

Note

The Separate Spheres Ideology: An Improved Empirical and Litigation Approach to Family Responsibilities Discrimination

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In a 2008 commercial for Oreo cookies, a man and his son appear on the screen enjoying a few moments of quality time as they eat their Oreos together.¹ When the camera zooms out, it is clear that they are not in the same location, but are using a webcam to interact.² The man says, “goodnight, buddy,” and the boy says, “good morning, dad,” indicating that they are in different time zones.³ After the boy climbs into bed, the camera pans back to the man’s location, and he is shown sitting in a hotel room wearing a suit.⁴ The ad suggests that a positive, involved father is a man who spends time with his son over the Internet while he travels across the globe for his job.

While career devotion is traditionally regarded as the hallmark of good fatherhood, mothers are held to different standards.⁵ Much public discussion in recent years centers on the plight of women who want to both pursue their careers and

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1. *Laptop* (Nabisco television advertisement May 5, 2008), available at <http://www.youtube.com/watch?v=Y195nIN3Jx8>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Joan C. Williams et al., *Cultural Schemas, Social Class, and the Flexibility Stigma*, 69 *J. SOC. ISSUES* 209, 220–21 (2013).

parent their children.⁶ Because the traditional conception of motherhood requires women to be present and intimately involved in the day-to-day aspects of their children's lives, working mothers experience significant work-life conflict and disparities in income and advancement.⁷ Traditional gender norms dictate that men belong in the public sphere and women belong in the domestic sphere; gender scholarship and social science research, including my own, refer to this set of beliefs as the separate spheres ideology.⁸

In recent years, however, there is increasing recognition that many fathers desire more active involvement in their family lives.⁹ Men's increased involvement in the household division of labor, while beneficial to both men and women,¹⁰ is nevertheless hampered by family responsibilities discrimination in the workplace.¹¹ Family responsibilities discrimination (FRD) is discrimination against an individual on the basis of his or her real or perceived caregiving responsibilities.¹² FRD can take many different forms, including denying a mother a promotion because her employer assumes that she does not want to travel for work, denying light duty to pregnant women but providing it liberally for men with back injuries, or denying a father family leave because his employer thinks his wife should be taking care of things at home.¹³ FRD jurisprudence developed rapidly over the last decade, with cases arising under various legal

6. *E.g.*, Anne-Marie Slaughter, *Why Women Still Can't Have It All*, THE ATLANTIC, June 13, 2012, <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020>.

7. STEPHANIE COONTZ, A STRANGE STIRRING: *THE FEMININE MYSTIQUE* AND AMERICAN WOMEN AT THE DAWN OF THE 1960S 177–78 (2011); Williams et al., *supra* note 5, at 210, 221–22.

8. Andrea L. Miller & Eugene Borgida, *The Separate Spheres Ideology and Gendered Inequality in Society* 4 (Aug. 2, 2014) (unpublished manuscript, on file with author).

9. *See generally* KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY* (2010).

10. Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267, 1282–86 (2012).

11. Williams et al., *supra* note 5, at 211–12, 220–21.

12. Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 171 (2006).

13. *Id.* at 177–78, 181. These examples are drawn from real FRD cases. *Id.* Light duty is a temporary set of job duties that is designed to accommodate an employee's health restrictions. For examples, see *Light Duty Job*, WASH. ST. DEP'T LAB. & INDUS., <http://www.lni.wa.gov/ClaimsIns/Claims/RTW/LightDuty/default.asp> (last visited October 16, 2014).

causes of action related to employment discrimination.¹⁴ FRD affects both men and women, although in distinct ways.¹⁵ The rapid growth in this area of law and the number of courts grappling with new types of FRD claims simultaneously may explain why FRD jurisprudence has been fragmented and uncoordinated. Plaintiffs' success in FRD cases often depends on individual lawyers' and judges' understanding of gender stereotyping; as a result, inconsistent and inaccurate lay theories about gender often impact case outcomes.¹⁶ While women have experienced increasing success as plaintiffs by arguing that FRD is a form of Title VII sex discrimination, men have generally not succeeded as plaintiffs under this legal theory.¹⁷

This Note posits that new social psychology research on the separate spheres ideology provides a theoretical approach to FRD that can unite existing disparate legal understandings of FRD into a coherent, empirically supported legal doctrine. One of the major problems this theoretical approach can address is the low success rate of male FRD plaintiffs compared to women. Part I of this Note describes existing social-psychological research on FRD in the workplace. Part II analyzes the development of FRD jurisprudence and the currently fragmented state of FRD case law. Part II also discusses the widespread inability (or unwillingness) of the courts to recognize FRD as a form of sex discrimination against men. Part III proposes that the Separate Spheres Model provides a useful litigation framework for legal actors in FRD cases. This Note argues that by adopting an empirically grounded social-psychological understanding of FRD in litigation, judges are in a better position to develop a coherent body of law reflecting the realities of gender roles in modern society and providing justice to plaintiffs of any gender who are harmed by FRD in the workplace.

I. CURRENT SOCIAL-PSYCHOLOGICAL APPROACHES TO FAMILY RESPONSIBILITIES DISCRIMINATION

Legal scholars in the area of FRD consistently rely on social psychology research to inform their theories of sex discrim-

14. Williams & Bornstein, *supra* note 12, at 172, 181–82.

15. Williams et al., *supra* note 5, at 220–22.

16. See generally Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835 (2004).

17. Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1299–1300 (2012).

ination and their litigation strategies.¹⁸ Indeed, from the time FRD first developed as a potential legal claim, legal scholarship in this area has been in tune with social science knowledge regarding gender inequality in the workplace.¹⁹ The interdisciplinary nature of FRD law is a strength, as it ensures that FRD theorizing is grounded in empirical reality. It also makes it more likely that FRD law will develop in ways that reflect the actual lived experiences of the men and women harmed by rigid gender norms and gendered inequality.

This Part provides background information on the current state of gendered workplace inequality and on the existing social-psychological research that has informed FRD theorizing thus far. Part A describes the current state of gender inequality in the United States. Part B summarizes the psychological theory of descriptive and prescriptive stereotyping. Finally, Part C introduces a new psychological approach called the Separate Spheres Model.

A. THE MODERN PROBLEM OF GENDER INEQUALITY

The United States has made remarkable progress toward economic equality between men and women in many ways. For example, income levels for childless women under thirty are almost equal to those of men in the same category.²⁰ For women who are mothers, however, the situation is not so rosy. According to legal scholar Joan Williams, the motherhood penalty, or the “maternal wall,” has severe economic consequences for women.²¹ As of 2010, for example, mothers earned sixty-seven cents for every dollar earned by fathers.²² Sociologist Stephanie Coontz similarly argues that “[m]otherhood may in fact have replaced gender as the primary factor constraining women’s choices.”²³ Gender inequality, it seems, cannot simply be reduced to sex or gender; it is often driven by the intersection be-

18. See generally, e.g., Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science To Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401 (2003).

19. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 101–10 (2000).

20. JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 15 (2010).

21. *Id.*

22. JOAN WILLIAMS ET AL., CENTER FOR WORKLIFE LAW, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 17 (2006), available at <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>.

23. COONTZ, *supra* note 7, at 177–78.

tween gender and caregiving responsibilities.²⁴ Legal scholarship and social science research on FRD recognize this complexity and attempt to address gendered inequality in the workplace as it relates to caregiving responsibilities.²⁵ A major program of research that uses this approach is the theory of descriptive and prescriptive stereotyping.

B. THE THEORY OF DESCRIPTIVE AND PRESCRIPTIVE STEREOTYPING

For more than a decade, the dominant social-psychological approach to studying FRD has been to investigate the role of descriptive and prescriptive gender stereotypes.²⁶ Until recently, research on descriptive and prescriptive stereotyping in FRD focused almost exclusively on discrimination against women.²⁷ This Part describes how this area of research contributes to our understanding of gender discrimination in the workplace. Part 1 discusses research on discrimination against women, Part 2 discusses research on discrimination against men, and Part 3 discusses the types of social interventions that have developed out of these bodies of research.

24. Of course, gender inequality is also characterized by intersections with race, class, sexuality, immigrant status, disability, and many other sources of inequality. See, e.g., Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 *GEO. J. ON POVERTY L. & POL'Y* 1 (2012). While these intersecting identities are an integral aspect of gender inequality and FRD, they are outside the scope of this Note.

25. See generally WILLIAMS, *supra* note 20; Williams et al., *supra* note 5.

26. See, e.g., Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 *PSYCHOL. PUB. POL'Y & L.* 665 *passim* (1999); Joan C. Williams, *Hibbs as a Federalism Case*; *Hibbs as a Maternal Wall Case*, 73 *U. CIN. L. REV.* 365, 387 (2004); Joan C. Williams & Allison Tait, "ManceSSION" or "Momcession"? *Good Providers, a Bad Economy, and Gender Discrimination*, 86 *CHI.-KENT L. REV.* 857, 865 (2011).

27. See generally, e.g., Michelle Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 *J. APPLIED PSYCHOL.* 1499 (2007); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 *J. SOC. ISSUES* 743 (2001); Pamela Stone & Lisa Ackerly Hernandez, *The All-or-Nothing Workplace: Flexibility Stigma and "Opting Out" Among Professional-Managerial Women*, 69 *J. SOC. ISSUES* 235 (2013).

