

# Institutional Perspectives on Law, Work, and Family

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Annu. Rev. Law Soc. Sci. 2007. 3:397-426

First published online as a Review in Advance on August 15, 2007

The *Annual Review of Law and Social Science* is online at <http://lawsocsci.annualreviews.org>

This article's doi:  
10.1146/annurev.lawsocsci.3.081806.112803

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1550-3585/07/1201-0397\$20.00

## Key Words

gender, organizations, family leave, social change, motherhood

## Abstract

Work and family scholarship increasingly focuses on how institutions constrain the choices of families struggling to balance market work with care work. Recent legal reforms, including the Family and Medical Leave Act, also focus on institutional reform to alleviate work/family conflict. This article reviews important empirical questions raised by this institutional turn in both law and social science. How have changes in the institutions of family and work contributed to work/family conflict? Have legal reforms produced more egalitarian sharing of care work between men and women? How do work organizations respond to these legal mandates? How have organizational and cultural institutions hindered or given support to laws that attempt to reform the relationship between work and family? Empirical research indicates that legal reforms have brought about important changes but that entrenched work practices and cultural norms around work, family, and gender continue to generate institutional resistance to social change.

## INTRODUCTION

In the past few decades, the conflict between work and family, and the government's role in managing that conflict, moved from marginal concern to center stage. This emerging focus reflects monumental shifts in women's workplace participation, family structure, and cultural ideologies concerning gender, work, and family. Changes in labor markets and work organizations are also part of the story. For many families, these converging factors feel like a train wreck of clashing demands.

New government policies seem like obvious solutions, yet the conflict between work and family implicates longstanding social structures that may be difficult to dislodge. Demographic changes in families and in women's workplace participation map on to, and in some instances conflict with, much deeper, institutionalized social practices and normative commitments around work, family, and the relationship between them. These institutions define the meaning of work and give meaning to gender and family. For these reasons, understanding how institutions shape work/family conflict is a central question for social scientists who seek to theorize potential solutions and to document the unintended consequences of legal reforms.

The growing focus on institutions reflects the social constructivist turn in social science generally, and in gender theory, organizational theory, and feminist legal theory in particular (Berger & Luckman 1967, Giddens 1984). For example, gender theory has moved away from viewing gender as an individual trait or a socialized identity toward understanding gender as the product of microinteractions and institutionally constrained actions that (re)produce gendered social structure (Ferree 1990, Ridgeway & Smith-Lovin 1999, Risman 1998, West & Zimmerman 1987). In the organizational literature, social constructivist perspectives gave rise to neo-institutional theories about how organizational practices become institutionalized through normative, mimetic, or coer-

cive pressures from organizational environments rather than from economic or production imperatives (DiMaggio & Powell 1983). From this perspective, work organizations that grapple with work/family issues do not just rationally respond to competitive pressures, but also respond to, and recreate, social meanings in response to their organizational environments. Social constructivist ideas also found their way into debates in feminist legal theory about the meaning of equality when it comes to combining work, pregnancy, and family responsibilities (Finley 1986, Kay 1985, Littleton 1987, Minow 1987, Williams 1984/1985). Feminist legal theorists documented how socially constructed gender norms permeate the workplace and how work institutions recreate inequality by channeling women into marginal jobs and traditional family roles (Abrams 1989, Krieger & Cooney 1983, MacKinnon 1989, Siegel 1985).

The institutional turn in all these areas of scholarship suggests that a new perspective is emerging in which work and family scholars think of work as more than a neutral set of economically rational organizational practices that are separate from other arenas of social life. Instead, scholars in diverse disciplines have begun to view work as a social institution that shapes not only experiences within work organizations, but also the division of labor within families and the meaning of gender itself. In this view, work practices and norms are tied to deeply engrained normative commitments that help recreate and reinforce the social meaning of both work and gendered family arrangements. This perspective frames new questions about law's role in work/family conflict, including how legal reforms interact with the norms and practices embodied in the institutions of work and family.

This review examines how institutional processes shape the conflict between work and family and affect legal reforms directed toward easing that conflict. It considers how changing demographic and social arrangements have eroded standard work practices

and traditional family structure as mutually constitutive institutions. It also considers the degree to which institutional processes hinder or give support to legal mandates for reforming the relationship between work and family. As the empirical research reviewed here demonstrates, these organizational and cultural institutional processes are critical for evaluating whether legislative change is likely to bring about meaningful social change.

Together, the institutions of work and family encompass most of social life, and so it should not be surprising that the literature in this area is wide-ranging, interdisciplinary, and somewhat unwieldy to summarize. As a result, this article does not comprehensively address several important areas, including comparative research on work/family policies and research regarding the division of labor within the family. Excellent summaries of comparative research (Gornick & Meyers 2003, Kelly 2006) and work within the family (Bianchi et al. 2006) can be found elsewhere. Instead, this review develops its institutional theme by first examining how major social shifts have undermined the symbiotic relationship between standard work practices and traditional family arrangements. Second, the article considers the relationship between legal reforms and (a) workers' choices and behavior, (b) organizational adoption of work/family policies, and (c) institutional resistance to work/family policies. The review concludes by examining recent proposals for reform in this area, asking how institutional insights into the work/family conflict might better inform these policy choices.

## UNDERSTANDING THE PROBLEM

Describing the problem as the "conflict between work and family" is somewhat of a misnomer because of course not all family forms conflict with work schedules and demands. Families structured around a (male) breadwinner and a (female) homemaker are compatible with, and complement, the traditional

structure of paid employment on a full-time, year-round schedule. Conflict between work and family reflects substantial changes to both families and work that make these institutions less compatible and symbiotic. Indeed, much recent theorizing about work and family issues focuses on naming and analyzing the institutional dependence between the male breadwinner model and traditional work structures, including how these two institutions are mutually constitutive and reinforcing, even in the face of substantial social change undermining both sides of the dyad. And, as I explore in greater detail below, legal solutions interact with institutional arrangements in complex ways that make policy solutions difficult to formulate. So, the problem can be understood not so much in terms of static conflict, but instead in terms of dynamic social change that produces both adaptation and retrenchment in institutional arrangements.

Part of that social change has been a steep rise in the proportion of women who work. In the latter half of the twentieth century, women's labor force participation increased dramatically. In 1996, the labor force participation rate of women with children under six was 62.7%, compared with 45.1% in 1980, 30.3% in 1970, and only 18.6% in 1960 (U.S. Dep. Commerce 1997). Similar patterns emerged for women's participation rate in general (Hayghe 1997). To be sure, although most married women with children under six are employed, only about a third of employed mothers work full time (Cohen & Bianchi 1999, Kelly 2005a). In contrast, 96% of fathers with children under six were employed in 1997, and most of those men work full time (Kelly 2005a). Nevertheless, even though women may not always work the same schedules as men, many more women work now compared with 30 years ago.

Not surprisingly, given women's growing labor force participation, the proportion of families that fit the traditional breadwinner model also declined during this period, although the traditional model was never universal, particularly among economically and

racially marginalized populations (Kessler-Harris 1982). Approximately 70% of families in 1940 fit the traditional breadwinner model, but by 1988, traditional families accounted for only about 20% of all families (Hayghe 1990). Dual-income families did not become the new norm, however. Although dual-income families make up a growing proportion of families, single-parent families are also on the rise owing to increasing divorce rates and more never-married parents (Fields & Casper 2001, Hayghe 1990). As a result, there is no longer a typical or dominant family form. This change in the composition of American families presents particular challenges for crafting legal responses to work and family issues, as no one policy will fit all families.

Women's increasing workforce participation can be seen as reflecting changing norms about the acceptability of women (particularly women with children) engaging in paid employment. Indeed, this increase coincided with the women's movement in the 1970s and legislation such as the Civil Rights Act of 1964 that prohibited workplace discrimination on the basis of sex (Ferree & Hess 1994). The increase also can be seen as a response to structural changes in the labor market such as stagnating wages and increasing instability of employment for many American workers. Many mothers entered the work force in part because one income was no longer sufficient to support their families (Martin & Kats 2003, White & Rogers 2000). In addition, patterns of hours worked have changed in the past three decades. Many highly skilled workers experienced an increase in hours worked (Jacobs & Gerson 2001, 2004; Schor 1992). At the same time, other workers have experienced increasing instability and contingency around work (Jacobs & Gerson 2001, 2004), which sometimes has required that either one parent hold down two jobs or both parents work.

