The Law of Gender Stereotyping and the Work-Family Conflicts of Men

STEPHANIE BORNSTEIN*

This Article looks back to the early equal protection jurisprudence of the 1970s and Ruth Bader Ginsburg's litigation strategy of using men as plaintiffs in sex discrimination cases to cast a renewed focus on antidiscrimination law as a means to redress the work-family conflicts of men. From the beginning of her litigation strategy as the head of the ACLU Women's Rights Project, Ginsburg defined sex discrimination as the detrimental effects of gender stereotypes that constrained both men and women from living their lives as they wished—not solely the minority status of women. The same sex-based stereotypes that kept women out of the market sphere kept men out of the domestic sphere, and both were unlawful. Through a handful of key cases, Ginsburg challenged sex-based stereotypes that cast men as breadwinner and women as caregiver, succeeding in convincing the Supreme Court to establish a standard of heightened scrutiny for sex-based classifications.

In the four decades since, women have made great strides in entering and advancing in the market sphere. Meanwhile, men's advancement in the domestic sphere, while initially on the rise after the mid-1960s, has stalled since the late 1980s. Today, men have begun to prevail in lawsuits against their employers when they are penalized at work for participating in caregiving responsibilities at home. For the most part, however, their legal claims are not sex discrimination, but claims that courts can more easily recognize as actionable for men—such as violations of family and medical leave or benefits laws. Despite their lack of sex discrimination claims, however, such cases reveal the persistence of entrenched gender stereotypes about men's and women's proper roles when it comes to family caregiving. At the same time, Title VII case law now recognizes that penalties for gender nonconformity and stereotyping of mothers may be actionable sex discrimination. By combining these areas of jurisprudence, this Article argues that courts are failing to recognize actionable sex discrimination against men in the work-family context: Even without being covered by family and medical leave or benefits laws, men may prevail in lawsuits to redress penalties at work based on caregiving at home by alleging sex discrimination under a gender stereotyping theory. Following the reasoning first adopted by the Supreme Court in the equal protection cases litigated by Ginsburg in the 1970s, penalizing men at work for acting as caregivers instead of unencumbered breadwinners is sex discrimination under Title VII.

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* Visiting Assistant Professor of Law, University of California, Hastings College of the Law. I wish to thank Allison Tait (Yale Law School Class of 2011) and Jennie Stephens-Romero (Hastings Class of 2012) for their invaluable research assistance; Cynthia Thomas Calvert for her expertise in developing the Center for WorkLife Law's database of caregiver discrimination cases, which provided a key research foundation; and Joan C. Williams for her essential feedback and support.

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INTRODUCTION

Forty years ago, shortly after Title VII of the Civil Rights Act of 1964 made discrimination on the basis of sex illegal in the workplace, Ruth Bader Ginsburg created a legal strategy to root out the same type of discrimination in other areas of life using the constitutional doctrine of equal protection.[1] As the architect of the ACLU Women's Rights Project litigation strategy, Ginsburg framed the problem the law needed to resolve not as the minority status of women, but as the unlawful sex-based stereotyping of both men and women under traditional notions of "separate spheres" that constrained individuals from living their lives as they wished.[2] Through a series of cases in the 1970s, Ginsburg succeeded in establishing a heightened level of scrutiny for sex-based classifications in state and federal laws.[3] As she conceptualized it, writing sex-based stereotypes into the laws of the land was sex discrimination in violation of equal protection[4]—and the Supreme Court agreed.

In the decades since, explicit sex-based distinctions in the law and the workplace have all but vanished, yet the stereotypes at their root remain, particularly at the intersection of work and family.[5] As discrimination has become increasingly more subtle and our understanding of bias and stereotyping has evolved, the law has developed continually to redress modern-day discrimination. Consistent with Ginsburg's early construction of sex discrimination as based on stereotypes, jurisprudence under Title VII now recognizes a gender stereotyping theory, under which workplace penalties and harassment of individuals for failing to conform to gender stereotypes may be actionable sex discrimination.[6] A parallel line of case law under the

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1. *See* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 8–9, 37–38 (1975) (discussing Title VII and constitutional law together); David Von Drehle, *Redefining Fair with a Simple Careful Assault*, WASH. POST, July 19, 1993, at A1 (discussing strategy); *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 7, 2006), http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff (discussing strategy). *See generally* Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157 (2002).

2. *See* Ginsburg, *supra* note 1, at 28–29, 34–42 ("[I]ndeed above all else, the home-work gap must be confronted . . . . The breadwinning male/homemaking female division of functions deserves neither special favor nor condemnation by the law. It is a pattern individuals should be free to adopt or reject, without government coercion."); Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 271–75 (2009) ("The most insidious of . . . [gender] stereotypes, Ginsburg believed, was that of male breadwinner and female homemaker.").

3. *See* Von Drehle, *supra* note 1; ACLU, *supra* note 1.

4. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 87–88, 91–92, 104–06, 120–25 (2010); Ginsburg, *supra* note 1, at 28–29, 34–42; Klarman, *supra* note 2, at 271–75.

5. *See infra* Part III.

6. *See infra* Part II.

Family and Medical Leave Act of 1993 ("FMLA") has also recognized that the FMLA was intended to further redress sex discrimination and has identified that the intersection of work and family is where gender stereotyping remains the most entrenched.[7] Most recently, developing law in the area of caregiver discrimination, along with the 2007 enforcement guidance issued by the Equal Employment Opportunity Commission ("EEOC"), has applied Title VII gender stereotyping theory directly to the work-family context.[8]

While most courts now follow these lines of jurisprudence and recognize detrimental stereotyping of working mothers as sex discrimination, courts fail to recognize the same theory when it penalizes men. The vast majority of cases brought by male plaintiffs in the work-family context are brought under family and medical leave laws—protections that fail to cover a significant portion of the workforce.[9] In failing to recognize that the same gender stereotypes that police women out of breadwinning roles also police men out of caregiving roles, courts are missing a wide swath of impermissible sex discrimination. This Article argues that, as the law now stands, men may prevail in Title VII sex discrimination lawsuits when penalized for caregiving at work, even in the absence of leave or benefits laws. Connecting these related jurisprudential dots completes the vision for redressing the problem of sex discrimination that Ginsburg first articulated forty years ago: rooting out the detrimental gender stereotypes of separate spheres that constrain both women and men at work and at home.[10]

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7. *See infra* Part III.

8. *See infra* Part IV.

9. For example, because of its length of service and size of employer requirements, the FMLA fails to cover a full 40% of the U.S. workforce (two in every five American workers), and lower-income workers are more likely to lack coverage. KATHERIN ROSS PHILLIPS, THE URBAN INST., GETTING TIME OFF: ACCESS TO LEAVE AMONG WORKING PARENTS 1–2 (2004). As of the most recent U.S. Department of Labor survey data available, only 58.3% of all employees worked in FMLA-covered establishments, and only 46.9% of employees in the private sector were both covered by the FMLA and eligible to take FMLA leave. Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, MONTHLY LAB. REV., Sept. 2001, at 17, 19–20.

10. A great deal of scholarship has been written about Ruth Bader Ginsburg's equal protection jurisprudence in the area of sex discrimination. For examples of this scholarship, see Julie A. Greenberg, *The Gender Nonconformity Theory: A Comprehensive Approach to Break Down the Maternal Wall and End Discrimination Against Gender Benders*, 26 T. JEFFERSON L. REV. 37 (2003); Rebecca L. Barnhart & Deborah Zalesne, *Twin Pillars of Judicial Philosophy: The Impact of the Ginsburg Collegiality and Gender Discrimination Principles on Her Separate Opinions Involving Gender Discrimination*, 7 N.Y. CITY L. REV. 275 (2004); Courtney Megan Cahill, *Celebrating the Differences That Could Make a Difference:* United States v. Virginia *and a New Vision of Sexual Equality*, 70 OHIO ST. L.J. 943 (2009); Martha Chamallas, Ledbetter*, Gender Equity and Institutional Context*, 70 OHIO ST. L.J. 1037 (2009); Jennifer Yatskis Dukart, Geduldig *Reborn:* Hibbs *as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy*, 93 CALIF. L. REV. 541 (2005); Toni J. Ellington et al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 HAWAII L. REV. 699 (1998); Kenneth L. Karst, "*The Way Women Are": Some Notes in the Margin for Ruth Bader*

I. GINSBURG'S VISION: SEPARATE SPHERES VIOLATES THE EQUAL PROTECTION OF *BOTH* WOMEN *AND* MEN

From the beginning of her tenure as the founding director of the ACLU Women's Rights Project, Ruth Bader Ginsburg's goal was to "open all doors for men and for women" and to "get rid of all overt gender-based classifications" for men and women alike.[11] Ginsburg understood that the same stereotypes that limited women's advancement at work also limited men's ability to participate actively in family life (which cyclically reinforced limitations on women's advancement by perpetuating women's near-total responsibility for home life).[12] The central goal of the cases Ginsburg pursued on behalf of the ACLU in the 1970s was to deconstruct the gender *system*, which led her to an unlikely strategy for a women's rights organization: representing male plaintiffs.[13] Yet given her vision of sex discrimination as a two-sided coin of constraints imposed by sex-based stereotypes, she realized she could achieve her goal just as well by using either male or female plaintiffs.[14]

Personal accounts of Ginsburg's own experiences underscore her approach to sex discrimination as the unlawful operation of sex stereotypes. As a full-time working mother with young children, whenever the school her son attended needed to speak to a parent, they would call her.[15] After a series of such interruptions while working as a Columbia law professor, Ginsburg decided to raise the school's awareness: "This child has two parents," she told the school administrator the next time she received such a call. "[P]lease alternate your calls; it's his father's turn."[16] After that, she found that the calls tapered off dramatically.[17]

Ginsburg, 20 HAWAII L. REV. 619 (1998); Deborah Jones Merritt, *Hearing the Voices of Individual Women and Men: Justice Ruth Bader Ginsburg*, 20 HAWAII L. REV. 635 (1998); Carey Olney, *Better Bitch than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 BUFF. WOMEN'S L.J. 97 (2000–2001); Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095 (2009); Neil S. Siegel & Reva B. Siegel, Struck *by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010). In addition, many have written about the concept of gender stereotypes in the law. For recent examples, see Franklin, *supra* note 4; Monica Diggs Mange, *The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons*, 16 COLUMB. J. GENDER & L. 1 (2007); Meredith M. Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133 (2010); Kerri Lynn Stone, *Clarifying Stereotyping*, 59 KAN. L. REV. 591 (2011).

11. Interview by Joan C. Williams with Ruth Bader Ginsburg, Legally Speaking Series, Univ. of Cal., Hastings Coll. of the Law, in S.F., Cal. (Sept. 15, 2011).

12. *See* Ginsburg, *supra* note 1, at 28–29, 34–42 ("Solutions to the home-work problem are as easily stated as they are hard to realize: man must join woman at the center of family life, and government must step in to assist both of them during the years when they have small children."); Klarman, *supra* note 2, at 271–75.

13. *See* Interview by Williams, *supra* note 11; *see also* ACLU, *supra* note 1.

14. Interview by Williams, *supra* note 11.

15. *Id.*

16. *Id.*

Another account, from many years later, tells of a photograph on "prominent display" in Ginsburg's judicial chambers, of "her son-in-law gazing adoringly at his newborn child."[18] Of the picture she explained, "This is my dream for society . . . . Fathers loving and caring for and helping to raise their kids."[19]

As she conceived of and litigated it in the 1970s—and as the Supreme Court agreed based on the outcome of the litigation—reliance on stereotypical notions of separate spheres, that men should be breadwinners and women caregivers, was sex discrimination against both women and men.[20] "If I were to invent an affirmative action plan [for gender]," she recently explained, "it would be to give men every incentive to be close to children."[21]

A. Men and Women as Caregivers: *Reed v. Reed* and *Moritz v. C.I.R.*

In her first two briefs with the ACLU[22]—*Reed v. Reed*[23] and *Moritz v. C.I.R.*[24]—Ginsburg challenged laws related to the proper roles of men and women as caregivers. With these two cases, Ginsburg established the litigation strategy she would pursue on behalf of the ACLU Women's Rights Project throughout the next decade: to challenge state and federal statutes that wrote gender stereotypes into the law and to establish a heightened level of constitutional scrutiny for sex-based classifications.[25] Ginsburg viewed *Reed* and *Moritz* as companion cases, referring to them as the "mother" and "grandmother" cases.[26] Her goal was to get both cases before the Supreme Court at the same time,[27] to have the high court rule on laws that relied on the stereotype that women, and not men, should be caregivers, from the perspective of both male and female plaintiffs.[28] When the *Moritz* plaintiff prevailed in the Tenth Circuit, however, the Supreme Court denied certiorari, leaving its ruling in *Reed* to set the path for cases that followed.[29]

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17. *Id.*

18. Von Drehle, *supra* note 1.

19. *Id.*

20. *See* Franklin, *supra* note 4, at 87–88, 91–92, 104–06, 120–25; Ginsburg, *supra* note 1, at 28–29, 34–42; Klarman, *supra* note 2, at 271–75; *see also* Dukart, *supra* note 10, at 558–61.

21. Interview by Williams, *supra* note 11.

22. *See* Franklin, *supra* note 4, at 125; Deborah Jones Merritt & Wendy Webster Williams, *Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, April 10, 2009*, 70 Ohio St. L.J. 805, 809, 810 (2009).

23. 404 U.S. 71 (1971).

24. 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

25. *See* Von Drehle, *supra* note 1; ACLU, *supra* note 1.