1. Family Responsibilities Discrimination Against Gender-Conforming Women

Descriptive stereotypes describe how men and women are thought to be.²⁸ Traditionally, men are thought to be “agentic” and competent while women are thought to be “communal” and warm.²⁹ When a woman has a child, announces she is pregnant, or activates maternal concepts in some other way in the workplace, people tend to see her as having more feminine attributes (i.e., warmth) and fewer masculine attributes (i.e., competence).³⁰ People endorsing these descriptive stereotypes often assume that mothers are less competent and less committed to the workplace than non-mothers, because they seem to fit the descriptive stereotypes of women.³¹ One of the consequences of descriptive stereotypes about women is FRD. The perception that women who engage in caregiving are less competent can lead to fewer recommendations for promotions,³² lower hiring rates,³³ and less willingness to educate mothers compared to other employees.³⁴ Women are also penalized by the assumption that they may become caregivers, even when they have not had children.³⁵

In contrast to descriptive stereotypes, prescriptive stereotypes describe how men and women *should* be.³⁶ Specifically, people endorsing prescriptive gender stereotypes believe that

28. Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent up the Organization Ladder*, 57 J. SOC. ISSUES 657, 658–59 (2001).

29. *Id.* at 658.

30. *Id.*; see also Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 887 (2002) (finding that housewives are consistently perceived as high in warmth and low in competence); Heilman, *supra* note 28, at 666–69 (finding that women who are perceived as competent in the workplace are also perceived as interpersonally deficient).

31. Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004).

32. Madeline E. Heilman & Tyler G. Okimoto, *Motherhood: A Potential Source of Bias in Employment Decisions*, 93 J. APPLIED PSYCHOL. 189, 196 (2008).

33. Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004).

34. *Id.*

35. Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCHOL. 474, 479 (2012).

36. Heilman, *supra* note 28, at 659.

men *should* be agentic and competent and that women *should* be communal and warm.³⁷ In the employment context, this means that people tend to prescribe that women should engage in caregiving rather than trying to be competent in the workplace.³⁸ Like descriptive stereotypes, prescriptive stereotypes about women can lead to FRD. For example, in many organizations, there is a stigma against women who make use of their companies' flexibility policies (e.g., part-time hours, parental leave, tele-commuting).³⁹ The use of flexibility benefits can result in wage penalties, lower performance evaluations, fewer promotions, and lower-status assignments.⁴⁰ For women, this stigma originates in prescriptive stereotypes that expect women to prioritize childrearing over their careers (thus making them ideal parents but bad employees).⁴¹ Women who are mothers or who use flexibility benefits at work are seen as fulfilling their proper gender role by engaging in caregiving, but deviating from proper workplace performance.⁴² In many workplaces, women are actually praised for opting out of the workplace entirely to care for their children, but are punished if they stay at work and make use of flexibility policies.⁴³ Thus, while FRD against women is based on their actual or perceived caregiving duties, it is also based on descriptive and prescriptive stereotypes about women as belonging in the home rather than the workplace. In other words, although this type of FRD occurs against a specific sub-group of women, it is based on sex and gender.

2. Family Responsibilities Discrimination Against Gender-Nonconforming Men

In recent years, researchers have recognized that gender equality in the workplace is not only a matter of women's work-

37. *Id.*

38. *See generally* Hebl et al., *supra* note 27; Rudman & Glick, *supra* note 27.

39. Williams et al., *supra* note 5, at 209–10.

40. Jeffrey R. Cohen & Louise E. Single, *An Examination of the Perceived Impact of Flexible Work Arrangements on Professional Opportunities in Public Accounting*, 32 J. BUS. ETHICS 317, 324–25 (2001); Jennifer Glass, *Blessing or Curse?: Work-Family Policies and Mother's Wage Growth Over Time*, 31 WORK & OCCUPATIONS 367, 387 (2004); Stone & Hernandez, *supra* note 27, at 246–52; *see generally* PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2007).

41. Williams et al., *supra* note 5, at 221–22.

42. *Id.*

43. Stone & Hernandez, *supra* note 27, at 252.

life conflict and how women are treated at work; if gender equality is to be achieved, men must also be able to participate fully in their family lives.⁴⁴ It turns out that men, like women, experience FRD at work; FRD against men, however, originates in different prescriptive stereotypes. Prescriptive stereotypes of men dictate that they should devote themselves fully to competence in the workplace.⁴⁵ Because earning a living is seen as the central role of fatherhood, fathers are heavily penalized for using flexibility benefits at work; using flexibility benefits is regarded as inappropriate for men, because it detracts from their complete career devotion.⁴⁶ In other words, FRD for men who attempt to contribute at home results from men's gender-nonconforming behavior. This is in contrast to FRD against women, which, as described above,⁴⁷ results from women's supposedly gender-conforming behavior of prioritizing children over work. Thus, while both men and women experience FRD, this stigma is highly gendered and may be experienced in distinct ways. Furthermore, although FRD is directed only at subsets of men and women, social-psychological evidence makes clear that it is based on sex and gender.

3. Interventions Made Possible by the Descriptive and Prescriptive Stereotyping Approach

Investigating FRD through the lens of descriptive and prescriptive stereotyping puts the explanatory focus on the individual being discriminated against. In other words, from this perspective, the trigger of the discrimination is the victim's gender-conforming or gender-nonconforming behavior, and the result is the backlash that another person engages in against the victim. Researchers attempting to find ways to reduce this type of backlash in the workplace have identified strategies individuals can use to prevent negative reactions from others. For

44. See Bornstein, *supra* note 17, at 1299–1300; Williams, *supra* note 10, at 1282–86.

45. Williams et al., *supra* note 5, at 220–21; Williams & Tait, *supra* note 26, at 865–69.

46. Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341, 358 (2013); Scott Coltrane et al., *Fathers and the Flexibility Stigma*, 69 J. SOC. ISSUES 279, 297–98 (2013); Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. SOC. ISSUES 322, 335–36 (2013); Joseph A. Vandello et al., *When Equal Isn't Really Equal: The Masculine Dilemma of Seeking Work Flexibility*, 69 J. SOC. ISSUES 303, 315–16 (2013).

47. See *supra* Part I.B.1.

example, recent research suggests that women may be able to reduce the effects of their caregiver status on perceptions of their low commitment to work by explicitly stating their commitment to the job over the family.⁴⁸ However, researchers also recognize that this strategy is risky, because women who signal devotion to the workplace over their families may be penalized for not acting appropriately warm and feminine, as prescriptive stereotypes dictate.⁴⁹ Therefore, it seems that intervention strategies that require men and women to engage in complex gender performances to reduce backlash against them require significant effort and may often fail.⁵⁰ Other types of intervention strategies have not been forthcoming from social psychologists, which may be due to the fact that the descriptive and prescriptive stereotyping approach puts the locus of causation on the victim of discrimination, making it difficult to intervene in any other way. The next Part will discuss the Separate Spheres Model as an alternative approach to studying FRD and the benefits of this approach for scientific inquiry and social intervention.

C. THE SEPARATE SPHERES MODEL

Although research on descriptive and prescriptive stereotyping has been the primary theoretical approach to the study of FRD in social psychology, a new area of research investigates FRD using an approach called the Separate Spheres Model.⁵¹ Research on descriptive and prescriptive stereotypes inspired the Separate Spheres Model, but the Separate Spheres Model diverges from the previous approach in several important ways. Part 1 of this section describes the separate spheres ideology, and Part 2 discusses how the Separate Spheres Model differs from previous approaches to gender discrimination.

48. Beatriz Aranda & Peter Glick, *Signaling Devotion to Work over Family Undermines the Motherhood Penalty*, 17 GROUP PROCESSES & INTERGROUP REL. 91, 96 (2014).

49. *Id.* at 98; Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC'Y 616, 639 (2010).

50. See Hannah Riley Bowles & Linda Babcock, *How Can Women Escape the Compensation Negotiation Dilemma? Relational Accounts Are One Answer*, 37 PSYCHOL. WOMEN Q. 80, 90–91 (2013); Laura J. Kray et al., *Feminine Charm: An Experimental Analysis of Its Costs and Benefits in Negotiations*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 1343, 1253–54 (2012).

51. See generally Miller & Borgida, *supra* note 8.

1. The Separate Spheres Ideology

According to the Separate Spheres Model, FRD and gender inequality in today's society are at least partly caused by individuals' endorsement of the separate spheres ideology.⁵² The separate spheres ideology (SSI), as I have defined it in my own research, is a belief system that claims that: "1) gender differences in society are innate, rather than culturally or situationally created; 2) these innate differences lead men and women to freely participate in different spheres of society; and 3) gendered differences in participation in public and private spheres are natural, inevitable, and desirable."⁵³ The remainder of this Part will explain each of the three tenets of the SSI in more detail and discuss existing empirical research that contributes to our understanding of each tenet.

a. *The Belief that Gender Differences Are Innate*

The first tenet of the SSI is the belief that gender differences are innate or biologically determined, rather than culturally or situationally created.⁵⁴ Of course, it is likely that some gender differences are rooted in a combination of biological differences and cultural processes that socialize men and women to be different. However, those who endorse the SSI rely heavily on biological explanations for gender differences to the exclusion of socialization explanations.⁵⁵ For example, it is a relatively common assumption of the courts that biology dictates that women act as the primary caregivers for their children.⁵⁶ Under

52. *See generally id.*

53. *Id.* at 4. There is an extensive literature on the separate spheres as a nineteenth century construct. *See, e.g.,* Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 *passim* (1988). In this Note, and in my broader program of research on the separate spheres ideology, I use the term differently. The separate spheres ideology as it is referred to here is a measurable *psychological* construct—an ideological belief system—that is characterized by individual differences and plays a role in individual cognition, attitudes, and behavior. *See generally* Miller & Borgida, *supra* note 8.

