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Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities

Nicole Buonocore Porter

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MUTUAL MARGINALIZATION: INDIVIDUALS WITH
DISABILITIES AND WORKERS WITH CAREGIVING
RESPONSIBILITIES

*Nicole Buonocore Porter**

Abstract

This Article explores the marginalization of two groups of employees—individuals with disabilities and workers with caregiving responsibilities. One might argue that these two groups have little in common. However, while these groups are not perfectly aligned, they do have much in common in the workplace. First, these employees are unable to consistently meet their employers’ expectations of an “ideal worker.” Thus, they often must seek adjustments or modifications in the workplace to accommodate for their failure to conform to the ideal-worker norm. The need for accommodation causes both groups of employees to suffer from “special-treatment stigma,” which manifests itself in resentment by coworkers about the special benefits these employees receive, and in employers’ reluctance to hire these employees because of the real or perceived costs of employing such individuals. Despite these similarities, the law deals with these two groups of employees very differently. Individuals with disabilities are entitled to broad protection in the workplace, including the rather unique reasonable accommodation provision in the Americans with Disabilities Act. On the other hand, despite some laws protecting some aspects of pregnancy and caregiving, workers with caregiving responsibilities do not enjoy the same broad protection as individuals with disabilities.

This Article explores why the law treats these groups of employees differently. It addresses many of the concepts that are thought to distinguish individuals with disabilities and workers with caregiving responsibilities and that are therefore used to justify their different treatment under the law. But this Article ultimately concludes that these distinctions, once unpacked, do not justify the law’s different treatment of the two groups. Moreover, these differences are not as significant as the similarity that binds these two groups together—special-treatment

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stigma. Thus, this Article explores whether a combined legal and theoretical approach to eliminating the special-treatment stigma is feasible and defensible. Specifically, this Article seeks to provide theoretical justification for the reasonable accommodation provision under the ADA and argue that the same justification can be used to support an accommodation mandate for workers with caregiving responsibilities.

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INTRODUCTION

Even today, most workplaces continue to operate with highly entrenched norms, including a full-time, forty-hour-plus workweek,¹ rigid starting and ending times, very little access to paid time-off or leaves of absence, and work functions that employers insist can only be completed in the traditional way they are always completed.² Because of these entrenched norms, many individuals with disabilities and workers with caregiving responsibilities cannot meet their employers' expectations. For instance, imagine an individual who has kidney failure and cannot work the normal rotating shifts because of his dialysis schedule. Or imagine a single mother who cannot work the midnight shift because she has no one at home to care for her children. Also, imagine an employee who has cancer, and even though she schedules her chemotherapy treatment at times when she is not working, she is frequently fatigued or nauseous from the treatment and sometimes misses work, which causes her supervisor to discipline her for her absences and fail to give her a promotion for which she believes she is qualified. Or imagine a mother who, because her husband frequently travels for work, must miss work when her small children are sick and cannot attend daycare or need to be taken to the doctor. She, too, is disciplined and does not get a promotion for which she was qualified. What all of these employees have in common is their inability to meet the "ideal worker"³ norm. Although the reasons for their failure are different—two of the examples above are individuals with disabilities and the other two are individuals with caregiving responsibilities—they all involve the reality that the employees' failure to conform to the ideal-worker norm likely hinders their success at work (and perhaps even their job security).

1. Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005) (discussing how the "bundle of related default organizational structures—referred to collectively as the 'full-time face-time norm'—frequently excludes individuals from the workplace, particularly individuals with disabilities and women with significant caregiving responsibilities"); see also Michelle A. Travis, *Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 10 EMP. RTS. & EMP. POL'Y J. 233, 257 (2006).

2. See, e.g., Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 U. KAN. L. REV. 355, 361–64 (2010).

3. The term "ideal worker" was first coined by Joan Williams, and it is now a well-used phrase in the work/family literature. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1 (2000) [hereinafter WILLIAMS, UNBENDING GENDER]. Joan Williams describes the ideal-worker norm as the "total devotion to work and a constant availability" to work. 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, 81 (2009) [hereinafter Williams, *Reconstructive Feminism*].

Despite the similarities between individuals with disabilities and workers with caregiving responsibilities in the workplace, the law's treatment of these two groups is very different.⁴ As this Article explains below, individuals with disabilities are covered by a unique statutory structure, including the protection of the Americans with Disabilities Act's (ADA)⁵ reasonable accommodation provision.⁶ Although the Pregnancy Discrimination Act (PDA)⁷ provides *some* protection for women during pregnancy and childbirth, and the Family and Medical Leave Act (FMLA)⁸ provides *some* unpaid leave for *some* caregiving responsibilities, workers with caregiving responsibilities do not enjoy the same level of protection as individuals with disabilities.⁹

Although there are many apparent differences between these two groups of employees,¹⁰ and one can argue that these differences justify different treatment by the law and employers, many (if not most) of these differences fall away once unpacked. Moreover, these distinctions pale in comparison to the experiences that these two groups share in common—the inability to conform to the ideal-worker norm and the special-treatment stigma caused by that failure. Thus, this Article explores whether there is any common ground in law and theory that could end these groups' mutual marginalization.¹¹ Specifically, this

4. See 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, 620–24 (2004) (discussing treatment of workers with caregiving responsibilities under the Family and Medical Leave Act and the different treatment of workers with disabilities under the Americans with Disabilities Act).

5. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006 & Supp. V 2011)).

6. See *infra* notes 102–08 and accompanying text.

7. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2078 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)).

8. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 5 U.S.C. §§ 6381–6387 (2012) and 29 U.S.C. §§ 2601–2654 (2006 & Supp. V 2011)).

9. See *infra* Section III.A; see also 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, 374–75 (2001) (discussing the inadequacy of the law's ability to deal with women's cultural caregiving); Ann O'Leary, *How Family Leave Law Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 10 (2007) (stating that Title VII did nothing to accommodate women's roles as caregivers); Porter, *supra* note 2, at 370–80 (discussing the inadequacy of the current law to protect women with caregiving responsibilities).

10. Cf. Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 401 (2000) (arguing that "disability" is a "socially defined group status" that is "distinctive" based on its "systematic, socially contingent disadvantage").

11. See also Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 352–53 (2009) (mentioning the "potential for coalition building between . . . disability rights activists

Article argues that we need a new theoretical framework that will justify the special treatment that reasonable accommodations provide to individuals with disabilities and also justify providing that same protection to workers with caregiving responsibilities. That theoretical justification is communitarian theory. This Article argues that communitarian theory's emphasis on working together for the good of the community is both relevant and necessary for the workplace community. Communitarian theory recognizes that what binds us together is more significant and more important than what makes us different. Because workplace accommodations for both individuals with disabilities and workers with caregiving responsibilities will, over time, benefit us all, communitarian theory offers the justification for providing these accommodations.

Part I explores the common bond between individuals with disabilities and workers with caregiving responsibilities. Specifically, this Part discusses the inability of many individuals in both groups to conform to the ideal-worker norm, which often leads to special-treatment stigma for both groups. Part II addresses the differences in how the law treats these two groups of employees and explores the reasons used to justify the different treatment of individuals with disabilities and employees with caregiving responsibilities. This Article demonstrates that the reasons alleged for the different treatment do not, once unpacked, justify the differences in the law.

Because the marginalization of these two groups unites them more than that which divides them, in Part III, after briefly considering other solutions to end special-treatment stigma, this Article explores the use of the communitarian theory as a justification for providing workplace accommodations to individuals with disabilities and extending that reasonable accommodation protection to workers with caregiving responsibilities.

I. COMMON BOND

This Part explores the ways in which employees with disabilities and workers with caregiving responsibilities have a shared experience in the workplace. First, both groups of employees have difficulty conforming to the ideal-worker norm that employers expect of their employees. Because of the physical manifestations or medical needs of their disabilities, these employees often have difficulty meeting the hour and schedule requirements of their employers. Similarly, workers with caregiving responsibilities often have difficulty meeting the rigid schedule and hour requirements of their employers. This inability to

and work/family advocates" where the ADA "affect[s] general workplace policies . . . by allowing greater workplace flexibility").

conform to the ideal-worker norm leads to the second commonality between individuals with disabilities and workers with caregiving responsibilities—special-treatment stigma. Special-treatment stigma manifests itself in two ways. First, because these employees often cannot meet the ideal worker norm, employers may be reluctant to hire, promote, or provide accommodations for them. Second, the workers who do receive accommodations will likely be resented by their coworkers, either because the coworkers desire the same types of accommodations or because the coworkers resent their employers for calling upon them to pick up the slack when their employers provide these two groups of employees with exceptions from the normal workplace requirements.

A. *Cannot Conform to Ideal-Worker Norm*

The way in which workers with caregiving responsibilities and individuals with disabilities are most similar is the marginalization they experience in the workplace because of their inability to conform to the ideal-worker norm.¹² Both individuals with disabilities¹³ and workers with caregiving responsibilities¹⁴ often have difficulty meeting the stringent workplace requirements of their employers.¹⁵ The primary way in which these groups cannot meet their employers' expectation of the ideal worker is the same—they need some variation in their work schedule.¹⁶ However, the reason for the requested variance in schedule

12. See Palma Joy Strand, *Do We Value Our Cars More Than Our Kids? The Conundrum of Care for Children*, 19 DUKE J. GENDER L. & POL'Y 1, 25 (2011) (stating that in today's society, "the role of caregiver is inconsistent with the role of ideal worker"); *supra* notes 1–2.

13. The term "disability" under the ADA refers to an individual who has (A) "a physical or mental impairment that substantially limits one or more major life activities"; (B) "a record of such an impairment"; or (C) "being regarded as having such an impairment." 42 U.S.C. § 12102(1) (2006 & Supp. V 2011).

14. I chose to use the phrase "workers with caregiving responsibilities" rather than "women with caregiving responsibilities," even though women are still the vast majority of primary caregivers. WILLIAMS, UNBENDING GENDER, *supra* note 3, at 2; Befort, *supra* note 4, at 620. I made this decision for two reasons. First, men are sometimes primary caregivers and can and do experience discrimination in that role. See EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 4, 24–25 (2007), <http://www.eeoc.gov/policy/docs/caregiving.pdf>. But second, in the spirit of communitarianism, I am trying to advocate for a more inclusive view of the workplace, one in which we reject the "us against them" mentality. Recognition that all workers (and not just women) might have caregiving responsibilities is the first step in this process.

15. See, e.g., EEOC v. AT&T Mobility Servs. LLC, No. 10-13889, 2011 WL 6309449, at *1, *13 (E.D. Mich. Dec. 15, 2011) (denying a claim to an employee with multiple sclerosis who asked for an accommodation to work only forty hours per week); Porter, *supra* note 2 (giving examples of employees who are unable to meet the ideal worker norm).

16. To be fair, there is plenty of evidence that Americans in general experience a time crunch problem and several scholars have made suggestions on how to alleviate this. See, e.g.,

may differ: it may be due to their caregiving responsibilities,¹⁷ their medical needs, or the physical manifestations of their disabilities.¹⁸ These two groups might also have difficulty meeting the ideal-worker norm with respect to the physical aspects of the job either because their disability precludes them from performing all of the essential functions of their position¹⁹ or because meeting all of the physical demands of the position is difficult due to pregnancy.

Examples of employees who fail to meet their employers' schedule demands are plentiful. In the caregiving context, women with caregiving responsibilities are often fired when they refuse to work overtime. In *Upton v. JWP Businessland*,²⁰ the plaintiff, a divorced single mother, was fired when she requested to work more manageable hours than the almost fourteen-hour, six day-a-week schedule that her employer demanded.²¹ Other workers face termination because they have too many absences due to pregnancy or caregiving responsibilities.²² "Some of the most troubling [work/family] conflict stories involve a caregiver having to make the impossible decision

Before, *supra* note 4, at 619; Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1956–58 (2000).

17. See Befort, *supra* note 4, at 618 ("The time pressures faced by working caregivers, particularly female caregivers, often deter successful participation in market work."); Porter, *supra* note 2, at 361–62 (discussing situations where caregivers need time off work); *id.* at 362–63 (discussing the difficulty caregiving employees may experience trying to get leaves of absence); Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX J. WOMEN & L. 345, 355–56 (2003). In addition to caregivers not having enough time off work, caregiving obligations hamper caregivers in other ways. For instance, "[c]aregivers are less likely to be able to work overtime" and they often cannot "travel for business for extended periods or [with] limited notice." *Id.* at 355.

18. See, e.g., *AT&T Mobility Servs.*, 2011 WL 6039449, at *1, *4 (granting the employer's motion for summary judgment when the employer terminated the employee with multiple sclerosis because she could not work more than forty hours per week); Bagenstos, *supra* note 10, at 429 (mentioning how some intangible workplace norms, such as inflexible work rules that exclude part-time or break periods, make it difficult for individuals with disabilities to succeed).

19. See Bagenstos, *supra* note 10, at 505–06 (noting that "[p]eople who cannot work because of their impairments are . . . likely to experience prejudice, and they are particularly likely to be ignored when others decide how to construct the physical environment and attendant social structures").

20. 682 N.E.2d 1357 (Mass. 1997).

21. *Id.* at 1358.

22. See sources cited and accompanying text in Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 783–85 nn.28–43, 847–48 nn.417–18 (2010) (discussing the difficulty many women face meeting their employers' strict attendance policies because of their pregnancies or caregiving responsibilities); see also JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 42 (2010) (discussing one example of an employer firing a worker for leaving work because her child was in the emergency room).

between leaving a child alone or losing [her] job.”²³ For instance, one woman was terminated because her child was in a car accident and had to be taken to the hospital.²⁴ Another mother left her one-year-old and nine-year-old children alone because the babysitter did not arrive on time and her employer had threatened termination if she did not report to work; while she was gone, the children died in a fire.²⁵ These are just a few of the negative consequences that arise when caregivers cannot meet the ideal-worker norm.

In the disability context, we see similar examples of employees being unable to meet their employers’ schedule demands. One case involved an employee who had multiple sclerosis and was fired for failing to meet the ideal-worker norm.²⁶ The plaintiff was a store manager for an AT&T store and working more than forty hours per week exacerbated her MS symptoms.²⁷ She submitted medical documentation and asked for an accommodation to limit her work schedule to no more than forty hours per week but her employer refused, stating that being able to work more than forty hours per week was an essential function of the store manager position.²⁸ Because an employer is not obligated to eliminate an essential function of the job under the ADA, the employer terminated the plaintiff.²⁹ Similarly, in another case, the plaintiff was a systems engineer who worked between sixty to eighty hours per week.³⁰ After he was diagnosed with hepatitis C, he requested an accommodation that would allow him to reduce his hours to forty hours per week so he could get adequate rest and reduce his stress level.³¹ Although the employer accommodated him temporarily, the employer refused to accommodate him permanently, alleging that it could not continue to do so without hiring additional staff, thus making the accommodation unreasonable.³² The court agreed

23. Porter, *supra* note 2, at 407–08; *see also id.* at 409 & n.374 (discussing the need for legislation that protects caregivers against termination for performing mandatory caregiving tasks).

24. 9TO5, NAT’L ASS’N OF WORKING WOMEN, 10 THINGS THAT COULD HAPPEN TO YOU IF YOU DIDN’T HAVE PAID SICK DAYS AND THE BEST WAY TO MAKE SURE THEY NEVER HAPPEN TO ANYONE 4, available at <http://1000voicesarchive.org/resource/228/10things.pdf>.

25. Nina Bernstein, *Daily Choice Turned Deadly: Children Left on Their Own*, N.Y. TIMES (Oct. 19, 2003), <http://www.nytimes.com/2003/10/19/nyregion/daily-choice-turned-deadly-children-left-on-their-own.html>.

26. EEOC v. AT&T Mobility Servs. LLC, No. 10-13889, 2011 WL 6309449, at *1, *4 (E.D. Mich. Dec. 15, 2011).

27. *Id.* at *2.

28. *Id.* at *3–4.

29. *Id.* at *4, *7.

30. Davis v. Microsoft Corp., 37 P.3d 333, 335 (Wash. Ct. App. 2002), *aff’d*, 70 P.3d 126 (Wash. 2003).

31. *Id.*

32. *Id.*

and stated that the overtime schedule was an essential function of the job and the employer was not obligated to accommodate the plaintiff.³³

Another similarity between these groups arises when caregivers are pregnant³⁴ in the workplace and find it difficult to perform all of the physically demanding tasks of the job,³⁵ which is similar to the difficulty some individuals with disabilities have performing the more arduous tasks of the job.³⁶ In the pregnancy context, many pregnant women are put on medical restrictions by their doctors—such as not lifting heavy objects or not climbing in the latter stages of pregnancy—or they might require more frequent breaks from standing, or more frequent restroom breaks.³⁷ Because employers are not generally required to accommodate physical restrictions based on pregnancy,³⁸ many employers either force these women to take a leave of absence, if they are entitled to leave,³⁹ or fire pregnant employees who cannot perform every physical function of their jobs even if those functions are

33. *Id.* at 337.

