

# 1 Institutions, Inequality, and the Mobilization of Rights

**F**OR THE PAST ONE-HALF CENTURY, INEQUALITY IN EMPLOYMENT has been addressed through antidiscrimination laws that prohibit discrimination on the basis of certain protected categories. These statutes conceive of inequality as the product of individual animus toward traditionally subordinated groups, including those defined by race, gender, and disability. Individual animus is clearly unacceptable, and workplace policies or rules that disproportionately disadvantage workers within a protected class are subject to challenge in some limited circumstances. Courts have also allowed challenges to workplace practices such as subjective decision making that allow animus to operate freely. Institutions, however, are at most marginal concerns for these statutes. In evaluating claims of discrimination, courts examine actions and rules within specific workplaces on a case-by-case basis; they do not consider the industry-wide practices, such as time norms, attendance requirements, or workplace schedules, which largely define work in our culture. Until recently, basic institutional arrangements that make up what we understand to be work have been largely insulated from any meaningful substantive legal reform.

A few laws enacted toward the end of the twentieth-century attempt to address work institutions directly. For example, the Americans with Disabilities Act (ADA) requires workplaces to provide reasonable accommodations to workers with disabilities, including changes to workplace structures and practices. The Family and Medical Leave Act

(FMLA), which is the subject of this study, requires specific modifications of time standards and the schedule of work to allow workers time off for their own illnesses, to care for ill or injured family members, for pregnancy and childbirth, or to care for a new child in the family. These statutes move away from the individual animus model toward an institutional-reform approach to ameliorating inequality. Like their antidiscrimination predecessors, however, these laws tend to treat institutions as structures within a single workplace, focusing on whether a particular employer's attendance policies, schedule requirements, and the like impermissibly affect workers protected by these statutes.

A different way to think about institutions is to view them as cross-workplace, culturally determined beliefs, norms, values, and practices that are self-perpetuating and reinforcing. In this view, institutions are so taken for granted that we rarely view them as changeable choices; instead, they seem to be natural and inevitable background features of our everyday lives. For example, time standards and attendance policies in a particular workplace also connect to broader cultural understandings of work as a full-time, year-round endeavor. In this sense, workplace practices that the ADA and the FMLA attempt to change, such as time norms and attendance requirements, are not just the rules of a particular employer, but instead are a social institution that is reinforced by collective values and beliefs that legitimize and naturalize those practices. In the context of inequality, this self-perpetuating aspect of institutions can create resistance to laws designed to change problematic practices, particularly in a legal regime in which rights are enforced primarily through a private right of action.

The thesis of this book is that, although rights are embedded within social institutions that often constrain social change, rights also operate as social institutions to create unexpected opportunities for change. New legal rights such as the FMLA do not change entrenched practices and meanings overnight. Workers who claim rights to time off must contend with established social practices and norms regarding work, gender, and disability that are antithetical to FMLA rights. These include workplace

**INSTITUTIONS, INEQUALITY, AND RIGHTS****3**

cultures that presume that women, but not men, prioritize family over work, that disability and work are mutually exclusive, and that any deviation from a standard year-round, full-time work schedule justifies penalties at work. But these cultural systems of meaning are not confined to just one workplace, nor do they affect only the actions of employers who are resistant to new rights. These workplace cultures also affect how workers, families, and friends understand FMLA rights, and they shape how judges interpret FMLA rights when workers mobilize those rights in court. As a result, rights like the FMLA that challenge institutionalized practices regarding work face resistance on multiple fronts: from skeptical courts, from resistant employers, and even from workers themselves, all of whose cognitions and behavior are subtly shaped by the institutions the FMLA was intended to change.

One strand of sociolegal theory suggests that, despite initial resistance from entrenched practices and norms, successful rights mobilization in the courts will eventually legitimize FMLA rights and help change cultural expectations about work and leave. Indeed, law can have an expressive, symbolic effect such that authoritative statements of legal requirements change individuals' normative beliefs and behaviors (Berkowitz & Walker 1967; Galanter 1983; Suchman 1997; Sunstein 1996). But institutional factors come into play here as well. Even when workers go to court, formal procedural rules determine which cases reach adjudication and produce decisions that become precedent. As this study will show, these institutional rules effectively screen out the cases most likely to lead to expansive interpretations of FMLA rights, and in this way constrain the symbolic impact of law.

