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Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance

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Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance

RACHEL ARNOW-RICHMAN

This Article examines the significance of the 4/40 work week to caregivers in need of individualized workplace accommodation. Employer interest in 4/40 and other alternative work structures demonstrates that the current organization of market work is not inevitable and that its re-organization in ways that facilitate full participation by caregivers can sometimes be mutually beneficial. Yet it is unlikely that employers act optimally in responding to individual accommodation requests. Well-known limits on rational choice theory can impede supervisors' ability to determine whether a particular accommodation will effectively enable the caregiver to perform her job and whether the costs entailed in adopting the accommodation will be outweighed by other savings. Thus, it is likely that some number of viable, cost-effective accommodations are not being implemented by employers.

This Article argues that the law should play a role in facilitating optimal, individualized accommodation of working caregivers. Drawing on existing and pending legislation, it argues for the creation of a statutory "right to request" that would protect workers from retaliation for seeking accommodations and would require employers to consider such requests in good faith. By encouraging workers to come forward with their requests and requiring parties to engage in an "interactive process," the law can potentially reduce some of the biases and informational gaps that currently plague discretionary employer decisions about accommodation requests. In this way, such a law may ultimately inspire mutually beneficial changes to work structure that would not have been achieved absent legal intervention.

ARTICLE CONTENTS

I. INTRODUCTION.....	1083
II. VOLUNTARY 4/40 AND THE LEGAL PROTECTION OF WORKING CAREGIVERS	1086
A. A TAXONOMY OF LEGAL PROTECTIONS	1087
B. THE RISE OF VOLUNTARY ACCOMMODATION	1093
III. THE LAW & ECONOMICS OF INDIVIDUAL ACCOMMODATION.....	1095
A. INDIVIDUAL ACCOMMODATION AS RATIONAL CHOICE.....	1096
B. INDIVIDUAL ACCOMMODATION AND THE LIMITS ON RATIONAL CHOICE THEORY	1099
C. VOLUNTARY ACCOMMODATION REVISITED	1107
IV. THE ROLE OF LAW IN INCENTING VOLUNTARY ACCOMMODATION.....	1108
A. THE WORKING FAMILIES FLEXIBILITY ACT	1108
B. IMPLICATIONS FOR VOLUNTARY ACCOMMODATION	1112
V. CONCLUSION	1116



Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance

RACHEL ARNOW-RICHMAN*

I. INTRODUCTION

A central feature of market work is employers' expectation that full-time workers will perform eight hours per day, five days per week, and on-site at the employer's facility. Legal scholars concerned with the position of working caregivers have critiqued this "full-time face-time" ("FTFT") norm as reflecting the life patterns of men who generally require no time off for childrearing and can depend on a steady stream of unpaid domestic labor supplied by a female spouse.¹ Despite the rhetorical power of this claim, mainstream work structures like the FTFT norm have proved particularly difficult to eradicate through legal regulation. Even in areas where the law actually compels firms to alter their employment practices for the benefit of nontraditional workers, truly transformative changes are quite rare. For instance, under the Americans with Disabilities Act ("ADA"),² which requires employers to reasonably accommodate disabled workers, courts have often treated the FTFT norm as a backstop that limits what types of workplace accommodations will be considered reasonable.³

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¹ Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 359 (2003) (discussing the disparate impact on women of "full-time face-time" work requirements in the context of telecommuting); see also JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 64–66, 113 (2000) (describing how market work is structured around an ideal worker who has no household or caregiving responsibilities).

² 42 U.S.C. §§ 12101–12213 (2006).

³ See, e.g., *Denczak v. Ford Motor Co.*, 215 Fed. App'x 442, 445 (6th Cir. 2007) (reasoning that "[c]ommon sense, to say nothing of [defendant's] business judgment, supports the point" that a production quota in an assembly line is an essential function of a welding job because such positions "are only as fast as the slowest member of the production team"); *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1303–06 (11th Cir. 2000) (holding that a utility company was not required to limit an employee's hours to eight hours per day because mandatory overtime was an essential function of the job); *Davis v. Microsoft Corp.*, 37 P.3d 333, 337 (Wash. Ct. App. 2002) (holding that a software company was not required to accommodate plaintiff by allowing him to work a forty-hour week where the un rebutted evidence demonstrated "that all systems engineers within the department had consistently worked 60–80 hours per week for years"); see also Rachel Arnow-Richman,

Recent changes by some employers, however, call into question the inviolate nature of current work structures. Several companies and government employers have instituted or proposed compressed work weeks and other forms of alternative scheduling to deal with budgetary shortfalls in the wake of the Great Recession of 2008.⁴ Most such initiatives tinker at the edges of the FTFT norm. For example, a plan announced by the Utah state government in June 2008 requires state employees to maintain the same number of full-time hours, but spreads their work over fewer days (the so-called “4/40” week).⁵ Employees benefit by obtaining one full weekday “off” per week.⁶ Such changes are far from the wholesale reform of market work that some legal scholars have envisioned.⁷ These voluntary initiatives, however, have been touted as both efficiency-enhancing for employers and supportive of the life and family needs of employees.⁸ Moreover, they are voluntary undertakings that have emerged absent legal compulsion and outside the discourse over equal employment quality for caregivers.

Accommodation Subverted: The Future of Work/Family Initiative in a “Me, Inc.” World, 12 TEX. J. WOMEN & L. 345, 363–67 (2003) (describing this phenomenon and discussing cases in which courts limit the reach of individualized accommodation under the ADA); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 23–36 (2005) (providing examples of courts refusing to require accommodations that varied employees’ hours, punctuality, attendance, start and stop times, and on-site work requirements).

⁴ See Colleen McCarthy, *Employers Offer Benefits To Offset Higher Fuel Prices*, BUS. INS., Sept. 1, 2008, at 27 (reporting survey results finding that twenty-two percent of employer respondents planned to offer a four-day work week option to at least some employees); Josée Valcourt & Justin Scheck, *Oil Prices Prompt Four-Day Week*, WALL ST. J., May 29, 2008, at A3 (describing various states’ efforts to reduce the work week to four days “to provide relief from the cost of commuting”); cf. Hannah Seligson, *An Alternative to Layoffs: The Shorter Workweek*, N.Y. TIMES, Mar. 1, 2009, at BU11 (detailing a New York policy center’s switch of some employees to a three-day, twenty-four-hour work week at reduced pay).

⁵ See Brock Vergakis, *Utah’s 4-Day Workweek Draws Out-of-State Attention*, ASSOCIATED PRESS, Feb. 25, 2009 (explaining that under Utah’s four-day work week, 17,000 state employees now work four ten-hour days each week).

⁶ See STATE OF UTAH, WORKING 4 UTAH: INITIATIVE PERFORMANCE REPORT, FINAL 16 (2009), available at http://www.dhrm.utah.gov/Working4Utah_FinalReport_Dec2009.pdf (showing that, based on employee survey results, almost seventy-five percent of respondents prefer the four-day work week); *4-Day Workweek Creates New Volunteers in Utah*, USA TODAY, July 10, 2009, http://www.usatoday.com/news/nation/2009-07-10-utah-volunteers_N.htm (reporting that the “extra day off” allows employees an opportunity to engage in volunteer activities).

⁷ See Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1941 (2000) (envisioning a vast overhaul of market work in which “the state sustains suitable work for everyone: providing jobs, guaranteeing a living wage, cultivating empowering working conditions and relations, restructuring working time, and providing the job-holding services necessary to allow people to pursue paid work along with broader care commitments and civic activities”); Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 131, 140–41 (Judy Fudge & Rosemary Owens eds., 2006) (proposing far-reaching changes to the American work environment, including a reduction of the standard work week from forty hours to thirty-five hours for all employees).

⁸ See Vergakis, *supra* note 5 (reporting that Utah’s four-day work week initiative would cut greenhouse gas emissions and reduce gasoline consumption, and finding that “the schedule offers more flexibility” for affected employees); McCarthy, *supra* note 4 (describing the compressed work week as one of “a variety of benefits to alleviate the impact of higher gasoline prices”).

What does the emergence of an employer-initiated, 4/40 week mean for working caregivers? What does it mean to scholars seeking to alter the structure of market work through legal reform? This Article examines this trend through the lens of individual accommodation—workers’ need for and employers’ willingness to provide idiosyncratic changes in job requirements or workplace structures to meet the demands of particular caregivers. From the perspective of these workers, voluntary 4/40 is potentially, though not inherently, transformative. Its emergence illustrates the viability of win-win accommodations that benefit both caregivers and their employers. At least in some cases, the interests of caregivers and traditional workers elide.⁹

At the same time, however, voluntary 4/40 reminds us that employees in an at-will system remain subject at all times to employers’ unilateral changes in work structure—a reality that may more heavily burden caregivers whose personal responsibilities are likely to be schedule-dependent. The inherent limitation of 4/40, or any other employer-sponsored reform, is that such initiatives are neither motivated by, nor comprehensive of, the needs of working caregivers. For voluntary restructuring efforts to constitute an effective, long-term component of a larger reform agenda, as this Article contends they must, employers must undertake those efforts in response to employee demands and not solely in response to catastrophic financial circumstances, like those currently facing many state governments.

This Article argues that the law has a role both in encouraging and mediating this type of voluntary and individualized accommodation. It argues for the creation of statutory procedural rights that enable and protect caregivers in seeking alternative work arrangements. This approach has been adopted successfully abroad¹⁰ and has been proposed domestically in

⁹ Legal scholarship has long emphasized such synergies. See, e.g., Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 *FORDHAM L. REV.* 2221, 2227 (2002) (arguing that “the business case for providing usable part-time programs demonstrates that the savings attributable to reduced attrition far outweigh any arguable higher overhead”); Joan C. Williams, *The Family-Hostile Corporation*, 70 *GEO. WASH. L. REV.* 921, 924 (2002) (same); Joan C. Williams, *The Politics of Time in the Legal Profession*, 4 *U. ST. THOMAS L.J.* 379, 398–403 (2007) (arguing “the business case for work-life balance in the legal profession”); 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, 85–89 (2003) (making the business case for “family-responsive policies”); cf. Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 *TENN. L. REV.* 311, 311–14 (2009) (summarizing how non-disabled workers stand to benefit from employer accommodation of disabled individuals).

¹⁰ See, e.g., Employment Act, 2002, c. 22, § 47 (U.K.), available at http://www.opsi.gov.uk/acts/acts2002/pdf/ukpga_20020022_en.pdf (giving British parents of children under the age of seventeen the right to request flexible work); Employment Relations (Flexible Working Arrangements) Amendment Act 2007, No. 105, Public Act, Part 6AA (N.Z.), available at http://www.legislation.govt.nz/act/public/2007/0105/latest/DLM1034656.html?search=ts_act_Flexible+working_noresel&p=1 (granting New Zealand employees “a statutory right to request a variation of their working arrangements if they have the care of any person”). A study of a similar German law concluded that

a pending congressional bill.¹¹ Its ultimate effectiveness, however, will depend on regulatory and judicial interpretation of the scope of employers' procedural obligations. Thus, this Article contends that such legislation should be understood to impose an employer obligation to engage in a good faith "interactive process"¹² when faced with an explicit accommodation request by an individual caregiver.