26. Interview by Williams, *supra* note 11; *see* Merritt & Williams, *supra* note 22, at 810–11.

27. Interview by Williams, *supra* note 11.

28. *Id.*

29. Moritz v. C.I.R., 412 U.S. 906 (1973) (denying petition for certiorari from 469 F.2d 466 (10th

In *Reed*, representing a woman, Ginsburg challenged an Idaho state probate law that distinguished between men and women in recognizing who was a preferable estate administrator after a family member's death.[30] Sally Reed and her husband Cecil separated, and later divorced, when their son Richard was a young child.[31] When Richard committed suicide as a teenager, both parents sought to be the administrator of his estate.[32] Under a state law requiring that where the parties petitioning to be estate administrators were equally entitled, males were preferred to females, the Idaho probate court appointed Cecil Reed as the administrator.[33]

In her brief to the U.S. Supreme Court on behalf of Sally Reed, Ginsburg first articulated her argument that sex-based classifications in the law often rely on stereotypes and should be subjected to a higher level of constitutional scrutiny than a mere rational basis test.[34] Here, the stereotype was that women, while suited to provide care as mothers, could not be involved in the financial matters of those children for whom they cared.[35] Sally Reed had primary custody and raised Richard until he was a teenager, when Cecil sought and was awarded partial custody.[36] Sally opposed this because she thought Cecil was a bad influence; indeed, Richard committed suicide with a rifle owned by Cecil.[37] Yet Sally's contribution as primary caregiver was limited to just that by state law, so long as an equally suited man applied to be the estate administrator.

Ginsburg's brief highlighted the role that sex-based stereotypes and assumptions, particularly those about work and family, played in the Idaho state law. "Whatever differences may exist between the sexes," she argued, "legislative judgments have frequently been based on inaccurate stereotypes of the capacities and sensibilities of women."[38] Arguing for a higher standard of scrutiny than rational basis when state laws relied on sex-based classifications, she honed in on the separate spheres ideology, arguing that "[t]he traditional division within the home—father decides, mother nurtures—is reinforced by diverse provisions of state law."[39] Yet "however much some men may wish to preserve Victorian notions about

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Cir. 1972)).

30. Reed v. Reed, 404 U.S. 71, 72 (1971).

31. *Id.* at 71; Merritt & Williams, *supra* note 22, at 811.

32. *Reed*, 404 U.S. at 71–72; Merritt & Williams, *supra* note 22, at 811.

33. *Reed*, 404 U.S. at 72–73.

34. Brief for Appellant at 5–7, *Reed*, 404 U.S. 71 (No. 70-4); *see* Merritt & Williams, *supra* note 22, at 811–12.

35. Brief for Appellant, *supra* note 34, at 5–7.

36. Merritt & Williams, *supra* note 22, at 811.

37. *Id.*

38. Brief for Appellant, *supra* note 34, at 17.

39. *Id.* at 34.

woman's relation to man, and the 'proper' role of women in society," she reasoned, "the law cannot provide support for obsolete male prejudices or translate them into statutes that enforce sex-based discrimination."[40]

Turning the separate spheres ideology on its head, Ginsburg concluded her brief with an argument about the *economic value* of caregiving: Because she ran the household, Sally Reed was likely *better suited* than her ex-husband to manage the estate of her deceased child:

> [I]t is not unlikely that more women than men have the kind of "business experience" most relevant to the duties of an administrator. Women who do not work outside the home often handle most if not all the financial affairs of their family unit. Managerial responsibility, including the settlement of accounts and the preservation of property, is a central part of their daily occupation. As preparation for the duties of an administrator, experience in household management surely is not inferior to experience in such typically male occupations as truck driver, construction worker, factory worker, or farm laborer.[41]

As Ginsburg reasoned, stereotypes that limited women's roles to providing family care but not managing family affairs were not only unfair but also illogical, because to run the domestic sphere required the woman of the house to interact with the market. The Court found Ginsburg's arguments persuasive and struck down the Idaho statute as an "arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[42]

Around the same time, in *Moritz v. C.I.R.*, representing a man, Ginsburg challenged the other side of the stereotype that women should be caregivers and men should not, by challenging a federal tax law that allowed a caregiving deduction for women but not men.[43] Charles Moritz was a single, unmarried man who worked full-time as editor of the western division of a Philadelphia publishing company.[44] His eighty-nine-year-old mother, who was in a wheelchair due to arthritis and suffered from diminished memory and hearing, lived with him and refused to go to a nursing home.[45] To meet the demands of his job, which required extensive travel, he hired a woman to provide care for his mother in his absence and paid her a salary and meals.[46] At the time, federal tax law allowed expenses "for the care of one or more dependents" to be deducted "by a taxpayer who is a woman or widower [including women and men who are divorced or legally separated], or is a husband whose

40. *Id.* at 46.
41. *Id.* at 66.
42. Reed v. Reed, 404 U.S. 71, 76 (1971).
43. 469 F.2d 466, 467–68 (10th Cir. 1972).
44. *Id.* at 468.
45. *Id.*
46. *Id.*

wife is incapacitated or is institutionalized . . . but only if such care is for the purpose of enabling the taxpayer to be gainfully employed."[47] Thus the threshold question the Tenth Circuit had to address was whether it was Charles Moritz's responsibility to provide care for his mother as it would have been for any wife, ex-wife, or sister of his.[48]

As Ginsburg described it, Moritz wanted a caretaker tax credit to which he would have been entitled if he was a "dutiful daughter" instead of a never-married "dutiful son."[49] Ironically, in its choice of how to defend the statute, the government actually lent support to Moritz's argument by relying firmly on stereotypes of who could provide caregiving for dependent family members, arguing that Moritz "did not establish that [he] was qualified or able to furnish the type of care required . . . [because] his supplying the care himself was not a realistic alternative to his being employed."[50] Because he could not prove that he would have been the one to care for his mother if he was not working, the government argued, he was not entitled to the deduction.[51]

In a brief to the Tenth Circuit that bore "a strong resemblance" to the appellate brief to the Supreme Court that she filed in *Reed*,[52] Ginsburg argued that the law was based on a gender stereotype that was untrue. "Congress never suggested, nor could any rational person believe," she reasoned, "that the biological differences between sons and daughters are related to the activity in question here—provision of care for an invalid parent."[53] Citing a dozen prior cases demonstrating that courts were "[n]o longer shackled by decisions reflecting social . . . conditions or . . . theories of an earlier era,"[54] she argued that "[l]egislative discrimination grounded on sex, for purposes unrelated to any biological or functional difference between the sexes" required the same strict scrutiny as discrimination based on race.[55] And, while women were the usual victims of sex-based stereotypes, "the constitutional sword necessarily has two edges: Fair and equal treatment for women means fair and equal treatment for members of both sexes."[56] Speaking later of the case, she recalled that "in those days," one "could make the assumption that a daughter would be able to care for an elderly parent,

47. *Id.* (quoting 26 U.S.C. § 214(a) (1967)).

48. *Id.* at 467–68 ("[W]e need [to] discuss . . . whether . . . the expenses [Moritz] paid for care of [his] mother . . . were for the purpose of enabling him to be gainfully employed . . . .").

49. Interview by Williams, *supra* note 11; *see* Merritt & Williams, *supra* note 22, at 809.

50. *Moritz*, 469 F.2d at 469.

51. *Id.*

52. Merritt & Williams, *supra* note 22, at 811.

53. Brief for Petitioner-Appellant at 18, *Moritz*, 469 F.2d 466 (No. 71-1127).

54. *Id.* at 18.

55. *Id.* at 19.

56. *Id.* at 20.

but . . . [not] a son"—that is, "a woman can take care of [a] . . . parent or a child, but a man would have to prove he had that ability."[57] Noting that the services performed by the caregiver Moritz hired "were in the nature of general care and not specialized medical attention which Moritz could not give," the Tenth Circuit agreed, holding that "the denial of the deduction to a man who has not married" could not pass constitutional muster.[58] Because the tax code classification was "premised primarily on sex," the Tenth Circuit applied the equal protection principles as established in *Reed v. Reed* to hold that the statute impermissibly "made a special discrimination premised on sex alone"—the stereotype that a single man is unqualified to care for an elderly parent.[59]

B. Men and Women as Breadwinners: *Frontiero v. Richardson* and *Califano v. Goldfarb*

Following her victories in *Reed* and *Moritz*, Ginsburg challenged the other side of the problematic coin of separate spheres by tackling laws related to the proper roles of men and women as breadwinners. In two subsequent cases, *Frontiero v. Richardson*[60] and *Califano v. Goldfarb*,[61] Ginsburg challenged stereotypes that men, and not women, could be breadwinners for their families by arguing that benefits requiring husbands, but not wives, to prove financial dependency on their spouses also violated equal protection.

Representing a woman in *Frontiero*, Ginsburg and the ACLU as amicus curiae helped to challenge a federal statute that allowed an increased housing allowance and medical benefits for military wives regardless of their dependency on their husbands, but for military husbands only if they proved financial dependency on their wives.[62] Air Force Lieutenant Sharron Frontiero applied for an increase in her housing allowance and medical and dental benefits for her husband Joseph, a veteran and full-time college student.[63] Under the federal statute providing such benefits (designed "to attract career personnel through re-enlistment"), a male servicemember's wife was automatically considered a dependent, while a female servicemember was required to

57. Merritt & Williams, *supra* note 22, at 810.

58. *Moritz*, 469 F.2d at 469. By late 1971, after the tax year in question but before the Tenth Circuit decision was rendered, the statute was amended to provide the deduction for any "individual who maintains a household which includes as a member one or more qualifying [dependents]." *Id.* at 468 n.2.

59. *Id.* at 470.

60. 411 U.S. 677 (1973).

61. 430 U.S. 199 (1977).

62. *Frontiero*, 411 U.S. at 679–81.

63. *Id.*

demonstrate that her husband relied on her income for over half of his financial support.[64]

Again, the approach was to challenge gender stereotypes written into the law as sex discrimination in violation of equal protection. The brief written by plaintiffs' counsel[65] argued that, while the statute might have been "an attempt to guess [the] actual dependency" of husbands and wives, "the true basis for this discriminatory legislation can be traced to a sex stereotype which predominated in the heyday of the common law"—the stereotype of "woman as the dependent homebound wife."[66] In her amicus brief on behalf of the ACLU, Ginsburg further tied the violation to impermissible stereotyping, arguing that the statute "rests upon a foundation of . . . custom which assumes that the male is the dominant partner . . . and which reinforces restrictive and outdated sex role stereotypes about married women and their participation in the workforce."[67] Highlighting statistics from the time period that "relegate to myth the notions that relatively few married women work, and that when they do, their earnings are 'pin money' rather than an essential part of the family's finances," Ginsburg reasoned that the statue "reinforce[d] restrictive and outdated sex-role stereotypes and penalize[d] married women who do not conform to the assumed general pattern."[68] For women like Sharron Frontiero, "[i]n marriage, the wife is presently th[e] primary wage-earner; the husband, the 'assistant breadwinner.'"[69]

Again, the Supreme Court agreed with Ginsburg and the plaintiffs, striking down the federal law as a violation of equal protection. Writing for the plurality, Justice Brennan highlighted the nation's "long and unfortunate history of sex discrimination. . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[70] In particular, Justice Brennan criticized the Court's 1873 decision in *Bradwell v. Illinois*, which enshrined separate spheres ideology by "proclaim[ing that] . . . . '[t]he constitution of the family organization . . . founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood'" and "repugnant to the idea of a woman adopting a distinct and independent career from

64. *Id.* at 679–80.

65. Note that Ginsburg did not author this brief but argued the case as amicus curiae. *See Frontiero*, 411 U.S. at 678 (listing Joseph J. Levin Jr. and Morris S. Dees Jr. as arguing the cause and authoring the brief for appellants, and Ruth Bader Ginsburg and Melvin L. Wulf as arguing the cause and authoring the brief for amicus curiae ACLU).

66. Brief for Appellants at 59, *Frontiero*, 411 U.S. 677 (No. 71-1694).

67. Brief for Amicus Curiae ACLU at 7, *Frontiero*, 411 U.S. 677 (No. 71-1694).

68. *Id.* at 24–25.

69. *Id.* at 27.

70. *Frontiero*, 411 U.S. at 684.

that of her husband."[71] Based on these deeply rooted ideas, Justice Brennan explained, "our statute books gradually became laden with gross, stereotyped distinctions between the sexes," such as the law Sharron Frontiero challenged.[72] Relying on the precedent established in *Reed*, the Court held that the law holding servicewomen to a different standard than servicemen to obtain benefits for their families was unconstitutional sex discrimination.[73]

Shortly thereafter, representing a man in *Califano v. Goldfarb*, Ginsburg mounted a similar challenge to a federal law that provided social security survivor benefits for widows regardless of their dependency on their husbands, but for widowers only after proving their prior financial dependency on their wives.[74] Prior to her death, Hannah Goldfarb had worked as a secretary for New York City public schools for nearly twenty-five years, during which time she paid all required social security taxes.[75] When her surviving husband Leon, who was retired, applied for widower's benefits, his application was denied because he could not prove that he had been receiving over half of his financial support from his wife at the time of her death.[76] Under the relevant federal law, surviving widows were not similarly required to prove dependency on their deceased husbands to receive such benefits.[77]

As in *Frontiero*, Ginsburg's brief argued that relying on gender stereotypes that devalued women's roles as breadwinners was sex discrimination in violation of equal protection.[78] The social security statute at issue, she argued, "assumes gainful employment as a domain in which men come first, women second," which in effect "promote[s] the traditional division of labor between men and women" and "retard[s] society's progress toward equal opportunity, free from gender-based discrimination."[79] Like the laws held unconstitutional in *Reed* and *Frontiero*, she reasoned, "statutes that make convenient assumptions about 'the way women (or men) are'" violate the Constitution.[80] Quoting Congresswoman Martha Griffiths, Ginsburg's brief highlighted the impermissible influence of separate spheres ideology: "The income security programs of this nation were designed for a land of male and

71. *Id.* at 684–85 (citing Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)).

72. *Id.* at 685.

73. *Id.* at 690–91.

74. 430 U.S. 199, 201–02 (1977).

75. *Id.* at 202–03.

76. *Id.* at 203.

77. *Id.* at 201.

78. Brief for Appellee, *Califano*, 430 U.S. 199 (No. 75-699), 1976 WL 181387, at *17.

79. *Id.* at *24.

