



Institutional Inequality and
the Mobilization of the
Family and Medical Leave Act

Rights on Leave

Catherine R. Albiston

CAMBRIDGE STUDIES IN LAW AND SOCIETY

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University of California, Berkeley



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INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT

How do the rights created by the Family and Medical Leave Act operate in practice in the courts and in the workplace? This empirical study examines how institutions and social practices transform the meaning of these rights to re-create inequality. Workplace rules and norms built around the family wage ideal, the assumption that disability and work are mutually exclusive, and management's historical control over time all constrain opportunities for social change. Yet workers can also mobilize rights as a cultural discourse to change the social meaning of family and medical leave.

Drawing on theoretical frameworks from social constructivism and new institutionalism, this study explains how institutions transform rights to re-create systems of power and inequality but at the same time also provide opportunities for law to change social structure. It provides a fresh look at the perennial debate about law and social change by examining how institutions shape the process of rights mobilization.

Catherine R. Albiston is Professor of Law at the University of California, Berkeley. She is active in the American Sociological Association and the Law and Society Association, serving in several capacities, including Trustee for the Law and Society Association. Her research has been supported by grants from the National Science Foundation and the American Bar Foundation, and she has published widely in peer-reviewed journals and law reviews, including *Law & Society Review* and *Annual Review of Law & Social Sciences*.

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Preface

For many years the United States was virtually the only major industrialized country without a family and medical leave policy. Employers could legally fire a worker who needed time off to care for a seriously ill child, parent, or spouse. Employers had wide latitude to fire workers temporarily unable to work because of illnesses or injuries. Employers could legally fire women who needed time off for pregnancy and childbirth if they also denied time off to nonpregnant employees who were unable to work. And, although some employers provided parental leave after the birth of a new child, this discretionary leave was primarily available to professional or management employees and not to the rank and file (Kamerman et al. 1983). In short, national employment policy left many serious family and medical needs unaddressed.

By the end of the twentieth century, significant social changes made difficult choices about managing work, family, and illness more visible and compelling. Stagnating wages and changing gender roles meant more women with children entered the workforce, contributing to a time squeeze for many families (Epstein & Kalleberg 2004; Gornick & Meyers 2003; Jacobs & Gerson 2004; Presser 2003). Increasing divorce rates also left many working women as the sole source of support for their families (Reskin & Padavic 1994). As medical care improved and legal reforms required education for children with disabilities, there were more potential workers with disabilities (Shapiro 1993). As a result,

the many ways in which the structure of work conflicted with caring for others or with living with disabilities became more apparent. Research about how workers handled this conflict revealed the ways in which social institutions construct the relationships among work, family, and disability (Hochschild 1989, 1997; Stone 1984). It also documented how the state, by failing to provide for family or medical leave, effectively defined the problem as a private dilemma.

Family policy in the United States has begun to change, however. Since 1993 the federal Family and Medical Leave Act (FMLA) has provided some workers with a legal right of up to 12 weeks of unpaid, job-protected leave for family or medical crises.¹ Both men and women may take leave to care for a sick child, parent, or spouse. Workers may also use FMLA leave for pregnancy disability, and both men and women may take parental leave after the birth of a new child.² The statute protects workers who take leave from retaliatory harassment, termination, and discrimination.³ Perhaps most importantly, FMLA leave is an entitlement for workers; the statute requires employers to provide FMLA leave even if they do not allow time off for any other reason. In other words, the statute leaves employers no discretion to deny qualified workers job-protected leave.

The FMLA represents a significant shift in American employment policy, and it challenges implicit, fundamental assumptions about the nature of work. It rejects unbroken attendance as the measure of a good worker and it takes away some of employers' unilateral control over the schedule of work. It changes the often-gendered division between the public life of employment and the private life of family by forcing work to accommodate family needs on a gender-neutral basis. And by protecting

¹ 29 U.S.C. § 2612. Not all workers are covered by the FMLA. Workers who have worked for their employers for less than one year are not eligible for FMLA leave, nor are workers who work for companies with fewer than fifty employees. 29 U.S.C. § 2611.

² 29 U.S.C. § 2612.

³ 29 U.S.C. § 2614, 2615.

the jobs of workers who are temporarily too sick to work, it undermines cultural conceptions of disability and work as mutually exclusive categories. In short, the FMLA not only creates a new benefit for workers, it also challenges entrenched conceptions of what being a good worker means. By attempting to change taken-for-granted workplace practices and norms, the law reconceptualizes the relationships among work, gender, and disability, and creates an opportunity for social change.