Some theorists point out that this changing institutional environment not only produced major structural changes in the labor force, but also generated deep contradictions be-

tween cultural norms associated with market work and those associated with care work (Gerson 2002, Hays 1996). Working women in particular find themselves in a catch-22 between suboptimal choices, as they cannot meet both good worker standards, which require full-time, uninterrupted employment, and good mother standards, which require intense, time-consuming, and personal care (Hays 1996, Williams 2000). As Gerson (2002, p. 12) puts it, social change creates ambiguity that gives rise to serious socially structured moral dilemmas because "institutional and cultural contexts make it difficult or impossible for individuals to make a socially sanctioned choice. . . . [A]ll options invite disapproval but action is nevertheless required." However, such social contradictions often create opportunities for innovative responses to change that can both undermine and rework the institutions that constrain choice around work and family (Albiston 2005a, Gerson 2002, Ridgeway & Smith-Lovin 1999, Sewell 1992).

Both federal and state governments have adopted legal reforms to respond to the stress on social institutions created by these changes. For example, Title VII of the 1964 Civil Rights Act prohibits discrimination on the basis of gender in the terms and conditions of employment (42 U.S.C. § 2000e et seq.). The Pregnancy Discrimination Act requires employers to treat pregnant women the same as other employees who are similar in their ability or inability to work (42 U.S.C. § 2000e(k)). The Equal Pay Act requires that men and women who perform the same jobs receive the same pay (29 U.S.C. § 206(d)). The Family and Medical Leave Act (FMLA) requires covered employers to grant eligible workers up to 12 weeks of unpaid, job-protected leave each year for a variety of family and medical reasons, including maternity leave and leave to bond with a new child in the family (29 U.S.C. § 2611 et seq.). In addition, several states have adopted more extensive leave statutes, including paid leave in California and time off for ordinary events in caring for families such as

attending doctors' appointments or caring for mildly ill children who are nevertheless too sick to attend school (Albiston 2005c, Han & Waldfogel 2003). All these developments respond, in part, to the growing proportion of women, especially mothers, who now work outside the home, and the pressure on workers to balance work responsibilities with family caregiving needs. Extensive as these reforms are, they lag far behind family policy provisions in most other industrialized countries (Gornick & Meyers 2003).

Although early legal reforms generally focused on prohibiting discrimination on the basis of gender, recent legislation has moved away from an antidiscrimination model and toward requiring substantive changes in institutionalized work practices (Burstein et al. 1995). The FMLA, state leave statutes, and laws mandating "sick days for sick kids" all reflect this trend, which tracks the reasonable accommodation approach taken by the Americans with Disabilities Act (ADA). This trend reflects a major theoretical shift in approaches to work/family issues. It acknowledges that not only overt discrimination, but also the very nature of institutions themselves drive the conflict between work and family. These reforms recognize that substantive change requires reworking institutions directly and attempt to use law to do just that. Below, I take up the question of whether institutional processes have helped or hindered these legal reforms.

## GENERAL IMPACT OF LEAVE LEGISLATION

If choice and agency to manage work and family are institutionally constrained, legally mandated changes in institutional arrangements should, theoretically, produce different choices and behavior. Accordingly, one important empirical question is how legislative changes to institutionalized work requirements affect parents' and employers' responses to work/family conflict. This section discusses research about how leave legislation

(primarily the FMLA) has affected both gender equity and the work/family conflict. The primary research questions here include: How has leave legislation affected leave coverage? Do more workers now have access to family leave? Has the legislation promoted egalitarian sharing of caretaking responsibilities, or do gendered patterns of leave taking persist? How have legal mandates for leave affected the employment and the wages of women?

### Leave Coverage

Before Congress enacted the FMLA, leave benefits in the United States were far from universal and were primarily available to highly paid, high-status workers (Kamerman et al. 1983, Vogel 1993). Some scholars suggested that the FMLA, which applies only to large employers, would do little to improve the availability of leave because it covers less than half of private sector workers and because covered workers are disproportionately likely to have had access to leave even before the FMLA came into effect (Ruhm 1997, Waldfogel 1999b, 2001). Empirical evidence indicates, however, that the FMLA has significantly increased the percentage of workers with access to family leave. For example, Han & Waldfogel (2003) found that legal entitlements to parental leave substantially increased unpaid leave coverage in the 1990s. The largest jump in coverage occurred around the enactment of the FMLA in 1993, suggesting that legal mandates produced this increase (Han & Waldfogel 2003). In addition, the post-FMLA increase in coverage was sharpest among workers covered by the act, indicating that the law affected coverage independent of other contemporaneous social changes that may have encouraged employers to provide leave (Waldfogel 1999a, 2001). Moreover, increased coverage estimates do not account for expansion in benefits among employers who offered leave before the FMLA became effective. For example, two-thirds of employers reported altering their leave policy to comply with the FMLA, including

providing longer leaves (66%), permitting leaves for male workers (69%), or providing job protection for leaves (55%) (Commission on Leave 1996). Class differences in coverage among workers persist, however. Lower-wage workers are less likely to be covered because they tend to work for smaller employers that are not covered by the act (Cantor et al. 2001, Gornick & Meyers 2003).

### Patterns in Leave Use

Has leave legislation promoted a more egalitarian division of caretaking responsibilities between men and women? To answer this question, several scholars have investigated the relationship between gender and patterns of leave taking post-FMLA. Although the FMLA was intended to promote gender neutrality in family leave use (Schroeder 1988), critics note that unpaid FMLA leave tends to reinforce gendered patterns of care work. They contend that because women generally make less than men, families incur smaller opportunity costs if the mother, rather than the father, takes unpaid leave (Dowd 1989a, Kittay 1995).<sup>1</sup> In addition, unpaid leave violates cultural norms about men as family breadwinners, which may cause employers to resist allowing men to take leave. I explore the question of employer attitudes in more detail below in the section on organizational resistance to leave.

Empirical studies consistently find gendered differences in leave-taking behavior. Women generally take family leave more often than men, and women generally take longer family leaves than men (Armenia &

Gerstel 2006, Gerstel & McGonagle 1999). Although men do take family leave, these leaves tend to be of relatively short duration, from a few days to one week (Armenia & Gerstel 2006, Bond et al. 1991, Pleck 1993), compared with approximately 9 to 12 weeks for women, particularly for maternity disability leave (Commission on Leave 1996, Hyde et al. 1996). Armenia & Gerstel (2006) found that leave taking varied with the reason for taking leave as well as with gender: Men are almost as likely as women to take leaves for seriously ill children and parents, but men are much less likely to take leaves to care for and bond with a newborn child. Most men report that they want the opportunity to take family leave (Hyde et al. 1993, Pleck 1993), so these patterns in leave-taking behavior may reflect pressure from exogenous expectations about when it is appropriate for men to take time off from work for family reasons more than endogenous gendered preferences about leave.

Armenia & Gerstel (2006) found interesting racial differences in these gendered leave-taking patterns: White men, but not men of color, are less likely than women to take family leave. The researchers suggest that the interaction between race and gender may reflect cultural factors in that children and kinship may be more central among certain racial communities. They also note that the wage gap between spouses is greater for white couples than for African American couples, and this gap may encourage less egalitarian leave taking among whites (Armenia & Gerstel 2006). Future research should investigate variations in cultural norms across multiple racial and ethnic communities, as different cultures may take different approaches to solving the work/family conflict. Indeed, Armenia & Gerstel's findings underscore how the diversity of families produces different responses to legislation, and how this diversity complicates the task of developing a comprehensive work/family policy. Their findings also show how work features external to the family, such as the gender

<sup>1</sup>This critique assumes, however, that there are two parents in the family, rather than a single parent who needs job-protected leave to hold on to a job. Also, in the United States leave entitlements are personal, rather than family, benefits, in the sense that the FMLA allows each parent to take up to 12 weeks of unpaid, job-protected leave for the arrival of a new child. This arrangement creates an incentive for fathers to take leave to maximize parental time with the new child because the father's leave time is a "use it or lose it" benefit that cannot be transferred to the mother.

wage gap, shape choices about taking family leave.

Empirical research also indicates race and class disparities in the need for and use of leaves provided by the FMLA. Gerstel & McGonagle (1999) found that although women, parents, low-income individuals, and African Americans were particularly likely to perceive a need for job leaves, married women and whites were more likely to actually take leave. In addition, workers who meet the criteria for coverage under the FMLA tend to be relatively affluent. The authors argue that the FMLA is structured to benefit primarily white, middle-class, married individuals with significant financial and familial resources, particularly given the unpaid nature of leave and the relatively narrow definition of family in the statute. They also note that those with less income are especially vulnerable to workplace pressures not to use family leave: Workers with less income were significantly more likely to report pressure to return to work and significantly more likely to report being denied time off to attend to family medical concerns (Gerstel & McGonagle 1999). Thus, not only social inequalities based on gender, but also those based on race and class may be reinforced by the current structure of family leave legislation.

