Caregivers as a Class: Considering Antidiscrimination Protections for Caregivers

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Unpaid caregiving is an enormous element of life for millions of Americans. But caregivers too often suffer discrimination in the paid workplace due to the real or perceived demands of their care work outside of it. Despite this inequality, employment antidiscrimination statutes do not protect caregivers explicitly. Instead, caregivers must demonstrate a connection to at least one expressly protected class to access antidiscrimination protection, usually by linking discrimination based on caregiving (unprotected) with discrimination based on sex (protected). As a result, equal employment opportunity (EEO) laws implicitly and explicitly reinforce the connection between being a woman in the workplace and being a caregiver outside of it. This state of affairs is both a driver and a manifestation of sex inequality because unpaid caregivers in this country are mostly women. This Comment offers a critical feminist analysis of how, why, and what could be done about it.

Specifically, this Comment advocates for explicit protections for caregivers as a class to help disentangle sex from caregiving and thereby help address sex inequality in the United States. Part I discusses the landscape of federal EEO laws and how it is insufficient for caregivers. Part II dives into the avenues that caregivers currently most often use to gain protection under the law. Part III showcases how broad and explicit protection for caregivers as caregivers can be successful.

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INTRODUCTION

"Over the course of our lives, all of us will both receive and give care."[1] But caregivers[2] in the United States are "crying for help"[3] as the cost of childcare outpaces inflation,[4] the senior population

1. *Supporting Home and Community Based Care Advances Gender Justice*, NAT'L WOMEN'S L. CTR. (Nov. 1, 2024), https://nwlc.org/resource/supporting-home-and-community-based-care-advances-gender-justice/ [https://perma.cc/SXL2-ML27].

2. Caregivers are "child care workers and direct care workers, including domestic workers [who] provide life-sustaining care that allows families and communities to thrive." Laura Valle Gutierrez et. al., Century Found., Care Matters: A 2024 Report Card for Policies in the States 10 (2024), https://production-tcf.imgix.net/app/uploads/2024/03/26155617/Care-Matters-A-2024-Report-Card.pdf [https://perma.cc/3MD4-AAK5].

3. Sonia Marton, *Prop 1 Is About More than Abortion—It Will Help Caregivers Across New York State*, MS. MAG. (Oct. 31, 2024), https://msmagazine.com/2024/10/31/prop-1-new-york-abortion-caregivers-era/ [https://perma.cc/XMP9-DRSE].

4. *See* Emily Peck, *Why Child Care Costs Are Soaring*, AXIOS (Apr. 16, 2024) (on file with the *Columbia Journal of Law & Social Problems*), https://www.axios.com/2024/04/16/child-care-costs.

keeps growing,[5] and paid care workers are fewer and farther between.[6] As a result, unpaid caregiving, including childcare, eldercare, and care for adults with disabilities, is a "daily reality" for millions of Americans.[7] Caregiving responsibilities pose a particular challenge for those with paid jobs outside the home, as caregivers often suffer discrimination at work[8] due to the real or perceived demands of their care work outside of it.[9]

This "caregiving conundrum" is not sex-neutral;[10] it is a driver and a manifestation of sex inequality[11] because most unpaid caregivers in the United States are women.[12] Women perform two-thirds of all unpaid care work,[13] including both the responsibilities

5. *See* Kristie Wilder & Paul Mackun, *While Number of People Age 65 and Older Increased in Almost All Metro Areas, Young Population Declined in Many Metro Areas from 2020 to 2023*, UNITED STATES CENSUS BUREAU (June 27, 2024), https://www.census.gov/library/stories/2024/06/metro-areas-population-age.html [https://perma.cc/NP4Y-RDX4].

6. *See Amidst Caregiving Crisis, Casey, Kaine, Baldwin Introduce Bill to Revitalize Nation's Long-Term Care Workforce*, U.S. S. SPECIAL COMM. ON AGING (Apr. 15, 2024), https://www.aging.senate.gov/press-releases/amidst-caregiving-crisis-casey-kaine-baldwin-introduce-bill-to-revitalize-nations-long-term-care-workforce [https://perma.cc/6Y6U-3P4H]; *see also* Vanessa G. Sánchez & Daniel Chang, *Immigration Crackdowns Disrupt Caregivers*, NBC NEWS (Apr. 3 2025, 9:57 AM), https://www.nbcnews.com/health/health-news/trump-immigration-crackdowns-threaten-health-caregiving-us-families-rcna199383 [https://perma.cc/U493-LE47] (discussing how "[t]he Trump administration's anti-immigration policies threaten to cut a key source of labor for nursing facilities and home health agencies that rely on foreign-born workers").

7. *Protecting Caregivers from Workplace Discrimination*, NAT'L WOMEN'S L. CTR. (Mar. 22, 2023), https://nwlc.org/wp-content/uploads/2023/03/NWLC_Caregivers-factsheet.pdf [https://perma.cc/6GR2-DS7D].

8. This Comment refers to discrimination and workplace discrimination interchangeably.

9. *See Protecting Caregivers*, *supra* note 7.

10. Madeleine Gyory, *Legislating Flexibility in the Post-Pandemic Workplace*, 69 VILL. L. REV. 209, 219 (2024) (citing Nicole Buonocore Porter's coinage of "caregiving conundrum" and Catharine MacKinnon discussing the underlying sexism of norms that generally assume the centrality of men).

11. This Comment uses gender and sex interchangeably and proceeds with a binary conception of sex (and related pronouns), with acknowledgement of how fluid both categories can be. For a thoughtful discussion of how to complicate the binary sex framework and engage with distinctions between sex and gender in legal literature and practice, see Joshua Kipps, *Bear-stock: Bear Creek's Errors and Bostock's Implications on Bisexuals, Bathrooms, and Beyond*, 58 COLUM. J.L. & SOC. PROBS 347, 349 n.4, 350 n.8 (2025).

12. *See* Katherine Gallagher Robbins & Jessica Mason, *Americans' Unpaid Caregiving Is Worth More than $1 Trillion Annually—and Women Are Doing Two-Thirds of the Work*, NAT'L P'SHIP FOR WOMEN & FAMILIES (June 27, 2024), https://nationalpartnership.org/americans-unpaid-caregiving-worth-1-trillion-annually-women-two-thirds-work/ [https://perma.cc/DCJ3-ERZP].

13. *See id.*; *see also The Business Case for Child Care*, MARSHALL PLAN FOR MOMS 6 (2022), https://marshallplanformoms.com/childcare-report/ [https://perma.cc/TR6F-8NXR] (noting that some studies have suggested that 75% of women self-report as their family's primary caregiver).

of motherhood[14] and the responsibilities of caring for aging parents.[15] At the same time, women make up roughly half of the workforce,[16] often serving as their families' sole or primary breadwinners.[17] Conflict between the demands of women's first and "second shift"[18] has been a feature of female life since women entered the paid workforce in significant numbers in the latter part of the 20th century.[19] And workplace discrimination in consequence of this conflict remains a concomitant constant.[20]

The disproportionate caregiving burden on women, moreover, has a significant impact on their social and economic status. For example, women are forced into less compensated (in terms of wages and non-salary benefits) and less stable roles (in terms of job changes and losses) in order to facilitate their caregiving

14. One way to measure the toll that motherhood takes on women workers is through the wage gap. Indeed, it is clear that "women are financially penalized for having children. A study by Census Bureau researchers found that between two years before the birth of a couple's first child and a year after, the earnings gap between opposite-sex spouses doubles . . . This is referred to as the 'Motherhood Penalty.'" *The Motherhood Penalty*, AM. ASS'N UNIV. WOMEN, https://www.aauw.org/issues/equity/motherhood/ [https://perma.cc/M379-R2Y2].

15. *See* Ali Rogin et al., *As America's Population Ages, Women Shoulder the Burden as Primary Caregivers*, PBS NEWS (Mar. 30, 2024) (on file with the *Columbia Journal of Law & Social Problems*), https://www.pbs.org/newshour/show/as-americas-population-ages-women-shoulder-the-burden-as-primary-caregivers.

16. *See* Stephanie Ferguson Melhorn & Isabella Lucy, *Data Deep Dive: Women in the Workforce*, U.S. CHAMBER OF COM. (June 26, 2024), https://www.uschamber.com/workforce/data-deep-dive-a-decline-of-women-in-the-workforce [https://perma.cc/HS9H-T6NL].

17. *See* Gyory, *supra* note 10, at 218.

18. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 401 n.165 (2001) ("The 'second shift,' first identified as such by Arlie Hochschild in her book by the same name, refers to the housework and caregiving responsibilities for which women still remain largely responsible, despite the dramatic increase in their labor force participation.").

19. *Compare id.* (discussing the decades between the passage of Title VII and the time the article was published in 2001), *with* Grace Rehaut, *The Caregiver Conundrum*, 75 STAN. L. REV. 715, 725–27 (2023) (discussing similar statistics from more recent years and "The Significant and Sweeping Impacts of Caregiver Mistreatment," as written in 2023).