80. *Id.*

female stereotypes, a land where all men were breadwinners and all women were wives or widows; where men provided necessary income for their families but women did not"—a "view of the world [that] never matched reality, but today . . . is further than ever from the truth."[81]

Once again, based in part on the precedent established in *Frontiero*, the Court agreed.[82] Noting that the distinction in the federal requirements "deprive[s] women of protection for their families which men receive as a result of their employment" (that is, deprives Hannah Goldfarb's husband of the social security taxes she had paid out of her salary for twenty-five years), the Court held that "the gender-based differentiation"[83] was unconstitutional.[84] The statute was, according to the Court, "supported by no more substantial justification than 'archaic and overbroad' generalizations . . . that are more consistent with 'the role-typing society has long imposed,' than with contemporary reality."[85] In striking down the law, the Court held that "such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits."[86]

C. Mothers and Fathers: *Weinberger v. Wiesenfeld*

The culmination of Ginsburg's strategy to challenge assumptions that men were not proper caregivers and women were not proper breadwinners came in the case of *Weinberger v. Wiesenfeld*,[87] in which Ginsburg challenged both sides of separate spheres stereotypes at once. In *Wiesenfeld*, representing a father whose wife had died in childbirth, Ginsburg challenged a federal law that provided social security survivor benefits to children and the widows or surviving divorcées who cared for them ("mother's insurance benefits"), but not to widowers.[88] When Paula Wiesenfeld, a public school teacher and her family's primary breadwinner, died of an embolism after giving birth to a healthy son, her husband

81. *Id.* at *28 (quoting Congresswoman Martha Griffiths) (internal quotations omitted).

82. *Califano*, 430 U.S. at 217.

83. *Id.* at 206.

84. *Id.* at 207.

85. *Id.* at 206–07 (citations omitted); *cf.* Kahn v. Shevin, 416 U.S. 351, 352–56 (1974) (holding that a state statute giving widows a $500 property tax exemption did not violate equal protection where it benefitted a certain class based on a reasonable distinction in state policy that did not conflict with the Constitution). The *Kahn* case was the only one out of the six cases that Ginsburg argued before the Supreme Court in which she did not prevail. *See* Von Drehle, *supra* note 1. Note, however, that Ginsburg did not choose to bring this case; it was filed by a local ACLU affiliate without her knowledge, and she was brought in for the appeal to the Supreme Court. *Id.* Because she was concerned about the strength of the plaintiff's case, she argued the case under a rational basis test for fear of setting back the effort toward heightened scrutiny for sex-based classifications. *Id.*

86. *Califano*, 430 U.S. at 217.

87. 420 U.S. 636 (1975).

88. *Id.* at 640–41.

Stephen applied for and was denied survivor benefits for himself.[89] Stephen was determined to care for his son and not return to work full-time until his son was in school full-time.[90] Had he been a woman, he would have been entitled to survivor benefits for himself "as long as he was not working," or, if he was working, offset by an amount based on what he earned.[91] Because he was a man, however, the benefits were not available to him.

In her lawsuit on his behalf, Ginsburg argued that sex-based classifications in employment benefits laws were impermissible when women's contributions as breadwinners were diminished.[92] Yet because *Wiesenfeld* involved benefits that would allow mothers to stay home with their children, Ginsburg went further here, arguing that denigrating men's contributions as caregivers was also impermissible.[93] By championing a man who did not conform to gender stereotypes, she challenged both breadwinner and caregiver stereotypes simultaneously—identifying reliance on either as sex discrimination. Ginsburg's brief to the Supreme Court lays out this two-pronged argument clearly: To provide survivor benefits to women but not men "reflects the familiar stereotype that, throughout this Nation's history, has operated to devalue women's efforts in the economic sector";[94] likewise, to provide "mother's" insurance benefits but not "father's" devalues men's efforts in the domestic sector.[95] Thus, "[j]ust as Paula Wiesenfeld's status as a breadwinner is devalued," Ginsburg argued, "so Stephen Wiesenfeld's parental status is denigrated, for [the statute] recognizes the mother, to the exclusion of the father, as the nurturing parent."[96] Relying on the precedent established in *Reed* and *Frontiero*, Ginsburg reasoned that "upholding the gender-based criterion [here] would require approval of gross sex-role stereotyping as a permissible basis for legislative distinction," violating equal protection.[97] "In providing a 'mother's benefit,' but no father's benefit," Congress legislated based on impermissible sex-based assumptions: "breadwinner was synonymous with father, child tender with mother."[98]

Consistent with its prior decisions, the Court agreed with Ginsburg yet again, striking down the gendered provision of survivor benefits as

89. *Id.* at 639–41; Merritt & Williams, *supra* note 22, at 814.
90. Merritt & Williams, *supra* note 22, at 814–15.
91. *Wiesenfeld*, 420 U.S. at 640–41.
92. Brief for Appellee at 10–11, *Wiesenfeld*, 420 U.S. 636 (No. 73-1892).
93. *Id.* at 16–17.
94. *Id.* at 5.
95. *Id.* at 6.
96. *Id.* at 11–12.
97. *Id.* at 16.
98. *Id*.

unconstitutional.[99] The Court looked to the statute and its legislative history to determine that the benefit was not intended to remedy past economic discrimination against women but instead "was intended to permit women to elect not to work and to devote themselves to the care of children."[100] Having determined this intent, the Court held that the sex-based distinction was "entirely irrational" and could not stand:[101]

> Even in the typical family hypothesized by the Act, in which the husband is supporting the family and the mother is caring for the children, this result makes no sense. . . . It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of "the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection."[102]

Here, the issue was not the financial dependency of a wife per se, but rather her desire to care for her children rather than work after the death of her husband. For the legislature to assume that a man would not want similarly to care for his children after his wife died was to write a gender stereotype into the law, which the Court held violated equal protection.[103]

Among the cases she litigated throughout the 1970s, Ginsburg has described *Wiesenfeld* as her favorite because

> Stephen Wiesenfeld was, I thought, the perfect plaintiff. His case involved three-fold discrimination. Discrimination against the woman as wage earner—her contributions to Social Security did not net for her family the same benefits that a man's contributions did. Discrimination against Stephen as a parent, who wanted to care personally for his child. And discrimination against the baby, who would have the opportunity for the care of the sole surviving parent if the parent were female, but not if the parent were male.[104]

With this one case, she was able to challenge the parallel limitations that result when "the traditional breadwinner/homemaker view of life—the notion that it is man's obligation to earn a living, and woman's to care for the home and children"—is embedded in the law.[105] Despite being at the helm of the ACLU's *Women's* Rights Project, Ginsburg actually represented "numerically more men . . . in the Supreme Court than

99. Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975).
100. *Id.* at 648.
101. *Id.* at 650–51.
102. *Id.* at 651–52 (alteration in original) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
103. *Id.* at 652–53.
104. Merritt & Williams, *supra* note 22, at 815.
105. *Id.* at 814.

women."[106] Yet this fact is consistent with her conception of sex discrimination as the unlawful application of gender stereotypes to men and women. And with her many victories, Ginsburg's vision is reflected in the law of sex discrimination today. Wiesenfeld's case started when a colleague of Ginsburg's read a letter Wiesenfeld had written to a local paper about his story, in which he referred to "hearing a lot about women's lib" and, after telling his story, ended his letter with "Tell that to Gloria Steinem."[107] But it was Ginsburg who recognized that what had happened to him was unlawful—and who convinced the Supreme Court to agree that denying the ability of a man to care for his children while supporting the ability of a woman to do so is sex discrimination.

II. The Law of Gender Stereotyping Under Title VII: Workplace Penalties for Gender Nonconformity Are Actionable

While Ginsburg focused on impermissible sex-based classifications in state and federal statutes through the constitutional law of equal protection, a parallel jurisprudence of sex discrimination in the workplace was developing under Title VII.[108] Initial litigation focused on explicit sex-based distinctions in workplace hiring, promotion, and benefits, including those based on generalizations about the sexes.[109] In the work-family context, a series of cases held that employers must provide the same non-disability-related parental leave benefits to men and women (Title VII does permit additional leave to women who are birth mothers, solely for the disabling periods of pregnancy).[110] From the

106. *Id.*

107. *Id.* at 815.

108. 42 U.S.C. §§ 2000(e)–2000(e)-17 (2010). Ginsburg herself commented on the parallel line of cases under Title VII in her brief to the Supreme Court in *Reed v. Reed*:

> Currently, federal and state measures are beginning to offer relief from discriminatory employment practices. Principal measures on the national level [include] . . . Title VII of the Civil Rights Act of 1964 . . . . These developments promise some protection of the equal right of men and women to pursue the employment for which individual talent and capacity best equip them. But important as these federal measures are, their coverage is limited . . . . They provide no assistance at all in the many areas apart from employment, as in the case at bar for example, where women are relegated to second class status.

Brief for Appellant, *supra* note 34, at *11–12.

109. *See, e.g.*, Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) (holding that excluding women from battery-manufacturing jobs based on concerns for the women's potential future children was sex discrimination under Title VII); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 722–23 (1978) (holding that requiring women to pay more into a pension fund based on generalizations of women's longevity was sex discrimination under Title VII).

110. *See, e.g.*, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 277 (1987); Schafer v. Bd. of Pub. Ed. of Pitt., 903 F.2d 243, 248 (3d Cir. 1990); EEOC v. Vucitech, 842 F.2d 936, 940 (7th Cir. 1988); EEOC v. Commonwealth Edison Co., No. 85 C 5637, 1985 U.S. Dist. LEXIS 18361, at *4 (N.D. Ill. July 1, 1985); *cf.* Johnson v. Univ. of Iowa, 431 F.3d 325, 332 (8th Cir. 2005) (discussing how a biological mother and a biological father were not similarly situated for the purpose of comparing

late 1980s onward, however, as the understanding of how stereotypes operate to result in more subtle forms of discriminatory behavior grew, the law evolved. In 1989, in *Price Waterhouse v. Hopkins*, the Supreme Court articulated that penalizing employees at work for failing to conform to expected gender stereotypes could amount to impermissible sex discrimination under Title VII.[111] Within ten years, in the 1998 case of *Oncale v. Sundowner Offshores Services, Inc.*, the Court ruled that sexual harassment of a man by his male coworkers could also amount to sex discrimination in violation of Title VII.[112] Through these and the cases that followed, Title VII jurisprudence defining sex discrimination paralleled the definition Ginsburg had established under equal protection: Distinctions or penalties at work based on gender stereotypes—or an individual's failure to conform to them—may constitute sex discrimination against women *and* men.

A. "Masculine" Women: *Price Waterhouse v. Hopkins*

In *Price Waterhouse v. Hopkins*, the Supreme Court articulated the "gender stereotyping theory" under Title VII: When women are penalized at work because they do not conform to expected stereotypes of feminine behavior—how women should look or behave—that is evidence of unlawful sex discrimination.[113] Ann Hopkins had worked successfully as a senior manager in the Washington, D.C. office of national accounting firm Price Waterhouse for five years when she was proposed for firm partnership.[114] At the time (1982), only seven of the firm's 662 partners were women, and Hopkins was the only woman out of eighty-eight proposed for partnership that year.[115] Hopkins's work contributions in the year prior to the partnership proposal were unmatched by any of the other candidates; several partners "praised her character as well as her accomplishments, describing her . . . as 'an outstanding professional' . . . [with] a 'deft touch,' a 'strong character, independence and integrity.'"[116] Yet she also had critics, who faulted her for "abrasiveness," "brusqueness," and a lack of "interpersonal skills,"[117] which made her at times "overly aggressive, unduly harsh, difficult to

their leave under Title VII).

111. 490 U.S. 228, 250 (1989).

112. 523 U.S. 75, 81–82 (1998).

113. 490 U.S. at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

114. *Id.* at 233.

115. *Id.*

116. *Id.* at 234.

117. *Id.* at 236.

work with and impatient."[118] When a decision on the proposal to make her a partner was put on hold for a year and then ultimately denied, she sued for sex discrimination under Title VII.[119]

Evidence showed that criticism of Hopkins related to the fact that she was a woman: Had she been a man, she would not have been faulted equally (in fact she may have been praised) for her behavior.[120] As the Supreme Court recounted in its decision: "One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.'"[121] When told she would not make partner, Hopkins was told that "to improve her chances for partnership . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[122] While Hopkins was an outstanding achiever, she was faulted for not performing her gender in a way that matched a sex-based stereotype of how women should behave. Other female candidates for partnership "were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers"; the problem was not necessarily that Hopkins was a woman, but that she was not a feminine woman in a workplace where "[t]o be identified as a 'women's lib[b]er' was regarded as [a] negative comment."[123]

As the Court explained, the criticisms of Hopkins "stemmed from an impermissibly cabined view of the proper behavior of women,"[124] and, by "giving . . . effect to . . . comments that resulted from sex stereotyping," Price Waterhouse "unlawfully discriminated against Hopkins on the basis of sex."[125] Citing early Title VII precedent from the 1970s, the Court made its view explicit:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[126]

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118. *Id.* at 234–35.

119. *Id.* at 231–32.

120. *Id.* at 251 ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.").

121. *Id.* at 235 (citations omitted).

122. *Id.* (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

123. *Id.* at 236 (alterations in original) (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

124. *Id.* at 236–37.

125. *Id.* at 237.

126. *Id.* at 251 (alteration in original) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

To help establish the link between gender stereotypes and the actions taken against Hopkins, her attorneys provided expert testimony from a social psychologist about how "the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping."[127] Yet, writing for the plurality, Justice Brennan noted that "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school'" and that, "if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick," it is likely her sex that is the basis for the criticism, "motivated by stereotypical notions about women's proper deportment."[128] Writing separately in a concurrence, Justice O'Connor went even further to identify that the stereotypical comments constituted *direct evidence* that sex discrimination played a significant role in the denial of Hopkins's partnership—meaning the comments were themselves sex discrimination, without the factfinder having to draw an inference.[129] As it had done in the equal protection cases of the 1970s, here the Supreme Court established that, in the context of Title VII, embedding gender stereotypes and penalizing individuals for failing to conform to them may constitute sex discrimination.[130]

B. "Feminine" Men: *Oncale v. Sundowner Offshore Services, Inc.*

A decade after *Price Waterhouse*, in the 1998 case of *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court established that when a man is sexually harassed at work by other men, he may claim actionable sex discrimination.[131] Joseph Oncale was working as a roustabout on an all-male crew on an oil platform in the Gulf of Mexico when he was "forcibly subjected to sex-related, humiliating actions" by and in front of his male coworkers, "physically assaulted . . . in a sexual manner, and . . . threatened . . . with rape."[132] After his complaints to his

127. *Id.* at 235.