But what will this new law mean in practice? FMLA rights are not self-enforcing; to enjoy their benefits, individual rights holders must actively claim or “mobilize” them in the workplace and in the courts. Understanding what FMLA rights will mean requires examining how workers come to comprehend and claim their rights, especially when they encounter conflict over taking leave. In addition, workers do not mobilize their rights in a cultural vacuum. FMLA rights remain embedded within existing power relations, institutions, and culture, including deeply entrenched beliefs and practices associated with work, gender, and disability. Although the FMLA creates an opportunity for restructuring the workplace, what these new rights will mean in practice depends on the ways in which social institutions affect the rights mobilization process.

The existing empirical research paints a complicated and conflicting picture of rights to family and medical leave. Some empirical research indicates that the FMLA has significantly increased unpaid leave coverage for American workers (Han & Waldfogel 2003; Waldfogel 1999a, 2001), although class differences in leave coverage remain because low-wage workers tend to work for smaller employers who are not covered by the Act (Cantor et al. 2001; Gornick & Meyers 2003). Many employers who provided family and medical leave before the FMLA became effective substantially expanded benefits to bring their policies into compliance with the Act (Cantor et al. 2001). More organizations are adopting family-friendly policies in response to legal mandates and growing pressure from their organizational environments (Davis & Kalleberg 2006; Glass & Fujimoto 1995; Goodstein 1994; Guthrie & Roth 1999; Osterman

1995). The vast majority of employers report that leave requirements have not been difficult to implement and have had little or no impact on productivity, profitability, or growth (Cantor et al. 2001; Waldfogel 2001). The available evidence also indicates that employers have not shifted the costs, if any, of leave mandates to women in the form of lower wages or less employment (Baum 2003; Ruhm 1997, 1998; Waldfogel 1999b). In short, most large-scale, policy-oriented studies indicate that the FMLA has substantially increased access to leave with little downside for either employers or employees.

Sociological research about the dynamics of family and medical leave in the context of the workplace, however, tells a somewhat different story. Both experimental and observational research indicate that workers who take leave or use family-friendly policies suffer penalties at work (Allen & Russell 1999; Glass 2004; Hochschild 1997; Jacobsen & Levin 1995; Judiesch & Lyness 1999; Wayne & Cordeiro 2003). Indeed, in a post-FMLA survey, 32 percent of eligible workers who chose not to take leave reported that they opted against taking leave because they feared they might lose their jobs (Cantor et al. 2001). Empirical research regarding disability leaves indicates that employers often deny accommodations in the form of schedule changes even when their own policy and/or the law requires such accommodations (Harlan & Robert 1998). Research also indicates that more powerful workers within organizations, in terms of pay or status, have more family and medical leave options and are more likely to use the options they have (Blair-Loy & Wharton 2002; Harlan & Robert 1998). In addition, managers retain significant control over how these policies are implemented, and in some instances implement them as discretionary benefits rather than as legal mandates (Edelman et al. 1993; Kelly & Kalev 2006).

The research makes clear that cultural norms about gender, work, and family also continue to matter. Despite gender-neutral legal reforms, men are generally less likely than women to take leave (Armenia & Gerstel 2006; Gerstel & McGonagle 1999). Although this pattern may reflect gendered preferences, employers also expect gendered behavior

from their employees in terms of taking leave and often resist leaves of more than a few days for male employees (Haas & Hwang 1995; Malin 1993–94; Pleck 1993). Experimental research also indicates that men who took parental leave are perceived to be less likely to help their coworkers, be punctual, work overtime, or have good attendance than men who did not take parental leave, even when performance was held constant (Wayne & Cordeiro 2003). Clearly the social meaning of taking leave is not the same as the entitlement created by the statute. Gendered cultural norms about the appropriate way to manage work and family continue to shape perceptions of leave, and may actively discourage some workers from taking leave.

The research suggests that although the FMLA mandates certain family and medical leave benefits for eligible workers, the reality on the ground may be quite different from the formal policies articulated by the law and by work organizations. Although organizations are adopting family leave policies, it remains an open question whether these policies are merely symbolic or whether they produce substantial changes in workplace practices (Edelman 1992; Meyer & Rowan 1977). Indeed, studies that examine whether workers actually use family-friendly policies suggest that gendered corporate culture, concern about losing a job, and fear of retaliation often discourage workers from mobilizing their rights to leave (Cantor et al. 2001; Fried 1998; Hochschild 1997). This research raises important questions about how systems of power and meaning in the workplace affect whether workers exercise their leave rights.