20. *See* MARSHALL PLAN FOR MOMS, *supra* note 13, at 9 (noting that women workers of color are particularly affected: "34% of Black primary caregivers felt that they have been penalized at work because of their caregiving responsibility, more than respondents from other racial or ethnic backgrounds").

responsibilities.[21] This "occupational segregation"[22] furthers women's economic inequality, which leads to the "feminization of poverty"[23] and other harms like the inability to leave an abusive marriage.[24] Especially insidious, the imbalance of care work across gender lines perpetuates an imbalance of care work across racial lines, as economically privileged (often white) women outsource their family's care work to economically underprivileged women (often women of color).[25]

Despite the intimate relationship between caregiving responsibilities and sexual and racial discrimination, federal employment antidiscrimination statutes—also known as Equal Employment Opportunity (EEO) statutes—do not explicitly protect caregivers.[26] Caregiver discrimination,[27] unlike

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21. *See* Kessler, *supra* note 18 at 386–87; *see also* Wendy Chun-Hoon, *How the U.S. Department of Labor's Women's Bureau Is Disrupting Occupational Segregation*, AM. BAR ASS'N.: HUM. RTS. MAG. (Oct. 31, 2023) (on file with the *Columbia Journal of Law & Social Problems*), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/labor-and-employment-rights/dol-womens-bureau-disrupting-occupational-segregation/ (arguing that this is especially true in a country in which there is no federal paid leave or access to guaranteed affordable childcare).

22. Marina Zhavoronkova et al., *Occupational Segregation in America*, CTR. FOR AM. PROGRESS (Mar. 29, 2022) (on file with the *Columbia Journal of Law & Social Problems*), https://www.americanprogress.org/article/occupational-segregation-in-america/ ("Occupational segregation occurs when one demographic group is overrepresented or underrepresented in a certain job category . . . . The causes of occupational segregation include societal biases about particular demographics of workers that are embedded in public and private systems, in policy choices, and in operations across education, training, and work . . . . Simply put, jobs that pay higher wages disproportionately employ white men, [e.g., physicians] while lower paid jobs disproportionately employ women, particularly women of color [e.g., childcare workers].").

23. Diana M. Pearce, *The Feminization of Poverty: A Second Look*, INST. FOR WOMEN'S POL'Y RSCH 2 (1989), https://iwpr.org/wp-content/uploads/2021/01/D401.pdf [https://perma.cc/9HUX-LM83] (describing "feminization of poverty" as the fact that "women have always experienced a disproportionate share of poverty" and "not only is gender [ ] correlated with poverty, but that gender is an increasingly important factor" in determining poverty).

24. *See* Kessler, *supra* note 18, at 387–88 (discussing women's reduced ability to leave abusive marriages as a result of their economic standing).

25. *See id.* at 388. Even though Kessler's article is almost 25 years old, the consequences of caregiving inequity remain quite consistent today. *See, e.g.*, Diana Boesch & Katie Hamm, *Valuing Women's Caregiving During and After the Coronavirus Crisis*, CTR. FOR AM. PROGRESS (June 2020), https://www.americanprogress.org/article/valuing-womens-caregiving-coronavirus-crisis/ [https://perma.cc/E736-GPQZ].

26. *See Protecting Caregivers*, *supra* note 7. For further discussion of this issue, see *infra* Part II.

27. Defined as "employment discrimination against working people based on their caregiving responsibilities," which can include discrimination such as refusing to hire an individual because of their disclosure of their caregiving responsibilities. *Protecting Caregivers*, *supra* note 7.

discrimination against other vulnerable groups,[28] is therefore not prohibited by federal law. Instead, caregivers must seek protection against discrimination for their caregiving responsibilities by linking those responsibilities with their sex under EEO statutes.

EEO statutory prohibitions on sex discrimination are caregivers' primary avenues for seeking legal protections at the federal level.[29] The need to seek sex-based protection for caregiving discrimination under these statutes, however, creates a wanting legal landscape that reinforces "the existing paradigm"[30] in which being a woman in the workplace is implicitly and explicitly intertwined with being a caregiver outside of it. To be sure, EEO laws have largely "facilitated women's entrance into . . . the existing androcentric structure of the workplace"[31] around the country. But the approach of deriving caregiver discrimination protection via sex discrimination protection, which has necessarily arisen from the current framework, furthers the connection between caregivers and women to the end of harming both groups. In a moment in which the federal government insists on "Defending Women From Gender Ideology Extremism,"[32] ensuring that law distances women from traditional gender role "extremism" is all the more critical. Rather than "fundamentally . . . [re]enforcing" the connection between sex and

28. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"); s*ee also* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483 (2011) (discussing the alterability of different traits and antidiscrimination laws' relative protection of them). It is worth noting that this Comment does not focus on the fact that characteristics such as race, color, religion, sex, or national origin are considered immutable, and one's status as a caregiver more debatably so is not. For further discussion of this issue, see *infra* Part III.

29. *See Protecting Caregivers*, *supra* note 7.

30. Kessler, *supra* note 18, at 376.

31. *Id.* at 401.

32. Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025) (articulating the Trump Administration's position that "[e]fforts to eradicate the biological reality of sex fundamentally attack women by depriving them of their dignity, safety, and wellbeing. The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system . . . Under my direction, the Executive Branch will enforce all sex-protective laws").

caregiving, explicit protections for caregivers as a class[33] would help disentangle sex from caregiving in law and in fact.[34]

Moreover, because the inequitable distribution of caregiving responsibilities and its consequences are both a symptom and a cause of sex inequality,[35] antidiscrimination protection for caregivers as caregivers would also help address sex inequality[36] in the United States in at least two ways. First, caregiver-specific protections would support male caregivers in the workplace, thereby facilitating a much-needed redistribution of caregiving responsibilities. Second, such protections would help dismantle the sexist conception that women are caregivers and caregivers are women. Protections for caregivers as a class would provide caregivers antidiscrimination protection full stop, without bringing sex into the mix.

This Comment proceeds in three stages. Part I discusses the current landscape of EEO laws and details how they fail to provide full protection for caregivers. Part II explores two primary avenues for legal protection currently available to caregivers: the sex-plus and sex stereotyping theories of Title VII discrimination. Part III argues that New York City's Human Rights Law[37] demonstrates the viability of expansive and explicit protection for caregivers and offers suggestions for the future.

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33. The exact parameters of such a class would, of course, need to be defined through statutory interpretation but would ideally include anyone who provides care for any family member. For a helpful overview of what such a class may encompass, see *Laws Protecting Family Caregivers at Work*, CTR. FOR WORKLIFE L., U.C. L. S.F., https://worklifelaw.org/wp-content/uploads/2022/11/FRD-Law-Table.pdf [https://perma.cc/EYG5-B73W]; *see also infra* Part III (discussing New York City's Human Rights Law and the Center for Worklife Law's model legislation as laudable examples).

34. In addition, these protections would provide immediate and much-needed support for millions of American workers. *See Family Caregiver Discrimination*, CTR. FOR WORKLIFE LAW, U.C. L. S.F., https://worklifelaw.org/projects/family-caregiver-discrimination/ [https://perma.cc/VB54-YVUM].

35. *See* Zhavoronkova et al., *supra* note 22 (articulating the vicious cycle in which discrimination "cause[s] and [ ] effect[s]" occupational segregation, and how occupational segregation, a major consequence of the inequitable distribution of caregiving responsibilities, reflects and drives sex inequality).

36. In contrast to the Trump administration's dubious framing of women's issues, *see supra* note 32, sex inequality is itself "Gender [ ] Extremism" by another name and the type of "[e]xtremism" the federal government should prioritize addressing.

37. N.Y.C. ADMIN. CODE tit. 8, §§ 8-101–8-703. Chapter 1 of Title 8 covers the "Commission on Human Rights," and §§ 8-102 and 8-107 specifically cover related definitions and unlawful discriminatory practices, respectively.

I. CURRENT EEO STATUTORY PROTECTIONS FOR CAREGIVERS

While there are no explicit federal antidiscrimination protections for caregivers in the workplace, several laws afford some caregivers antidiscrimination protection.[38] This Part considers five federal statutes caregivers can use to protect themselves from workplace discrimination. Part II then offers a particular focus on one of these statutes: Title VII.

A. THE EQUAL PAY ACT

The Equal Pay Act of 1963 (EPA)[39] "prohibits wage discrimination on the basis of sex"[40] and can be used to address one of the primary effects of caregiver discrimination: the gender wage gap.[41] The EPA, however, ultimately fails caregivers for two reasons. First, it requires connecting caregiving responsibilities with sex to trigger the law's protections, which furthers discrimination against both women and caregivers.[42] Second, the EPA permits an overbroad "other than sex" justification to explain pay disparities.[43]

This "other than sex" justification can include factors that are themselves causes and effects of sex inequality. For example, employers can point to differences in employee schedules to explain differences in employee pay.[44] Caregivers, however, are often forced to work shorter schedules to facilitate their caregiving responsibilities, especially in localities that do not provide affordable childcare or paid leave.[45] Allowing employers to use schedule differences as an affirmative defense to an EPA claim thus allows employers to continue discriminating against

38. *See Protecting Caregivers*, *supra* note 7.

39. 29 U.S.C. § 206(d).

40. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 142 (2003).

41. *See* Julie Kashen & Heather McCulloch, *The Pay Gap for Moms Is Bad. It's About to Get Worse*, MS. MAG. (Aug. 15, 2023), https://msmagazine.com/2023/08/15/moms-equal-pay-gap-childcare/ [https://perma.cc/G6KU-L63T] ("A significant portion of this gap is driven by the caregiving responsibilities disproportionately shouldered by women, and women of color in particular.").

