INSTITUTIONAL INEQUALITY

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Employment discrimination statutes generally treat inequality as the product of discriminatory animus, but this approach undertheorizes how institutions construct identities and generate inequality. Drawing on neo-institutionalist theories in sociology, this Article develops a theory of *institutional inequality* that focuses on how institutions give rise to inequality by reproducing the social patterns and belief systems that existed at the time they emerged. To develop this theory, the Article examines why workplace time standards that disadvantage pregnant women have remained resistant to reform through Title VII and the Pregnancy Discrimination Act. Historical genealogy shows that workplace time standards embody cultural conceptions of gender and work that developed during the transition to modern capitalist production. Courts rely on these institutionalized conceptions of work and gender to interpret antidiscrimination statutes narrowly, reinforcing an oppositional relationship between work and gender and restricting opportunities for social change. The Article concludes by arguing that legal theories, such as the Family and Medical Leave Act, which focus on structural change rather than subordinated identities, are better suited to eradicating workplace inequality that flows from the historical development of work.

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INTRODUCTION

Discrimination in American employment law is personal. With few exceptions, employment discrimination laws focus on eradicating discriminatory animus toward certain protected groups.[1] They locate inequality in individual decision-making based on impermissible characteristics, such as race, gender, or disability. Although the law allows challenges to workplace practices that disproportionately disadvantage members of protected groups in limited circumstances, the vast majority of employment discrimination claims advance legal theories that require evidence of discriminatory animus.[2] Institutions are, at most, marginal concerns for these statutes.

From a sociological perspective, however, inequality is the product of institutional processes, not individual animus. Inequality results from the structural conditions that make up major social institutions such as the market, the family, and the state.[3] Institutions are the product of the historical conditions from which they emerged, and tend to reflect and recreate the social patterns and belief systems that existed at their inception.[4] Because institutions are taken for granted, however, they seem largely irrelevant to any statutory claim of discrimination even as they subtly shape human behavior.

This Article develops an institutionalist theory of inequality by drawing on one particular statute, the Pregnancy Discrimination Act (PDA),[5] as an illustration of institutional dynamics. The PDA is a particularly useful example because pregnancy raises thorny questions about the origins of inequality and whether equality requires structural

1. Title VII of the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a)(1) (2006) (prohibiting discrimination "because of . . . race, color, religion, sex, or national origin"); Americans with Disabilities Act of 1990, 42 U.S.C. § 12,112(a) (2006) (prohibiting discrimination on the basis of disability).

2. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1151 (1990).

3. PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 56–57 (1966).

4. *Id.*

5. 42 U.S.C. § 2000e(k) (2006).

change. Courts interpreting the PDA have long struggled with whether Title VII and the PDA merely prohibit discrimination against pregnant women or go further to require "accommodation" of pregnancy in the workplace.[6] Although the language of the PDA focuses on equal treatment, it has not necessarily been understood to require changes to the workplace.[7] Courts have, however, allowed plaintiffs to advance disparate-impact theories under the PDA and in this way challenge structural barriers to working while pregnant.[8] Nevertheless, claims under the PDA have been most successful when pregnant women seek access to work on its own terms; that is, when employers seek to exclude women who are able and willing to work despite their pregnancies.[9] These claims are much less successful when women require some change in existing working arrangements, however small, as a result of their pregnancies.[10] Because pregnancy and childbirth almost always require at least a short absence from work, one of the most difficult sticking points in this regard has been workplace time norms that demand full-time uninterrupted labor.

Why has the PDA been an ineffective tool in changing work schedules in response to pregnancy and childbirth? Theoretically, the "accommodation problem" is often described as the result of work's masculine characteristics.[11] In this view, workplace time norms reflect and privilege male ways of living and working, and leave little room for pregnancy, childbirth, or the ongoing care of children. These time norms assume that the standard worker has a stay-at-home partner who manages the non-work aspects of everyday life. Although this argument deconstructs workplace practices to show that, rather than being natural and inevitable, they are often constructed along gendered lines, ironically it also tends to reinforce gender stereotypes by reifying "male" and "female" traits, or ways of working, rather than interrogating the relationship between work and gender as social categories.

A deeper analysis of how work and gender are socially constructed and historically contingent is necessary to understand the resilience of workplace time standards in the face of legal reforms. Stating that work's structure is "male" merely pushes the reification back one step,

6. *See infra* notes 241–282 and accompanying text.

7. *See infra* notes 166–240 and accompanying text.

8. *See infra* notes 241–254 and accompanying text.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 224 (1989); Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC'Y 139, 146–47 (1990).

so that male ways of working become another unexamined category in the analysis of workplace practices. Focusing on whether work's characteristics are or *should be* male or female only recreates the same gender divisions and does little to challenge work's underlying structures or interrogate how these structures continue to shape the meaning of gender for both men and women.

In this Article, I draw upon sociological theories about the maintenance and recreation of social institutions like work to explain why time norms seem to be impervious to reform by antidiscrimination law. I argue that work practices like time norms reflect what I call *institutional inequality*—that is, the way that institutions incorporate historical social practices that presumed women would be marginal workers and would occupy subordinate roles in both the workplace and family. Theoretical approaches and legal reforms that focus on discriminatory animus or historical discriminatory bias fail to account for the societal-level patterns of inequality that gave rise to these institutions. New legal theories that focus on structural change rather than subordinated identity are better suited to eradicating workplace inequality based on these historical patterns.

Institutional inequality is not the same as the more familiar concept of institutional discrimination. The latter term describes how structural conditions in workplaces facilitate decision-making driven by bias against protected groups.[12] Scholars who draw on this concept often focus on how workplace structures can be changed to guard against subtle or unconscious bias against historically disadvantaged groups.[13] Scholarship in this vein investigates which workplace practices best alleviate persistent inequalities at work,[14] and it typically adopts an implicit model of individual animus or unconscious bias. This perspective pays little attention to the origins of these biases or the origins of workplace practices that facilitate their operation. It also typically does not consider how workplace structures actively construct the meaning of protected identities in ways that facilitate discrimination.

Institutional inequality also differs from perspectives that view some workplace structures as gendered. These approaches argue that to eradicate inequality, laws must require that workplace structures

12. *See* Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 2 (2006).

13. *See, e.g.*, Tristan Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 94 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462–65 (2001).

14. *See, e.g.*, Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action*, 71 AM. SOC. REV. 589 (2006).

accommodate the needs of women, for example by providing time off for childbirth and recovery.[15] Although these approaches are closer to the concept of institutional inequality than are theories of individual animus, they nevertheless tend to reify the meaning of gender and to promote objections that the law should not require special treatment of some groups. These perspectives also typically do not consider how workplace structures subtly construct the meaning of gender in ways that reflect historical patterns of gender inequality long since rejected as illegitimate.

In contrast, institutional inequality operates at a more societal—and socially constructed—level of analysis than these other perspectives.[16] How do workplace structures reinforce traditional, historically contingent conceptions of gender or race, regardless of individual animus? How do institutionalized structures in one area, such as work, shape social arrangements outside that area to reproduce social inequality? Illuminating institutional inequality requires a historical analysis to identify not only the process through which work practices came to be taken for granted, but also how the meanings of those practices are deeply embedded in the social conditions that accompanied their historical development. In this view, institutions are important not because they provide mechanisms that encourage or limit the operation of unconscious bias, but because they embody particular, historically determined conceptions of identities such as gender.[17] Workplace institutions are also important sites for leveraging social change because they actively construct the meaning of gender identity. Changing these institutions may therefore change the social meaning of identities.[18]

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15. *See* Nadine Taub & Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 825, 829–31 (1985).

16. For approaches that take into account the process of social construction, see generally Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 475 (2000); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

17. For example, feminists such as Catharine MacKinnon have long recognized that work structures reflect the needs, biography, and life cycle of men, but not women. MACKINNON, *supra* note 11, at 224.

18. Although this Article focuses on the social construction of gender as an identity, this theory of institutional inequality and social change can be applied to other social identities as well. For example, the public accommodation requirements of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12,101 (2006)—which required changes such as Braille signs in elevators, building ramps, accessible bathrooms and parking—did much more than make the physical environment more accessible to people with disabilities. The everyday presence of such structural changes also communicated that people with disabilities belonged in the public sphere. This new social meaning challenged the idea that people with disabilities belonged in institutions or were to be

Drawing on this concept of institutional inequality, I argue that courts construe antidiscrimination provisions, including the PDA, to be consistent with deeply entrenched expectations about work that have evolved in conjunction with historically contingent conceptions of gender. As a result, when courts enforce time norms, they reinforce a mutually constitutive relationship between gender and work, undermining the transformative potential of civil rights law. These judicial interpretations not only fail to grant relief; they also permit employers to continue practices that reinforce gender inequality at home and at work. To respond to this dynamic, legal reforms must address both discriminatory animus and structural work conditions that perpetuate inequality. Title VII and the PDA, which focus on discriminatory animus, have done much to promote equal treatment in the workplace, but legislation—like the Family and Medical Leave Act (FMLA)[19] that directly and substantively reforms workplace structures—is also necessary to break the mutually constitutive dynamic between work and gender.

This Article proceeds in three parts. Part I sets forth a genealogy of work as a social institution, tracing the origins of ideas and practices we now take for granted about work, time, leave, and gender. Drawing on an interdisciplinary literature encompassing both history and sociology, I examine how modern norms about time on the job embody social inequalities and patterns based on historically contingent conceptions of gender. This Part develops a neo-institutionalist theory of the relationship between work and gender and discusses how institutions respond to changing social conditions, such as the rapid entry of women into the workplace in the last decades of the twentieth century.

Part II analyzes how courts draw on implicit understandings that are derived from the history of work when they interpret Title VII and the PDA. This analysis shows that courts remain reluctant to enforce changes to employers' established work schedules and leave policies, even when the statutory language is consistent with requiring these changes.[20] I argue that courts rely on established cultural meanings of work and time, rather than statutory language, to interpret antidiscrimination rights narrowly.

Part III argues that the PDA and the FMLA reform alternative sides of the gender-work relationship. It analyzes recent FMLA cases to show how the FMLA's structural reforms address concerns raised by

cared for privately by their families, but were not, by definition, productive and active participants in civil society.

19. 29 U.S.C. § 2601 (2006).

20. *See infra* notes 229–282 and accompanying text.

courts' narrow interpretation of the PDA. It also discusses how the FMLA's structural requirements have begun to erode long-standing assumptions about work, time, and gender, and therefore hold promise for reconceptualizing the relationship between work and gender for both men and women.

I. WORK AS A SOCIAL INSTITUTION

The FMLA represents a significant change in family policy, but these rights do not operate in a social vacuum. FMLA rights interact with the informal norms, expectations, and practices that make up existing work organizations. Some of these norms and practices are so deeply entrenched that they have become taken for granted, so much so that employers, courts, and sometimes even workers find it hard to imagine work being organized in any other way. Civil rights laws like the FMLA, which set out to change established work practices, often face resistance from the informal expectations and unspoken normative commitments that constitute work. Even recognizing this resistance can be difficult because existing arrangements seem so natural, normal, and inevitable that they appear unchangeable.

A brief genealogy of work as a social institution can make this process of resistance more visible and understandable.[21] The purpose of genealogy is to investigate social categories like work to uncover the historical struggles and developments that give them meaning.[22] This analysis focuses on uncovering the relations of power embodied in the social practices and expectations that make up work, especially how standardized work practices relate to particular conceptions of gender. Genealogy reveals that work and gender are not ahistorical, unchanging categories, and exposes how they give meaning to each other. In particular, modern forms of work derived their structure and meaning from ideologies about women's traditional roles as caretakers and homemakers as well as from men's traditional breadwinner status and patriarchal authority within the family.

The social conditions that gave rise to standard work practices have begun to change, but institutionalized work practices tend to persist and endure because social life has become structured around these arrangements, which operate as invisible and uninterrogated background guidelines for everyday interactions. These institutions mediate what rights mean in any given social setting. For example, courts often interpret civil rights laws so that they are consistent with

21. HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 106–07 (2d ed. 1983).

22. *Id.*

institutionalized work practices, even when those laws were intended to change those practices. In addition, informal practices and beliefs institutionalized in modern workplaces shape the pragmatic meaning of FMLA rights by influencing how employers and workers interpret workplace interactions and rights to leave.[23]

The FMLA undermines these practices by making leave an entitlement rather than a management prerogative. It restructures the boundary between work and private life by mandating time off for childbirth and care responsibilities. Yet legal reforms may have little effect because they have difficulty penetrating taken-for-granted arrangements that are common to most workplaces and that have come to define the characteristics of work. Resistance to change, both in the courts and in the workplace, is linked to broader social institutions that reflect historically contingent understandings of gender and work that breed inequality. Examining these sources of resistance can help us understand the subtle power dynamics in these situations and identify potential mechanisms of change.

A. What is a Social Institution?

In sociological terms, an institution is much more than an organization, such as a hospital, firm, or university. It is a set of complementary social practices and meanings that form "taken-for-granted" background rules that shape social life.[24] Institutions consist of tacitly agreed-upon practices, routines, and scripts that shape behavior and give meaning to social life. An institution need not have a brick-

23. *See generally* Catherine Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11 (2005).

24. Krieger, *supra* note 16, at 479; *see* BERGER & LUCKMANN, *supra* note 3, at 57; Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 143, 147 (Walter W. Powell & Paul L. DiMaggio eds., 1991); López, *supra* note 16, at 1770–71. Philip Selznick, one of the earliest institutionalist sociologists, defines an institution in this way:

> Characteristically, an institution is not an expendable instrument for the achievement of narrowly defined goals. It is valued for the special place it has in a larger social system and for the way it serves the aspirations and needs of those whose lives it touches. As a result, the institution is not readily dispensable. It usually serves more than one goal or interest. It endures because persons, groups, or communities have a stake in its continued existence.

PHILIP SELZNICK ET AL., LAW, SOCIETY AND INDUSTRIAL JUSTICE 44 (1969).

and-mortar manifestation and can be as varied as marriage, wage labor, the vacation, the forty-hour work week, or Tuesday.[25]

Neo-institutionalist perspectives in sociology draw on social constructivist theories of social organization to elaborate the concept of institution.[26] In this view, institutions have a number of distinctive characteristics. First, institutions can be both normative and cognitive structures.[27] They are normative in the sense that they not only describe the way various social activities are typically done, but also come to be seen as the accepted way things *should* be done. That is, people come to believe that institutionalized practices are correct, fair, and appropriate—in short, *normal*.[28] Institutions can also be cognitive, in the sense that choices shaped by institutions cease to be a matter of conscious thought. Institutions give rise to background templates that shape social interactions such that compliance with these background rules is largely unconscious and routine.[29] These mental templates cut down on conscious decisions, which facilitates cognitive efficiency but also implicitly constrains the available choices.[30]

Second, new institutionalists contend that institutions are the product of a historical process through which human beings construct patterns of conduct and interaction.[31] As Berger and Luckmann note:

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25. Jepperson, *supra* note 24, at 144–45.