34. Obviously, not all caregivers will be pregnant in the workplace (especially the men!), but most caregivers either were pregnant or will become pregnant at some point in their working careers.

35. *See, e.g., Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 544–46 (7th Cir. 2011) (affirming grant of summary judgment when an employer fired a pregnant employee because she could no longer perform a few of her more strenuous job duties); *see also* Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES (Jan. 30, 2012), <http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html> (discussing the frequency of cases where employers fired pregnant women because doctors gave them restrictions on the physical tasks of their jobs).

36. *Compare Otto v. City of Victoria*, 834 F. Supp. 2d 912, 914 (D. Minn. 2011) (discussing an employee who unsuccessfully sought accommodation from heavy lifting because of his back disability), *with Williams, Reconstructive Feminism, supra* note 3, at 100 (stating that pregnancy interferes with the ability to meet the ideal-worker norm because the “template [of the ideal worker] is designed around someone with a man’s body”).

37. *See, e.g., Serednyj*, 656 F.3d at 546 (noting some restrictions of pregnant women); Bakst, *supra* note 35 (same).

38. *See* Jeanette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 453–54 (2012) (noting that the lack of a right to pregnancy accommodations under the law allows employers to fire pregnant women). *But see* Derrick Cain, *House Democrats Introduce Legislation To Ensure Assistance for Pregnant Workers*, 38 Emp. Discrimination Rep. (BNA) 702 (May 16, 2012) (discussing proposed legislation that would make it unlawful for employers to discriminate against pregnant women because they need accommodations on the job).

39. *See, e.g., Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698 (7th Cir. 2012) (holding that plaintiff lacked a claim when her employer forced her to take leave because she could no longer lift fifty pounds due to pregnancy restrictions); Kevin P. McGowan, *Bias Based on Pregnancy, Caregiver Duties Still Widespread, Witnesses Tell Commission*, 38 Emp. Discrimination Rep. (BNA) 257 (Feb. 22, 2012) (noting that “[s]ome employers force women to take unpaid leave upon learning of their pregnancies, even when no medical reason exists to do so” or when the employees could continue their job with “modest workplace accommodations”).

marginal and not essential.⁴⁰ Of course, it is relatively common for individuals with disabilities to seek accommodations under the ADA for some of the more physically strenuous tasks of their job. Even though employers are obligated to accommodate these employees,⁴¹ they are often reluctant to do so and will find many excuses to avoid the accommodation, such as arguing that the employee with the disability cannot be accommodated either because the accommodation would dispense with an essential function of the job or because the accommodation is unreasonable or would create an undue hardship.⁴²

B. *Special-Treatment Stigma*

Because individuals with disabilities and workers with children or other caregiving responsibilities cannot conform to the ideal-worker norm, both groups suffer from special-treatment stigma.⁴³ Special-treatment stigma manifests itself in two distinct but related ways. First, the requirement to provide special accommodations to individuals in the workplace makes an employer believe (sometimes correctly) that employing such individuals is more expensive and burdensome than employing other individuals.⁴⁴ This belief, in turn, causes an employer to be reluctant to hire and promote these individuals.⁴⁵ Second, the provision of special accommodations to certain individuals in the workplace fosters the resentment of coworkers who believe (again, sometimes correctly) that they have to carry a larger burden to help

40. See, e.g., Bakst, *supra* note 35.

41. See *infra* notes 102–08 and accompanying text.

42. The ADA prohibits discrimination only against a “qualified individual,” which is defined as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8) (2006 & Supp. V 2011). An employer is required to accommodate an individual with a disability only if doing so does not cause an undue hardship. *Id.* § 12112(b)(5)(A) (2006) (defining discrimination to include: “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business”).

43. I coined the phrase “special-treatment stigma” in prior work to refer to the problems associated with the receipt of special benefits or accommodations in the workplace. Porter, *supra* note 2, at 359; see also Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1282 (2009) (noting that the ADA’s reasonable accommodation obligation raises concerns about “special rights”).

44. See Porter, *supra* note 2, at 390 & nn.250–51. Notably, fears regarding the costs of accommodation are likely unwarranted. Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1097 (2010) (discussing the possibility that there are many benefits to accommodations, such as greater loyalty, increased productivity, and reduced absenteeism and turnover, which can offset the costs of the accommodations); Travis, *supra* note 11, at 321; see also *infra* note 61.

45. Porter, *supra* note 2, at 359; see *id.* at 390.

accommodate the employee or that the employee who receives the accommodation or “special treatment”⁴⁶ is getting an unfair (and perhaps undeserved)⁴⁷ advantage.⁴⁸ The next two subsections discuss each of these in turn.

1. Employers’ Reluctance to Hire and Accommodate

One common bond between individuals with disabilities and workers with caregiving responsibilities is the way employers treat (or more accurately, mistreat) both groups. In the eyes of most employers, all accommodations are deemed equal, or in most cases, equally bad.⁴⁹ Employers often see proposals for special treatment as evidence that those employees “just can’t cut it” in the workplace.⁵⁰ Despite their legal obligation, employers often appear no more willing to provide accommodations to individuals with disabilities than they are to provide accommodations or special treatment to caregivers or other workers who need some kind of special treatment or accommodation from the regular rules of the workplace.⁵¹ In fact, employers are often willing to provide informal accommodations to an employee until and unless the employee requests an accommodation that signals a possible legal obligation.⁵² For instance, in *Serednyj v. Beverly Healthcare, LLC*,⁵³ in

46. Of course, as Professor Samuel Bagenstos pointed out, the ADA does not *require* an employer to grant individuals with disabilities special treatment because employers are free to give the same accommodations to non-disabled workers. Bagenstos, *supra* note 10, at 459; *see also* WILLIAMS, *supra* note 22, at 39 (stating that women do not need special treatment in the workplace and that “[f]raming the issue that way leaves intact the [ideal-worker] norm” and will create a backlash against women).

47. *Cf.* Anderson, *supra* note 43, at 1283 (noting that, because the rights under the ADA are special, only the truly deserving should get them and some courts are reluctant to provide benefits to workers they believe are undeserving or lazy).

48. Porter, *supra* note 2, at 390; Travis, *supra* note 11, at 312.

49. *See, e.g.*, Befort, *supra* note 4, at 618 (stating that “employers have an economic incentive to make accommodation requirements politically unfeasible and practically unworkable”); *id.* at 629 (noting that the accommodation mandate is prone to employer resistance).

50. *See* WILLIAMS, *supra* note 22, at 39 (internal quotation marks omitted).

51. *See* Arnow-Richman, *supra* note 17, at 383–86 (discussing the failure of the accommodation mandate); Befort, *supra* note 4 (comparing accommodations under the ADA to accommodations for caregiving). Of course, employers have a legal obligation to provide an accommodation for individuals with disabilities and no obligation to do so for women individuals with caregiving responsibilities, *see infra* Section II.A, but having a legal obligation does not mean that employers are more willing to accommodate; in fact, it might be the legal obligation which makes employers more resentful of the accommodation.

52. *See, e.g.*, SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 56 (2009) (“Disability rights advocates commonly charge that employers accommodate the needs of workers without disabilities all the time; in many cases, it is only when a disabled worker asks for accommodation that the employer balks.”). In one disability case, the employer accommodated a disabled employee’s request for reduced hours (forty hours

her attempt to prove that the employer discriminated against her because of her pregnancy, the plaintiff pointed to the fact that before her pregnancy, other employees assisted her in performing her more strenuous job duties, but after she became pregnant and asked for the same assistance, the employer refused.⁵⁴ The court stated that there was a material difference between requesting and receiving assistance from other employees and forcing those employees to give assistance if needed as an accommodation.⁵⁵ The former, the court said, “was completely voluntary and given in a spirit of teamwork” but if the employer granted the plaintiff the accommodation, the assistance by the coworkers would be obligatory.⁵⁶

Further evidence that employers dislike having to provide accommodations is the fact that the ADA has not noticeably improved the employment of individuals with disabilities.⁵⁷ Many argue that the reason for this is because employers are resistant to providing accommodations to individuals with disabilities⁵⁸ so they simply do not hire them.⁵⁹ As most employment lawyers know, it is far easier for an employer to defend a failure to hire claim than it is to defend a termination claim.⁶⁰ Therefore, anything that arguably increases the

per week down from sixty to eighty) for a short period but ultimately concluded that continuing to do so was not a reasonable accommodation. *Davis v. Microsoft Corp.*, 37 P.3d 333, 335 (Wash. Ct. App. 2002).

53. 656 F.3d 540 (7th Cir. 2011).

54. *Id.* at 549.

55. *Id.*

56. *Id.*

57. BAGENSTOS, *supra* note 52, at 117 (stating that the ADA “has failed significantly to improve the employment position of people with disabilities”). In fact, nearly all accounts indicate that the employment rate for individuals with disabilities declined during the statute’s existence. *Id.* Despite the potential of the ADA’s reasonable accommodation provision, many argue that it “has not effectuated wide-scale changes in the structure of employment.” Arnow-Richman, *supra* note 17, at 363; *see, e.g.*, Adrien Katherine Wing, *Examining the Correlation Between Disability and Poverty: A Comment from a Critical Race Feminist Perspective—Helping the Joneses to Keep Up!*, 8 J. GENDER, RACE & JUST. 655, 656–57 (2005) (discussing research revealing “that only 2.7% of plaintiffs prevailed in Title I ADA filed cases”); *see also id.* at 657 (“It is quite evident some thirteen years after the passage of the ADA that it has failed to vindicate the rights of the disabled in the employment area.”).

58. Anderson, *supra* note 43, at 1308 (“It has . . . been suggested that the ADA has increased the difficulty for individuals with disabilities to obtain employment, because employers seek to avoid the obligations under the statute.”); *see also* Travis, *supra* note 11, at 315 (noting that “employers were initially the ADA’s primary opponents because of the concerns about the potential costs of accommodations”).

59. BAGENSTOS, *supra* note 52, at 117 (pointing to, but disagreeing with, some commentators who argue that the employment rates of individuals with disabilities declined because of the ADA).

60. *See id.* at 134.

costs of employing an individual⁶¹ or makes it more difficult for an employer to fire an employee might incentivize an employer to not hire the individual in the first place.⁶²

2. Resentment by Coworkers

Coworkers are often resentful when employers allow individuals with disabilities or workers with caregiving responsibilities to deviate from the normal workplace rules or give them any other kind of special treatment.⁶³ One reason for this resentment is that workplace rules are often very rigid so that any deviation is seen as unfair special treatment to the employee who receives the “benefit.”⁶⁴ Coworkers resent that others get a benefit that they do not.⁶⁵ These employees might also resent the fact that employers might require them to work harder or

61. There is evidence that employers’ fears regarding the excessive costs of accommodation are unwarranted. A U.S. Department of Labor study indicated that only 22% of individuals with disabilities need any accommodation at all and that of those needing accommodation, 51% of the accommodations cost nothing and another 30% cost less than \$500 per worker. Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1448–49 (1991) (citing Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 930); see also Arnow-Richman, *supra* note 17, at 364 (stating that “most accommodations provided under the statute tend to be modest and relatively inexpensive”); Bagenstos, *supra* note 10, at 469 (“Available empirical evidence indicates that most . . . accommodations have little or no direct cost, and the overwhelming majority [cost] less than \$500.”); Travis, *supra* note 11, at 321 (regarding the costs of disability accommodations as fairly minimal); *id.* at 353 (noting that the flexible arrangements that many caregivers need can decrease costs).

62. See, e.g., Porter, *supra* note 2, at 379 (pointing out that perceived costs of employing caregivers might incentivize an employer to not hire employees who might need this leave).

63. *Id.* at 390; Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 327 (2003) (stating that because ADA accommodations are seen as preferences by many, they create resentment by those who are not accommodated); Travis, *supra* note 11, at 315 (footnote omitted) (stating that the backlash against the ADA is partially caused by “fears about adverse effects on nondisabled workers and hostility to the perceived preferential treatment of individuals with disabilities”).

64. See Arnow-Richman, *supra* note 17, at 392 (stating that accommodations are “perceived by non-accommodated workers as preferential treatment in tension with merit-based decision making”); Travis, *supra* note 11, at 322 (stating that when non-disabled coworkers “see their disabled coworkers receiving desirable job modifications, reduced hours, scheduling flexibility, or other exceptions to existing workplace policies that employers do not” give to everyone else, it disrupts expectation interests); see also *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (“By definition any special ‘accommodation’ requires the employer to treat an employee with a disability differently, i.e., preferentially.”); Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 346–47 (2007) (“[T]he ADA is referred to as a ‘special treatment’ statute because it requires employers to sometimes treat employees differently because of their disability.” (citing Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, in *BACKLASH AGAINST THE ADA* 62, 65 (Linda Hamilton Krieger ed., 2006))).

65. See Bagenstos, *supra* note 10, at 475 (stating that those who are not disabled may become resentful of the special treatment they perceive as needed by individuals with disabilities).

longer or to vary their working hours in order to accommodate individuals with disabilities and workers with caregiving responsibilities.⁶⁶ The accommodations that are alleged to benefit employees with disabilities at the expense of others include: “job restructuring, providing part-time or . . . modified work schedules, allowing leaves of absence, and reassigning individuals with disabilities to open positions.”⁶⁷ In all of these cases, the accommodation would have some effect on other employees. Job restructuring, for example, might require other employees to perform tasks that a disabled employee cannot perform because of his disability. Part-time or modified work schedules and leaves of absence could require other employees to work longer or different hours to make up for the absences of the disabled or caregiving coworker. Finally, reassigning individuals with disabilities to other positions can cause conflicts with nondisabled coworkers who might also be interested in those positions and have either more seniority or superior qualifications for the position.⁶⁸

In reality, some of this resentment is unwarranted because courts often hold that employers are not obligated to accommodate employees if doing so would require other employees to work harder or longer.⁶⁹ As Professor Travis states, “[I]n most accommodation cases the ADA’s accommodation mandate does *not* benefit individuals with disabilities at the expense of their nondisabled coworkers.”⁷⁰ The most common types

66. See, e.g., Travis, *supra* note 11, at 318–19 (discussing that courts perceive that different treatment of disabled individuals gives them preferential treatment, which leads to resentment by coworkers).

67. *Id.* at 322; see also WILLIAMS, *supra* note 22, at 35 (stating that when U.S. employers provide paid leave, they often heap the leave-takers’ job duties onto other employees, creating resentment).

68. Samuel R. Bagenstos, *US Airways v. Barnett and the Limits of Disability Accommodation*, in CIVIL RIGHTS STORIES 323, 343 (Myriam E. Gilles & Risa L. Goluboff eds., 2008) (“The accommodation Barnett sought, on its face, looks like charity of a particularly troubling kind—charity in the form of a job that one employee is forced to give another.”); see also Anderson, *supra* note 43, at 1315 (arguing that, at a minimum, the reassignment accommodation acts as a preference to the individual with a disability). Anderson argues that the fact that some courts allow reassignment to an individual with a disability even when “there are other, more qualified applicants for th[e] position . . . is what makes th[e] reassignment] accommodation especially controversial.” *Id.* at 1314–15. However, Professor Anderson also argues that if an impairment is significant enough to be “the subject of societal exclusion and stigma, there is a strong rationale for requiring reassignment as a reasonable accommodation.” *Id.* at 1316.

69. Nicole Buonocore Porter, *Relieving (Most of) the Tension*, 20 CORNELL J.L. & PUB. POL’Y 761, 799 (2011) (review of SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009)) (citing to cases where courts say that an employer is not obligated to accommodate an employee if the accommodation requires other employees to work harder or longer); accord Arnow-Richman, *supra* note 17, at 366.