Most empirical findings regarding gendered patterns of leave use come from cross-sectional, rather than longitudinal studies. Accordingly, they do not speak to how leave-taking patterns may have changed in response to leave legislation, although they do document that gendered patterns of leave taking persist post-FMLA. There are, however, a few studies that analyze longitudinal data to determine whether the FMLA has increased leave usage over time. On this question, the evidence is mixed, with some studies showing that usage increased post-FMLA (Waldfogel 1999b, 2001), and others producing little evidence that the FMLA increased men's leave taking and only mixed evidence for increases in women's leave taking (Han & Waldfogel 2003). These findings may differ because Han

& Waldfogel studied only unpaid leave, and, as they suggest, unpaid leave may do little to encourage increased leave taking, especially among men. Indeed, comparative research suggests that fathers' use of leave is greater in countries with paid parental leave mandates, although it is difficult to disentangle the effects of leave legislation from variation in cultural factors (Gornick & Meyers 2003).

### Effects on Women's Wages and Employment

Finally, a few studies address the common concern among economic scholars that the FMLA's institutional reforms may have unintended negative effects on women's employment and wages. Although the act is gender neutral, only women use pregnancy-related disability leave. In addition, employers may perceive women to be more likely to use other forms of leave because women traditionally do more care work than men. As Waldfogel (1999b) notes, theory on mandated benefits suggests that if employers perceive women to be more costly employees than men owing to leave mandates, they may pass the costs of FMLA leaves along to women as a group. This cost shifting could take the form of lower employment (if employers shift away from hiring women to attempt to save the costs associated with leave), and/or the form of lower wages (if employers pass along the costs of the benefit to women) (Waldfogel 1999b). Countervailing pressures may mitigate or offset this potential cost shifting, however. For example, Title VII and *Phillips v. Martin Marietta Corporation* (1971) (which held that an employer's refusal to employ women, but not men, who had preschool-age children could violate Title VII) prohibit employers from basing decisions about wages and employment on gendered assumptions about care responsibilities. Although legal claims can be difficult to prove, antidiscrimination law may have some normative or deterrent effect that mitigates potential employer cost shifting. In addition, cost shifting might be offset by an

increase in women's labor force attachment if women use job-protected leave to stay in the same position, retain their seniority, and avoid a break in employment (Waldfogel 1999b).

Empirical studies generally have found little or no negative effect of leave legislation on women's wages and employment (Baum 2003; Klerman & Leibowitz 1997; Ruhm 1997, 1998; Waldfogel 1999b).<sup>2</sup> For example, both Waldfogel (1999b) and Baum (2003) found that the leave benefits mandated by the FMLA had no significant negative effects on women's employment or wages. Waldfogel also shows in other work that women who had leave coverage (paid or unpaid) and returned to work after childbirth received a wage premium that offset the family gap or wage penalty for having children (Waldfogel 1997a, 1998). This finding suggests that leave legislation improves women's work outcomes by ensuring continuity in the same job and reducing long breaks in employment.

Along these lines, family leave policies, especially those that mandate job-protected leave, are associated with a more rapid return to work after leave and with returning to the same employer after childbirth (Berger & Waldfogel 2004, Hofferth & Curtin 2006, Lyness et al. 1999, Smith et al. 2001, Waldfogel 1998, Waldfogel et al. 1999). One recent longitudinal study found that women who took leave returned to work significantly sooner after the passage of the FMLA than before it, and the proportion of women who returned to the same job was higher post-FMLA than before it (Hofferth & Curtin 2006). Hofferth & Curtin (2006) also found, however, that mothers' hourly postpartum wages were lower post-FMLA than before, except for mothers who returned to the same employer, which the authors suggest indicates a trade-off between flexibility and compensation postpartum.

<sup>2</sup>Although women as a group do not appear to have suffered detriment as a result of legislation, research suggests that individual workers who take leave are penalized in terms of wages and other benefits (Judiesch & Lyness 1999, Jacobsen & Levin 1995).

The premise behind the mandated benefits dilemma may also be faulty, as this theory assumes that there are, in fact, costs to providing family leave. There is contrary evidence that providing unpaid leave costs less than allowing employees to quit and hiring replacements (Trzcinski & Alpert 1990). Costs are minimal because employers do not have to pay workers on unpaid leave, and employers typically shift the work of absent workers to other employees, rather than hiring temporary replacements (Bond et al. 1991). In addition, several studies indicate that access to family friendly policies reduces turnover, which can be very expensive for employers (Aryee et al. 1998, Batt & Valcour 2003, Glass & Riley 1998, Holtzman & Glass 1999, Scandura & Lankau 1997).

Although research suggests that the FMLA produced little or no negative effect on employment and wages, comparative research suggests that the effects of leave legislation may vary with the length of leave taken (Gornick & Meyers 2003, Ruhm 1998). In a study of maternity leave provisions across 16 European countries, Ruhm (1998) found that short mandated leaves (three months paid leave) increased women's employment and had no wage effects, whereas longer mandated leaves (approximately nine months leave or more) increased employment but had a negative effect on wages. Ruhm notes that the positive employment effect may be because some countries count individuals on leave as employed, whereas workers who left employment after the birth of a child count as unemployed, although this does not explain the entire positive impact on employment. Ruhm also notes that long mandated leaves may cause aggregate wages to go down not only because employers (illegally) shift leave costs to female employees, but also because the female labor supply goes up as women who otherwise would not work (and who may have fewer skills and less experience) enter the labor market to qualify for paid leaves. Perhaps this explains why evidence regarding mandated leave benefits in the United States, virtually all of



which are unpaid, finds few negative effects on either employment or wages for women. Nevertheless, short, unpaid leaves impose other costs. Workers who need leave often do not take it because it is unpaid (Cantor et al. 2001), and they may suffer financial hardships because of the loss of pay if they do take leave. Also, longer maternity leaves are associated with better outcomes for both mothers and children (Clark et al. 1997, Gornick & Meyers 2003, Hyde et al. 1995, Ruhm 2000).

In contrast to the near consensus that leave mandates do not negatively affect the employment and wages of women generally, ample research makes clear that there is a significant wage penalty for motherhood (Kelly 2005a). Mothers earn less than men, whether or not those men have children; mothers also earn less than women who do not have children. For example, Waldfogel (1997b) found that in 1991, mothers' hourly wages were 81% of nonmother female workers' wages and 73% of men's wages. Other studies based on survey data document similar penalties (Anderson et al. 2003, Budig & England 2001, Waldfogel 1997a). What causes these penalties is in dispute, with some scholars attributing wage differences to productivity and skill differences between mothers and nonmothers, and other scholars pointing to discrimination as the explanation. Supporting the discrimination explanation, most studies indicate that wage penalties remain even after controlling for factors that might differentiate mothers and nonmothers, such as human capital investments, part-time employment, the mother-friendly characteristics of jobs held by mothers, and other important differences in the characteristics, skills, and behaviors of mothers and nonmothers (Anderson et al. 2003, Budig & England 2001, Waldfogel 1997a).

Experimental research that holds constant worker characteristics such as qualifications and productivity confirms that wage differentials likely result from employer discrimination against mothers, rather than from differences between mothers and other workers (Correll et al. 2007, Cuddy et al. 2004, Fuegen

et al. 2004). For example, Cuddy et al. (2004) found that when working women become mothers, they trade evaluations of perceived competence for warmth: They are perceived to be warmer but less competent than working women without children. In contrast, when men become fathers, they make no such trade-off; instead they gain in perceived warmth and maintain perceived competence relative to working men without children. Cuddy et al. (2004) also found that evaluators reported less interest in hiring, promoting, and educating working mothers relative to working fathers and childless employees. Correll et al. (2007) found that subjects who evaluated applications from equally qualified job candidates penalized mothers relative to other workers on factors such as perceived competence, suitability for management training, and recommended starting salary. Mothers were also held to a higher performance standard than nonmothers in terms of attendance and punctuality at work (Correll et al. 2007). With regard to attendance criteria, as discussed in more detail below, some studies also show that behavior that signals care responsibilities, such as taking leave, is associated with lower performance evaluations, less likelihood of promotion, and lower salaries (Allen & Russell 1999, Glass 2004, Judiesch & Lyness 1999, Wayne & Cordeiro 2003). Legal reforms such as prohibiting parental status discrimination and requiring job-protected leave may help mitigate these effects.

