

CHAPTER INTRODUCTION: CAREGIVING 2014

RACHEL ARNOW-RICHMAN[†]

Intransigent. Intractable. Entrenched. Ineradicable. These are some of the adjectives that feminist scholars have used to describe the persistent problem of achieving work/family balance for caregivers. Why such strong language? Since Title VII's enactment in 1964, we have seen additional legislative action in this area, including congressional passage of the Pregnancy Discrimination Act in 1978¹ and the Family and Medical Leave Act in 1990,² as well as various state statutes, several of which provide greater protection than federal law. We have also seen the development of novel litigation strategies, such as the theory of family responsibilities discrimination³ and discriminatory failure to accommodate,⁴ which have been embraced by the Equal Employment Opportunity Commission (EEOC)⁵ and enjoyed some success in court. And yet, the inability to achieve work/family balance remains a significant bar to realizing substantive gender equality today, in 2014, much as it has for decades. Why?

The scholars participating at the "Caregiving 2014" Panel at the *Revisiting Sex* Symposium posed this question and wrestled with its implications. Professor Michael Selmi launched the discussion with a retrospective, citing the minimal progress we have made in job segregation, pay equity, and division of household labor. Professor Selmi suggested that a reason for this may be the absence of a common goal. As a society we remain deeply ambivalent about caregiver participation in the workforce, particularly with regard to working mothers. What, then, should equality for caregivers look like? Absent agreement on this question, the only consensus point within the work-/family debate is the desire to protect caregivers' individual choices and insulate them from penalty. Pro-

[†] Professor of Law and Workplace Law Program Director, University of Denver Sturm College of Law; B.A., Rutgers University; J.D. Harvard Law School; L.L.M., Temple Law School. Special thanks to my research assistant Sarah Bryant, the caregiving panel participants, the Denver Law faculty and community members who helped to plan and execute this event, and to all of the editors at the Denver Law Review for their hard work and commitment.

1. 42 U.S.C. § 2000e(k) (2012).

2. 29 U.S.C. § 2601 (2012).

3. See Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1313 (2008).

4. See Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1105 (2010).

5. See TITLE VII/EPA/ADEA DIV., OFFICE OF LEGAL COUNSEL, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, in 2 EEOC COMPLIANCE MANUAL § 615 (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf>.

fessor Selmi is skeptical that such a broad principle can serve as a guiding framework for meaningful reform.

Professor Nicole Porter suggested that the problem lies in the structure of work itself and our unwillingness to interrogate existing workplace norms. Drawing on case law under the Americans with Disabilities Act (ADA),⁶ Professor Porter demonstrated how courts defer to employers' judgment about the way work time is organized. Managerial choices such as the use of rotating shifts, the preference for full-time workers, and the strict enforcement of attendance and leave policies are treated as essential functions of the job from which employers may not be compelled to deviate. In the face of these entrenched expectations, there is little hope that new legislation or legal strategies aimed at enhancing caregiver protection will be successful in court. Rather, progress in the work/family arena depends first and foremost on dismantling workplace norms. Strategies that attack these norms directly—such as mandating paid time off, incenting work-spreading through wage and hour reform, and requiring audits and disclosure of flexible work practices—are a first step.

Professor Kyle Velte's contribution focused on employer retaliation against second-time parents, or "second child bias" (SCB). In cases of SCB, mothers report no discrimination in the workplace after the birth of their first child, but experience marginalization, loss of work, negative performance evaluations, and other adverse consequences after the birth of a second child. Professor Velte theorized a basis for SCB—the belief that a mother fulfills her "right" to combine market work and parenting when she has a single child—and speculated that employers' instinct to suppress stereotype diminishes after a mother has a second. Naming SCB and framing cases around the theory can serve an expressive function as well as a strategic one, according to Professor Velte. Such claims advance a stereotype theory of family responsibility discrimination (FRD) and can potentially steer the law away from reliance on comparator evidence, a requirement that has been a death knell for many FRD plaintiffs.

Professor Laura Kessler closed the panel on a hopeful note, highlighting the numerous incremental but collectively significant steps in the development of gender discrimination law since Title VII's enactment. She reminded us that the law's role in effecting social change is often invisible to those who experience its benefits and urged caution in discounting the possibility of a continued role for antidiscrimination law in effecting greater gender equality. Rather than turning to universalist reforms, Professor Kessler suggested that scholars and advocates incorporate the anti-essentialist critique of the discrimination framework in reforming discrimination law itself. We might start by breaking down doc-

6. 42 U.S.C. § 12101 (2012).

trinal walls—both within Title VII and across antidiscrimination statutes—that currently impede plaintiffs in obtaining relief for intersectional harms like caregiver discrimination.

In this way, the panel both acknowledged Title VII’s limitations and celebrated its successes. It questioned the viability of further reform while reaffirming the importance of Title VII to the project of securing full equality for working women. Pessimism is the academic’s luxury; the challenge lies in finding pathways for progress using the legal tools that we have and those we can hope to secure. In introducing the panel at the Symposium, I jested that we should call our program “Title VII: Fifty and Looks It.” Reality, however, is far more complicated. Beauty is in the eye of the beholder.