54. Miller & Borgida, *supra* note 8, at 5.

55. *Id.* at 5–6. For more research on gender essentialism, see generally Victoria Brescoll & Marianne LaFrance, *The Correlates and Consequences of Newspaper Reports of Research on Sex Differences*, 15 PSYCHOL. SCI. 515 (2004); Carol Lynn Martin & Sandra Parker, *Folk Theories About Sex and Race Differences*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 45 (1995); Deborah A. Prentice & Dale T. Miller, *Essentializing Differences Between Women and Men*, 17 PSYCHOL. SCI. 129 (2006).

56. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 997 (1984).

this view, motherhood is characterized as an inevitable responsibility and fatherhood is characterized as an “opportunity” for men to engage in nurturing.⁵⁷ Even the U.S. Census Bureau defines parental roles in ways that make maternal caregiving, and not paternal caregiving, appear to be a biological inevitability.⁵⁸ The Bureau classifies the time fathers spend taking care of their own children as “childcare,” on the same level as using a nanny, babysitter, or daycare institution.⁵⁹ In contrast, the Bureau considers mothers to be the default parents, and time that children spend with their mothers is not classified as “childcare.”⁶⁰

In contrast to the common belief that gender differences are biologically determined, researchers have identified powerful cultural and psychological processes that create and exacerbate gender differences. For example, as described above, prescriptive stereotypes serve to police men and women into gender-stereotypical behaviors.⁶¹ Recent sociological research suggests that young men and women share remarkably similar aspirations for the future; they both tend to want to live in committed, egalitarian families in which both partners work and contribute equally at home.⁶² However, both young men and women sense that institutional forces will make this egalitarian ideal difficult to achieve in practice; as a result, these forces lead young men and women to develop different fallback strategies that vary by gender.⁶³ Psychologists have also demonstrated that environmental factors can be very effective

57. *Id.*

58. K.J. Dell’Antonia, *The Census Bureau Counts Fathers as ‘Child Care,’* N.Y. TIMES (Feb. 8, 2012), <http://parenting.blogs.nytimes.com/2012/02/08/the-census-bureau-counts-fathers-as-child-care>; LYNDLA LAUGHLIN, U.S. CENSUS BUREAU, WHO’S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2005/SUMMER 2006 at 1 (2010), available at <http://www.census.gov/prod/2010pubs/p70-121.pdf>.

59. LAUGHLIN, *supra* note 58, at 1.

60. *Id.*

61. See *supra* Parts I.B.1–2; see also, e.g., Rudman & Glick, *supra* note 27, at 744–45; Rudman & Mescher, *supra* note 46, at 323–24.

62. See generally GERSON, *supra* note 9 (discussing the frustrations new generations of workers feel regarding traditional gender mentalities and dichotomies).

63. *Id.* Gerson found that young men were more likely to fall back on a strategy of finding a woman partner who would handle all of their domestic needs, so that they would not compromise any of their career goals. *Id.* at 162–64. Young women, in contrast, were more likely to fall back on a strategy of taking full responsibility for both their career and domestic concerns, so that they would be financially independent from men. *Id.* at 126–28.

in creating gender differences. For example, women in one study who watched an advertisement that featured stereotypical gender roles performed worse on a math test, but better on a verbal test, than women who watched a non-stereotypical ad.⁶⁴ This result suggests that simple environmental factors can cause men and women to conform to gender stereotypes that they otherwise would not. However, individuals who endorse the SSI attribute gender differences primarily to biological causes at the expense of recognizing these known environmental causes of gender differences.⁶⁵

b. The Belief that Men and Women Freely Choose Separate Spheres

The second tenet of the SSI is the belief that men's and women's innate differences lead them to freely participate in different spheres of society.⁶⁶ For example, print media consistently perpetuate the idea that mothers are opting out of the workplace in droves, in order to pursue a more fulfilling lifestyle of caring for their children.⁶⁷ In truth, women who leave the workplace when they have children are not as common as popularly believed; furthermore, they are often low-income women who leave because they cannot afford to pay for child-care on their low wages.⁶⁸

64. Paul G. Davies et al., *Consuming Images: How Television Commercials that Elicit Stereotype Threat Can Restrain Women Academically and Professionally*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1615, 1626 (2002); see also Jennifer R. Steele & Nalini Ambady, "Math Is Hard!": *The Effect of Gender Priming on Women's Attitudes*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 428, 431-32 (2006).

65. See Miller & Borgida, *supra* note 8, at 5.

66. *Id.* at 6.

67. WILLIAMS ET AL., *supra* note 22, at 10-12; see also Lisa Belkin, *The Retro Wife Opt Out: What Has Changed, and What Still Needs To*, HUFFINGTON POST (Mar. 19, 2013), [http://www.huffingtonpost.com/lisa-belkin/retro](http://www.huffingtonpost.com/lisa-belkin/retro-wife-opt-out_b_2902315.html)

-wife-opt-out_b_2902315.html; Arielle Kuperberg & Pamela Stone, *The Media Depiction of Women Who Opt Out*, 22 GENDER & SOC'Y 497, 497-98, 512 (2008). For an example of the opt-out myth in print media, see Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES (Oct. 26, 2003), available at <http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html>.

68. Anna North, *Why the Opt-Out Story Won't Die*, BUZZFEED (Mar. 18, 2013), <http://www.buzzfeed.com/annanorth/why-the-opt-out-story-wont-die>; Lydia Saad, *Stay-at-Home Moms in U.S. Lean Independent, Lower-Income*, GALLUP (Apr. 19, 2012), <http://www.gallup.com/poll/153995/Stay-Home-Moms-Lean-Independent-Lower-Income.aspx>.

Research from psychology also demonstrates that men and women can be led fairly easily to participate in more or less stereotypical spheres.⁶⁹ For example, women in one study who watched ads that featured stereotypical gender roles, compared to women who watched non-stereotypical ads, were less likely to volunteer for a leadership role in a later task,⁷⁰ expressed less interest in careers that involved quantitative skills,⁷¹ and deemphasized achievement relative to homemaking in their plans for the future.⁷² In another study, priming women with traditional gender roles led to reduced interest in masculine career domains.⁷³ Finally, participants in one study were led to believe that their interaction partners were either male or female, regardless of the targets' actual sex; the participants then unknowingly induced the partners to choose jobs that were stereotypically masculine or feminine, respectively.⁷⁴ Thus, while there are powerful situational and institutional forces influencing men and women to participate in separate gendered spheres, individuals who endorse the SSI characterize this pattern as a matter of personal choice by individual women and men.⁷⁵

c. The Belief that Separate Spheres Are Natural and Desirable

The third tenet of the SSI is the belief that separated gendered spheres in society are natural and desirable.⁷⁶ This belief system relies on a separate-but-equal logic that regards women's homemaking role as equally important and fulfilling as men's career role, even while insisting that these spheres be

69. *E.g.*, Berna J. Skrypnek & Mark Snyder, *On the Self-Perpetuating Nature of Stereotypes About Women and Men*, 18 J. EXPERIMENTAL SOC. PSYCHOL. 277, 288–90 (1982).

70. Paul G. Davies et al., *Clearing the Air: Safety Moderates the Effects of Stereotype Threat on Women's Leadership Aspirations*, 88 J. PERSONALITY & SOC. PSYCHOL. 276, 284 (2005).

71. Davies et al., *supra* note 64, at 1626.

72. *See generally* F.L. Geis et al., *TV Commercials as Achievement Scripts for Women*, 10 SEX ROLES 513 (1984).

73. Laurie A. Rudman & Julie E. Phelan, *The Effect of Priming Gender Roles on Women's Implicit Gender Beliefs and Career Aspirations*, 41 SOC. PSYCHOL. 192, 198 (2010); *see also* Thierry Devos et al., *Influence of Motherhood on the Implicit Academic Self-Concept of Female College Students: Distinct Effects of Subtle Exposure to Cues and Directed Thinking*, 22 EUR. J. PSYCHOL. EDUC. 371, 381–82 (2007) (finding that motherhood cues in the environment reduced women's academic self-identification).

74. Skrypnek & Snyder, *supra* note 69, at 288.

75. *See* Miller & Borgida, *supra* note 8, at 6.

76. *Id.* at 6–8.

segregated by gender.⁷⁷ In other words, this ideology does not explicitly argue that women are inferior to men (although the reality is that care work in our society is not economically valued and rewarded as much as work in the public sphere). This logic is a type of mutual benefits argument,⁷⁸ because it argues that separate gendered spheres benefit both men and women.

While the third tenet of the SSI is in some ways a matter of opinion, scholars have identified several concrete negative outcomes for men, women, and society that may be related to the separation of men and women into different spheres. For example, because women have traditionally had less access to the workplace sphere than men, they still earn less money than men do.⁷⁹ When couples divorce, women are more often left in a state of financial vulnerability.⁸⁰ A woman's job is often seen as the "second job" in the family, which means it is the first thing to be cut if the family relocates or cuts down to a single income.⁸¹ Because men are expected to devote themselves fully to the workplace, fathers who contribute to caregiving at home are often not acknowledged or given credit;⁸² they are seen as "babysitting" their own kids and "helping out" their wives.⁸³ Some scholars argue that careers have become an integral part of masculinity, to the point that society defines men's success and self-worth in terms of their careers, and men are more likely to hide their need for caregiving flexibility at work in order to avoid stigma.⁸⁴ Indeed, the large number of FRD lawsuits⁸⁵ brought in the last decade suggests that men and women who

77. *Id.* at 7–8.