Institutional theories suggest that over time, normative, as well as economically rational, motivations may affect employers' behavior so that both cost shifting (to the extent it exists) and penalties for leave taking become less common (Davis & Kalleberg 2006, Kelly & Dobbin 1999, Meyer & Rowan 1977). Leave legislation is a relatively new phenomenon. As more organizations adopt family friendly policies, these policies may come to be seen as appropriate and legitimate organizational practices. As a result, employers may no longer see penalizing potential leave takers as an available strategy,

but instead see providing leave as a legitimate requirement of operating a going concern. Also, as more men begin to take leave, leave taking may eventually cease to be salient as a gendered behavior, which in turn creates less of an incentive to shift costs to women as a group. Some scholars have suggested, however, that it is also possible that the penalty for parenthood may remain but simply cease to be a gendered phenomenon (Hunt & Hunt 1990). In other words, the relevant categories may become parents and nonparents, rather than women and men, without any substantial change in institutional arrangements at work that penalize care responsibilities.

### **INSTITUTIONAL PROCESSES AND ORGANIZATIONAL ADOPTION OF FAMILY POLICIES**

Neo-institutional developments in organizational theory suggest that social meaning and organizational environment are as important as competitive pressures in determining how organizations respond to legal mandates. These perspectives posit that organizational practices become institutionalized—that is, legitimate, taken for granted, standard, and expected—through environmental pressures that feed mimetic, coercive, and normative isomorphic processes (DiMaggio & Powell 1983). For example, organizations may respond to legal mandates by adopting new policies and practices (coercive isomorphism). Organizations do this not only from fear of legal sanction but also from the need to appear to be legitimately responding to legal mandates; indeed, this form of compliance may be largely symbolic and ceremonial (DiMaggio & Powell 1983, Edelman 1992). Organizations may also copy the compliance behavior of other organizations in their organizational field (mimetic isomorphism), or adopt policies recommended by human resources professionals attuned to the norms in their field (normative isomorphism) (DiMaggio & Powell 1983). In these ways,

neo-institutional theories show how an organization's environment as a whole, rather than just formal legal mandates or competitive pressures, drives compliance behavior and shapes what form institutionalized compliance with law will take (DiMaggio & Powell 1983; Edelman 1990, 1992, 1999; Edelman et al. 1993, 1999; Edelman & Suchman 1997; Sutton et al. 1994).

There is no question that more organizations have adopted work/family policies in recent years, but there are competing theories as to what drives this process. In their excellent and comprehensive article, Kelly & Dobbin (1999) examine three competing theories, and their analysis provides a useful framework for discussing this question here. The researchers first discuss explanations centered on the feminization of the workplace, which contend that organizations adopt work/family policies as a means to compete for women workers as more women enter the workforce (Davis & Kalleberg 2006, Glass & Fujimoto 1995, Goodstein 1994, Guthrie & Roth 1999, Osterman 1995). In contrast, explanations that focus on legal regulation contend that work/family policies are primarily a rational response to legislative mandates. These approaches generally treat organizations as rational actors that adopt policies in response to the threat, and relative likelihood, of legal sanction (see Kelly & Dobbin 1999). Taking a third approach, some neo-institutionalist scholars argue that work organizations adopt work/family benefits in response to environmental pressures including not only law, but also normative pressures from other organizations in their organizational field and from professionals' recommendations about how to translate ambiguous legal mandates into corporate policy (Edelman 1990, 1992; Ingram & Simons 1995; Kelly & Dobbin 1999; Milliken et al. 1998). Here, the process is driven in part by the organization's need both to signal compliance with the law and to seek legitimacy within its organizational field (DiMaggio & Powell 1983). Thus, as Davis & Kalleberg (2006, p. 199) note, "organizations

may adopt family friendly benefits because they regard them as accepted and legitimate practices, whether [or not] they actually enhance recruitment and retention, increase efficiency, or lower costs.”

Kelly & Dobbin's (1999) study evaluated these competing theories by examining organizational adoption of maternity leave policies between 1955 and 1985, prior to enactment of the FMLA. They found little evidence for the feminization thesis; neither sex composition of the workplace nor increasing feminization over time was significantly related to organizational adoption of leave policies. They also conclude that organizations were not responding to the threat of direct legal sanction, as relatively weak and legally embattled administrative rules were better predictors of maternity leave adoption than were the stronger statutory mandates enacted later. Instead, the researchers argue, organizations “behaved as social actors, copying the behavior of others, rather than as rational calculators, making objective assessments of the risks associated with non-compliance” (Kelly & Dobbin 1999, p. 486). To support this conclusion, they point to the fact that the presence of benefits professionals (who presumably track emerging norms in the organizational field) and media coverage of challenges to Equal Employment Opportunity Commission regulations on maternity leave best predicted adoption of maternity leave policies. One might quibble that perhaps media coverage of challenges to the regulations did not so much communicate norms as increase the salience of legal sanctions, but the researchers also found that other measures of sanction salience, such as the number of enforcement actions under maternity leave laws, did not predict adoption of maternity policies.

Other studies provide additional evidence to support neo-institutional explanations for organizations adopting work/family policies in response to legal mandates (Davis & Kalleberg 2006, Guthrie & Roth 1999). Davis & Kalleberg (2006) distinguish among coercive, normative, and mimetic institutional

processes. They found evidence that mimetic (imitating other organizations) and coercive (in response to legal mandates and surveillance) institutional processes lead to organizations adopting work/family policies, but they found no evidence that normative institutional processes driven by human resources professionals are at work. Guthrie & Roth (1999) found that organizations in federal judicial circuits that have more expansive interpretations of antidiscrimination legislation are more likely to offer paid maternity leave. Their cross-sectional data, however, make it difficult to determine the causal mechanism operating here. These organizations may not be responding to their legal environment, but instead may simply be in progressive jurisdictions where both the courts and the business communities embrace family friendly policies. Alternatively, the circuit courts might be responding to, and institutionalizing, progressive business practices rather than the other way around (Edelman et al. 1999).

The growing evidence for how institutional processes affect organizational adoption of work/family policies raises some interesting empirical questions. First, as Edelman (1992) has pointed out, formal policies do not necessarily translate into actual compliance on the ground. Do institutional processes lead to significant progress toward family friendly workplaces, or do they merely produce symbolic compliance in the form of paper policies that organizational actors largely ignore or subvert? Second, if in fact organizations respond to normative institutional pressures in addition to the threat of legal sanction, at least theoretically it should be possible to harness institutional processes to produce family friendly benefits that go far beyond legal requirements. In other words, if leading organizations in certain organizational fields adopt family friendly best practices such as paid leave that go beyond legal requirements, mimetic or normative pressures should cause other organizations to do so as well, even in the absence of coercive pressures from law. If this is the case, then

promoting family friendly best practices to human resources professionals and other diffusion agents would help promote change alongside more coercive legislative reforms (Kelly 2003, Williams & Segal 2003).

Finally, institutional processes may also lead to undercompliance with legal mandates. In recent work, Kelly (2005b) found that at least one-quarter of workplaces covered by the FMLA failed to comply with the parental leave provisions of this federal statute. In her analysis of data from a survey of organizations covered by the FMLA, she found that noncompliance took a particular, gendered form: Organizations with illegally short maternity leaves were more common than those that lacked maternity leave, whereas the pattern was reversed for paternity leaves. Note that although the FMLA is gender neutral, these patterns of noncompliance track the older legal environment that required pregnancy disability to be treated the same as other disabilities and did not require parental leave for either parent. Kelly argues that noncompliance results from the failed deinstitutionalization of older policies, such as short pregnancy disability leaves often required by the Pregnancy Discrimination Act, and the common practice of allowing no time off or only a few days of vacation for fathers (see Malin 1993/1994). Thus, "non-compliance may occur when organizations hold on to existing policies and practices (and the beliefs and expectations that support those practices), rather than changing their policies and practices to match the new legal environment" (Kelly 2005b). Kelly's work confirms that noncompliance, like compliance, does not always follow from rational calculations of costs and benefits, but instead can be influenced by institutionalized practices, even those that were institutionalized in response to prior legal mandates.