128. *Id.* at 256.

129. *Id.* at 275, 277 (O'Connor, J. concurring). As Justice O'Connor described it in her concurrence:

> It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid.

Id. at 272–73.

130. *Id.* at 251–52 (majority opinion). While the Court noted that stereotypical remarks "do not inevitably prove that gender played a part in a particular employment decision" and that a "plaintiff must show that the employer actually relied on her gender in making its decision," it held that "stereotyped remarks can certainly be *evidence* that gender played a part." *Id.* at 251.

131. 523 U.S. 75, 79 (1998).

132. *Id.* at 77.

supervisors and his employer's safety compliance clerk went nowhere and fearing that, if he did not leave, he "would be raped or forced to have sex," he eventually quit, with the request that his records show "that he 'voluntarily left due to sexual harassment and verbal abuse.'"[133]

When Oncale sued for sex discrimination under Title VII, the trial and appellate courts ruled against him, relying on prior cases that held that, as a male, "Oncale . . . has no cause of action under Title VII for harassment by male co-workers."[134] Citing precedent establishing that sexual harassment amounted to discrimination under Title VII and that Title VII protected men as well as women and regardless of whether "the plaintiff and the defendant . . . are of the same sex,"[135] a unanimous Supreme Court disagreed.[136] Writing for the Court, Justice Scalia explained that, although male-on-male harassment was not the principal objective of Congress in enacting Title VII, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[137] Thus, while "[c]ourts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations," he reasoned, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[138] Under this holding, the Court explained, a factfinder "might reasonably find such discrimination" if a victim is harassed by a harasser of the same sex but "in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of [the victim's sex] in the workplace."[139]

Despite the fact that Joseph Oncale was a married, heterosexual man with two children, the Court held that, when he was singled out and harassed by other men in a sexually derogatory manner, this was actionable discrimination "because of sex" under Title VII.[140] Indeed, as Oncale argued in his brief, "there is no type of conduct more repulsive to the nonconsenting heterosexual male and more certain to drive him from the work place than that engaged in by the defendants in this case."[141] The conduct was "degrading and humiliating" specifically "because of [Oncale's] sexual identity as a man."[142] In recognizing that sexual

133. *Id.*
134. *Id.*
135. *Id.* at 79.
136. *Id.* at 75, 78–79.
137. *Id.* at 79.
138. *Id.* at 80.
139. *Id.*
140. *Id.* at 82.
141. Brief for Petitioner, *Oncale*, 523 U.S. 75 (No. 96-568), 1997 WL 458826, at *19.
142. *Id.*

harassment whereby men denigrate and threaten another man's sexuality could be actionable sex discrimination, the Court signaled its agreement.[143]

C. Title VII Gender Stereotyping Today: The Progeny of *Price Waterhouse* and *Oncale*

In the wake of *Price Waterhouse* and *Oncale*, the law of gender stereotyping and harassment under Title VII has evolved to hold that the gender stereotyping theory under Title VII applies to men, too. Under the law of Title VII today, when a man is penalized or harassed at work for failing to conform to a gender stereotype of masculine behavior, he can allege that he has been discriminated against because of sex. While a full discussion of the development of this case law is beyond the scope of this Article,[144] several key cases highlight the progression of the Title VII gender stereotyping theory and provide examples of the protections it affords to men for failure to conform to masculine norms.

Predating the *Oncale* decision by a year, in the 1997 case *Doe v. City of Belleville*, the Seventh Circuit applied *Price Waterhouse* to hold that harassing a man because his appearance or behavior did not conform to male stereotypes constituted impermissible harassment because of sex under Title VII.[145] Twin brothers sued for sex discrimination in violation of Title VII and the Equal Protection Clause after being "subjected to a

143. *Oncale*, 523 U.S. at 81–82 ("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.'" (alterations in original)). While Oncale may not have been a "feminine" man, clearly targeted for harassment based on his outward gender nonconformity, the harassment he endured was a way of "feminizing" him—denigrating him by treating him as a woman. News accounts of the case note clearly that Oncale was a married heterosexual man with two children; yet he also went by the nickname "Jody" and was smaller in stature, five feet, four inches and 140 pounds. *See* Dorothy Atcheson, *Assault with a Sexual Weapon*, Out, Dec./Jan. 1997–1998, at 42, 44.

144. For discussion of the development of this case law over time, including the limitations of this theory as applied in the context of sexual orientation and dress and appearance codes, see, for example, Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 2–3 (1995); Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 Duke J. Gender L. & Pol'y 205 (2007); Jonathan A. Hardage, Nichols v. Azteca Restaurant Enterprises, Inc*., and the Legacy of* Price Waterhouse v. Hopkins*: Does Title VII Prohibit "Effeminacy" Discrimination?*, 54 Ala. L. Rev. 193 (2002); Stephen J. Nathans, *Twelve Years After* Price Waterhouse *and Still No Success for "Hopkins in Drag": The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII*, 46 Vill. L. Rev. 713, 713–14 (2001); *cf.* Philip McGough, *Same-Sex Harassment: Do Either* Price Waterhouse *or* Oncale *Support the Ninth Circuit's Holding in* Nichols v. Azteca Restaurant Enterprises, Inc. *That Same-Sex Harassment Based on Failure to Conform to Gender Stereotypes is Actionable?* 22 Hofstra Lab. & Emp. L.J. 206 (2004); Colleen Keating, *Extending Title VII Protection to Non-Gender-Conforming Men*, Modern Am., Fall 2008, at 82.

145. 119 F.3d 563, 566 (7th Cir. 1997), *vacated and remanded in light of* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

relentless campaign of harassment by their male coworkers" at their summer landscaping job for Belleville.[146] One of the brothers, referred to as "H. Doe" and who wore an earring, was particularly subjected to gender-based harassment including being called "fag," "queer," or "bitch," asked whether he was a boy or a girl, being threatened with sexual assault "out [in] the woods," and, after one coworker announced, "I'm going to finally find out if you are a girl or a guy," being pinned against a wall and grabbed by the testicles.[147] Relying on *Price Waterhouse*, the Seventh Circuit held that this constituted sex discrimination as H. Doe "was singled out for . . . abuse because the way in which he projected the sexual aspect of his personality (. . . his gender) did not conform to his coworkers' view of appropriate masculine behavior."[148] Thus, just as Price Waterhouse's "reliance upon gender stereotypes" to deny Ann Hopkins partnership was because of her sex, the harassment H. Doe endured was also because of his sex.[149] The Seventh Circuit explained,

> [A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or *because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave*, is harassed "because of" his sex.[150]

Whether a plaintiff is male or female, the court continued, the analysis should be the same: "The question in both cases is whether a particular action . . . can be attributed to sex," and "reliance upon stereotypical notions about how men and women should appear and behave . . . reasonably suggests that the answer to that question is yes."[151]

Five years later, the Ninth Circuit applied *Price Waterhouse* and *Oncale* in two cases that again extended gender stereotyping and sexual harassment theories under Title VII to men. In 2001, in *Nichols v. Azteca Restaurant Enterprises, Inc.*, the Ninth Circuit held (like the Seventh Circuit had in *Doe v. Belleville*) that a man who was harassed for failing to meet a stereotype of masculinity could allege sex discrimination under Title VII.[152] Antonio Sanchez, who worked as a restaurant host and food server, was "subjected to a relentless campaign of insults, name-calling, and vulgarities" by his male coworkers and even a supervisor, who "referred to Sanchez . . . as 'she' and 'her,'" criticized him "for walking

146. *Id.*

147. *Id.* at 566–67.

148. *Id.* at 580.

149. *Id.* at 580–81 ("*Price Waterhouse v. Hopkins* makes clear that Title VII does not permit an employee to be treated adversely because his . . . conduct does not conform to stereotypical gender roles." (citation omitted)).

150. *Id.* at 581 (emphasis added).

151. *Id.* at 575, 581.

152. 256 F.3d 864, 869 (9th Cir. 2001).

and carrying his serving tray 'like a woman,'" and called him, among other things, a "female whore."[153] Relying on *Price Waterhouse* and *Oncale*, the Ninth Circuit agreed with Sanchez that "he was harassed because he failed to conform to a male stereotype" and that "the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine."[154] The next year, in *Rene v. MGM Grand Hotel, Inc.*, the Ninth Circuit held that another man, who was gay, was also subject to sex discrimination based on sexual harassment: His sexual orientation was irrelevant where his harassment was sufficiently sex-based to violate Title VII.[155] Medina Rene, who worked as a "butler" for "wealthy, high-profile" hotel guests, was harassed almost daily for two years by his male coworkers, who called him "sweetheart" and "muñeca" ("doll") and subjected him to "offensive physical conduct of a sexual nature," including caressing, hugging, and "touch[ing his] body like they would to a woman."[156] Here the majority focused on *Oncale*,[157] noting that "Oncale did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination *in comparison to other men.*"[158] Likewise, Rene "was singled out from his other male co-workers for this treatment," and "treated differently—and disadvantageously—based on sex," which is "precisely what Title VII forbids."[159]

Most recently, in 2011 in *Glenn v. Brumby*, the Eleventh Circuit applied these and related precedents and joined a number of other federal courts to hold that firing a transgendered employee because of the employee's transition from one gender to another was penalizing the employee for gender nonconformity and, therefore, unlawful sex discrimination.[160] When Vandiver Elizabeth Glenn, who was born a biological male, was fired from her job with a state agency because of her intended gender transition from male to female, she sued for sex discrimination in violation of equal protection.[161] The Eleventh Circuit

153. *Id.* at 870.

154. *Id.* at 874.

155. 305 F.3d 1061, 1063–64 (9th Cir. 2002).

156. *Id.* at 1064.

157. In addition, the concurrence, citing *Price Waterhouse*, said the case presented "actionable gender stereotyping harassment" and was "indistinguishable" from *Nichols*. *Id.* at 1068 (Pregerson, J., concurring).

158. *Id.* at 1067 (majority opinion).

159. *Id.*

160. 663 F.3d 1312, 1314, 1316–18 (11th Cir. 2011) (citing similar holdings from the First, Sixth, and Ninth Circuits and district courts in Arizona, New York, Pennsylvania, Texas, and the District of Columbia); *see* Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (explaining how *Price Waterhouse* "eviscerated" prior holdings to the contrary in the Seventh, Eighth, and Ninth Circuits).

161. *Id.* at 1313–14. As a public employee, Glenn brought her claim as a constitutional violation of equal protection under 42 U.S.C. § 1983, rather than under Title VII, but the analysis is applicable to

held that "discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination."[162] To reach its holding, the court drew upon a wide swath of precedent defining sex discrimination, citing not only *Price Waterhouse*, *Oncale*, *Doe v. Belleville*, and *Nichols*, but also the early cases litigated by Ginsburg, including *Frontiero* and *Wiesenfeld*. As the court explained:

> All persons . . . are protected from discrimination on the basis of gender stereotype. For example, courts have held that plaintiffs cannot be discriminated against for wearing jewelry that was considered too effeminate, carrying a serving tray too gracefully, or *taking too active a role in child-rearing.* An individual cannot be punished because of his or her perceived gender-nonconformity. . . . The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination . . . .[163]

Surveying the field, the court emphasized that penalizing an employee for gender nonconformity—including in the context of child rearing[164]—is sex discrimination based on sex stereotyping. Harkening back to Ginsburg's initial vision, the court noted, "Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes."[165]

III. The Law of Gender Stereotyping Under the FMLA: Work, Family, and Entrenched Gender Stereotypes

Advances in gender equality through challenges to sex-based stereotypes in statutes and in the workplace were sparked by Ginsburg's equal protection cases and furthered by Title VII jurisprudence in *Price Waterhouse*, *Oncale*, and their progeny. Yet while antidiscrimination law made holding men and women to gender-based stereotypes unlawful in the market sphere, rooting out stereotypes tied to the domestic sphere proved more difficult. The passage of the FMLA in 1993,[166] which provides job-protected leave for both women and men to care for new children or seriously ill children or family members, was designed to help. With its subsequent interpretation of the FMLA in *Nevada Department of Human Resources v. Hibbs*, the Supreme Court made the link between equal protection, Title VII, the FMLA, and gender

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Title VII cases as well. *See id.* at 1321 ("[There is] ample direct evidence to support the . . . conclusion that [Glenn's employer] acted on the basis of Glenn's gender non-conformity [so that] [i]f this were a Title VII case, the analysis would end here.").

162. *Id.* at 1316.

163. *Id.* at 1318–19 (emphasis added) (footnotes omitted).

164. *See infra* Parts III, IV.

165. *Glenn*, 663 F.3d at 1319.

166. 29 U.S.C. §§ 2601–2654 (2010).

stereotypes around work and family clear.[167] Like equal protection and Title VII prohibitions against sex discrimination, the FMLA was designed to rid the workplace of gender stereotypes, particularly where those stereotypes remain strongly entrenched at the intersection of work and family.[168]

A. Parallel Stereotypes of Breadwinner and Caregiver: *Nevada Department of Human Resources v. Hibbs*

The FMLA provides certain employees, both men and women, who work for a covered employer with up to twelve weeks of unpaid, job-protected family and medical leave to care for a new child; a seriously ill child, parent, or spouse; or the employee's own serious health condition.[169] A decade after the FMLA's passage, in *Hibbs*, the Supreme Court faced the question of whether a state employee could sue his employer for monetary damages under the FMLA.[170] In answering this question, the Court highlighted the role of sex stereotypes at the intersection of work and family in the persistence of gender inequality at work.[171]

Williams Hibbs was a social worker in his state's Department of Human Services when his wife, Dianne, was severely injured in a car accident, requiring neck surgery that left her addicted to pain medication, clinically depressed, and, at one point, suicidal.[172] Her doctors recommended a second surgery to correct problems from a metal plate that had been inserted in her neck and recommended "personal care by her husband in the interim."[173] Hibbs was granted twelve weeks of intermittent FMLA leave but was later ordered to return to work and terminated when he failed to do so.[174] When he sued for violation of the FMLA, the district court granted summary judgment against him based on Eleventh Amendment immunity barring such a suit against a state employer; the Ninth Circuit reversed, and the Supreme Court affirmed.[175] The question turned on "whether Congress acted within its constitutional

167. *See* 538 U.S. 721, 735–37 (2003).