78. See Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1464–65 (2009).

79. Christine Dugas, *Gender Pay Gap Persists*, U.S.A. TODAY (Oct. 24, 2012), <http://www.usatoday.com/story/money/personalfinance/2012/10/24/gender-pay-gap/1652511>.

80. WILLIAMS, *supra* note 20, at 21.

81. FAYE J. CROSBY, *JUGGLING: THE UNEXPECTED ADVANTAGES OF BALANCING CAREER AND HOME FOR WOMEN AND THEIR FAMILIES* 189 (1991).

82. WILLIAMS, *supra* note 20, at 80.

83. *Briones v. Genuine Parts Co.*, 225 F. Supp. 2d 711, 715 (E.D. La. 2002); CROSBY, *supra* note 81, at 49; Kelli K. García, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL'Y 1, 4 (2012).

84. See Richard J. Reddick et al., *Academic Fathers Pursuing Tenure: A Qualitative Study of Work-Family Conflict, Coping Strategies, and Departmental Culture*, 13 PSYCHOL. MEN & MASCULINITY 1, 6 (2012); WILLIAMS, *supra* note 20, at 56–59.

85. *Cf.* Williams & Bornstein, *supra* note 12, at 181–85 (noting successful legal approaches for FRD cases).

are penalized at work for trying to participate in both the workplace and domestic spheres regard this pressure as harmful and discriminatory, not beneficial. On a broader societal level, it has also been suggested that businesses that have not introduced worker flexibility into their policies are left with over-worked employees, increased employee turnover, and inefficient systems that break down when employees cannot be present.⁸⁶ Thus, although those who endorse the SSI view separate gendered spheres as natural and beneficial to individuals and society, there is significant evidence that this separation causes widespread harm.

2. How the Separate Spheres Model Diverges from the Previous Approach

Having outlined the features of the SSI, the remainder of Part I will discuss how the Separate Spheres Model approaches the study of this ideology. The Separate Spheres Model regards gender inequality in today's society as resulting from an interaction between individuals' endorsement of the SSI and structural and institutional forces of the workplace.⁸⁷ The Separate Spheres Model does not dispute that the processes of descriptive and prescriptive stereotyping play an important role in workplace discrimination; years of research studies have demonstrated how powerful these processes are.⁸⁸ Rather, the Separate Spheres Model argues that individuals' endorsement of the SSI, combined with environmental factors, determine the extent to which descriptive and prescriptive stereotyping and various forms of discrimination will occur.⁸⁹ Thus, the Separate Spheres Model places the locus of causation on the individual doing the discriminating and his or her own endorsement of the SSI.⁹⁰ This is in contrast to the descriptive and prescriptive stereotyping approach, which, as discussed above, places the locus of causation on the victim's gender-conforming or gender-nonconforming behavior.⁹¹

The fact that the locus of causation moves to the discriminator is not merely a matter of semantics. This shift allows researchers to measure and predict variation in discriminatory

86. WILLIAMS, *supra* note 20, at 65–66.

87. *See generally* Miller & Borgida, *supra* note 8.

88. *See supra* Parts I.B.1–2.

89. *See generally* Miller & Borgida, *supra* note 8.

90. *Id.* at 21.

91. *See supra* Part I.B.3.

outcomes. For example, research studies using the descriptive and prescriptive stereotyping approach find that when men violate masculine norms by helping out with caregiving at home, they experience stigma and backlash in the workplace.⁹² However, it is unlikely that every man in this situation experiences backlash to the same degree every time. Unfortunately, by making the victim's behavior the independent variable in the study, this approach is not amenable to measuring and predicting variation in the discriminator's responses. The scientific inquiry is simply: what kinds of target behaviors will cause others to discriminate against the target?

In contrast, the Separate Spheres Model makes individuals' endorsement of the SSI the independent variable in a study of discrimination.⁹³ The inquiries become: who is likely to discriminate against others on the basis of their family responsibilities, how severely are they likely to discriminate, and under what conditions are they likely to discriminate? It predicts that the more an individual endorses the SSI, the more likely he or she is to respond in prejudiced ways against other individuals who violate the separate spheres; furthermore, those who endorse the SSI more strongly are likely to have stronger prejudicial responses.⁹⁴ The Separate Spheres Model also regards various environmental and institutional factors as independent variables; the theory predicts that when an individual who endorses the SSI is placed in a situation which allows him or her to express those beliefs, prejudicial and discriminatory outcomes will become more likely.⁹⁵ Thus, in contrast to the descriptive and prescriptive stereotyping approach, the Separate Spheres Model is equipped to predict when, how strongly, and by whom FRD is likely to occur.

Having described existing social-psychological approaches to the study of FRD in Part I, Part II will proceed to discuss how theories of gender discrimination have played out in the courts in FRD cases.

92. Coltrane et al., *supra* note 46, at 297–98; Rudman & Mescher, *supra* note 46, at 335–36; Vandello et al., *supra* note 46, at 315–16.

93. Miller & Borgida, *supra* note 8, at 20–21.

94. *Id.*

95. *Id.* at 21–22.

II. THE FRACTURED DEVELOPMENT OF FAMILY RESPONSIBILITIES DISCRIMINATION JURISPRUDENCE

Legal scholars studying FRD have been remarkably in tune with social-psychological research on gender stereotyping and discrimination.⁹⁶ In contrast, judges and fact-finders have been inconsistent in their understanding of empirical research on gender and sometimes rely on their own inaccurate lay theories to decide cases. This Part will discuss the failing of some judges' lay theorizing and the consequences for plaintiffs in FRD cases. Part A will describe some of the common inaccuracies in judges' theories about gender. Part B will discuss the relative success women plaintiffs have had in getting the courts to recognize FRD as sex discrimination. Finally, Part C will discuss the relative failure of the courts to recognize FRD against men as sex discrimination.

A. THE FAILING OF JUDGES' LAY THEORIES OF GENDER

A significant part of judges' jobs requires them to make assertions and assumptions about the nature of human psychology and behavior.⁹⁷ When judges' theories about human behavior align with empirical reality, judges are equipped to make decisions that further justice and the goals of public policy. When judges' theories about human behavior are inaccurate, however, significant harm to the parties, and society as a whole, can result.⁹⁸ Because human psychology and behavior are so central to the law, scholars argue for a "psychological jurisprudence," which aims to "make legal assumptions about human nature as consistent with contemporary psychological knowledge as possible, that is, to close the gap between folk and scientific theories of the person."⁹⁹ In that spirit, it is important that judges deciding FRD cases clearly understand how gender stereotyp-

96. See generally, e.g., Williams, *supra* note 18 (providing a thorough overview of research on gender stereotyping and discrimination).

97. Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 997 (2006).

98. Krieger, *supra* note 16, at 836–37; Krieger & Fiske, *supra* note 97, at 998–1000; see generally BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM (Eugene Borgida & Susan T. Fiske eds., 2008).

99. Tom R. Tyler & John T. Jost, *Psychology and the Law: Reconciling Normative and Descriptive Accounts of Social Justice and System Legitimacy*, in SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 807, 808 (Arie W. Kruglanski & E. Tory Higgins eds., 2007).

ing and discrimination really work.¹⁰⁰ Furthermore, in recent years, plaintiffs' reliance on comparator evidence¹⁰¹ in FRD cases has decreased; instead, more and more plaintiffs are proving their cases using evidence of gender stereotyping.¹⁰² Thus, the need for judges to understand psychological theories of stereotyping and discrimination is growing. Having access to a clear and consistent theory of the psychological processes underlying FRD will help reach this goal.¹⁰³ Unfortunately, judges' lay understanding of gender biases has been inconsistent and often inaccurate. The remainder of this section will provide two major examples of how judges' lay theories of discrimination lead them astray. Part 1 will discuss the same actor inference, and Part 2 will discuss the tendency to believe that discrimination happens in discrete, deliberate moments.

1. The Same Actor Inference

One example of problematic lay theorizing in the context of FRD cases is the same actor inference. Judges tend to believe that prejudice, bias, and discrimination are stable, unwavering properties of the individual.¹⁰⁴ This view implies that if a person were going to discriminate against another on the basis of caregiver status, he or she would do so in every situation and against every caregiver.¹⁰⁵ This assumption works against plaintiffs when, for example, the same supervisor who discriminated against the employee was the person who hired the employee in the first place.¹⁰⁶ In this situation, many courts infer that, because the supervisor did not discriminate at the time of hiring, he or she must not have discriminated later.¹⁰⁷

100. Krieger & Fiske, *supra* note 97, at 1000.

101. Comparator evidence is evidence showing that an individual who is similarly situated to the plaintiff (in all relevant ways except for the plaintiff's protected class) received different treatment from the plaintiff. See BLACK'S LAW DICTIONARY 321 (9th ed. 2009). The comparison allows the courts to infer that the differential treatment was based on the plaintiff's protected class, which makes the case for discrimination. *Cuevas v. Am. Express Travel Related Servs. Co.*, 256 F. App'x 241, 243 (11th Cir. 2007) (per curiam).

102. Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRd": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1349–50 (2008).

103. See generally Borgida & Fiske, *supra* note 98.

104. Krieger, *supra* note 16, at 840–41.

105. *Id.*

106. Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 357–58 (2010).