### **INSTITUTIONAL RESISTANCE TO WORK/FAMILY POLICIES**

In addition to explaining why organizations adopt family friendly policies, institutional

processes also play a role in organizational resistance to legal mandates. For example, organizations that offer work/family policies may adopt these policies primarily for their symbolic value in signaling that the organization is responsive to legal mandates and to normative concerns about work/family conflict (Meyer & Rowan 1977). In practice, these policies may remain largely decoupled from the actual functioning of the organization and may therefore produce little substantive change in managerial behavior (Edelman 1992, Edelman et al. 1999). In some instances, managers adapt workplace policies to be responsive to managerial concerns by implementing work/family accommodations as merely discretionary benefits rather than legal mandates (Albiston 2005a, Kelly & Kalev 2006), or by treating disputes as personality conflicts or managerial failures rather than potential legal violations (Albiston 2005a,b; Edelman et al. 1993). In addition, leave policies for men can be hidden by incorporating them into existing leave of absence policies, and, as a result, many fathers may be unaware that legally mandated parental leave benefits are available to them (Malin 1993/1994).

Does organizational adoption of work/family policies in response to law translate into actual change on the ground? Several scholars suggest that established work practices, and the normative beliefs associated with them, are likely to create resistance to work/family policies. These practices include norms around time, such as face time, constant availability, and total commitment to the job, all of which are common in professional settings (Abrams 1989, Acker 1990, Epstein et al. 1998, Perlow 1995, Schor 1992, Williams 2000). Institutional resistance, particularly to men taking family leave, may also come from gendered cultural norms about men as workers and women as caretakers (Albiston 2005a, 2006; Malin 1993/1994; Pleck 1993). Considerable empirical evidence details how institutional processes within organizations can undermine work/family policies.

In some instances, internal organizational cultures discourage workers from making use of these policies. For example, Thompson et al. (1999) found that perceptions of an unsupportive work/family culture were associated with less utilization of work/family benefits and were positively related not only to work/family conflict but also to workers' intentions to leave the organization. Ethnographic studies conducted before the FMLA came into effect show that workers often choose not to use their employers' family friendly policies because they fear negative consequences for their status and advancement at work (Fried 1998, Hays 1998, Hochschild 1997). These fears are well-founded given evidence that taking leave is associated with lower wages and other penalties at work (Jacobsen & Levin 1995, Judiesch & Lyness 1999). Qualitative research conducted after the FMLA became effective documents that penalties for taking leave persist despite legal entitlements to leave, and that antileave norms are not limited to one or two idiosyncratic workplaces (Albiston 2005a,b, 2006). Indeed, a post-FMLA survey found that 32% of eligible leave takers chose not to do so because they feared they might lose their job, and 43% chose not to take leave because they believed their job advancement might be hurt if they did (Cantor et al. 2001; see also Finkel et al. 1994).

Intraorganizational social context also can affect leave use. For example, workers who belong to work groups with organizational clout are more likely to use family friendly policies than those that have less power, even after individual-level factors such as gender or caretaking responsibilities are controlled (Blair-Loy & Wharton 2002). Interestingly, however, the effects of work group power are much stronger for flexibility policies, which are not legally mandated, than for family care policies, which are now legal entitlements for many employees (Blair-Loy & Wharton 2002). Legislative mandates may make family care policies less ambiguous, contested, and perhaps discretionary than flexibility poli-

cies, and thus help reduce the impact of a worker's personal (or work group) organizational clout. Nevertheless, these findings indicate that workers' power within the organization continues to affect their ability to use family friendly policies despite legal reforms.

Cultural institutions also interact with organizational processes to create gendered variation in patterns of leave use. Work is a social institution built around cultural expectations and practices regarding how men and women combine paid employment and family obligations. Full-time, uninterrupted work schedules implicitly assume that workers have no caretaking responsibilities and that someone else (traditionally an unemployed wife) will see to those needs (Fraser & Gordon 1994, Pateman 1988, Williams 2000). Expectations that women will care for family and men will take on the breadwinner role do not vanish overnight when new legislation passes or organizations adopt family friendly policies. Also, workplace practices built around these gendered assumptions persist, and these practices can create resistance to legal rights to leave.

Although federal and state leave laws are gender neutral, organizations may implement these mandates through a filter of gendered expectations about work and family. For example, Albiston (2005b) found that men and women who experienced conflict over FMLA leave received different reactions to their attempts to mobilize their entitlements to family leave. Men were encouraged not to use their entitlement to leave in the first place, whereas women experienced fewer problems taking leave but encountered resistance to returning to work or penalties at work if they did return (Albiston 2005a). Organizational resistance to fathers taking parental leave is common. Malin (1993/1994) reports that in surveys conducted before the FMLA became effective, 63% of larger employers considered it unreasonable for a man to take any parental leave and another 17% considered parental leave reasonable only if limited to two weeks or less. Legal mandates may

eventually change these norms, but even in Sweden, where parental leave mandates are well established, employer resistance to fathers' taking leave persists. For example, Haas & Hwang (1995) found that although most Swedish companies were aware of family leave laws, few had changed their corporate policy to make the work environment supportive of fathers. Swedish men made only modest use of leave time, typically taking a few days of paid time off immediately following the birth of a child, and not otherwise reducing their work schedule or taking longer leaves (Haas & Hwang 1995).

A few experimental studies also document these cultural responses to leave. Because experimental studies hold postleave performance constant, they isolate the effect of normative expectations attributable to gendered stereotypes from the effect of variations in actual performance. Experimental research indicates that decision makers evaluate leave taking by men more negatively than that of women, and more negatively still than how they evaluate men who do not take leave. For example, Wayne & Cordeiro (2003) asked subjects to evaluate identical personnel files for employees who took legally protected FMLA leaves. Their subjects rated men who took parental leave as less likely to help their coworkers, be punctual, work overtime, or have good attendance than men who did not take parental leave and than women regardless of leave-taking behavior. In another experimental study, Allen & Russell (1999) found that men who took a leave of absence for parental reasons were less likely to be recommended for rewards than were men who had not taken leave (Allen & Russell 1999). Other studies have not found similar effects for women who took leave compared with women who did not (Wayne & Cordeiro 2003). There is some evidence, however, that in general male evaluators perceive women to be less likely than men to work overtime, be punctual, and to have good attendance (Wayne & Cordeiro 2003).

These studies suggest that deeply entrenched expectations about work and gender affect how leave rights play out for men and women. These expectations, however, present complicated dynamics around the interaction between gender and caretaking behavior. On this point, Ridgeway & Correll (2004) theorize that motherhood is a status characteristic quite apart from the hierarchical status characteristic of gender, and as a result workers who signal that they are primary caretakers (by, for example, taking family leave) are likely to be disadvantaged in the workplace. But they note that gender matters, too: When men take leave, it may be that "a man's lower status as a [primary caregiver] will combine with his somewhat higher status as a man, so that he will not suffer quite as much in terms of lowered performance expectations as would an otherwise similar woman who is a mother" (Ridgeway & Correll 2004, p. 696). Alternatively, the interaction between gender expectations and expectations regarding caregivers could also mean that "since being a mother is more gender inappropriate for men than women, men identified as primary caregivers will suffer a backlash in the workplace that overwhelms any status advantage that they have as males" (Ridgeway & Correll 2004, p. 696).

The empirical studies discussed above suggest that men who take leave do incur a status disadvantage that overwhelms male privilege, as men seem to suffer greater penalties for taking leave than do women. Indeed, men who make use of leave entitlements violate gendered expectations that men are breadwinners and women are caretakers, and those who violate expected gender roles are penalized (Lobel & Clair 1992, Lovell et al. 1999). As a result, managers may evaluate the work performance of male leave takers less favorably than that of men who conformed to gendered expectations by not taking time off. It is also possible that managers may automatically evaluate women as if they are primary caretakers whether or not they take leave; this stereotyping would explain why taking leave

seems to affect the performance evaluations of men more than those of women.

Taken together, these studies suggest that institutions, in the form of organizational processes and cultural norms, reduce the likelihood that men will take parental leave and contribute to the pattern that men take shorter parental leaves than women. These patterns may be not so much the product of hardwired gendered preferences about parenting—indeed, most men report that they want the opportunity to take family leave or spend more time with their family (Gornick & Meyers 2003, Hyde et al. 1993, Pleck 1993)—but instead the result of institutionalized constraints that discourage men from using leave. The unfortunate consequence is to encourage gendered patterns of leave taking, which are already reinforced by labor market differentials in pay between men and women and the unpaid nature of FMLA leave. As a result, these cultural institutions undermine the FMLA's ability to reduce gender stratification in pay and employment and to encourage more egalitarian caretaking arrangements in the family. In this way, organizational and cultural institutions help reinforce and maintain the mutually constitutive relationship between standard work practices and the traditional breadwinner/caretaker division of labor in the family. They also put enormous pressure on single-parent families and other family forms that do not mesh well with the existing structure of work. And, because institutional constraints help channel workers' choices into gender-differentiated behavior, they also reinforce the social meaning of gender itself (Ridgeway & Smith-Lovin 1999).