168. *Id.*

169. Covered employers include private employers with fifty or more employees and all public agencies, including local, state, and federal employers and public schools. Eligible employees include those who have worked for over one year and for 1250 hours in the prior year to their leave, and who work at a worksite with fifty or more employees in a seventy-five mile radius. *See* 29 U.S.C. §§ 2601–2654; U.S. Dep't of Labor, Fact Sheet #28: The Family and Medical Leave Act of 1993, at 1 (2010).

170. 538 U.S. at 721, 736–37.

171. *Id.*

172. *Id.* at 725; Brief for Respondent, *Hibbs*, 538 U.S. 721 (No. 01-1368), 2002 WL 31655020 at *6.

173. Brief for Respondent, *supra* note 172, at *6–7.

174. *Hibbs*, 538 U.S. at 725.

175. *Id.* at 725, 740.

authority when it sought to abrogate the States' immunity [and allow lawsuits against state employers] for purposes of the FMLA's family-leave provision."[176] To answer this question required determining the legislative intent behind the FMLA.

In her brief to the Supreme Court on Hibbs's behalf, attorney and law professor Cornelia Pillard highlighted how the FMLA was enacted to remedy sex discrimination and "specifically targets the very stereotypes about family and work that this Court has long recognized as a basis for its own heightened scrutiny of sex-based classifications."[177] In a section entitled "The FMLA Responds to Unconstitutional Sex Discrimination as This Court Defines It" and citing precedent from Ginsburg's equal protection cases, including *Frontiero*, Pillard explained:

> This Court's equal protection jurisprudence is designed to bar state reliance on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas,'" and to uproot the correlative sex bias against men when they are presumptively cast as family "breadwinners." In recognition of the pervasive part that sex-role stereotypes, particularly those about work and family roles, have played in maintaining inequality between men and women, this Court skeptically scrutinizes discrimination not just against females, but against males as well. When States treat female and male employees differently due to sex-based assumptions about their family responsibilities, they violate the Equal Protection Clause as this Court has interpreted it.[178]

Paralleling Ginsburg's use of male plaintiffs in the 1970s equal protection cases, here too a male plaintiff illustrated the goal behind the FMLA: to provide family leave to men and women equally to reduce gender stereotypes about the division of family care that perpetuate sex discrimination.

Agreeing with the plaintiff, the Court held that because Congress enacted the FMLA to remedy a proven history of States' reliance on "the pervasive sex-role stereotype that caring for family members is women's work" in their administration of family leave benefits, Congress had acted validly (within its enforcement powers in Section 5 of the Fourteenth Amendment) to enforce equal protection.[179] Writing for the majority, Justice Rehnquist described in detail the relationship between gender stereotyping and the intersection of work and family:

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176. *Id.* at 726–27.

177. Brief for Respondent, *supra* note 172, at *11.

178. *Id.* at *22 (citations omitted) (quoting Craig v. Boren, 429 U.S. 190, 190–99 (1976), and Frontiero v. Richardson, 411 U.S. 677, 681 (1973)).

179. *Hibbs*, 538 U.S. at 725–27, 731. A full discussion of the Eleventh Amendment issues is beyond the scope of this Article. For a more detailed discussion, see Joan C. Williams, Hibbs *as a Federalism Case;* Hibbs *as a Maternal Wall Case*, 73 U. CIN. L. REV. 365 (2004).

> The impact of the discrimination targeted by the FMLA is significant. . . . Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.[180]

Given the intractable problem of separate spheres stereotyping that had not been resolved adequately by the passage of Title VII and its amendment to clearly prohibit pregnancy discrimination, Rehnquist explained, Congress enacted the FMLA to remove the stigma of caregiving solely from women employees, "thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."[181] The FMLA was a federal law "narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest."[182] Once again, as it had done in the equal protection and Title VII cases, in *Hibbs* the Court identified sex-based stereotypes as at the root of the sex discrimination the FMLA sought to remedy.[183]

B. Gender Stereotyping in FMLA Cases Brought by Male Caregivers

The Court's interpretation in *Hibbs* that the legislative intent behind the FMLA was to root out gender stereotypes in family caregiving is reflected in the evidence in FMLA lawsuits brought by male caregivers. To allege a violation of the FMLA, a man who is penalized at work for taking family caregiving leave must prove that he is protected by the Act (an "eligible employee" working for a "covered employer") and that his employer either interfered with his ability to take entitled leave or discriminated or retaliated against him for doing so; he need not prove any intentional sex discrimination by his employer.[184] Yet as cases brought by male plaintiffs under the FMLA demonstrate, the penalties they experience at work for taking a caregiving leave often reflect hostility to their transgressing the gender stereotype of man as breadwinner.[185]

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180. *Hibbs*, 538 U.S. at 736.

181. *Id.* at 736–37.

182. *Id.* at 738.

183. *Id.* at 736–38.

184. 29 U.S.C. §§ 2601–2654 (2010).

185. For a discussion of male caregiving as a stereotype "transgression," see Laura T. Kessler, *Transgressive Caregiving*, 33 Fla. St. U. L. Rev. 1 (2005).

Many such cases provide direct evidence of gender stereotyping where a man has sought caregiving leave—usually statements that women, and not men, should be doing the family caregiving.

The examples abound: An airline maintenance parts foreman who sought intermittent FMLA leave to care for his newborn was told to let his wife take care of the baby because he "ha[d] a shop to run."[186] A police officer who had taken FMLA leave for the births of his three children was passed over for promotions given to lower-ranking officers multiple times; supervisors had repeatedly derided him in front of his peers, including one who said, "Congratulations for taking the most time off for having a baby and not actually having the baby."[187] An accountant who asked for FMLA leave for the birth of his child was told he could not take leave if his employer was "really busy" and that he did not have the same rights to leave as his female colleagues.[188] When an equipment operator's wife, step-daughter, and infant son all developed serious medical conditions and the operator requested FMLA leave, a supervisor asked why the mother or "real father" of his step-daughter could not take care of her—she had brain cancer.[189] And when a lumber company manager trainee requested FMLA to care for his sick father, his supervisor warned the trainee he would be "cutting his own throat" if he took the leave; when the trainee did, he was fired.[190]

Other examples show men who sought caregiving leave being "feminized" by the same types of stereotypes that working mothers experience: that they are unreliable, uncommitted, and that work and family are incompatible.[191] An aircraft mechanic was disciplined and then

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186. Beyst v. Pinnacle Airlines, Inc., No. 07-10927, 2008 U.S. Dist. LEXIS 45468, at *34–36 (E.D. Mich. June 11, 2008). In addition to his FMLA claims, Beyst also brought a claim of gender discrimination in violation of state law, based on the direct evidence of his supervisor's statement: "Let your wife take care of your kid. You have a shop to run." *Id.* at *34. The court held that this statement was not sufficient direct evidence to prove his claim and that he had not properly pled a circumstantial case of gender discrimination. *Id.* at *34–39.

187. Wells v. City of Montgomery, No. 1:04CV425, 2006 U.S. Dist. LEXIS 23013, at *5–8 (S.D. Ohio Apr. 25, 2006).

188. Rabe v. Nationwide Logistics, Inc., 530 F. Supp. 2d 1069, 1073 (E.D. Mo. 2008).

189. Aldridge v. Indian Elec. Coop., No. 07-CV-633-HDC-PJC, 2008 WL 1777480., at *1, *5 (N.D. Okla. Apr. 17, 2008).

190. Final Brief of the Appellee, Bates v. 84 Lumber Co., 2006 U.S. App. LEXIS 23640 (6th Cir. Sept. 14, 2006) (No. 04-6493, 05-5544, 05-5736), 2005 U.S. 6th Cir. Briefs LEXIS 297 at *2.

191. *See, e.g.*, Drew v. Plaza Constr. Corp., No. 09 Civ. 2129 (VM), 2010 U.S. Dist. LEXIS 8699, at *3–4 (S.D.N.Y. Jan. 27, 2010) (describing how a system support technician on FMLA leave to care for his father with leukemia was asked why his father needed so much attention and was told by a supervisor "you're killing us"); Viera v. Costco Wholesale Corp., No. CV-07-5010-EFS, 2009 U.S. Dist. LEXIS 15621, at *7–8 (E.D. Wash. Feb. 27, 2009) (involving a cashier who was called "unreliable" for taking FMLA leave to care for his children during his wife's high-risk pregnancy); Rhoades v. Stewart Enters., Inc., No. 01-5044, 2003 U.S. Dist. LEXIS 550, at *4 (E.D. Pa. Jan. 3, 2003) (describing how a salesperson who requested a day of sick leave because his mother was "gravely ill" was terminated

terminated after using FMLA leave to care for his pregnant wife, who suffered from gestational diabetes, because of his "lack of dependability."[192] A store operations manager's supervisor said he had "lost confidence" in the manager because he took a week of FMLA leave during the store's biannual inventory period; the inventory occurred two days after the birth of the manager's baby, while his wife and newborn were still in the hospital due to delivery complications.[193] A carpenter on FMLA leave to care for his father who was recovering from a heart attack was told after being fired that it was "because no one wanted to work with him."[194] And a waste management company laborer and divorced father of three was told, after encountering resistance to requests for FMLA leave to care for his son with hemophilia, that "he had to decide what was more important: his job or his family."[195]

The evidence presented in these cases shows that FMLA violations and retaliation against men are often an expression of gender stereotyping at work: The idea that being an active family caregiver is inconsistent with what it means to be a good breadwinner and man. Because the FMLA explicitly includes men as eligible employees and does not require proving discriminatory intent, men seeking to challenge penalties at work based on their caregiving responsibilities at home most often bring such lawsuits under the FMLA.[196] Yet about forty percent of the U.S. workforce does not meet the requirements to be covered by the FMLA.[197] Moreover, failing to recognize that workplace penalties against men for not conforming to a male gender stereotype of unencumbered breadwinner is sex discrimination is failing to address the other half of the two-sided coin of separate spheres ideology. For this reason, the next Part argues, these plaintiffs—and others like them—could have alleged sex discrimination in violation of Title VII in addition to their claims under the FMLA.[198]

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over the phone for "lacking commitment to his job"; the plaintiff alleged federal and state race, age, and disability discrimination claims as well).

192. Meyer v. United Airlines, Inc., No. 08 C 0599, 2009 U.S. Dist. LEXIS 11114, at *3 (N.D. Ill. Feb. 15, 2009).

193. Blohm v. Dillard's, Inc., 95 F. Supp. 2d 473, 476–77 (E.D.N.C. 2000).

194. Morgeson v. OK Interiors Corp., No. 1:06-cv-21, 2007 U.S. Dist. LEXIS 48581, at *2 (S.D. Ohio July 3, 2007).

195. Scott v. Allied Waste Serv. of Bucks-Mont, No. 10-105, 2010 U.S. Dist. LEXIS 136202, at *17 (E.D. Pa. Dec. 23, 2010) (alleging federal and state disability discrimination and association claims as well).

196. *See* CYNTHIA THOMAS CALVERT, THE CTR. FOR WORKLIFE LAW, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010, at 10–11 (2010).

197. *See* Phillips, *supra* note 9.

198. *See infra* Part IV.C.

IV. TITLE VII GENDER STEREOTYPING THEORY AS A REMEDY FOR THE WORK-FAMILY CONFLICTS OF MEN

As discussed in Parts I through III, three strands of jurisprudence have established what constitutes sex discrimination based on gender stereotypes: (1) statutes that embed sex-based stereotypes of women as caregivers and men as breadwinners are sex discrimination in violation of equal protection; (2) workplace sanctions or sexual harassment of women and men for failing to conform to gender stereotypes of proper feminine or masculine behavior are sex discrimination under Title VII; and (3) protections for family caregiving leave under the FMLA were intended to remedy sex discrimination based on our most entrenched stereotypes around work and family. Over the past decade, a fourth strand of law combining several of these theories has emerged: caregiver discrimination (also known as "family responsibilities discrimination" or "FRD"). While the field of caregiver discrimination encompasses a number of existing legal theories, at the heart of this jurisprudence is the recognition that penalizing or harassing working women based on gender stereotypes of mothers as incompetent or uncommitted is also sex discrimination.[199] This is, once again, courts recognizing that when employers take action based on gender stereotypes around work and family—in this case, stereotypes that because women should be caregivers, they are inadequate breadwinners—this constitutes sex discrimination.

The field of caregiver discrimination applies to men as well, consistent with Supreme Court precedent labeling as sex discrimination both policies embedding stereotypes that keep men out of the domestic sphere (for example, in *Moritz*, *Wiesenfeld*, and *Hibbs*) and workplace penalties against men for failing to conform to masculine norms (for example, in *Price Waterhouse*, *Oncale*, and their progeny). Under current Title VII gender stereotyping case law and doctrine, this Part argues, men may now allege sex discrimination when they are penalized at work for participating in family caregiving, even without attaching their Title VII claim to other caregiving claims (like violations of the FMLA). In the terms of stereotyping law, a man who is penalized at work for failing to conform to the masculine stereotype of man as breadwinner and not caregiver—who is viewed as "defectively masculine"[200] or "effeminate" because he takes an active role in caring for his children or family members—can now allege a *Price Waterhouse*-style Title VII sex discrimination lawsuit using a gender stereotyping theory. While the

199. *See* CALVERT, *supra* note 196, at 6–7; Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1331 (2008).

200. *See* JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 79–91 (2010).

EEOC and a handful of plaintiffs have recognized this theory,[201] many courts (and even many plaintiffs' attorneys) have not. A wider recognition and application of this theory has the potential to protect caregiving men who are not covered by the FMLA. Moreover, it has the potential to fully realize Ginsburg's vision for remedying sex discrimination by rooting out *both* of the gender stereotypes embedded in the ideology of separate spheres.