42. *See supra* Introduction; *infra* Part II, Conclusion.

43. Williams & Segal, *supra* note 40, at 144.

44. *See* Williams & Segal, *supra* note 40, at 145.

45. *See* Chun-Hoon, *supra* note 21. For an example that further illustrates this issue, see the discussion of Palmer v. Cook, 108 N.Y.S.3d 297 (N.Y. Sup. Ct. 2019) *infra* Part II.

caregivers who have to adjust their schedule based on their caregiving.[46]

As a result, even though it was a major milestone at the time,[47] the EPA does not provide sufficient support for caregivers in the workplace.[48]

B. TITLE VII OF THE CIVIL RIGHTS ACT

A year after the EPA was codified, Congress passed Title VII of the Civil Rights Act (Title VII).[49] Title VII protects employees from discrimination based on their membership in certain protected classes, such as race, national origin, religion and sex.[50] Title VII, however, does not consider caregivers a protected class. Thus, if caregivers wish to claim protection under Title VII, they must do so via their membership in a protected class covered by the statute—usually sex. Caregivers, to be sure, can seek protection under Title VII through a few legal avenues,[51] namely by invoking the sex-plus theory[52] or the sex stereotyping theory.[53] But these sex-based avenues leave too many caregivers without sufficient legal recourse.[54]

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46. See Part III for an example of a situation in which a caregiver had to take a reduced salary to facilitate her caregiving responsibilities.

47. *See* THE WHITE HOUSE NAT'L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT 4 (June 2013), https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf [https://perma.cc/E7B9-NZP3] ("The Equal Pay Act of 1963 was the first in a series of major federal and state laws that had a profound effect on job opportunities and earnings for women over the next half century, and laid the foundation for the movement of women into the paid labor force at unprecedented levels.").

48. *See* Williams & Segal, *supra* note 40 at 145–46 (noting that the EPA also does not address any other forms of compensation, such as benefits, for example, which also contribute to the inequality caregivers face).

49. 42 U.S.C. §§ 2000e–2000e-17.

50. *See Protecting Caregivers*, *supra* note 7.

51. The United States Equal Employment Opportunity Commission (EEOC) has also offered helpful guidance to this end, but this guidance is not the focus of this Comment. *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2007-1, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (May 23, 2007), https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities [https://perma.cc/JKD9-N3VQ].

52. *See* Part II.B.2.

53. *See* Part II.B.3.

54. *See generally infra* Parts II.B, III.

C. THE PREGNANCY DISCRIMINATION ACT

Title VII was amended by the Pregnancy Discrimination Act (PDA) in 1978,[55] which helped clarify protections for pregnant workers.[56] Because much of caregiving stems from a current or recent pregnancy, the PDA was a crucial expansion of the capacity of Title VII to support caregivers.[57] Pregnancy-based protections are necessary; they cannot, however, support all caregivers because caregiving extends far past pregnancy and birth[58] and may not involve children at all.[59] For these same reasons, the Pregnant Workers Fairness Act and Providing Urgent Maternal Protections for Nursing Mothers Act do not sufficiently support caregivers either.[60]

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55. 42 U.S.C. § 2000e(k).

56. *See Protecting Caregivers*, *supra* note 7 ("Specifically, the PDA provides that discrimination on the basis of sex includes adverse treatment because of pregnancy, childbirth, or related medical conditions; and workers affected by pregnancy, childbirth, or related medical conditions have the right to be treated the same as other employees who are not pregnant but are 'similar in their ability or inability to work.'").

57. *See* Kessler, *supra* note 18, at 393–94 (noting that the PDA came on the heels of two Supreme Court decisions in the 1970s, which "held that disparate treatment on the basis of pregnancy did not constitute sex discrimination under the Fourteenth Amendment to the Constitution [(Geduldig v. Aiello, 417 U.S. 484 (1974))] or under Title VII [(Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976))].").

58. *See* Williams & Segal, *supra* note 40, at 106; *see also* Kessler, *supra* note 18, at 398 (discussing Maganuco v. Leyden Community High School District, 939 F.2d 440 (7th Cir. 1991), which clarified the point).

59. *See* Robbins & Mason, *supra* note 12 (noting examples such as care for a niece, a neighbor, or an elderly family member).

60. *See* Pregnant Workers Fairness Act of 2022, 42 U.S.C. § 2000g (providing reasonable accommodations and antidiscrimination frameworks for most pregnant workers.); *The Pregnant Workers Fairness Act (PWFA): Frequently Asked Questions*, BETTER BALANCE, https://www.abetterbalance.org/resources/pregnant-workers-fairness-act-explainer/ [https://perma.cc/B32X-U4LZ] (Feb. 12, 2025); The PUMP Act of 2022, 29 U.S.C. § 218d (updating the Fair Labor Standards Act to create a cause of action for most employees who are denied a private and reasonable place to pump for up to a year post birth); *Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work*, WAGE & HOUR DIV., U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers [https://perma.cc/UL4V-VVXB] (Jan. 2023).

D. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act of 1991[61] and its 2008 Amendments[62] (together, the ADA) offer a notable sex-neutral framework that protects workers who provide care for someone else, including someone other than their minor child. Through the ADA's "associational discrimination" provision, workers with caregiving responsibilities "for [a] loved one[ ] with disabilities"[63] can receive recourse for discrimination they suffered due to their caregiving. Yet the ADA does not entirely fill caregivers' needs because the "narrowly defined"[64] disabilities covered by the ADA likely do not extend to ongoing, moderately disabling conditions that nonetheless require continuous care.[65] Moreover, and perhaps axiomatically, the ADA does not cover caregiving for someone who is completely healthy. Thus, while the ADA is the only federal statute that provides protection for caregivers on wholly unsexed terms and allows for protection based on a caregiving worker's relationship with a third party, its provisions are too limited to sufficiently support caregivers.[66]

E. THE FAMILY AND MEDICAL LEAVE ACT

Finally, the Family and Medical Leave Act (1993) (FMLA),[67] which offers critical protection for caregivers in some emergency situations, is also limited in its ability to offer adequate protections for caregivers. The FMLA provides "employees the right to take 12 weeks of unpaid, job-protected leave . . . to care for a family member"[68] but only covers a subset of workers and only provides

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61. 42 U.S.C. § 12111.
62. 42 U.S.C. § 12213.
63. *Id.*
64. *See* Williams & Segal, *supra* note 40, at 149–51 (assessing the ADA and noting that, by statute, "the impairment must be a significant one, with permanent or long-term ramifications"). Note that the ADA Amendments of 2008 changed the definition of disability significantly, but dispositively for our purposes here. *See Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/notice-concerning-americans-disabilities-act-ada-amendments-act-2008 [https://perma.cc/47N2-XY53].
65. *See* Williams & Segal, *supra* note 40, at 150 (citing diabetes as an example).
66. *See id.* at 149–51.
67. 29 U.S.C. § 2601.
68. *Protecting Caregivers*, *supra* note 7.

for unpaid leave.[69] As such, for the many caregivers who are not protected by the law and for whom unpaid leave is a non-starter,[70] the FMLA is hardly protection at all.[71]

While the FMLA is gender-neutral, moreover, it is only nominally so: "[C]odified within the Act is the finding that 'the primary responsibility for family caregiving often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.'"[72] The ostensible "gender neutrality of the Act" therefore ends up "perpetuat[ing] the myth that women and men share equally in the burdens of caregiving" while doing little to address the systemic reasons why that is the not the case.[73] As such, the FMLA furthers the link between sex and caregiving on paper and in practice. Due to its limited scope and its articulated connection between caregiving and sex, the FMLA, too, does not sufficiently support caregivers.

II. CAREGIVER DISCRIMINATION UNDER TITLE VII

Within the existing patchwork of EEO statutes, two sex-based Title VII theories (trait-plus and stereotyping)—first mentioned in Part I.B—offer caregivers their best options for federal protection against workplace discrimination. Despite these theories, Title VII ultimately reinforces the exact type of sex discrimination it was intended to address without explicit protection for caregivers.[74]

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69. *See id.* ("Unfortunately, the FMLA only covers workers at employers with 50 or more employees, workers who have worked for their current employer for at least 12 months, and who have worked 1,250 or more hours during the past 12 months with that employer.").

70. *See No #FalseChoice Here: Let's Give Workers the Paid Leave They Deserve*, NAT'L WOMEN'S L. CTR. (July 13, 2018), https://nwlc.org/no-falsechoice-here-lets-give-workers-the-paid-leave-they-deserve/ [https://perma.cc/EB6J-7VE4] (suggesting unpaid leave is a "false choice"); *see also Unlocking the Full Potential of Paid Leave*, MOMS F1RST, https://momsfirst.us/wp-content/uploads/2025/02/MomsFirst_report_Letter-size_digital.pdf [https://perma.cc/4FY9-PZV3] (discussing how minimal uptake is of leave policies).

71. *See* Kessler, *supra* note 18, at 422–25 (detailing additional limitations of the law).

72. *Id.* at 420 (citation omitted).

73. *Id.* (discussing the "myth" of the "ideal worker," Joan Williams' "term for the theoretical employee unencumbered by caregiving responsibilities," for example, that the FMLA takes for granted) (citing Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822 (1989)).