Resistance to family friendly policies may also come from workplace practices that appear gender neutral but that have their roots in the historical institutionalization of full-time wage labor as the male breadwinner norm (Fraser & Gordon 1994). For example, empirical work documents time norms that frame full-time workers as more valuable, dedicated, and committed than part-time workers

(Epstein et al. 1998, Hochschild 1997). Part-time workers also reap proportionately fewer benefits from work than do full-time workers (Epstein et al. 1998, Ferber & Waldfogel 1998, Gornick & Meyers 2003, Kalleberg 1995, Smith 2002). For example, Gornick & Meyers (2003, pp. 62–63) found that after controlling for differences in human capital between part- and full-time workers, “women in the United States who work part time earn about 21% less an hour, on average, than their full-time counterparts,” a larger differential than in other industrialized countries. Other research indicates that employers tend to devalue the performance of workers who violate time norms by taking time off, even when presented with objective indicators of continued good performance (Albiston 2005a, Allen & Russell 1999, Hochschild 1997, Wayne & Cordeiro 2003).

Because antidiscrimination laws focus on discriminatory intent and defer to legitimate business practices and business necessity as defenses to discrimination claims, it is difficult to challenge penalties for workers whose schedules do not fit the institutional norm. Laws mandating structural changes to work schedules, such as the FMLA, may provide better options for institutional change. Of course, whether devaluing part-time workers is perceived as a legitimate business practice is itself socially constructed. Courts generally do not inquire, for example, whether such a practice is in fact economically rational. When courts allow employers to treat part-time workers, who are disproportionately women, poorly, they help institutionalize the mutually constitutive relationship between work and the implicit family wage norm that women are not breadwinners but instead work only for “pin money.” Nevertheless, the disadvantages of time norms increasingly apply to both men and women as the labor market polarizes into highly skilled, full-time work on the one hand and less-skilled, contingent, and part-time work on the other (Jacobs & Gerson 2001, 2004; Kalleberg et al. 2000; Tilly 1991).

Finally, additional evidence for neo-institutional arguments can be found in the fact that employer resistance to leave taking does not seem to be based on difficult experiences with unpaid FMLA leave. Surveys of employers conducted since the law was enacted show that nearly 90% of employers report little or no impact of leaves on productivity, profitability, or growth, and that most employers have found the act relatively easy to administer (Cantor et al. 2001, Waldfogel 2001). In addition, research on disability and medical leave shows that employers resist changes in schedules more than structural changes to the workplace, even though from a rational cost-benefit perspective the latter can be much more expensive (Harlan & Robert 1998). Employer resistance seems to be associated not with rational calculations related to efficiency concerns or operating problems, but instead with deeply entrenched expectations around work time, employer control of schedules, and gendered norms around caretaking and work. These attitudes may change over time as more workers, particularly men, begin to take leave, thus changing the social interactions that help to construct the meanings of work and gender (Ridgeway & Smith-Lovin 1999). Indeed, survey data collected after the FMLA was enacted indicate a cohort effect in which younger men are more likely than older men to take leaves (Sandberg 1999). Legal entitlements can play an important role in this transformation by creating both a gender-neutral right to leave and a normative discourse that leave taking is legitimate (Albiston 2005a,b, 2006).

## INSTITUTIONS AND LEGAL REFORMS

What can institutional processes tell us about legislative solutions to work/family conflict? Can a deeper understanding of institutional processes inform policy design and help to predict responses to legal reforms? These are not easy questions, given the voluminous research about how institutions shape responses

to family leave mandates. Nevertheless, empirical research can add new insights to feminist legal scholars' theoretical debates about how best to tackle work/family issues.

Conflict between work and family, and issues of accommodation around pregnancy in particular, have long presented conundrums for feminist legal theory and for finding practical solutions to the work/family problem. These issues were central in the debates about the meaning of equality and the best method of achieving it that dominated feminist legal theory in the late twentieth century. One school of thought, often called liberal feminism, focused on formal equality; these theorists sought to obtain for women the same rights and privileges as men, including access to employment free from stereotypical assumptions about women's abilities. A second school of thought, sometimes labeled difference feminism, argued that inequality stemmed from undervaluation of or disregard for women's interests and failure to accommodate their differences from men. From this perspective, the goal was to obtain pregnancy and maternity leaves from paid employment to accommodate, rather than penalize, the ways women differed from men (Finley 1986, Minow 1987, Williams 1984/1985; see also Kay 1985).

These two schools of thought seemed, at first blush, to be fundamentally incompatible. Liberal feminists criticized the goal of accommodation as encouraging protectionist policies that historically had marginalized women in the labor market and limited their choices. From this perspective, asking for special treatment encouraged stereotypes of women as less able than men and reduced all women to the biological function of reproduction, whether or not they chose to become mothers. Difference feminists countered that formal equality theories failed to provide essential accommodations that women needed to balance work and family and succeed in the workplace (Becker 2001). In a variation that attempts to harmonize accommodations with formal equality, Kay (1985) argued that



the law should treat women differently than men only during the limited, episodic period of pregnancy to avoid penalizing women for exercising their reproductive capacity. These debates only intensified as the Supreme Court considered what equal treatment meant in the context of pregnancy and maternity leave, particularly because the Court concluded that gender discrimination did not include pregnancy discrimination, and that Title VII permitted states to require special treatment for pregnant women in the form of maternity leave (Finley 1986, Krieger & Cooney 1983, Williams 1984/1985).

Some scholars resolved the equal treatment/special treatment conundrum by recognizing that institutions like work embody gendered inequality and power. From this perspective, work is not a natural or economically determined set of social relations, but instead is a social institution that implicitly privileges a (male) breadwinner norm (Abrams 1989, Acker 1990, Finley 1986, MacKinnon 1987, Williams 2000). For example, MacKinnon (1987, p. 34) points out that “[c]onced [in the sameness/difference debate] is the substantive way in which man has become the measure of all things.” She notes that “virtually every quality that distinguishes men from women is already affirmatively compensated in society [including the fact that] [m]en’s . . . socially designed biographies define workplace expectations and successful career patterns” (MacKinnon 1987, p. 36). This insight moved feminist legal theory beyond the question of how women could be fairly incorporated into existing work structures. Instead, institutionally focused theories revealed how gendered work practices constrained workers’ choices for meeting their family responsibilities in ways that reproduced gender inequality.

Other scholars extended this insight by recognizing how workplaces are typically structured around an always-available ideal worker who enjoys significant support from a stay-at-home spouse, traditionally a wife (Abrams 1989, Okin 1989, Pateman 1988,

Williams 2000). From this perspective, standard work practices presume not only a male biography, but also a certain (gendered) division of labor within the family. As a possible reform, Abrams (1989) proposes that Title VII should prohibit employers from applying this ideal worker standard because it is based on the experience of a single, dominant group within the workplace, not the objective requirements of good performance.

The debate over work/family policies touches on a classic dilemma at the heart of feminist legal theory: Should feminists seek to enact laws that adapt to the circumstances women find themselves in now and, as a consequence, reinforce those social arrangements? Or should feminists promote laws that create incentives for more equitable sharing of family responsibilities between men and women and risk disadvantaging those women who continue to shoulder the majority of family responsibilities? The institutional approach suggests a different understanding of this dilemma, one that does not foreclose radically restructuring both work and family to allow more creative, varied solutions. From this perspective, the problem is not simply an unequal division of caretaking labor between men and women. Instead, work/family conflict results in part from capitalist work organization and the symbiotic relationship between standard work arrangements and traditional family structures. In this view, legal solutions to work/family conflict require more than just antidiscrimination measures, which tend to take as given gendered work practices built around male norms. Instead, institutional redesign is also necessary.

