members,¹⁶² various other extensions of family and medical leave,¹⁶³ and mandated breaks and facilities plus anti-discrimination protections for lactating women.¹⁶⁴

What was enacted was more modest and narrower. We saw extensions of leave provisions but only to members of the military and their families.¹⁶⁵ Health care reform mandated breaks and facilities for lactating women to express milk, but no legislation provided a real increase in funding to support childcare.¹⁶⁶ The Executive Branch also

111th Cong. (2009).

162. See Family and Medical Leave Inclusion Act, H.R. 2132, 111th Cong. (2009).

163. Some bills extended coverage to more people or for more reasons. See Military Family Leave Act of 2009, H.R. 3257, 111th Cong. (2009); S. 1441, 111th Cong. (2009) (providing two weeks of leave each year for each family member (spouse, child or parent) of the employee who is in the military and either receives notification of an impending call or order to active duty, or who is deployed in connection with a contingency operation); Family and Medical Leave Enhancement Act, H.R. 824, 111th Cong. (2009); H.R. 1440, 112th Cong. (2011) (expanding FMLA to allow leave for child's educational and extracurricular activities, to attend to routine family medical needs and to assist elderly relatives, to cover employers who employ 25 or more employees, to permit substitution of accrued vacation, personal or sick leave for FMLA leave, and to require seven days' notice or "as much notice as is practicable" in order to use the FMLA leave); Domestic Violence Leave Act, H.R. 2515, 111th Cong. (2009), H.R. 3151, 112th Cong. (2011) (extending FMLA to allow leave to address domestic violence, sexual assault or stalking and their effects).

Other bills would have provided for paid leave. See Healthy Families Act, H.R. 2460, 111th Cong. (2009); S. 1152, 111th Cong. (2009); H.R. 1876, 112th Cong. (2011); S. 984, 112th Cong. (2011) (requiring employers with at least fifteen employees who work at least thirty hours a week to provide up to seven days of paid sick leave for care of family members and other individuals "whose close association with the employee is the equivalent of a family relationship"); Pandemic Protection for Workers, Families, and Businesses Act, H.R. 4092, 111th Cong. (2009); S. 2790, 111th Cong. (2009) (providing for seven days of paid sick time, pro rata for part time workers, for care related to a contagious illness); Emergency Influenza Containment Act, H.R. 3991, 111th Cong. (2009) (providing five days of paid leave for employees directed to stay home by employer because of contagious disease and prohibiting retaliation); Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. (2009) (creating a federal insurance benefits fund administered by the Secretary of Labor and funded equally by employees and employers, each paying .2 percent of annual earnings to the fund to provide employees with twelve weeks of paid family and medical leave).

Still other legislative proposals would have combined the two. Balancing Act, H.R. 3047, 111th Cong. (2009); H.R. 2346, 112th Cong. (2011) (expanding coverage to smaller employers, providing paid leave, expanding reasons for taking leave, expanding relationships of people leave can be taken for, expanding child care and school assistance programs, and creating a pilot program to encourage teleworking).

164. See The Breastfeeding Promotion Act, S. 1244, 111th Cong. (2009); H.R. 2819, 111th Cong. (2009).

165. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 565, 123 Stat. 2190, 2309 (2009). For a summary of the leave provisions, see GERALD MAYER, CONG. RESEARCH SERV., NO. R42758, THE FAMILY AND MEDICAL LEAVE ACT (FMLA): AN OVERVIEW (2012), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1965&context=key_workplace.

166. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 577-78

created a task force focused on raising the living and working standards for middle class families.¹⁶⁷ President Obama has been active with his executive order powers, enhancing data collection on women conducted by the White House Council on Women and Girls,¹⁶⁸ itself a creation of the President.¹⁶⁹

IV. CONCLUSION: EQUALITY AND DIVERSITY, A WAY FORWARD

This brief history, even with all of the legislation and court decisions, shows that we have not progressed very far in addressing inequality in contexts where we think people are different. We have difficulty critically assessing whether the standard against which we measure is something we should retain. We continue to define the workplace according to idealized male norms, norms that posit the ideal worker as able to work for long consecutive hours, with little notice, never needing leave, able to perform the same tasks until retirement. It doesn't matter that actual men can rarely meet this standard.

Perhaps the way forward is to work on two fronts, one social and one legal. On the social front, keep working to redefine gender roles and to recast the debates to not make one sex (or class or race or ability level) the norm against which an ideal is measured. The way that the debate over contraceptive coverage in the health reform legislation was reframed provides a good example. Contraception, abortion, and forced sterilization have, since the 1970s, been framed in rights terms.¹⁷⁰ Scholars and activists have sometimes used an equality framework, but that, too, has tended to focus on rights.¹⁷¹ Activists have at least tried to

(2010) (codified as amended at 29 U.S.C. § 207(r) (Supp. II 2010)).

167. See Memorandum for the Heads of Executive Departments and Agencies, White House Task Force on Middle-Class Working Families, 74 Fed. Reg. 5979 (Feb. 3, 2009) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2009-02-03/pdf/E9-2436.pdf> (defining the mission to make recommendations on how to expand education and lifelong training, improve work family balance, restore labor standards, protect incomes, and protect retirement security).

168. Memorandum for the Heads of Executive Departments and Agencies, Enhanced Collection of Relevant Data and Statistics Relating to Women, 76 Fed. Reg. 12,823 (Mar. 9, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-03-09/pdf/2011-5568.pdf>; U.S. DEP'T OF COMMERCE & EXEC. OFFICE OF THE PRESIDENT, WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING (2011), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf.

169. Exec. Order No. 13,506, 74 Fed. Reg. 11,271 (Mar. 16, 2009), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2009-03-16/pdf/E9-5802.pdf>.

170. See, e.g., Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (framing mandatory pregnancy leave as an issue of substantive due process and fundamental rights).

171. See Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329 (2010) (discussing the benefits and pitfalls of equality

reframe the issue in the healthcare reform context as a matter of women's health.¹⁷² By defining women's health to include control over reproduction, choosing to have children or not to have children, controlling the number and spacing of those children, the activists have had some success of getting beyond the problem of clashing rights. And because healthcare reform created larger pools, spreading risk among larger groups, it becomes easier to focus on the group in the aggregate (both men and women) rather than particular subsets of the larger group.

The second front is the legal front. On the legal front, reform advocates should focus less on the coercive model of the anti-discrimination norm, less on rights, and look to other models of improving women's lives, models that reach across identity categories. Income security connected with leave, possibly funded by a payroll tax system or a deferred compensation system, would help employees with caregiving responsibilities in the same way that disability insurance provides some help for employees who can't work because of their own serious health problems. The availability of paid leave might allow more men to take leave than those that currently do, speeding up the process of breaking the link between gender and caregiving. It would also better support single parents, most of whom are women, who may be in particular danger of sliding into poverty if forced to stop working, and it may better reach low wage workers.

As the review of recent legislation and developments in the states shows, we have already stepped partially down these paths. I think we should keep going.

arguments about reproductive issues and proposing a relational model to reframe the liberty issues).

172. *Id.* at 339.