74. *See generally* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012) (discussing the understatedly robust history of Title VII's sex provision, and, importantly, that concern about women's family roles was a key part of the debate).

To be sure, Title VII's initial focus, with much success, was on "rooting out overt [sex] discrimination and exclusion"[75] through disparate treatment and disparate impact claims.[76] But the Supreme Court later constrained the ability of both of those types of claims to address the evolving iterations of workplace discrimination—e.g., discrimination against caregivers.[77] While caregiver claimants have had more success addressing the discrimination they face through the trait-plus and stereotyping theories of Title VII liability,[78] those theories are also fundamentally inadequate because they inherently require connecting caregiving and sex. This Part demonstrates the shifts in theories used to raise Title VII claims and their underlying inabilities to unravel the sex discrimination they purport to address.

A. SEX DISCRIMINATION CLAIMS UNDER TITLE VII

Claimants may seek Title VII remedies for sex discrimination through "two main causes of action—disparate treatment and disparate impact."[79] A disparate treatment claim requires proof of *intentional* discrimination on the part of the employer.[80] In the sex context, "[a] disparate treatment claim under Title VII can be brought whenever an employer intentionally treats applicants or workers differently on the basis of sex."[81] Disparate impact claims, on the other hand, do not require a showing of discriminatory intent.[82] In disparate impact sex discrimination cases, a Plaintiff can sue based on a facially neutral policy that has "*resulted* in a disproportionately negative impact" for employees because of their sex.[83]

Both disparate treatment and disparate impact claims were used to successfully target explicit sex discrimination in officially

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75. Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 927 (2016).
76. *See infra* II.A.
77. *See infra* II.A.
78. *See infra* II.B.1–2.
79. Bornstein *supra* note 75, at 928.
80. *See* Kessler, *supra* note 18, at 391 (citing, e.g., Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–58 (1981)).
81. Williams & Segal, *supra* note 40, at 124.
82. *See* Bornstein, *supra* note 75, at 932.
83. *Id.* at 928 (emphasis added).

segregated workplaces.[84] But both theories lost their full efficacy as workplaces diversified in the late 20th century. Discrimination presents differently in diverse workplaces, and advocates needed new strategies to address that "second generation discrimination."[85]

Indeed, "second generation discrimination," or the ways that "bias, structures of decisionmaking, and patterns of interaction" interact to disparately harm historically nondominant groups, has become a significant expression of inequality in the modern workplace.[86] Unintentional, even unspoken, practices that are functionally demeaning and exclusionary can have compounding effects with discriminatory results.[87] Even more insidious, these practices are often grounded on unchallenged and widely accepted social norms and expectations. Sexual harassment and the glass ceiling[88] are two paradigmatic examples of second generation discrimination;[89] both manifest the quiet misogyny that underlies

84. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (noting that workplaces with "smoking guns" of discrimination, such as "the sign on the door that 'Irish need not apply' or a rejection explained by the comment that 'this is no job for a woman'—are largely things of the past. Many employers now have formal policies prohibiting race and sex discrimination, and procedures to enforce those policies").

85. *Id.* at 460.

86. *Id.*

87. *See id.*

88. Defined as "different treatment of men and women with respect to job assignments that lead to advancement, initial placement in relatively dead-end jobs, and lack of mentoring for women." Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 833 n.121 (2002) [hereinafter Williams, *Snowing*] (citing JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 69 (2000)).

89. *See* Sturm, *supra* note 84, at 462.

much of American workplace culture.[90] Discrimination against caregivers is another prime example.[91]

At first, Title VII's disparate treatment and disparate impact causes of action were helpful in addressing second generation discrimination. Over the years, however, the Supreme Court constrained both approaches and their consequent capacity to address more subtle forms of discrimination.

First, the disparate impact avenue was limited by *Ricci v. DeStefano* in 2009.[92] There, an employment test used by the Fire Department in New Haven, Connecticut was at issue due to its alleged discriminatory impact.[93] The Department had a history of significant racial discrimination in its hiring practices and had developed an employment test to try and even out its recruitment.[94] So when the employment test yielded racially disparate results, too, the Department threw them out.[95] In this case brought by non-minority applicants who had been rejected,[96] the Court held that employers must have a "strong basis in evidence" that the policy or practice at issue (i.e., the employment test) created disparate impact before the employer could lawfully take intentional steps to address that impact (i.e., throwing out results).[97] This convoluted holding essentially tied impact to intent

90. *See, e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1298–99 (1991) ("Women's situation combines unequal pay with allocation to disrespected work; sexual targeting for rape, domestic battering, sexual abuse as children, and systematic sexual harassment . . . . Like other inequalities, but in its own way, the subordination of women is socially institutionalized, cumulatively and systematically shaping access to human dignity, respect, resources, physical security, credibility, membership in community, speech, and power . . . . To speak of social treatment 'as a woman' is thus not to invoke any universal essence or homogeneous generic or ideal type, but to refer to this diverse material reality of social meanings and practices such that to be a woman 'is not yet the name of a way of being human.'"); Williams, *Snowing*, *supra* note 88, at 832 (discussing the glass ceiling as an example of the "persistence of sex discrimination reinforces the notion that women are not serious workers, thereby providing the rationale for further sex discrimination").

91. Joan Williams, *Toward A Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U.L. REV. 89, 90 (1998) ("[M]arket work continues to be structured in ways that perpetuate the economic vulnerability of caregivers. Their vulnerability stems from the way we define the ideal worker, as someone who works at least forty hours a week year round. This ideal worker norm, framed around the traditional life patterns of men, excludes most [caregivers] . . . . When work is structured in this way, caregivers often cannot perform as ideal workers.").

92. 557 U.S. 557 (2009).

93. *See id.* at 562–66.

94. *See id.* at 610 (Ginsburg, J., dissenting).

95. *See id.* at 562.

96. *See id.* at 562–63.

97. *Id.* at 585.

in a previously unnecessary way, heightened the standard for disparate impact suit, and significantly "hamstrung the reach of disparate impact" to address discrimination as a result.[98]

Two years later, in *Wal-Mart Stores, Inc. v. Dukes*,[99] the Court similarly cast aspersions on an expansive conception of disparate treatment. There, over 1.5 million former and current female Wal-Mart employees sought to sue the company for significant and widespread disparities in pay and promotion practices.[100] But the Court rejected the Plaintiffs' attempt to be certified as a class,[101] and went out of its way to constrain future claimants' capacity to use "'social framework' evidence" to prove liability for systemic discrimination.[102] In doing so, *Wal-Mart* diminished litigants' potential to use the disparate treatment avenue of Title VII liability to demonstrate second generation discrimination at work.[103] Taken together, *Ricci* and *Wal-Mart* "severely hobbled" Title VII's capacity to target inherently "subtle and structural" manifestations of second generation discrimination.[104]

As a result, litigants have moved away from traditional disparate impact and disparate treatment arguments in second generation Title VII sex discrimination suits. Two new legal theories have come up in their place: sex-plus and sex stereotyping. Through the sex-plus theory, employers are constrained from "treat[ing] female employees differently than their male coworkers on the basis of their sex 'plus' some facially neutral characteristic, such as the fact that they have young children."[105] Through the sex stereotyping theory, employers may not take action based on "stereotypes of how a female employee should appear and behave as a woman,"[106] such as stereotypes with regard to her expected capacity in the workplace due to her caregiving responsibilities outside of it. These theories have been helpful for caregivers

98. Bornstein, *supra* note 75 at 933.
99. 564 U.S. 338 (2011).
100. *See id.* at 342.
101. *See id.* at 367.
102. Bornstein, *supra* note 75, at 922 (citing *Wal-Mart*, 564 U.S. at 352–56) (discussing the insufficiencies of the "social framework").
103. *See id.*
104. *Id.*
105. Kessler, *supra* note 18, at 392 (discussing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971))*; see also infra* Part II.B.1.
106. Bornstein, *supra* note 75, at 929 (discussing Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989)); *see also infra* Part II.B.2.

suffering discrimination at work,[107] but as Part II.B discusses, they fail to disentangle one's sex with one's capacity as caregiver. As a result, these theories are insufficient to support caregivers in the workplace.

B. SEX-BASED THEORIES OF TITLE VII LIABILITY

Sex-plus and sex stereotyping are fundamentally inapt to fully support caregivers because they require the link of one's capacity as a caregiver with one's sex. To be sure, "the difficulties experienced by family caregivers [often] fall into documented patterns of gender bias."[108] But if the various theories of Title VII address these "difficulties," they do so by relying on the caregivers' sex.[109] This "rigid[ ] categorical framework"[110] inherently limits the protection Title VII can offer caregivers as caregivers. By requiring a connection between one's status as a caregiver and one's sex, Title VII cannot reach all caregivers, furthers stereotypes of women as caregivers and caregivers as women, and consequently manifests and multiplies sex inequality in the United States. The following analyses of the sex-plus and sex stereotype approaches to Title VII litigation showcase how this linkage is problematic.