This Article proceeds as follows: Part II situates voluntary 4/40 within the context of existing legal regulation pertaining to the status of working caregivers. It demonstrates that 4/40 suffers the weaknesses associated with fixed mandates, such as the Family Medical Leave Act ("FMLA"), which are not flexible enough to account for individual needs. Part III makes the case for legislation aimed at inspiring voluntary behavior at the individual level, exploring the basic economics of voluntary accommodations decisions. It suggests that well-known limits on rational choice theory may lead to sub-optimal voluntary accommodation of individual requests. Part IV demonstrates how the law may respond to these limitations, and uses the pending Working Families Flexibility Act as an illustration. This Article concludes that a modest and carefully developed procedural right requiring employers to consider caregiver accommodation requests in good faith is likely to inspire beneficial and cost-effective changes to work structure that might not have been achieved absent legal intervention.

II. VOLUNTARY 4/40 AND THE LEGAL PROTECTION OF WORKING CAREGIVERS

The emergence of 4/40 is particularly propitious given the state of the workplace reform movement. The project of advancing the position of caregivers and other non-traditional workers through legal rule making has achieved much over the last three decades.¹³ It is unclear, however, how

nine out of ten requests were accepted by employers, while a study of a comparable Dutch law found that six out of ten requests for reduced working time were fully accepted and one out of ten was partially accepted. See Ariane Hegewisch, *Employers and European Flexible Working Rights: When the Floodgates Were Opened*, WORKLIFE LAW (UC Hastings College of the Law, S.F., Cal.), Fall 2005, at 2, available at http://www.uchastings.edu/site_files/WLL/european_issue_brief_printversion.pdf.

¹¹ See Working Families Flexibility Act, H.R. 1274, 111th Cong. (2009) (proposing a bill "to permit employees to request, and to ensure employers consider requests for, flexible work terms and conditions").

¹² Employers are currently compelled to do this in the disability accommodation context. See Americans with Disabilities Act, 29 C.F.R. 1630.2(o)(3) (2009) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."); see also *infra* Part IV.

¹³ Key developments in achieving greater inclusion and equal treatment of working caregivers include the passage of the Family Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006), and the

much more reform can be achieved through legal channels, particularly with respect to those disparities that result from long-standing structural features of work and other “unconscious” behaviors or practices.¹⁴ For this reason, voluntary action by employers emerges as a natural focus for furthering the goal of equal employment quality for non-traditional workers. The question for legal scholars is whether such efforts will be initiated, implemented, and maintained solely by employers motivated by financial interests, or whether the law has a role in directing those efforts toward the interests of caregivers and ensuring they are actually served.

This section sets the stage for that question. It argues that 4/40 programs offer some of the benefits associated with mandated benefits legislation, but suffer from the same limitation: a lack of flexibility necessary to address the unique needs of particular workers.

A. *A Taxonomy of Legal Protections*

Legal interventions to benefit working caregivers in the United States have come in two forms—anti-discrimination laws and mandated benefits laws—and can be associated with two distinct reform strategies.¹⁵ The first, anti-discrimination laws (and their strategic use in litigation), aims to eradicate stereotypes and other forms of conscious or unconscious bias that result in differential treatment of caregivers under existing workplace rules and practices. Laws embodying this approach include the federal Pregnancy Discrimination Act (“PDA”)¹⁶ and, at the state level, laws that directly prohibit discrimination on the basis of “family responsibilities.”¹⁷

development of the “family responsibilities” discrimination theory, which has been recognized by the Equal Employment Opportunity Commission (“EEOC”) *Enforcement Guidance*. See EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> [hereinafter *EEOC Enforcement Guidance*] (describing situations in which disparate treatment of caregivers may constitute unlawful disparate treatment on the basis of gender).

¹⁴ This problem of structural discrimination, or what I have referred to in earlier writing as “structural exclusion,” has become a principal concern of legal scholars focusing on the eradication of employment discrimination. See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 91 (2003) (indicating that “discrimination often operates in the workplace today less as a blanket policy or discrete, identifiable decision to exclude than as a perpetual tug on opportunity and advancement”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–74 (2001) (describing the problem of “second generation discrimination” as “patterns of interaction among groups within the workplace that, over time, exclude nondominant groups”). On the challenges of eradicating the disparate effects of structural exclusion through legal rule making, see Lindsa Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 485–92 (2000); Sturm, *supra*, at 475–78.

¹⁵ I set forth this binary framework in greater detail in a prior article. Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 36–44 (2007).

¹⁶ The PDA is an amendment to Title VII providing that discrimination on the basis of “sex” includes discrimination on the basis of pregnancy. 42 U.S.C. § 2000e(k) (2006).

¹⁷ See, e.g., ALASKA STAT. § 18.80.220 (2008) (making “parenthood” a protected characteristic

These measures prohibit differential treatment under employers' *existing* standards and practices and are critical to ensuring that caregivers who are able to perform on par with traditional workers are treated equally.

By and large, however, such efforts do not address the needs of those caregivers who require some deviation in existing standards to accommodate the demands of their families.¹⁸ The second approach, mandated benefits laws and related accommodation strategies, seeks to fill that gap. These laws require employers to adopt or alter certain practices to address particular needs. The principal example of this approach on the federal level is the FMLA, which grants eligible workers twelve weeks of unpaid leave upon the birth or adoption of a child or to care for a family member with a serious health condition.¹⁹ Several states go further, providing some paid leave for FMLA-qualifying events;²⁰ extending unpaid leave to routine parental activities, such as participating in school-related activities;²¹ and requiring employers to provide distinct benefits such as lactation rooms for breastfeeding mothers.²² As these examples

under an unlawful employment practices statute); D.C. CODE § 2-1402.11 (2010) (prohibiting discrimination in employment on the basis of "family responsibilities"). While federal law does not directly protect caregivers as a class, the prohibition on gender discrimination has been used strategically to achieve such results in some instances. *See Williams & Segal, supra* note 9, at 122–61 (laying out a strategy for pursuing "family responsibilities discrimination" as gender discrimination and offering successful case examples).

¹⁸ Several scholars have criticized the anti-discrimination approach to rectifying caregiver exclusion on these and similar grounds. *See, e.g.,* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 386–87 (2001) (critiquing liberal theory and equality norms as incapable of addressing the women's disproportionate caregiving responsibilities and their detrimental effects on women's participation in market work); Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 16–40 (2010) (comparing European and American family leave policy and criticizing "the unintended consequences of antidiscrimination law's role in addressing work-family conflict in the United States").

¹⁹ 29 U.S.C. § 2612(a)(1)(A)–(C) (2006). Although not the focus of this Article, the FMLA also covers a worker's leave to care for her own serious health condition. 29 U.S.C. § 2612(a)(1)(D) (2006). More recently, the FMLA was amended to provide leave for workers to attend to personal responsibilities occasioned by the deployment of a family member serving in the military. 29 U.S.C.A. § 2612(a)(1)(E) (West 2009).

²⁰ *See, e.g.,* CAL. UNEMP. INS. CODE §§ 3300–3301 (West 2004) (providing an eligible employee up to six weeks of wage replacement benefits when taking time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption).

²¹ *See, e.g.,* MASS. GEN. LAWS ANN. ch. 149, § 52D(a)–(b)(1) (West 2004) (granting eligible employees twenty-four hours of school-related leave during any twelve-month period to "participate in school activities directly related to the educational advancement of a son or daughter of the employee, such as parent-teacher conferences or interviewing for a new school"); *see also* Kirsten K. Davis, *Extending the Vision: An Empowerment Identity Approach to Work-Family Regulation as Applied to School Involvement Leave Statutes*, 16 WM. & MARY J. WOMEN & L. (forthcoming 2010) (contrasting the level of accommodation among ten states and the District of Columbia that currently have school involvement leave legislation).

²² *See, e.g.,* CAL. LAB. CODE § 1030–31 (West 2002) (requiring employers to provide a reasonable amount of break time to accommodate employees wishing to express milk at work and requiring the employer to make "reasonable efforts to provide the employee with the use of a room or other location . . . for the employee to express milk in private"); N.M. STAT. ANN. § 28-20-2 (West 2009)

suggest, mandated benefits laws that target working caregivers are similar to, though not co-extensive with, accommodation laws that seek to rectify disparities in the employment quality of caregivers. Under mandated benefits laws, workers who meet a set of qualifying conditions obtain a particular benefit (or accommodation) that other workers do not. Depending on how narrowly the eligible group is defined, the benefit looks less like a universal entitlement and more like an accommodation. Thus, the FMLA identifies workers with a new child or seriously ill family member as one protected group. This group is arguably broader than the group benefited under state parental involvement legislation (parents of school-aged children who engage in particular, qualifying school activities), and that group is broader than the group benefited under state lactation laws (breastfeeding mothers).

This characterization of mandated benefits laws, however, differs in significant ways from the common notion of accommodation, which is drawn largely from the law of disability accommodation.²³ Unlike *reasonable* accommodation, which is required in that context, mandated benefits laws are inflexible. Thus, the FMLA benefits the worker who wants—and is financially able—to take twelve unpaid weeks to care for a newborn. It does not serve the interests of the worker who prefers—or is compelled financially—to immediately re-enter the workplace following childbirth but would like to use her leave time to work a reduced schedule. Neither does it allow that same worker to return to work full-time and use her leave to take three unpaid breaks per day to pump breast milk.²⁴

To be clear, my critique here resonates with, but is distinct from, long-standing concerns about the reach and scope of the FMLA. Legal scholars have expressed significant frustration with the limits of the FMLA in terms of how much leave it provides, the limited purposes for which leave is authorized, and the fact that it is unpaid.²⁵ I share the view that three months of unpaid leave merely scratches the surface in terms of what a

(requiring employers to provide a clean and private space, excluding a bathroom, near the employee's workspace, in addition to flexible break times, for nursing employees to express milk); *see also* Lara M. Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN'S L.J. 259, 284–85 (2002) (discussing various state law mandates as to the level of workplace accommodation for breastfeeding mothers).

²³ See 42 U.S.C. § 12112(b)(5)(A) (2006) (defining the term “discriminate” to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability”).

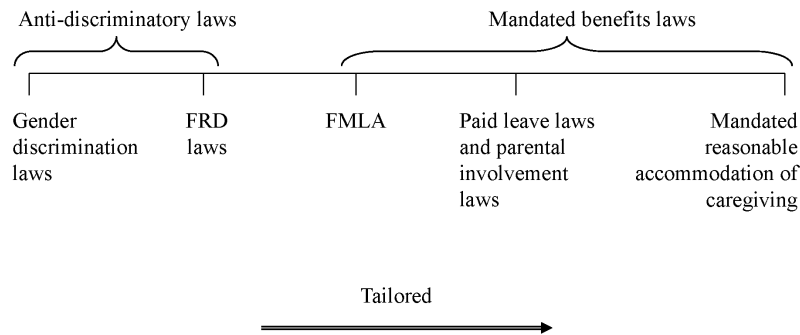
²⁴ While the FMLA does allow for “intermittent leave,” the employer must allow such leave only when “medically necessary” due to the serious health condition of the employee or a covered family member. See 29 C.F.R. § 825.203 (2009).

²⁵ See, e.g., WILLIAMS, *supra* note 1, at 237 (describing the FMLA as a “drop in the bucket”); Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 81 (2000) (“[B]y providing only emergency or short-term coverage . . . the benefits provided by the [FMLA] are more symbolic than they are real.”).

primary caregiver needs following the birth or adoption of a new child.²⁶ My point, however, is that even for those workers for whom three months of total leave time is adequate, the law does not grant the worker the flexibility to use that entitlement in the way that he or she might find it most helpful.²⁷ To obtain that type of accommodation, one would require either very tailored, detailed rules or an open-ended reasonable accommodation mandate like that which exists under the ADA. Figure 1 demonstrates the relationship between these rules and strategies.