A. Stereotyping Mothers as Poor Workers

Caregiver discrimination cases encompass a range of legal theories tied to penalties at work for caregiving responsibilities at home, including claims under Title VII, the FMLA, the Americans with Disabilities Act, state statutes, and common law.[202] Yet underlying all of these claims is the operation of sex-based stereotypes around work and family: the idea that being a good employee is incongruous with being a good mother or family caregiver.[203]

1. Back v. Hastings on Hudson Union Free School District

The 2004 case *Back v. Hastings on Hudson Union Free School District*, viewed as a key case in caregiver discrimination jurisprudence, made clear that stereotyping of mothers is unlawful sex stereotyping.[204] In *Back*, the Second Circuit established that penalizing an employee based on gender stereotypes of mothers as uncommitted (more caregiver than breadwinner) was impermissible sex discrimination in violation of equal protection and, importantly, that evidence of sex-based stereotypes alone could be evidence of sex discrimination, even without evidence of a "comparator" (a similarly situated man who was treated better).[205] Elana

201. *See supra* Part IV.B.1. and C.

202. *See* Calvert, *supra* note 196, at 10–11; Williams & Bornstein, *supra* note 199, at 1322.

203. *See* Calvert, *supra* note 196, at 10–11; Williams & Bornstein, *supra* note 199, at 1328.

204. 365 F.3d 107, 113 (2d Cir. 2004).

205. *Id.* at 121–22. While *Back* was germinal in its holding that stereotyping of mothers could be gender stereotyping in violation of Title VII and equal protection without comparator evidence, prior to *Back*, many circuit courts had also held that stereotypical comments related to an employee's pregnancy or motherhood could constitute evidence of sex discrimination. *Id.*; *see, e.g.*, Lust v. Sealy, Inc., 383 F.3d 580, 583–84 (7th Cir. 2004) (involving an employer who assumed that the plaintiff would not want to relocate for her job because she had children); Laxton v. Gap Inc., 333 F.3d 572, 583 (5th Cir. 2003) (involving an employer who reacted angrily to the plaintiff's pregnancy); Gorski v. N.H. Dept. of Corr., 290 F.3d 466, 473–74 (1st Cir. 2002) (involving an employer who commented derogatorily about the plaintiff's pregnancy); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55–56 (1st Cir. 2000) (involving an employer who implied that the plaintiff could not manage both a job and a family); Sheehan v. Donlen Corp., 173 F.3d 1039, 1043 (7th Cir. 1999) (involving an employer who told the plaintiff, upon termination, that now she would have time to take care of her children); Troy v. Bay State Computer Grp., Inc., 141 F.3d 378, 380–81 (1st Cir. 1998) (involving an employer who suggested that the plaintiff was unable to perform her job due to her pregnancy);

Back was a school psychologist who, for the first two years at her public elementary school, received consistently excellent evaluations from her two female supervisors, with ratings of "outstanding" or "superior" (the two highest marks) in most categories on her performance evaluations and repeated assurances that she would receive tenure.[206] As her review for tenure with the school approached in her third year—and after she had taken a three-month maternity leave to give birth to a child—her evaluations changed.[207] According to Back, one supervisor asked "how she was 'planning on spacing [her] offspring,'" advised Back to "wait until [her son] was in kindergarten to have another child," and suggested "maybe [Back] reconsider whether [she] could be a mother and do this job" because the supervisor "did not know how [Back] could possibly do this job with children."[208] Both supervisors told Back "that it was 'not possible for [her] to be a good mother and have this job.'"[209] They also questioned whether Back's "apparent commitment to [her] job was an act," and whether, once she was granted tenure, she "would not show the same level of commitment . . . because [she] had little ones at home."[210] When Back was ultimately denied tenure and her probationary job status terminated, she filed suit for sex discrimination.[211]

In its ruling in favor of Back, the Second Circuit held that "stereotyping about the qualities of mothers is a form of gender discrimination" that "can be determined in the absence of evidence about how the employer in question treated fathers."[212] To make her case, Back relied "upon a *Price Waterhouse* 'stereotyping' theory," under which she argued that "comments made about a woman's inability to combine work and motherhood are direct evidence of [sex] discrimination."[213] Writing for the Second Circuit, Judge Calabresi

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Barbano v. Madison Cnty., 922 F.2d 139, 143 (2d Cir. 1990) (involving an employer who questioned an applicant about her plans to get pregnant based on a desire not to hire a woman who would get pregnant and quit); Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 726 (8th Cir. 1982) (involving an employer who implied that the plaintiff was less available and dedicated to the job because she had a family).

206. *Back*, 365 F.3d at 114–15.

207. *Id.* at 115.

208. *Id.*

209. *Id.* (alteration in original).

210. *Id.*

211. *Id.* at 113. Like in *Glenn v. Brumby*, 663 F.3d 1312, 1314, 1316–17 (11th Cir. 2011), discussed in Part II.C, as a public employee, Back brought her claim as a constitutional violation of equal protection under 42 U.S.C. § 1983, rather than under Title VII, but this difference is irrelevant as the court applied Title VII precedent in the case. *See Back*, 365 F.3d at 119–21, 123–24 (applying *Price Waterhouse* to hold that Back had proved evidence of sex stereotyping that could amount to sex discrimination and applying the *McDonnell Douglas* burden-shifting standard to find that Back met her burden to survive summary judgment).

212. *Back*, 365 F.3d at 113.

213. *Id.* at 119.

explained that being penalized at work based on an assumption that you *will conform* to a gender stereotype that is *devalued* is also evidence of sex discrimination:

> It is the law . . . that "stereotyped remarks can certainly be evidence that gender played a part" in an adverse employment decision. The principle of *Price Waterhouse* . . . applies as much to the supposition that a woman *will* conform to a gender stereotype (and therefore will not, for example, be dedicated to her job), as to the supposition that a woman is unqualified for a position because she does *not* conform to a gender stereotype.
>
> . . . Just as "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school'" so it takes no special training to discern stereotyping in the view that a woman cannot "be a good mother" and have a job that requires long hours, or in the statement that a mother who received tenure "would not show the same level of commitment [she] had shown because [she] had little ones at home."[214]

Thus, based on the precedent established in *Price Waterhouse*, judging a woman against a stereotype of feminine behavior and penalizing her at work based on that judgment is evidence of sex discrimination—whether you fault her for failing to conform *or* for assuming she will conform to the stereotype that women should be caregivers rather than breadwinners.

To further clarify the legal standard for when gender stereotyping occurs, the court linked Elana Back's experience not only to *Price Waterhouse* but also to stereotyping against men, both in the *Oncale* line of cases and the work-family context in *Hibbs*. Noting that to determine what constitutes a gender-based stereotype, courts must look to "the particular context in which it arises . . . without undue formalization,"[215] the court looked to *Doe v. Belleville* as an example, specifically the holding that harassing a man who "exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave" constitutes harassment because of sex.[216] The Supreme Court provided another example in *Hibbs* by noting that "mutually reinforcing stereotypes" of women as caregivers and men as breadwinners can "lead to subtle discrimination that may be difficult to detect on a case-by-case basis."[217] Summarizing its position, the court explained that "[t]he question . . . is whether a particular action . . . can be attributed to sex" and that "reliance upon stereotypical notions about how men and women

214. *Id.* at 119–20 (citations omitted) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251, 256 (1989)).

215. *Id.*

216. *Id.* at 120 n.10 (quoting Doe v. City of Belleville, 119 F.3d 563, 581–82 (7th Cir. 1997)).

217. *Id.* at 121 (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003)).

should appear and behave . . . reasonably suggests that the answer to that question is yes."[218]

> *Hibbs* makes pellucidly clear . . . that, at least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based. *Hibbs* explicitly called the stereotype that "women's family duties trump those of the workplace" a "*gender* stereotype," and cited a number of state [leave laws] . . . as evidence of "pervasive sex-role stereotype that caring for family members is women's work."[219]

Like the direct evidence of sex stereotyping Ann Hopkins experienced in *Price Waterhouse*, the explicit statements that Back would not be committed or could not be a good employee because she was a mother were, themselves, direct evidence of sex discrimination. While comparator evidence might have strengthened her case, "the ultimate issue is the reasons for the individual plaintiff's treatment, not the relative treatment of different groups within the workplace."[220] Nor does the employer's evidence that the majority of teachers hired in the year Back was hired were women with children defeat Back's claim, because "what matters is how *Back* was treated."[221] Because "stereotypical remarks about the incompatibility of motherhood and employment 'can certainly be *evidence* that gender played a part' in an employment decision," the Second Circuit held, "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive."[222]

2. Back*'s Progeny*

In almost a decade since the *Back* decision, an increasing number of federal courts as well as the EEOC, which enforces Title VII, have held that stereotyping of mothers may be unlawful sex discrimination under Title VII.[223] In the jurisprudence of caregiver discrimination, it is commonly understood that harassing or penalizing a woman at work based on the assumption that she will be less committed or less competent because she is a mother—that she will conform to a negative caregiver stereotype—is unlawful sex discrimination. While a full

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218. *Id.* at 120 n.10 (quoting Doe v. City of Belleville, 119 F.3d 563, 581–82 (7th Cir. 1997)).

219. *Id.* at 121 (citations omitted) (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731–33 nn.5–6 (2003)).

220. *Id.* at 121 (emphasis removed) (quoting Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001)).

221. *Id.* at 122.

222. *Id.*

223. *See* CALVERT, *supra* note 196, at 10–12; Williams & Bornstein, *supra* note 199, at 1342–43.

discussion of this case law is beyond the scope of this Article,[224] two examples highlight how far the gender stereotyping theory has come in the protections it affords to mothers under Title VII.

First, based on the evolving understanding of how stereotypes operate in the context of work and family and on the rapidly growing number of cases alleging caregiver discrimination, in 2007 the EEOC issued official enforcement guidance on the subject, entitled *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*.[225] The EEOC adopted the holding in *Back* as its position, stating clearly that because "stereotypes that female caregivers should not, will not, or cannot be committed to their jobs are sex-based, employment decisions based on such stereotypes violate Title VII."[226] In an in-depth discussion citing case law and social scientific evidence, the EEOC explained the unlawful effects of employers "[r]elying on stereotypes of traditional gender roles and the division of domestic and workplace responsibilities" and how "gender stereotypes of caregivers may more broadly affect perceptions of a worker's general competence."[227] While EEOC enforcement guidance is not formally binding on federal courts, as the agency's official position, it has a persuasive impact both on judicial decisionmaking[228] and on employer practice in the workplace.[229] In 2009, responding to the continued growth of the field, the EEOC followed up with a document setting forth "best practices" for employers to avoid liability for caregiver discrimination.[230]

Second, in the 2009 case *Chadwick v. WellPoint, Inc.*, the First Circuit held that detrimental stereotyping of an individual mother could constitute sex discrimination even when the plaintiff was passed over for a promotion that went to *another mother* who had not been subject to

224. For a more complete discussion of the field of family responsibilities discrimination, see, for example, Williams & Bornstein, *supra* note 199; CALVERT, *supra* note 196; Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171 (2006); 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 (2003).

225. EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007).

226. *Id.* at 11–12.

227. *Id.* at 10–21.

228. *See, e.g.*, John S. Moot, Comment, *An Analysis of Judicial Deference to EEOC Interpretative Guidelines*, 1 ADMIN L.J. 213 (1987); Robyn S. Stoter, Note, *Discrimination & Deference: Making a Case for the EEOC's Expertise with English-Only Rules*, 53 VILL. L. REV. 595, 623–25 nn.164–69 (2008).

229. *See* Mary C. Still, *Family Responsibilities Discrimination and the New Institutionalism: The Interactive Process Through Which Legal and Social Factors Produce Institutional Change*, 59 HASTINGS L.J. 1491, 1513–14 (2008).

230. *Employer Best Practices for Workers with Caregiving Responsibilities*, EEOC, http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last visited May 1, 2012).

similar stereotyping.[231] Laurie Chadwick was a well-performing employee of WellPoint for nearly ten years, during which she had been promoted.[232] She was also the mother of an eleven-year-old son and six-year-old triplets (and was taking one college course per semester), but there was no indication that it affected her work performance; her husband, who worked nights and weekends, was the primary caregiver for the children during the day.[233] When she was passed over for a second promotion in favor of someone with significantly less experience and lower performance evaluations, Chadwick sued for sex discrimination "based on the sex-based stereotype that mothers, particularly those with young children, neglect their work duties in favor of their presumed childcare obligations."[234] One supervisor who challenged an answer Chadwick gave in the interview for the promotion said, "Laurie, you are a mother[.] [W]ould you let your kids off the hook that easy if they made a mess in [their] room[?] [W]ould you clean it or hold them accountable?"[235] The other, the ultimate decisionmaker, said upon learning that Chadwick had triplets, "Oh my—I did not know you had triplets. Bless you!"[236] Then, when telling Chadwick she did not get the promotion, explained, "It was nothing you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now." Noting that if the three interviewers were in Chadwick's position, "they would feel overwhelmed," the supervisor told Chadwick she would be "happier with this [not working out] down the road."[237]

When the First Circuit sided with Chadwick, it indicated just how far the gender stereotyping theory has developed in the context of the stereotype of mothers as caregivers. While the evidence Chadwick presented certainly indicated unlawful stereotyping, it was not the type of overwhelming direct evidence with which courts were faced in *Price Waterhouse* or *Back*. Yet the court was still able to recognize it for what it was: acting on impermissibly gender-based assumptions. Moreover, Chadwick succeeded despite a factual scenario that might have been fatal to earlier claims: The person who was promoted instead of Chadwick was not only a woman but a mother of two children, aged nine and fourteen.[238] WellPoint made much of this fact; the court, however, did

231. 561 F.3d 38, 42–49 (1st Cir. 2009).
232. *Id.* at 41.
233. *Id.* at 42.
234. *Id.*
235. *Id.* (alterations in original).
236. *Id.*
237. *Id.*
238. *Id.*

not, noting that "[t]he principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole,"[239] so "discrimination against one employee cannot be remedied solely by nondiscrimination against another employee in that same group."[240] It was not clear that the decisionmakers knew the woman they selected for promotion was a mother; regardless, the First Circuit held that "the stereotype that Chadwick complains of would arguably be more strongly held as to a mother of four children, three of whom were only six years old, than as to a mother of two older children."[241] Citing *Price Waterhouse* and *Hibbs*, the court explained clearly how those earlier precedents prohibit gender stereotyping of mothers today:

> In the simplest terms, these cases stand for the proposition that unlawful sex discrimination occurs when an employer takes an adverse job action on the assumption that a woman, because she is a woman, will neglect her job responsibilities in favor of her presumed childcare responsibilities. . . . [A]n employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities. The essence of Title VII in this context is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities.[242]

Thus, "[g]iven what we know about societal stereotypes regarding working women with children," the court held that "a jury could reasonably determine that a sex-based stereotype was behind [the decisionmaker's] explanation to Chadwick,"[243] despite the fact that another woman with children got the promotion.