1. *Sex-Plus Claims to Allege Discrimination*

Because "caregiver" is not a protected class under federal law, a major avenue for caregivers to seek recourse for discrimination is through the sex-plus theory of Title VII.[111] Sex-plus, a legal theory that developed in the 1970s, "enables plaintiffs to demonstrate that they have been discriminated against on the basis of sex by showing that they have been treated differently than members of the opposite sex with whom they share a particular, ostensibly non-sex-related [i.e., non-protected] characteristic."[112] Sex-plus (and other "trait-plus") suits have

107. *See id.* at 919.
108. Williams & Segal, *supra* note 40, at 90.
109. *See id.* at 94 ("The masculine gendering of occupations and workplace ideals, in conjunction with the assumptions surrounding motherhood, will create situations in which mothers are considered unsuitable or incompetent; in other words, men will be treated differently than women for reasons related to stereotyping.").
110. Kessler, *supra* note 18, at 417.
111. *See* Rehaut, *supra* note 19, at 728 (citing Williams & Segal, *supra* note 40, at 123).
112. Franklin, *supra* note 74, at 1374.

expanded Title VII's protections to individuals facing discrimination based on intersecting identities.[113]

In 1971, *Phillips v. Martin Marietta Corp.*[114] paved the way for the sex-plus framework. There, the Martin Marietta company hired men with small children but had a policy against hiring similarly situated women.[115] The Court remanded the case for further showing as to whether "the condition in question" (i.e., having pre-school-aged children) was a "bona fide occupational qualification" such that it was a reasonable explanation for discrimination.[116] The case, however, now stands for the proposition that illegal discrimination can be present if there is discrimination against some, even if not all, of the protected class.[117] This "sex-plus" protection post-*Phillips* allows Title VII to reach individuals who suffer from discrimination because of overlapping characteristics, one of which is protected by law and one of which is "facially neutral" (i.e., being a woman *and* being a caregiver) even if the individual would not have a claim based solely on their membership in the protected class (i.e., being a woman).[118]

Though useful, the trait-plus avenue still leaves too many caregivers, especially male caregivers, unprotected because it hinges on a showing of sex discrimination in the first instance. In *Palomares v. Second Federal Savings and Loans Association*,[119] for example, the Northern District of Illinois rejected a male caregiver's claims of discrimination, finding that "[g]ender plus claims are really a sub-category of gender discrimination claims," not a cause of action unto themselves.[120] In the case, Camarena, an employee who had been let go by his employer, alleged that he had been "discriminated on the basis of his sex and his status as the primary caregiver for his five year old son," because a similarly

113. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 764 (2011); *see also* Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. OF CHI. LEGAL F. 139 (1989).

114. 400 U.S. 542 (1971).

115. *See id.* at 543.

116. *Id.* at 544.

117. *See* Kessler, *supra* note 18, at 392.

118. *Id.* Importantly, "[n]arrow judicial interpretation of the sex-plus theory of discrimination as limited to those situations where the neutral 'plus' factor is either an immutable characteristic or a fundamental right" has also limited the sex-plus avenue as a route to success for caregivers' claims. *Id.* at 400.

119. 2011 WL 760088 (N.D. Ill. Feb. 25, 2011).

120. *Id.* at *3.

situated male coworker without such primary caregiver responsibilities had not been dismissed.[121] Despite his claims, the court sided with the employer, finding that because familial status (i.e., one's role as caregiver) is not itself a protected characteristic, any claims of discrimination on those grounds must be "in conjunction with" a claim of discrimination based on an actually protected characteristic (i.e., sex).[122] "The essential element of a 'gender plus' claim," the court insisted, "is that *men and women* be treated differently."[123] But here, the court did not think that Camarena had sufficiently shown that he had suffered discrimination based on his sex (especially because of his reliance on a male comparator).[124] "Absent any allegation of disparate treatment upon *men and women*," the court held, Camarena "fails to state a claim."[125]

Palomares evidences a core problem with the sex-plus avenue for caregiver discrimination litigation: It is conditioned upon and requires a tie to sex. As such, sex-plus discrimination does not and cannot account for all the caregivers who need recourse for discrimination, such as male caregivers. Through this demanded link to sex, moreover, the sex-plus theory insists on a conceptual connection between womanhood and caregiving, and in so doing, furthers sex inequality in its ostensible efforts to dismantle it.

2. *Sex Stereotyping Claims to Allege Discrimination*

The use of stereotyping to allege disparate treatment was a key innovation in Title VII jurisprudence.[126] Stereotyping-as-disparate-treatment demands a showing of "how impermissible stereotypes factor into workplace decisions and cultures" and lead to discrimination.[127] Stereotypes are usually either "descriptive," which punish an individual because she *does* "conform to a negative stereotype of her group" or "prescriptive," which punish her because she does *not*.[128]

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121. *Id.*
122. *Id.* (citations omitted).
123. *Id.* (citations omitted) (emphasis added).
124. *See id.*
125. Palomares v. Second Fed. Sav. & Loans Ass'n, 2011 WL 760088 at *3 (N.D. Ill. Feb. 25, 2011) (emphasis added).
126. *See* Bornstein, *supra* note 75, at 931–32.
127. *Id.* at 931.
128. *See id.* at 962.

Sex stereotyping in Title VII jurisprudence emerged in the 1970s. The Supreme Court acknowledged the harms of sex stereotyping in the employment context in *Price Waterhouse* in 1989.[129] There, the Court affirmed that sufficient demonstration of stereotypes about a protected class in the workplace can be used to "expos[e] how workplace structures . . . disadvantage members of that class."[130] As a mechanism of highlighting the impact that structures and institutions can have in creating and recreating explicit and insidious forms of discrimination, sex stereotyping-based advocacy can successfully be used to attack the ways that second generation discrimination exists in modern workplaces.

Indeed, sex stereotyping has been helpful as a tool in the fight against a classic instance of second-generation discrimination—discrimination against caregivers. But because caregiver is not a protected class under Title VII, a main avenue for caregiver plaintiffs to seek relief from discrimination is by linking adverse treatment based on their caretaking responsibilities with sex stereotypes about women as caretakers. This linkage can be necessary within an antidiscrimination regime that recognizes sex but not caretaker status to show how an employer's discrimination with regard to an employee's caretaking belies the employer's underlying sex stereotypes, which serves as evidence of the employer's unlawful sex-based discriminatory intent.[131]

Stereotyping theory has also opened further avenues for caregivers to assert their rights with regard to the need for comparators in their claim.[132] Traditionally, the "comparator requirement" allows a Plaintiff to make "a showing of disparate treatment [ ] by pointing to the adverse employment action and [another] employee who suffered no such fate."[133] In making such a claim, an individual simply needs to "point to [a] counterpart[ ]" who did not suffer the adverse action,[134] so long as the counterpart was similarly situated "but for the protected characteristic" at issue.[135] By finding this similarly situated comparator, plaintiffs

129. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
130. Bornstein, *supra* note 75, at 938.
131. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 122 (2d Cir. 2004) (explaining that "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive").
132. *See generally id.*
133. Goldberg, *supra* note 113, at 744 (collecting cases).
134. *Id.* at 731.
135. *Id.* at 728.

can make a showing "that the protected trait was the reason for the adverse treatment at issue."[136]

But finding similarly situated comparators can be impossible for plaintiffs in workplaces with a dearth of comparators, such as workplaces impacted by occupational segregation.[137] Stereotyping theory has given plaintiffs grounding for Title VII suits to address caregiver discrimination in the absence of comparators. *Back*, a "landmark decision" in 2004, held that "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive."[138] There, the plaintiff worked in a paradigmatic site of occupational segregation: a school.[139] The district court rejected her claim of sex discrimination with regard to her denial of tenure after having a baby, demanding that she find a male comparator who had not been similarly denied. That demand was lofty: "[T]he plaintiff was the only school psychologist and 85% of the school's teachers were women, 71% of whom were mothers"—there were no even potential comparators to be found.[140] Finding the request unreasonable, the Second Circuit reversed, holding that "stereotypical remarks about the incompatibility of motherhood and employment" are sufficient to show "that 'gender played a part' in [the] employment decision," and are, therefore, sufficient to evince sex discrimination without the presence of comparator.[141] The decision made waves; in response, the EEOC updated its Guidance on caregiver

136. *Id.* at 731; *see also id.* at 731 n.3 (noting that the causation component is key to a Title VII analysis.).

137. *See* Bornstein, *supra* note 75, at 945 (noting, for example, that "96.4% of dental hygienists were women" in 2015). Inherently small workplaces also have a similar issue. *See supra* notes 21–25 and accompanying text (discussing occupational segregation, generally).

138. Bornstein, *supra* note 75, at 947 (citing Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 122 (2d Cir. 2004)).

139. Schools have quite sex-segregated workforces. *See generally* Katherine Schaeffer, *Key Facts about Public School Teachers in the U.S.*, PEW RSCH. CTR. (Sept. 2024), https://www.pewresearch.org/short-reads/2024/09/24/key-facts-about-public-school-teachers-in-the-u-s/ [https://perma.cc/XPV2-VZBE] (noting that over 75% of public school teachers in the United States are women). Schools, moreover, are quintessential examples of occupational segregation because "characteristics seen as inherently 'female' are associated with traditionally female-dominated occupations," like teaching, which further recruitment and hiring imbalances "[o]ver time." Zhavoronkova et al., *supra* note 22.