26. W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS 13 (1995); Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 910 (1996).

27. SCOTT, *supra* note 26, at 137–38; Suchman & Edelman, *supra* note 26, at 915.

28. Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 481.

29. *Id.* at 482–84; Suchman & Edelman, *supra* note 26, at 915; Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 83, 83 (Walter W. Powell & Paul L. DiMaggio eds., 1991). For example, most people who stop to consider the question would recognize that Tuesday is a socially constructed institution rather than a natural phenomenon. We do not ordinarily, however, consciously decide each day whether we should act as if it is Tuesday (or Friday or Sunday); if we did so for such routine decisions we would quickly become cognitively overloaded.

30. Jepperson rightly points out that "[i]nstitutions are not just constraint structures; all institutions simultaneously empower and control." Jepperson, *supra* note 24, at 146. They facilitate social interaction and arguably coordination by making behavior predictable, patterned, and routine. This structure comes at a cost, however, because it also constrains the forms of social organization or behavior that are theoretically possible. Also, because power plays a role in which behavioral patterns become institutionalized, those constraints may benefit some groups within society more than others.

31. BERGER & LUCKMANN, *supra* note 3, at 54–55.

> It is impossible to understand an institution adequately without an understanding of the historical process in which it was produced. Institutions also, by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible.[32]

These patterns come to be perceived as objective features of the external world and thus recede into the background of everyday life. What were once emerging patterns of conduct, which participants initially viewed as nothing more than an ad hoc consensus, become expected and come to seem natural and inevitable.[33]

Third, neo-institutionalist perspectives view institutions as both social and socially constructed. Institutions consist of shared social understandings that cut across organizational and group boundaries. They are "both supraorganizational patterns of activity through which humans conduct their material life in time and space, and symbolic systems through which they categorize that activity and infuse it with meaning."[34] Social actors must recognize and comply with institutions to get along in the social world, as others expect them to behave

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32. *Id.* at 52.

33. Berger and Luckmann are careful to distinguish institutional control from rational action in response to specific rewards or punishments. They note that "this controlling character is inherent in institutionalization as such, prior to or apart from any mechanisms of sanctions specifically set up to support an institution." *Id.* That is, actors no longer perceive these patterns to be a conscious and changeable agreement, but simply the way things are, and therefore compliance with these patterns is automatic, rather than a calculated response to reward or punishment. Subsequent generations repeat these social practices, reinforcing them. In this way, social practices become objectified; they seem to exist apart from their human participants. Moreover, these "objective" institutions come to shape human actors' understanding of themselves and of the social world.

> An institutional world, then, is experienced as an objective reality. It has a history that antedates the individual's birth and is not accessible to his biographical recollection. It was there before he was born, and it will be there after his death. This history itself, as the tradition of the existing institutions, has the character of objectivity.

Id. at 56–57.

As Berger & Luckmann further observe, institutions come to be just "how these things are done," and "[a]ll institutions appear in the same way, as given, unalterable and self-evident." *Id.* at 56.

34. Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices and Institutional Contradictions*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 232, 232 (Walter W. Powell & Paul J. DiMaggio eds., 1991). For example, one cannot very well act as if Tuesday did not exist because the rest of the social world will continue to assume it does, attending work and school, refusing to deliver the Sunday paper, and the like.

consistent with shared social understandings. Once institutions are established, they invisibly structure social life in ways that reinforce and recreate themselves.[35] Everyday social interactions that conform to institutions generate regular patterns of behavior that support the existing social order. This collective compliance gives meaning to social life and reproduces and reinforces the patterns of behavior that make up social structure.[36] Although institutions may seem real, objective, and autonomous, they do not exist apart from the social interactions that continually recreate them. An institution's socially constructed nature is largely invisible, however, because the social practices associated with it have become routine, rationalized, and taken for granted.[37]

It can be difficult to imagine how social change comes about once social practices become institutionalized. Yet institutions are variable and changeable.[38] When the social conditions that gave rise to and supported those institutions start to erode, institutions can become destabilized and vulnerable to challenge. If underlying social conditions change, institutions can develop contradictions with their environments, with other institutions, or with underlying social behavior.[39] Institutions then may become ineffective or even dysfunctional, and, as a result, the contradictions between institutionalized assumptions and existing social conditions become more visible.[40] Some theorists contend that when these contradictions become apparent, human agents "can (or are forced to) improvise or innovate in structurally shaped ways that significantly reconfigure the very structures that constituted them."[41] Human action thus has the potential to change institutions even when agency is constrained and shaped by those institutions.

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35. BERGER & LUCKMANN, *supra* note 3, at 52–55; Jepperson, *supra* note 24, at 145.

36. In this view, social structure means "the tendency of patterns of relations to be reproduced, even when actors engaging in the relations are unaware of the patterns or do not desire their reproduction." William H. Sewell, Jr., *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOC. 1, 3 (1992).

37. This is not to say that social institutions absolutely determine social behavior. Social institutions can be more or less institutionalized, more or less taken for granted or infused with values. SELZNICK ET AL., *supra* note 24, at 44; Jepperson, *supra* note 24, at 151–52; Zucker, *supra* note 29, at 85. In addition, a social practice can be institutionalized even if some people do not follow that social practice. Deviations from institutionalized practices generally require conscious action and explanation, however, whereas institutionalized practices are taken for granted. Jepperson, *supra* note 24, at 148–49.

38. Jepperson, *supra* note 24, at 152; Sewell, *supra* note 36, at 5.

39. Jepperson, *supra* note 24, at 152–53.

40. *See id.*

41. Sewell, *supra* note 36, at 5.

Work can be understood as a social institution within this theoretical framework. The concept of work includes both "taken-for-granted" social practices and a web of social meanings, norms, and implicit expectancies about objective reality that form a background template for everyday life.[42] Work incorporates standardized patterns of conduct through which productive activities take place. These routines channel work practices in a particular direction as against other theoretically possible ways of organizing productive activities.

Many of the characteristics of work that seem natural, normal, and inevitable involve practices regarding time and employer control. For example, if we are asked to imagine work, our mental image is likely to include certain features such as permanent, uninterrupted year-round labor, or a standard forty-hour work week on a five-day schedule. We usually expect employers to control work schedules and to control the way productive activities are organized and performed. Of course, many jobs deviate from this standard, but we mark those deviations by referencing (and thus reinforcing) the institutional norm: We speak of "part-time" work, "night shifts," or "working for oneself." Indeed, some forms of labor outside this rubric are not considered work at all, such as unpaid labor in the home. Employers that offer jobs that conform to implicit work standards need not specify that they do, but advertisements for positions that deviate from these standards usually state so explicitly, such as part-time or weekend work.

Institutionalized workplace practices embody normative judgments about how production should be organized and about the social meaning of working (and of not working). In American society, work lies at the intersection of ideologies about the capitalist economy and market, meritocracy, and economic independence as a safeguard against political tyranny.[43] These interlocking systems of meaning reinforce and justify existing work conventions. Because work is considered central to social and civic life, departures from work's institutionalized features can provoke normative backlash that reflects the social meanings of working and nonworking. For example, in our culture workers are considered "productive members of society" and non-workers are viewed as "drains on society." Normative judgments may also follow distinctions between standard work that fits institutionalized expectations and nonstandard work that does not. For example,

42. Krieger, *supra* note 16, at 479.

43. *See* SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 54 (1996); Nancy Fraser & Linda Gordon, *A Genealogy of* Dependency*: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS: J. WOMEN IN CULTURE & SOC'Y 309, 315–16, 324 (1994); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 768–74 (1964).

potential employers may view intermittent-work histories as a troubling lack of commitment to work, and women who work in the home (as opposed to at home) are devalued as "just housewives."

Although a variety of work patterns are possible, workers who depart from institutionalized time norms pay a stiff price.[44] For example, part-time workers, defined as those who work less than thirty-five hours per week, receive far less compensation than full-time workers, even on a pro rata basis[45]—part-time workers earn only about 60 percent of what full-time workers make among workers paid on an hourly basis.[46] Annually, part-time workers make much less than full-time workers on a pro-rata basis, even controlling for age, education, race, organizational size, occupational prestige, tenure with the organization, and whether the worker holds a supervisory position.[47] In addition, these workers are often laid off before full-time workers, regardless of seniority.[48]

Workers with nonstandard jobs forfeit other benefits as well. The degree to which work is associated with notions of citizenship in American society is evident in the way many social welfare benefits—which T.H. Marshall calls *social citizenship rights*—are attached to work.[49] In the United States, many of these benefits are provided through private employment, rather than by the state, and they most often accompany employment that conforms to work's standard institutionalized features. For example, part-time workers are significantly less likely to receive fringe benefits such as medical

44. JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 153–55 (2003); Marianne A. Ferber & Jane Waldfogel, *The Long-Term Consequences of Nontraditional Employment*, MONTHLY LAB. REV., May 1998, at 3, 5–10; Arne L. Kalleberg et al., *Bad Jobs in America: Standard and Nonstandard Employment Relations and Job Quality in the United States*, 65 AM. SOC. REV. 256, 267–74 & tbls.5–6 (2000) [hereinafter Kalleberg et al., *Bad Jobs in America*]; Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 780–84 (1995) [hereinafter Kalleberg, *Part-Time Work and Workers*]; *see generally* CYNTHIA FUCHS EPSTEIN ET AL., THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER (1999).

45. GORNICK & MEYERS, *supra* note 44, at 62–64; Kalleberg, *Part-Time Work and Workers*, *supra* note 44, at 780–82 & fig.4.

46. Kalleberg et al., *Bad Jobs in America*, *supra* note 44, at 272 & tbl.7; Kalleberg, *Part-Time Work and Workers*, *supra* note 44, at 780.

47. Kalleberg, *Part-Time Work and Workers*, *supra* note 44, at 780–81 & tbl.2.

48. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 74 (2000).

49. T.H. Marshall, Citizenship and Social Class, *in* CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT: ESSAYS BY T.H. MARSHALL 65, 78–79 (1963).

insurance, dental care, life insurance, and paid sick leave.[50] They are also less likely to receive benefits such as flexible hours, private retirement or pension plans, and alternative forms of compensation such as stock or cash bonuses.[51] Even to the extent that the American state does provide social citizenship rights such as pensions or unemployment insurance, the beneficiaries of those rights tend to be long-term, full-time wage-earners or their dependents.[52]

Like many social institutions, work reflects and reinforces relations of inequality, subtly allocating social citizenship rights as well as social recognition and approval along gendered lines. Feminist scholars have long recognized how work's institutionalized time norms assume an implicitly gendered worker. Year-round, full-time labor away from home without interruption is difficult to combine with childbirth, child care, or care of elderly or ill family members—all responsibilities that traditionally fall on women.[53] Women often work part-time to accommodate these caretaking responsibilities, and disproportionately bear the losses that flow from deviating from standard work practices.[54] Institutionalized work schedules are built for an independent worker without care responsibilities, and assume that full-time workers with children will be partnered with full-time caretakers for those children.[55] As a result, work time norms implicitly incorporate women's traditional family roles in a way that shapes gender by encouraging—indeed, producing—a gendered division of labor within the family.

However socially constructed they may be, conventional work practices have significant consequences for the economic and social status of women. The social practices and belief systems that make up work constrain individuals' choices for engaging in productive and

50. Kalleberg et al., *Bad Jobs in America*, *supra* note 44, at 271; Kalleberg, *Part-Time Work and Workers*, *supra* note 44, at 782–85 & figs.5–7.

51. Kalleberg et al., *Bad Jobs in America*, *supra* note 44, at 271; Kalleberg, *Part-Time Work and Workers*, *supra* note 44, at 782–85 (noting, however, that "women who work part time were more likely to have flexible hours").

52. SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY 45, 127–28 (1998); Linda Gordon, *The New Feminist Scholarship on the Welfare State*, *in* WOMEN, THE STATE, AND WELFARE 9, 18–19 (Linda Gordon ed., 1990).

53. SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 154–56 (1989); WILLIAMS, *supra* note 48, at 70–72; *see generally* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK (1997); MACKINNON, *supra* note 11.

54. GORNICK & MEYERS, *supra* note 44, at 36, 153–55.

55. OKIN, *supra* note 53, at 155–56; CAROLE PATEMAN, THE SEXUAL CONTRACT 131 (1988).

reproductive behavior; by acting within those constraints individuals reinforce and reproduce work as a social institution and work's interrelationship with traditional family structures. Although work theoretically could be organized in many ways, most desirable and well-paid jobs incorporate dominant time norms around full-time, uninterrupted labor.[56] Those who cannot meet this standard, like women with childcare responsibilities, have diminished employment options.[57] Moreover, because social citizenship rights, independence, merit, and cultural status are all associated with long-term, full-time, wage labor, marginalization in the labor market often means social marginalization as well. Because a particular standard of work has become pervasive, differential treatment of nonstandard workers seems unproblematic, natural, and fair. Taken-for-granted work practices and the beliefs that support them thus become a means for legitimating institutionalized inequality.

B. A Genealogy of Work: Modernity and Transformation

The social institution of work is both a product and an embodiment of history. Work's features are not determined solely by production's inherent requirements, but also reflect work's historical development. In the American context, this history includes the transition to modern production and a capitalist economy, the bureaucratization of work practices, and the role of the state in these social transformations. Work also reflects the cultural ideologies that shaped these periods of transformation, particularly the ways in which wage labor came to be defined in opposition to motherhood. A genealogy of work focused on these themes reveals the historically contingent nature of work practices, and shows how those practices incorporate the complex relations of power and inequality built around particular conceptions of gender.[58]

A vast historical literature explores the transition from preindustrial to industrial systems of production in England and the United States from the eighteenth through the early twentieth century. From this literature, generalizations are possible about two key themes:

56. *See generally* Kalleberg et al., *Bad Jobs in America*, supra note 44.