107. *Id.*

Years of research in social psychology have made clear that the same actor inference is misguided—stereotyping, bias, and discrimination are highly context-dependent.¹⁰⁸ However, the primary psychological theory that is used to understand FRD cases, the theory of descriptive and prescriptive stereotyping, is not amenable to an analysis of systematic situational variation in stereotyping and discrimination. As discussed in Part I, this theoretical approach places the locus of causation on the behavior of the target of discrimination. What this approach has not done is produce much research measuring and accounting for differences across situations in the discriminator’s tendency to discriminate. Thus, plaintiffs cannot offer judges an empirically grounded explanation for why instances of FRD might vary from situation to situation in their workplaces. When expert witnesses are used in these cases, they typically testify on the general pattern that gender-conforming or gender-nonconforming behavior tends to lead to discrimination.¹⁰⁹ They generally cannot testify as to whether this process likely occurred in any specific case.¹¹⁰ As a result, courts sometimes dismiss expert testimony on descriptive and prescriptive stereotyping as not providing any more information than their lay understanding already provided.¹¹¹

2. The Requirement of Discrete, Deliberate Action

Another common assumption by judges in FRD cases is that bias and discrimination happen in a discrete moment at the time of the employment decision, and that they are carried out deliberately and consciously.¹¹² In contrast to this view, discrimination often occurs outside of conscious awareness and

108. Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1298 (2008).

109. Robin Stryker et al., *Employment Discrimination Law and Industrial Psychology: Social Science as Social Authority and the Co-Production of Law and Science*, 37 LAW SOC. INQUIRY 777, 782 (2012); see, e.g., *E.E.O.C. v. Bloomberg L.P.*, No. 07 Civ. 8383(LAP), 2010 WL 3466370, at *4–5 (S.D.N.Y. Aug. 31, 2010); *Ray v. Miller Meester Adver., Inc.*, 664 N.W.2d 355, 364–66 (Minn. Ct. App. 2003).

110. See, e.g., *Ray*, 664 N.W.2d at 366.

111. *E.g., id.* (stating that the expert witness’s “testimony is hardly the type of evidence without which laypersons are incapable of forming a correct judgment”).

112. Krieger, *supra* note 16, at 838. This problem is true of other forms of stereotyping and discrimination (e.g., race, age); it is not limited to sex discrimination or FRD. *Id.*

over time long before the moment of the employment decision.¹¹³ For example, a workplace might be infused with a culture of masculinity that discourages men from taking leave to engage in caregiving.¹¹⁴ This situation does not involve a specific moment of intentional discriminatory action; however, it may lead to significant levels of gender inequality and FRD.¹¹⁵ The descriptive and prescriptive stereotyping approach recognizes that workplace culture may generally influence FRD, but it is not amenable to the identification of specific workplace factors that make FRD more likely.¹¹⁶ Because this approach places the explanatory focus on the target of discrimination, rather than the discriminator and the environment in which the discriminator operates, there has not been a systematic attempt by researchers to identify specific workplace characteristics that lead to FRD. This makes it difficult for plaintiffs to articulate their cases in situations that lack a specific discriminatory moment or policy.¹¹⁷

As these few examples illustrate, lay theorizing by the courts is a significant problem when their assumptions do not align with empirical reality. The goal of FRD scholars and practitioners should be to bring cases using clear, consistent, and empirically supported theories of gender stereotyping and discrimination in an effort to reduce courts' reliance on faulty reasoning. The next section analyzes the courts' willingness to recognize FRD against women as sex discrimination after being exposed to social-psychological research on descriptive and prescriptive stereotyping. The remainder of Part II will discuss the failure of the courts to extend this reasoning to cases of FRD against men and the need to bring a new theoretical perspective to FRD jurisprudence.

B. THE COURTS' WILLINGNESS TO RECOGNIZE FRD AGAINST WOMEN AS SEX DISCRIMINATION

There is currently no federal statute that defines caregivers as a protected class.¹¹⁸ This means that there is no FRD

113. Albiston et al., *supra* note 108, at 1298.

114. See Williams et al., *supra* note 5, at 220–21.

115. See *id.*

116. See *supra* Parts I.B.1–3.

117. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553–56 (2011).

118. Steven L. Locke, *Family Responsibilities Discrimination and the New York City Model: A Map for Future Legislation*, 51 S. TEX. L. REV. 19, 29 (2009). A few states and several dozen local governments recognize parental or

cause of action *per se*. In order to succeed in a federal claim, a plaintiff must fit FRD under another existing cause of action. FRD cases arise under several different statutes, including Title VII of the Civil Rights Act of 1964 (Title VII), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Employment Pay Act (EPA), and the Employee Retirement Income Security Act (ERISA).¹¹⁹ Title VII offers plaintiffs the most flexibility in the types of legal theories they can bring; furthermore, Title VII covers more employers than the FMLA and other statutes.¹²⁰ Therefore, plaintiffs are in the most advantageous position if they can convince the court that the FRD they experienced was based on sex for the purposes of Title VII.¹²¹

Women have experienced significant success convincing the courts that FRD against them is based on sex, particularly once they began to systematically articulate a theory of descriptive and prescriptive stereotyping to the courts.¹²² The number of FRD cases filed in federal courts has risen sharply since 1999, as has the number of cases decided by the courts.¹²³ Almost 90% of the plaintiffs in FRD cases are women.¹²⁴ Furthermore, employees succeed in FRD cases at higher rates than they do in other types of employment discrimination cases.¹²⁵

One example of a successful FRD plaintiff under Title VII was Tracey Lust.¹²⁶ Lust's supervisor passed her over for a promotion because he assumed that, because she had children,

caregiver status as a protected class for discrimination purposes. Williams & Bornstein, *supra* note 102, at 1346.

119. Williams & Bornstein, *supra* note 12, at 181–82.

120. See García, *supra* note 83, at 6.

121. 42 U.S.C. § 2000e-2(a) (2012). Title VII makes it unlawful for an employer to discriminate against an employee “because of such individual’s . . . sex.” *Id.* In *Price Waterhouse v. Hopkins*, the Supreme Court ruled that discrimination against an individual because he or she fails to conform to gender stereotypes is sex discrimination under Title VII. 490 U.S. 228, 250–51 (1989); see also Stephanie Bornstein, *The Legal and Policy Implications of the “Flexibility Stigma”*, 69 J. SOC. ISSUES 389, 389–91 (2013).

122. Williams & Bornstein, *supra* note 102, at 1343. For examples of successful cases, see *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004); *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004); *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998); *Stern v. Cintas Corp.*, 319 F. Supp. 2d 841 (N.D. Ill. 2004).

123. CYNTHIA THOMAS CALVERT, CTR. FOR WORKLIFE LAW, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010 7–8 (2010).

124. *Id.* at 13.

125. *Id.* at 11.

126. See *Lust*, 383 F.3d at 583.

she would not be interested in a job position that required her to relocate.¹²⁷ The supervisor never asked Lust whether she would be interested in relocating, and she expressed interest in the promotion several times.¹²⁸ Lust was fortunate in the sense that her supervisor had made numerous sexist comments during her employment, making it fairly easy to ground the promotion decision in a theory of sex discrimination. For example, when Lust expressed interest in a promotion on one occasion, shortly after having gotten married, her supervisor commented that he was surprised, and asked why her husband was not going to take care of her.¹²⁹ He also admitted in court that the reason he had not considered Lust for the promotion was the fact that she had a family.¹³⁰ Thus, Lust was able to convince the court that the FRD she experienced was based on sex for the purposes of Title VII.¹³¹ Her supervisor's actions were based on descriptive stereotypes that women with children lack the motivation to excel in their careers. They were also based on prescriptive stereotypes that push women to prioritize their children over their careers and depend on their husbands for income.

Shireen Walsh was another woman plaintiff who successfully brought an FRD claim under Title VII.¹³² When Walsh came back to work after having her first child, she faced enormous hostility from her supervisor.¹³³ Walsh's supervisor closely scrutinized every minute of Walsh's absences, despite the fact that other employees were allowed to come and go as they pleased without notice, made Walsh stay later in the day than other employees, put up a sign on Walsh's cubicle that said "Out—Sick Child," referred to Walsh's son as "the sickling," and threw a phone book at Walsh, demanding that she find a pediatrician who was open after business hours.¹³⁴ On one occasion, Walsh fainted at work as a result of the stress she was under; when she returned the next day, her supervisor said, "[Y]ou better not be pregnant again."¹³⁵ The court found that

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150, 1160 (8th Cir. 2003).

133. *Id.* at 1154.

134. *Id.* at 1154–55.

135. *Id.* at 1155.

these actions amounted to sex discrimination for the purposes of Title VII.¹³⁶ The actions of Walsh's supervisor were based on descriptive stereotypes of women with children as not committed enough to the workplace and not dependable enough to be trusted managing their own work schedules.

A third example of a woman plaintiff who succeeded in an FRD case under Title VII is Kellie Meier.¹³⁷ Meier worked at a hotel and was in charge of overseeing all of the food service and catering, including training new staff.¹³⁸ Shortly after Meier began experiencing complications with her pregnancy, her supervisor hired a man to serve as a manager above her.¹³⁹ The new manager commented in one meeting that "a woman's place is in the home."¹⁴⁰ Shortly thereafter, Meier was demoted to a part-time server position.¹⁴¹ The court denied the hotel's motion for summary judgment, finding that Meier successfully made a prima facie case that her demotion was based on sex for the purposes of Title VII.¹⁴² Meier's demotion was based on prescriptive stereotypes that encourage women to opt out of the workplace once they have children and devote themselves to childbearing and childcare.

These cases represent just a few examples of women's success as plaintiffs in FRD lawsuits, and they are fairly representative of the types of cases that succeed under Title VII.¹⁴³ In each case, the plaintiff was able to articulate to the court the fact that FRD in her case was, at its heart, based on sex. This success rate is likely at least partly due to the concerted efforts of legal scholars who have worked to establish FRD as a legitimate type of sex discrimination under Title VII and other statutes.¹⁴⁴ It may also be due to the fact that, unlike in standard

136. *Id.* at 1160.