70. Travis, *supra* note 11, at 321.

of accommodations—such as making the building more accessible, or providing modifications to work equipment—do not negatively affect other employees.⁷¹ She recognizes, as do I, that some might think that the overall costs of accommodations negatively affect coworkers indirectly because money is being spent on accommodations that could be spent on compensation or benefits for the rest of the workforce.⁷² However, as noted by Travis: “[E]mpirical research has found that the costs of most accommodations are minimal or may even provide employers net long-term economic gains.”⁷³ While some accommodations place some burdens on coworkers to take on some additional tasks, those tasks are usually “marginal” tasks and do not place any unreasonable burden on other employees.⁷⁴

Nevertheless, employers’ decisions to not accommodate employees are often due to a fear that coworkers will feel that the employer is treating them unfairly when the employer gives accommodations to employees with disabilities. Courts share this concern about the resentment of coworkers. For instance, in the first ADA reasonable accommodation case the Supreme Court decided,⁷⁵ the employee with the disability, Robert Barnett, was allowed to transfer into a mailroom position once he became disabled due to a back injury that prevented him from performing his duties as a cargo handler.⁷⁶ After Barnett served in this position for two years, the employer opened it up for seniority bidding and two employees with more seniority than Barnett bid on the mailroom position.⁷⁷ I suspect that the employees were willing to bid on this position (even knowing it would likely cause Barnett’s termination) because they resented the fact that Barnett was allowed to have this physically less-strenuous position in the first place. It appears that the Court was also concerned about this perceived unfairness.⁷⁸ Other reasonable accommodation cases similarly imply that coworkers are resentful of accommodations employers give to disabled employees if the coworkers perceive those accommodations as

71. *Id.*

72. *Id.*; Porter, *supra* note 64, at 333 & n.126 (stating that even when accommodations only cost the employer money (and do not otherwise affect coworkers), the money spent on those accommodations is arguably money that could be spent on other employees).

73. Travis, *supra* note 11, at 321; accord Bagenstos, *supra* note 10, at 469.

74. Travis, *supra* note 11, at 324.

75. *See* US Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

76. *See id.* at 394.

77. *Id.*

78. *See id.* at 404. As stated by Professor Bagenstos, burdens on other employees are the “most significant causes of the social backlash against the ADA, and Justice Breyer’s rule that seniority systems need not ordinarily be modified clearly reflects a fear of exacerbating that backlash.” Bagenstos, *supra* note 68, at 345 (footnote omitted).

negatively affecting other employees.⁷⁹

In the caregiving context, scholars argue that accommodating caregivers is likely to create tensions between those caregivers and their coworkers.⁸⁰ The argument is that accommodating caregivers bestows undue privileges on parents, yet holds nonparents to higher performance standards.⁸¹ Many studies indicate that employees without primary caregiving responsibilities express a desire to work fewer hours like their caregiving counterparts⁸² and express resentment that only the caregiving employees are allowed the opportunity to work reduced hours.⁸³ Many of us have also heard anecdotal stories regarding coworkers' resentment when workers with caregiving responsibilities must leave work early or are not expected to come in on the weekends, leaving the non-caregivers to pick up the slack for their caregiving coworkers.⁸⁴

To be fair, not all workplaces involve resentful coworkers. There are examples of workplaces that are infused with a communitarian spirit.⁸⁵ In the disability context, the case of *Miller v. Illinois Department of Transportation*⁸⁶ is a good example. The plaintiff was assigned to a bridge crew as a highway maintainer, along with four other highway maintainers and a bridge technician.⁸⁷ Miller had occasional difficulty working from heights, especially when he was unsecured.⁸⁸ He was not officially diagnosed with acrophobia, but he did tell his supervisor that he had a fear of heights and that he would be unable to perform some of the work, such as walking a bridge beam.⁸⁹ Despite his fear, he was able to work at heights if he was enclosed, and he estimated his fear kept him

79. See, e.g., *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (indicating that it is unreasonable to accommodate a disabled employee if doing so would require other employees to work harder or longer); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) (same); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995) (same).

80. Arnow-Richman, *supra* note 17, at 374.

81. *Id.* at 392.

82. See, e.g., Befort, *supra* note 4, at 632 (noting that “63% of American workers would prefer to work fewer hours”).

83. Porter, *supra* note 22, at 802 (stating that “the accommodation model is problematic because of . . . resentment from non-caregiving employees” who “believe that accommodating caregivers unduly privileges those who . . . [are] parents” and requires “the non-parents to pick up the slack”).

84. Cf. Arnow-Richman, *supra* note 17, at 392.

85. Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 574–75, 583–84 (2013) (describing *Miller v. Illinois Department of Transportation*, 643 F.3d 190 (2011), a case where employees were willing to help each other fulfill the required duties so that they can all remain employed and still get the job done).

86. 643 F.3d 190 (2011).

87. *Id.* at 192.

88. *Id.*

89. *Id.*

from performing only three percent of his job duties.⁹⁰ His employer informally accommodated the plaintiff by allowing other members to handle those tasks that Miller could not perform, and in turn, Miller and other employees helped their coworkers with tasks those employees could not perform.⁹¹ “In short, . . . the team worked effectively as a team, taking advantage of each member’s abilities and accommodating each member’s limitations.”⁹²

In a similar case in the pregnancy context, *Serednyj v. Beverly Healthcare, LLC*,⁹³ the plaintiff was hired as an activity director in a nursing home.⁹⁴ Some of her many duties were physically strenuous, including rearranging dining room tables and pushing patients in wheelchairs.⁹⁵ Even before the plaintiff became pregnant, other employees voluntarily helped the plaintiff with these more strenuous functions.⁹⁶ Shortly after the plaintiff became pregnant, she began to have complications, and in order to avoid a second miscarriage, her doctor ordered her to avoid all strenuous activities.⁹⁷ These restrictions meant that she was unable to perform a few of the physically strenuous functions mentioned above.⁹⁸

Because the company allowed accommodations only for individuals with disabilities or employees who suffered workplace injuries, the employer told the plaintiff that she had to return with no restrictions at all or she would be fired.⁹⁹ Her doctor insisted on the restrictions to prevent a miscarriage, and her employer terminated her.¹⁰⁰ This case demonstrates that even when employees are willing to help out a coworker, employers might nevertheless refuse the accommodation, presumably because they fear later resentment should the coworkers eventually tire of providing the assistance.

90. *See id.*

91. *Id.* at 193. For instance, one of Miller’s coworkers could not weld. Another coworker could not ride in the snooper bucket; was not able to climb the arches of an interstate bridge; was unable to spray bridges because of allergies; and could not mow or rake. *Id.* Miller and his coworkers helped each other by performing tasks that the others could not perform.

92. *Id.*

93. 656 F.3d 540 (7th Cir. 2011).

94. *Id.* at 545.

95. *Id.*

96. *Id.*

97. *Id.* at 545–46.

98. *Id.* at 546.

99. *Id.* The plaintiff was not employed long enough to be eligible for leave under the FMLA. *Id.*

100. *Id.*

II. UNJUSTIFIED DIFFERENCES?

Having explored the similarities between individuals with disabilities and workers with caregiving responsibilities, this Part will explore the differences, or perceived differences, between these two groups. It first discusses the differences in how the law treats these two groups of employees, then moves on to explore whether those differences can be justified. Specifically, the second section explores many of the common explanations that are given, or could be given, to justify the law's different treatment of these two groups of employees. In the end, however, I conclude that most of these reasons do not hold up under scrutiny.

A. *Difference in the Law*

Because there is not one statute that prohibits employment discrimination based on all protected categories, the protection afforded to individuals with disabilities and employees with caregiving responsibilities is very different. Individuals with disabilities are covered by the ADA and discrimination based on caregiving responsibilities is covered (if at all) by Title VII's prohibition on sex discrimination,¹⁰¹ the PDA, and the FMLA. This Section will explore the differences in these statutes.

The main difference between how the law treats individuals with disabilities and caregiving employees is the reasonable accommodation provision of the ADA.¹⁰² Individuals with disabilities are entitled to reasonable accommodations if needed to perform the essential functions of their positions.¹⁰³ Accommodations go beyond the antidiscrimination

101. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–718, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-16, 2000e-17 (2006 & Supp. V 2011)); *see also* Porter, *supra* note 2, at 370–75 (discussing the feasibility of using Title VII's sex discrimination prohibition to protect women with caregiving responsibilities).

102. *See* Befort, *supra* note 4, at 622–23 (stating that the way in which the ADA differs from other antidiscrimination statutes is that the ADA requires employers to provide reasonable accommodations to the known disabilities of their employees); Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who is Disabled to Who Can Work*, 34 *HAMLIN L. REV.* 469, 471 (2011) (noting the significance of the reasonable accommodation provision, which separates the ADA from other antidiscrimination statutes); Cooper, *supra* note 61, at 1441 (“Reasonable accommodation is the key concept of the employment provisions of the ADA, and it distinguishes the ADA from other areas of discrimination law.”); *id.* at 1430 (noting that avoiding “discrimination [against] individuals with disabilities may require the employer to take remedial action above and beyond that typically required by Title VII”).

103. *See* 42 U.S.C. § 12112(b)(5)(A) (2006 & Supp. V 2011) (defining discrimination to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such

goal of other statutes—they require employers to take affirmative steps to promote functional equality.¹⁰⁴ These accommodations can be very broad.¹⁰⁵ For instance, the ADA may require employers to eliminate nonessential or marginal functions of the job if the employee with a disability cannot perform those functions.¹⁰⁶ Or the ADA may require an employer to allow an employee to work different hours or a different shift.¹⁰⁷ The ADA may also require employers to modify the physical aspects of the job to allow the employee to perform it.¹⁰⁸

Workers with caregiving responsibilities are not entitled to accommodations in the workplace.¹⁰⁹ In fact, they are entitled to very few benefits.¹¹⁰ In certain circumstances, workers with caregiving responsibilities are entitled to leaves of absence under the FMLA;¹¹¹

covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

104. See Befort, *supra* note 4, at 617 (“An accommodation, as such, goes beyond the negative anti-discrimination prohibition of some employment statutes to compel employers to take ‘active steps’ to promote functional equality.” (emphasis added) (footnote omitted)).

105. *But see* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1392–93 (1993) (footnote omitted) (arguing that the undue hardship defense places such a limitation on the reasonable accommodation provision that it represents “a political compromise: there is a recognition that society discriminates against people with disabilities both overtly and through ablist [sic] structures, but because people with disabilities are still seen as flawed, society will only offer partial protection and guarantee partial rights”).

106. 42 U.S.C. § 12111(9)(B) (reasonable accommodation includes “job restructuring”); Travis, *supra* note 11, at 324. See generally Collins & Phillips, *supra* note 102, at 485–86 (quoting *Ward v. Mass. Health Research Inst., Inc.*, 209 F.3d 29, 35 (1st Cir. 2000)) (internal quotation marks omitted) (discussing the determination of an essential function and the employer’s burden of “proving that a given job function is an essential function”).

107. 42 U.S.C. § 12111(9)(B) (reasonable accommodation includes “part-time or modified work schedules”).

108. 42 U.S.C. § 12111(9)(A)–(B) (reasonable accommodation includes “making existing facilities used by employees readily accessible[.]” “reassignment to a vacant position,” “job restructuring,” and the “acquisition or modification of equipment or devices”).

109. *E.g.*, Arnow-Richman, *supra* note 17, at 368 (stating that an employee who returns to work after the birth of her child “is not entitled to any accommodation to assist her in balancing her job” with the care of her new baby); see Porter, *supra* note 2, at 377–79 (discussing how the FMLA attempted, but did not succeed, to accommodate all of the routine childcare obligations and conflicts working caregivers face); cf. Porter, *supra* note 22, at 799, 801–03 (discussing the possibility and criticism of adopting the ADA’s model of reasonable accommodations in the caregiving context). *But see* Cain, *supra* note 38 (discussing proposed legislation that would require employers to accommodate pregnant employees).

110. See Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 139 (1998) (“[S]ex discrimination law completely ignores the needs of the child in receiving adequate parenting, the needs and aspirations of the family, and the interests of communities in ensuring that their members are raised adequately.”).

111. See Porter, *supra* note 2, at 377–78; see also Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17, 19–20 (2004); Kessler, *supra* note 9, at 374, 419, 422; O’Leary, *supra* note 9, at 38. The FMLA

however, this entitlement is fairly limited.¹¹² In the context of caregiving, after an initial leave to care for a newborn, the FMLA only covers absences for employees caring for a spouse, child, or parent with a serious health condition.¹¹³ The statute does not address “the full range of caregiving responsibilities that employees coping with childbirth or serious family illness are likely to experience.”¹¹⁴ Furthermore, the FMLA covers only a limited number of employers. It applies only to employers who have fifty or more employees within a seventy-five-mile radius and only to employees who have worked for their employer for one year and who worked at least 1,250 hours in that prior year.¹¹⁵ Finally, the FMLA requires the employer to provide only unpaid leave, which makes it difficult for many caregivers to take advantage of the leave.¹¹⁶

Other than this limited entitlement to leave under the FMLA, there is no legal protection for workers with caregiving responsibilities.¹¹⁷ There

requires employers to reinstate the employee to his or her previous position or to a position with equivalent pay and benefits after the leave period. 29 U.S.C. § 2614(a)(1) (2006).

112. Arnov-Richman, *supra* note 17, at 367 (stating that the FMLA leave has benefited only a small portion of those employees who qualify for leave); Cox, *supra* note 38, at 454–60 (2012) (discussing the many limitations of the FMLA).

113. 29 U.S.C. § 2612(a)(1)(C).

114. Arnov-Richman, *supra* note 17, at 368. FMLA leave is available only for (1) the birth of a child of the employee and in order to care for such a child; (2) because of the placement of a child with the employee for adoption or foster care; (3) in order to care for the spouse, child, or parent of the employee if the spouse, child, or parent has a serious health condition; (4) because of a serious health condition that makes the employee unable to perform the functions of his position; or (5) because a spouse, child, or parent of the employee is on covered active duty or has been notified of impending duty in the Armed Forces. 29 U.S.C. § 2612(a)(1)(A)–(E) (2006 & Supp. V 2011).

115. 29 U.S.C. § 2611(2)(A)–(2)(B), (4)(A); *see also* Porter, *supra* note 2, at 377–78 (stating that these limitations of the FMLA mean that almost 40% of all employees are not entitled to leave under the statute).

116. Befort, *supra* note 4, at 621–22 (noting that about 3.5 million employees reported that they needed leave but could not take it, most often because they could not afford to take it). However, it should be noted that individuals with disabilities do not necessarily have more entitlement to paid leave under the ADA. The ADA does not require an employer to provide paid leave as a reasonable accommodation. *See* 42 U.S.C. §§ 12101–12213 (2006 & Supp. V 2011). And to the extent that a disabled employee uses the FMLA leave for a serious health condition (something less than, but included within, the employee’s disability), the employee would not be entitled to paid leave. *See* 29 U.S.C. § 2612(c).

117. *See* Kessler, *supra* note 9, at 429. As Kessler stated:

[W]omen’s typical caregiving responsibilities, *i.e.*, caring for young but healthy children or elderly but not seriously ill parents; dealing with minor family illnesses; cooking and cleaning; transporting children or parents to routine medical appointments; and coping with unexpected family emergencies—all the work that women disproportionately and invisibly perform within the family—does not even register as a blip on the radar screen of the American legal system.

is limited protection for pregnant employees under the Pregnancy Discrimination Act.¹¹⁸ The PDA is an amendment to the definition section of Title VII.¹¹⁹ It simply states that the terms used in Title VII, “because of sex” or “on the basis of sex” include:

because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work¹²⁰

Thus, the PDA protects only women who are pregnant or recovering from childbirth and leaves women (and caregiving men) without coverage for the rest of their child’s life.¹²¹ Moreover, the PDA requires an employer to treat pregnant employees only as the employer would treat other employees who experience a similar inability to work.¹²² Thus, if a small employer not covered by the FMLA does not provide leaves of absence for short-term illnesses or injuries, the employer is not required to provide any leave at all for a pregnant woman who just gave birth.¹²³ Many employers give a pregnant woman only one or two weeks to recover from childbirth before the employer expects her to be back to work.¹²⁴ In sum, the law entitles individuals with disabilities to much greater protection than workers with caregiving responsibilities.

B. *Justifying These Differences?*

This section explores all of the reasons that are given or could be given to justify different (better) treatment of individuals with disabilities from workers with caregiving responsibilities. This section will also explore the limitations of those justifications and argue that the differences are not, in fact, justified.

Id.

118. See 42 U.S.C. § 2000e(k) (2006). Thus, although the PDA sought to level the playing field for pregnant women, it was unsuccessful. Williams, *Reconstructive Feminism*, *supra* note 3, at 80.

119. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2078 (1978) (codified at 42 U.S.C. § 2000e(k)).

120. 42 U.S.C. § 2000e(k).

121. See Porter, *supra* note 2, at 375–76. Of course, the PDA provides no protection to men who have caregiving responsibilities.

122. *Id.* at 376.

123. Porter, *supra* note 2, at 376; see also Kessler, *supra* note 9, at 426 (stating that employers can treat pregnant employees as badly as they treat other non-pregnant employees).