57. GORNICK & MEYERS, *supra* note 44, at 36, 153–55.

58. The genealogical approach to the historical development of work in this Article departs from typical histories in that it focuses on the historical development of social categories and meanings, rather than the chronological unfolding of events. As a result, the following historical analysis is organized thematically, rather than chronologically, to reveal the historical sources of meaning for modern social institutions.

first, this historical period produced a fundamental reorganization of productive activities as society moved away from household economies toward entrepreneurial enterprises and centralized industrial production based on wage labor; second, this transformation created a gendered division of labor in which men performed wage labor outside the home and women performed the "residual" tasks of childcare and housekeeping in the home without pay. In addition to discussing these material changes, most accounts discuss how cultural ideologies shaped the way this transformation was understood, noting how these same ideologies continue to give meaning to work practices today, including, inter alia, time standards and employer control over production.

1. THE REORGANIZATION OF PRODUCTION

Typically, historical interpretations of the eighteenth- and nineteenth-century reorganization of production emphasize the displacement of work from the household to the workplace, as well as the increasing rationalization, centralization, and specialization of work.[59] In these accounts, preindustrial productive activities occurred within a self-contained household economy.[60] Work, household upkeep, and childcare were all part of an undifferentiated process that took place primarily within the home.[61] Work patterns in the household economy followed the production of goods and services for family consumption and reflected natural rhythms, determined by seasons, weather, or a worker's inclination.[62] Accordingly, work could proceed in fits and starts, be interwoven with childcare responsibilities, and be performed at any pace.[63]

In these interpretations, industrialization moved some productive activities from the household to a workplace based on a wage-labor system.[64] This shift created two separate spheres of activity: the

59. *See generally* RICHARD EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY (1979); SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900–1945 (1985); David Montgomery, *Workers' Control of Machine Production in the Nineteenth Century*, 17 LAB. HIST. 485 (1976); E.P. Thompson, *Time, Work-Discipline, and Industrial Capitalism*, PAST & PRESENT, Dec. 1967.

60. *See* NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780–1835, at 58–59 (1977); Thompson, *supra* note 59, at 60–61.

61. *See* COTT, *supra* note 60, at 58–59; Thompson, *supra* note 59, at 60–61, 70–79.

62. *See* COTT, *supra* note 60, at 58–59; Thompson, *supra* note 59, at 60–61, 70–79.

63. *See* COTT, *supra* note 60, at 58–59; Thompson, *supra* note 59, at 56, 79.

64. *See* COTT, *supra* note 60, at 58–59; Thompson, *supra* note 59, at 60–61.

workplace, which was seen as economic in nature, and the home, which was viewed as noneconomic.[65] Wage labor outside the home became more visible and more important with the rise of cash markets, land scarcity, and modern work practices.[66] Although women performed significant wage labor by doing piecework in the home or even by working in factory settings, non-wage labor such as cooking, cleaning, and childcare continued to consume married women's time and to disadvantage them in the labor market.[67] Even though many women worked out of economic necessity, their labor force participation was constrained by segregated labor markets, protective legislation that limited their ability to work, and social norms that situated women's primary responsibilities in the home rather than the workplace.[68]

The distinction between work and home deepened with industrialization because household activities continued to be task-oriented in sharp contrast to the time discipline of the factory clock.[69] E.P. Thompson, in his classic article on time and work,[70] argues that a preindustrial task-orientation toward work focused on the task to be performed, not the pace of performance.[71] In contrast, time became currency within the industrial wage system. Workers began to make sharp distinctions between time belonging to their employer and their own time,[72] and employers used the regular rhythms of machinery, the time sheet, and timekeepers to enforce time discipline.[73] Thompson argues that although workers initially resisted time discipline, over time they came to contest only the amount of time required for work.[74]

65. JEANNE BOYDSTON, HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC 144 (1990) (noting that this distinction occurred along gender lines); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 321–22 (1992).

66. BOYDSTON, *supra* note 65, at 24–29; COTT, *supra* note 60, at 59–62.

67. TAMARA K. HAREVEN, FAMILY TIME AND INDUSTRIAL TIME: THE RELATIONSHIP BETWEEN THE FAMILY AND WORK IN A NEW ENGLAND INDUSTRIAL COMMUNITY 200, 204–05 (1982); ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 21–22 (1982).

68. KESSLER-HARRIS, *supra* note 67, at 180–81.

69. COTT, *supra* note 60, at 58–62; Thompson, *supra* note 59, at 70–71, 78–79.

70. *See generally* Thompson, *supra* note 59.

71. Task-oriented work made less of a distinction between activities of work and life, and followed natural rhythms dictated by the characteristics of tasks, like ploughing, which fluctuated with the season or weather. *Id.* at 60, 78.

72. *Id.* at 61.

73. *Id.* at 82.

74. Standardization did not come without conflict, and several historical accounts focus on how the transition to modern forms of production created problems

Through the wholesale reorganization of productive activities, time standards came to be institutionalized.[75] Thus, as productive activities moved into rationalized workplaces based on regular work patterns controlled by the clock, time—and not task—came to define work. In this way, the decisions about the pace and structure of the labor process slowly came to be decisions made by management rather than by workers, and time norms came to define the production process.

The distinction between time discipline and task orientation is closely related to a second theme in this literature: the increasing division of labor between the sexes. The separation of home and work, time discipline, and the introduction of factory production set work and reproduction in opposition to one another.[76] Women became associated with private space in the home rather than the public industrial workplace, with task-oriented rather than time-discipline labor, and, increasingly, with domesticity.[77] As many scholars have noted, however, this conception of domesticity was not so much an accurate description of emerging patterns of gendered labor, but was touted as a morally appropriate arrangement that flowed from the nature of women

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of coordination and control for employers. Most accounts trace the origin of the eight-hour day and employers' authority over the organization of work back to this early struggle for control. EDWARDS, *supra* note 59, at 18–19, 51–52 (1979); JACOBY, *supra* note 59, at 44–48, 282–83 (1985); Montgomery, *supra* note 59, at 490–91, 507–09.

75. As Thompson puts it,

> The first generation of factory workers were taught by their masters the importance of time; the second generation formed their short-time committees in the ten-hour movement; the third generation struck for overtime or time-and-a-half. They had accepted the categories of their employers and learned to fight back within them. They had learned their lesson, that time is money, only too well.

Thompson, *supra* note 59, at 86.

Nevertheless, the transition to modern work practices was neither easy nor uniform and the move toward time discipline was "uneven." Richard Whipp, *'A Time to Every Purpose': An Essay on Time and Work*, *in* THE HISTORICAL MEANINGS OF WORK 210, 218–19 (Patrick Joyce ed., 1987); *see* Montgomery, *supra* note 59, at 487–91. Even at the end of the nineteenth century, other ways of organizing work continued to exist alongside time-disciplined, employer-controlled labor. For example, as late as the 1920s, work hours for potters in the British ceramics industry "varied so widely that there was no standard working day." Whipp, *supra*, at 226. In other instances, manufacturers simply provided raw materials and agreed to a price for the finished product; the workers collectively decided who to hire, how to train them, and how to pay themselves. JACOBY, *supra* note 59, at 15; Montgomery, *supra* note 59, at 487–89.

76. CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 85–86 (1985).

77. *Id.* at 86; Barbara Welter, *The Cult of True Womanhood: 1820–1860*, 18 AM. Q. 151, 152 (1966).

and men.[78] In fact, many women worked for wages during this transition, and single women as well as men transitioned from work at home to work in factories, for example as factory girls in textile mills.[79] Women, however, generally filled unskilled jobs, were paid very low wages, and received little help from labor unions, who viewed them as competition for scarce work for their predominantly male members.[80] As the cult of domesticity took hold in the broader culture, work for women was increasingly seen not as a career or a vocation, but as a temporary interlude before marriage and motherhood or an unfortunate necessity resulting from poverty or the death of a spouse.[81] Through practice and meaning, the division of labor based on gender became institutionalized in work's new structure of a family wage for men and, at best, low-wage, unskilled, temporary labor for women if they worked outside the home at all.[82]

Ideologies regarding citizenship also shaped the transition from preindustrial to industrial economies and became entwined with this gendered division of labor. For example, early American ideals of democratic citizenship emphasized ownership of property to bolster economic self-reliance as a defense against tyranny.[83] But as working-class men began to demand electoral and civil rights based on their wages rather than on property, wage labor became associated with independence and citizenship, and exclusion from wage labor came to imply dependency.[84] As social meanings became attached to industrial ways of organizing work, particularly long-term, full-time wage labor outside the home, working at home and part-time wage labor, once central to the idea of self-sufficiency, became devalued.[85]

Modern time norms have deep roots in the reorganization of production during the transition to modernity. During this social transformation, these norms helped to privilege certain ways of organizing work and devalue others, even when multiple forms of productive labor took place side by side. Norms of standardized, full-

78. *See, e.g.*, SKOCPOL, *supra* note 65, at 469–70; Welter, *supra* note 77, at 160, 162, 173–74.

79. HAREVEN, *supra* note 67, at 190; KESSLER-HARRIS, *supra* note 67, at 31–35.

80. HAREVEN, *supra* note 67, at 284; KESSLER-HARRIS, *supra* note 67, at 53–54, 157–59.

81. KESSLER-HARRIS, *supra* note 67, at 51–53.

82. *Id.* at 51–54.

83. Fraser & Gordon, *supra* note 43, at 312–14; *see* Reich, *supra* note 43, at 771–74.

84. Fraser & Gordon, *supra* note 43, at 314–19.

85. *See* DEBORAH VALENZE, THE FIRST INDUSTRIAL WOMAN 41, 67, 94–95 (1995).

time wage labor outside the home eventually came to define work itself. In this way, the transition to modernity not only constructed new forms of working, but also attached new meanings to full-time wage labor that eclipsed work done in other forms and in other places. Even today, this valorization of full-time wage labor outside the home reinforces existing work practices and evokes normative commitments to those practices.

2. THE LEGAL CONSTRUCTION OF TIME NORMS AND EMPLOYER CONTROL

How did law contribute to the transformation of work? During this historical transition, conceptions of employment as a free contract between employer and worker replaced customary means of regulating working conditions, and the legal relationship of contract, rather than ascriptive status or relationships, became the center of social organization.[86] The contours of the employment relationship did not spring fully formed from the transition to industrial production, however; courts interpreted what these new relationships would mean.[87] Courts did more than enforce employment contracts in a new economy; they also constructed and gave meaning to the new social relationship of wage labor.

Courts generally enforced contractual bargains in favor of employers' interests and solidified control over the production process.[88] Over time, courts resolved initial ambiguities regarding employer control and employee discretion by ruling that the contractual exchange of a wage for work included not only the worker's labor

86. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 186–88 (1977); SIR HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 163–65 (6th ed. 1876). Modern legal conceptions of at-will employment, rather than an ongoing relationship of obligation between worker and employer, reflect this development, even though culturally and socially, most employees do not view their employment relationships in terms of free contract and at-will employment doctrine. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133–36 (1997).

87. KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES 112–15 (1991); ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870, at 154–60 (1991); CHRISTOPHER L. TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 226 (1993).

88. HORWITZ, *supra* note 86, at 186–89; ORREN, *supra* note 87, at 112–15; CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846, at 54 (1992); TOMLINS, *supra* note 87, at 226.

power but also submission to his employer's authority.[89] Courts relied upon traditional class-based doctrines of master and servant to require submission, and consistently recognized employers' unilateral power to change the conditions of employment and rejected workers' attempts to change or control their working environment.[90] By enforcing the authority of employers in all employment relationships, rather than only those traditionally associated with servitude, the law remade the meaning of work.[91]

Later legal developments also helped to install the forty-hour, five-day work week as the standard for wage labor. After making little progress in negotiations for shorter hours for anyone other than skilled workers, labor and reformers turned to legislative strategies to limit working hours, but met opposition in the courts, which consistently overturned regulation of working hours by relying on free-contract principles.[92] The paradigmatic example is *Lochner v. New York*,[93] in which the Supreme Court struck down a New York law that limited bakers' hours to ten per day as "an illegal interference with the rights of individuals . . . to make contracts."[94] Although three years later, the Court upheld an Oregon law limiting the hours of working women in *Muller v. Oregon*,[95] it distinguished *Lochner* by relying on women's dependent status and roles within the family, setting women apart from wage laborers even as they were considered as workers.[96] In the process, full-time work became even more closely associated with men.

The battle over time continued as shorter-hours legislation at the state level spread rapidly after *Muller v. Oregon*.[97] By 1933, in the early years of the Great Depression, national legislation limiting the work week to thirty hours seemed almost certain to be enacted as a temporary work-sharing provision to combat unemployment.[98] Faced with stiff and growing opposition from business interests that feared

89. TOMLINS, *supra* note 87, at 228–31.

90. ORREN, *supra* note 87, at 79–91; TOMLINS, *supra* note 87, at 226.

91. TOMLINS, *supra* note 87, at 230–31.

92. BENJAMIN KLINE HUNNICUTT, WORK WITHOUT END: ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK 20–21 (1988); KESSLER-HARRIS, *supra* note 67, at 183–84; SKOCPOL, *supra* note 65, at 226–27; *see generally* Robert Whaples, *Winning the Eight-Hour Day, 1909–1919*, 50 J. ECON. HIST. 393 (1990) (discussing factors that contributed to establishing an eight-hour work day).

93. 198 U.S. 45 (1905).

94. *Id.* at 61–62.

95. 208 U.S. 412 (1908).

96. *Id.* at 421–23; Sybil Lipschultz, *Social Feminism and Legal Discourse: 1908–1923*, 2 YALE J.L. & FEMINISM 131, 134–38 (1989).

97. SKOCPOL, *supra* note, 65, at 396–401.

98. HUNNICUTT, *supra* note 92, at 147.

these restrictions would become permanent, however, President Roosevelt fought off this legislation with alternative proposals such as massive public-works programs to decrease unemployment.[99] In part to undermine calls for shorter-hours legislation, businesses adopted their own time standards through industry-negotiated codes under the National Recovery Act.[100] These codes almost uniformly adopted the forty-hour work week that was already common, but above the current average in most industries.[101] In the end, the Fair Labor Standards Act eventually set a much weaker federal standard work week of forty hours that was riddled with exceptions and allowed longer hours if overtime was paid.[102]

These historical developments teach that what now seems natural and inevitable was at one time a contested element of the employment relation. The transition to a wage-labor economy, during which the meaning of employment relations might have been reimagined, saw courts instead interpret the employment relation to include the traditional privileges of control and authority associated with servitude. Even the later institutionalization of the forty-hour work week—an apparent victory for labor—staved off what had been a steady decline of weekly hours over decades and avoided restrictive legislation that would have limited work schedules even more.