140. Bornstein, *supra* note 75, at 947 (citing *Back*, 365 F.3d at 122).

141. *Id.* (citations omitted).

discrimination,[142] and "caregivers" gained access to a "broadened [ ] lens of what is probative of discrimination."[143]

Yet even without the comparator requirement, stereotyping insists on a showing of discrimination in a way that is still too entangled with sex to provide protection for the wide range of caregivers that exist (i.e., including men) or to sufficiently extricate the concepts of sex and caregiving (as discussed *infra*). *Maier v. United Parcel Service, Inc.*[144] clearly highlights this issue. There, Sara Maier sought summary judgment in her allegations that her employer, UPS, discriminated against her on the basis of sex.[145] Maier, a "high perform[er],"[146] who had been "identified [by her supervisor] as a 'ready now' candidate for promotion,"[147] was denied promotion in favor of a male peer. In their respective interviews for the roles, both Maier and the man who got the job discussed their children and other "family responsibilities."[148] But only Maier was "question[ed] . . . about whether [s]he could handle working 'long hours, working in the middle of the night' with . . . 'small children.'"[149] When Maier learned she had not been promoted, her concerns about discrimination were summarily dismissed; she had been rejected because the interviewer perceived that she "had a lot going on right now," and that she should just "calm down."[150]

But the court decided that "'[b]asing an employment decision on an employer's notions of how women do or ought to behave—the employer's sex-role stereotypes—is discrimination 'because of sex.'"[151] The *Maier* court grounded its finding of discrimination on stereotypes about a woman's role at home vis-à-vis her role at work.[152] Specifically, the court suggested that a question about

142. *See id.* at 947–48.
143. *Id.* at 957.
144. 721 F. Supp. 3d 693 (N.D. Ill. 2024).
145. Maier's claims included retaliation under Title VII, "sex discrimination and retaliation under . . . the Illinois Human Rights Act (IHRA), retaliation under the Family Medical Leave Act (FMLA), and failure to accommodate under the Nursing Mothers in the Workplace Act." *Id.* at 699.
146. *Id.* at 701.
147. *Id.* at 702.
148. *Id.* at 706.
149. *Id.*
150. Maier v. United Parcel Serv., Inc., 721 F. Supp. 3d 693, 707 (N.D. Ill. 2024).
151. *Id.* at 717 (citations omitted).
152. *See id.* at 717 (collecting cases affirming the idea, including Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 731 (2003) and Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)).

family responsibility, "when asked only of Plaintiff [i.e., a woman] and not of a similarly situated male," is an example of sex "stereotyping."[153] The court found for the Plaintiff, holding that those "who weighed in on [Maier's] promotion decision[ ] discriminated against her on the basis of the sex stereotype that women will dedicate more time to family and children at the expense of work performance," and denied summary judgment on that count.[154]

Even though Maier prevailed, the court's reasoning exemplifies how the stereotyping analysis is still too grounded in the link between caregiving and sex to sufficiently dismantle the link between womanhood and caregiving. *Maier* highlights that "at the core of [even] unlawful sex stereotypes about caregivers is the idea that being a mother . . . is incompatible with being a good worker."[155] As demonstrated by *Maier*, the linkage that sex stereotyping forces caregivers to make between their sex and their caregiving relies on sex stereotypes to sustain a claim of discrimination. In leveraging the sex stereotyping theory, plaintiffs rely on and thereby inherently reinforce traditional stereotypes of sex-based roles in and outside the workplace. Indeed, Title VII has been broadly criticized for its use of sex as a protected class exactly because "[t]he very process of defining what gender and work mean for purposes of legal analysis tends to solidify and naturalize existing conceptions of these categories."[156] When formalized tools "embody stereotypic gender assumptions, they themselves become independent agents of bias."[157] As such, the very use of sex stereotypes as a basis of allegations of discrimination is not neutral.[158] The constitutive relationship between traditional notions of work and gender embedded in Title

153. *Id.* at 721 (citations omitted).

154. *Id.*

155. Bornstein, *supra* note 75, at 957; *see also* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 65–70 (2000) (describing the "ideal worker" as one who embodies the "masculine norm" of one "unencumbered and always available for work"); Williams & Segal, *supra* note 40, at 102 (noting that the ideal worker norm harms men as well by perpetuating "negative stereotypes of fathers who take parental leave or go part-time," which "stem in part from the close linkage of manliness with work success").

156. Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1155–56 (2009).

157. Bornstein, *supra* note 75, at 966.

158. *See* Bornstein, *supra* note 75, at 966 (discussing how the "use sex of and gender as a primary frame for organizing how they relate to others . . . [is a] gender frame [that] spreads gendered meanings" throughout society" (internal citations omitted)).

VII and its stereotyping theory of liability further the discrimination they are meant to redress.[159]

This constitutive relationship is all the more consequential when it comes to using the sex stereotyping theory of Title VII liability for second generation discrimination. That is because stereotypical conceptions are often the impetus behind second generation discrimination in the first place.[160] Thus, by relying on stereotypes about caretakers—and how those stereotypes intersect with sex stereotypes—caretakers' use of the stereotyping theory can end up reinforcing the exact stereotype of woman-as-caretaker and caretaker-as-woman the caretakers are using the theory to target. In this way, the derivation of Title VII protection for caregivers via the law's prohibition of sex discrimination can work to further the exact type of inequality the law is intended to address.[161]

III. PROTECTING CAREGIVERS

Explicit caregiver discrimination protection would "fill an important gap in federal law by granting those with certain caregiving responsibilities the right to equal treatment without the need to tether such treatment to gender."[162] Specific protection for caregivers as a class is not a new idea;[163] a number of states and localities already protect caregivers explicitly.[164] Many of those laws, however, only protect caregivers (and usually just parents) of minor children.[165] Because caregiving extends well beyond young children and the difficulties of balancing work and care are

159. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '"[i]n forbidding employers to discriminate against individuals because of their sex [in Title VII], Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."' (internal citations omitted)).

160. *See* Sturm, *supra* note 84, at 468–49 (discussing second generation discrimination that can result from "behavior that departs from stereotypes about gender").

161. *See generally* Franklin, *supra* note 74.

162. Gyory, *supra* note 10, at 226.

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

164. *See Laws Protecting Family Caregivers at Work*, CTR. FOR WORKLIFE L., U.C. L. S.F, https://worklifelaw.org/wp-content/uploads/2022/11/FRD-Law-Table.pdf [https://perma.cc/EYG5-B73W] (noting that 250 governments provide caregiver-specific protections in one form or another).

165. *See id.*

undeniable,[166] the law should protect all caregivers as caregivers—regardless of who they care for.

Today, qualifying and providing for caregivers as a class is consistent with legislative and possibly even presidential priorities. Bipartisan coalitions introduced bills to create a tax credit for eligible workers during the last Congress,[167] and President Trump indicated support[168] for the concept during his latest run for office.[169] Similarly, a bipartisan, bicameral legislative working group hopes to provide federal paid leave for parents and caregivers (as distinct groups).[170] While neither of these indicia are dispositive, such activity indicates that the notion of protecting caregivers as a class is legislatively cognizable. Moreover, in a moment in which the federal government insists on inserting an exclusively biological sex orientation wherever and whenever it can,[171] an intentionally sex agnostic class may be a particularly palatable political approach.

Were Congress willing to legislate in this area, the PDA provides a prime example of how to codify a protected class. There,

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166. *See* Press Release, AARP, New U.S. Workforce Report: Nearly 70% of Family Caregivers Report Difficulty Balancing Career and Caregiving Responsibilities, Spurring Long-Term Impacts to U.S. Economy (May 16, 2024), https://press.aarp.org/2024-5-16-US-Workforce-Report-70-Caregivers-Difficulty-Balancing-Career-Caregiving-Responsibilities [https://perma.cc/U4R8-Y7HZ].

167. *See* Tony Pugh, *Caregiver Tax Credit Could Pass in 2025 with Trump, GOP Support*, BLOOMBERG L. (Dec. 24, 2024) (on file with the *Columbia Journal of Law & Social Problems*), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/health-law-and-business/X3UAN0QO000000?bna_news_filter=health-law-and-business#jcite.

168. *See* Scott Wong et al., *Republicans Take a Backseat as Trump Steamrolls Congress with Flurry of Unilateral Moves*, NBC NEWS (Feb. 3, 2025, 7:22 PM), https://www.nbcnews.com/politics/congress/republicans-back-seat-trump-steamroll-congress-unilateral-moves-rcna190465 [https://perma.cc/X9SN-2THY] ("[I]n the second Trump administration, Republicans are . . . deferring to the president.").

169. *See* Tami Luhby, *Trump's Latest Promised Tax Break Is for Family Caregivers*, CNN (Oct. 28, 2024, 1:16 PM), https://www.cnn.com/2024/10/28/politics/family-caregivers-trump-tax-credit/index.html [https://perma.cc/4Q7B-YRSR].

170. *See* Press Release, Office of Sen. Maggie Hassan, Gillibrand, Cassidy, Houlahan, Bice Lead Bipartisan, Bicameral Paid Leave Working Group to Request Input on Paid Leave Proposal (Dec. 13, 2023), https://www.hassan.senate.gov/news/press-releases/gillibrand-cassidy-houlahan-bice-lead-bipartisan-bicameral-paid-leave-working-group-to-request-input-on-paid-leave-proposal [https://perma.cc/UL4Z-QP4F].