B. Stereotyping Fathers as "Feminine" Men

Beyond helping to develop a more sophisticated understanding of how gender stereotypes operate for working mothers, the field of caregiver discrimination also encompasses penalties against men who take on a more than nominal role in caring for their children or other family members. As discussed in Part III, the majority of caregiver discrimination claims brought by men are brought as violations of the FMLA. Yet the EEOC guidance on caregiver discrimination includes a discussion of Title VII protections for male caregivers who experience gender stereotyping. In addition, a recent and expanding field of social scientific studies documents that when men are penalized at work for

239. *Id.* at 42–43 n.4 (quoting Connecticut v. Teal, 457 U.S. 440, 453–54 (1982)).
240. *Id.*
241. *Id.*
242. *Id.* at 44–45.
243. *Id.* at 46–47.

taking on caregiving responsibilities, they are actually being penalized for violating gender norms of masculinity.

1. EEOC Guidance Extends Caregiver Stereotyping Theory to Men

In its 2007 enforcement guidance on caregiver discrimination, the EEOC explicitly identified how Title VII offers protections for men who experience sex discrimination based on their caregiving responsibilities.[244] The guidance, which covers disparate treatment theories under Title VII and the Americans with Disabilities Act (the EEOC does not enforce the FMLA),[245] includes a specific section entitled "Discrimination Against Male Caregivers."[246] Citing the Supreme Court in *Hibbs*, the EEOC notes:

> The Supreme Court has observed that gender-based stereotypes also influence how male workers are perceived . . . . Stereotypes of men as "bread winners" can further lead to the perception that a man who works part time is not a good father [breadwinner], even if he does so to care for his children. Thus, while working women have generally borne the brunt of gender-based stereotyping, *unlawful assumptions about working fathers and other male caregivers* have sometimes led employers to deny male employees opportunities that have been provided to working women or to subject men who are primary caregivers *to harassment or other disparate treatment*.[247]

The EEOC then provides specific examples of disparate treatment under Title VII, for example when women, but not men, are granted reduced or part-time schedules for child care reasons, or when women are treated more favorably in terms of family leave (unrelated to pregnancy-disability leave) than men.[248] The inclusion of language on stereotypes indicates that, where gender stereotyping of men in the work-family context itself amounts to harassment or is the basis of an adverse action, it may be actionable as sex discrimination under Title VII.

2. Social Scientific Studies Document Male Caregivers Being Penalized for Gender Nonconformity

Underscoring current case law and the EEOC guidance, social scientific studies over the past two decades have documented that when men are penalized at work for taking an active role in family caregiving, they are being penalized for failing to conform to the gender stereotype that men should be breadwinners and not caregivers. Early studies

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244. *See* EEOC, *supra* note 225, at 24–25.

245. *Id.* at 1.

246. *Id.* at 24–25.

247. *Id.* at 24 (emphasis added) (citations omitted) (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003)).

248. *Id.* at 25.

documented that men who worked part-time or took advantage of family and medical leaves experienced steep penalties at work that were related to gender stereotypes.[249] Men who worked part-time were seen as unable to fulfill their traditional obligation of full-time employment and thus lower in "agency" (an attribute associated with masculinity) than were other men as a consequence of their loss of this positive role.[250] Fathers who took a parental leave of absence, even a short one, were viewed as less committed and were recommended for fewer rewards than were women who did so, and received lower ratings on work performance than similarly situated women.[251]

Recent studies in an emerging field of inquiry known as the "flexibility stigma" (which links the penalties experienced by workers who adopt flexible or reduced work schedules to maternal wall bias) not only confirm these findings, but also show that penalties can be triggered for caregiving men even when they do not take an actual leave from work.[252] In one study, men who requested a twelve-week family leave to care for a sick child or parent experienced what the researchers described as a "femininity stigma, whereby 'acting like a woman' deprives them of masculine agency (e.g., competence and assertiveness) and impugns them with negative feminine qualities (e.g., weakness and uncertainty)."[253] As a result, they were "more likely to be viewed as poor workers and subject to penalties," (demotion, reduced pay or responsibilities, termination, or layoff) and "less likely to be recommended for rewards" (promotion, raises, training, or choice projects).[254] In another study, workers who requested a reduced schedule

249. *See, e.g.*, Tammy D. Allen & Joyce E.A. Russell, *Parental Leave of Absence: Some Not So Family-Friendly Implications*, 29 J. APPLIED SOC. PSYCHOL. 166 (1999); Adam B. Butler & Amie Skattebo, *What Is Acceptable for Women May Not Be for Men: The Effect of Family Conflicts with Work on Job Performance Ratings*, 77 J. OCCUP. & ORG. PSYCHOL. 553 (2004); Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 PSYCHOL. WOMEN Q. 252 (1986); Julie Holliday Wayne & Bryanne L. Cordeiro, *Who Is a Good Organizational Citizen?: Social Perception of Male and Female Employees Who Use Family Leave*, 49 SEX ROLES 233, 233–34 (2003); *see also* Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 39 (1998).

250. *See* Eagly & Steffen, *supra* note 249, at 254.

251. *See* Allen & Russell, *supra* note 249, at 166; Butler & Skattebo, *supra* note 249, at 553–59; Wayne & Cordeiro, *supra* note 249, at 233–34.

252. *See, e.g.*, Jennifer L. Berdahl & Sun H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving* (Working Paper, 2012) (on file with Author); Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?* (Working Paper, 2012) (on file with Author); Joseph A. Vandello, et al., *When Equal Isn't Really Equal: The Masculine Dilemma of Seeking Work Flexibility* (Working Paper, 2012) (on file with Author). The *Journal of Social Issues* has accepted a formal proposal to publish these and related articles in a forthcoming special issue on the flexibility stigma.

253. Rudman & Mescher, *supra* note 252, at 3, 6–7.

254. *Id.* at 12–14.

after the birth of a new child "were seen as less masculine and more feminine than people who worked traditional hours" and were rated lower on positive job characteristics than full-time workers; but a man who did so "in effect suffered more by it, because the woman is seen as conforming to feminine prescriptions whereas a man is seen as a gender deviant."[255] In a third study, researchers documented that when compared to all men and traditional fathers, "fathers who engaged in a high amount of childcare experienced significantly more masculinity harassment" (derided for not being "tough enough" or for being "soft-spoken or shy," or pressured to "sacrifice family or personal time" to gain respect at work) and more general workplace mistreatment (excluded, ignored, insulted, bullied, or humiliated).[256] Thus, a growing body of social science evidence indicates that, for men, demonstrating a high level of participation in family care triggers penalties for gender nonconformity: A man who does so is behaving like a mother and is therefore inconsistent with gender stereotypes of men as breadwinners, not caregivers.

C. Achieving Ginsburg's Vision: Workplace Penalties for Caregiving Men as Title VII Gender Stereotyping for Failing to Conform to a Masculine Norm

Putting these four jurisprudential pieces together—sex discrimination as the operation of gender stereotypes under equal protection (as in *Wiesenfeld*), Title VII (as in *Price Waterhouse*), the FMLA (as in *Hibbs*), and caregiver discrimination (as in *Back*)—does not create a new legal claim. Indeed, since *Price Waterhouse*, *Doe v. Belleville*, and *Oncale*, men have been able to allege sex discrimination under a gender stereotyping theory for failing to conform to masculine norms, and since long before Ginsburg litigated *Wiesenfeld*, acting like a caregiver rather than an unencumbered breadwinner has been a violation of masculine norms. Yet it is useful to draw the path through these lines of precedent to illustrate what plaintiffs and courts are still missing. Despite data and human experience that tell us that many men perceive active family caregiving to be "career suicide," men are not alleging this legal theory as robustly as they could and, relatedly, courts are not recognizing it as much as they should. A few cases in which male plaintiffs have attempted to allege sex discrimination under a gender stereotyping theory in the work-family context prove illustrative.

The most successful attempt at this theory in recent years was made in *Knussman v. Maryland*, an early caregiver discrimination case brought

255. Vandello, et al., *supra* note 252, at 18–19.

256. Berdahl & Moon, *supra* note 252, at 16–17, 23–24.

as sex discrimination under the Equal Protection Clause because the plaintiff was a public employee seeking access to a benefit.[257] Maryland state trooper Kevin Knussman's wife Kimberly became pregnant and developed complications that required bed rest.[258] When Knussman requested four to eight weeks of "paid 'family sick leave' to care for his wife and spend time with his family following the birth of his child," his supervisor told him "that there was 'no way' that he would be allowed more than two weeks," (his department was understaffed) and, incorrectly, that any more leave than that would have to be unpaid under the FMLA.[259] Shortly before the birth of his daughter, his employer announced a new "nurturing leave" law applying to state employees that allowed primary caregivers—those "primarily responsible for the care and nurturing of a child"—to use up to thirty days of accrued sick leave to care for a newborn child and secondary caregivers—those "secondarily responsible for the care and nurturing of a child"—to use up to ten days.[260] When Knussman inquired about his ability to take leave under the new law, the female personnel manager told him that "only birth mothers could qualify as primary care givers; fathers would only be permitted to take leave as secondary care givers since they 'couldn't breast feed a baby.'"[261] After his daughter was born, his wife experienced continued health problems, so Knussman again tried to extend his leave, this time explaining that, given his wife's health problems, "he was the primary care giver for the child" because "he was performing the majority of the essential functions such as diaper changing, feeding, bathing and taking the child to the doctor."[262] The personnel manager again denied his continued requests, explaining that "God made women to have babies and, unless [he] could have a baby," there was no way he could qualify.[263] "[H]is wife had to be 'in a coma or dead' . . . for Knussman to qualify as the primary care giver."[264]

Citing, among other cases, *Reed*, *Frontiero*, *Califano*, and *Wiesenfeld*, the Fourth Circuit agreed that Knussman's state employer violated equal protection when it applied the nurturing leave policy "unequally solely on the basis of a gender stereotype."[265] The court compared the case to those striking down classifications based on

257. 272 F.3d 625 (4th Cir. 2001). The initial case also included violations of the FMLA, but those were vacated at the district court level. *Id.* at 632.

258. *Id.* at 628.

259. *Id.*

260. *Id.* (quoting MD. CODE ANN. STATE PERS. & PENS. § 7-508(a)(1)–(b)(1) (1994)).

261. *Id.* at 629.

262. *Id.*

263. *Id.* (alterations in original).

264. *Id.* at 630.

265. *Id.* at 634–36.

"conventional notions about the proper station in society for males and females" and "generalizations about typical gender roles in the raising and nurturing of children."[266] The stereotyping in this case was extreme, and Knussman was able to bring his claim directly following the equal protection precedent established by Ginsburg's early cases. Yet as a recent reminder of how entrenched gender stereotypes impact men and women at work differently, *Knussman* stands for the proposition that stereotyping men out of caregiving roles constitutes sex discrimination. Indeed, *Knussman* was cited by the Eleventh Circuit in the recent Title VII case of *Glenn v. Brumby* when noting that "discrimination on the basis of gender stereotype" may include a man "taking too active a role in child-rearing."[267]

Beyond Knussman, other men who have alleged sex discrimination under a gender stereotyping theory based on family caregiving have had less success, often due to a misunderstanding or misapplication of the law or to some lack of proof or fact. For example, in *Hayden v. Garden Ridge Management, LLC*, the district court held against the plaintiff on his Title VII sex discrimination claim based on an incorrect application of the law regarding what a plaintiff is required to show to make out a prima facie case of sex discrimination under Title VII.[268] Tom Hayden was working as a store general manager when he requested FMLA leave to care for his wife and newborn child for three intermittent periods totaling the twelve weeks to which he was entitled by law.[269] In response to his request, the company's human resources representative, a woman, "questioned the amount of time he requested off and stated '[i]t's very strange that we have a male manager request that amount of time off, we have never had that before.'"[270] His request was granted—but then he was fired a week later.[271] When he sued alleging violations of the FMLA and for sex discrimination under Title VII, his claim for FMLA retaliation was upheld against his employer's motion for summary judgment; his Title VII claim, however, was not.[272] In a cursory discussion, the magistrate judge who wrote the opinion required that, "to establish a *prima facie* case of gender discrimination," Hayden had to show that "he was replaced by a person not in the protected group."[273] The court reasoned that because the plaintiff was "replaced by another

266. *Id.* at 636.

267. 663 F.3d 1312, 1318–19 n.8 (11th Cir. 2011).

268. No. 4:08cv172, 2009 WL 5196718, at *5 (E.D. Tex. Dec. 22, 2009).

269. *Id.* at *1.

270. *Id.* at *4 (alteration in original).

271. *Id.* at *1.

272. *Id.* at *5.

273. *Id.* (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993); Alvarado v. Tex. Rangers, 492 F.3d 605, 611 (5th Cir. 2007)).

male . . . he cannot show he was replaced by someone outside his protected class, and his gender discrimination claim therefore fails."[274] Yet this is a basic misreading of federal employment discrimination law that has been rejected by the Supreme Court in the context of age discrimination, and by most circuit courts in the context of sex and race discrimination: A plaintiff's claim of discrimination is *not* barred simply because he was replaced by a member of the same protected class.[275] Unfortunately, due to the court's misapplication of Title VII sex discrimination to a male plaintiff, Hayden was denied the chance to prove his sex discrimination claim under a gender stereotyping theory.[276]

Other cases show how men alleging sex discrimination for caregiving issues may be particularly disadvantaged by courts that misapply the comparator "requirement" under Title VII due to the widespread mistreatment of working *women* based on *their* caregiving responsibilities. To make out a prima facie case of sex discrimination under Title VII, a plaintiff must allege, among other things, that the adverse employment action he experienced arose "under circumstances which give rise to an inference of unlawful discrimination."[277] As described previously,[278] the most common (and traditionally most convincing[279]) way for a plaintiff to prove this is by pointing to a comparator—a similarly qualified coworker from outside the protected class who was treated better. Yet this is not *required* by Title VII.[280] Despite this fact, some courts still require a plaintiff to provide such comparator evidence to make out a prima facie case under Title VII,[281] which may pose particular hurdles for caregiving men.