That legal rights do not translate directly into social change is a longstanding theme in law and society literature. The fact that the law on the books and the law in action are different – and often contradictory – is a familiar story. This study builds on that simple premise by analyzing in detail the process by which institutions play a role in hindering, but also sometimes facilitating, social change through law. It examines not only how legal rights can be weakened, expanded, or even nullified in

particular social contexts, but also the ways in which that transformation is connected to larger social institutions. It also contributes to this literature by documenting the process through which interactions in particular social contexts can remake the meaning of institutions from the ground up. It thus speaks to broader questions about the conditions under which legal rights matter, and how cultures of power and inequality reproduce themselves when law operates in particular social settings.

This study lies at the intersection of several areas of law and society scholarship, including the debate about the utility of rights, research about rights mobilization and dispute resolution, and the literature regarding law's relationship to other normative systems. The remainder of this chapter briefly sets out how this project fits within and contributes to these theoretical traditions. A short historical background of the FMLA as a social policy is followed by a discussion locating this study within the ongoing debate about the utility of rights for social change. This discussion also lays out in more detail the institutional context of rights mobilization, by which I mean the entrenched workplace practices and accompanying expectations about law and inequality within which individuals come to understand and claim their rights.

### **The FMLA and American Family and Disability Policy**

The cultural norms, expectations, and institutional arrangements within which FMLA rights are embedded draw their meaning in part from how American social policy historically has dealt with maternity, family, and disability. Although the FMLA is the first American policy dealing with family and medical leave, it is by no means the first maternity policy, nor is it the first disability policy. The FMLA must be understood against the backdrop of earlier policies, which incorporated assumptions about the nature of gender and disability. Accordingly, a brief history of the social policies and civil rights laws that led to the FMLA is useful, particularly considering how these policies construct the meaning of work, gender, and disability.

## INSTITUTIONS, INEQUALITY, AND RIGHTS

5

Historically, family and disability policies have focused on women and people with disabilities as nonworkers rather than as workers, and have presumed that women and people with disabilities should not or could not work. This approach set up a mutually constitutive dichotomy between work on the one hand, and gender and disability on the other. Over time, this dichotomy gave meaning not only to social welfare provision but also to work itself, and constructed cultural understandings of work that implicitly excluded women and people with disabilities.

With regard to gender, that model of work and social life had at its center the family wage ideal, which presumes that the most common and most desirable family configuration is the male breadwinner/stay-at-home housewife model. Family wage ideology treats work as secondary to a woman's primary roles as mother and wife. Work in this rubric is a way for women to pass the time between childhood and marriage, or a means of earning a little "extra" income, but not a lifelong endeavor (Frank & Lipner 1988). Work practices reflected this presumption. Historically, women were commonly fired when they married or became pregnant, and employers justified paying women less than men by pointing to the male breadwinner ideal (Smith 1987). Even though many of these practices are now illegal, the cultural beliefs that support them remain: Women who become mothers still consistently find themselves devalued as workers (Budig & England 2001; Hochschild 1997; Williams 2000). In addition, modern work arrangements are still constructed around an ideal worker/marginalized caregiver model that allocates less desirable and less secure work to those, still primarily women, who meet family obligations (Kalleberg 1995; Kalleberg et al. 2000; Williams 2000).