171. *See* Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025); *see also* Danielle Kurtzleben, *Trump's Executive Actions Curbing Transgender Rights Focus on 'Gender Ideology'*, NPR (Feb. 7, 2025), https://www.npr.org/2025/02/07/g-s1-46893/trump-anti-trans-rights-executive-action-gender-ideology-confusion [https://perma.cc/A8DB-CPDZ]; Press Release, Equal Emp. Opportunity Comm'n, Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace (Jan. 28, 2025, 5:00 AM), https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace [https://perma.cc/5DL2-4RQ3].

Congress made discrimination against pregnant workers a federal offense under Title VII.[172] Here, it could do the same for caregivers by amending Title VII. Such an amendment would be an excellent avenue for codifying caregiver-specific protections given amending a law is often easier than writing new one.[173] As Title VII is already devoted to antidiscrimination in the workplace, this statute is a prime target for such an amendment.[174]

To be sure, there are differences in providing protection for caregivers as a class as compared to other groups. But the differences are not sufficiently meaningful to be dispositive—especially when considered through the lens of the "*Carolene Products* formula."[175] For instance, caregiver is not necessarily a permanent status—but neither is pregnancy, and pregnant workers are protected as a class under Title VII via the PDA as well as by the PWFA. Like other protected classes, caregivers sustain discrimination,[176] suffer from how their status relates to (workplace) decision making,[177] and lack meaningful political power.[178] And even with the *Carolene Products* test up for

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172. The PDA was a legislative response to two Supreme Court decisions (Gen. Elec. Co. v Gilbert, 429 U.S. 125 (1976) and Geduldig v. Aiello, 417 U.S. 484 (1974)) that confusingly insisted that pregnancy discrimination was not discrimination on the basis of sex.

173. The PDA was passed two years after the *General Electric* decision, while the PWFA was the product of a decade-long *campaign*. *See generally* Better Balance, WINNING THE PREGNANT WORKERS FAIRNESS Act (June 2023), https://www.abetterbalance.org/wp-content/uploads/2023/05/ABB-Winning-PFWA-RD7-2.pdf [https://perma.cc/WZN6-XB8V].

174. *See generally supra* Part II. The FMLA provides for (unpaid) leave, which is not per se related to discrimination on the job; the ADA protects individuals with disabilities, which serving as a caregiver is not; the EPA ensures equal pay, the lack of which is a regular consequence of caregiver discrimination but is likewise not exactly the issue; and the PDA and PWFA, as mentioned above, are both cabined to pregnancy and postpartum protection, which (while much needed) also does not cover the full ambit of caregiver needs.

175. Farrell & Guertin, *supra* note 163, at 1481–82 (rehashing the *Carolene Products* factors: "(1) [T]he possession of an immutable characteristic by members of the protected class, (2) the existence of a history of discrimination against members of the class, (3) the relevance of the characteristic to legitimate decision making, and (4) the political power of the class." (citing Peggie Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 601 (2002); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 16–23 (3d ed. 2000))). *But see* Farrell & Guertin, *supra* note 163, at 1484 (discussing the "defunct" *Carolene Products* formula and suggesting that there are other reasons why caregivers should still be considered a protected class).

176. *See generally supra* Part I; *see also* Farrell & Guertin, *supra* note 163, at 1464 ("Discrimination against employees based on their status as . . . caregivers occurs at an alarming rate in this country, but is hardly a new phenomenon . . . [and has] resulted in discrimination in hiring and promotions, demotions, retaliation for lawful leaves of absence, and wrongful terminations." (citations omitted)).

177. *See* discussion of caselaw *infra*.

178. *See Campaign Funds for Childcare*, VOTE MAMA FOUND. 2 (Jan. 2024), https://www.votemamafoundation.org/_files/ugd/

discussion,[179] class status remains appropriate when "comparing caregivers as a social group to other social groups that have received statutory protection against discrimination," such as pregnant workers, older workers, child workers, and workers with disabilities.[180] Considered this way, class status for caregivers is warranted.

Critics of this comparative argument may point out that a person's status as a caregiver is third-party oriented unlike most protected classes. But there, too, caregiving is not unique; the ADA offers protection for associational disability, which is arguably even more third-party oriented than caregiving.[181] Critics may also note that the Supreme Court is loath to find new protected classes.[182] But Title VII is Congress' to amend. With caregivers caucusing in Congress more than ever before,[183] Congress is better situated than ever to see the merits of such an amendment.

8c99c1_20910ab97adf41b48229e253f1327caf.pdf [https://perma.cc/DZF4-63HY] ("The cost of childcare impacts how and when caregivers are able to run for office, and for some, it may shut them out of our political system entirely. Research shows that women are less likely to run for office if they have young children. It is no wonder that just 6.8% of federal legislators and 5.3% of state legislators are moms with minor children. The cost and accessibility of caregiving creates structural, financial, and logistical barriers to running for office.").

179. *See* Farrell & Guertin, *supra* note 163, at 1482 ("A number of scholars have suggested that the *Carolene Products* analysis is a bankrupt standard, rooted in an unrealistic model of politics, that the Court itself no longer uses in a substantive manner. Bruce Ackerman has called for a 'reorientation' of the doctrine in the interest of protecting against discrimination within a pluralistic democracy.").

180. *See id.* at 1484.

181. *See Questions & Answers: Association Provision of the ADA*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/questions-answers-association-provision-ada [https://perma.cc/7N3M-9VRB] (noting that the ADA ensures one cannot be discriminated against based solely on their "*relationship or association* with an individual with a disability"). Caregiving discrimination, in contrast, is concerned with discrimination based on *one's own* actions (real or assumed), albeit one's own actions oriented around another.

182. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.").

183. *See Politics of Parenthood: Representation in the 118th Congress*, VOTE MAMA FOUND. 10 (May 2023), https://www.votemamafoundation.org/_files/ugd/8c99c1_33c9c599ba624a68bdc3bee1aaa91205.pdf [https://perma.cc/77BM-PD79] ("Parents in Congress are joining together to bond over their unique experience as both caretakers and legislators and to advocate for policies that matter to working families."). Significantly, a growing number of younger congressmembers are part of the "sandwich generation," who carry a whole host of additional caregiving responsibilities. *See* Juliana Menasce Horowitz *More than Half of Americans in Their 40s Are 'Sandwiched' Between an Aging Parent and Their Own Children*. PEW RSCH. CTR. (Apr. 8, 2022), https://www.pewresearch.org/short-reads/2022/04/08/more-than-half-of-americans-in-their-40s-are-sandwiched-between-an-aging-parent-and-their-own-children/ [https://perma.cc/U73Z-5BH4].

Federal action, nonetheless, is quite unlikely in this political climate.[184] As such, especially while a federal focus on "gender ideology" runs rampant, local governments may offer a better opportunity for gender-neutral caregiver protections.[185] New York City offers a good example of how localities can successfully provide protections for caregivers. New York City's Human Rights Law (NYCHRL)[186] has explicitly protected caregivers as caregivers since 2016[187] and defines "caregivers"[188] and "care recipients"[189] quite broadly.[190]

Palmer v. Cook,[191] a Queens County Supreme Court case, illustrates the expansive efficacy of the NYCHRL. Palmer, a Black female employee of State Assemblywoman Vivian Cook, successfully alleged discrimination based on her status as a caregiver for her husband. Assemblywoman Cook hired Palmer, but Palmer felt forced to quit shortly thereafter because the

184. *See* Daniel Weissner, *Trump Hobbles U.S. Antidiscrimination Agency by Firing Democrats*, REUTERS (Jan. 28, 2025, 7:50 PM), https://www.reuters.com/world/us/trump-hobbles-us-anti-discrimination-agency-by-firing-democrats-2025-01-28/ [https://perma.cc/HTW9-YM45] ("The five-member [Equal Employment Opportunity] [C]ommission already had a vacancy, so firing [Commissioners] Samuels and Burrows leaves it without a quorum of three commissioners. That means the remaining members cannot adopt rules and legal guidance, direct staff to take certain actions, and issue rulings in discrimination cases brought by federal employees."); N.Y. Times Editorial Board, *Now is Not the Time to Tune Out*, N.Y. TIMES OPINION (Feb. 8, 2025), (on file with the *Columbia Journal of Law & Social Problems*) https://www.nytimes.com/2025/02/08/opinion/trump-musk-public-attention.html ("The Republican-led Congress has so far abdicated its role"); Joe LoCascio et al., *118th Congress on Track to Become the Least Productive in US History*, ABC NEWS (Jan. 10, 2024, 7:30 PM), https://abcnews.go.com/Politics/118th-congress-track-become-productive-us-history/story?id=106254012 [https://perma.cc/82J8-WXFM] (explaining that the number of bills passed in the 118th Congress was the lowest since the Great Depression).

185. *See generally* Gurjot Kaur & Dana Sussman, *Unlocking the Power and Possibility of Local Enforcement of Human and Civil Rights: Lessons Learned from the NYC Commission on Human Rights*, 51 COLUM. HUM. RTS. L. REV. 582 (2020).

186. N.Y.C. ADMIN. CODE §§ 8-101–8-703.

187. *See* Gyory, *supra* note 10, at 250.

188. N.Y.C. ADMIN. CODE § 8-102 (A caregiver is "a person who provides direct and ongoing care for a minor child or a care recipient.").