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274. *Id.*

275. *See* DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 110–11 (8th ed. 2010) (citing *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996), and its progeny) ("[T]he fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost because of [a protected classification].").

276. The case, however, settled. *See* Verdict, Agreement and Settlement, Hayden v. Garden Ridge Mgmt., LLC, No. 4:08CV172, 2010 WL 1483289 (E.D. Tex. Feb. 26, 2010).

277. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

278. For a discussion of this issue in the context of the *Back* decision, see *supra* notes 205–22 and accompanying text.

279. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (describing, in a race discrimination case, that evidence of white employees with "comparable" backgrounds who were treated better than the black plaintiff would be "especially relevant" to a showing that the employer was motivated by unlawful discrimination).

280. *See* AVERY ET AL., *supra* note 275, at 111–13; *see also* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731–32 n.3 (2011); Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839 (2002); Charles A. Sullivan, *The Phoenix from the* Ash*: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 204–06 (2009).

281. *See* AVERY ET AL., *supra* note 275, at 111–13 (discussing how some circuit courts of appeals

For example, in *McGarity v. Mary Kay Cosmetics*, the district court granted summary judgment against plaintiff Gregory McGarity's Title VII sex discrimination claim (and his FMLA claims) when he failed to prove that a similarly situated woman was treated better than he.[282] When McGarity, a cosmetics technician, told his supervisor he planned to take FMLA leave when his wife gave birth to their third child, his supervisor "reacted badly" and "complained to others in their department that men could not or should not be allowed to take leave for the birth of a child."[283] Nevertheless, McGarity was granted three weeks of leave, after which he claimed that his supervisor reacted with hostility, subjecting McGarity to unwarranted "accusations" of "errors," "inaccurate complaints" about his work efforts, and "miscalculations of McGarity's efficiency ratings" based on which his performance was judged.[284] As a result, McGarity was suspended; he complained to human resources but, believing his complaint was not taken seriously, ultimately left to take another job.[285] Based on the employer's evidence that "women in the company [who] had taken FMLA leave . . . had not been treated any differently on return" and that men "who had *not* taken FMLA leave [but made workplace mistakes] received the same disciplinary sanctions as McGarity in similar situations," the district court held that McGarity had not made out a prima facie case of sex discrimination.[286] Indeed, this particular case may have lacked a strong enough factual basis to prove sex discrimination based on a gender stereotyping theory.[287] Regardless, the district court undermined a potentially legitimate sex discrimination claim through a mistaken framing of the requirements for making out a prima facie case. McGarity lost at summary judgment because the court compared his treatment to that of women who signaled their role as caregivers by taking a family leave, and to gender conforming men with poor workplace performance. Neither comparison rebuts the claim that, consistent with a gender stereotyping theory under Title VII, a man who participates in family caregiving and, therefore, fails to conform to the masculine breadwinner stereotype may be penalized at work for doing so when he is subsequently subjected to greater scrutiny and discipline.[288]

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require comparator evidence, while others view it as only one means for proving an inference of discrimination).

282. No. 3:96-cv-3413-R, 1998 U.S. Dist. LEXIS 1150, at *13–14 (N.D. Tex. Jan. 20, 1998).

283. *Id.* at *2.

284. *Id.* at *3.

285. *Id.* at *3–4.

286. *Id.* at *13–14.

287. *Id.* at *15–16 (discussing how McGarity's case, even had it made it passed the prima facie stage, might have failed at the pretext stage based on his admission that he did, in fact, make the mistake that led to his suspension).

288. For other examples of courts misapplying the comparator requirement to Title VII claims

Still other cases show courts dismissing evidence of gender stereotyping of men in the work-family context as either insignificant or as based not on sex but on status as a parent (which is not protected under federal law), thus missing the point that penalizing men for failure to conform to a masculine gender stereotype can rise to the level of sex discrimination. In *Cumbie v. General Shale Brick*, the district court granted summary judgment against a plaintiff after finding that the family-care-related sexual harassment and retaliation he experienced did not amount to sex discrimination.[289] Dana Cumbie, a fifty-five-year-old male truck driver for a brick company who lived with and cared for his eighty-seven-year-old mother, was met with a number of harassing drawings of him posted and spread around his workplace several times over the course of a month.[290] One drawing depicted him riding a motorcycle with his mother; another pictured him in a boat with two men and a drum of Preparation H floating nearby, with the caption "butt hurts"; a third showed him on a couch next to a penis pump and, at the announcement of the band the Dixie Chicks on television, saying, "What? Chicks with Dix?"[291] Cumbie complained to his employer, who agreed it was offensive; yet over the next two months, despite having received excellent performance ratings and three merit awards in the prior year, Cumbie was given less work, required to take an alcohol test, and suspended twice for failing to report workers' compensation claims "in a timely manner."[292]

Then, while on an FMLA leave to care for his mother, Cumbie was terminated before his leave expired.[293] While finding that the drawings derided Cumbie for being a "Momma's Boy" and "inappropriately ridicule[d] [him] as gay, . . . impotent and somehow interested in transsexuals," the district court found that the harassment was merely "boorish and juvenile" and "insufficient to . . . lead[] a person to reasonably believe" that he had experienced hostile work environment sexual harassment that amounted to sex discrimination.[294] Further, because the underlying sex discrimination claim was unreasonable, the

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brought by men in the context of family caregiving, see, for example, *Palomares v. Second Federal Savings & Loan Ass'n of Chicago*, No. 10-cv-6124, 2011 U.S. Dist. LEXIS 19143 (N.D. Ill. Feb. 25, 2011); *Samuels v. Baltimore*, No. RDB 09-458, 2009 U.S. Dist. LEXIS 96228 (D. Md. Oct. 15, 2009); *Beyst v. Pinnacle Airlines, Inc.*, No. 07-10927, 2008 U.S. Dist. LEXIS 45468 (E.D. Mich. June 11, 2008) (making a similar claim under state law).

289. 508 F. Supp. 2d 486 (E.D. Va. 2007), *vacated and remanded on other grounds*, 302 F. App'x 192 (4th Cir. 2008).

290. *Id.* at 488.

291. *Id*.

292. *Id.* at 488–89.

293. *Id.* at 489.

294. *Id.* at 491.

district court held that the retaliation that occurred after Cumbie complained was not actionable.[295] The appellate court remanded the retaliation claim.[296]

Similarly, in *Marchioli v. Garland Co.*, the district court ruled that an employer's threat to heavily scrutinize an employee who was about to become a father, although "clearly reprehensible," was not enough to amount to sex discrimination and dismissed plaintiff's Title VII claim.[297] Plaintiff Anthony Marchioli was performing his job as a sales representative well, receiving "very positive evaluations," when his girlfriend became pregnant.[298] He requested one afternoon off to assist her with finding a doctor.[299] Immediately, his supervisor began criticizing his work and gave him a negative evaluation, despite the fact that Marchioli had reached one hundred percent of his sales quota after three months of work.[300] In a written evaluation, his supervisor warned him about "distractions," given his girlfriend's pregnancy, and expressed his clear view that active participation in family caregiving was inconsistent with being a good salesman:

> You need to decide if you want to totally commit yourself to this endeavor. If you don't want to "buy in" and put a maximum effort into developing your career, do me . . . a favor and quit now. . . . I'm not going to tolerate working with a guy who does not give it his all. . . . You need to decide what you want to do. I intend to monitor very closely your progress from here on out. If you do not want to work under that kind of scrutiny, leave now.[301]

The next month, Marchioli was fired.[302]

The district court, while granting the employer's motion to dismiss Marchioli's complaint for sex discrimination under Title VII, held that Marchioli "was terminated because of his gender-neutral classification as a parent or parent-to-be."[303] Yet in doing so, the district court overlooked that terminating a male employee after he signaled gender nonconformity (that he planned to take an active role in caregiving by requesting an afternoon off to find a doctor), overtly stating that it was not possible to be both a good worker and an active caregiver, and

295. *Id.* at 491–92.

296. Cumbie v. Gen. Shale Brick, 302 F. App'x 192, 194 (2008).

297. No. 5:11-CV-124, 2011 WL 1983350, at *5 (N.D.N.Y. May 20, 2011).

298. *Id.* at *1.

299. *Id.*

300. *Id.* at *1–2.

301. *Id.* at *1.

302. *Id.* at *2.

303. *Id.* at *5. The court also dismissed Marchioli's claims for pregnancy discrimination under the Pregnancy Discrimination Act (because only pregnant women are covered by the Act) and for associational discrimination under the Americans with Disabilities Act (because his girlfriend's normal pregnancy did not meet the definition of "disabled" under the Act). *Id.* at *5, *8.

threatening to hyperscrutinize "a guy who does not give it his all" could amount to actionable gender stereotyping of a male employee. Indeed, while it is not clear that Marchioli ultimately could have proven gender discrimination under Title VII, the district court did not give him a chance, dismissing his case before it even began.[304]

As these cases and others like them demonstrate, many courts—and even plaintiffs' attorneys—have yet to understand how Title VII gender stereotyping theory applies to prevent sex discrimination against caregiving men. Rooting out employment decisions based on stereotypical notions of the roles men and women should properly play at work and at home is at the very core of how the Supreme Court has always defined sex discrimination. While the courts have yet to decide a *Price Waterhouse*-style discrimination case on behalf of a man penalized at work for failing to conform to the masculine stereotype of the unencumbered breadwinner, such a decision may only be a matter of time. One case pending in federal district court in Massachusetts, *Ayanna v. Dechert, LLP*, provides an example of how to effectively plead such a claim.[305] In the lawsuit, plaintiff Ariel Ayanna, a male attorney and father of two, alleged sex discrimination under Title VII and the state law equivalent based on a gender stereotyping theory.[306] Ayanna was a well-performing attorney who had received a bonus; then his wife became pregnant with their second child and experienced serious mental health problems.[307] Ayanna took leave to care for his children and wife; when he returned, the firm discriminated and retaliated against him, limiting his assignments and opportunities and ultimately terminating him.[308] As the complaint alleges:

> Ayanna was an equal co-parent of his children . . . . After [his wife suffered serious health issues], he became the primary caretaker of their children and had to care for her, assuming a traditionally "female" role.
>
> . . . Dechert's firm culture equates masculinity with relegating caretaking to women and working long hours in the office. . . . Ayanna did not conform to Dechert's firm culture for males.
>
> . . . Ayanna contends that Dechert terminated him because [among other things] he refused to assume a stereotypically "male" role in connection with his children . . . .[309]

304. *Id.* at *8. As of May 20, 2011, the complaint has been dismissed and the case closed.

305. Complaint and Jury Demand, Ayanna v. Dechert, LLP, No. 110CV12155, 2010 WL 5344371 (D. Mass. Dec. 14, 2010).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

The complaint also states that, because he was a man, "Ayanna was treated differently from female caregivers," who generally "were allowed and expected to leave or rearrange their schedules to attend to [family] obligations, to work from home, and to return to work later in the evening."[310] This, the complaint alleges, "demonstrat[es] that [his employer] intends that only women were to fulfill this role and discriminates against men who take a traditionally 'female' caretaking role."[311] As such, in addition to claims under the Americans with Disabilities Act and the FMLA, the complaint includes counts for "sex discrimination based upon disparate treatment and unlawful stereotyping" in violation of Title VII and the equivalent state law.[312] While the case may be the first to plead the issue so clearly, the precedent established from the early equal protection cases through *Price Waterhouse*, and from *Oncale* through *Hibbs*, supports the idea that penalizing men at work for failing to conform to masculine stereotypes of breadwinners, free from the demands of—or desire for—family caregiving, may be actionable sex discrimination.

CONCLUSION

Forty years ago, Ruth Bader Ginsburg understood that the ideology of separate spheres was as limiting to men as it was to women and, through her litigation strategy, led the Supreme Court to define sex discrimination in a way that encompassed this understanding. In the intervening decades, the law has evolved to recognize that stereotyping women out of the market sphere and into the domestic sphere is actionable sex discrimination. Precedent has also established that penalizing both women and men at work for failing to conform to "impermissibly cabined view[s] of the proper behavior"[313] for each is actionable sex discrimination under a gender stereotyping theory. Yet gender-based stereotypes around expected roles in the work and family context remain strongly entrenched in American society. While male caregivers often prevail in lawsuits alleging that they were penalized at work for using family leave or benefits to which they were entitled (for example, under the FMLA or an employer policy), they have yet to use Title VII gender stereotyping theory in a robust fashion to remedy this problem.

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310. *Id.* ¶ 28.

311. *Id.*

312. *Id.* The plaintiff later voluntarily dismissed his federal Title VII and Americans with Disabilities Act claims but maintained his state law claims. Ayanna v. Dechert LLP, No. 10-12155-NMG, 2012 WL 39580, at *1 (D. Mass. Jan. 6, 2012).

313. Price Waterhouse v. Hopkins, 490 U.S. 228, 236–37 (1989).

By the letter of the law, this Article argues, men currently have a cause of action for such gender stereotyping under Title VII. Yet federal courts' understanding of how to apply Title VII in lawsuits by men alleging stereotyping based on their participation in family care—and some plaintiffs attorneys' understanding of how to effectively plead such a case—has limited the effectiveness of this remedy. Courts are poised to take the final step in ridding the workplace of separate spheres ideology: recognizing that stereotyping men out of the domestic sphere and into the market sphere is actionable sex discrimination based on unlawful gender stereotypes. This step is needed for antidiscrimination law to achieve its full promise of allowing individuals access to gender equality, free from the sex-based stereotypes that constrain them, whether they are men or women—a promise Ginsburg envisioned four decades ago.