Title VII, the primary federal law prohibiting gender discrimination, has proven to be a poor tool for institutional redesign. For one thing, disparate treatment theories under Title VII defer to facially neutral business practices even when they generate gender-differentiated outcomes. As a result, courts allow standard business practices with gendered histories to justify treating men and women differently because these practices

involve institutional, rather than intentional, discrimination (Abrams 1989). In contrast, disparate impact theories allow workers to challenge workplace practices that disproportionately affect protected groups, and these theories require no proof of discriminatory intent. Consequently, these theories seem to be better vehicles for institutional redesign. However, courts have been reluctant to allow disparate impact challenges to institutionalized practices such as inflexible, full-time work schedules or no-leave policies, even when presented with evidence that these practices have a disparate impact on women (Jolls 2001). In addition, the Supreme Court undermined disparate impact theories by repeatedly expanding the business necessity defense (Abrams 1989), although Congress reversed this trend somewhat with the Civil Rights Act of 1991 (Jolls 2001). In short, work practices such as full-time schedules and no-leave policies have become so taken for granted that courts have difficulty imagining productive activities organized in other ways and therefore conclude that existing practices are necessary to doing business. As a result, institutionalized work practices remain largely insulated from Title VII challenges because these practices appear to be natural and normal aspects of productive processes, rather than gendered forms of social organization.

Institutional perspectives suggest that feminist legal theorists may have focused too much on how work institutions are gendered. Doing so tends to take gender and gendered characteristics as given and thus merely moves the reification of gender back one step from challenges to overt gender stereotypes. The empirical research suggests that reformers might productively focus on changing institutions directly as a way both to reform material practices and to change norms and attitudes about gender, work, and the relationship between them. This approach invokes a social constructivist strategy directed toward disrupting the institutional processes that construct gender and sustain the mutually constitutive relationship between stan-

dard work practices and traditional family forms.

How much do recent proposals for reform track this social constructivist strategy for change? Recent practical responses to the work/family conflict include three major approaches to reform. One approach would expand antidiscrimination theories to encompass "family responsibilities discrimination" (Williams & Cooper 2004). This approach relies, in part, on an expansive understanding of causes of action already available in existing law, including Title VII, the ADA, the FMLA, and the U.S. Constitution (Williams & Cooper 2004). In addition, Williams (Williams & Cooper 2004, Williams & Segal 2003) has proposed a new statute that would prohibit discrimination on the basis of family responsibilities, regardless of who performs these tasks. The statute would prohibit employers from applying different performance standards to workers who work modified schedules, take parental leave, or otherwise attend to family responsibilities. This approach would have the advantage of decoupling gender from family responsibilities in the applicable legal theories, which would help expand legal protections not only for mothers, but also for fathers and other family members who participate in care work.

Scholars have expressed concern about antidiscrimination approaches such as this because, they argue, these proposals primarily help women who can meet standard work requirements but whose employers assume they are less able or committed simply because they are mothers (Becker 2001, Chamallas 1999, Dowd 1989b, Kessler 2001). These critics worry that antidiscrimination theories only protect workers who are able to meet standard work requirements against blanket assumptions that workers with family responsibilities are inferior. As a result, these theories may be less useful to workers who actually need reduced schedules or other adjustments to accommodate standard work practices to their family responsibilities.

A second approach would be to require standard work practices to accommodate family responsibilities, and several legal reforms seem to be moving in this direction (Burstein et al. 1995, Edwards 1996). Along these lines, Jolls (2001) makes the theoretical argument that legal distinctions between antidiscrimination and accommodation are not defensible because all antidiscrimination mandates require some adjustment to existing workplace practices. Logically, this implies that current antidiscrimination provisions may be sufficient to support family responsibilities accommodations. Other scholars argue explicitly for family responsibilities accommodations that are patterned after existing required accommodations for workers' religious beliefs and disabilities (Kessler 2001, Smith 2001). Such accommodations might include (longer) parental leaves and paid family leave.

The accommodation solution to work/family conflict is still a full-commodification strategy because it continues to commodify both women's labor and the provision of most care work through market-based child care (Williams 2000). This strategy generally attempts to accommodate family responsibilities within the standard work schedule, with only minor adjustments. As a result, standard, institutionalized work practices remain largely unchanged. Some feminist legal theorists find this proposal troubling because it continues to presume, with only minor exceptions, that workers do not have ongoing caretaking responsibilities at home (Albiston 2005c, Williams & Segal 2003). In addition, delegating care work to the market does little to promote more egalitarian sharing of family responsibilities between fathers and mothers (Glenn 1992). Instead, it merely frees both parents to pursue work structured around the male norm and delegates care work to less economically advantaged women, who are also often racial minorities or recent immigrants (Albiston 2005c, Glenn 1992, Mattingly 2001, Perreñas 2000).

Another flaw in this approach is that market provision of care work is regressive; less

economically advantaged women generally cannot afford to purchase child care at the market rate (Glenn 1992). As a result, women employed to perform care work often must rely on substandard care for their own children because their own labor is so poorly paid. Alternatively, care workers rely on unpaid assistance from female family members whose unpaid labor is thus appropriated to support the market labor of more privileged women (Mattingly 2001). Accordingly, full-commodification strategies help replicate race and class inequality, fail to encourage an egalitarian division of labor in the home, and do little to change work practices that strain families. Instead, they leave the mutually constitutive relationship between standard work practices and traditional family arrangements intact and merely allow well-to-do women to delegate their traditional family roles to other, less-privileged women.

Accommodationist approaches also highlight parents and caregivers as different by defining them as a protected class with special accommodation needs. To be sure, defining the protected class in terms of caretaking behavior rather than gender does help avoid reifying care as a gendered characteristic. Nevertheless, this strategy still makes caregiving a salient status difference in the workplace, which empirical research suggests risks opening the door to discriminatory evaluation (Ridgeway & Correll 2004). As Ridgeway & Correll (2004, p. 685) point out, "salient status characteristics [such as caretaker status] shape the implicit expectations actors form for one person's performance in the situation compared to others." Because caretaker status is already a devalued status characteristic (Correll et al. 2007, Ridgeway & Correll 2004), laws protecting and highlighting this status could have the unintended effect of promoting negative evaluations of workers who take leave. Of course, this does not necessarily mean that such reforms should not be enacted. Instead, this dynamic suggests that any such laws should also include strong provisions prohibiting differential treatment of or

retaliation against workers who make use of leave.

A third set of proposals attempts to restructure the institution of work itself. The most common proposals are to shorten the work week to about 30 hours and to give workers more flexibility and control over their time by prohibiting mandatory overtime and allowing intermittent time off to meet family responsibilities (Gornick & Meyers 2003; Jacobs & Gerson 1998, 2004; Schultz 2000; Fraser 1994). Often these proposals are combined with other policies, such as allowing both parents to work part time during the first year of a child's life, allowing longer family leaves, and providing more state support for child care to improve the quality of care and the salaries of care workers. For example, Gornick & Meyers's (2003) proposal includes providing paid family leave of a moderate duration (about one year) in conjunction with state initiatives to regulate work hours and to support public provision of child care.

The primary critique of proposals to restructure work practices directly is that these policies are politically infeasible in the United States at this time (Williams & Cooper 2004). Indeed, it may be, as Williams & Cooper (2004) have argued, that intermediary measures such as prohibiting family responsibilities discrimination will need to be implemented first. Nevertheless, from an institutional perspective, proposals to restructure work show promise for changing the deeply entrenched normative and practical constraints that now restrict parents' choices around work and family. These proposals take on the institution of work directly. They do not focus on gendered identities as the basis for entitlements to protection and thus avoid reifying gender as a social category in legal doctrine. Also, unlike antidiscrimination theories under Title VII, these approaches are agnostic about whether work practices must be changed because they are, in some sense, gendered. By restructuring work directly, these legal reforms avoid taking on the difficult intermediary doctrinal questions of what

constitutes equality and what constitutes gender discrimination. And, because institutional theories teach that work and traditional family arrangements are mutually constitutive, these legal reforms show promise for restructuring the division of labor in the family as well. To be sure, these legal theories may not be sufficient alone to overcome gendered patterns of work that are deeply engrained in cultural norms. At the very least, however, these reforms would loosen the constraints that shape parents' choices and allow workers to choose work/family patterns other than an always-available worker and a stay-at-home spouse. Reducing the standard work week would also bolster wages and promote employment because fewer hours worked by each worker theoretically will generate more employment opportunities for all.