137. *See* Meier v. Noble Hospitality, Inc., 197 F. Supp. 2d 1178, 1184 (S.D. Iowa 2001).

138. *Id.* at 1179.

139. *Id.* at 1180.

140. *Id.*

141. *Id.*

142. *Id.* at 1184.

143. For more examples, see *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004); *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998); *Stern v. Cintas Corp.*, 319 F. Supp. 2d 841 (N.D. Ill. 2004); and *Eslinger v. U.S. Central Credit Union*, 866 F. Supp. 491 (D. Kan. 1994).

144. *See, e.g.*, WILLIAMS, *supra* note 19; Williams & Bornstein, *supra* note 12. These efforts also led the Equal Employment Opportunity Commission to issue guidelines in 2007 explicitly interpreting family responsibilities discrim-

sex or race discrimination cases, it is fairly common in FRD cases for discriminating parties to make comments out loud that reveal their discriminatory motivations.¹⁴⁵ Increasingly, courts are allowing these comments to serve as evidence of discriminatory motive, rather than dismissing them as irrelevant “stray remarks.”¹⁴⁶

As this cause of action has matured, more recent FRD cases have relied less on expert testimony to make arguments about gender stereotypes.¹⁴⁷ The courts have become increasingly familiar with the concepts of descriptive and prescriptive stereotyping, even though they may not often use that terminology.¹⁴⁸ According to Joan Williams and Stephanie Bornstein, “[f]ifteen years of stereotyping evidence has given even the layperson the power to understand that an employer who makes decisions about individual female employees based on stereotypes about women’s behavior is engaging in gender discrimination.”¹⁴⁹ However, as described above, judges’ lay theorizing about gender stereotyping and discrimination is spotty at best.¹⁵⁰ As the remainder of this Part will argue, it is not yet time to abandon attempts to inform the courts about the empirical realities of gender discrimination. For many who experience FRD, particularly men, lay theories of gender discrimination do not suffice.

C. THE COURTS’ FAILURE TO RECOGNIZE FRD AGAINST MEN AS SEX DISCRIMINATION

In order to reduce gendered inequality and discrimination in the workplace, the courts must address FRD against both men and women. As long as courts continue to assume that FRD is a women’s problem, the structural forces that underlie this form of inequality will go unaddressed.¹⁵¹ It is a start that

ination as a form of unlawful sex discrimination. See Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, 2 EEOC Compl. Man. (BNA) § 615 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf>.

145. Williams & Bornstein, *supra* note 12, at 176.

146. Albiston et al., *supra* note 108, at 1293–97.

147. Williams & Bornstein, *supra* note 12, at 175.

148. *Id.*

149. *Id.*

150. See *supra* Parts II.A.1–2.

151. Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 253–57 (2013); Nancy E. Dowd, *Work and Family: The Gender Paradox*

men have brought substantial numbers of FRD cases in the last decade.¹⁵² Most of these cases, however, are brought under the FMLA.¹⁵³ Only about half of the employees in the U.S. are covered by the FMLA, because many workplaces are not large enough to fall under its requirements, and relief under this statute is limited to certain leave-related causes of action.¹⁵⁴ Therefore, it is important that men be able to bring their FRD cases as sex discrimination cases under Title VII. Social-psychological research makes clear that FRD against men is based on gender stereotypes.¹⁵⁵ As described above, men who engage in caregiving are often regarded as not masculine enough at work, because they are seen as defying prescriptive stereotypes that encourage men to devote themselves fully to their careers.¹⁵⁶ Despite the clear empirical connection between FRD against men and sex stereotyping and discrimination, the courts have been reluctant to recognize these claims as sex discrimination for the purposes of Title VII.

Tom Hayden is one example of a man who was unsuccessful in an FRD case under Title VII.¹⁵⁷ When Hayden requested FMLA leave to care for his wife and newborn baby, a human resources officer questioned his request, stating, “[i]t’s very strange that we have a male manager request that amount of time off, we have never had that before.”¹⁵⁸ Hayden’s request for leave was initially granted, but he was fired one week later.¹⁵⁹ Hayden sued under both the FMLA and Title VII, but his Title VII claim was defeated.¹⁶⁰ The judge declared that because Hayden was replaced by another man, a member of the same protected class, he could not make a case for sex discrimination under Title VII.¹⁶¹ The human resources officer’s comment strongly suggests that Hayden was fired because he did not fit

and the Limitations of Discrimination Analysis in Restructuring the Workplace, 24 HARV. C.R.-C.L. L. REV. 79, 79–82 (1989).

152. See CALVERT, *supra* note 123, at 13 (finding that 11.6% of FRD cases filed between 1999–2008 were brought by men).

153. Bornstein, *supra* note 17, at 1323–25.

154. *Id.* at 1325; García, *supra* note 83, at 6.

155. *E.g.*, Williams et al., *supra* note 5, at 220–21.

156. See *supra* Part I.B.2.

157. See *Hayden v. Garden Ridge Mgmt., LLC*, No. CIV.A 4:08CV172, 2009 WL 5196718, at *5 (E.D. Tex. Dec. 22, 2009).

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

159. *Id.* at *1.

160. *Id.* at *5.

161. *Id.*

in with prescriptive stereotypes that push men to devote all of their time to the workplace and leave domestic work to women. However, the judge grossly misunderstood how sex discrimination works, believing that sex discrimination required a showing that the employer rejected all men for Hayden's position. This is another example of the misguided same actor inference, or the notion that an individual who discriminates does so in every situation and against every individual of the same class.¹⁶² On the contrary, hiring only men who avoid caregiving responsibilities is sex discrimination.

Another example of this fundamental misunderstanding is in the case of Anthony Marchioli.¹⁶³ Marchioli requested an afternoon off after his girlfriend became pregnant, so that he could help her find a doctor.¹⁶⁴ Afterward, he was subjected to extreme scrutiny at work and negative evaluations from his supervisor.¹⁶⁵ In a written evaluation, Marchioli's supervisor said, "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."¹⁶⁶ A few weeks later, Marchioli was fired.¹⁶⁷ The court dismissed Marchioli's Title VII claim, because it found that Marchioli was terminated because of his parental status, which is not a protected class under Title VII, and not because of his sex.¹⁶⁸ The comments from Marchioli's supervisor could not be clearer in revealing that Marchioli was punished for failing to comply with masculine prescriptive norms of career devotion. However, the court's misunderstanding of gender stereotyping and discrimination led it to view the discrimination as based narrowly on parental status only. If the court in this case had a basic understanding of how FRD is known to operate, it would have seen that Marchioli's experience was sex discrimination. Instead, it dismissed Marchioli's case before he had a chance to make it.¹⁶⁹

162. See *supra* Part II.A.1.

163. See *Marchioli v. Garland Co.*, No. 5:11-CV-124 (MAD/ATB), 2011 WL 1983350, at *5 (N.D.N.Y. May 20, 2011).

164. *Id.* at *1.

165. *Id.* at *1–2.

166. *Id.* at *1.

167. *Id.* at *2.

168. *Id.* at *5.

169. *Marchioli v. Garland Co.*, No. 5:11-CV-124 (MAD/ATB), 2011 WL 1983350, at *8 (N.D.N.Y. May 20, 2011) (granting the defendant's motion to dismiss the complaint).

Despite what these cases suggest, a cause of action for men who experience FRD in the workplace already exists under Title VII.¹⁷⁰ The problem is that many courts, and sometimes plaintiffs, fail to recognize FRD against men as being based in gender stereotypes.¹⁷¹ It is not clear why a basic understanding of descriptive and prescriptive stereotyping against women has not spread to cases involving men. It is possible that judges are simply not accustomed to thinking about sex discrimination as a problem faced by men. What is clear, however, is that scholars need to re-double their efforts to educate the courts regarding the empirical reality of sex discrimination. Men and women will not achieve gender equality (not to mention work-life balance) until women are given full access to the workforce *and* men are given full access to the domestic sphere. As long as women continue to be overburdened with disproportionate amounts of domestic work and men continue to be dismissed as sincere caregivers, both women and men will be harmed by rigid gender roles. As Kelli García has argued, “a new focus on men as caregivers is necessary to promote workplace equality and gender equity within families, allowing both men and women to live full lives that include both work and family life.”¹⁷² In Part III, I argue that emerging research on the Separate Spheres Model provides a theoretical perspective that can unite the current fragmented case law on FRD in the workplace and provide litigation advantages over the descriptive and prescriptive stereotyping approach.

III. THE ADVANTAGES OF THE SEPARATE SPHERES MODEL IN FRD LITIGATION

As discussed above, the Separate Spheres Model diverges in several important ways from the descriptive and prescriptive stereotyping approach.¹⁷³ The Separate Spheres Model does not dispute that the processes of descriptive and prescriptive stereotyping play an important role in workplace discrimination. Rather, it asks different questions than the previous approach and moves the explanatory focus from the target of discrimination to the discriminator. This Part will analyze how the Sepa-

170. Bornstein, *supra* note 17, at 1335.

171. *Id.* at 1342. For relatively rare examples of successful cases by male plaintiffs, see *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001); *Schafer v. Board of Public Education*, 903 F.2d 243 (3d Cir. 1990).