124. Porter, *supra* note 2, at 376.

To state it simply (no doubt too simply), the primary reason why Congress requires employers to provide accommodations to individuals with disabilities but not to caregivers is because providing accommodations to disabled individuals is more politically palatable than providing accommodations to workers to fulfill their caregiving responsibilities. But why is that the case? This section explores that question.

1. Conservatives and the Private Sphere

One reason legislators might be more willing to mandate workplace accommodations to individuals with disabilities than to workers with caregiving responsibilities is because some legislators see caregiving as part of the private sphere and not the public sphere.¹²⁵ This public/private dichotomy may lead to two conclusions. First, caregiving's locus in the private sphere means that government should not provide support for it. In other words, families are responsible for caring for their own children. Second, its location in the private sphere also means that some people believe that women should be home with their families rather than at work,¹²⁶ or if they are at work, then they should work in flexible part-time jobs, allowing ample time for caregiving. Thus, those who believe in the public/private dichotomy might not support measures that make it easier for women with children to work.

Of course, as many scholars argue, the public/private dichotomy is a false one.¹²⁷ Because we all benefit from the caregiving that caregivers perform, we all should help caregivers succeed.¹²⁸ Furthermore, to the extent that conservatives might prefer that women with children work in part-time or flexible jobs, such a choice is likely to lead to the serious marginalization of those women's careers. For the most part, the only types of jobs that are part-time, very flexible, or both are usually dead-end jobs with no challenge, no opportunity for advancement, and no benefits.¹²⁹ This might not be a problem for mothers who have husbands

125. See generally Williams, *Reconstructive Feminism*, *supra* note 3, at 81, 104 (discussing the "separate spheres" ideology).

126. Reality does not support this belief. While only 12% of women with children under the age of six worked outside of the home in 1950, as of 1999, 64% did. Befort, *supra* note 4, at 620.

127. E.g., Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 289–94 (1998).

128. Porter, *supra* note 2, at 384, 387–90 (discussing how the communitarian theory explains that viewing caregiving as simply a choice is misguided).

129. See Porter, *supra* note 22, at 787–88 (discussing the marginalization of part-time workers).

who are the primary earners,¹³⁰ but it is a problem for the millions of women (and men) who are either an equal or primary earner in a dual-earner household or are the sole breadwinner.¹³¹ In these cases, not giving these workers accommodations to manage their caregiving responsibilities often leads to severe consequences such as unemployment or harm to their children.¹³²

2. The Goal of Independence Under the ADA

Another reason that legislators favored an accommodation mandate for individuals with disabilities was because they believed that the ADA fostered the independence of individuals with disabilities.¹³³ If more individuals with disabilities had employment opportunities (which would presumably be easier with the passage of the ADA's reasonable accommodation provision) then these individuals would not have to rely on government-funded support.¹³⁴ Some argue it was the disability rights movement's emphasis on the goal of independence that contributed significantly to the enactment of the ADA.¹³⁵

This is not to say that everyone supports the use of the independence goal as justification for disability rights legislation; in fact, there are problems with relying on this goal. For one, citing independence and efficiency as reasons for disability-rights legislation can “detract from the purpose of . . . guaranteeing equal access to society through equal protection and due process.”¹³⁶ Moreover, as Professor Bagenstos notes, many individuals with disabilities who claim to seek “independence” and “self-reliance” must “rely significantly on assistance from third parties,” such as courts to enforce their rights, employers to provide

130. The stereotypical family of the 1950s, a married couple with three children and the father as the breadwinner, no longer exists. Today, less than 15% of American households have a married couple with only a male earner. Befort, *supra* note 4, at 619.

131. About 60% of all married couples are comprised of two working adults and “[m]ore than seven million families are now headed by a single parent.” *Id.*

132. See *supra* notes 20–25 and accompanying text.

133. See, e.g., BAGENSTOS, *supra* note 52, at 29–31 (arguing that “[t]he focus on independence and self-reliance provided a way of appealing to the more conservative people with disabilities without alienating those who held more liberal orientations.”); Drimmer, *supra* note 105, at 1344–45 (stating that Congress’s message in the passage of the ADA is that individuals with disabilities are “merely tolerated when they . . . become economic participants”).

134. Cf. Drimmer, *supra* note 105, at 1380 (noting that even before the ADA, the history of other disability legislation was couched “in terms of ‘cost-effectiveness,’ ‘investment return,’ and ‘benefits to the national economy’”).

135. See BAGENSTOS, *supra* note 52, at 29; cf. Drimmer, *supra* note 105, at 1399–400 (arguing that the ADA and its predecessors “all share the common theme that productivity . . . is the backbone of American policy regarding people with disabilities”).

136. Drimmer, *supra* note 105, at 1381. *But see id.* at 1400 (“Rather, economic efficiency, the hallmark of federal disability policy, is the final congressional purpose.”).

workplace accommodations, and other institutions to make structures and services accessible.¹³⁷ Despite this criticism, there is ample evidence that independence was at least one of the goals of the ADA.

Yet, one can see why this same goal did *not* lead to accommodations for caregiving employees. It is assumed that workers with caregiving responsibilities do not need the legal protection of accommodations to keep them independent and off public benefits¹³⁸ because, it is assumed, most caregivers are women who have spouses to support them if they either lose their job or they must take a low-paying, part-time position that affords necessary flexibility.¹³⁹ Of course that assumption does not always, or even often, reflect reality. Many caregivers are either the primary breadwinners or single parents.¹⁴⁰ In fact, some even argue that providing protection to women with caregiving responsibilities will help women achieve the independence they need to live a full, rewarding life, one in which they do not have to depend on men for their livelihood.¹⁴¹ Yet the perception of caregivers as women who can depend on the income of their spouses is a hard one to dispel.

137. BAGENSTOS, *supra* note 52, at 32 (internal quotation marks omitted).

138. A great deal of interesting scholarship has been written about the public/private dichotomy that surrounds caregiving and families. As one scholar states, “The demarcation drawn in the liberal tradition between the public and private realms also impedes legal support for parenting.” Eichner, *supra* note 110, at 156.

139. *But see* Strand, *supra* note 12, at 7 (discussing the false “assumption that all children will have steady access to an ideal worker’s wage”).

140. As noted *supra* note 131, about 60% of all married couples have two working spouses and “[m]ore than seven million families are now headed by a single parent.” Befort, *supra* note 4, at 619; *see also* WILLIAMS, *supra* note 22, at 51 (stating that 70% of all American children live in households where all adults are employed). Furthermore, as noted *supra* note 126, although only 12% of women with children under the age of six worked outside of the home in 1950, as of 1999, 64% did. Befort, *supra* note 4, at 620. In fact, as Senator Tom Harkin noted, “most parents of young children work because even a modest middle class life often requires two incomes.” Derrick Cain, *Congress Should Approve Paid Sick Leave, Push Family-Friendly Policies, Witnesses Say*, 38 Emp. Discrimination Rep. (BNA) 700 (May 16, 2012) (internal quotation marks omitted). One recent study found that only 25% of families consist of two parents with one who works and one who stays at home. *Id.*

141. *See* WILLIAMS, *supra* note 22, at 3 (stating that “opt-out stories” ignore the risks women face when they exit the workforce “only to find both their economic future and their children’s jeopardized by divorce”); *see also id.* at 21 (quoting one author as stating that “[m]odern marriage demands self-sufficiency”); *id.* at 124–25 (stating that “women need to stay in the workforce to protect their economic futures” and noting that “women who leave employment are highly vulnerable if they divorce”); Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267, 1275 (2012) [hereinafter Williams, *Ginsburg*] (citing Justice Ginsburg as describing her reconstructive vision of feminism as including “equal educational opportunity and effective job training for women, so they would not be reduced to dependency on a man or on a state”).

3. The Numbers Problem

The willingness to provide an accommodation mandate to individuals with disabilities but not caregivers might also be based on the perception of the relative size of the protected groups. The preamble to the ADA before the 2008 amendments described individuals with disabilities as a “discrete and insular minority”¹⁴² and subsequent Supreme Court opinions reinforced that view.¹⁴³ However, the ADA Amendments Act makes this a much more difficult proposition to support.¹⁴⁴ Because it is now infinitely easier to fall under the coverage of the ADA, the number of individuals who could be considered disabled under the Act has expanded dramatically.¹⁴⁵ The fact that a condition occurs in a significant portion of the population is no longer a viable justification for its exclusion from the ADA’s protected class.¹⁴⁶ “The ADA now includes virtually all persons diagnosed with diabetes, 8.3 percent of the U.S. population, and also likely includes many persons with hypertension, who comprise up to 31.3 percent of the U.S. population.”¹⁴⁷ Although it is likely that workers with primary caregiving responsibilities still outnumber those individuals who could be considered disabled under the ADA, the disparity is not nearly as significant as it was before the ADA was amended.

142. 42 U.S.C. § 12101(a)(7) (2006) (stating that “individuals with disabilities are a discrete and insular minority”), *repealed by* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3555. *But see* Bagenstos, *supra* note 10, at 404–06 (arguing, even before the ADA Amendments Act, that disability can refer to an “enormously diverse array of conditions”); *see also id.* at 421 & n.84 (stating that individuals with disabilities made up more than 20% of the population in late 1994 and early 1995).

143. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (internal quotation marks omitted) (stating that the terms defining disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled” because “Congress found that some 43,000,000 Americans have one or more physical or mental disabilities” and if the definition of disability was interpreted too broadly, “the number of disabled Americans would surely have been much higher”), *abrogated by* ADA Amendments Act of 2008 § 3; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999) (Ginsburg, J., concurring) (stating that the legislative findings that 43 million Americans have disabilities and that individuals with disabilities are a discrete and insular minority are inconsistent with a definition of disability that would encompass a large group of individuals), *abrogated by* ADA Amendments Act of 2008 § 3.

144. The ADA Amendments Act makes clear that Congress disagreed with the focus on the “43 million” number and the “discrete and insular minority” reference in the original ADA. Both phrases were removed in the Amendments. *Anderson*, *supra* note 43, at 1290.

145. *See* Porter, *supra* note 69, at 805 (stating that the number of individuals the Act covers after the Amendments will increase).

146. *Cox*, *supra* note 38, at 472.

147. *Id.*

4. The Rhetoric of Choice

Another justification given for treating individuals with disabilities more favorably than individuals with caregiving responsibilities is the rhetoric of choice. Most people view most disabilities as immutable and not the fault of the individual with the disability,¹⁴⁸ whereas most people see caregiving decisions as voluntarily made and most often desired.¹⁴⁹ Hence, there is a willingness to provide additional protection (in the form of accommodations) to employees with disabilities because those employees have no choice regarding their disability,¹⁵⁰ but we disfavor accommodations for workers with caregiving responsibilities who presumably chose their status as caregivers and therefore should live with the consequences.¹⁵¹ As discussed below, this distinction, once unpacked, does not stand up to scrutiny.

a. Some Disabilities Are Caused by Voluntary Actions

Even though the immutability and sometimes-genetic basis may have influenced Congress when passing the ADA, the case law and the reactions of employers and coworkers indicate that some believe that voluntary lifestyle decisions cause certain disabilities. When courts and employers believe an impairment is caused by lifestyle choices, they are less sympathetic. For instance, the media backlash against the ADA focused on impairments that the public views as particularly undeserving precisely because the public perceives their cause to be voluntary actions—e.g., obesity, substance abuse, and alcoholism.¹⁵² Courts and employers are also skeptical of calling diabetes, high blood

148. Drimmer, *supra* note 105, at 1347 (discussing the medical model of disability defining a “sick person” as someone who is not responsible for her illness because it is “not due to malingering, but to biology over which the individual has no control”); *see also* Anderson, *supra* note 43, at 1274 (implying that those with true disabilities are less able to participate in society because of conditions “beyond their control”); Bagenstos, *supra* note 10, at 455 (defining disability as a “socially salient group status, based on characteristics currently outside of the control of group members, that results in systematic disadvantage”).

149. Arnow-Richman, *supra* note 17, at 406; Porter, *supra* note 2, at 384 (discussing the view that caregiving is a “freely-made choice”).

150. *See* Drimmer, *supra* note 105, at 1352–53 (arguing that individuals with disabilities often take on the image of the “deserving poor” who are not to blame for their “unfortunate circumstances”).

151. Kessler, *supra* note 9, at 441–42 (stating that under the lens of the “rational choice theory, women’s cultural caregiving is a mere choice, for which the state owes no support and employers owe no accommodation”); *see, e.g.*, Cox, *supra* note 38, at 481 (discussing how some employers believe the ADA should not cover pregnancy because it is medically preventable); Eichner, *supra* note 110, at 146 (stating that courts often deny legal protection to women because they could have “chosen” not to parent or could have parented in such a way that did not interfere with work responsibilities).

152. Travis, *supra* note 11, at 317.

pressure, and sometimes even cancer disabilities, perhaps because all of these impairments may have a lifestyle-contributing factor.¹⁵³

Of course, there are some lifestyle choices that cause disabilities that are not disfavored or stigmatized. For example, imagine an employee becomes disabled after a skiing accident. Even though the employee made a “choice” to engage in a potentially risky activity (and maybe even a choice to ski recklessly), it is not an activity that is disfavored in our society (such as, perhaps, the use of illegal drugs) and employees would likely be more willing to support accommodations provided to the employee disabled from a skiing accident than to an employee who has diabetes because he is overweight or an employee who gets lung cancer because he smokes. Thus, relying on the concept of immutability to justify the provision of greater protection for individuals with disabilities does not make much sense.

b. The Myth of the Caregiving Choice

Just as disabilities are not always immutable, neither is caregiving always a freely made choice.¹⁵⁴ And even when it is, it is a socially valuable choice. Feminist legal theorists long disputed the idea that caregiving decisions are “freely-made, unconstrained choices.”¹⁵⁵ First, at the most basic level, it is unfair to call caregiving a choice when many people are “forced” into caregiving either because of unplanned pregnancies or unexpected events that require them to care for a sick or disabled family member.¹⁵⁶ Second, caregiving is not a purely

153. See, e.g., Anderson, *supra* note 43, at 1278 (noting that courts even find impairments that are specifically mentioned in the congressional debate, such as diabetes, to not be disabilities); *McNiff v. Town of Dracut*, 433 F. Supp. 2d 145, 155 (D. Mass. 2006) (concluding that the plaintiff’s skin and prostate cancer was not a disability); *Carter v. RMH Teleservices, Inc.*, No. SA-04-CA-1130-RF, 2005 WL 3244257, at *3 (W.D. Tex., Nov. 23, 2005) (finding that the plaintiff’s hypertension was not a disability); *Treiber v. Lindbergh Sch. Dist.*, 199 F. Supp. 2d 949, 960–61 (E.D. Mo. 2002) (holding that the plaintiff’s breast cancer was not a disabling impairment and citing other cases holding similarly); *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 184–85 (D.N.H. 2002) (holding that the plaintiff’s breast cancer did not constitute a disability); *Stumbo v. Dyncorp Tech. Servs., Inc.*, 130 F. Supp. 2d 771, 773 (W.D. Va. 2001) (holding that the plaintiff’s correctable hypertension was not a disability); see also Bagenstos, *supra* note 10, at 400 (noting that courts interpret the definition of disability to exclude things like epilepsy and diabetes).

154. Relatedly, once one becomes a parent, the decision of whether or not to work is often not a choice. Alicia Biggs, *Family Rights: Advocacy Group Says Employment Laws Failing to Help Parents in the Workforce*, 38 Emp. Discrimination Rep. (BNA) 703 (May 16, 2012) (stating that the nation’s political debate too often promotes a false narrative that “suggests families have all adults in the labor force by choice rather than by economic necessity”).

155. Porter, *supra* note 2, at 384–85; see also Kessler, *supra* note 9, at 445.

156. See, e.g., Befort, *supra* note 4, at 633 (noting that “one out of four U.S. families is responsible for the care of an elderly relative”); see also Jane Gross, *Who Cares for the Caregivers?*, N.Y. TIMES (Oct. 14, 2008), <http://newoldage.blogs.nytimes.com/>

autonomous decision “because gender socialization greatly influences [women’s] decisions to take on caregiving responsibilities.”¹⁵⁷ Choices about how to balance work and family are “influenced heavily by gendered stereotypes and expectations.”¹⁵⁸ Third, and perhaps most importantly, referring to caregiving as a choice ignores the responsibility becoming a parent involves.¹⁵⁹ In other words, even when the decision to become a parent is voluntary, “raising them well is not—it is a responsibility.”¹⁶⁰

As I discussed in prior work,¹⁶¹ not only is caregiving a responsibility, but it is a responsibility that benefits all of society.¹⁶² The value of caregiving is an idea many communitarians emphasize—they argue that “parents have a moral responsibility to [their] community to invest themselves in the proper upbringing of their children.”¹⁶³ Other scholars agree.¹⁶⁴ As Professor Laura Kessler states, “[C]aregiving work is fundamental to the functioning of society, the continuation of the human race, and the living of a full life.”¹⁶⁵ Understanding the importance of caregiving—not just for the parents who raise the children, but for the rest of society—helps us understand how the focus on the “choices” parents make is flawed.¹⁶⁶ Caregiving is not simply a choice. It is a responsibility.