Figure 1

Taxonomy of Legal Interventions to Assist Working Caregivers



On the far left side is the broad equality principle of federal anti-discrimination law that requires gender parity, but neither protects caregivers per se nor accommodates that activity. Family responsibility discrimination laws go one step further, explicitly making caregivers a protected class, but still requiring nothing more than equal treatment. The FMLA represents the jump to a mandated benefits approach, providing a fixed benefit for two discrete caregiving needs. To the right of the FMLA are state laws that create greater flexibility for caregivers, focusing on the longer term, day-to-day burdens of caregiving, such as the need to breastfeed infants or manage and participate in a child's schooling.

There is, however, a natural limit to the details with which caregiving benefits can be legislated. Setting aside the important question of how

²⁶ See Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 845 (2002) (noting that "twelve weeks falls far short of what child development experts believe is minimally necessary" for post-partum recovery).

²⁷ For additional examples of how statutory inflexibility renders FMLA benefits of limited usefulness to some caregivers, see Arnow-Richman, *Public Law and Private Process*, *supra* note 15, at 31–36.

such mandates would be funded, it is unclear how law makers would extend laws like school involvement legislation to provide workers with the requisite flexibility to accommodate all of the particular needs of their families without creating a highly complex and unwieldy system of rules. The recent Military Leave Amendments to the FMLA offer a telling counter-example. Passed with little fanfare or public attention as part of the National Defense Authorization Act of 2008,²⁸ these amendments require employers to provide FMLA leave to employees experiencing a “qualifying exigency” as a result of a family member serving or called to active duty in the Armed Forces.²⁹ The regulations interpreting this provision define “qualifying exigency” with incredible breadth and detail. Included are personal responsibilities attending to a short-term deployment, participation or attendance at military events or ceremonies, arranging alternative childcare or providing emergency childcare as a result of deployment, making personal financial or legal arrangements relating to deployment, sharing rest and relaxation time with service members on leave, and involvement in post-deployment activities.³⁰ The regulations then further define each of these categories of exigencies.³¹

The military amendments illustrate the type of forethought and detailed drafting that would be necessary to fully address the situation of working caregivers through legal rule making. One might be tempted to view these amendments as blueprints for more comprehensive and inclusive work/life legislation for civilian caregivers.³² The military amendments, however, apply to a tiny swath of the working population (only family members of military personnel), are triggered by one particular life event (deployment or active duty), and provide a single form of accommodation (unpaid leave). It is a far different problem to provide varied and flexible benefits for the wide range of needs faced by ordinary working caregivers, which might be best addressed through temporary or permanent schedule changes, alterations of work structures or other accommodations short of, or in addition to, leave time.³³ Moreover, the military amendments were passed

²⁸ Pub. L. No. 110-181, § 585 (2008).

²⁹ 29 U.S.C.A. § 2612(a)(1)(E) (West 2009).

³⁰ 29 CFR § 825.126(a) (2009).

³¹ *Id.*

³² See Marcy Karin, *Time Off for Military Families: An Emerging Case Study in a Time of War . . . And the Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REC. 46, 48 (2009) (questioning whether the amendments “represent a paradigm shift in the way legislators (and society) think about work-life policy”).

³³ Scholars from different fields have noted the challenges faced by regulators in designing optimal rules. See Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management To Achieve Public Goals*, 37 LAW & SOC’Y REV. 691, 703–04 (2003) (suggesting that the transaction costs involved in researching, selecting, and implementing legal rules may make it difficult for law makers to devise highly detailed rules that appropriately balance social benefits and costs to firms and that retain sufficient flexibility to account for future change); see also Sturm, *supra* note 14, at 475 (“Any rule specific enough to guide behavior will inadequately account for the

in a unique political climate, when national attention was focused on the War on Terror and the need to support American troops.³⁴ Therefore, while I am reasonably optimistic that the military amendments will prove successful for their narrow purpose,³⁵ I do not believe they provide a realistic blueprint for broadly dealing with work/life conflict.

The alternative, and arguably more suitable, method for legislating accommodation, given the nuanced needs of a heterogeneous population, is through a reasonable accommodation mandate. Although proposed by some scholars,³⁶ this tack has not been seriously pursued as a strategic matter, likely due to the documented resistance of employers to the reasonable accommodation mandate of the ADA.³⁷ The principal objection to this portion of the ADA has been the costs imposed on employers, and that argument no doubt would be levied, not without legitimacy, in the context of any regulation requiring accommodation of non-traditional workers, whatever its form.³⁸ Setting that policy choice aside, however, there are additional problems that come with an open-ended standard. Such rules engender significant legal uncertainty about the scope of the mandate and the means of compliance, creating a high risk of litigation and making it costly for employers to comply.³⁹ This would be even more true in the case of reasonable accommodation of caregivers

variability, change, and complexity characteristic of second generation [discrimination] problems.”).

³⁴ See Karin, *supra* note 32, at 52 (acknowledging that the adoption of the Military Leave Amendments “was possible because of the nature of the group protected and the fact that America is at war”).

³⁵ To date, there has been no case law interpreting the Military Leave Amendments nor any empirical research on their implementation or effect.

³⁶ See, e.g., Kessler, *supra* note 18, at 457–59; Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1445–48.

³⁷ See Krieger, *Afterword*, *supra* note 14, at 504 (describing backlash against the ADA as privileging the disabled at the expense of mainstream workers).

³⁸ The cost implications of the ADA, and accommodation mandates more broadly, is a vast subject that falls outside the scope of this Article. For extensive discussion of these issues, see John J. Donahue III, *Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 STAN. L. REV. 897, 899–903 (2001); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 317–19 (2001); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 225–28 (2000); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 167–78 (2003).

³⁹ See Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1254–55 (2003) (discussing the nebulous quality of the language of the ADA, which “provides only a general structure for analysis and gives little guidance to help define its scope and limits”); Floyd D. Weatherspoon, *The Americans with Disabilities Act of 1990: Title I and Its Impact on Employment Decisions*, 16 VT. L. REV. 263, 282–87 (1991) (discussing cases litigating the meaning of “reasonable accommodation” in the ADA and the difficulty this standard imposes on employer compliance). Cf. Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer’s Financial Hardship Becomes “Undue” Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 397 (1995) (criticizing vagueness of the undue hardship standard, which presents employers with an uncertain backdrop against which to make decisions to accommodate).

than it is currently in the context of disability accommodations. Like the beneficiaries of the FMLA Military Leave Amendments, disabled individuals comprise a relatively discrete group of workers as compared to the universe of workers who will likely face conflicts between work and family caregiving.⁴⁰

In short, assuming that we would even want to force employers to make comprehensive changes, one might question the feasibility of using legal rules to achieve that end. For these reasons, it would be unrealistic to expect a comprehensive legal response to the structure of market work and its effect on working caregivers.

B. *The Rise of Voluntary Accommodation*

If comprehensive legal reform of market work is unlikely, voluntary accommodation becomes a necessary and indeed, inevitable bridge between the types of changes that some scholars would like to achieve and the reality of what regulators can do through legislative action. The question is how useful will employer-sponsored accommodation be for the population that most needs it.

One way to speculate about this question is by looking at 4/40 as an example. Within the schema laid out above, 4/40—and other forms of compressed work weeks—analyze best to mandated benefits laws that provide a discrete and defined accommodation (one additional day off per week). They also suffer from some of the same limitations that are endemic to those statutes when judged from the perspective of caregivers. On a practical level, 4/40 is invaluable to the worker who needs a full day away from her job to care for a child or an aging parent. It is not helpful, and in fact places additional burdens on the worker who is unable to find child or elder care during the early and late hours that a 4/40 work week requires.⁴¹ Furthermore, a universal 4/40 plan can create a more difficult environment for caregivers seeking different or additional accommodations. An employer may feel justified in rejecting an employee's request, however necessary or reasonable, given the company's adoption of what many would consider a generous and employee-friendly work schedule.

⁴⁰ The 2008 amendments to the ADA expanded the universe of protected employees. See Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 218 (2008) (explaining changes to the definition of disability). The protected population remains small, however, compared to the population of working caregivers.

⁴¹ See STATE OF UTAH, WORKING 4 UTAH, INITIATIVE PERFORMANCE REPORT, INTERIM DRAFT 13 (2009), available at <http://www.utah.gov/governor/docs/Working4UtahInterimReport.pdf> [hereinafter WORKING 4 UTAH INTERIM DRAFT] (stating that twelve percent of survey respondents in the Utah program reported a negative impact on childcare after implementation of the four-day work week).

That said, whenever an employer takes a creative approach to work structure, caregivers will likely (although not invariably) reap some benefit. In the case of a company that adopts a 4/40 work week, there will doubtlessly be a subset of working caregivers for whom one work day off per week obviates the need for special accommodations. Thus, a caregiver may be able to schedule family medical appointments, children's carpools, or parent/teacher conferences on the non-work day in lieu of leaving work early on particular days or taking time off from work.⁴² The more generous the new form of work is—not just a reduction in days, but a reduction in hours; not just a reduction in hours, but enhanced flexibility in scheduling hours—the more fluid the norms of the workplace, and the more likely it is that scholars can begin to do away with thinking about caregivers as a unique class at all.⁴³

But until that day arrives, legal scholars must contend with this question of individual needs. Currently, individual workplace accommodation issues—outside the disability context—are left largely to private resolution. Despite this, voluntary accommodations do occur. In the ADA context, where employers are obligated only to reasonably accommodate, research demonstrates that firms frequently grant more generous accommodations than the law requires and often to employees other than those who are legally protected.⁴⁴ To some extent, this may be explained as a rational response to legal uncertainty. Particularly in the context of tailored mandates, like reasonable accommodation, employers will over-comply to reduce the risk of liability or simply the risk of litigation.⁴⁵

⁴² See *id.* (reporting a decrease in employee absenteeism under the four-day work week).

⁴³ Several scholars have made compelling arguments that the challenges faced by working female caregivers will not be resolved by efforts that target women as a distinct class. See, e.g., Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1095 (1994) (arguing for greater attention to the needs and obligations of fathers because “[g]ender-neutral parental leave policies will not prevent such discrimination as long as women dominate the use of family leave”); Schultz, *supra* note 7, at 1939 (explaining why reform should focus on making the workplace conducive to the lives of all workers so that “[e]veryone would have a right to train for and pursue work of their own choosing, and . . . [e]veryone would work saner, and more similar hours, so that all of us would have an opportunity to participate fully in family, friendship, politics, and civic life”); Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 410–11 (1999) (arguing that men should be given incentives, if not forced, to take parental leave).

⁴⁴ See Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 324–26 (2008) (citing studies demonstrating that employers will choose to accommodate non-disabled workers when practical to do so); Helen A. Scharz et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917, 941–42 (2006) (finding in a nationwide study of employers who contacted the Job Accommodation Network that forty-three percent of accommodated employees did not suffer a substantial limitation of a major life activity); cf. Travis, *Lashing Back*, *supra* note 9, at 363 (arguing that managerial infrastructure created to comply with the ADA benefits non-disabled workers who are able to reap non-costly accommodations).