189. N.Y.C. ADMIN. CODE § 8-102 ("1. Care recipient. The term 'care recipient' means a person with a disability who: (i) is a covered relative, or a person who resides in the caregiver's household and (ii) relies on the caregiver for medical care or to meet the needs of daily living. 2. Covered relative. The term 'covered relative' means a caregiver's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of the caregiver's spouse or domestic partner, or any other individual in a familial relationship with the caregiver as designated by the rules of the commission.").

190. *See* Steven I. Locke, *Family Responsibilities Discrimination and the New York City Model: A Map for Future Legislation*, 51 S. TEX. L. REV. 19, 19–20 (2009) (calling the New York City law "noteworthy for its scope").

191. 108 N.Y.S.3d 297 (N.Y. Sup. Ct. 2019).

working environment was so toxic.[192] Because insurance is blind to the hostility of work environments, Palmer returned to work in Assemblywoman Cook's office to access the healthcare benefits her husband desperately needed.[193] Upon her return, Palmer was forced to take a $6,000 pay cut so she could have the flexibility in her schedule to care for her husband.[194] Back at the office, within her rights and as required by her caregiving responsibilities, Palmer requested to use her earned vacation time to take her husband to his chemotherapy appointments. Her request was initially approved, but that approval was then rescinded, requiring her to "scramble" to find someone else to cover the care.[195] Meanwhile, her working conditions remained egregious, including, among other vitriol, relentless "negative comments about [her] husband's health," derogatory name calling, comments about her appearance, and questions as to "whether [her] husband was actually sick."[196] Then, when Palmer's husband passed away, the Assemblywoman's office "declined to renew Palmer's appointment" into the new year.[197]

In her discussion, the judge clearly laid out the components of Palmer's successful claim under NYCHRL.[198] Based on the revocation of the use of earned time off to take her husband to chemotherapy, the Assemblywoman's "'grossly inappropriate and objectively hurtful statements' related to [her] husband's health," and the significant pay cut she was forced to take, the judge found Palmer's allegations sufficient to "give rise to a claim" of caregiver discrimination under the NYCHRL.[199]

Palmer illustrates why explicit protection for caregivers as caregivers, without any regard for their sex or familial status, is

192. *See* Palmer v. Cook, 108 N.Y.S.3d 297, 301 (N.Y. Sup. Ct. 2019) (The "hostile and intimidating work environment" included instances in which Assemblywoman Cook "cursed at, and excoriated [Palmer] and her co-workers. Additionally, [the Assemblywoman] directed multiple derogatory racial epithets towards Plaintiff, despite Plaintiff's regular requests that Defendant refrain from doing so.").

193. *See id.*

194. *See id.* at 308.

195. *Id.* at 302.

196. *Id.* at 301, 303.

197. *Id.* at 303.

198. *See* Palmer v. Cook, 108 N.Y.S.3d 297, 306 (N.Y. Sup. Ct. 2019).(These included "1) membership in a protected class; 2) qualification for the position and satisfactory performance; 3) adverse employment actions and 4) such adverse actions occurred under circumstances that give rise to an inference of discrimination." (citations omitted)).

199. *Id.*

critical. Here, Palmer succeeded[200] on her claims of caregiver discrimination without a connection to her membership in any other protected class.[201] The case, moreover, features a caregiver who suffered discrimination based on her caregiving responsibilities for someone who was not her minor child.[202] As such, Palmer's success demonstrates why protections for caregivers as caregivers are key: Neither the law, nor the facts, nor the analysis reference Palmer's sex in any significant way. Her status as caregiver was the only pertinent point. Under the NYCHRL, the discrimination Palmer suffered on account of her caregiving responsibilities was rightfully actionable under law.

Other states could follow in New York City's footsteps, based on model legislation such as that put forth by the Center for WorkLife Law,[203] the example set by the NYCHLR, and the EEOC's guidance on the subject.[204] Illinois, for instance, just enacted a new state law based on WorkLife Law's model legislation.[205] While the Illinois statute is still novel,[206] its existence is significant as

200. Palmer's success being that the Assemblywoman's motion to dismiss on that prong was denied.

201. *See Palmer*, 108 N.Y.S.3d at 309. Indeed, she failed on her allegations of discrimination based on sex, as well as two other protected classes, age and race. In her allegations of sex and age discrimination, the judge did not think the "stray comments" Palmer was subject to had sufficient "nexus" to the "adverse employment action" at issue. *Id.* With regard to the racist comments, Palmer's claim was partially sustained. *Id.*

202. *See Laws Protecting Family Caregivers*, *supra* note 164.

203. *See Model State or Local FRD Law*, CTR. FOR WORKLIFE L., U.C. L. S.F. 4 (Nov. 2020), https://worklifelaw.org/wp-content/uploads/2020/11/Model-FRD-Law-Nov-2020.pdf [https://perma.cc/ST3B-G9MA] (describing the following proscriptions at its core: "It is a violation of this chapter for an employer, because of the actual or perceived family responsibilities of any otherwise qualified individual, to refuse to hire or employ such individual, to bar or discharge such individual from employment, or to otherwise discriminate against such individual in compensation or in terms, conditions, or privileges of employment; to limit, segregate, classify, or make any distinction in regards to employees based on family responsibilities; or to follow any employment procedure or practice which, in fact, results in discrimination, or segregation based on family responsibilities without a valid business necessity"). To be sure, any business necessity defense would be a hurdle to overcome in the course of litigation under such a law. But the availability of affirmative defenses should not chill the provision of protection in the first instance.

204. *See The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Law*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, (Mar. 14, 2022), https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment [https://perma.cc/C8A9-XU7Y].

205. *See New Law Based on WorkLife Law's New Model Protects Illinois Family Caregivers*, CTR. FOR WORKLIFE L., U.C. L. S.F. (Aug. 23, 2024), https://worklifelaw.org/news/new-law-based-on-worklife-laws-model-protects-illinois-family-caregivers/ [https://perma.cc/A746-AQ27].

206. As of Mar. 8, 2025, no legal claims under the state law have been raised, and no legal decisions analyzing such claims have been issued, per a Westlaw search.

workplace conduct inevitably occurs in the shadow of the law,[207] and the law itself can shape societal behavior.[208]

CONCLUSION

Caregivers need protection in the workplace, but federal law does not offer it expressly. Instead, caregivers predominantly derive protection against discrimination for their caregiving responsibilities through sex-based antidiscrimination laws. This derivation itself, however, is a manifestation and mechanism of sex inequality in America.

Indeed, the dearth of explicit caregiver protection contributes directly to sex inequality. First, it leaves too many men without caregiving protections and thereby reinforces the unequal breakdown in caregiving responsibility.[209] Second, and more insidiously, it furthers the notion that caregivers are women and women are caregivers.[210]

Protecting caregivers as caregivers would not only expand the class of individuals the law protects but would critically disentangle sex and caregiving.[211] Antidiscrimination protections for caregivers, moreover, may lead toward more fulsome protections, such as an affirmative accommodation mandate.[212]

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207. *See, e.g.*, Press Release, Office of Governor JB Pritzker, Protections for Family Responsibilities in Employment Take Effect January 1 (Dec. 27, 2024), https://gov.illinois.gov/news/press-release.30774.html [https://perma.cc/RKD9-U9YU] ("'Being a caregiver is one of the most important roles a person can take on, and in Illinois, we're making sure no one is penalized for stepping up for their loved ones,' said Governor JB Pritzker . . . . 'Workplace policies should reflect the realities of caregiving and the responsibilities today's families face," said Lt. Governor Juliana Stratton. "This law not only provides protections but also recognizes the complex lives of working people and helps create more supportive and compassionate workplaces.'").

208. *See, e.g.*, Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 339–40 (2000) ("Legal theorists sometimes posit that law affects behavior 'expressively' by what it says rather than by what it does . . . . [O]ne causal theory for the expressive effect of law [is] that law changes behavior by signaling the underlying attitudes of a community or society. Because people are motivated to gain approval and avoid disapproval, the information signaled by legislation and other law affects their behavior.").

209. *See* Palomares v. Second Fed. Sav. & Loans Ass'n, 2011 WL 760088 at *3 (N.D. Ill. Feb. 25, 2011).

210. This is the case even when such stereotypes can be used successfully to furnish the basis of a workplace discrimination claim under existing federal law. *See* Maier v. United Parcel Serv., Inc., 721 F. Supp. 3d 693 (N.D. Ill. 2024).

211. *See* Palmer v. Cook, 108 N.Y.S.3d 297, 303 (N.Y. Sup. Ct. 2019).

212. *See, e.g.*, the progression from the Pregnancy Discrimination Act of 1978, which only prohibits discrimination to the Pregnant Workers Fairness Act of 2022, which includes an affirmative mandate.

Explicit antidiscrimination protections for caregivers, at the federal, state, and local levels, would take this country one critical step closer to real sex equality.[213]

213. *See generally* MOMS F1RST, *supra* note 70 (suggesting that antidiscrimination protection could be helpful by leading to a functional affirmative mandate on employers and the state to facilitate greater uptake of leave provisions. Paid leave, in the localities in which it is provided is significantly underutilized, in what a new report from MomsF1rst calls the "paid leave paradox.")