Questions of power and meaning are particularly salient to the process through which workers mobilize their rights. Like most employment discrimination statutes, the FMLA is enforced primarily through a private right of action that is mobilized by individuals. Of course, the government does litigate some claims, but the vast majority of employment rights claims – in some estimates more than 90 percent – are brought by individual plaintiffs (Burstein & Monaghan 1986). This book draws on interviews with workers who negotiated leaves in the workplace and on content analysis of federal court decisions to analyze what happens when

workers attempt to mobilize legal rights that conflict with established practices and expectations about taking time off for family or medical reasons. Although this study focuses on FMLA rights, the larger question is this: Given that individuals attempt to mobilize their rights in some way, how do social institutions affect mobilization and the potential for law to bring about social change?

Understanding how legal reform can enable or constrain social change requires a close examination of legal mobilization in a variety of social contexts. This study does not privilege formal court claims over informal negotiations in the workplace, but instead examines legal mobilization in both locations. The chapters in this volume present a combination of quantitative and qualitative data, as well as a more traditional analysis of judicial reasoning. They draw on interpretive methodological traditions in the social sciences that emphasize the construction of meaning in social interactions. For example, they consider how cultural frameworks that arise from law and other social institutions influence individuals' preferences and perceptions when they decide whether to mobilize their rights. They examine how these same cultural frameworks influence judicial interpretations of FMLA rights. The analysis also considers the ways in which courts' procedural rules shape judicial interpretations of the FMLA that can facilitate or inhibit rights mobilization in the future. Finally, this study addresses how individual mobilization might produce collective results, including how legal rights can help workers connect with one another in the workplace and collectively resist their employers' reluctance to recognize FMLA rights.

The analysis in the chapters that follow explains how deeply ingrained social practices associated with work transform the meaning of FMLA rights and, ironically, help re-create the very inequalities that the FMLA aims to change. Chapter 2 sets the stage with a genealogy of work that highlights how entrenched work norms and practices incorporate, and help reinforce, systems of power and domination. It traces the historical origins of workplace standards regarding time and

leave, focusing on how modern time norms embody not only historical struggles for management control of workers, but also social inequalities based on gender and disability. It also examines how social changes in the family and the workforce have eroded the social conditions on which institutionalized work practices rest, even as these practices remain largely the same.

To examine how work as an institution shapes the meaning of employment law, Chapter 3 analyzes how federal courts have interpreted civil rights laws related to work, gender, and disability, including the Americans with Disabilities Act, Title VII, and the FMLA. This analysis pays close attention to the ways in which courts deal with attempts to modify standard work schedules to accommodate pregnancy and disability. Courts rely on established cultural meanings of work and time, rather than on statutory mandates, to resist enforcing changes to institutionalized time standards that disadvantage women and people with disabilities. By relying on cultural, rather than statutory, definitions of work and leave, courts interpret legal rights narrowly and incorporate institutionalized understandings of work into these statutory reforms.

Chapter 4 presents data from in-depth, qualitative interviews with workers who negotiated contested leaves in the workplace but did not take their claims to court. It examines how cultural conceptions of work, gender, and disability inform the attitudes and actions of workers and employers, including how workers decide whether to mobilize their rights and how they understand conflict over leave. The interview data indicate that the meaning of FMLA rights in the workplace varies with both the gender identity of the worker and the reason for taking leave. This variation tracks cultural understandings of women as caretakers and men as breadwinners, and cultural assumptions that disability and work are mutually exclusive. Moreover, these cultural understandings reflect the same institutionalized conceptions of work and time that appear in judicial interpretations of these rights. At the same time, however, these

rights provide a framework of meaning within which workers recognize their collective grievances and gain solidarity with one another around issues related to family leave.

Chapter 5 examines mobilization of FMLA rights in the courts, drawing on a content analysis of all FMLA opinions in federal courts that were published in the first five years after the statute was enacted. This analysis focuses on how institutionalized rule-making opportunities in the litigation process restrict opportunities for advocates to create judicial interpretations of the FMLA that are favorable to workers, skewing judicial interpretations of the Act in favor of employers. Despite the theoretical promise of litigation-based strategies for change, these data suggest that formal litigation offers only limited opportunities to generate expansive interpretations of rights.

The final chapter discusses the implications of this study for the American system of enforcing civil rights through private rights of action. It articulates a new institutional framework that focuses on how institutions affect mobilization across both court and noncourt settings. The book concludes by suggesting how the process of rights mobilization, if insufficiently insulated from these institutional influences, can allow deeply entrenched social practices, traditional conceptions of status based on gender and disability, and power to transform legal rights. It also examines how individual rights mobilization in all its forms creates unexpected opportunities for social change.

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1 Institutions, Inequality, and the Mobilization of Rights

FOR 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