Family wage ideology permeates the history of American social welfare policy directed toward women, much of which has assumed, and in some instances enforced, the breadwinner/homemaker model. For example, early maternity policy, such as mother's pensions and the Sheppard-Towner Act, focused on supporting women in their roles as mothers, not in their roles as workers (Frank & Lipner 1988; Skocpol 1992). Similarly,

early twentieth-century protective labor legislation relied on women's roles as mothers and wives to justify limiting their working hours and banning them from certain occupations (Frank & Lipner 1988; Kessler-Harris 1982). The Depression Era Economy Act enforced the family wage model by requiring married persons to be the first to be discharged from federal employment if their spouses were also government employees, recognizing only one person per couple as a "breadwinner" (Frank & Lipner 1988). Before portions of the Social Security Act were ruled unconstitutional in the 1970s, a wife, but not a husband, could collect survivor benefits upon the death of her working spouse because it was unthinkable that a wife might have provided the primary support for the family.<sup>1</sup> Even modern, facially neutral Social Security provisions still provide greater benefits to a family consisting of a single earner with a stay-at-home spouse than to a dual-earner family, even if the earnings of these two families are exactly the same (Liu 1999). Similarly, nominally gender-neutral New Deal policies tended to direct benefits toward long-term, full-time wage workers and their dependents (Mettler 1998), effectively excluding many women who worked part time, part of the year, or interrupted their work for childbirth and family responsibilities, while benefiting families that conformed to the breadwinner/homemaker ideal. Thus, American social welfare policies reflect and incorporate a deep ambivalence about whether mothers should work outside the home, and this historical ambivalence has helped constitute contemporary cultural frameworks for understanding the relationship between work and gender.

The story with regard to disability, although driven by different social dynamics, is much the same. American social policy has long incorporated a model of work and social life that constructs the meaning of disability in opposition to labor, and assumes that people with disabilities should be excluded from public life. By the twentieth century, it had become taken for granted that people with disabilities were not and

<sup>1</sup> See *Califano v. Goldfarb*, 430 U.S. 199 (1977).

## INSTITUTIONS, INEQUALITY, AND RIGHTS

7

should not be active participants in public life, including work (Stone 1984). Social policies tended to focus on residential homes and special schools that segregated people with disabilities from society, allowing the structure of the public world to develop without accommodating a range of abilities (Finkelstein 1980). Typically, social policies either institutionalized people with disabilities or provided for support outside of employment; these policies rarely aimed to remove barriers to participation in public life or work (Oliver 1990). Indeed, the very concept of “disability” evolved in part as an attempt to enforce participation in the labor market by identifying (and narrowly defining) the category of persons legitimately unable to work (Stone 1984); the inability to work continues to define eligibility for disability benefits today. In short, both work practices and disability policies developed around the assumption that disability and work were mutually exclusive.

Although their experiences differ, women and people with disabilities share a common historical relationship to the institution of work and its influence on the provision of social welfare benefits, and as a result, both gender and disability draw their meaning from a particular, historically contingent conception of work that was structured to exclude women and people with disabilities. Institutions such as work draw their power in part from how their assumptions and practices come to be naturalized and accepted as just the way things are, as unchangeable reality. Once these work structures and practices came to seem natural and inevitable, barriers to work for women who care for families and for people with disabilities appear to arise from their personal circumstances, rather than from the structure of work. For example, needing time off to care for sick family members becomes a “private” problem, and accommodations for disabilities become “special treatment.” Consequently, statutes like the FMLA that change the structure of work run up against deeply entrenched beliefs about who can and should work, about which features of work are necessary, and about what it would mean to adjust workplaces to make them more accessible to a broader range of potential workers.

Of course, the FMLA is not the first attempt to challenge the notion that it is natural and normal that women and people with disabilities not work. Both the women's movement and the disabilities movement of the 1970s and 1980s attempted to debunk assumptions that the gendered and able-bodied structure of work was natural and inevitable. Feminist advocates brought successful constitutional challenges to social policies that presumed that women were never the family breadwinner and always the dependent spouse. They also undermined assumptions that women, but not men, were responsible for caring for children and the home. Similarly, disability activists argued against a medical model of disability that located impairment solely within the individual. Instead, they articulated a civil rights model of disability that focused on removing environmental constraints that create barriers for some individuals, and therefore socially construct them as disabled (Drimmer 1993). Partly in response to these social movements, Congress enacted legislation protecting both women and people with disabilities in their roles as workers, including Title VII of the Civil Rights Act of 1964, Title I of the ADA, and most recently the FMLA.