3. INSTITUTIONALIZED GENDER INEQUALITY

The brief sketch of these historical patterns suggests how institutionalized work practices embody the outcome of a series of protracted struggles over time, control, and the very meaning of work. This genealogy, however, is incomplete. Although this literature traces the transition to modern forms of production, it gives insufficient attention to how implicit conceptions of gender became embedded in work practices and the meaning of work. Alternative interpretations suggest that work practices and the beliefs that support them developed in opposition to historically and socially contingent conceptions of gender, and incorporated the social inequalities that attach to this category.

Conventional historical interpretations argue that gendered work practices and a gendered division of labor within the family are by-

99. *Id.* at 160–63, 172–75.

100. *Id.* at 175–78.

101. Indeed, Hunnicutt notes that "[o]ver 90 percent of the NRA codes set hours at 40 a week or longer at a time when the actual average workweek in American industry was well under 36 hours." HUNNICUTT, *supra* note 92, at 178.

102. *Id.* at 246–47.

products of moving work from home to industrialized settings.[103] In this view, modern work structures conform to male life patterns because after industrialization, men performed work—meaning wage labor—and women performed "residual," non-work life activities such as caring for children in the home. Accordingly, because work no longer took place in the household, women no longer worked in addition to their residual household tasks.[104] But this approach accepts modern understandings of work as given, and then applies them to historical analysis without interrogating how the meaning of work itself has changed over time. It takes for granted that work consists only of those activities that moved from the home to industrial workplaces, and assumes that the tasks left behind were residual or supplementary non-work. As other historical accounts have shown, understandings of labor performed in the home as "residual" or "supplementary" are themselves historically and socially contingent, constructed by social and political responses to changing production patterns.[105]

In contrast to approaches that claim that industrialization caused work to leave the home, alternative interpretations describe how industrialization redefined the meaning of work as a social category. In particular, accounts that focus on gender examine how women's labor, which was previously considered productive work, became defined through economic and legal changes as the antithesis of work.[106] As a first step, these interpretations posit that a gendered division of labor predated, rather than flowed from, industrialization. Although prior to industrialization women and men traditionally performed different tasks, culturally both men and women's labor were recognized as

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

104. Alternatively, industrialization could be seen as forcing a division of labor between the sexes—where both women and men had previously performed productive labor and housework, now men would exclusively perform "work" while women exclusively performed homemaking. This interpretation is also suspect as based merely on assumption rather than on fact, as recent historical accounts make clear that a gendered division of labor predated industrialization and industrialization may have merely obscured the intensive labor done in the home by focusing only on wage labor. BOYDSTON, *supra* note 65, at xi, xv–xvi, 11–12; VALENZE, *supra* note 85, at 3–7.

105. BOYDSTON, *supra* note 65, at xiv–xv, 11–18, 122–23; VALENZE, *supra* note 85, at 6; Desley Deacon, *Political Arithmetic: The Nineteenth-Century Australian Census and the Construction of the Dependent Woman*, 11 SIGNS: J. WOMEN IN CULTURE & SOC'Y 27, 27–29 (1985); Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought*, 16 SIGNS: J. WOMEN IN CULTURE & SOC'Y 463, 464–65 (1991); Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1086–94 (1994).

106. BOYDSTON, *supra* note 65, at 11–18; VALENZE, *supra* note 85, at 3–7; Deacon, *supra* note 105, at 31–32, 34–35, 41–42; Folbre, *supra* note 105, at 470–78; Siegel, *supra* note 105, at 1091–94, 1118.

valuable contributions to the family's survival.[107] Preindustrial productive activities, however, were viewed in terms of specific tasks rather than in terms of work and non-work. Indeed, the concept of work evolved as an abstract category in part in response to industrialization:

> [This period was] a critical point of transition in the history of work, when ideas about productivity and productive processes themselves underwent significant transformations. . . . At this juncture, an "idea of work in general" emerged, "that is, work considered separately from all of its particular forms in agriculture, manufacturing or commerce." The abstraction was implicated in important determinations taking place in the late eighteenth and early nineteenth century: the assignment of tasks to individuals according to age and sex, the correct level of wages, the notion of worker incentive, and the designation of wage earning according to gender.[108]

Not only the location but also the meaning of work changed with industrialization, and pre-existing gendered patterns of labor helped give meaning to new conceptions of work. Rather than being caused by industrialization's technological developments, existing gendered patterns of labor were an integral part of industrialization's technological and social changes.[109]

Economic, legal, and ideological factors helped infuse gender into the meaning of work that developed during this time. A confluence of social changes including urbanization, the transition to a cash economy based on wage labor, the scarcity of land for agriculture, the decline of trades, and the gradual decline of early American barter economies that relied on textiles, cheese, or butter as mediums of exchange made the products of women's labor less visible as direct contributions to household survival.[110] Although both men and women contributed labor

107. BOYDSTON, *supra* note 65, at 11–12. Boydston describes in detail how in colonial America, women and men performed different tasks, consistent with Protestant beliefs that women were the keepers of the home and helpmates to men. Women generally performed sewing, spinning, caring for children, cooking, cleaning, tending the kitchen garden as well as cows and chickens, and manufacturing products for the household such as soap, bedding, and clothing. *Id.* Men cleared and cultivated the land, constructed household buildings, practiced a trade or craft such as shoemaking or weaving, managed household finances, and performed heavy labor. *Id.*

108. VALENZE, *supra* note 85, at 6.

109. MAXINE BERG, THE AGE OF MANUFACTURERS: INDUSTRY, INNOVATION AND WORK IN BRITAIN 1700–1820, at 145–58 (1985); BOYDSTON, *supra* note 65, at 122–24; VALENZE, *supra* note 85, at 6.

110. BOYDSTON, *supra* note 65, at 20–26, 35–37, 60–61, 66–67.

toward their family's sustenance, the changing economic structure emphasized men's contributions and obscured the less market-oriented contributions of women.[111]

At the same time, the meaning of work as a social category was becoming more closely associated with the time-disciplined labor of industrial factory settings, a form of labor primarily performed by men. Women continued to perform task-oriented work at home, including caring for children, housekeeping, and piecework for the market, but by emerging industrial standards this labor came to appear less efficient and less essential than men's time-disciplined labor.[112]

Prevailing legal interpretations also obscured the contributions of women's productive labor by only recognizing and valuing market contributions to family survival, which were primarily made by men, while framing women's contributions in the home as gratuitous and obligatory labor in the private sphere. For example, courts and lawmakers drew on gender roles to give wives rights only to their earnings from labor outside the home, defining other forms of labor performed in the home as marital service to a woman's husband.[113] Consequently, legally recognized work, which gave rise to property rights, came to mean only labor performed outside the home, even though both men's and women's ways of working underwent dramatic changes during this historical period.[114] Similarly, nineteenth-century British and American censuses moved from legally defining women performing labor in the home as productive workers to classifying the same women performing the same work in the home as dependents, along with children and disabled individuals.[115] Thus law was part of the process through which women's labor gradually came to be disassociated from, and even set in opposition to, the evolving concept of work.[116]

111. *Id.* at 35–37, 43–44, 46–48, 50, 54–55.

112. COTT, *supra* note 60, at 58–62.

113. Siegel, *supra* note 105, at 1180–89.

114. BOYDSTON, *supra* note 65, at 134–35; Siegel, *supra* note 105, at 1180–89.

115. Deacon, *supra* note 105, at 32, 35; Folbre, *supra* note 105, at 464.

116. In an even more extreme example, Valenze notes that during the enclosure movement in England, many traditional activities of women that historically had been performed on the common, such as gathering wood and tending cattle, became not only no longer possible but also criminalized. The criminalization of these activities transformed women's labor from a valued source of survival to punishable and reprehensible behavior. In addition, women who protested the prohibitions against their customary labor were cast as backward and ignorant opponents of the social progress of industrialization. VALENZE, *supra* note 85, at 102. This history shows one subtle way in which women's traditional forms of labor came to be devalued.

Cultural ideologies about the appropriate gendered division of labor also contributed to work's emerging meaning. At least three interlocking ideologies contributed to this process: separate-spheres ideology, the pastoralization of the home, and the family wage ideal. Separate-spheres ideology emphasized women's cultural and moral authority as keepers of the home and caretakers and teachers of young children,[117] and contrasted sharply with the sources of cultural authority for men, namely their status as workers, breadwinners, and participants in civic activities. It taught that work outside the home not only contravened women's natural role in life, but also threatened to undermine the social order by distracting her from her roles as wife, mother, and homemaker.[118]

A second, related ideological theme was the pastoralization of housework and the valorization of the home as a safe haven of peace and rest from the demanding commercial activities of the marketplace. During the industrial transition, popular literature portrayed the home as a place of refuge and repose, drawing a sharp distinction between the tranquil home and the restive economic activities of the marketplace.[119] Contemporary accounts portrayed basic household requirements, such as bread or meals, as bounty from nature rather than the products of women's traditional labor. Pastoralization helped make women's labor in the home less visible, as both women and the home ceased to be identified with work.[120]

Third, family wage ideology, or the idea that the normative worker is a male breadwinner with a stay-at-home wife, contributed to this interlocking system of meaning. Family wage ideology was, in part, a gendered response to the changing economic system brought about by industrialization and the upheavals that threatened male exclusive competence and authority in the economic realm.[121] With industrialization, working-class women began to compete with men for wages at the same time as prior opportunities for economic support such as land ownership or agricultural labor began to diminish.[122] Displaced artisans and craftsmen responded to these changes by organizing and negotiating skilled classifications for certain jobs, essentially ensuring that those positions would be open only to men, pushing women into lower-paid, less desirable wage labor or into

117. Welter, *supra* note 77, at 162, 170–72.

118. *Id.* at 162, 172.

119. SKOCPOL, *supra* note 65, at 322; *see generally* Welter, *supra* note 77.

120. BOYDSTON, *supra* note 65, at 146–49, 152.

121. Fraser & Gordon, *supra* note 43, at 315–19.

122. BOYDSTON, *supra* note 65, at 154–55; KESSLER-HARRIS, *supra* note 67, at 201–04; VALENZE, *supra* note 85, at 101–02.

unpaid labor in the home.[123] Excluding women from many forms of wage labor helped to reestablish a material basis on which to rest patriarchal claims to authority and independence, and offered a way to reimagine the social basis of independence, citizenship, and patriarchal authority in terms of wage labor rather than real property.[124]

Law referenced the family wage norm, in which women were dependent mothers and wives, to justify restrictions on women's participation in work. In the nineteenth century, the Supreme Court upheld closing certain professions to women, relying in part on

123. KESSLER-HARRIS, *supra* note 67, at 201–04; VALENZE, *supra* note 85, at 95; *see also* BOYDSTON, *supra* note 65, at 155 (listing arguments for the family wage based on unfitness of women for wage labor).

124. BOYDSTON, *supra* note 65, at 156–57; Fraser & Gordon, *supra* note 43, at 315–16. Of course the family wage arrangement historically was a white middle-class ideal more than it was a universal reality. Women—particularly immigrant women, poor women, and women of color—have always worked outside the home for wages despite the pervasive ideology of the family wage. PATRICIA HILL COLLINS, 2 PERSPECTIVES ON GENDER, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 46–47 (1991); Eileen Boris, *The Power of Motherhood: Black and White Activist Women Redefine the "Political," in* MOTHERS OF A NEW WORLD: MATERNALIST POLITICS AND THE ORIGINS OF THE WELFARE STATE 216 (Seth Koven & Sonya Michel eds., 1993); BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 219–21 (Gerda Lerner ed., 1972). The gendered division between wage labor and household tasks was thus not a universal pattern driven by the technological advances of industrialization. Instead, family wage ideology was a cultural frame for interpreting (and, arguably, enforcing) modern labor patterns in terms of gender, and a particular classed perspective on gender at that.

Family wage ideology exacerbated class and race distinctions. For example, the ideology of the self-sufficient, independent worker who earns a family wage constructed poverty as an individual failing rather than as social oppression, justifying and legitimizing class differences. LIPSET, *supra* note 43, at 47 (quoting ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 167–69 (1957)). Similarly, the cult of domesticity helped draw class lines more clearly by simultaneously glorifying middle-class women who could afford not to work and condemning working-class women who worked to support their families. Martha May, *The Historical Problem of the Family Wage: The Ford Motor Company and the Five Dollar Day*, *in* FAMILIES AND WORK 111, 114–15 (Naomi Gerstel & Harriet Engel Gross eds., 1987). These working-class women were disproportionately women of color. BLACK WOMEN, *supra* 219–21.

Family wage ideology also set class and gender interests in opposition by simultaneously bolstering working-class arguments for higher wages while justifying less pay for women or excluding them from work altogether. May, *supra*, at 113, 115; Dorothy E. Smith, *Women's Inequality and the Family*, *in* FAMILIES AND WORK 23, 34 (Naomi Gerstel & Harriet Engel Gross eds., 1987). Employers who provided a family wage could also undermine unionization and appropriate unpaid women's labor in the home for capitalist production. May, *supra*, at 119, 123. Although class and race were part of the story, nevertheless it is the relationship between gender and work that forms the common thread among these intertwined dimensions of social inequality.

gendered rhetoric about their responsibilities as wives and mothers.[125] Similarly, early twentieth-century statutes restricting women's working hours were passed by state legislatures and upheld in the courts based on women's special status as present or future mothers.[126] Reformers promoting protective labor regulations used one cultural category, motherhood, against another, the free-contract conception of work, to justify protections for some workers. By focusing on women's roles as wives and mothers, however, they helped to reify gender and work as oppositional social categories, to promote perceptions that women were less committed than men to work, and to foster beliefs that women worked only sporadically and temporarily, for "pin money" or to fill "the gap between school and marriage."[127] Indeed, even in the second half of the twentieth century it was still common to fire working women when they married, or, at the latest, when they had their first child.[128] Women's status as mothers and wives, not their abilities and worth as workers, continued to define their roles both at work and at home. Law, therefore, helped to construct work and, implicitly, the meaning of gender such that wage labor came to mean different things for women and men. Work came to be seen as a fundamental element of male identity. For women, however, it was assumed that work at most merely marked a short transition period from childhood to marriage.[129]

125. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

126. SKOCPOL, *supra* note 65, at 394–95. Critical interpretations argue that unions supported this legislation to exclude women from certain occupations, creating less competition for their primarily male members. KESSLER-HARRIS, *supra* note 67, at 201–04. Indeed, the National Congress of Mothers expressed concern that valorizing motherhood to justify protective legislation would enforce women's secondary position in the wage-labor market when employers found it cheaper to employ men than to comply with restrictions on women's wage labor. SKOCPOL, *supra* note 65, at 382.