In fact, such an experiment has already been done in the United States. In *Kellogg's Six-Hour Day*, Hunnicutt (1996) documents the Kellogg Corporation's decision in 1930 to adopt four six-hour shifts rather than three eight-hour shifts while largely maintaining wages for its workers. Kellogg adopted this shift change to promote employment during the Great Depression, but, as Hunnicutt documents in interviews with Kellogg's former workers, the new shift revealed the *joie de vivre* of a life more evenly shared between work and other pursuits. With a brief hiatus for wartime production during World War II, Kellogg retained this arrangement until 1985, when it finally abandoned this schedule because, it claimed, workers wanted to work more hours. In fact, faced with growing fixed costs per worker, Kellogg threatened to move its facility elsewhere unless the union agreed to eliminate the remaining six-hour shifts, and in response the last six-hour holdouts finally gave in.

Two other influences brought about the demise of the six-hour day at Kellogg. First, the social meaning of the six-hour shift changed in response to both macroeconomic pressures and changes in management approaches. When unemployment

threatened—during the Depression and as soldiers returned from World War II—six-hour shifts were seen as sharing work, as not being a “work hog,” and as a way to ensure that everyone could earn a living. But after the war, as unemployment threats eased, working six hours came to mean shirking rather than sharing. Along these lines, Hunnicutt also documents how management ideology moved away from a “Liberation Capitalism” philosophy of turning productivity gains into more leisure for all workers (rather than unemployment for some) and toward making work, rather than community or family, the center of life. Thus, his analysis underscores that not only the structure of work but also its social meaning contribute to decisions about organizing productive activities.

Second, Hunnicutt (1996) unearths a fascinating relationship between gender and time that foreshadows the second-class status of primarily female part-time workers today. Gender norms in the broader culture, which still largely hewed to the eight-hour standard day, pushed men to “work a full week” of 40 hours to meet the family breadwinner norm. For example, after World War II, economic and ideological factors worked in tandem as family wage ideology helped push working women back into the home as soldiers seeking work returned from overseas (Murray 2002). Tellingly, at the end of the six-hour era, it was primarily female workers at Kellogg who still worked six-hour shifts and who wished to maintain this schedule. Male workers, in contrast, compared themselves to eight-hour shift workers at other employers and contended that a six-hour shift was insufficient to “feed the family” and “put bread on the table” (Hunnicutt 1996). Six-hour shifts became feminized, characterized by both male workers and management as for women who were not family breadwinners, who needed the extra time to attend to house and home, or who “were not up to full-time work.” Simultaneously, time outside work was feminized, and pursuits such as family and community activities were trivialized in comparison

to work (Hunnicutt 1996). Like Schor (1992), Hunnicutt interprets the demise of Kellogg’s six-hour day as reflecting the American drive for consumption, but clearly gendered ideology plays a role here as well. One might also ask whether in a different organizational environment in which men at other workplaces also worked a six-hour shift such a feminization and rejection of shorter hours would have been as easy to accomplish.

Hunnicutt’s (1996) historical analysis reveals that the 40-hour work week is not the only way to organize productive processes in a capitalist economy. Hunnicutt’s analysis also shows, however, how institutionalizing the eight-hour day—in the Fair Labor Standards Act as well as in common work practices in other firms—undermined Kellogg’s experiment, suggesting that changes in work culture require widespread institutional reform rather than piecemeal voluntary change. His study teaches that making different trade-offs between time and money will likely require developing a counter-ideology to the idea that work is an all-important relative to family and community pursuits.

Finally, Hunnicutt’s analysis shows how institutionalized cultural norms that men should be breadwinners and women should be caretakers operate in tandem with work ideology. Indeed, empirical evidence suggests that the family wage ideal continues to affect how employers evaluate the competence and potential of workers and even how workers understand their options in the workplace (Albiston 2005a, Correll et al. 2007). Comparative research also suggests that these cultural norms may limit how much policy reforms can promote egalitarian sharing of family responsibilities. For example, Gornick & Meyers (2003) found that mean daily hours of child care spent in the home by men and women remained largely static across various policy regimes, even though more generous family policies were associated with other desirable outcomes for families. These data suggest that legal reforms that take into account cultural institutions, such as the family wage norm, may be

more successful than those that do not. Moving toward men's equal participation in child care may require ensuring paid leave at a high rate of wage replacement so that men can both provide care and fulfill the breadwinner role. In addition, leave entitlements that are personal, rather than family, entitlements (and therefore use it or lose it in nature) may be more likely to encourage men to participate in caregiving (Gornick & Meyers 2003).

All the same, both work norms and gender norms are changing. Men are more engaged in care work, and increasingly they are expected to be more engaged. At the same time, critics are challenging the all-consuming nature of work (Hochschild 1997; Hunnicutt 1988, 1996; Schor 1992). Although empirical research makes clear that institutions help to maintain old patterns of work and family organization, reformers should not discount law's normative force in encouraging and legitimating changes in both work and family. As more men take leave, as working women continue to return to work after having a baby, and as family responsibilities become more visible at work, treating workers poorly because they attend to family responsibilities may come to be seen as inappropriate and wrong. Legal policies can either enable or constrain this process of change. Successful reform requires careful attention to these institutional processes so that work/family policies can complement, rather than hinder, the social change that is already underway.

## CONCLUSION

The social science research about law, work, and family offers both encouragement and a cautionary tale. On the one hand, legal mandates for family friendly policies appear to have produced many positive effects. More workers have access to leave. More organizations are adopting family friendly policies in response to legal mandates and to growing normative pressure from their organizational environments. Employers report that leave mandates are relatively costless, and em-

ployers do not seem to be shifting the cost of leave mandates to women in the form of lower wages or less employment. From a policy perspective, these are all desirable outcomes.

On the other hand, from a more sociological perspective that focuses on social processes and institutions, a cautionary tale emerges. When one looks within organizations, power still matters. More powerful workers have more options for managing work and family and are more likely to use the options they have, although legal protections seem to mitigate this dynamic. Institutionalized work practices also matter; workers who violate time norms by taking leave pay a price in terms of lower wages or poor performance evaluations. In addition, cultural norms about gender, work, and family still matter. Despite gender-neutral legal reforms, men are generally less likely to take leave than women. Employers continue to expect gendered leave-taking behavior among their employees. Experimental studies show that workers who violate those gendered expectations are penalized, independent of their actual performance. In short, formal legal reform does not necessarily produce meaningful change on the ground. Institutional processes create resistance to legal reforms, and legal rights have difficulty penetrating deeply entrenched practices and assumptions around work, gender, and family.

It is tempting to write off such social and cultural institutions as beyond the reach of law and simply accept as inevitable the limitations these institutions place on reform. An alternative interpretation is that these findings demand future research to investigate variation in these effects and the conditions under which they hold true. One important question is whether policies that take into account cultural norms and organizational practices are less subject to resistance than those that do not. For example, paid family leave may be more likely than unpaid leave to encourage men to take leave because paid leave does not force men to choose between caring for family members and being the family

breadwinner. Rather than treating resistance to reforms as invariable and static, researchers should focus on the conditions under which institutional processes hinder or bolster legal reforms.

From a policy perspective, the social science research raises important caveats about how legal institutions should address the work/family conflict. For example, empirical evidence about organizations' response to law indicate that courts should be deeply skeptical of how organizations implement work/family policies. Rather than focusing only on formal policy statements, courts should consider patterns of actual use of leave and ask how organizations respond to workers who request and use family leave. In addition, the social psychological research indicates that courts should adopt a more sophisticated understanding of discrimination, one that takes into account the dual contributions of gender and caretaker characteristics to workplace dynamics. This approach extends existing theories of discrimination based on stereotyping

and may encourage a more social constructivist understanding of discriminatory decision making (Krieger 2004).

This may very well be a transitional moment for the institutions of work and family. As institutional foundations erode, social change is possible, but current institutional arrangements will also affect what direction that change takes. Just as gendered ideologies contributed to the organization of capitalist production during the transition to modernity, gendered conceptions of work and family are likely to shape the institutional forms to come. Law will also help construct these new social forms. Legislation can open up new choices regarding work and family, but the research reviewed here suggests that laws can also have unintended consequences that reinforce gender inequality if institutions are not taken into account. Understanding the other institutional processes at work will help make law's contribution more relevant to and effective in the sociological processes that shape work and family.

## DISCLOSURE STATEMENT

The author is not aware of any biases that might be perceived as affecting the objectivity of this review.

## ACKNOWLEDGMENTS

I wish to thank Kathryn Abrams, Shelley Correll, Lauren Edelman, Herma Hill Kay, Erin Kelly, Kristin Luker, Melissa Murray, and Joan Williams for our terrific conversations about work/family research and their helpful comments on drafts of this article. I also wish to thank Marc Melnick for his support and encouragement while I wrote this review. Finally, many thanks to Lisa Montague for her able research assistance on this project.

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## Errata

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