⁴⁵ See Arnow-Richman, *Public Law and Private Process*, *supra* note 15, at 63–66 (explaining these incentives); Travis, *Lashing Back*, *supra* note 9, at 363 (“[E]ven if an employer is fairly certain that it could prevail in a potential lawsuit by proving that an employee’s condition is not a statutory disability, the employer may find it cost-effective to avoid the risk of defending costly (albeit winning)

But that does not explain what happens in the caregiver context where there is no background mandate at all. Despite the absence of legal compulsion, numerous employers accommodate caregiving both through formal policies, such as paid parental time, and informal accommodation, such as allowing employees to return to work gradually following childbirth or adoption.⁴⁶ In addition, recent data suggests that a large number of employers offer some degree of flexibility including allowing employees to alter start and stop times and work occasionally from home.⁴⁷ The emergence of 4/40 explains in part why employers offer such accommodations voluntarily—employers see synergies between the life needs of workers and the needs of their business. Thus, the employer may regard the choice to accommodate as a good personnel policy, hoping its decision will yield enhanced productivity, better workplace morale, or reduced turnover.⁴⁸ Or, as 4/40 suggests, the employer might see gains to be harnessed in the form of lower energy consumption or other reductions in operating costs.⁴⁹ Either way, it is mutually beneficial for the parties to make these changes.

III. THE LAW & ECONOMICS OF INDIVIDUAL ACCOMMODATION

What does this mean for the law? Thus far, I have argued both that the law's ability to mandate employer-funded benefits to caregivers is finite,

litigation by instead granting the employee's accommodation request."); Patrick F. Dorrian, *Companies Should Be 'Liberal' with Leave Requests*, 21 CORP. COUNS. WKLY. NEWSL. (BNA), Apr. 12, 2006, at 115 (recommending that employers err on the side of accommodating whenever an employee makes a request as it is difficult to predict who the court will determine to be "disabled").

⁴⁶ See EXEC. OFFICE OF THE PRESIDENT, COUNCIL OF ECON. ADVISERS, WORK-LIFE BALANCE AND THE ECONOMICS OF WORKPLACE FLEXIBILITY 10–12 (2010), available at <http://www.whitehouse.gov/files/documents/100331-cea-economics-workplace-flexibility.pdf> [hereinafter WORK-LIFE BALANCE] (noting that 56% of large employers surveyed reported giving paid maternity leave; 47% reported allowing most employees to take a few days off to care for ill children without loss of pay, and 77% allowed some workers to gradually increase hours after childbirth or adoption).

⁴⁷ *Id.* at 4–5, 9 (summarizing surveys in which seventy-nine percent of large employers reported allowing some workers to periodically change their start and stop time, twenty-eight percent reported allowing some workers to work compressed work weeks, and more than fifty percent reported allowing some employees to occasionally work paid hours at home). It is important to note, however, that such data is derived from employer self-reports and that the percentages refer to the number of employers who offer these benefits to *some* workers. See *id.* at 6 ("If many employers only provide a benefit to a minority of their workers, the percent of workers with a benefit will be smaller than the percent of firms offering the same benefit. In addition, there may be a difference between an organization's policies and their implementation.").

⁴⁸ See Williams, *The Family-Hostile Corporation*, *supra* note 9, at 924–25 (describing how accounting firms Deloitte & Touche and Ernst & Young saved \$20 million and at least \$25 million, respectively, upon implementing flexible schedules due to reduced attrition); Jyoti Thottam, *Reworking Work*, TIME, July 25, 2005, at 50 (discussing how workers are happier and more productive under Best Buy's "results-oriented work environment" program where "employees can work when and where they like, as long as they get the job done").

⁴⁹ See WORKING 4 UTAH INTERIM DRAFT, *supra* note 41, at 4 (citing annual operational cost savings of \$203,177 in custodial service contracts and energy usage reductions of ten to twenty percent in half of the buildings since switching to the four-day work week).

and that employers will, in at least some instances, find reasons to provide such benefits on their own. One might conclude from this that any further legislation on behalf of caregivers is unnecessary or impractical. But that would be wrong for two reasons. First, there is every reason to suppose that continued advocacy can result in modest legislative reform that expands, in limited ways, the parameters of existing mandated benefits and anti-discrimination laws. Second, the fact that employers in some instances chose to voluntarily accommodate does not mean that they are doing so optimally.

The first point requires little explanation. As previously discussed, the past five years have witnessed several limited but important legal expansions of caregiver law at the federal and state levels, including such developments as the passage of the FMLA's Military Leave Amendments, the adoption by the EEOC of guidance on family responsibilities discrimination, and the enactment of parental involvement laws by many states.

The second is the subject of this section. Rational choice theory would suggest that employers, left to their own devices, will provide individual non-compelled accommodations whenever it is in their financial interest to do so. If so, the only role for law is to force employers to provide more costly accommodations that they would not otherwise choose to undertake. This view, however, betrays an overly simplistic understanding of employer incentives and the effects of law on party behavior. The section that follows draws on behavioral economics to argue that, absent some intervention, employers are unlikely to act optimally in identifying and implementing cost-effective accommodations that would assist caregivers. In so doing, this section lays the groundwork for corrective legislation that will be the subject of Part IV.

A. *Individual Accommodation as Rational Choice*

Traditional law and economics scholars would explain employers' decisions to voluntarily accommodate in terms of rational choice theory. Employers acting on the basis of full information will make those accommodations, and only those accommodations, that are utility-maximizing as determined by a straight cost-benefit analysis.⁵⁰ Suppose a new mother returning to work requests permission to leave one hour early

⁵⁰ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (7th ed. 2007) (“[E]conomics is the science of rational choice in a world . . . in which resources are limited [Its task] is to explore the implications of assuming that man is a rational maximizer of his . . . ‘self-interest.’”); Russell Korobkin, *A “Traditional” and “Behavioral” Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441, 447 (2004) (“[T]he term ‘rational choice theory’ lacks a single, standard definition [M]ost versions of [rational choice theory] assume, at a minimum, that individuals will use all available information to select behaviors that maximize their expected utility.” (footnotes omitted)).

each day to pick up her child from daycare. In deciding whether to approve this arrangement, the employer will weigh the cost to the business of the five hours per week against the benefit of saving five hours of wages. If the benefit outweighs the cost (perhaps the worker's output is only negligibly reduced and the employer saves five hours' wages), the employer will grant the arrangement, as it is inefficient to continue under the current schedule.⁵¹ If, on the other hand, the employer will suffer losses in excess of the wage savings (perhaps the employer will have to assign an employee with a higher hourly rate to cover the lost hours), the employer will deny the request.⁵²

What counts as costs and benefits in any particular situation will range from straightforward monetary gains and losses, as in the example above, to broader, more intangible considerations such as the value of the particular worker and the culture of the particular workplace. For instance, on the cost side, an employer might weigh the possibility that the repeated early departure of one worker will negatively affect office morale. If such a risk is likely, it may well be rational for the employer to deny the caregiver's accommodation request even if the savings in wages and loss of five hours of performance cancel one another out or would otherwise suggest a gain to the company. Similarly, on the benefit side, the employer might weigh the possibility that granting the accommodation will instill greater loyalty in the worker, which may increase her productivity and reduce the likelihood of absenteeism and turnover.⁵³ This might push an employer to grant an accommodation that, dollar for dollar, would otherwise appear inefficient.

Of course, it is not always easy for decision makers to identify or assign values to these variables, creating informational deficits that may impede rational choice.⁵⁴ The point, however, is that assuming employers can and do undertake such a calculus, the role of regulatory law is limited to mandating behavior that rational employers would not otherwise undertake. Figure 2 illustrates this relationship.

⁵¹ Of course, this raises the question why the employer pays the worker for full-time work under the current schedule in the first place. A utility-maximizing employer would have sought the reduction in working hours (or else cut the worker's pay). The short answer to this is that a combination of information deficits and cognitive biases prevent the employer from realizing the possibility of a utility gain. I will turn to the operation of these impediments to rational behavior *infra* Part III.B.1–2.

⁵² A third possibility is that the change is cost-neutral to the employer. In such a situation the proposed accommodation is the Pareto superior schedule, as it will make the employee better off without changing the employer's bottom line. For this reason, I place cost-neutral accommodations within the category of cost-effective accommodations that the employer ought to be willing to grant voluntarily. Employers, however, may lack the incentive to implement these accommodations, a subject addressed *infra* Part III.B.

⁵³ See WORK-LIFE BALANCE, *supra* note 46, at 17–22 (summarizing data on the economic benefits of flexible scheduling).

⁵⁴ See *infra* Part III.B.

is a set of accommodations that employers will justifiably refuse to implement, but also a large swath of accommodations that they will voluntarily undertake and to which legal regulation is seemingly irrelevant.

B. *Individual Accommodation and the Limits on Rational Choice Theory*

But as economists themselves acknowledge, human beings do not always behave as rational choice theory would predict. For a variety of reasons—lack of information, cognitive biases, transactions costs and other impediments—individuals may make sub-optimal decisions. In the context of workplace accommodations, this may mean that employers are under-serving caregivers (and in some instances themselves) by failing to make cost-neutral and even mutually advantageous accommodations.

The recent trend toward 4/40 offers insight to the problem. A four-day work week is nothing new; compressed schedules were instituted by hundreds of companies during the late 1960s and early 1970s, and isolated instances of its use date to the 1940s.⁵⁷ If 4/40 is in fact the cost-effective, energy saving, and family-friendly policy that some employers currently claim, why are they only now considering its adoption?⁵⁸ One possibility is that the 4/40 structure is cost-effective only when energy costs are exceptionally high, as they were in 2008 when programs such as the Utah initiative were unfurled. Another possibility, however, is that employers, until now, failed to identify the potential value of work restructuring due to defects and limitations in their decisionmaking process. Such defects may include informational deficits, such as a lack of knowledge or experience with alternative schedules, combined with high barriers to obtaining that information. Or they may be the result of strong predispositions in favor of the status quo, skepticism about change, or other biases that employers were forced to re-examine in light of recent financial circumstances.

Whatever the explanation, impediments to rational decision making are likely to redouble in individual accommodation situations where requests are made ad hoc to individual supervisors with idiosyncratic biases and a lack of incentive to assess long-term employer interests. This section explores some of these impediments to the optimal implementation of

taxpayers to unload some of the costs of supporting the disabled population onto employers.”). It is possible that accommodation of caregivers offers comparable social benefits that, on balance, outweigh the costs to employers. See WORK-LIFE BALANCE, *supra* note 46, at 19–24 (suggesting that flexible work benefits society by encouraging labor force participation, improving worker health, and reducing commute time). Whether such claims can be sustained is a question beyond the scope of this Article.

⁵⁷ See Robert C. Bird, *The Four-Day Work Week: Old Lessons, New Questions*, 42 CONN. L. REV. ____ (2010).

⁵⁸ It should be noted that existing research on the positive effects of 4/40 is conflicting. See *id.* at _____. For purposes of this analysis, however, I assume that the sanguine claims of employers currently experimenting with 4/40 are true. If not, however, that would merely strengthen the point that employers (and, a fortiori, individual managers) are often not able to assess ex ante the costs and benefits of any particular change in schedule.

individual caregiver accommodation, beginning with the problem of information deficits and then turning to the problem of cognitive bias in decision making.

1. *Information Deficits*⁵⁹

At the most basic level, employers' ability to identify and effectuate cost-effective accommodations is dependent on individual requests. Not every caregiver who would benefit from an accommodation asks for one, and it is often rational for caregivers to keep silent about their personal needs.⁶⁰ A caregiver may worry that requesting an accommodation will signal to the employer that she is not committed to her job⁶¹ or that the request will trigger subsequent discrimination or retaliation.⁶² Such fears are well grounded. Empirical research demonstrates that working mothers are often perceived as lacking in competence, undependable, and uncommitted to their work,⁶³ and case law supplies powerful anecdotal examples of how such stereotypes may translate into actual discrimination.⁶⁴ On the other hand, female caregivers may be reluctant to

⁵⁹ I consciously use the term "information deficits" rather than "information asymmetry," the term usually adopted in law and economics literature, as information asymmetry typically refers to situations in which one party has information that the other does not. *See, e.g.,* Ronen Avraham & Zhiyong Liu, *Incomplete Contracts with Asymmetric Information*, 8 AM. L. & ECON. REV. 523, 549 (2006) (explaining that after parties to a contract "learn their own valuations, they are asymmetrically informed" because each contains information that the other party does not have). Such asymmetries are certainly present in the individual accommodation context (as where an employee knows that a particular schedule change would be helpful for her but does not share that information with her employer). I wish to consider, however, informational impediments to optimal behavior as encompassing actual gaps in information suffered by both parties and which may not be feasible to correct (as where both the employer and employee are ignorant as to the likely effect a particular accommodation will have on office morale or productivity).