Perhaps because they recognized this danger, women reformers changed their arguments significantly between *Muller* in 1908 and their 1923 *Adkins* Supreme Court brief, which also defended protective legislation. The *Muller* brief treated women's wage labor as an unfortunate anomaly that should be prevented from interfering with their true vocation as mothers. Lipschultz, *supra* note 96, at 136–37. It essentially advocated for a secondary labor market position for women, a position consistent with maintaining the family wage model and women's traditional role in the home. *Id.* at 141–42. In contrast, the *Adkins* brief argued for the need for government intervention to create gender equity *because* of women's weaker position in the labor market. *Id.* at 133. Reformers had begun to realize that protective legislation structured around maintaining the family wage system constrained work opportunities for women. Culturally, however, the rhetorical battles regarding protective legislation had already constructed work and motherhood in opposition to one another.

127. Meryl Frank & Robyn Lipner, *History of Maternity Leave in Europe and the United States*, *in* THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY 3, 11–13, 19 (Edward F. Zigler & Meryl Frank eds., 1988) (internal citation omitted).

128. Smith, *supra* note 124, at 34.

129. Frank & Lipner, *supra* note 127, at 11.

Conceptions of work and gender also were deeply tied to welfare policy, which continued to reference work to set the boundaries of who was legitimately entitled to aid. American welfare policies have consistently resolved the tension between the norm of the autonomous, self-sufficient worker and the need to care for families in ways that reinforced and recreated the family wage ideal. For example, Skocpol notes that early twentieth-century mothers' pensions were premised on the idea that mothers were not—and should not be—workers.[130] Advocates justified mothers' pensions by citing women's traditional roles as the caretakers of children, which helped neutralize objections to their nonparticipation in the labor market and reduced the moral hazard of social support.[131] Generally limited to married women who were in traditional families until their husbands' deaths, these pensions did little to undermine the family wage ideal.[132] The pensions also shored up the wages of male breadwinners.[133] Labor organizations supported mothers' pensions specifically because widowed mothers would otherwise enter the labor market and work for less than others, which could undermine employment opportunities for men.[134]

Later, New Deal policies continued to reinforce women's traditional roles. The most generous policies accrued to long-term, full-time workers, so that the part-time, intermittent work commonly performed by women was seldom sufficient to make women eligible for substantial support.[135] Explicit gendered exclusions also operated. For example, the Social Security Act initially provided financial benefits to widows, but not to widowers, presuming that only the work of male breadwinners, and not the labor of wives, contributed to the support of their families.[136] Similarly, the Act provided aid to families whose dependent children were needy because of the death, incapacity, or absence of a parent.[137] By excluding two-parent families from social welfare provision, the state both recognized and reinforced a particular, usually gendered, organization of labor at work and at home—one

130. SKOCPOL, *supra* note 65, at 465, 469–70.

131. *Id.* at 435–39, 452, 456.

132. *Id.* at 467–70.

133. *Id.* at 430–32.

134. *Id.*

135. METTLER, *supra* note 52, at 45, 127–28.

136. This gender-specific standard fell to a legal challenge in 1977. *Califano v. Goldfarb*, 430 U.S. 199, 201–02 (1977) (holding that "the different treatment of men and women mandated by § 402(f)(1)(D) constituted invidious discrimination against female wage earners by affording them less protection for their surviving spouses than is provided to male employees").

137. *Califano v. Westcott*, 443 U.S. 76, 79 (1979).

parent to provide care and the other to provide financial support.[138] Even when benefits became available to two-parent families, married women with children were excluded from the program's work requirements, but single women with children were not.[139] Thus, the state looked not only to motherhood but also to dependency in traditional family roles to justify eligibility for support outside the wage-labor system.[140]

Much research argues that the gendered assumptions of these programs construct the meaning of welfare in terms of gender and race.[141] These programs also, however, construct the meaning of work. Economically and politically, support for these social programs was justified as protection for legitimate and appropriate nonworkers; recipients by social definition were not workers. Thus, to the extent that motherhood rendered one a legitimate nonworker, work and motherhood come to be understood as oppositional categories. By defining mothers as appropriately outside the wage-labor system, the state reinforced cultural expectations that women stay home and care for children without pay. It also facilitated structuring work around the assumption that workers are male breadwinners who have wives at home.[142]

By the time women, and especially mothers, began to enter the workforce in earnest in the last half of the twentieth century, both the full-time, year-round time norms of work and the implicit gendered meanings associated with wage labor were firmly in place. Antidiscrimination legislation, such as Title VII of the Civil Rights Act of 1964, made changes at the margins by prohibiting employers from assuming women had care responsibilities that conflicted with work and by prohibiting employers from refusing to hire or promote women because of their gender.[143] Nevertheless, the standard forty-hour work

138. Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1253–56 (1983).

139. *Id.* at 1264–66.

140. Of course, with recent welfare reforms, mothers on the least generous track of these welfare programs are now required to work, even though similar requirements do not apply to widows receiving Social Security benefits. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

141. Gordon, *supra* note 52, at 18–30; Barbara Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mother's Aid*, *in* WOMEN, THE STATE, AND WELFARE 123, 133–45 (Linda Gordon ed., 1990); *see generally* JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994).

142. Law, *supra* note 138, at 1253.

143. 42 U.S.C. § 2000e-2(a) (2006); *Phillips v. Martin Marrietta Corp.*, 400 U.S. 542 (1971).

week, mandatory overtime, travel and relocation expectations, and a lack of leave for parenting responsibilities continued to be common features of many jobs.[144] Even after the law came to prohibit formal exclusion of women from the workplace, the historically determined structure of work continued to erect significant barriers to employment, particularly for women who were also mothers.

This genealogy reveals that institutionalized work practices derive, in part, from the ideologies, cultural meanings, and historically contingent conceptions of gender that predominated during the transition to modernity; they cannot be understood as simply the natural product of material transformations in productive activities and technology. To say that work draws its meaning from the categories of gender is not the same, however, as the claim that work is built around a "male" norm. Such arguments assume that there are stable, essential qualities of women that exist independent of their relationship to work and that work fails to accommodate these qualities. Instead, I argue that work and gender have no essential or natural characteristics, but instead constitute one another as the result of the historical process through which modern work structures developed.[145]

C. Institutional Change and Retrenchment

Social conditions and the legal environment of workplaces are changing, raising the question of how work as an institution will respond to yet another major social transition. Fundamental changes to institutions tend to occur when the social arrangements that support institutional regimes erode and institutions "suddenly appear problematic."[146] Changing social arrangements reveal the social assumptions underlying institutions, destabilizing them, and leaving them open to reinterpretation and challenge. Because institutions evoke automatic acceptance and normative approval, however, they can be a source of resistance to accepting changes in the social arrangements that support them.[147] In fact, institutions often persist long after the social conditions that gave rise to them have shifted, and such is the case with work.

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144. *See generally* SHEILA B. KAMERMAN ET AL., MATERNITY POLICIES AND WORKING WOMEN (1983); WILLIAMS, *supra* note 48.

145. Of course pregnancy is a physical condition, but the consequences and perceptions of pregnancy in the workforce are socially constructed.

146. Paul J. DiMaggio & Walter W. Powell, *Introduction* to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 11 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

147. Krieger, *supra* note 16, at 477.

Two recent dramatic changes have undermined the symbiotic relationship between the family wage model and traditional work structures: the increased participation of women in the labor force, including married women with children, and the growing number of single-parent families. The steep rise in women's workforce participation is stunning. The participation rate of married women with children under six was only 18.6 percent in 1960, compared with 30.3 percent in 1970, 45.1 percent in 1980, 62.7 percent in 1996,[148] and 63.5 percent in 2006.[149] In addition, more women with very young children are working. "In 1976, only 31 percent of mothers with a child under one year old were in the labor force,"[150] but by 2006, 56.1 percent of mothers with a child under one year old were in the labor force.[151] Similar patterns emerged for women's participation rate in general.[152] Women and men now participate in the labor market at similar rates,[153] although a substantial percentage of working women work part-time.[154]

Given this trend, it is not surprising that the proportion of families that fit the traditional breadwinner model has declined substantially. In 1940, 67 percent of families consisted of "employed husbands with stay-at-home wives."[155] In 2006, that figure was only about 20 percent.[156] Single-parent families also became more common as the result of increasing divorce rates and more never-married parents.[157]

148. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 404 (117th ed., 1997).

149. BUREAU OF LAB. STATISTICS, U.S. DEP'T OF LAB., EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2006, tbl.5, *available at* http://www.bls.gov/news.release/archives/famee_05092007.pdf.

150. BARBARA RESKIN & IRENE PADAVIC, WOMEN AND MEN AT WORK 144 (1994).

151. BUREAU OF LAB. STATISTICS, *supra* note 149, at 2.

152. Howard V. Hayghe, *Developments in Women's Labor Force Participation*, MONTHLY LAB. REV., Sept. 1997, at 41, 41–42.

153. Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950–98 and 1998–2025*, MONTHLY LAB. REV., Dec. 1999, at 3, 5–6.

154. Philip N. Cohen & Suzanne M. Bianchi, *Marriage, Children, and Women's Employment: What Do We Know?*, MONTHLY LAB. REV., Dec. 1999, at 22, 24–25 & tbl.1.

155. RESKIN & PADAVIC, *supra* note 150, at 144.

156. BUREAU OF LAB. STATISTICS, *supra* note 149, at 2.

157. JASON FIELDS, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: POPULATION CHARACTERISTICS 7 (2000), *available at* http://www.census.gov/prod/2001pubs/p20-537.pdf; *see generally* Hayghe, *supra* note 152, at 15–16 & chart 1.

Dual-income families have become much more common, increasing the time pressure on many families.[158]

Legal changes in civil rights doctrine suggest how these social changes destabilized work as an institution and undermined the social perceptions that set work in opposition to gender and disability. For example, in the 1960s Congress enacted the Equal Pay Act, which requires equal pay for men and women performing the same work, and Title VII of the Civil Rights Act, which prohibits discrimination in employment on the basis of sex.[159] The more recent Family and Medical Leave Act requires employers to provide certain employees with up to twelve weeks of job-protected, unpaid leave to care for new children or ill or injured family members, helping ease the conflict between work and family responsibilities.[160]

Despite these significant social changes and legal reforms, women, and especially women with family responsibilities, have found themselves marginalized with regard to work even as they enter the workforce in greater numbers. For example, women consistently earn only a fraction of what men earn.[161] In addition, ample research makes clear that there is a significant wage penalty for motherhood.[162] Mothers earn less than men, whether or not those men have children; mothers also earn less than women who do not have children. These wage penalties remain even after controlling for factors that might differentiate mothers and non-mothers, such as human capital investments, part-time employment, the family-friendly characteristics of jobs held by mothers, and other important differences in the characteristics, skills, and behaviors of mothers and non-mothers.[163]

One potential explanation for these lingering disadvantages lies in the persistence of the institutional relationship between work and

158. JERRY A. JACOBS & KATHLEEN GERSON, THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY 1 (2004).

159. Equal Pay Act, 29 U.S.C. § 206(d) (2006); Title VII of the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2006).

160. 29 U.S.C. § 2612 (2006 & Supp. 2009).

161. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 2000, at 437 (120th ed., 2000).

162. Erin L. Kelly, *Discrimination Against Caregivers? Gendered Family Responsibilities, Employer Practices, and Work Rewards*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 353, at 357 (Laura Beth Nielsen & Robert Nelson eds., 2005).

163. Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 291 (2003); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 214–16 (2001); Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 143 (1998).

conceptions of gender, despite legal reforms. Institutionalized time norms built around the male breadwinner-worker play an important role in this regard. Workplace time norms help to police traditional gender expectations. For example, experimental research shows that mothers who violate gender roles by working are not only perceived as less competent and less likely to be recommended for promotions or hiring than other workers, but are also held to a higher performance standard in terms of attendance and punctuality at work.[164] More generally, workers who violate time norms by making use of family leave are evaluated more negatively than other workers in terms of perceived commitment and allocation of organizational benefits, regardless of performance.[165] Along these lines, detailed ethnographic research documents that many informal penalties and disincentives at work discourage workers from making use of leave policies.[166] Time norms and gendered expectations are connected here as well: although all leave-takers are disadvantaged, men who use family leave are evaluated more negatively than men who do not use leave, and more negatively than women whether or not they make use of leave.[167] Thus, workplace penalties are not directed solely at women who seek to break out of their non-worker status; men are penalized too when they seek to depart from the breadwinner role. In fact, workplace penalties associated with time norms are a subtle system for enforcing particular, historically contingent conceptions of gender roles based on the family wage model.

164. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1332 (2007); Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004); Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004).

165. Tammy D. Allen & Joyce E.A. Russell, *Parental Leave of Absence: Some Not So Family-Friendly Implications*, 29 J. APPLIED SOC. PSYCHOL. 166, 184–85 (1999); Jennifer Glass, *Blessing or Curse? Work-Family Policies and Mothers' Wage Growth over Time*, 31 WORK & OCCUPATIONS 367, 382, 387 (2004); Michael K. Judiesch & Karen S. Lyness, *Left Behind? The Impact of Leaves of Absence on Managers' Career Success*, 42 ACAD. MGMT. J. 641, 648 (1999); Julie Holliday Wayne & Bryanne L. Cordeiro, *Who is a Good Organizational Citizen? Social Perception of Male and Female Employees Who Use Family Leave*, 49 SEX ROLES 233, 242–43 (2003) (noting little or no bias against women who use leave for purposes other than to care for a sick child, but noting bias against men who take leave for reasons other than to care for a sick child).

166. *See generally* MINDY FRIED, TAKING TIME: PARENTAL LEAVE POLICY AND CORPORATE CULTURE (1998); HOCHSCHILD, *supra* note 53.

167. Allen & Russell, *supra* note 165, at 185; Wayne & Cordeiro, *supra* note 165, at 242–43.

To understand why marginalizing work practices persist, it is necessary to understand that not only changing conceptions of gender, but also resistance from the institution of work itself affect the dynamics of social change. Even as the social foundations of work erode, institutionalized work practices and expectations persist. Yet work does not conflict with family per se, only with families that depart from traditional gender roles; that is, work conflicts with changing conceptions of gender. Because the features of work have become naturalized, however, social conflict seems to originate in external social changes, such as changing family structures, rather than within the relationship between the institution of work and outmoded conceptions of gender.