172. García, *supra* note 83, at 5.

173. See *supra* Part I.C.2.

rate Spheres Model provides several distinct advantages for both men and women in FRD litigation. Part A will discuss the theoretical and evidentiary advantages that the theory offers. Part B will analyze the relative strength of causal arguments under the theory. Finally, Part C will examine how this theoretical approach allows employers to prevent the occurrence of FRD and reduce litigation.

A. THE SEPARATE SPHERES MODEL OFFERS THEORETICAL AND EVIDENTIARY ADVANTAGES

As discussed above, the descriptive and prescriptive stereotyping approach to FRD is not particularly amenable to predicting variation.¹⁷⁴ The scientific inquiry underlying this approach asks: what types of target behaviors will cause others to discriminate against the target? Research using this approach finds that when women engage in gender-conforming behavior by taking on caregiving roles, they experience backlash.¹⁷⁵ Conversely, when men engage in gender-nonconforming behavior by taking on caregiving roles, they experience backlash.¹⁷⁶ However, it is unlikely that all acts of gender-conforming or gender-nonconforming behavior result in backlash in every situation and to the same degree. The Separate Spheres Model allows researchers to measure and predict variation in FRD across individuals and situations, rather than treating this variation as error.¹⁷⁷ This has important implications for FRD litigation, which the remainder of this Part will discuss. Part 1 explains the theoretical and evidentiary advantages offered by the Separate Spheres Model approach, and Part 2 describes what FRD legal theories and evidence would look like in an ideal world.

1. Theoretical and Evidentiary Advantages Offered by the Separate Spheres Model

Recall the same actor inference discussed in Part II(A)(1). Courts commonly presume that an individual who might discriminate against someone on the basis of a protected class will

174. See *supra* Part I.C.

175. See Williams et al., *supra* note 5, at 221–22. See generally Heilman, *supra* note 28 (describing how both prescriptive and descriptive stereotypes can negatively impact the career progress of women).

176. Williams et al., *supra* note 5, at 220–21.

177. Miller & Borgida, *supra* note 8, at 20–21.

do so for all individuals in that class and in any situation.¹⁷⁸ The Separate Spheres Model makes clear that only in some situations is a person's endorsement of the separate spheres ideology likely to manifest as discrimination.¹⁷⁹ An ongoing program of social-psychological research investigates different situational factors that may play a role in this process.¹⁸⁰ For example, it is possible that in workplaces that give supervisors high amounts of discretion in employee evaluations, supervisors find it easier to act on their personal gender ideologies.¹⁸¹ As a result, one would expect to see more FRD in workplaces with high supervisor discretion, and, within these environments, more FRD among supervisors who more strongly endorse the SSI. Another possibility is that moment-to-moment situational factors influence the expression of gender ideology. For example, it is possible that when a supervisor's cognitive resources are depleted (when he or she is hungry, tired, or distracted), he or she is less able to inhibit discriminatory responses against employees with caregiving responsibilities.¹⁸² In this case, one would expect to see more FRD from a given supervisor during times of cognitive depletion and less FRD from that supervisor when cognitive resources were replenished. Both of these outcomes would be explained by systematic and predictable variation in contextual workplace factors, and

178. Krieger, *supra* note 16, at 840–41.

179. See generally Miller & Borgida, *supra* note 8 (studying the psychological processes underlying individuals' endorsement of SSI).

180. The author is currently conducting this research with colleagues at the University of Minnesota.

181. See, e.g., Thomas C. Monson et al., *Specifying When Personality Traits Can and Cannot Predict Behavior: An Alternative to Abandoning the Attempt to Predict Single-Act Criteria*, 43 J. PERSONALITY & SOC. PSYCHOL. 385, 397 (1982) (finding that when participants were put in situations that induced few constraints on their personality traits, personality was highly correlated with behavior).

182. For general reviews of the relationship between cognitive load and stereotyping, see Diana J. Burgess, *Are Providers More Likely To Contribute to Healthcare Disparities Under High Levels of Cognitive Load? How Features of the Healthcare Setting May Lead to Biases in Medical Decision Making*, 30 MED. DECISION MAKING 246 (2010); Jeffrey W. Sherman et al., *Encoding Flexibility Revisited: Evidence for Enhanced Encoding of Stereotype-Inconsistent Information Under Cognitive Load*, 22 SOC. COGNITION 214 (2004); Daniel P. Skoric & Kenneth I. Mavor, *Cognitive Load Privileges Memory-Based over Data-Driven Processing, Not Group-Level over Person Level Processing*, 52 BRIT. J. SOC. PSYCHOL. 469 (2013); Daniel H.J. Wigboldus et al., *Capacity and Comprehension: Spontaneous Stereotyping Under Cognitive Load*, 22 SOC. COGNITION 292 (2004).

both would provide clear evidence against the same actor inference.

Another misguided assumption of the courts is that discrimination occurs within conscious awareness and in a discrete moment at the time of the employment decision.¹⁸³ Once again, the descriptive and prescriptive stereotyping approach recognizes that workplace culture plays a role in FRD.¹⁸⁴ However, this approach is not amenable to the identification, measurement, and prediction of specific workplace cultural factors that might cause FRD to increase.¹⁸⁵ In contrast, the Separate Spheres Model allows researchers to identify certain factors of workplace environments that cause individuals' endorsement of the SSI to be more or less likely to translate into FRD.¹⁸⁶ For example, it is possible that the basic structure of how jobs are defined influences individuals' perceptions of what it means to be a dedicated employee.¹⁸⁷ One might imagine that in a workplace in which employees have set hours and extensive procedures for requesting leave or flexibility, high-SSI employees might view a co-worker who needs a few days off here and there as deviating from masculine workplace norms.¹⁸⁸ In a workplace in which employees arrange their own hours or are allowed to do some of their work from home, a co-worker who needs a few days off is less likely to raise any alarms, even from co-workers who endorse the SSI.¹⁸⁹ This outcome would be explained by systematic and predictable variation in contextual workplace factors, and it would provide clear evidence against the assumption that FRD always happens in discrete, intentional moments by one individual.¹⁹⁰

2. What FRD Legal Theories and Evidence Would Look Like in an Ideal World

Using the Separate Spheres Model to enhance theory and evidence in FRD cases involves efforts by several different parties. First, social psychologists who are interested in addressing FRD should focus their efforts on studying features of the

183. See *supra* Part II.A.2; Krieger, *supra* note 16, at 838.

184. Miller & Borgida, *supra* note 8, at 21.

185. *Id.* at 20.

186. *Id.* at 20–21.

187. *Id.* at 15–16.

188. See Monson et al., *supra* note 181, at 386.

189. See *id.*

190. Miller & Borgida, *supra* note 8, at 41; Krieger, *supra* note 16, at 838.

workplace environment that either increase or decrease individuals' ability to translate their endorsement of the SSI into actions against their employees. At this point in time, the primary shortcoming of the Separate Spheres Model is that it is a new approach in social psychology, and researchers are just beginning to utilize it in empirical research.¹⁹¹ Ideally, psychologists will begin to conduct more research using this approach and will quickly build a body of evidence that legal scholars and practitioners can rely on. As social psychologists study the role of the SSI in workplaces more in depth, specific environmental and institutional factors that influence FRD will be identified. The Separate Spheres Model makes it easier for scientists to identify systematic sources of situational variation in FRD,¹⁹² and it makes it easier for legal scholars and plaintiffs to apply this knowledge to specific cases.

Second, in an ideal world, lawyers who represent plaintiffs in FRD cases would consider the value of expert testimony on FRD rather than trusting in judges' and juries' lay theories of gender. The Separate Spheres Model may allow plaintiffs to bring stronger expert testimony than in the past. Recall that expert witnesses typically comment on the general processes of stereotyping and discrimination without being able to testify whether these processes took place in a specific workplace.¹⁹³ Using the Separate Spheres Model, a plaintiff can bring an expert witness to testify regarding the specific workplace factors known to contribute to FRD *and* the extent to which these factors are present in a specific workplace (for example, by testifying that research has shown a correlation between supervisor discretion and instances of FRD and that the defendant's employment records reveal a high amount of supervisor discretion that resembles the research). Some scholars argue that expert witnesses should not provide testimony on specific causation in discrimination cases.¹⁹⁴ However, many psychological phenom-

191. Miller & Borgida, *supra* note 8, at 8–9.

192. *Id.* at 20–21.

193. See *supra* Part II.A.1; Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Cases*, 83 TEMP. L. REV. 867, 875 (2011) (discussing the distinction between general and specific causation in expert testimony).

194. *E.g.*, David L. Faigman, *Evidentiary Incommensurability: A Preliminary Exploration of the Problem of Reasoning from General Scientific Data to Individualized Legal Decision-Making*, 75 BROOK. L. REV. 1115, 1135–36 (2010); John Monahan, et al., *The Limits of Social Framework Evidence*, 8 L. PROBABILITY & RISK 307, 308 (2009).

ena are well-established enough to allow scientists to make probabilistic judgments about specific cases, and this type of testimony is consistent with the Federal Rules of Evidence.¹⁹⁵ This type of evidence would be more likely to be accepted by the courts as relevant and helpful to the factfinder.¹⁹⁶ Thus, plaintiffs would benefit from having access to a theory that allows for a closer analysis of structural and situational variation in FRD and from the stronger evidence that would result.