Similarly, a caregiver’s “choice” to care for an adult family member who is elderly, sick, or disabled is also a responsibility.¹⁶⁷ This caregiving responsibility is often less of a “free choice” than the decision to have children.¹⁶⁸ We do not choose our parents and we

2008/10/14/who-cares-for-the-caregivers (stating that the need for family caregivers increases as the population ages).

157. Kessler, *supra* note 9, at 445; *accord* WILLIAMS, *supra* note 22, at 27–28 (explaining how it is inaccurate to call the decision to opt-out of the workplace a purely voluntary choice).

158. Angela Onwuachi-Willig, *GIRL, Fight!*, 22 BERKELEY J. GENDER L. & JUST. 254, 257 (2007) (reviewing MEGAN SEELY, *FIGHT LIKE A GIRL: HOW TO BE A FEARLESS FEMINIST* (2007)); *accord id.* at 267 (discussing how caregiving choices are not real choices).

159. *Cf.* Eichner, *supra* note 110, at 147 (noting that calling parenting a choice ignores the issue of whether “society has some interest in and responsibility to children once parents have ‘chosen’ to [have] them”).

160. Porter, *supra* note 2, at 385; *accord id.* at 389.

161. Much of this discussion regarding caregiving derives from my work in Porter, *supra* note 2, at 386–87, 389. Instead of repeating the citations to my own work, I will cite directly to the sources I cited in that article.

162. *Id.* at 389.

163. *E.g.*, AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 54 (1993).

164. Porter, *supra* note 2, at 386–87, 389.

165. Kessler, *supra* note 9, at 457.

166. Porter, *supra* note 2, at 389.

167. *Id.*

168. *Id.*

cannot control (or even always anticipate) when a family member is going to become ill or need care.¹⁶⁹ “The only ‘choice’ that might be made in this regard” is which family member is going to care for a loved one.¹⁷⁰ “In many families, there is no choice.”¹⁷¹ “One spouse must care for the other.”¹⁷² One adult daughter might be the only family member living near her parent when that parent needs care. Accordingly, while it is true that reliance on the concept of choice likely influences the difference in the law’s and employers’ treatment of individuals with disabilities and women with caregiving responsibilities, that reliance is misplaced.

5. Stigma

Another factor that differentiates some individuals with disabilities from women with caregiving responsibilities is stigma.¹⁷³ I use “stigma” here to mean something different than the stigma that I refer to in my concept of “special-treatment stigma.” The latter phrase refers to the resentment coworkers feel when they believe (correctly or not) that another employee receives special treatment in the workplace. The other use of the word “stigma” refers to the negative reactions about individuals’ physical attributes, appearance, or behavior, unrelated to their work habits.¹⁷⁴ Or, stated simply, I refer to stigma’s ordinary definition: “a mark of disgrace associated with a particular circumstance, quality, or person.”¹⁷⁵ Although this varies greatly

169. *Id.*; see also WILLIAMS, *supra* note 22, at 52 (discussing the magnitude of workers taking care of elderly relatives).

170. Porter, *supra* note 2, at 389.

171. *Id.*; cf. Gross, *supra* note 156 (“Without the unpaid labor of family caregivers—provided at great physical, emotional and financial cost—the long-term care system in this country (if you can call it a ‘system’) would collapse.”).

172. Porter, *supra* note 2, at 389.

173. See Drimmer, *supra* note 105, at 1376 (comparing and contrasting stigma associated with disability to other minority groups). However, “[a]lthough current social views of disability are different from those of other minorities in that revulsion, condescension, pity, and discomfort are perhaps more common than outright hostility, the effects of all prejudice and discrimination are the same—a view of inherent inferiority, leading to exclusion from society.” *Id.* Of course, there is plenty of evidence that both groups suffer from stigma. See, e.g., Cooper, *supra* note 61, at 1427 (stating that social bias may cause discrimination based on disability, like discrimination based on sex and other protected classifications).

174. Professor Bagenstos describes the subordination individuals with disabilities suffer as such: “Through prejudice, stereotypes, and widespread neglect, society’s attitudes and practices attach systematic disadvantage to particular impairments.” Bagenstos, *supra* note 10, at 418.

175. NEW OXFORD AMERICAN DICTIONARY 1712 (3d ed. 2010). Bagenstos states that, “[a]lthough stigma colloquially refers to animus and prejudice,” it is also meant to encompass three seemingly disparate problems: prejudice, stereotypes, and neglect. See Bagenstos, *supra* note 10, at 436–37. In reference to one commentator’s broader conceptualization of “stigma,” Bagenstos discusses stigma as referring to the problem of undesirable difference. *Id.* at 436–39.

depending on the particular disability,¹⁷⁶ it is quite obvious that there is greater stigma associated with most disabilities¹⁷⁷ than with being a caregiver. The statutory findings of the ADA reference this stigma.¹⁷⁸ The findings note that individuals with disabilities have been “subjected to a history of purposeful unequal treatment”; that society has tended to “isolate and segregate individuals with disabilities”; and that continued discrimination is a “serious and pervasive social problem.”¹⁷⁹ The ADA findings “support the notion that disability is a condition marked by . . . subordination and second-class citizenship.”¹⁸⁰

The stigma that faces individuals with disabilities is well documented.¹⁸¹ Many believe that the major problem individuals with disabilities face is learning to deal with the stigma that surrounds their disabilities.¹⁸² Many view people with disabilities as “less than human,”¹⁸³ and society often responds to individuals with disabilities with “pity, fear, and quite often repulsion.”¹⁸⁴ Furthermore, when doctors treat disability as a medical condition, it stigmatizes individuals labeled as disabled “by defining them as something less than normal.”¹⁸⁵ Because it is assumed that many individuals with disabilities are unable to support themselves through gainful employment, many in society view individuals with disabilities as inadequate and as “sapping the strength of the country when unable to produce financially.”¹⁸⁶ Finally, individuals with disabilities are often deprived of opportunities because of generalizations made about the limitations their disabilities cause.¹⁸⁷

Although workers with caregiving responsibilities are unlikely to experience stigma in the sense of pity, fear, and repulsion, they do

176. See, e.g., Bagenstos, *supra* note 10, at 488–91 (comparing the relative stigma of infertility with the much more significant stigma of HIV).

177. See *id.* at 445 (internal quotation marks omitted) (defining disability to include impairments that are stigmatized—meaning that those who have them are seen as “abnormal or defective in mind or body”).

178. See *id.* at 419–20 (discussing the statutory findings of the ADA).

179. *Id.* (quoting 42 U.S.C. § 12101(a)(7), a(2) (2006)).

180. *Id.* at 420. In fact, during the debates over the ADA, Congress heard many examples of people to whom employers denied opportunities simply because of animus. *Id.* at 422.

181. Drimmer, *supra* note 105, at 1360 (“Societal intolerance toward people with disabilities dominated for centuries, and its remnants are still felt today.”).

182. *Id.* at 1349–50; see also, e.g., Bagenstos, *supra* note 10, at 423–25 (stating that “people with disabilities may be deprived of opportunities because of stereotypes,” pointing to examples in the school context, and noting the tendency of society to “overstate the limiting effects” of an impairment).

183. Drimmer, *supra* note 105, at 1343.

184. *Id.* at 1352–53.

185. Bagenstos, *supra* note 10, at 427.

186. Drimmer, *supra* note 105, at 1343–44.

187. Bagenstos, *supra* note 10, at 423.

experience stigma in the sense that employers and coworkers might discount their competence and dedication to the job.¹⁸⁸ There is a wealth of work/life scholarship that explores the stereotypical assumptions made about workers with caregiving responsibilities.¹⁸⁹ Even when caregiving does not interfere with an employee's ability to perform her job as an "ideal worker," stereotypes still negatively affect her.¹⁹⁰ For instance, one study that involved caregivers in the workplace compared women on two axes: "competence" and "warmth."¹⁹¹ The study rated career women high in competence but low in warmth.¹⁹² In contrast, the study rated housewives high in warmth but low in competence, similar to "the blind, disabled, retarded, and elderly."¹⁹³ A couple of cases further demonstrate how employers make discriminatory decisions "based on stereotypical beliefs, rather than reality."¹⁹⁴ In one case, the plaintiff "was told by her supervisors that it was not possible to do her job with little children at home."¹⁹⁵ Thus, "[s]he was denied tenure based on the assumption that she would not continue to work hard once she obtained tenure."¹⁹⁶ In another case, the plaintiff was a successful sales person who repeatedly demonstrated a desire to be promoted.¹⁹⁷ Her supervisor denied her promotion to a managerial position on the

188. See Williams, *Reconstructive Feminism*, *supra* note 3, at 84 (discussing the ways in which women face gender disadvantage because of unspoken masculine norms). Furthermore, men face serious stigma when they participate in caregiving tasks. WILLIAMS, *supra* note 22, at 80.

189. See, e.g., WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 2–3; Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. 313, 313 (2007); Kessler, *supra* note 9, at 374; Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 573 (2002); Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 171 (2006); Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 25 T. JEFFERSON L. REV. 1, 2 (2003); 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, 81–82 (2003) [hereinafter Williams, *Beyond the Maternal Wall*].

190. See, e.g., Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, 58–60 (2006).

191. Williams, *Beyond the Maternal Wall*, *supra* note 189, at 90.

192. *Id.*

193. *Id.* (internal quotations marks omitted).

194. Porter, *supra* note 2, at 369; *cf.* Williams, *Ginsburg*, *supra* note 141, at 1294 (criticizing a judge's assumptions in another case that "an employer is entitled to act on an unproven assumption that [employees] who take[] leave will, upon their return, be less productive than [employees] who [have] not taken leave").

195. Porter, *supra* note 2, at 369 (citing *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115 (2d Cir. 2004)).

196. *Id.* (citing *Back*, 365 F.3d at 115–16).

197. *Id.* (citing *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004)).

erroneous belief that, because she had children, she would not be willing to move.¹⁹⁸

Men who are primary caregivers also suffer from stigma associated with their caregiving. To some extent, this stigma is even more pronounced because it is not simply based on erroneous perceptions of competency and dedication. It is also based on assumptions about the proper gender roles of men and women.¹⁹⁹ As Professor Joan Williams states, “working-class men—like higher-status ones—recognize the stigma triggered when men signal their involvement in family care . . . [and] this stigma can be severe.”²⁰⁰

I recognize that it is difficult to compare the stigma individuals with disabilities might experience, which includes pity and possibly revulsion, with the stigma caregivers in the workplace experience. I think most people would agree that the stigma individuals with disabilities experience is much worse than any stigma workers with caregiving responsibilities experience, and that this difference, therefore, justifies different treatment of individuals with disabilities. In fact, many courts and scholars point to the stigma of individuals with disabilities as a major impetus for and justification of the ADA.²⁰¹ However, although the stigma experienced justifies protection against outright discrimination and exclusion,²⁰² it does not necessarily explain the reasonable accommodation provision.²⁰³ Some argue that, if an employer refuses to give a disabled employee an accommodation, it is not stigma that influenced that decision, but rather the reality that the

198. *Id.* (citing *Lust*, 383 F.3d at 583).

199. WILLIAMS, *supra* note 22, at 79–83. In discussing this stigma, Joan Williams tells stories of men who “face sizable job risks” when they disclose their caregiving tasks to their supervisors and coworkers. *Id.* at 80.

200. *Id.* at 60.

201. *See, e.g.*, Bagenstos, *supra* note 10, at 433 (stating that the ADA’s basic provisions directly target prejudice and stereotypes). In fact, some argue that the ADA should focus more on stigma and less on functional capacity. Anderson, *supra* note 43, at 1312–13. *See generally* Bagenstos, *supra* note 10 (arguing for a “subordination-focused approach” in which stigma plays an important role in defining disability under the ADA).

202. Bagenstos, *supra* note 10, at 454 (footnotes omitted) (noting that ongoing group-based inequality “feeds a stigma that both imposes psychic harm on members of stigmatized groups and justifies (in the minds of policymakers and the public at large) a continuing failure to treat them with equal consideration” and that “[i]ntervention is therefore necessary to eliminate the practices that create and perpetuate that subordinating outcome”).

203. In fact, some argue that the ADA would benefit from greater acceptance as a civil rights statute, which would protect against stigma-based disability discrimination, in the same way Title VII protects against stigma-based race or sex discrimination. *See* Anderson, *supra* note 43, at 1300. Anderson notes that the reasonable accommodation provision makes the ADA seem more like a welfare statute than a civil rights statute. *Id. But cf.* Bagenstos, *supra* note 10, at 434–35 (arguing that the accommodations given pursuant to the reasonable accommodation provision “remove socially contingent barriers to the full integration of people” with disabilities and therefore, accommodations are not simply redistributive).

disability requires special treatment and the reluctance to provide that special treatment.²⁰⁴ Thus, even though many disabilities admittedly lead to more stigma than that which faces workers with caregiving responsibilities, the ADA's nondiscrimination mandate could handle that additional stigma. Therefore, the additional stigma does not explain the additional benefit of the accommodation mandate for individuals with disabilities.

In sum, there are certainly differences between individuals with disabilities and workers with caregiving responsibilities. But the experiences they share—the mutual marginalization they experience caused by special-treatment stigma in the workplace—are more significant than the differences between the groups. Accordingly, for both groups, we must find a way to end the marginalization by ending special-treatment stigma. The next Part will explore that goal.

III. ENDING MUTUAL MARGINALIZATION

Because, as this Article argues, special-treatment stigma is the common link between individuals with disabilities and workers with caregiving responsibilities, this Part will explore how we can end, or at least minimize, the special-treatment stigma both groups experience in the workplace. This Part explores three alternatives. First, recognizing that the special treatment inherent in providing accommodations causes the stigma, some might argue that we should stop accommodating both groups and allow employers to voluntarily accommodate as they see fit. The second alternative is to rid the stigma of special treatment and accommodate all employees through a universal accommodation mandate. The third alternative would be to accommodate both individuals with disabilities and workers with caregiving responsibilities (but not everyone) and to find a way to justify this special treatment. This Part ultimately advocates in favor of this last alternative, and argues that the communitarian theory provides the justification for the special treatment of accommodations.

A. *No Special Treatment*

If the special treatment inherent in providing accommodations causes a backlash against individuals with disabilities, then the simplest response is to stop accommodating individuals with disabilities. Of course, without accommodations, many individuals with disabilities would not be able to work at all; many would not be able to work in a job that uses their abilities and skills to their maximum potential; and many individuals with disabilities would lose their jobs because of their

204. See, e.g., Anderson, *supra* note 43, at 1310–11.

failure to conform to the ideal-worker norm of the workplace.²⁰⁵ As discussed earlier, Congress included a reasonable accommodation provision in the ADA in part to increase the independence of individuals with disabilities, allowing them to support themselves through work rather than depending on government support.²⁰⁶ If employers no longer had a legal obligation to accommodate individuals with disabilities, employers would refuse to hire, terminate, or otherwise marginalize through dead-end jobs many of those individuals.

One argument in response to this is that employers always accommodated individuals with disabilities even without a legal obligation to do so and would continue to do so, just as they sometimes accommodate caregiving obligations. As Professor Arnow-Richman argues, many employers accommodate caregiving through formal policies (leaves of absence or various forms of flexibility) or through more informal mechanisms.²⁰⁷ She argues that an employer might see providing accommodations to workers with caregiving responsibilities as a “good personnel policy, hoping its decision will yield enhanced productivity, better workplace morale, or reduced turnover.”²⁰⁸ However, other studies reveal a less flexible workplace.²⁰⁹ Especially among blue-collar occupations, many employers do not offer much flexibility at all.²¹⁰ Some employers have very strict no-fault attendance policies, where six or eight absences (or late arrivals) in a year will result in termination, regardless of the reason for the absence.²¹¹ Lower-income workers are much less likely to receive the protections of the

205. See, e.g., Bagenstos, *supra* note 10, at 429 (discussing examples of individuals that are disabled by a lack of reasonable accommodations that would remove physical and structural barriers).