⁶⁰ *Cf. J.H. Verkerke, Is the ADA Efficient?*, 50 UCLA L. REV. 903, 911 (2003) (noting that in the disability context, job applicants may choose to keep unobservable disabilities secret, resulting in inefficient job matching).

⁶¹ The problem of signaling concerns impeding workers' ability to bargain for their preferred terms of employment has been explored in the context of just-cause protection. *See* Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1958–59 (1996) (suggesting that workers will not request just-cause protection for fear that they will be perceived as poor performers).

⁶² Such a result could be actionable as a matter of gender discrimination law or under an applicable state law outlawing family responsibilities discrimination. *See, e.g.,* ALASKA STAT. § 18.80.220 (2008) (making "parenthood" a protected characteristic under an unlawful employment practices statute); D.C. CODE § 2-1402.11 (2010) (prohibiting discrimination in employment on the basis of "family responsibilities"); *EEOC Enforcement Guidance, supra* note 13 (discussing unlawful disparate treatment of female caregivers). There is, however, currently no anti-retaliation protection for merely requesting an accommodation outside of the disability context.

⁶³ *See* Williams & Segal, *supra* note 9, at 90–91 (discussing social science stereotype studies whereby "career women" rated high in competence and "housewives" rated low in competence, and inferring that "[o]nce a woman's status as a mother becomes salient . . . she may begin to be perceived as a low-competence caregiver rather than a high-competence business woman").

⁶⁴ *See, e.g.,* Walsh v. Nat'l Computer Sys., 332 F.3d 1150, 1160 (8th Cir. 2003) (finding that the plaintiff was discriminated against on the basis of her pregnancy); *see also* Williams & Segal, *supra* note 9, at 122–61 (providing case examples).

push hard for particular benefits or concessions for fear of being viewed as aggressive or troublesome. Studies of other terms of employment, such as salary, show that women who negotiate with their employers often are viewed as demanding or entitled, while men who make similar requests are viewed as confident and professional.⁶⁵

At the same time, managers lack any incentive to inquire into a worker's caregiving responsibilities. Such questions are correctly perceived to be outside the scope of a manager's job responsibilities. In addition to the risk that such questions will appear personally intrusive, the manager may fear being charged with discrimination.⁶⁶ While employers' liability concerns might be exaggerated, it is certainly good risk management practice for human resource personnel and defense attorneys to counsel companies not to inquire into workers' immutable characteristics and family status.⁶⁷

Even if an employee comes forward with a request, his or her supervisor is unlikely to have information about the feasibility of an accommodation and probably has limited means of—or interest in—making such a determination. The Utah 4/40 plan is instructive in this regard. The move to a 4/40 work week was a top-down undertaking spearheaded by Utah's governor and preceded by significant study and budget forecasting.⁶⁸ The State rolled out the plan on a trial basis and completed a detailed evaluation before implementing it permanently.⁶⁹ In this way, Utah's 4/40 plan resembled other highly publicized workplace restructuring initiatives aimed at such goals as securing greater racial diversity, eliminating the glass ceiling, or achieving improved morale and retention, which involved careful coordination, oversight, and study.⁷⁰ While such initiatives have been applauded as paradigmatic

⁶⁵ See Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 *YALE J. L. & FEMINISM* 79, 107–08 (2009) (summarizing studies).

⁶⁶ Employer inquiries about family responsibilities may be used as evidence of discrimination. See *EEOC Enforcement Guidance*, *supra* note 13 (“Relevant evidence in charges alleging disparate treatment of female caregivers may include . . . [w]hether the respondent asked female applicants . . . whether they were married or had young children, or about their childcare . . . responsibilities . . .”). Such inquiries are actionable in and of themselves under some state laws. See, e.g., CONN. GEN. STAT. § 46a-60(a)(9) (2009) (“It shall be a discriminatory practice . . . to request or require information from an employee . . . relating to the individual's child-bearing age or plans . . . or the individual's familial responsibilities . . .”).

⁶⁷ See, e.g., Williams & Segal, *supra* note 9, at 160 (describing how “statements supervisors make to mothers become embarrassing in court and can only aid plaintiffs who seek to recover”).

⁶⁸ See generally WORKING 4 UTAH, INITIATIVE PERFORMANCE REPORT, BASELINE DRAFT (2008), available at <http://www.utah.gov/governor/docs/Working4UtahReport.pdf> (forecasting economic impacts and various other costs, benefits, and impacts of the program launched by Utah Governor Jon Huntsman).

⁶⁹ See generally WORKING 4 UTAH INTERIM DRAFT, *supra* note 41 (following the Baseline Draft six months into the program's one-year pilot period and reporting actual impacts of the program as of that time).

⁷⁰ See Sturm, *supra* note 14, at 519–20 (describing systemic overhauls implemented by companies, including Deloitte & Touche and Intel, to address structural gender disparities).

worker/management partnerships, they are relatively unique. Few firms are likely to devote the resources required to investigate, assess, and implement a workplace restructuring for the uncertain prospect of what might be negligible savings.⁷¹

The situation faced by the individual supervisor is in some ways less daunting, but at the same time poses a higher risk. Consider once again the employee who asks her supervisor to leave one hour early each day. The supervisor need not engage in the wide-scale assessment involved in a firm-wide initiative to determine whether to grant the particular request. Law and economics scholars, however, recognize that individuals are “boundedly rational” in the degree to which they access and process relevant information.⁷² In this case, the supervisor is unlikely to have the time or means to calculate or predict things such as the likely effect of the employee’s departure on work output, its implications for office morale, and its ability to generate future returns for the company in terms of employee loyalty and retention, all of which would be relevant to a true cost-benefit assessment.⁷³ Most front-line supervisors are neither capable of, nor charged with, responsibility for this type of analysis.⁷⁴

Moreover, any attempt to ascertain the implications of adopting the accommodation, as through a trial effort, comes at significant risk to the individual supervisor. If the attempted accommodation adversely affects production or has other negative consequences, higher-ups will hold the

⁷¹ See Arnow-Richman, *Accommodation Subverted*, *supra* note 3, at 379 (describing such efforts as the exception rather than the rule); Coglianese & Lazer, *supra* note 33, at 702–03 (explaining that, while private firm incentives can lead to some organizational reform, the high costs of big structural changes may appear unjustified); WORK-LIFE BALANCE, *supra* note 46, at 23 (noting that firms are often slow to adopt new management practices, despite their documented efficiencies, in explaining the absence of more widespread adoption of flexible work practices). On the other hand, one should not underestimate the possibility of more spontaneous and higher risk experimentation in work restructuring, particularly by smaller employers or fledgling companies. Such initiatives have received attention in the popular media. See Jennifer Ludden, *When Employers Make Room for Work-Life Balance*, NPR, Mar. 15, 2010, <http://www.npr.org/templates/story/story.php?storyId=124611210&sc=nl&cc=nh-20100315> (describing the decision of a female executive of a 100-plus person software development company to allow employees to “largely set their own hours and telecommute at will” in recognition of employees’ need for work/life balance).

⁷² Bounded rationality refers to the idea that human decision making is usually based on limited information and information processing. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214 (1995); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1207 (2003).

⁷³ See Eisenberg, *supra* note 72, at 214 (“[S]earching for and processing information does involve costs, in the form of time, energy, and perhaps money. Most actors either don’t want to expend the resources required for comprehensive search and processing or recognize that comprehensive search and processing would not be achievable at any realistic cost.”).

⁷⁴ See *id.*

[O]ur abilities to process information and solve problems are constrained by limitations of computational ability, ability to calculate consequences, ability to organize and utilize memory [A]ctors will often process imperfectly even the information they do acquire. Such imperfections in human processing ability increase as decisions become more complex and involve more permutations.

Id.

supervisor accountable.⁷⁵ Rather than making a reasoned calculation about possible outcomes, therefore, a supervisor will more likely act on instinct, granting or denying the request based on the limited information that he or she already has. Such an approach is fraught with potential for bias—a subject explored in the next section.

In sum, it is unlikely that front-line supervisors will make careful assessments of the costs and benefits of particular accommodation requests. As a result, some accommodations that would help working caregivers—while posing no cost to the employer or even, in some cases, resulting in cost savings—likely are not being implemented.

2. Cognitive Bias

If supervisors are unlikely to think comprehensively about the costs and benefits of particular accommodation requests, how *do* they make decisions about whether to accommodate? Law and economics scholars have recognized that in making choices or predictions, individuals are likely to rely on flawed heuristics.⁷⁶ Decision makers may unduly rely on recent information, generalize based on particular salient experiences, over- or under-estimate future risk, overvalue the status quo, and take other cognitive shortcuts in processing information and reaching a result.

Consistent with this description, social scientists researching social cognition and the operation of discriminatory bias have demonstrated that mental heuristics may reflect latent biases or assumptions about non-traditional group members.⁷⁷ Professor Joan Williams and other legal scholars have developed and applied this theory in the context of employers' treatment of working caregivers.⁷⁸ In making decisions,

⁷⁵ To some extent, this reflects an agency problem. In cases where employers stand to reap only long-term gains by accommodating workers, the interests of a particular manager and the company as a whole may deviate. The company has a strong interest in long-term productivity and turnover reduction, whereas the manager may be focused on the immediate task of satisfying his discrete job requirements and constrained by the transaction costs entailed in evaluating and effectuating individual accommodations. See George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 *FORDHAM L. REV.* 273, 279 (1998).

In all principal-agent relationships, there is a divergence of interests because of the separation of ownership (in the principal) and control (in the agent) of productive assets. Because the agent does not reap the full reward from his efforts on the principal's behalf, and because the agent knows more than the principal about what the agent is doing (what economists refer to as "asymmetric information"), the agent has the incentive and opportunity to act—whether alone or in concert with others—in numerous ways that harm the principal's interests.

Id.

⁷⁶ See, e.g., Eisenberg, *supra* note 72, at 218–25 (summarizing research exploring the effects of "defective capability" on decisionmaking processes).

⁷⁷ See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1188 (1995) (describing how cognitive structures and processes involved in categorization and information processing often result in stereotyping).

⁷⁸ See Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping*

employers may unconsciously mistreat mothers and pregnant women because of stereotypes about their competency and fitness for market work.⁷⁹ Thus, absences or tardiness by a working mother may be more salient to an employer than the attendance record of a child-free worker, or the employer may be more inclined to look for—and consequently prone to find—deficiencies in the mother’s performance.⁸⁰ As a result, the employer may evaluate working caregivers more harshly than traditional workers, provide them lower-profile work, and fail to consider them for promotions and key assignments for which they are otherwise qualified.