II. TITLE VII AND ITS DISCONTENTS: THE LIMITS OF THE PDA

Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex, became one of the first legislative tools for opening work opportunities to women.[168] Title VII did not explicitly specify whether discrimination on the basis of pregnancy was a form of sex discrimination or permissible practice, leaving this issue for courts to decide. Some of the most difficult questions emerged in the context of pregnancy, not only when the physical demands of pregnancy required women's absence from work, but also when employers believed that pregnant women should not work.

The Supreme Court took up this question in *General Electric Co. v. Gilbert*,[169] in which it held that Title VII's prohibition on discrimination on the basis of sex did not include discrimination on the basis of pregnancy.[170] This decision immediately came under heavy fire from critics who argued, among other things, that *Gilbert* implicitly presumed that women were only "supplemental or temporary workers

168. Section 703(a), 42 U.S.C. § 2000e-2(a) (2006) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

169. 429 U.S. 125 (1976).

170. *Id.* at 136.

. . . waiting to return home to raise children full-time."[171] Congress rejected this approach by enacting the Pregnancy Discrimination Act (PDA), which defines discrimination on the basis of sex to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions . . . ."[172] The PDA also provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."[173]

Even after the PDA, however, pregnancy remains a difficult issue because pregnancy almost always requires working women to violate entrenched workplace time norms. For example, pregnant workers generally need some time off for childbirth, and some workers may also require time off during the pregnancy.[174] Although the PDA requires employers who grant time off for non-pregnancy related disabilities to provide the same benefits for pregnancy-related disabilities, its language is less clear about whether employers that do not generally provide disability leave must grant leave to pregnant women. On the one hand, the first section of the PDA could be interpreted to prohibit discrimination against employees who are temporarily absent from work for medical reasons related to pregnancy and childbirth.[175] On the other hand, other language in the PDA suggests that pregnant women merely must be treated no worse than other workers who are similar in their ability or inability to work.[176]

Little legislative history exists for the prohibition against sex discrimination in Title VII because this prohibition was added at the last

171. Frank & Lipner, *supra* note 127, at 19.

172. 42 U.S.C. §2000e(k) (2006).

173. *Id.*

174. Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 518–19 (1983) (noting that four out of five female workers in the United States workforce are likely to become pregnant at some time in their working lives and require time off as a result).

175. 42 U.S.C. § 2000e(k) (2006) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .").

176. 42 U.S.C. § 2000e(k) (2006) ("[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."). Nevertheless, both courts and commentators have interpreted this second clause of the PDA as consistent with disparate impact theories, which can result in accommodations. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 662–63 & n.93 (2001).

minute as an attempt to defeat the other antidiscrimination provisions of the bill.[177] In addition, although the PDA was a legislative override of the *Gilbert* decision, advocates framed its provisions narrowly to avoid political opposition to the amendment.[178] Thus, at the time the PDA was enacted, the meaning of these antidiscrimination provisions and the degree to which they would reach facially neutral structural barriers at work was largely an open question. *Griggs v. Duke Power Co.*[179] had been decided, opening the door to challenges to facially neutral workplace practices that had a disparate impact on a protected class of workers,[180] but there was as yet little judicial guidance about what disparate impact theories would mean in the gender discrimination context, particularly with regard to pregnancy.

177. *See* 110 CONG. REC. 2577–84 (1964) (floor debate); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–18 (1985) (reading floor record to mean that the addition of "sex" was a racist joke to defeat the bill that backfired). For a rejection of the popular interpretation that the last-minute addition of "sex" was a ploy to defeat the bill, see Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 163, 176–78, 182 (1991) (noting, inter alia, that the "sex" amendment's sponsor, segregationist Rep. Howard W. Smith, had been an ERA sponsor since 1943 and had advocated a "sex" amendment in 1956). Freeman concludes that "[t]he overall voting pattern implies that there was a large group of Congressmen (in addition to the Congresswomen) that was serious about adding 'sex' to Title VII, but only Title VII. That is not consistent with the interpretation that the addition of 'sex' was part of a plot to scuttle the bill." *Id.* at 178. *Cf.* Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997) (documenting that feminists "strongly supported inclusion of sex" and "secured its passage into law"). Bird concludes that Rep. Smith was "an opponent of civil rights legislation and introduced the sex discrimination provision to scuttle the bill. If the bill was to pass, however, Smith genuinely preferred a bill with a ban on sex discrimination. . . . The overwhelming evidence defies the conclusion that 'sex' was added as a mere joke." *Id.* at 157–58, 161.

178. Both Senate and House reports, as well as the floor debates, emphasized the PDA's modest scope and analogousness to Title VII's pre-existing provisions. H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 150 (1980); S. REP. NO. 95-331, at 4 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 41 (1980) ("[T]he bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions."); 123 CONG. REC. 29,664 (1977) (Sen. Brooke assuaging his colleagues' concerns by emphasizing that the PDA "in no way provides special disability benefits for working women"); 123 CONG. REC. 29,385 (1977) (Sen. Williams providing illustrative description of the Senate bill as merely requiring equal treatment "with other employees on the basis of their ability or inability to work").

179. 401 U.S. 424 (1971).

180. *Id.* at 429–33.

How the PDA's prohibition against discrimination on the basis of pregnancy should be interpreted became a significant theoretical debate among feminist legal scholars because it tapped unresolved questions about what workplace equality required. Some argued that equality required only that employers give women equal access to existing workplace structures and practices, and employers should simply treat pregnancy-related disabilities no better or worse than non-pregnancy related disabilities.[181] In their view, providing affirmative benefits to accommodate work to pregnancy would open the door to protectionist policies that reinforced and prioritized women's roles as mothers and wives rather than workers.[182] Others argued that the law should value and reward the traditional family labor done by women, rather than requiring women to abandon the roles of mother and caregiver to claim the role of worker.[183] Those that took this view did not believe that special treatment such as pregnancy leave paternalistically categorized women as only mothers. Instead, they argued that antidiscrimination mandates should include changing workplace practices to provide leave so as to value women's traditional roles.[184] Thus, the early debate became: should women be given the special treatment of pregnancy leave, potentially reifying their roles as mothers, or should they be treated the same as other workers (i.e., men) and have access to leave only if leave was generally available to all workers for conditions other than pregnancy.

A third set of scholars challenged the unspoken assumptions in this debate by pointing out that defining equal treatment as equal access to the workplace as it is currently organized incorporates existing work arrangements into the legal standard, without interrogating their socially determined and gendered history.[185] In this view, merely requiring the same treatment as men presumes that work practices and conventions are not discriminatory. In fact, they contend, even though one could locate difference in either men or women since each sex is

181. *See id.*

182. *See* DEBORAH RHODE, JUSTICE AND GENDER 120–122 & n.22 (1989) (discussing the split in the feminist community over pregnancy litigation and identifying the public interest legal organizations on either side of this debate); Taub & Williams, *supra* note 15, at 833 (citing Brief of National Organization for Women et al., amici curiae, *Cal. Fed'n Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390 (9th Cir. 1985) (Nos. 84-5842 & 84-5844)).

183. *See* RHODE, *supra* note 182, at 120–122 & n.22; Taub & Williams, *supra* note 15, at 833.

184. *See, e.g.*, Krieger & Cooney, *supra* note 174, at 528–29; RHODE, *supra* note 182, at 121 & n.22; Taub & Williams, *supra* note 15, at 833.

185. MACKINNON, *supra* note 11, at 224; Taub & Williams, *supra* note 15, at 834–35.

equally dissimilar from the other, workplace practices privilege male ways of living and devalue the life experience of women on the rationale that it is *women's* differences which justify different treatment.[186] This critique helped generate a rich scholarship examining how taken-for-granted work practices can be implicitly gendered and can operate to recreate gendered systems of power and inequality.[187] This debate has been recently revisited by scholars who argue that antidiscrimination requirements inherently encompass accommodationist policies such as maternity leave because even formal equality mandates will, in some instances, require substantive change.[188]

These theoretical debates deconstructed workplace practices to show that, rather than being natural, neutral, and inevitable, they are often gendered. In this way, feminist legal theorists have named an implicit and uninterrogated norm in workplace antidiscrimination doctrine—the male life experience around which wage work historically has been organized. But neo-institutionalist and social-constructivist theories show that this insight only gets us so far. The debate over the PDA illuminated how work characteristics are gendered, but the discussion ever since has, by and large, been framed as how far work must (or should) change to accommodate the realities of gender, as if work and gender exist as preexisting categories with independent and stable meanings, when in fact they are socially constructed and historically contingent. To state that the structure of work is "male" merely pushes the reification back one step, so that male ways of working become another socially constructed and unexamined category in the analysis of workplace practices. This formulation recreates new versions of the same gender divisions, rather than challenging work's underlying structures (such as restrictive schedules and control over time). It also fails to interrogate how work's historically contingent characteristics organize both employment-related *and non-employment-related* social life in ways that construct the meaning of gender for both men and women.

Given the PDA's history, the story of the evolution of interpretations of the PDA raises interesting questions about why

186. MACKINNON, *supra* note 11, at 224.

187. *See, e.g.*, MACKINNON, *supra* note 11, at 224; WILLIAMS, *supra* note 48, 37–39; Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Acker, *supra* note 11; Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

188. *See, e.g.*, Jolls, *supra* note 176; Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003).

particular interpretive paths were taken and others were not. There were several open interpretive paths when the PDA was enacted, including theories of discrimination focused on intent and unequal treatment, and theories focused on structural barriers and disparate outcomes. The analysis that follows builds on the genealogy set forth above to draw out the influence of institutions, including cultural and normative belief systems associated with work and gender, on judicial interpretations of the PDA. This analysis argues for an institution-focused, social-constructivist theory of interpretive development, rather than one that relies on political factors, academic commentary, or judicial decision-making as explanatory factors for doctrinal development.

My approach departs from the antidiscrimination rubric in that it does not treat work as an ahistorical, objective structure, but instead recognizes how institutionalized work practices not only exclude women, but also construct the meaning of gender in an ongoing, contingent process. Rather than treat work and gender as objective, preexisting categories, institution-focused, social-constructivist theory allows one to view them as a mutually constitutive system in which work gives meaning to gender and gender gives meaning to work. I argue that when courts interpret the meaning of the antidiscrimination provisions of Title VII, they make use of this mutually constitutive framework to determine what is appropriate and legitimate, as well as what is discriminatory and illegal.

Title VII and the PDA did not change work overnight; discriminatory practices persisted. For example, some employers continued to impose mandatory leaves during pregnancy,[189] restrict the type of work pregnant women could perform,[190] and limit the number of hours they could work.[191] In addition, when working women required pregnancy disability leave, or other pregnancy-related accommodations, some employers refused to adapt workplace policies

189. *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361, 365 (4th Cir. 1980) (mandatory leave for pregnant flight attendants); *deLaurier v. San Diego Unified Sch. Dist.*, 588 F.2d 674, 675 (9th Cir. 1978) (mandatory leave for school teachers).

190. *Int'l Union v. Johnson Controls*, 499 U.S. 187, 191–92 (1991) (prohibiting fertile women from holding positions that involved the manufacture of batteries due to exposure to lead).

191. *Ensley-Gaines v. Runyun*, 100 F.3d 1220, 1222–23 (6th Cir. 1996) (employer's refusal to allow pregnant woman to use stool while sorting mail effectively limited her hours to four hours per day); *EEOC v. Red Baron Steak Houses*, 47 Fair Empl. Prac. Cas. (BNA) 49, 50–51 (N.D. Cal. June 2, 1988) (employer reduced the number of hours it allowed waitress to work after discovering she was pregnant).

and instead simply fired these women.[192] Most feminist legal scholars perceived these practices to be obviously discriminatory, and yet legal challenges to these practices often failed.

A close analysis of Title VII doctrine reveals that courts have left little doctrinal room for challenging facially neutral work practices that nevertheless construct the meaning of gender. Legal challenges to discriminatory practices have been more likely to be successful when employers attempted to enforce traditional gender roles explicitly, and less likely to be successful (and more likely to be controversial) when plaintiffs challenge the taken-for-granted, historically determined relationship between work practices and gender norms. As a result, although the meaning of gender may have changed in the sense that women able and willing to meet institutionalized work norms are legally protected, the gendered provenance of those norms remains unexamined. In the sections that follow, I examine in detail the doctrinal opportunities and constraints Title VII creates for unpacking the relationship between work and gender, and show how this relationship informs courts' interpretations of Title VII.

Pregnancy discrimination cases are particularly useful to illustrate how courts interpret Title VII's prohibition against sex discrimination in light of culturally resonant, common-sense meanings of work and gender; this is because work and motherhood had, until recently, been seen as very nearly mutually exclusive, and pregnancy presents real differences[193] that some courts held could be legally considered in workplace decisions. Yet cases about pregnancy often expose unspoken expectations and assumptions about work, gender, and family. Pregnancy usually requires at least a short absence from work, highlighting how time norms affect working women. Challenges based on legal theories that implicitly or explicitly call into question these deeply entrenched time standards tend to produce either doctrinal inconsistency or wholesale defeats for plaintiffs. Despite evidence of how institutionalized time standards disproportionately disadvantage women, courts generally interpret the PDA to reinforce work's culture of time.

192. *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1311–12 (11th Cir. 1999) (employer denied nurse's assistant's request for help lifting a particularly heavy patient during her pregnancy and instead terminated her employment); *Lang v. Star Herald*, 107 F.3d 1308, 1310 (8th Cir. 1997) (employer terminated employee rather than allowing coworkers to cover her work while she was on pregnancy disability leave).

193. *See* Taub & Williams, *supra* note 15, at 833 (describing pregnancy as the one incontestable significant difference between the sexes).

A. Legal Challenges by Pregnant Woman Who Can Work

The most successful pregnancy-related challenges under Title VII and the PDA have been brought by pregnant women seeking to maintain their access to employment without modifying the features of work. Generally, if women can do the job as specified even while pregnant, courts have been unsympathetic to employers who attempt to exclude pregnant women from the workplace. Even where employers claim that pregnancy prevents women from meeting work requirements due to safety concerns, courts generally require employers to prove rather than assert that facially discriminatory policies that exclude women are essential to their business. Thus, consistent with new institutionalist theories, where antidiscrimination principles do not require restructuring taken-for-granted work practices, legal challenges generally succeed.