206. See *supra* Subsection II.B.2.

207. Arnow-Richman, *supra* note 44, at 1095. She states 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.” *Id.* However, it is notable that Professor Arnow-Richman is citing to studies that surveyed “large” employers.” *Id.* at 1095 nn.46–47. Many employees do not work for large employers. In fact, the FMLA’s coverage leaves out almost 40% of all workers, most of them because their employers do not have at least fifty employees in a seventy-five-mile radius. Grossman, *supra* note 111, at 37–38 & n.120.

208. Arnow-Richman, *supra* note 44, at 1095; see also Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573, 582 (2007) (stating that more than 40% of employers adopted some form of flexible workplace practices, which may provide a strong inducement for some employees to stay with their employers).

209. See, e.g., Porter, *supra* note 22, at 782 & n.23.

210. See WILLIAMS, *supra* note 22, at 45 (stating that “nearly [75%] of employed adults say they have little or no control over their schedules” and that “87% of [working class] families have two weeks or less of vacation and sick time combined”).

211. See *id.* at 45; Porter, *supra* note 22, at 783. The only exception to this is for absences that the FMLA covers. See Porter, *supra* note 22, at 784–85 & n.40.

FMLA,²¹² and even if they qualify for leave under the FMLA, they often cannot afford to take it.²¹³ For many reasons—including employers’ lack of information about the business case for providing flexibility benefits—the majority of employers will not, to any great extent, voluntarily offer flexible workplaces to the majority of their employees.²¹⁴ Thus, without an accommodation mandate, many individuals with disabilities and workers with caregiving responsibilities will continue to be marginalized.

B. *Universal Accommodation*

If our goal is to avoid special-treatment stigma, one option to explore is a universal accommodation mandate. If all employees had the right to have employers accommodate their workplace needs, there would no longer be a need for any *special* treatment. Thus, it might make sense to explore a universal solution to what is increasingly becoming a universal problem—workers often need variations from the strict workplace norms that have been entrenched in our society for decades.²¹⁵ And because singling out certain groups for special treatment contributed to the backlash against individuals with

212. O’Leary, *supra* note 9, at 43–45 (stating that the FMLA covers the vast majority of lower-income workers).

213. *Id.* at 45 (stating that 75% of employees reported they could not afford to take leave).

214. *See, e.g.,* Arnow-Richman, *supra* note 44, at 1096–103 (discussing how employers often lack information that would allow them to make rational choices about accommodating employees); Porter, *supra* note 22, at 795–98 (discussing what I call the “free market fallacy”—the fact that employers, left to their own devices, will not, to any great extent, provide flexible workplaces); *see also* Selmi, *supra* note 209, at 585 (making a slightly different point that perhaps we should not expect employers to voluntarily adopt flexible practices because there is not very good data about how efficient these practices are).

215. *See* Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159, 181–83 (2002) (arguing that we should “rectify the tilt” caused by creating society’s norms without consideration of particular groups of individuals). Professor Feldblum argues that the norms of the workplace (religious norms, building accessibility norms, etc.) did not just happen; they were created by affirmative actions or decisions, even if those actions and decisions were made long ago. *Id.* at 181. Those who follow the norms are on flat ground, but if you have different norms (for example, you use sign language rather than speak audibly in English), you are on a tilt and being on a tilt is not easy. *Id.* She states:

If we believe that equality means treating every person in our society “as an equal,” and if we believe that the different norm that creates a tilt for a person in society is not morally problematic, then any non-discrimination law that purports to establish equality should be required to do something about the tilt.

Id. at 182–83 (footnote omitted). To be clear, although I think Feldblum believes in broadly remedying the “tilt,” I do not suggest that she would favor an accommodation mandate that applies to everyone, in part because most people are not on a tilt; most stand on flat ground.

disabilities and caregivers, perhaps the way to get rid of that backlash is to have a system of universal accommodation.²¹⁶

A universal accommodation mandate would be an extension of a universally applicable process law, similar to the interactive process under the ADA.²¹⁷ Several scholars discuss implementing a “process” law²¹⁸ for caregivers, and such a bill has been proposed in Congress.²¹⁹ The basic premise of such a law would be to “allow an employee to request workplace flexibility from his or her employer and would prohibit employers from discriminating or retaliating against employees for making these requests.”²²⁰ “[E]mployers would be required to consider the employee’s request and, within a reasonable period of time, accept or reject the employee’s request.”²²¹ “If the request [were] rejected, the employer would have to give a reason for the rejection.”²²² As Arnow-Richman states, the purpose of such a law is to encourage compliance with the interactive process “with the hopes that good

216. See, e.g., WILLIAMS, *supra* note 22, at 39 (stating that mothers do not need special accommodations—they need what everyone else needs—“workplaces to be designed to reflect the realities of today’s family life”).

217. Although the backlash against the ADA is well documented, almost everyone agrees that the interactive process of the ADA achieved great success. See Befort, *supra* note 4, at 626. For instance, one scholar stated that although the ADA’s accommodation provision was not very successful, “a revolution of quite a different sort has occurred in the procedural arena. The interactive process contemplated by the ADA is a unique procedural device that has launched untold numbers of successful workplace accommodations.” *Id.* Further, Professor Arnow-Richman states that “good process is an essential component in identifying and achieving viable accommodations consistent with the statute.” Arnow-Richman, *supra* note 44, at 1111.

218. Porter, *supra* note 22, at 804–06. See generally 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 [hereinafter Arnow-Richman, *Public Law*] (discussing the use of processes to help employees successfully effectuate accommodations to serve their needs and their employer’s concerns); Arnow-Richman, *supra* note 44, at 1085–86 (calling for “the creation of statutory procedural rights that enable and protect caregivers in seeking alternative work arrangements” as well as the imposition of employer obligations “to engage in a good faith ‘interactive process’ when faced with an explicit accommodation request by an individual caregiver”).

219. Working Families Flexibility Act, H.R. 1274, 111th Cong. (2009). This bill was recently reintroduced in both the House and Senate. Derrick Cain, *Measure Introduced in House and Senate Intended to Promote Workplace Flexibility*, 38 Emp. Discrimination Rep. (BNA) 356 (Mar. 14, 2012).

220. Porter, *supra* note 22, at 804. Professor Arnow-Richman argues that such a law is necessary because employees will often not request an accommodation even if they need one, for fear of negative perceptions of her commitment to work, or even retaliation for making such a request. See Arnow-Richman, *supra* note 44, at 1100.

221. Porter, *supra* note 22, at 804.

222. *Id.*; see also Arnow-Richman, *supra* note 44, at 1113 (arguing that there should be a good faith requirement in the process law; in other words, an employer can reject a requested flexibility accommodation only if the employer is doing so in good faith).

process can lead to voluntary accommodation.”²²³ However, under such a process law, if the employer rejects the request, the reason given is not subject to scrutiny as to whether or not the accommodation requested was truly feasible.²²⁴ But an accommodation mandate would change that. It would allow an employer to refuse a requested accommodation only if the accommodation was unreasonable or it would create an undue hardship for the employer.²²⁵ And unlike a universal process rule, which is limited to requests for flexible schedule accommodations, a true universal accommodation mandate would allow employees to seek accommodations if they need a variation from the normal workplace schedule *or* if they need assistance with or modifications to the physical tasks of a particular job.

There are several benefits to a universal accommodation mandate. One benefit is that it would alleviate some of the decision-making problems employers face. For instance, some employers have strict attendance policies and enforce those policies in a draconian manner, in part because they want to avoid making decisions that a court could later find unjust (in the union context)²²⁶ or even discriminatory. Unions even sometimes oppose flexibility because they do not want employers to have too much discretion—they view uniform rules as the only way to limit employers’ power.²²⁷ But if a universal accommodation mandate required flexibility, it would take some of the decision-making out of the hands of employers. While many would object to such a loss of business autonomy, the benefit is that employers would have less of a risk of applying the rules inconsistently, where such inconsistency could lead to legal liability.²²⁸ On a more practical level, managers and human resources personnel might appreciate not having to make distinctions between what they perceive to be equally compelling reasons for

223. Arnow-Richman, *Public Law*, *supra* note 218, at 61; *see also* Arnow-Richman, *supra* note 44, at 1110 (stating that the right to request an accommodation can help overcome “some of the . . . informational limitations that likely plague unregulated supervisory decision making”); *id.* at 1115 (stating that, in the United Kingdom, their process law has led to 60% of requests being fully accepted by employers and 18% being partially accepted).

224. *See* Porter, *supra* note 22, at 806 (stating that many employers would deny requests for accommodation “without having a good business reason for doing so”).

225. *See, e.g., id.* at 799–800.

226. *See* WILLIAMS, *supra* note 22, at 47–49 (discussing union arbitration cases where arbitrators ruled in favor of employees who employers fired for attendance violations because of unavoidable caregiving obligations).

227. *See id.* at 210–11.

228. The *Barnett* case reflects this obsession with wanting uniform rules without exceptions. *See* *US Airways, Inc. v. Barnett*, 535 U.S. 391, 404–05 (2002) (holding that seniority systems should, in most cases, trump an individual’s right to a disability in part to avoid the “discretionary elements” of the employer making decisions regarding layoffs and other important benefits without the benefit of a uniform seniority system, which often includes an element of due process that limits unfairness in personnel decisions).

needing accommodations from the normal workplace demands.²²⁹ Of course, the primary benefit of a universal accommodation mandate is that it would lessen the special-treatment stigma that providing accommodations to only certain groups of employees causes. If all employees had access to accommodations from the normal workplace demands, there would be no “special treatment” to stigmatize workers with disabilities and employees with caregiving responsibilities.

Despite these benefits, it is difficult to imagine drafting a workable universal accommodation proposal. Employers would be obligated to provide an accommodation, if reasonable, and if the accommodation did not create an undue hardship. Even though employers would not be allowed to judge the merits of the reason for the accommodation request, the employer would still need to determine whether the employee actually *needs* the accommodation. This is where confusing line-drawing takes place. What does it mean to *need* an accommodation? Is it based on the employee’s subjective belief of what the employee needs? For instance, if an employee requests a waiver from performing mandatory clean-up duty at the end of the shift because the employee has an especially sensitive sense of smell and the odor of the cleaning materials bothers her, is this a *need* that the employer should accommodate? Certainly the mandate would require an employer to accommodate an employee who has an allergy or asthma that the cleaning materials exacerbate, but does that mean the employer should have to accommodate an employee who is bothered by a particular job task if performing the job task is not impossible or would not create any serious physical consequences? Does an employer have to accommodate an employee who asks to work a flex-time schedule through the winter, coming in earlier and leaving earlier, so that he can train for an upcoming marathon in the late afternoon before it is dark outside? These line-drawing difficulties would seemingly make a universal accommodation mandate almost impossible to implement and enforce. And even though the purpose of a universal accommodation mandate would be to eliminate much of employers’ discretion, these examples demonstrate that there would still be some difficult discretionary decisions.

Furthermore, critics of such a proposal are likely, especially among disability rights advocates. For instance, Professor Bagenstos disagrees with proposals that treat the ADA as mandating a “universal regime of individualized accommodation.”²³⁰ Because he favors an interpretation

229. See Porter, *supra* note 64, at 345 (arguing that having a bright line rule regarding when an employee’s need for an accommodation should trump the rights of other employees might be seen as a benefit to employers because it will allow them to avoid making confusing and litigation-risky decisions).

230. Bagenstos, *supra* note 10, at 401.

of the ADA that would allow protection for only those whose impairments are “stigmatizing,” he would not provide protection to someone who, for instance, has a broken leg and therefore cannot enter a particular building or who misses work because of the broken leg.²³¹ Other disability rights advocates might be concerned that allowing everyone to have individualized accommodations might lead to the denial of the accommodations of some individuals with disabilities. This is because the undue hardship defense looks at cumulative expenses,²³² so if an individual with a disability asks for a flexible start or end time, as an example, and the employer already granted that accommodation to other employees, it is possible that the accommodation for the individual with a disability would cause an undue hardship, and therefore the employer would deny the accommodation.²³³

Another criticism of a universal accommodation mandate is likely to come from those who believe that proposals should give more weight to needs arising from disabilities and mandatory caregiving obligations than other reasons for requiring flexibility.²³⁴ In other words, it is likely that the idea that all reasons for a requested accommodation are equally valid would offend both disability rights advocates and work/family

231. See *id.* at 479–80.

232. See *Kralik v. Durbin*, 130 F.3d 76, 87 (3d Cir. 1997) (Mansmann, J., dissenting). But see David Harger, *Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act: Reducing the Effects of Ambiguity on Small Businesses*, 41 U. KAN. L. REV. 783, 790 (1993) (stating that “the issue of whether the cumulative effect of multiple accommodations upon the employer constitutes undue hardship is not addressed in the statute or in the EEOC regulations”).

233. I previously wrote about a scenario where an accommodation for an individual with a disability conflicts with others who need accommodations, including workers with caregiving responsibilities. See Porter, *supra* note 64, at 338 (arguing that, in circumstances where an accommodation of last resort for an individual with a disability conflicts with the needs of a caregiving worker, the accommodation for the individual with a disability should trump, but expressing reservation about this result); Porter, *supra* note 69, at 804–06 (discussing the scenario where accommodations for individuals with disabilities might conflict with other individuals including other individuals with disabilities, but recognizing that “there are limits to the burdens employers can place on non-disabled employees”). However, in both of these articles, I wrote under the assumption that only individuals with disabilities are entitled to accommodations and not workers with caregiving responsibilities. If everyone had the right to request an accommodation and receive it (as long as it is reasonable and does not cause an undue hardship), then weighing priorities is more difficult. Obviously, the end goal of any universal or large-scale accommodation mandate is that employers would come to realize that it is more efficient to change the structure of how work is done than it is to deal with individual accommodation requests.

234. See, e.g., WILLIAMS, *supra* note 22, at 56–58 (discussing arbitration cases where the arbitrator was more willing to find in the employee’s favor if the employee informed the supervisor that the need for flexibility was because of caregiving obligations rather than remaining silent).

advocates. Both groups would view the accommodation of disabilities or legitimate caregiving responsibilities as morally superior.²³⁵

In the end, although I am not opposed to a universal accommodation mandate, I think the criticisms of it are more convincing than the arguments made in favor of it. One possibility that could accomplish the same result as the universal accommodation mandate without causing the same criticism is to change the structure of the workplace. Proposals such as reduced-hour workweeks for everyone have that as their goal.²³⁶ In other words, instead of making each employee individually request an accommodation for a flexible starting and ending time, we could change the default norms of the workplace so that every employer simply offered to let every employee pick their own start and end time. Some progressive employers are doing just this. But mandating such a wholesale restructuring of the workplace is beyond the scope and imagination of this Article.

C. *Justification for Accommodating Individuals with Disabilities and Caregivers*

Most workers with caregiving responsibilities need accommodations from the normal workplace schedules and structures to avoid the marginalization that the inability to meet the ideal-worker norm causes.²³⁷ Some caregivers need variable working hours on a regular basis. Some will miss work occasionally for reasons related to caregiving and will need exceptions to strict attendance policies. Some caregivers might need to work reduced hours. Some cannot work overtime. Some will be unable to travel.

235. Professor Chai Feldblum would justify accommodations for individuals with disabilities and perhaps employees with caregiving responsibilities (but not for the employee who is training for a marathon) with the argument that the employee training for a marathon is on “level ground”: the workplace norms do not cause him to be on a “tilt.” See Feldblum, *supra* note 216, at 182–84. Of course, the marathon runner would argue that his workplace norm is different than the majority workplace norm. His norm requires a flexible schedule and the workplace norm is the standard 9-to-5 work day. But something makes us less sympathetic to the marathon runner’s plight (and I say this as a former marathon runner who trained in Detroit for a January marathon). Perhaps it is because his requested schedule change is the result of something that is completely voluntary (not immutable) and not considered fundamental to his identity, like religion, sexual orientation, and marital and family status. *Id.* at 182 (pointing out that those with differential religious and sexual orientation norms are on a tilt because “there is something about the *reality* of their lives that is different from the societal norm”).

236. See, e.g., Schultz, *supra* note 16, at 1917.

237. To be clear, not all workers with caregiving responsibilities are unable to meet the ideal-worker norm. Some employees can afford very reliable nannies to care for the children and also handle all child-related emergencies. Some employees are fortunate enough to have a close family member that is also willing to handle doctor’s appointments, sick children, etc. But most caregivers do not have the ability to delegate *all* caregiving needs that might arise during the work day. See *supra* notes 12 & 217.