These same heuristics may influence the way in which a supervisor weighs a request for an individual accommodation. Returning to the prior example about the new mother who asks to leave one hour early each day, imagine that the mother proposes that she make up the one hour per day working one hour each evening from home after her children go to sleep. Suppose that the work in question is of the type that is transportable to a home environment—for instance, it involves preparing documents that can be done on a home computer—so that there ought to be a very limited effect, if any, on the employee’s marginal product. If the supervisor believes, however, consciously or unconsciously, that mothers are not as committed to their jobs as other workers he may over-predict possible adverse consequences of granting the request, or make unfounded assumptions about how it will impact the worker’s performance. Thus, the supervisor might assume that the mother will not actually perform the daily hour of work at home, that her performance will be affected by the distraction of her children, that granting the request will encourage further requests or shirking, or that there is no point in allowing the accommodation because the mother will eventually quit her job anyway.

Of course, if such beliefs did influence the supervisor, his decision would in theory be actionable under basic anti-discrimination principles. Those laws do not require accommodation of a caregiver’s desire to work at home, but they do preclude consideration of gender in determining terms and conditions of employment.⁸¹ The new mother in this hypothetical

and Cognitive Bias Evidence To Prove Gender Discrimination, 7 EMP. RTS. & EMP. POL’Y J. 287, 300–01 (2003) [hereinafter Williams, *Glass Ceiling*] (summarizing scholarship).

⁷⁹ See Susan Huhta et al., *Looking Forward and Back: Using the Pregnancy Discrimination Act and Discriminatory Gender/Pregnancy Stereotyping To Challenge Discrimination Against New Mothers*, 7 EMP. RTS. & EMP. POL’Y J. 303, 318–20 (2003) (summarizing studies demonstrating that working mothers received competence ratings equivalent to those of elderly, retarded, and disabled workers, and that pregnant women received lower performance ratings than non-pregnant women engaging in identical behavior).

⁸⁰ See Krieger, *The Content of Our Categories*, *supra* note 77, at 1206 (explaining that where males and females perform a stereotypically male task poorly, the female may be more severely punished because the supervisor sees her performance as “dispositional” and sees the male’s performance as “situational”); Williams, *Glass Ceiling*, *supra* note 78, at 294 (describing “the tendency of in-groups to apply objective rules rigorously to outsiders but flexibly to insiders”).

⁸¹ See 42 U.S.C. § 2000e(2) (2006); *EEOC Enforcement Guidance*, *supra* note 13 (“[S]tereotypes

could bring a “discriminatory failure to accommodate” claim.⁸² In this scenario, the reason (or a reason) for the denial of the requested accommodation was based on gender stereotype. The difficulty, however, is that such adverse actions often masquerade as legitimate business decisions, particularly where the influence of bias is subtle or unconscious. One is only likely to be able to prove the effect of cognitive bias where statements or stray remarks reflect the decision makers’ stereotypical beliefs or where the existence of more favorably-treated comparators creates an inference that stereotype influenced the decision.⁸³ Thus, it is likely that supervisors, in at least a subset of cases, are making decisions about individual accommodations that are not only sub-optimal, but also discriminatory, and which are currently going undetected (and unremedied) by existing law.

Just as employers may rely on heuristics built in part on stereotypes about working caregivers, they may also rely on heuristics based in an essentialistic understanding of the proper structure of work. In the early departure hypothetical, the supervisor not only makes judgments about the worker herself—whether she is “deserving” of the accommodation, whether she will in fact work at home, and whether it is in the company’s interest to invest in her retention—he also makes judgments about the viability of the accommodation in light of the company’s business needs. He may wonder whether the departure will disrupt other workers or working relationships, whether it will negatively affect office morale, whether it will limit his ability to monitor and supervise work, or whether it will adversely affect the quality of the goods or services the company provides.

In the context of any particular accommodation decision, such concerns may be legitimate or they may be overstated. In the current example, the requested time away from the office is limited to one hour per day, so problems owing to lost “face time” at work ought to be de minimis. Yet, there are many reasons why the supervisor might exaggerate these

that female caregivers should not, will not, or cannot be committed to their jobs are sex-based, employment decisions [that] violate Title VII.”)

⁸² Arnov-Richman, *Public Law and Private Process*, *supra* note 15, at 34.

⁸³ Cases involving explicit stereotype-based statements about pregnant and working mothers are not infrequent. See Huhta et al., *supra* note 79, at 320–21. On the other hand, caregivers’ ability to win discrimination cases using comparator evidence is often hampered by court decisions requiring the situation of the proffered comparators to be almost indistinguishable from the plaintiff herself. See, e.g., *Walker v. Fred Nesbit Distrib. Co.*, 356 F. Supp. 2d 964, 968 (S.D. Iowa 2005) (upholding a jury verdict for an employer charged with discriminatory failure to accommodate a pregnant truck driver seeking light duty despite the fact that the employer had a policy of accommodating male drivers injured on the job and had previously accommodated some male drivers injured off the job, implicitly accepting the employer’s contention that the pregnant driver was not similarly situated to male workers unable to lift due to work injuries); see also Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 238–39 (2009) (critiquing the strict view of relevant comparators and urging an objective evaluation of comparability guided by expert testimony).

risks. Professor Michelle Travis has demonstrated that in assessing failure to accommodate claims under the ADA, courts betray a very narrow view of the appropriate structure of work, treating the FTFT norm as an essential and inevitable component of the job.⁸⁴ Thus, courts routinely hold that requests to work from home, alter attendance requirements, or change work schedules are unreasonable and have consistently denied claims based on an employer's failure to provide these types of accommodations.⁸⁵

The same tendency may occur when supervisors vet individual accommodation requests not only from disabled workers but from caregivers as well. Thus, a supervisor presented with a request to work reduced hours, work on a flexible schedule, or work from home may perceive these accommodations as inherently inconsistent with work norms even in situations where, from an objective perspective, they are unlikely to pose any cost to the employer. Such a view may in part be explained by the empirically documented effect of status quo allocations. Studies demonstrate that in a variety of contexts, from exchanges of goods to changes in the state of the world, individuals systematically favor maintaining their current situation over an equally valuable alternative.⁸⁶ In effect, individuals exact a premium in negotiating for change and will ask more for giving up what they currently enjoy than they would pay to acquire it in the first place.⁸⁷

In the individual accommodation context this would mean that a supervisor will place undue value on maintaining existing work rules and structures. The supervisor may prefer having each worker perform all eight hours of work at the work site to working one hour from home even if all other aspects of the alternative arrangement are objectively equal. If

⁸⁴ See Travis, *Recapturing*, *supra* note 3, at 23.

⁸⁵ See Arnow-Richman, *Accommodation Subverted*, *supra* note 3, at 365–66 (providing case examples); Travis, *Recapturing*, *supra* note 3, at 25–28 (same). An interesting question is whether this tendency is likely to change as flexible work practices grow more prevalent. There is some case support to suggest that employees can be successful in seeking accommodations that violate the FTFT norm where such deviations were previously tolerated by the employer. See, e.g., *Jacobs v. Marietta Mem'l Hosp.*, 2010 WL 749897 *5 (S.D. Ohio Feb. 23, 2010) (denying summary judgment to an employer on a bipolar worker's claim of unreasonable failure to accommodate request to work occasionally from home on a flexible schedule where plaintiff had successfully maintained that work arrangement for eight years prior to its discontinuation by a new supervisor); *Graffius v. Shinseki*, 672 F. Supp. 2d 119, 128 (D.D.C. 2009) (finding a material issue of fact as to whether allowing the plaintiff to telecommute would pose an undue hardship in light of her job description and the fact that she had previously received a high performance evaluation while telecommuting).

⁸⁶ Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625 (1998).

⁸⁷ See *id.* at 627. If individuals valued particular states of the world without reference to pre-existing allocations, they would value the cost to achieve or acquire that state of the world the same as they would to give that state up. Controlled experiments, however, consistently reveal a gap between the price individuals are willing to pay to acquire an object or achieve a particular state of the world and the price they are willing to accept to sell that same object or relinquish that state of the world. *Id.*

so, cost effective accommodations that parties should ordinarily implement as a matter of rational choice may, in some situations, be denied.

C. *Voluntary Accommodation Revisited*

The previous section argued that, in contrast to the conclusions of rational choice theory, cost effective accommodations will not necessarily be granted by employers voluntarily. Supervisors' decisions may be based on limited or inaccurate information, subtly influenced by bias toward working caregivers, or reflect an intractable desire to preserve the status quo.

For these reasons, the universe of individual accommodations that are currently granted to caregivers likely looks less like Figure 2 and more like the following:

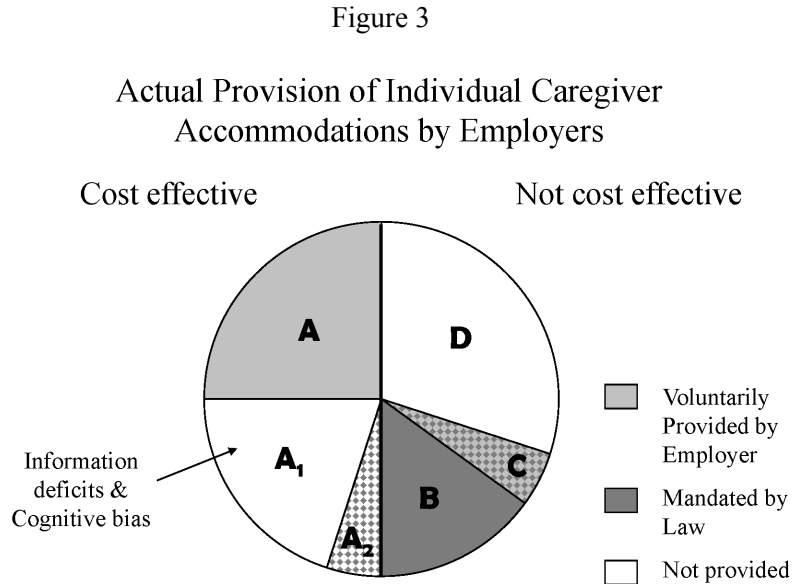


Figure 3 demonstrates the actual state of voluntary accommodation. In contrast to Figure 2, only a portion of the cost-effective accommodations on the left side of the graph are in fact voluntarily implemented. Thus, shaded section A, representing voluntarily provided accommodations, is significantly smaller than the full universe of cost-effective accommodations. The rest of that half of the graph (sections A₁ and A₂) represents those situations in which a cost-effective accommodation is not achieved due to information deficits, cognitive bias, or any number of other possible limitations on rational choice. The denial of some number of these cost-effective accommodations likely owes to bias against caregivers as a class, and may therefore constitute actionable gender

discrimination (represented here as section A2). Importantly, though, even assuming that all denials based on group bias were adequately redressed by existing discrimination law, there remains a universe of cost-effective accommodations that parties fail to achieve due to market breakdown and which ought to be addressed through legal intervention.

IV. THE ROLE OF LAW IN INCENTING VOLUNTARY ACCOMMODATION

This section returns to the question of law and the role it might play in light of both the potential for and the limitations of voluntary accommodation. As described in Part II, there are various challenges inherent in crafting legislation that mandates caregiver accommodation. If the goal of legal intervention, however, is not to impose particular obligations on employers, but to facilitate the discovery of mutually beneficial accommodations, then other options present. Pending legislation creating a statutory “right to request” flexible work offers an example. The Working Families Flexibility Act (the “WFFA” or the “Act”), modeled on the 2002 Right to Request Law adopted in the United Kingdom,⁸⁸ creates and protects a worker’s procedural right to apply for a change in schedule.⁸⁹ The law imposes no obligation on the employer to accept the worker’s proposal and therefore is unlikely to affect widespread work restructuring or individual accommodations that impose significant costs on employers. If adopted, however, the law may lead workers and employers to identify and implement cost-effective accommodations that they might otherwise have ignored or overlooked. This section considers the benefits and limitations of such a law with an eye toward correcting the impediments to optimal voluntary accommodation presented in Part III.