Third, in an ideal world, judges would acknowledge that they are subject to many of the same cognitive biases as other human beings and that some of their lay theories of gender discrimination may be flawed. They would make efforts to incorporate empirically supported evidence into their understanding of stereotyping and discrimination or, at the very least, be receptive to the idea that expert testimony on gender discrimination might better inform the fact-finding process. Judges who routinely dismiss psychologists' expert testimony as not relevant or helpful to the factfinder do a disservice to FRD cases. It may seem implausible that many judges will acknowledge that their own folk theories of gender discrimination are imperfect. Human beings, after all, tend to view their own perceptions of the world as accurate and complete.¹⁹⁷ However, legal scholars who study FRD have been quite successful over the past decade

195. See FED. R. EVID. 702; Eugene Borgida, et al., *Stereotyping Research and Employment Discrimination: Time To See the Forest for the Trees*, 14 INDUS. & ORGANIZATIONAL PSYCHOL. 405, 407 (2008); Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 45 (2009).

196. *C.f.* Ray v. Miller Meester Adver., Inc., 664 N.W.2d 355, 364–66 (Minn. Ct. App. 2003) (ruling that the expert witness's testimony was inadmissible because it did not go beyond a layperson's understanding of how gender stereotypes work in general).

197. See generally, e.g., Dale W. Griffin & Lee Ross, *Subjective Construal, Social Inference, and Human Misunderstanding*, in 24 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 319 (Mark P. Zanna ed., 1991) (finding that individuals sometimes fail to understand that others see the world differently); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369 (2002) (describing that individuals see biases in others more so than in themselves); Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636 (Thomas Gilovich et al. eds., 2002) (describing how individuals tend to see their own view of the world as unbiased); Lee Ross & Andrew Ward, *Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in VALUES AND KNOWLEDGE 103 (Edward S. Reed et al., eds., 1996) (finding that individuals fail to make adequate allowances for differences in others' world view which can have consequences on interaction).

in teaching the courts that FRD is a type of sex discrimination using empirical evidence from social psychology.¹⁹⁸ I argue that continued attempts to educate the courts about the nature of gender and caregiver discrimination will be worth the effort.

B. THE SEPARATE SPHERES MODEL MAKES CAUSATION ARGUMENTS MORE PERSUASIVE

As described in Part I(C), the prescriptive and descriptive stereotyping approach puts the explanatory focus on the victim of discrimination—the victim engages in gender conforming or non-conforming behavior that causes others to react negatively.¹⁹⁹ This causal logic puts plaintiffs in an awkward position when arguing that another individual's gender stereotypes were the cause of the discrimination that they experienced. Part 1 of this section examines how the Separate Spheres Model provides stronger causal arguments in FRD cases, and Part 2 describes what FRD causal arguments would look like in an ideal world.

1. Causation Advantages Offered by the Separate Spheres Model

As mentioned above in Part II(C), male plaintiffs in particular have had some difficulty articulating the causal theory of FRD against them, possibly accounting for their low success rates in Title VII FRD claims.²⁰⁰ However, this difficulty is not limited to men. Women bringing FRD claims, particularly in the early years of this cause of action, often made their arguments using failure-to-accommodate theories.²⁰¹ They argued that they engaged in gendered behavior (such as wanting to work part time to accommodate a breastfeeding schedule), and their employers failed to accommodate this workplace deviance and took adverse actions against them.²⁰²

This argument fits well with the descriptive and prescriptive stereotyping approach, which regards the employee's behavior as the causal nexus of the problem;²⁰³ however, it is disadvantageous in FRD litigation. Failure-to-accommodate

198. Williams & Bornstein, *supra* note 12, at 175–76.

199. See Miller & Borgida, *supra* note 8, at 21.

200. Bornstein, *supra* note 17, at 1335–36.

201. See, e.g., Barrash v. Bowen, 846 F.2d 927, 928–29 (4th Cir. 1988) (per curiam).

202. *Id.*

203. Miller & Borgida, *supra* note 8, at 20.

arguments tend to fail under Title VII because the statute does not require employers to accommodate employees' gendered behavior; it only requires non-discrimination.²⁰⁴ This means that if women want to increase their rates of success in Title VII FRD claims, and if men want to begin succeeding in Title VII claims in meaningful numbers, they should shift the explanatory focus in their arguments of causation by providing a Separate Spheres Model narrative of discrimination.

2. What FRD Causal Arguments Would Look Like in an Ideal World

As discussed above, women began to succeed in meaningful numbers in FRD cases when legal scholars and lawyers began to systematically frame FRD as a form of sex discrimination.²⁰⁵ In litigation, this type of issue framing takes place as early as the filing of the Complaint, and it continues throughout other filings and in trial. For purposes of Title VII, lawyers ideally should avoid failure-to-accommodate frames, which argue that the plaintiff wanted to take some form of gendered, workplace-deviant action and the defendant refused to allow it.²⁰⁶ In an ideal world, the argument would be that the employer's endorsement of the SSI, combined with structural features of the workplace that allowed this ideology to manifest, caused adverse actions against the employee. In other words, the employer held traditional stereotypes about the roles of men and women at work and in the home, and the employer penalized the plaintiff for failing to adhere to those stereotypes. The more plaintiffs articulate the harm they experienced as a form of sex discrimination affirmatively enacted against them by their employers, the more consistently the courts will recognize FRD as a form of sex discrimination against both men and women.

204. Williams & Bornstein, *supra* note 12, at 173. *See also* Barrash, 846 F.2d at 931–32 (finding that under Title VII, “people, male and female, suffering extended incapacity from illness or injury” are not equivalent to “young mothers wishing to nurse little babies” when requesting workplace accommodations).

205. *See supra* Part II.B.

206. Failure-to-accommodate arguments may be more appropriate under other causes of action. Although Title VII does not require employers to accommodate employees' caregiving needs, some disability and labor statutes do. *See, e.g.*, Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117, 12112(b)(5)(A) (2012) (including “not making reasonable accommodations” in the definition of discrimination).

C. THE SEPARATE SPHERES MODEL HELPS EMPLOYERS PREVENT DISCRIMINATION AND LITIGATION

Finally, the fact that the Separate Spheres Model allows for the systematic study of workplace and contextual factors that influence FRD means that employers are more empowered to prevent discrimination from occurring in the first place. As discussed above, the descriptive and prescriptive stereotyping approach does little to identify the types of workplace factors that might put an employee at risk for experiencing FRD.²⁰⁷ This means that employers have little opportunity to identify and correct FRD risk factors in their workplaces, and employees have little option but to wait to be discriminated against and then sue. Part 1 of this section proposes that the Separate Spheres Model addresses this problem by allowing employers to prevent discrimination, and Part 2 describes what employment practices would look like in an ideal world.

1. Preventative Advantages Offered by the Separate Spheres Model

Joan Williams argues that employers should be held to something like a negligence standard in FRD cases—if they do not actively assess their own workplaces for the risk of FRD, then they have not used reasonable care and should be held accountable.²⁰⁸ This approach is helpful to plaintiffs because it prevents employers from making the argument that, because they were unaware of their own employees' gender attitudes, they cannot be held responsible for individuals who engage in FRD. However, if employers are unable to identify specific aspects of their workplaces that are in need of change, this approach is unlikely to succeed. The Separate Spheres Model addresses this problem by allowing researchers to identify very specific workplace factors that contribute to FRD. As these factors are identified and understood better by psychologists, employers can begin to use this knowledge to proactively prevent instances of FRD.

2. What Employment Practices Would Look Like in an Ideal World

As research on the Separate Spheres Model unfolds, employers should be aware of developments in research on fea-

207. See *supra* Part I.C.2.

208. Williams, *supra* note 18, at 446–48.

tures of the workplace that increase instances of FRD. In an ideal world, employers would actively monitor their own workplaces for FRD risk factors and do their best to eliminate these factors. Individual supervisors might even be motivated to assess their own endorsement of the separate spheres ideology using the SSI scale.

Some might argue that employers should avoid creating a record of the level of bias that exists in their workplaces, in order to avoid liability in future lawsuits. However, there are likely ways to examine FRD risk factors in the workplace that instead create records of attempts to eliminate bias, which can be used in the employer's favor in litigation. There are also likely ways for individual supervisors to examine their own endorsement of the SSI anonymously and in ways that do not create a written record. This opportunity is not available under the descriptive and prescriptive stereotyping approach, which has not led to the measurement of individual variation in the likelihood of discriminatory responses. If employers stay attuned to research developments on the Separate Spheres Model, both employers and employees may benefit from an approach that prevents FRD from occurring, rather than simply providing damages after the fact.

CONCLUSION

FRD is a significant problem in today's workplaces, and it plays an important role in the gender disparities that persist despite major legal reforms. Both men and women who are victims of FRD deserve legal relief. Social psychologists' research on descriptive and prescriptive stereotyping in the workplace has been pivotal in persuading courts to recognize FRD as a legal harm and to recognize existing sex discrimination laws as modes of relief for this harm. Furthermore, legal scholars' reliance on descriptive and prescriptive stereotyping research and their persistence in convincing courts to pay attention to empirical developments is commendable. The importance of these scholars' work in the movement to craft legal solutions to FRD cannot be overstated.

However, the legal utility of the descriptive and prescriptive stereotyping approach is diminishing now that many courts believe that their lay theories of gender stereotypes and discrimination are accurate. The Separate Spheres Model offers a variety of rhetorical, empirical, and legal advantages in FRD cases. The Separate Spheres Model allows for the identification

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of workplace and situational factors that lead to FRD, provides plaintiffs with more effective expert testimony, encourages both men and women to rely on discrimination arguments rather than failure-to-accommodate arguments, and empowers employers to prevent FRD in the first place. This Note serves as a call to action for scholars, legal practitioners, and employers interested in addressing gender inequality to work toward the development of the Separate Spheres Model and the integration of this empirical approach into FRD jurisprudence.