Because the needs of workers with caregiving responsibilities are varied, several scholars explore the possibility of using an accommodation mandate²³⁸ in the caregiving context.²³⁹ It is easy to see the allure of requiring employers to provide accommodations to caregivers in the same way they provide accommodations to individuals with disabilities. As Professor Arnow-Richman states:

On its surface, the ADA embodies a commitment to accommodation that could revolutionize employers' treatment of caregivers if transported to that context. A statute that by its terms contemplates accommodation through job restructuring and modified work schedules could conceivably challenge features of work rooted in the "ideal worker" norm and demand employer flexibility in the areas that most disadvantage caregivers.²⁴⁰

Despite the fact that a reasonable accommodation mandate for caregivers has some intuitive appeal, it does not enjoy widespread acceptance among work/family scholars. These scholars suggest that the ADA's accommodation mandate is not very successful²⁴¹ and some argue that it contributes to the backlash against the ADA.²⁴² Not only has the public, courts, and employers criticized the accommodation mandate, but it is also not very successful in significantly altering the "dominant work structures or norms."²⁴³ Scholars argue that there appears to be no reason why an accommodation mandate would be

238. Professor Arnow-Richman defines the individual accommodation mandate as "workers' need for and employers' willingness to provide idiosyncratic changes in job requirements or workplace structures to meet the demands of particular caregivers." Arnow-Richman, *supra* note 44, at 1085.

239. Porter, *supra* note 22, at 799–803 (discussing other scholars' models, and exploring but ultimately rejecting the use of an accommodation mandate to remedy caregiver discrimination).

240. Arnow-Richman, *supra* note 17, at 366. On the legislative front, Democratic House members introduced legislation called the "Pregnant Workers Fairness Act," which would make it unlawful for an employer to refuse to provide reasonable accommodations to pregnant workers unless the employer could prove that the accommodations would cause an undue hardship. Cain, *supra* note 38 (discussing this legislation). Of course, this is an incomplete (albeit important) solution. Caregivers experience workplace challenges throughout their caregiving careers, not just when they are pregnant, and this legislation will be especially unhelpful to male caregivers.

241. See Arnow-Richman, *supra* note 17, at 366–67 (stating that in spite of the ADA's accommodation mandate, courts have been reluctant to allow plaintiffs to deviate from the workplace rules and norms).

242. Arnow-Richman, *supra* note 44, at 1092 (noting the resistance of employers to the reasonable accommodation mandate of the ADA, in large part because of the perceived costs imposed on employers); Travis, *supra* note 11, at 312 (discussing the backlash in response to the perceived preferential treatment of the ADA's accommodation mandate).

243. Arnow-Richman, *supra* note 17, at 373.

more successful in the caregiving context;²⁴⁴ it will likely lead to the same backlash against protections for caregivers as we currently see against the ADA,²⁴⁵ perhaps even more so. Accordingly, its use in the caregiving context is seemingly doomed.

However, conceptualizing a way to eliminate the special-treatment stigma in the disability context might allow us to rethink an accommodation mandate in the caregiver context. Specifically, we need a theoretical justification for alleviating the resentment caused by the special treatment afforded to individuals with disabilities and the special treatment I propose employers give to caregivers.

In the remainder of this section, I argue that communitarian theory provides the justification we need to minimize the special-treatment stigma caused by providing accommodations to individuals with disabilities and workers with caregiving responsibilities. This argument will proceed in four parts. First, I explain how communitarian theory emphasizes “a departure from a preoccupation with rights in favor of an emphasis on responsibility toward others.”²⁴⁶ The communitarian platform alleges that we have a responsibility to everyone in the communities to which we belong,²⁴⁷ and the workplace is one such community. Second, many communitarians also believe that not only do we have a responsibility towards others in our communities, but that we all benefit when others in our community are successful and happy. Therefore, I demonstrate that there are significant benefits that the ADA bestows on nondisabled employees, which helps to justify the special treatment received by individuals with disabilities. Third, I argue that there are similar benefits to accommodating caregiving responsibilities that would help to minimize the special-treatment stigma facing workers with caregiving responsibilities. Finally, I discuss the logistics of an accommodation mandate for caregiving.

244. In fact, Professor Joan Williams argues that the accommodation framework does not make sense in the caregiving context. She states that individualized accommodations make sense for individuals with disabilities because there is no way to design a workplace norm that makes sense for all individuals with very diverse disabilities, but employers could structure the workplace in a way that recognizes the realities of today’s family lives. WILLIAMS, *supra* note 22, at 39. Instead, she advocates for “workplace flexibility,” which she defines as “a new set of workplace expectations to match today’s workplace to an era of single parents and tag team families.” *Id.* at 209.

245. Arnow-Richman, *supra* note 17, at 374; *see also id.* at 347–48 & n.10 (implying that “the pragmatic implications” of accommodating caregiving may lead to the same backlash that has been directed against the ADA’s reasonable accommodation mandate).

246. Porter, *supra* note 2, at 394.

247. *Id.*

1. The Workplace Community

Communitarianism is “a set of ideas centered on the issues of community, moral education, and shared values.”²⁴⁸ It rests on the idea that we have a mutual responsibility to each other as citizens and that a stable community depends on this shared responsibility.²⁴⁹ Thus, communitarian scholars criticize the absence of Americans’ sense of obligation to one another: “It is as if we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm.”²⁵⁰ The contemporary communitarian movement began in 1990 when a group of ethicists, social philosophers, and social scientists met to discuss the issues that harm our society.²⁵¹ One such issue was the troubling tendency of Americans to be quick to demand rights but reluctant to accept responsibilities.²⁵² Communitarians argue that rights come with responsibilities,²⁵³ and not all responsibilities will lead to immediate benefits of rights.²⁵⁴ Other scholars also emphasize the priority of duty over desires.²⁵⁵ Although rights are important to communitarians, they are secondary to duty and responsibility.²⁵⁶ Communitarians believe that “[r]ights alone do not make a good society.”²⁵⁷ Instead, they believe that

248. Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 HARV. L. REV. 1209, 1210 (1994). Much of this discussion regarding the communitarian theory derives from my work in Porter, *supra* note 2, at 386–87, 395–96. Instead of repeating the citations to my own work, I will cite directly to the sources I cited in that article.

249. See Brown-Scott, *supra* note 248, at 1210.

250. David Abraham, *Are Rights the Right Thing? Individual Rights, Communitarian Purposes and America’s Problems*, 25 CONN. L. REV. 947, 956 (1993) (internal quotation marks omitted) (reviewing MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991)) (using the example of there being no duty under the law to rescue a stranger).

251. ETZIONI, *supra* note 164, at 14–15.

252. *Id.* at 15.

253. *Id.* at 1.

254. For instance, we have a responsibility to take care of the environment, but the benefits we gain from that are not felt immediately. *Id.* at 10–11.

255. *E.g.*, Philip Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 454 (1987) (stating that “a vital strand of communitarian morality . . . [is] the priority of duty over wants, including claims of rights”); see also, *e.g.*, GLENDON, *supra* note 251, at 77 (criticizing the no-duty principle implicit in the American “rights dialect” that assumes “we . . . have no obligations to others except to avoid the active infliction of harm” and using the example of the sorcerer’s apprentice to demonstrate how this no-duty assumption “makes mischief in political discourse”).

256. *E.g.*, Selznick, *supra* note 255, at 454.

257. Abraham, *supra* note 250, at 947–51, 956 (pointing out that America’s emphasis on individual rights led to an inequality of wealth, an increase in children living in poverty, an environment where “sociopaths outnumber strollers on many streets; our infant and black male mortality rates that compare unfavorably with” third world countries, and those “in situations of

our “preoccupation with rights has gone too far” and that a return to community can help to overcome some of the problems in America.²⁵⁸

Instead of an emphasis on rights, the central value of communitarianism is belonging.²⁵⁹ As one scholar states, communitarianism’s “central doctrinal feature locates the essence of the human being in her relationship to others and to her community.”²⁶⁰ Communitarians’ core values “entail concern for others and the commons we share.”²⁶¹ Communitarians think that the community bears the responsibility for each individual member of the community.²⁶² As Etzioni states: “We adopted the name *Communitarian* to emphasize that the time has come to attend to our responsibilities to the conditions and elements we all share, to the community.”²⁶³

The communitarian theory supports accommodating individuals with disabilities and caregivers. The resentment nondisabled coworkers feel towards individuals who receive some type of special benefits in the workplace is evidence of an overemphasis on individual rights. Instead, if we all view the workplace as a community and understood ourselves as having a responsibility to others in our community, I believe much of the resentment coworkers feel would dissipate.²⁶⁴

Our individual rights should not always trump what is best for the community, especially when employers can provide accommodations with a minimal burden on other employees.²⁶⁵ The workplace community benefits from keeping disabled workers and caregiving workers employed.²⁶⁶ Turnover is very expensive, both in terms of direct costs of replacing workers and the indirect costs of lost productivity.²⁶⁷ Accommodating workers, both individuals with disabilities and those with caregiving responsibilities, allows those employees to remain employed, and thereby reduces attrition costs.²⁶⁸

dependency—mothers, children, the old, the sick, and the poor— . . . are worse off in the United States than in any comparable country”).

258. *Id.* at 953.

259. Selznick, *supra* note 255, at 454.

260. Brown-Scott, *supra* note 248, at 1217.

261. ETZIONI, *supra* note 163, at 10.

262. Porter, *supra* note 2, at 396.

263. ETZIONI, *supra* note 164, at 15.

264. *See* Bagenstos, *supra* note 10, at 430 (stating that “most disability rights advocates insist that society as a whole has a responsibility to eliminate the social and physical structures that deny individuals with ‘disabilities’ access to opportunities”).

265. *See* Porter, *supra* note 64, at 361.

266. *See* Bagenstos, *supra* note 10, at 469 (“Many accommodations . . . have significant countervailing benefits to the employer and co-workers.”).

267. *See* Porter, *supra* note 64, at 336 n.141 (citation omitted) (stating that costs of replacing a disabled employee “are estimated at roughly forty times the cost of the average accommodation”).

268. *See, e.g., id.*

Employers also benefit because restructuring the status quo of workplace norms improves employee morale and loyalty and can make the workplace more productive and efficient.²⁶⁹

Communitarian theory also emphasizes that we should consider what benefits society as a whole.²⁷⁰ Society as a whole benefits when employers provide accommodations to disabled workers and workers with caregiving responsibilities.²⁷¹ Increases in the employment opportunities for qualified individuals with disabilities and working caregivers decreases the chance that those individuals will rely on public assistance.²⁷²

Nonetheless, communitarian theory does not demand that employers and coworkers be completely altruistic. Because communitarians believe in working together to reach a common goal or to better a community, we can also justify accommodations for both individuals with disabilities and caregiving workers by pointing to the more tangible benefits of employer mandates that grant “special treatment” to these groups of employees. In other words, special treatment is not just good for the group of employees who receive it; there are concrete benefits that extend to other employees in the workplace.

2. The ADA Benefits Nondisabled Employees

This subsection will demonstrate how the ADA affirmatively benefits nondisabled coworkers.²⁷³ Professor Travis notes that although disability policy “ideally should be driven simply by the goals of equality and self-sufficiency for individuals with disabilities, rather than by the majority’s self-interest,” there is a “practical importance of identifying benefits to nondisabled workers to help sustain continued support for the law.”²⁷⁴ I agree that emphasizing the benefits that the ADA provides to all employees can minimize the stigma of special treatment.²⁷⁵

269. See Arnow-Richman, *supra* note 44, at 1097; see also, e.g., *id.* at 1101 (highlighting Utah’s implementation of a four-day work week aimed at “achieving improved morale and retention”).

270. Cf. Bagenstos, *supra* note 10, at 462–63 (internal quotations omitted) (arguing that the social benefits of accommodations outweigh the private costs because they reduce the cost of dependency and protect against “inefficient labor-market churning of people with hidden disabilities”).

271. See Porter, *supra* note 69, at 803; Porter, *supra* note 64, at 361; Travis, *supra* note 11, at 331.

272. See Porter, *supra* note 64, at 361; see also Bagenstos, *supra* note 10, at 463.

273. Accord Travis, *supra* note 11, at 330–77; see also Bagenstos, *supra* note 10, at 469 (stating that many accommodations have significant benefits to the employer and coworkers).

274. Travis, *supra* note 11, at 330.

275. Cf. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 18–19 (2000) (stating

First and perhaps most importantly, “nondisabled employees should feel a stake in the ADA’s future” because anyone might become disabled and “fall within the ADA’s protected class” at any time.²⁷⁶ In fact, as I argue elsewhere, this is even more true after the ADA Amendments Act in 2008 made it much easier to meet the definition of an individual with a disability.²⁷⁷ As Travis aptly states, the “us” versus “them” mentality that caused the backlash against the ADA “is based on an incorrect assumption that the ADA protects only a small subset of workers.”²⁷⁸ In fact, one benefit of the expanded definition of disability under the Amendments is that an increase in the number of individuals entitled to protection will increase exposure to individuals with disabilities and possibly dissipate the fear and misunderstanding of individuals with disabilities.²⁷⁹ As the ADA’s reasonable accommodation provision entitles more individuals to protection, one hopes that accommodations can “become commonplace rather than special.”²⁸⁰ Even better, employers might begin to change the structure of the workplace and not rely on individual accommodations to a large number of employees.²⁸¹ But it is hard to get people to understand that they should support legislation that they might need someday, in part because people have a tendency to ignore the possibility of becoming

that “[t]he mandate that [society] respond to dependency . . . is not [simply] a matter of altruism or empathy . . . but one that is primary and essential because such a response is fundamentally society-preserving”).

276. Travis, *supra* note 11, at 332; accord Porter, *supra* note 64, at 361–62; see also BAGENSTOS, *supra* note 52, at 144 (recognizing that the entire population is at risk of becoming disabled); Porter, *supra* note 69, at 805 (stating that we all exist along a spectrum of abilities and the entire population is at risk of becoming disabled).

277. Porter, *supra* note 85, at 542 (citing Porter, *supra* note 69, at 795–96). Consider an example I previously postulated in Porter, *supra* note 69, at 805 n.368: someone with the relapsing-remitting form of multiple sclerosis. This person might have very, very infrequent limitations (e.g. once a year, they might have numbness, partial paralysis, partial blindness) and the limitations might last only a few weeks. Yet, through a couple of new provisions in the Amendments, the ADA would likely consider this employee an individual with a disability, and if she needed time off or another accommodation during one of her relapses, the employer must provide it.

278. Travis, *supra* note 11, at 333. *But cf.* Anderson, *supra* note 43, at 1302 (quoting Bagenstos, *supra* note 10, at 479) (“While every person at some point has some physical or mental condition that could be described as an impairment, and many may suffer some physical instances of poor treatment as a result, only a smaller group of people is ‘designated handicapped’ in the process.”).

279. Anderson, *supra* note 43, at 1324–25.

280. *Id.* at 1325.

281. For instance, if several individuals with disabilities need flexible start and stop times or varied break times, it might make sense to change the workplace structure so that all employees can schedule their hours to fit their own needs. Obviously, this does not work for all types of industries and workplaces, but it can work for many.

ill, injured, or disabled.²⁸² Accordingly, Professor Travis outlines the other, more concrete benefits that the ADA provides to nondisabled individuals.

The first major way that the ADA helped nondisabled employees is that it increased the privacy protections for medical information in the workplace.²⁸³ The ADA has very specific provisions regarding when employers can ask medical-related questions, how they can ask them, and what they can do with the information.²⁸⁴ Even though the law is unclear regarding whether nondisabled individuals can sue for a violation of the ADA's privacy provisions, most employers simply no longer ask any invasive medical questions, regardless of whether an employee could sue under the Act.²⁸⁵ As Travis states:

The real benefit to nondisabled employees has been that many employers simply have stopped subjecting them to sweeping medical inquiries. Prior to the ADA's enactment, employers often asked their employees about medical conditions, impairments, health histories, genetic information, prior workers' compensation claims, and prescription medication use.²⁸⁶

Because most employers are averse to litigation, they do not ask questions that they routinely asked before Congress enacted the ADA.

Another benefit the ADA provides to nondisabled employees is what Travis calls "remedy spillover," where the employer changes the workplace to meet an accommodation demand or remedy an ADA claim and that change or remedy benefits others in the workplace.²⁸⁷ For instance, some employees directly or indirectly benefit from the accommodations an employer gives to the disabled employee. Examples include: installing a ramp or elevator that is easier than stairs; ergonomic redesigns to offices or purchases of equipment that other employees can use to make lifting easier; higher cubicle dividers for an employee with a mental disability but that also help eliminate the distractions for other employees; a new air filter for an employee with severe asthma that improves the air quality for everyone; and other accommodations that might be experimental but that, if effective, will be useful for many nondisabled employees.²⁸⁸

282. See Travis, *supra* note 11, at 334; see also Porter, *supra* note 64, at 361–62.

283. Travis, *supra* note 11, at 336.

284. *Id.* at 336–49.