Most successful pregnancy-related challenges under Title VII have involved facially discriminatory actions or employment policies that attempt to bar women from certain jobs, to place them on mandatory leaves, or to fire them solely because they are pregnant.[194] For example, in *Carney v. Martin Luther Home, Inc.*,[195] the court held that the employer violated Title VII by forcing a pregnant woman who was able to perform her job to take involuntary unpaid medical leave.[196] The court noted how policies such as this resonate with the protective legislation of the past:

> By enacting the PDA, Congress rejected the outdated notions upon which many "protective" laws and policies were based, policies which often resulted "from attitudes about pregnancy and the role of women . . . in our economic system," and which perpetuated women's second class status in the workplace.[197]

194. *See, e.g.*, *Johnson Controls*, 499 U.S. at 199–200, 206 (holding that excluding fertile women from jobs manufacturing batteries violated Title VII); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 649 (8th Cir. 1987) (holding employer violated Title VII by placing pregnant worker on mandatory unpaid leave when she remained able to perform her job); *EEOC v. Corinth, Inc.*, 824 F. Supp. 1302, 1309 (N.D. Ind. 1993) (holding that firing a pregnant waitress who was able to work violated Title VII); *Red Baron Steak Houses*, 47 Fair Empl. Prac. Cas. (BNA) at 50–52 (holding that terminating a pregnant cocktail waitress violated Title VII where the manager stated that pregnant cocktail waitresses were "tacky").

195. 824 F.2d 643 (8th Cir. 1987).

196. *Id.* at 649.

197. *Id.* at 647 (citing LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 61–62 (Sen. Williams) (1980)).

Other courts have reached the same conclusion when employers fire women because of their pregnancy even though they remained able to work[198] or seek to bar women from certain (often lucrative) jobs thought to be too dangerous for women who might become pregnant.[199] In *International Union v. Johnson Controls*,[200] the Supreme Court rejected a battery manufacturer's claim that excluding fertile women from jobs manufacturing batteries was necessary to the operation of its business because lead exposure endangered the potential fetuses of these women.[201] The Court held that an employer could explicitly exclude women only in "instances in which sex or pregnancy actually interferes with the employee's ability to perform the job,"[202] a situation the Court found was not presented in this case.

Rather than accepting the culturally resonant argument that pregnancy and motherhood justified excluding women from the workplace, the Court forced Johnson Controls to prove, rather than simply assert, that its gender requirements were objectively related to job performance.[203] The Court in *Johnson Controls* enforces the right of women to choose for themselves whether to work in conditions that might be particularly hazardous. The Court does not, however, create any doctrinal opening for considering whether antidiscrimination law requires those positions to be modified so that they are less hazardous for women (and less hazardous for men as well). Instead, even after *Johnson Controls*, pregnant workers' choices remained constrained by existing workplace practices.

Challenges to workplace practices encounter more difficulty when pregnancy causes working women to violate institutionalized time norms. In these instances, courts struggle with the difference between "equal" and "preferential" treatment, as well as whether employers' assumptions that pregnant employees will need time off constitute discrimination or merely good business judgment. How that struggle plays out largely depends on the doctrinal framework courts employ in deciding a case. The next few sections examine how Title VII doctrine has evolved to leave little room for challenging institutionalized work practices, even when those practices disproportionately disadvantage working women.

198. *See, e.g.*, *Red Baron Steak Houses*, 47 Empl. Prac. Cas. (BNA) at 51; *Corinth*, 824 F. Supp. at 1306.

199. *See, e.g.*, *Johnson Controls,* 499 U.S. at 206.

200. 499 U.S. 187, 191–92 (1991).

201. *Id.* at 206.

202. *Id.* at 204.

203. *Id.* at 207.

B. Disparate Treatment and Doctrinal Barriers to Restructuring Work

The majority of employment discrimination claims involve challenges to employment decisions under a disparate treatment theory of discrimination.[204] Courts generally evaluate disparate treatment claims through a three-part inquiry.[205] First, the plaintiff must establish a prima facie case of discrimination.[206] Courts formulate this burden in various ways, but typically the plaintiff must show that "(1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated."[207] Once the plaintiff makes this showing, the burden shifts to the defendant to produce a "legitimate, nondiscriminatory reason" for its actions.[208] If the defendant articulates such a reason, the plaintiff then bears the burden of proving that reason is a pretext for discrimination.[209]

This doctrinal structure does little to challenge existing time standards and may even reinforce them. For example, in the disparate treatment context several courts have held that the PDA does not protect pregnant employees from being discharged for being absent from work even if their absence is due to pregnancy or complications of pregnancy unless the employer overlooks comparable absences of non-pregnant employees.[210] As a result, a pregnant worker fired for taking pregnancy leave must point to evidence that the employer gives non-pregnant workers leave when they are unable to work. If the employer's normal operating procedures simply track work's institutionalized time norms, however, the similarly situated inquiry incorporates those norms without interrogating them. Typically in these cases, either other workers are treated just as badly as pregnant women,[211] or there are no similarly situated workers to whom pregnant

204. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STAN. L. REV. 983, 998 (1991).

205. This discussion leaves aside questions of mixed motive, in which the employee demonstrates that the employer considered gender or another protected classification in its decision. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–47 (1989). It is difficult to make this showing, so these cases are relatively rare.

206. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

207. *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998) (citing *McDonnell Douglas*, 411 U.S. at 802).

208. *Id.*

209. *Id.*; *see also Reeves v. Sanderson Plumbing Products, Inc.*, 520 U.S. 133, 143 (2000).

210. *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 859–60 (5th Cir. 2002); *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 222 (5th Cir. 2001); *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 583 (7th Cir. 2000).

211. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738–39 (7th Cir. 1994).

workers can be compared.[212] In either instance, the similarly situated inquiry does not require courts to consider whether the workplace's policies are built around an outmoded conception of gender.

The second step in the disparate treatment analysis, in which the court considers the legitimate business reason proffered by the defendant for its adverse employment action, can also reinforce work's institutionalized time norms. Employers typically offer an established work practice, such as attendance requirements or policies against leave, as a legitimate business reason for firing pregnant women.[213] To overcome this justification, a plaintiff must show that the employer's explanation is unworthy of belief or that discriminatory animus was the real motivation.[214] Showing that the employer could have accommodated the pregnant worker's needs has not been recognized as sufficient to demonstrate pretext, although it is not entirely clear why an employer's refusal to accommodate a pregnant woman if it could be done easily should not be evidence of animus toward this group. It may be that many of these practices, although they rest on the gendered history of work, seem so natural, normal, and inevitable that courts cannot imagine penalizing employers for refusing to change them. In any event, under current interpretations, courts treat an employer's ability to accommodate the worker as irrelevant.[215] In addition, courts generally defer to employers' assertions about the requirements of work,[216] unless there is evidence that those requirements were applied unequally.[217] As a result, workers who assert a disparate treatment

212. *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1155 (7th Cir. 1997).

213. *See, e.g.*, *Stout*, 282 F.3d at 859–60; *Dormeyer*, 223 F.3d at 584.

214. Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 703(m), 706(g)(2)(B), 105 Stat. 1071, 1075–76 (clarifying standard for overcoming employer's proffered legitimate business reason and stating that evidence that the employer's proffered reason was unworthy of belief constituted circumstantial evidence of intentional discrimination); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003) (noting that evidence that a defendant's explanation for an employment practice is unworthy of credence is circumstantial evidence probative of intentional discrimination); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515–16 (1993) (discussing the standard for overcoming an employer's proffered legitimate business reason).

215. *See, e.g.*, *Lang v. Star Herald*, 107 F.3d 1308, 1313 (8th Cir. 1997) (noting employee's argument that coworkers could have covered for her while on pregnancy leave was irrelevant: "The relevant question . . . is whether the *Star Herald* treated Lang differently than nonpregnant employees on an indefinite leave of absence, not whether the *Star Herald* could have made more concessions for Lang").

216. *See, e.g.*, *Ilhardt*, 118 F.3d at 1155 ("We refuse to act as a 'super-personnel department' and second-guess Sara Lee as to how best to staff its law department.").

217. *See, e.g.*, *EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 948 (10th Cir. 1992) (holding that denying a pregnant employee's request for a

theory have no doctrinal opening to demonstrate that alleged work requirements are not related to the job or that alternatives exist that do not penalize pregnant workers.[218]

Two recent Seventh Circuit cases illustrate these dynamics. *Troupe v. May Department Stores Co.*[219] involved a pregnant worker who changed to a part-time schedule, took several days of sick time for morning sickness, and then was fired the day before her maternity leave was to begin.[220] The court noted that the plaintiff presented no evidence that other, similarly situated workers with absences caused by non-pregnancy-related illness were treated more favorably.[221] The lack of a comparator was enough to defeat her claim, even though she was told that she was fired because her employer did not expect her to return to work after her maternity leave ended.[222] This outcome seems contrary to Title VII's prohibition on the use of gendered stereotypes. The employer's statement references the stereotype that women with children will (or should) leave work to care for their children, yet the *Troupe* court appeared to hold, as a matter of law, that this motivation for terminating a pregnant woman did not violate the PDA.[223]

In another case, *Ilhardt v. Sara Lee Corp.*,[224] the employer fired a part-time attorney after her maternity leave.[225] The court noted that because there were no non-pregnant part-time attorneys in the law department to whom she could be compared, she could not establish a prima facie case:

> [W]e must compare Ilhardt's treatment with that of a group of similarly situated nonpregnant employees to see if she was treated worse because she was pregnant, but because Ilhardt was the only part-time member of the law department, there are no other similarly situated employees with whom to compare her. It is also clear, however, that we cannot compare Ilhardt with the nonpregnant full-time attorneys, as she suggests, because full-time employees are simply not similarly situated to part-time employees. There are too many

schedule adjustment when all other requests from nonpregnant employees were granted violated Title VII).

218. *See, e.g.*, *Lang*, 107 F.3d at 1313 (noting employee's argument that coworkers could have covered for her while on pregnancy leave was irrelevant).

219. 20 F.3d 734 (7th Cir. 1994).

220. *Id.* at 735–36.

221. *Id.* at 736.

222. *Id.* at 737.

223. *Id.* at 737–38.

224. 118 F.3d 1151 (7th Cir. 1997).

225. *Id.* at 1152.

> differences between them; as illustrated in Ilhardt's case, part-time employees work fewer hours and receive less pay and fewer benefits. . . . Ilhardt must show that "she was treated less favorably than a nonpregnant employee under identical circumstances. [citations omitted] Because she was the only part-time attorney, she cannot do this.[226]

To attempt to show discriminatory intent through other evidence, Ilhardt cited her supervisor's comments that "he was sure she would not return to work full time after having her third child because his daughters were extremely busy with just two children, and that he thought it was better for mothers of young children to stay at home."[227] The court held that "statements expressing doubt that a woman will return to work full-time after having a baby do not constitute direct evidence of pregnancy discrimination."[228]

Workplace time norms that reference and reinforce traditional gender roles pervade this opinion. The court finds that part-time workers are not similarly situated to full-time workers without explaining why time worked should be a meaningful distinction in this case. Even though part-time status, pregnancy, and motherhood are all part of a system of meaning that portrays working mothers as less committed to their jobs than are other workers, the court never considered how the employer's part-time justification incorporated family wage stereotypes and failed to interrogate why it seems natural and normal to fire part-time workers first.[229] Instead, the court accepts without challenge that the plaintiff's nonstandard hours justify her termination despite her superior performance and offer to return full-time. Similarly, entrenched expectations about motherhood and work can make the supervisor's statements about a woman's presumed role

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226. *Id.* at 1155.

227. *Id.* at 1156.

228. *Id.* (citing *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)). Note, however, that after *Reeves* and *Desert Palace*, direct evidence of pregnancy discrimination may no longer be needed to prove such a claim. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

229. The plaintiff in *Ilhardt* also raised a disparate impact challenge to the employer's practice of laying off part-time workers before full-time workers. 118 F.3d at 1156. The court rejected this claim, holding that the employer's one-time reduction in force could not be called an "employment practice" within the definition of Title VII. *Id.* As a result, Ilhardt has no practice against which to raise a disparate impact challenge. The court also refused to take judicial notice of evidence of studies from the 1970s and 1980s showing that the majority of part-time workers are women with child-care responsibilities, stating that "the decades-old conclusions of the studies . . . are certainly subject to dispute." *Id.* at 1157.

as caretaker of her children seem to be natural and logical—to both workers and courts alike—rather than stereotypical assumptions about gender roles.

The courts' interpretations in *Troupe* and *Ilhardt* are inconsistent with Supreme Court precedent regarding stereotype theories more generally. In *Price Waterhouse v. Hopkins*,[230] the Court found that it violated Title VII to deny a woman manager partnership because she failed to conform to gendered norms about walking, talking, and dressing in a feminine manner, wearing make-up and jewelry, and taking "a course at charm school."[231] The Court held that the failure to conform to gender stereotypes was not a legitimate factor to consider for employment decisions, noting that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group . . . ."[232] More recently, in *Nevada Department of Human Resources v. Hibbs*,[233] the Court reiterated its view that stereotypical assumptions based on gender contribute to discrimination, noting that "stereotypical views about women's commitment to work and their value as employees . . . lead to subtle discrimination."[234] Consistent with these Supreme Court precedents, other circuit courts have held that stereotypical remarks expressing the view that mothers with young children are not as competent, committed, or valuable as other employees constitute evidence of gender discrimination.[235] In addition, at least one circuit court has held that evidence of stereotyping of women as caregivers could support a prima facie case of disparate treatment even without any evidence about the comparative treatment of similarly situated

230. 490 U.S. 228 (1989).

231. *Id.* at 235–36, 256.

232. *Id.* at 251.

233. 538 U.S. 721 (2003).

234. *Id.* at 736. *Hibbs* affirms Congress' power to enact substantive reforms such as the FMLA to ensure gender equality. *Id.* at 728–735.

235. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004) ("[I]t takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home."); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000) (holding that questioning whether the plaintiff "would be able to manage her work and family responsibilities" supported a finding of discriminatory animus); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044–45 (7th Cir. 1999) (holding that statements to a pregnant employee "that she was being fired so that she could 'spend more time at home with her children'" and "that she would be happier at home with her children" reflected gender stereotypes and provided direct evidence of discriminatory animus).

men.[236] Furthermore, several courts have held that assumptions that pregnant women will require substantial absences from work reflect gender stereotypes and therefore cannot be the basis for penalizing or refusing to hire pregnant women.[237] Although most circuit courts view the anticipatory firing of a pregnant employee due to a perceived hypothetical future need for leave as a violation of Title VII, an uncritical acceptance of time norms has led a few courts to disagree.[238]

When women actually do need to miss some work to accommodate pregnancy and childbirth, however, courts generally allow employers to terminate pregnant workers, so long as they do not explicitly rely on the *reason* for that absence (pregnancy) in their decision.[239] Thus, courts have permitted employers to penalize pregnant women who miss work or will miss work because of childbirth,[240] whose absenteeism increases due to morning sickness,[241] or whose pregnancies prevent

236. *Hastings on Hudson*, 365 F.3d at 121–22.