A. *The Working Families Flexibility Act*

Introduced in the House of Representatives in March 2009, the WFFA sets forth a new procedural right under which full and part-time workers may “apply” to their employer for a change in employment terms.⁹⁰ Specifically, the law sanctions employee requests pertaining to the hours, times and location where the employee is required to work.⁹¹ In effect, the law targets those aspects of work structure that comprise the FTFT norm, and which are often the most onerous to working caregivers.

While the Act places no substantive obligations on the employer, it does several things to enhance the process by which individual accommodation requests are posed and vetted. While nominally designed

⁸⁸ Employment Act, 2002, c. 22, § 47 (U.K.), available at http://www.opsi.gov.uk/acts/acts2002/pdf/ukpga_20020022_en.pdf.

⁸⁹ Working Families Flexibility Act, H.R. 1274, 111th Cong. § 3(a) (2009).

⁹⁰ *Id.*

⁹¹ *Id.*

to assist working families, the right to request applies to *all* workers who meet basic eligibility requirements, not just caregivers.⁹² The fact that the ability to request is declared a right available to everyone may encourage workers to come forward⁹³ and may in particular reduce the stigma associated with the special needs of caregivers.⁹⁴ In addition, the Act protects those who propose changes in employment terms from subsequent retaliation by their employer.⁹⁵ Workers subjected to adverse action based on their invocation of rights under the Act may recover equitable relief including backpay.⁹⁶ As a strategic matter, this provision should reduce the need for a plaintiff caregiver to identify a gender-based motivation for a subsequent adverse action in order to challenge that conduct under traditional anti-discrimination law. Whereas a plaintiff proceeding under the latter statute would have to demonstrate that the employer's response to her accommodation request was influenced by gender stereotype, the Act creates a direct cause of action for adverse treatment based on the plaintiff's need for an altered schedule.⁹⁷ In this way, the Act reduces the risks inherent in coming forward with individual requests.

⁹² See *id.* § 2(1) (defining "employee" as an individual "who has worked an average of at least 20 hours per week or . . . at least 1,000 hours per year"). In this respect, the Act differs substantially from its European precursors such as the U.K.'s Right to Request Law, which originally applied to parents of children under the age of six and now applies to those with children under the age of seventeen, as well as those who care for a disabled child or adult.

⁹³ On the value of rights and identity, see DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 78–80, 104–05 (2003); Catherine Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 27–28 (2005).

⁹⁴ Per this theory, some scholars have argued that working women will not achieve equal employment quality until men seek workplace accommodations for caregiving. See, e.g., Martin H. Malin, *Fathers and Paternal Leave*, 72 TEX. L. REV. 1047, 1095 (1994) (suggesting that improving parental leave policies will benefit women because "[t]he lack of good paternal leave policies also encourages workplace discrimination against women of childbearing age"); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 708 (2000) ("[I]f there is to be greater equality for women in the workplace, it will be necessary for men to change their behavior, both in and out of the workplace, before employers will begin to change theirs."). Of course, this problem will not go away if, despite the WFFA's broad applicability, it is invoked primarily by women. Such has been the experience with the FMLA, which is also gender-neutral. See Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 479–80 (2008) (summarizing Department of Labor statistics on FMLA usage, which demonstrate that men use FMLA leave less often than do women and that they do so primarily for their own health needs rather than to care for others); Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 260–61 (2003) (same). Unlike the FMLA, however, the WFFA is not only gender-neutral—it applies to caregivers and non-caregivers alike.

⁹⁵ Working Families Flexibility Act, H.R. 1274, 111th Cong. § 5(b) (2009).

⁹⁶ *Id.* § 7(a)(2).

⁹⁷ Instead, the plaintiff will presumably have to prove that the request triggered the adverse action. While this is likely to be a difficult task in itself, the plaintiff is no longer saddled with the problem of unearthing comparators whose treatment varied by gender. See *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (suggesting that the plaintiff could prevail on a discrimination claim based on the employer's unwillingness to tolerate her pregnancy-related tardiness and leave requirements only if the employer would have fired "a hypothetical Mr. Troupe, who is as tardy as Ms.

The Act also imposes a number of procedural requirements on an employer who receives a statutory request. The employer must hold a meeting with the worker within fourteen days of the request.⁹⁸ It must subsequently provide a written decision on the request that explains the reason for any denial, which may include such things as the resources of the employer, the costs posed by the change in terms, potential effects of the change on customers, and other managerial concerns.⁹⁹ The employer must also follow a similar procedure in the event the employee requests reconsideration of her proposal following a denial.¹⁰⁰ Any refusal to follow these procedures may result in a civil penalty of up to \$5000.¹⁰¹

These provisions lay out what is essentially a methodology for evaluating individual accommodation requests. In this way, the “right to request” may be helpful in overcoming some of the cognitive and informational limitations that likely plague unregulated supervisory decision making. At a minimum, the Act forces a degree of mutual information disclosure. Workers who wish to be accommodated must describe their preferences and needs; supervisors charged with evaluating requests must communicate about their managerial and cost concerns. Such a process could lead to the shared discovery of viable solutions that would not otherwise have been identified. It could also encourage more aggressive efforts by supervisors to acquire information about the business implications of a particular accommodation. Because the supervisor will have to meet with the applicant, and ultimately provide a written decision, he must invest some time and forethought to the stakes of the decision, including short- and long-term effects of the requested accommodation. In some cases, this could produce more deliberative results grounded in facts rather than purely reflexive responses based on limited information and supposition.

While there is little to suggest that the WFFA’s sponsors had the particular problem of information deficits in mind, overcoming those types of obstacles to accommodation is clearly a goal of the British Right to Request Law on which the WFFA is modeled. That law, which dates to 2002 and grants working parents a comparable right to request flexible work, is premised on the idea that employers stand to benefit from flexible schedules but are ill-informed both about the needs of their workers and the possibilities for change. Guidance interpreting the law suggests that the goal is to put both parties on the same side of the table where they can

Troupe was, also because of health problems, and who is about to take a protracted sick leave growing out of those problems at an expense to [the employer] equal to that of Ms. Troupe’s maternity leave”).

⁹⁸ H.R. 1274 § 4(b)(1)(A).

⁹⁹ *Id.* § 4(b)(1)(B)–(C).

¹⁰⁰ *Id.* § 4(b)(1)(E)–(K).

¹⁰¹ *Id.* § 7(a)(1).

educate one another and realize mutually advantageous accommodations.¹⁰²

In this respect, both the WFFA and its British counterpart are reminiscent of the well-established interactive process protocol imposed under disability law. Regulations interpreting the ADA counsel employers who receive an accommodation request, or have reason to know of a worker's disability, to "initiate an informal, interactive process" with the worker.¹⁰³ Courts have held that an interactive process is mandatory and, in some instances, have divined a prima facie case of unlawful failure to accommodate from the employer's refusal to engage in that process.¹⁰⁴ Courts so holding recognize that good process is an essential component in identifying and achieving viable accommodations consistent with the statute. Indeed, the interactive process requirement has been credited with enhancing compliance and effecting numerous accommodations outside the litigation context.¹⁰⁵

It is also possible that the WFFA's procedural requirements will help alleviate some of the effects of subconscious discriminatory bias. Social science research has determined that subconscious bias is especially likely to exert influence in situations calling for the exercise of discretionary judgment.¹⁰⁶ The procedure set forth in the WFFA could ideally replace

¹⁰² See U.K. DEP'T OF TRADE & INDUS., FLEXIBLE WORKING: THE RIGHT TO REQUEST AND THE DUTY TO CONSIDER 2 (2003).

¹⁰³ 29 C.F.R. § 1630.2(o)(3) (2009).

¹⁰⁴ See, e.g., *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112, 1116–17 (9th Cir. 2000) (noting that "[a]lmost all of the circuits to rule on the question have held that an employer has a mandatory obligation to engage in the interactive process" and concluding that the employer breached that duty where it summarily rejected all three of plaintiff's proposed accommodations, including a "low-tech" lifting device that "may well have been an adequate reasonable accommodation," and offered no practical alternatives), *vacated on other grounds*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633–34 (7th Cir. 1998) (declining to grant an employer summary judgment because factual dispute remained as to whether the employer caused the breakdown in the interactive process by failing to place plaintiff in a temporary position and failing to inform him of a position open to job-bidding); *Picinich v. United Parcel Serv.*, 321 F. Supp. 2d 485, 513–16 (N.D.N.Y. 2004) (finding a material issue of fact precluding summary judgment for the employer on a failure-to-accommodate claim where plaintiff's evidence suggested that the employer delayed the interactive process and withheld information about job openings).

¹⁰⁵ See Arnow-Richman, *Public Law and Private Process*, *supra* note 15, at 56 (speculating that the ADA interactive process requirement "is giving disabled workers a leg up in negotiating with their employers and, as a consequence, is achieving favorable, cooperatively designed solutions under the radar of reported case law"); Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 626 (2004) ("The interactive process contemplated by the ADA is a unique procedural device that has launched untold numbers of successful workplace accommodations."); cf. Travis, *Lashing Back*, *supra* note 9, at 359–63 (describing how, in addition to leading to accommodation of the disabled, formalized procedures implemented in response to the interactive process requirement yield residual benefits to non-disabled workers).

¹⁰⁶ On this basis, some legal scholars have set forth substantive theories of employer liability for structural discrimination in situations where managers are left to act on unguided discretion. See, e.g., Green, *supra* note 14, at 145 (proposing a "structural account of disparate treatment theory [that] would hold employers directly liable under Title VII for organizational choices, institutional practices, and

unstructured decision making by individual supervisors with a more focused review of relevant business considerations. The operation of subconscious bias may also be tempered by the Act's requirement that the parties meet, at least one time, to discuss the worker's application.¹⁰⁷ Social science research suggests that contextual factors, such as immediate exposure to subjects of negative stereotypes, can impact the degree to which bias manifests in subsequent decisions.¹⁰⁸ In one notable experiment, the presence of an African American test administrator resulted in a reduction in the degree of automatic prejudice subjects exhibited during the subsequent diagnostic.¹⁰⁹ In the context of a right to request, the requirement that the employer actually meet with the individual could serve as the immediate corrective exposure that mitigates the effects of negative stereotypes about caregivers.

B. *Implications for Voluntary Accommodation*

Undoubtedly, this is a highly optimistic take on the significance of the WFFA. Perhaps it is too optimistic. A procedural mandate certainly will not eliminate all of the innate biases and limitations associated with human decision making. Supervisors may develop a more expansive view of the range of possible accommodations, but they are not likely to become better forecasters of the productivity and retention effects of granting them.¹¹⁰ In the same vein, stereotyping and other forms of bias are innate components of human cognition, and certain effects on judgment will likely persist even in the face of positive exposure and extended dialogue.¹¹¹

Perhaps more problematic is the risk that the delineated procedures specified in the Act will operate as a script for compliance that

workplace dynamics that enable the operation of discriminatory bias"); Melissa Hart, *Learning from Wal-Mart*, 10 EMP. RTS. & EMP. POL'Y J. 355, 373–74 (2006) (discussing the importance and legitimacy of class action suits challenging big box employers' use of subjective and decentralized decision making as enabling the operation of cognitive bias).

¹⁰⁷ Working Families Flexibility Act, H.R. 1274, 111th Cong. § 4(b)(1)(A) (2009).