285. *Id.* at 337–39.

286. *Id.* at 346.

287. *Id.* at 349.

288. *Id.* at 350–52.

Caregiving employees in particular stand to benefit from the institutional changes to general workplace policies regarding when and where employees perform work.²⁸⁹ As Travis argues, if an employer must accommodate an employee with a disability and provide flex time, job-sharing, changes in shifts or starting and ending times, the employer might realize that these changes can “decrease turnover . . . lower absenteeism, increase productivity,” and help to recruit new employees.²⁹⁰ If the ADA forces employers to accommodate disabled employees by changing the when, where, and how employees perform their job tasks, employers might realize that flexible arrangements are not nearly as disruptive as they believed them to be.²⁹¹

Travis also discusses how benefits to nondisabled employees could increase if more individuals with disabilities used disparate impact claims rather than failure to accommodate claims.²⁹² For most employees who believe that a workplace rule, policy, norm, or physical structure made them unable to perform the essential functions of their position, they can either fashion their claim as a “failure to accommodate” claim—where they are asking their employer for an individual variance or exception from the rule, policy, or norm, or a modification of the physical structure of the workforce—or they can fashion their claim as a disparate impact claim and allege that the employer’s rule, policy, norm, or physical structure screens out or tends to screen out individuals with disabilities.²⁹³ In a disparate impact claim, the remedy might be the elimination or modification of the discriminatory practice, which would positively affect other, nondisabled employees.²⁹⁴ “[W]hile the ADA’s accommodation mandate requires employers to only modify the workplace for the individual with a disability, the disparate impact theory may require an employer to modify a challenged practice for the entire workforce.”²⁹⁵ Although disparate impact claims under the ADA are not very common,²⁹⁶ encouraging plaintiffs’ attorneys to bring these claims on behalf of individuals with disabilities (instead of failure to accommodate claims) will possibly provide additional benefits to nondisabled employees.

Perhaps the most significant benefit nondisabled employees receive from the ADA is the spillover effect of the ADA’s unique procedural

289. *Id.* at 352–53.

290. *Id.*

291. *Id.* at 353.

292. *Id.* at 354.

293. *See id.* at 354–55.

294. *Id.*

295. *Id.*

296. *Id.* at 354.

process. Courts and the EEOC developed the concept of an “interactive process,” where employers and employees with disabilities meet and discuss the employee’s limitations, the essential functions of the job, and what accommodations might help the employee perform the essential functions of the job.²⁹⁷ Even though the law requires employers to only engage in the interactive process with individuals with disabilities,²⁹⁸ the reality is that lawyers advise many employers to engage in this interactive process even when the employer is uncertain that the employee has a disability protected under the statute.²⁹⁹ Especially for those employers who are averse to litigation, it is more cost-effective “for employers to engage in the interactive process with all employees who request accommodations as a way . . . to insulate themselves from potential . . . liability.”³⁰⁰ Professor Stephen Befort calls the ADA’s interactive process a “procedural revolution,”³⁰¹ and Travis describes the process as one where “human resource professionals have designed procedures to allow a wide range of employees to initiate meaningful conversations with their employers about their work environments.”³⁰² As one employment attorney explains, it is often better to skip the determination of whether the employee has a disability and move directly to the determination of whether there is an accommodation that would keep the employee employed and allow him to return to his previous good performance.³⁰³

In addition to avoiding litigation, it might make business sense for an employer to accommodate nondisabled employees if those accommodations would allow the employee to perform her job more efficiently or more easily. This is especially true given that “most accommodations cost very little and may even provide employers with a long-term net economic gain.”³⁰⁴ Finally, the interactive process allows employees to challenge the norms of the workplace, and in some cases educate employers that there is often more than one way to structure the workplace.³⁰⁵ This is why many scholars recommend that we should take the lead from the ADA interactive process and adopt a process law to allow all employees to ask their employers for modifications to their work schedule and work environment without risking termination.³⁰⁶

297. Befort, *supra* note 4, at 626–27; Travis, *supra* note 11, at 357–58.

298. Travis, *supra* note 11, at 358.

299. *See id.* at 359–60.

300. *Id.* at 360.

301. Befort, *supra* note 4, at 626.

302. Travis, *supra* note 11, at 361.

303. *Id.* at 362.

304. *Id.* at 363; *see also* sources cited *supra* note 61.

305. *See* Travis, *supra* note 11, at 365–66.

306. *See* Arnow-Richman, *supra* note 208, at 29–30; Porter, *supra* note 22, at 803.

3. Accommodating Caregivers Also Benefits Non-Caregivers

Just as accommodating disabled employees benefits nondisabled employees, accommodating caregivers also benefits non-caregivers.³⁰⁷ First and foremost, just as everyone could become disabled at any time (especially after the much more relaxed definition of disability under the ADA Amendments Act), everyone could be forced into a caregiving role at any time.³⁰⁸ Even those workers who choose to never have children³⁰⁹ might unexpectedly find themselves caring for a sick or disabled spouse, partner, parent, or other family member. Thus, all employees stand to benefit from a law that requires employers to provide flexibility to workers with caregiving responsibilities.³¹⁰

But even in the unlikely event a worker spends his entire career without having caregiving responsibilities, accommodating workers who do have those responsibilities benefits all employees.³¹¹ Communitarian theory emphasizes the importance of the obligation and responsibility we have to individuals within our communities. “[C]ommunitarians believe that one of the most important communities to which we belong is our families,” which is where we learn moral values.³¹² As one commentator states: “Families and communities are the ground-level generators and preservers of values and ethical systems. No society can remain vital or even survive without a reasonable base of shared values. . . . They are generated chiefly in the family, schools, church, and other intimate settings.”³¹³

307. Of course, flexible workplaces also benefit employers, although that is not the focus of this discussion. *See, e.g., WILLIAMS, supra* note 22, at 68 (“Flexible policies can improve productivity in three basic ways: by allowing employers to stay open longer hours with the same number of employees; by improving staffing during vacations, illness, and emergencies; and by decreasing ‘presenteeism,’ when a worker is present in body only and not giving his full attention to the job.”).

308. *See* text accompanying *supra* notes 154–72.

309. Of course, it should go without saying that some pregnancies are unplanned and thus, some people who thought they would never parent might become parents.

310. As stated by Professor Martha Fineman: “All of us were dependent as children, and many of us will be dependent as we age, become ill, or suffer disabilities. In this sense, dependency is ‘inevitable’ and not deserving of condemnation or stigma.” Fineman, *supra* note 275, at 18.

311. Fineman takes the analysis a step further. Instead of just considering the likelihood that almost all adults will be called upon to give care to a family member, she also looks backward to note that all workers are at one point physically dependent on others and will likely be dependent as they age. As she states, it is the universality of dependency that is central to her argument for “societal or collective responsibility.” Once we accept that dependency is universal, we are more willing to accept her “claim for justice—the demand that society value and accommodate the labor done by the caretakers of inevitable dependents.” *Id.*

312. Porter, *supra* note 2, at 387.

313. ETZIONI, *supra* note 163, at 31 (first alteration in original) (quoting John Gardner); *see also* Fineman, *supra* note 275, at 18–19 (arguing that requiring a mandate for public support of

Etzioni and other communitarians contend “parents have a moral responsibility to the community to invest . . . in the proper [care and] upbringing of their children.”³¹⁴ Etzioni believes that there is a parenting deficit in society today, which he blames on both parents working too much and spending too little time at home.³¹⁵ He believes that children need attention and that both parents should be involved in their children’s lives.³¹⁶ Other scholars emphasize the “fundamental morality of caregiving work, and the importance of such work to the sustenance of society.”³¹⁷ Professor Laura Kessler states that we need to continually focus on the morality of caregiving because “caregiving work is fundamental to the functioning of society.”³¹⁸ Some scholars, when referring to the importance of children, characterize children as a “public good.”³¹⁹ Others argue that investing in children should be a national priority and caregiving is an “essential human function.”³²⁰

As communitarian theory teaches us, parenting and other caregiving is not simply a choice—it is a responsibility³²¹—and caregivers’ fulfillment of that responsibility benefits everyone.³²² Communitarian theory forces us to stop pitting caregivers against non-caregivers, and instead, teaches us that “there are other interests at stake—children, adult loved ones who need some care, and the communities to which they belong.”³²³ “Instead of viewing accommodations for parenting [and other caregiving] as only benefitting the [families], communitarian theory helps us to understand that we all benefit from parents’ choice to procreate; after all, society needs procreation to [sustain itself,] and employers need procreation to continue to have employees in the

caregiving should not be seen as based on empathy, but rather based on the fact that caregiving is “fundamentally society-preserving”).

314. ETZIONI, *supra* note 163, at 54 (emphasis omitted). This is true even if people are caring for children that they did not necessarily choose to have. See Selznick, *supra* note 256, at 451 (“Parents are responsible for the children they have, not for those they might have liked to have or only for those they chose to have.”). Much of this discussion regarding the communitarian theory derives from my work in Porter, *supra* note 2, at 388–89, 396–97. Instead of repeating the citations to my own work, I will cite directly to the sources I cited in that article.

315. ETZIONI, *supra* note 164, at 55–56.

316. *Id.*; see also WILLIAMS, *supra* note 22, at 93 (discussing the harm to children when fathers do not spend enough time with them).

317. Kessler, *supra* note 9, at 453.

318. *Id.* at 456–57.

319. Strand, *supra* note 12, at 18–20.

320. *Id.* at 32.

321. Eichner, *supra* note 110, at 153 (stating that parenting is not just an “expression of personal preference” but is the “fulfillment of a responsibility that derives from [one’s] role as parent and their relationship with their child”).

322. Porter, *supra* note 2, at 389.

323. *Id.* at 396.

future.”³²⁴ “Accordingly, caretaking labor creates a societal debt, which binds each and every member of society, not only individual family members.”³²⁵

Furthermore, communitarians assert that everyone lives with the consequences of children who are not brought up well and who then terrorize communities through misconduct and crime.³²⁶ Studies indicate that those children who spent too much time taking care of themselves are more likely to engage in risky behavior, such as controlled substance abuse, and are more likely to have anger management problems, all of which could affect other people.³²⁷ Others argue that “high parental involvement” (especially during adolescence) “can significantly help build self-esteem and educational accomplishment.”³²⁸

Accordingly, communitarian theory supports my proposal to provide reasonable accommodations to workers with caregiving responsibilities.³²⁹ If we can convince employers and coworkers that raising children well means that parents occasionally need accommodations from the normal workplace norms in order to meet their caregiving responsibilities, we should be able to minimize the resentment that accompanies those accommodations.³³⁰ “Above all, what we need is a *change in orientation* by both parents and workplaces.”³³¹ “Child raising is important, valuable work, work that must be honored rather than denigrated by both parents and the

324. *Id.* at 396; see also Strand, *supra* note 12, at 20 (stating that “[c]hildren are the taxpayers of tomorrow, the workers of tomorrow, and the citizens and leaders of tomorrow”); WILLIAMS, *supra* note 22, at 33–34 (arguing that women’s underemployment because of a lack of workplace flexibility is an important economic issue and that the better utilization of “women in the labor market could . . . offset the effects of an ageing, shrinking population”).

325. Porter, *supra* note 2, at 396–97; see also Fineman, *supra* note 275, at 16 (stating that the “idea of collective responsibility must be developed as a claim of ‘right’ or entitlement to support an[] accommodation on the part of caretakers”).

326. ETZIONI, *supra* note 163, at 54, 69.

327. ETZIONI, *supra* note 163, at 69; see also WILLIAMS, *supra* note 22, at 51 (stating that most teenage pregnancies and teen violence occur between 3–6 p.m. when schools are dismissed but parents are still at work).

328. WILLIAMS, *supra* note 22, at 51.

329. See also Fineman, *supra* note 275, at 25 (asking (rhetorically) whether it is “time to redistribute some responsibility for dependency, mandating that state and market bear their fair share of the burden”).

330. See Porter, *supra* note 2, at 398; see also WILLIAMS, *supra* note 22, at 76 (pointing to the irony of spouting family values by policymakers, yet ignoring the fact that family members “are often ‘one sick kin’ away from being fired”).

331. ETZIONI, *supra* note 163, at 257; see also Eichner, *supra* note 110, at 174 (“In the context of the work-and-parenting issue, it requires changing the perspective from enforcing the right to choose to parent to providing institutional support for parenting responsibilities.”).

community.”³³² As one author aptly states: “These are children, our collective future.”³³³

4. Logistics of Accommodating Caregiving

Of course, explaining the importance of accommodating employees with caregiving responsibilities does not explain how to implement and enforce such an accommodation mandate. Should an accommodation mandate be an open-ended reasonable accommodation provision similar to the ADA, or is it possible to draft an accommodation mandate that includes very specific, detailed rules designed to cover all caregiving-related accommodations?³³⁴ Although I think it is possible to draft a workplace law that would provide all of the accommodations working caregivers need, I agree with others that such a proposal would be highly complex and even unwieldy.³³⁵ Professor Arnow-Richman points to the military leave amendments to the FMLA as an example of a statute and regulations that are very detailed, but apply only to a very small portion of the population and provide only leaves of absence.³³⁶ She asserts that an attempt to draft a law that would apply to all caregivers and all accommodations would prove very difficult.³³⁷ I agree. It would be challenging to craft rules that would avoid legal uncertainty.³³⁸ Therefore, such a statute would create a high risk of litigation and make employer compliance costly.³³⁹ Thus, I think the best option is to borrow from the open-ended reasonable accommodation mandate and undue hardship defense³⁴⁰ under the

332. ETZIONI, *supra* note 163, at 257; *see also* Strand, *supra* note 12, at 22 (“[I]nvesting in children makes social sense because their care and cultivation contribute to the common good.”); *id.* at 33–34 (stating that tax breaks for certain caregiving occupations would make a “national statement that all children are valuable and that caring for them is an important social activity”); Eichner, *supra* note 110, at 174 (stating that the “recognition of the close connection between the parenting of children and the health of the polity reveals that parenting is a public good”).

333. Strand, *supra* note 12, at 37.

334. *Cf.* Arnow-Richman, *supra* note 44, at 1090 (stating that the FMLA is inadequate to cover all of the leave working caregivers would need and suggesting that only a very detailed set of rules or a disability-like accommodation mandate would truly give caregivers the flexibility that they need to meet their needs).

335. *E.g., id.* at 1091.

336. *Id.*

337. *See id.*

338. *Id.* at 1092.

339. *Id.*

340. I want to be clear that the drafters should define the undue hardship defense similar to the way it is defined under the ADA, as “significant difficulty or expense,” 42 U.S.C. § 12111(10)(A) (2006), and not the way it is defined in the context of accommodations for religion, where the Supreme Court said that requiring more than a *de minimis* expense is an undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

ADA. Borrowing from the ADA, and making explicit that the drafters should define terms similarly to the ADA, will be made easier as more and more courts are forced to address reasonable accommodation questions now that the ADA Amendments Act broadened the protected class under the ADA.³⁴¹

Obviously, some of the logistics of such an accommodation mandate would have to be worked out, and doing so is beyond the scope of this Article. At a minimum, such an accommodation mandate should allow caregivers to successfully manage work and family without fear of termination or the marginalization of their careers.

CONCLUSION

This Article explored two groups of employees that seemingly have little in common—individuals with disabilities and workers with caregiving responsibilities. Despite some obvious differences, these groups share one common bond—their marginalization in the workplace. They face marginalization because of their inability to meet the ideal worker norm and the special-treatment stigma that follows from that inability. Although one can argue that the differences between these two groups warrant the different levels of protection the law provides, these differences break down once explored and unpacked. Thus, because the special-treatment stigma both groups experience overshadows the differences between the groups, this Article explored ways to end the mutual marginalization of both groups of employees. Specifically, it argued that embracing a communitarian philosophy with regard to workplace flexibility and workplace accommodations (for both individuals with disabilities and for caregivers) can help us see the benefits that providing accommodations can have, not just for employees seeking those accommodations, but for coworkers, employers, and society. Acting accordingly, we can hopefully end the marginalization of both groups of employees.

341. See Porter, *supra* note 85, at 534. In that article, I provided a framework for courts to decide reasonable accommodation cases under the ADA. *Id.* This framework could also be useful for interpreting a reasonable accommodation mandate for caregiving.