Although these statutes explicitly recognize the status of women and people with disabilities as workers, Title VII and the ADA provide employment protections on the basis of identities – gender and disability – which historically have been constructed in opposition to work. Rights claimants under these statutes have struggled to prove that they were excluded from work because of their identity, rather than for neutral reasons justified by taken-for-granted work structures, especially when accommodations based on time are at issue. For example, courts have held that although employers may not fire a woman simply because she becomes pregnant, Title VII does not require employers to restructure work to provide time off for pregnancy and childbirth. Title I of the ADA requires workplaces to provide reasonable accommodations to disabilities, and it has produced some changes in workplace structures, most notably removing physical barriers such as the lack of ramps or inaccessible bathrooms (Engel & Munger 1996; Harlan & Robert 1998).



## INSTITUTIONS, INEQUALITY, AND RIGHTS

9

Despite this accommodation mandate, however, ADA claimants have had little success obtaining changes to the schedule of work to allow for absences because of illnesses or medical treatment, even though schedule adjustments are far less expensive than changes to physical structures (Harlan & Robert 1998). Work's institutionalized time norms have remained largely impervious to legal challenge because, although these statutes now formally require protections based on these identities, the social meaning of these identities, particularly in relation to work, remain the same.

The FMLA followed these legal attempts to challenge work practices that exclude women and people with disability, and can be seen as part of the civil rights attempt to denaturalize the implicit relationships among work, gender, and disability. But the FMLA also marks a sea change in American family and disability policy because it is the first such legislation to focus primarily on the features of work itself rather than on the identity of the workers it protects. By modifying work's structure directly, the FMLA does more than simply regulate work practices; it disrupts assumptions that disability and work are mutually exclusive, and that the normative worker is an always-healthy, always-ready individual free from any caretaking responsibilities for others. For this reason, the Act promises to make explicit the web of mutually constitutive meanings among work, gender, and disability, and to bring about reform. Yet, compared to the voluminous literature on both Title VII and the ADA, relatively little analysis addresses the courts' interpretations of the FMLA's structural reforms or how these reforms operate in practice.

Although the FMLA offers a new paradigm for restructuring work, there is some question whether this legislation can successfully restructure the deeply entrenched social relationships between work and family (Dowd 1989; Kittay 1995). For example, the FMLA requires workers to work at least twenty-five hours per week to qualify for its benefits.<sup>2</sup> Ironically, given the perception that the FMLA is primarily directed at

<sup>2</sup> 29 U.S.C. § 2611(2).

women, this requirement disproportionately excludes women because they often work part time to accommodate their caretaking responsibilities (Williams 2000). Also, because men generally earn more than women, unpaid leave creates an incentive for women rather than men to take time off to minimize the families' loss of income, at least in two-parent families. This dynamic reinforces traditional arrangements in which responsibility for care falls primarily on women (Dowd 1989).

Inequalities based on class and disability also affect the FMLA's practical meaning. For example, the FMLA applies only to workplaces with fifty or more employees; this excludes half the workforce (Kittay 1995).<sup>3</sup> The fifty-employee threshold excludes seasonal laborers and workers who cannot find full-time work, as well as workers with physical or mental impairments that prevent them from working full time. It also excludes most domestic workers, home health care providers, and child-care workers, all positions typically held by low-wage working women. Although the FMLA does protect low-wage workers' jobs when leave is unavoidable, that leave is unpaid. Accordingly, some feminists argue the FMLA disproportionately benefits wealthier families that can afford unpaid leave (Kittay 1995).

These are significant limitations, but it is important not to lose sight of how the FMLA challenges institutionalized oppositions between work and gender or disability on a cultural as well as practical level. The FMLA's gender-neutral parental leave provisions help undermine the traditional division of labor in the family by allowing both men and women to take parental leave. The Act challenges the ideal of the always-healthy, always-ready worker because it allows temporarily ill or injured workers to take job-protected leave. In legal terms, the FMLA is important because it brings together two disparate standards of legal theory, one addressing maternity leave and pregnancy, and a second addressing the relationship between work and disability. To these it adds a third dimension, the recognition for the first time that workers need to

<sup>3</sup> 29 U.S.C. § 2611(4).