¹⁰⁸ See Jason P. Mitchell et al., *Contextual Variations in Implicit Evaluation*, 132 J. EXPERIMENTAL PSYCHOL. 455, 456 (2003) (summarizing research indicating that "contextual factors can systematically shift self-reported attitudes and beliefs").

¹⁰⁹ Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 845 (2001); see also Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 806 (2001) (suggesting that exposure to pictures of admired and disliked exemplars can reduce automatic preference for white over black Americans).

¹¹⁰ See Eisenberg, *supra* note 72, at 214–16 (describing how achieving an optimal outcome may require individuals to limit acquisition of information that is costly to discover, resulting in "rational ignorance").

¹¹¹ See Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1158–67 (1999) (summarizing experimental research that calls into question the human ability to correct or control for the operation of discriminatory bias).

overshadows the thoughtful process the Act ought to encourage.¹¹² In this way, the WFFA may go both too far and not far enough in its efforts to ensure procedural fairness. The Act identifies the precise steps required of employers and imposes a penalty in the event those steps are not followed.¹¹³ It fails, however, to establish any standard of review by which employers are to judge applications or to impose any general duty on the employer in terms of the quality of its vetting process.

Regulatory and judicial interpretation could ultimately fill that gap. Such has been the case under the ADA, where courts have not only required parties to participate in the interactive process recommended by the regulations, but to do so in good faith. Thus, courts have looked to the quality of the employer's participation—the speed of its response, its willingness to experiment with a proposed accommodation, its efforts to accumulate information, its attentiveness to employee suggestions—to determine whether the employer meaningfully engaged in the interactive process with an intent and desire to reach a viable accommodation.¹¹⁴

¹¹² Such critiques have been levied, not without justification, in the context of sexual harassment law under which an employer must demonstrate that it engaged in preventative and corrective action in order to avoid liability for a hostile work environment. *See, e.g., Burlington Indus. v. Ellerth*, 524 U.S. 742, 764–65 (1998) (holding that an employer may avoid liability if it can show that it exercised reasonable care to prevent, and swiftly remedy, any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of preventive and corrective opportunities that the employer provided to mitigate the risk of harm to the employee); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (same). The general consensus among commentators is that this rule has resulted in superficial efforts by employers to deter hostile conduct—efforts that are often credited by courts but actually do little to eliminate sexual harassment. *See Susan Bisom-Rapp, An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 1 (2001) (emphasizing the absence of empirical support for the “widely held and rarely questioned” belief that corporate anti-discrimination training deters harassment and discrimination and suggesting that such programs might even polarize workers and undermine legal rights); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004) (observing that “courts reward employers for developing and distributing nicely worded harassment policies and procedures,” which do not necessarily deter sexual harassment in the workplace); John H. Marks, *Smoke, Mirrors, and the Disappearance of “Vicarious” Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1405 (2002) (“To trigger [the] safe harbor [under *Ellerth* and *Faragher*], all an employer has to do is promulgate a harassment complaint procedure.”); David Sherwyn et al., *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1267 (2001) (concluding that the message to be gleaned by employers from lower court rulings post-*Ellerth* and *Faragher* is that “to limit liability [employers] should exercise just enough reasonable care to satisfy a court, but not enough to make it easy or comfortable for employees to complain of workplace harassment”). *But see* Arnow-Richman, *Public Law and Private Process*, *supra* note 15, at 48–50 (acknowledging anti-plaintiff results under the *Ellerth-Faragher* rule but arguing that these are due to a misinterpretation and unjustified expansion of the Supreme Court’s decisions by lower courts and do not suggest the inevitability of “paper compliance” by employers).

¹¹³ Working Families Flexibility Act, H.R. 1274, 111th Cong. §§ 4(b)(1)(A)–(M), 7(a)(1) (2009).

¹¹⁴ *Compare Salgado-Candelario v. Ericsson Caribbean, Inc.*, 614 F. Supp. 2d 151, 168–71 (D.P.R. 2008) (finding a triable issue on the employer’s breach of the good faith interactive process requirement where the plaintiff-employee’s supervisor asked for repeated doctors’ notes, employer’s

The same type of inquiry could be applied to an employer's handling of a request under the WFFA. Indeed, British tribunals interpreting the U.K. Right to Request Law appear to be doing just that. The decision in *Commotion Ltd. v. Ruty* provides an example.¹¹⁵ There, the employee-appellant was a full-time warehouse worker who became the principal caretaker of her young granddaughter. As a result, she made an application under the Right to Request Law to reduce her work hours to a part-time schedule.¹¹⁶ The company met with the employee, per the statute, and issued a written denial of the request. Among other things, the employer asserted that there would be a "detrimental impact on performance" if the request were granted and cited the need to "help create a team spirit by having a uniform working day."¹¹⁷ On the employee's subsequent claim under the Right to Request Law, the Employment Tribunal held that the employer had not complied with its statutory requirements.¹¹⁸ Affirming this decision, the Employment Appeal Tribunal explained:

There is . . . a sliding scale of the considerations which a Tribunal may be permitted to enter into in looking at such a refusal. The one end is the possibility that all that the employer has to do is to state his ground and there can be no investigation of the correctness or accuracy or truthfulness of that ground. At the other end is perhaps a full enquiry looking to see whether the employer has acted fairly, reasonably, and sensibly in putting forward that ground. Neither extreme is the position, in our judgment The true position . . . is that the Tribunal is entitled to look at the assertion made by the employer[,] i.e.[,] the ground which he asserts is the reason why he has not granted the application[,] and to see whether it is factually correct. . . .

In order for the Tribunal to establish [this] . . . the Tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the Tribunal are entitled to enquire into what

written replies to the employee's submissions and those of her physician were repetitive and non-responsive, and the employer delayed closing an air duct as an accommodation to the employee because she had not provided a "specific medical order" stating there was a temperature problem), *with Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871–72 (6th Cir. 2007) (finding no lack of good faith where the employer sought to meet directly with the plaintiff employee, the employer's personnel were "open" and "professional" in talking to the employee's rehabilitation counselor, and representatives visited the production line where the employee worked to try to identify appropriate alternative jobs).

¹¹⁵ *Commotion Ltd. v. Ruty*, [2006] I.R.L.R. 171 (EAT).

¹¹⁶ *Id.* at 172–73.

¹¹⁷ *Id.* at 173.

¹¹⁸ *Id.* at 175.

would have been the effect of granting the application. Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? [A]nd matters of that type.¹¹⁹

Thus, the scope of inquiry for determining a procedural violation under British law clearly exceeds a checklist review of the employer's actions. Applying the standard articulated above, the Appeal Tribunal sanctioned the Employment Tribunal's finding in favor of the employee based on the fact that the employer had produced no information to support its claim that working as a part-time warehouse assistant was "not feasible."¹²⁰ As the lower tribunal concluded: "There has not been a shred of evidence that proper enquiry and proper investigation was carried out by the [employer] when dealing with [the employee's] request."¹²¹ Thus, it is clear that courts can and will draw a line between reflexive decisions and thoughtful process where the law sanctions this approach.¹²²

Finally, there is empirical evidence to support the conclusion that good process can achieve good outcomes. The most recent available study of the effects of the Right to Request Law in the United Kingdom, which has been in place since 2002, found that sixty percent of requests were fully accepted by employers and that another eighteen percent were partially accepted.¹²³ The overwhelming majority—eighty-seven percent—were accepted outright without need for the employee to resort to an appeal.¹²⁴ The types of requests ranged from requests for reduced hours or part-time status, to requests for flexible hours or changes in schedule, to requests to work at home or receive assistance with the employee's workload.¹²⁵ There were no statistically significant differences in the rate of employers' acceptance of proposals based on the type of request.¹²⁶ In short, employers willingly deviated from the FTFT norm to accommodate a range of individual needs in the precise manner requested by a significant majority of employees.

¹¹⁹ *Id.* at 177.

¹²⁰ *Id.*

¹²¹ *Id.* at 175.

¹²² I have presented this argument more expansively in my prior work proposing an "organizational justice" approach to caregiver equality. Arnow-Richman, *Public Law and Private Process*, *supra* note 15, at 56–58 (proposing the adoption of an amendment to the FMLA that would require employers to engage in a good faith interactive process upon a worker's request for and return from leave).

¹²³ HÜLYA HOOKER ET AL., INST. FOR EMP. STUD., EMPLOYMENT RELATIONS RESEARCH SERIES NO. 58, THE THIRD WORK-LIFE BALANCE EMPLOYEE SURVEY: MAIN FINDINGS 57 (2007), available at <http://www.berr.gov.uk/files/file38388.pdf>.

¹²⁴ *Id.* at 58.

¹²⁵ *Id.* at 55–56.

¹²⁶ *Id.* at 58.

V. CONCLUSION

In conclusion, I return to the 4/40 work week. What does the recent popularity of alternative work schedules portend for the future? Ten years from now, should we expect 4/40 to be the new full-time standard? Somehow, I suspect not. At the moment, we have no empirical data about the scope of this trend, only media attention to a few high-profile programs initiated primarily by government employers. As this Symposium Issue goes to press, it has been many months since the newspapers have focused on this particular initiative. As fuel prices stabilize and the economy recovers, 4/40 may go by the wayside just as it did in the 1970s when employer interest in novel forms of work restructuring peeked and waned amidst uncertainty as to its ultimate benefit.¹²⁷

But whatever happens with 4/40, the intractable problem of work/life balance remains and grows increasingly urgent. A recent report from the Executive Office of the President, describes workplace flexibility as an economic imperative given the changing needs and demographics of a “21st century workforce.”¹²⁸ A key point of this Article has been that the goal of improving the lives of working caregivers transcends any particular form of work restructuring and must not be assessed as a problem of proscription. Whether initiated by an employer or imposed by legislation, any singular, top-down requirement as to the appropriate structure of work will help some workers and hurt others. What is needed is not one type of reform so much as an overarching flexibility about possible work structure. Flexibility is a much harder animal to legislate.

In this way, 4/40 does matter. It is a testament to the possibility of voluntary efforts by employers to change work structure in ways that accommodate working caregivers. This is not to say that reliance on voluntary employer action must supplant other strategies in pursuit of change. Certainly the strategic use of discrimination laws to root out stereotypes about the fitness of caregivers for market work must continue, and it is possible that we will yet see enhanced substantive benefits for caregivers.¹²⁹ But employer-sponsored voluntary action can be a

¹²⁷ See Bird, *supra* note 57, at ____.

¹²⁸ WORK-LIFE BALANCE, *supra* note 46, at 24–26. While the report does not mention 4/40, it describes and supports a variety of flexible work arrangements “in terms of when one works, where one works, or how much one works” including “arrangements such as job sharing, phased retirement of older workers, and telecommuting, that allow workers to continue making productive contributions to the workforce while also attending to family and other responsibilities.” *Id.* at Executive Summary.

¹²⁹ While the various strategies discussed here do not conflict with one another, I am mindful of the practical reality that the resources required to enact legislation are not unlimited. It is beyond the scope of this Article to speculate as to whether the WFFA would ultimately yield greater benefits to workers than would a substantive enactment like the pending Family and Medical Leave Enhancement Act, which would expand the FMLA to cover more employers and more routine parental obligations. See Family and Medical Leave Enhancement Act of 2009, H.R. 824 111th Cong. (2009). I do believe, however, that the WFFA is the more likely of the two to gain passage and for this reason would

meaningful part of that process, and its value can be enhanced through the operation of law. Legislation such as the WFFA, which offers a narrow and, perhaps for that reason, politically viable approach to incentivizing employer flexibility, provides a promising example.