237. *Wagner v. Dillard Dep't Stores, Inc.*, 17 F. App'x 141, 151 (4th Cir. 2001) (holding the employer's refusal to hire pregnant plaintiff and statement that she should reapply "after her baby was born and [she] had proper childcare . . . reflect the stereotypical assumption that pregnant women will eventually require substantial absences from work"); *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999); *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378, 380–82 (1st Cir. 1998) (holding it was reasonable for the jury to conclude that the plaintiff had been dismissed based on the "stereotypical judgment that pregnant women are poor attendees"); *see also Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431, 434, 438 (8th Cir. 1998) (affirming jury verdict that employer discriminated against plaintiff by placing her on medical leave while she was pregnant despite her doctor's approval for her to return to work).

238. *Maldonado*, 186 F.3d 759 (finding anticipatory firing to violate Title VII); *Marshall v. Am. Hosp. Ass'n*, 157 F.3d 520 (7th Cir. 1998) (finding no Title VII violation); *Marafino v. St. Louis County Circuit Court*, 707 F.2d 1005 (8th Cir. 1983) (same).

239. *See, e.g.*, *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737, 743 (N.D. Ill. 1993).

240. *Marafino*, 707 F.2d at 1006 (holding that Title VII is not violated when employer offers the legitimate business reason that it refused to hire a pregnant woman because she will require a leave of absence in first year of work and plaintiff did not demonstrate that this reason was pretextual); *Marshall*, 157 F.3d at 527 (holding that a pregnant woman's need for pregnancy disability leave is sufficient justification for terminating her employment under Title VII). *But see Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (holding that terminating a pregnant employee for exceeding a ten-day absolute ceiling on disability leave violated Title VII).

241. *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 583 (7th Cir. 2000) (terminating employee for absences resulting from morning sickness did not violate Title VII); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 735–36 (7th Cir. 1994) (same). *But see Maldonado*, 186 F.3d at 766–67 (holding employer cannot assume pregnant worker will be absent in future based solely on her pregnancy); *Roberts v. U.S. Postmaster Gen.*, 947 F. Supp. 282, 289 (E.D. Tex. 1996) (noting that an

them from performing their employer's definition of the job's requirements.[242] Because of the structure of Title VII's disparate treatment standard, no showing is necessary that these work time requirements are significantly related to the job, unlike the substantial justification courts demand for facially discriminatory policies. Nevertheless, in all these cases, pregnant women lost their jobs when they violated deeply entrenched time norms in the workplace.

I make no argument here about whether the existing structure of disparate treatment analysis is jurisprudentially correct or incorrect in not requiring employers to demonstrate that the facially neutral practices they offer as legitimate reasons for terminating women are in fact related to the job. Instead, my point is that disparate treatment's doctrinal structure effectively sidesteps any direct inquiry into the relationship between work practices and traditional conceptions of gender, except perhaps in those circumstances where an employer also articulates discriminatory stereotypes about mothers. In circumstances that do not involve stereotypical remarks, however, disparate treatment analysis tends to incorporate the contradiction between gender and work that is embodied in institutionalized workplace practices such as time norms. When courts adopt this approach, they obscure the ways in which standard work schedules and the beliefs that support them constrain women's choices and reinforce gendered expectations and behavior at work and at home.

When courts allow institutionalized work practices to justify penalizing pregnant workers, they recreate institutionalized inequality. They validate institutionalized time norms, such as firing part-time workers first and denying time off for pregnancy-related medical conditions, which implicitly rest on outmoded conceptions of gender. They reinforce perceptions that the barriers working women face arise from natural characteristics associated with gender or pregnancy, rather than work practices such as no-leave policies, and they ignore how these policies constrain choices for both men and women, shaping the

employer can violate Title VII under a disparate impact theory by failing to provide an adequate attendance policy for the needs of pregnant women).

242. *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1312–13 (11th Cir. 1999) (terminating pregnant employee rather than providing light duty does not violate Title VII where some but not all other temporarily disabled employees are offered light duty); *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206–08 (5th Cir. 1998) (finding no violation of Title VII where a pregnant employee was denied light duty and forced to take unpaid leave, even though some other employees similar in their inability to work were offered light duty). *But see Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (pregnant employee could not be denied light duty if any other employees were offered light duty, even if all other employees with non-work related injuries were denied light duty).

social meaning of gender. Because courts treat work as a natural, normal, and unchanging category, the consequences for working women seem to flow from women's personal choices rather than the structure of work. As a result, disparate treatment analysis actually *legitimizes* institutionalized work practices that structurally enforce traditional gender roles, thus limiting Title VII's potential for social change.

C. The Qualified Promise of Disparate Impact Theories

Unlike disparate treatment approaches, disparate impact theories engage directly with work's structure. Disparate impact theories allow plaintiffs to challenge employment practices "that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[243] Although disparate impact theories require no proof of discriminatory intent,[244] a plaintiff must identify a specific employment practice and show it causes a disparity in treatment.[245] Once a plaintiff makes this showing, the defendant may raise the defense that the "challenged practice is job related for the position in question and consistent with business necessity . . . ."[246] If an employer successfully asserts business necessity, the plaintiff may still prevail by showing that less discriminatory alternatives exist to the challenged policy.[247]

Early disparate impact cases regarding time norms and pregnancy required employers to change workplace time standards that disproportionately disadvantage women.[248] For example, in *EEOC v. Warshawsky & Co.*,[249] the court held that the employer's policy of not providing sick leave to first-year employees had a disparate impact on women because of their ability to become pregnant, and therefore violated the PDA.[250] The court found that the policy could not be justified by business necessity given that "no one in management knew

243. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977).

244. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971).

245. 42 U.S.C. § 2000e-2(k)(1)(A) (2006); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–95 (1988).

246. § 2000e-2(k)(1)(A)(i).

247. § 2000e-2(k)(1)(A)(ii), (k)(1)(C); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

248. Jolls, *supra* note 176, at 660–65; Krieger & Cooney, *supra* note 174, at 527–29; Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 940–41 (1985).

249. 768 F. Supp. 647 (N.D. Ill. 1991).

250. *Id.* at 651–55.

the reason for the policy; the policy just existed,"[251] a classic description of an institutionalized practice. In *Abraham v. Graphic Arts International Union*,[252] a case in which a pregnant employee was fired because she took more than the allotted ten days of leave under the employer's facially neutral policy, the court held that "[a]n employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have."[253] Some courts have recognized disparate impact challenges to time-norm-based work practices such as selecting employees for termination based on their part-time status,[254] terminating women for absenteeism caused by morning sickness,[255] and even denying the use of sick leave to tend to ill family members.[256] All these policies assume an ideal worker who will not be pregnant, will not have family responsibilities, and will work a full-time schedule, assumptions based on a traditional division of labor between a breadwinner and a non-career-oriented partner.

Despite the initial promise of these cases, disparate impact theories have not become a reliable avenue for restructuring work's time norms. Although courts recognize that disparate impact challenges are theoretically permissible, in practice few plaintiffs prevail. Plaintiffs must overcome significant evidentiary hurdles to make the required prima facie showing that a specific employment policy exists and that it has a disparate impact on a protected group.[257] Institutionalized

251. *Id.* at 655.

252. 660 F.2d 811 (D.C. Cir. 1981).

253. *Id.* at 819.

254. *See Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1156–57 (7th Cir. 1997) (considering but then rejecting for lack of evidence plaintiff's disparate impact challenge to her termination on the basis of her part-time status).

255. *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 692 P.2d 1243, 1251–52 (Mont. 1984) (noting in state law claim that facially neutral policies may violate Title VII if they have a substantially disparate impact on members of one sex), *vacated and remanded*, 479 U.S. 1050 (1987), *judgment and opinion reinstated*, 744 P.2d 871 (Mont. 1987).

256. *Roberts v. U.S. Postmaster Gen.*, 947 F. Supp. 282, 289 (E.D. Tex. 1996) (holding that plaintiff's allegation that employer's policy of denying sick leave to attend to medical needs of family members stated a cause of action under Title VII's disparate impact theory).

257. First, although courts differ on whether employees must present statistical evidence to show disparate impact, several look for statistical evidence to make a prima facie case. *Lang v. Star Herald*, 107 F.3d 1308, 1314 (8th Cir. 1997) (requiring statistical evidence of disparate impact); *Armstrong v. Flowers Hosp. Inc.*, 33 F.3d 1308, 1314 (11th Cir. 1994) (requiring statistical evidence of disparate impact); *Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440, 443–44 (7th Cir. 1991) (noting plaintiffs "generally rely on statistical evidence" to show disparate impact). *But see Garcia v. Woman's Hosp. of Texas*, 97 F.3d 810, 813 (5th Cir. 1996) (holding statistical evidence would be unnecessary if plaintiff demonstrated all or

employment practices are so deeply entrenched, however, that they no longer appear to be business practices, but instead simply seem to define what work means. For example, inflexible work schedules, full-time or longer work hours, stingy absenteeism and leave policies, and penalties for part-time work seem natural, normal, and unchangeable, rather than explicit employer policies subject to challenge under a disparate impact theory.[258]

If the plaintiff makes a prima facie showing of disparate impact, her claim may still fail if an employer can raise the defense of business necessity—a murky and contested standard.[259] Even if the doctrinal

substantially all pregnant women would have lifting restrictions). Statistical disparities are difficult to demonstrate for small employers because statistical significance depends in part on the size of the sample. *See Lang*, 107 F.3d at 1314 (noting that employee admitted she cannot show statistical disparity for her small employer). Second, it can be difficult to demonstrate that an adverse employment action flows from a "particular practice" rather than simply a one-time decision by the employer. *See, e.g.*, *Ilhardt,* 118 F.3d at 1156–57 (holding that a reduction in force that eliminated a female employee because she was part-time was an "isolated incident" rather than an employment practice). Finally, cost is a factor. Establishing a disparate impact claim through statistics or responding to a business necessity defense usually requires expert testimony, which is very expensive to develop and present. *See Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002) (noting that disparate impact claims are usually established through statistical evidence).

258. *See* Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 355–56 (2003). *Ilhardt v. Sara Lee Corp.*, discussed above, illustrates how a disparate impact challenge to time norms can founder in this way on the evidentiary hurdles required for a prima facie case. 118 F.3d 1151. Ilhardt argued that terminating part-time employees had "a disparate impact on professional women with young children." *Id.* at 1156. The court rejected this claim, holding that the employer's one-time reduction in force could not be called an "employment practice" within the definition of Title VII. *Id.* As a result, Ilhardt had no practice against which to bring a disparate impact challenge. *Id.* at 1157. The court also refused to take judicial notice of evidence of studies from the 1970s and 1980s showing that the majority of part-time workers are women with child-care responsibilities. *Id.* Because Ilhardt could not sufficiently establish an employment practice or its disparate impact on women, the court never reached the question of whether her termination based on part-time status was justified by business necessity. *Id.*

259. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). Employers asserting the business necessity defense must demonstrate that job characteristics are objectively necessary. Early decisions interpreting disparate impact theories required defendants that asserted business necessity to show that the challenged employment practice was "related to job performance" and consistent with "business necessity." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In *Ward's Cove Packing Co. v. Atonio*, the Court held that an employer must demonstrate only that the practice served "legitimate employment goals." 490 U.S. 642, 659 (1989). *Ward's Cove* threatened to eviscerate disparate impact as a separate theory, but the Civil Rights Act of 1991 rejected the decision, allowing the standard to revert to the relatively stable, but not uncontested, state of law prior to *Ward's Cove*. Civil Rights Act of 1991, Pub. Law. No. 102-166, § 3. Disparate impact claims, although controversial, are relatively rare. Donohue & Siegelman, *supra* note 204, at 998.

requirements for disparate impact challenges were clear, however, the theoretical justification for this theory remains ambiguous. There is a tension between a broad rationale for disparate impact theory as a means to reach practices that were adopted without discriminatory intent but that have a discriminatory impact, and a narrower vision of disparate impact as merely a doctrinal tool for "smoking out subtle forms of intentional discrimination."[260] Despite early successful disparate impact challenges to workplace time norms, it has become unclear exactly how Title VII applies to employers who adopt common business practices that are facially neutral but rest on, and reference, outmoded conceptions of gender. Employers may not have chosen those practices with the intent to exclude women but instead merely adopted workplace practices that were institutionalized among their peers, even though historically, those practices systematically excluded women.

Some commentators argue that because disparate impact theories require no proof of intent, they allow women to challenge work's structural characteristics. In this view, disparate impact theories require not only the absence of discriminatory animus, but also changes to work's characteristics to adapt to women's needs, for example, by providing pregnancy leave.[261] Other commentators argue that disparate impact theories create just another means of smoking out more subtle, "covert" discriminatory intent that would be difficult to prove otherwise.[262] Indeed, consistent with the latter view, many early disparate impact cases involved facially neutral education or testing requirements, or in the case of women, physical tests or requirements, imposed to screen out women and minorities after the Civil Rights Act of 1964 took effect.[263] A more constrained view of disparate impact

260. Jolls, *supra* note 176, at 654–55; Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 95–96, 101–02 (2000) (discussing the shifting rationales for disparate impact analysis in *Griggs*).

261. WILLIAMS, *supra* note 48, at 104–10; Jolls, *supra* note 176, at 686–87.

262. George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1297–98 (1987); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 1012–13 (1989). *See also Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 489–90 (3d Cir. 1999) ("The disparate impact theory of discrimination combats not intentional, obvious discriminatory policies, but a type of covert discrimination in which facially neutral practices are employed to exclude, unnecessarily and disparately, protected groups from employment opportunities. Inherent in the adoption of this theory of discrimination is the recognition that an employer's job requirements may incorporate societal standards based not upon necessity but rather upon historical, discriminatory biases. A business necessity standard that wholly defers to an employer's judgment as to what is desirable in an employee therefore is completely inadequate in combating covert discrimination based upon societal prejudices.").

263. *See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 427–28 (1971).

theories would limited them to these kinds of covertly discriminatory hurdles, and contend that they do not reach work practices that are so institutionalized that they have become standard business practices and therefore seem free from covert discriminatory intent.

But what if institutionalized work practices do not reflect historical discriminatory biases but instead reflect what I call *institutional inequality*, that is, historical social patterns based on women's subordinate roles? Early disparate impact decisions such as *Warshawsky* and *Abraham* allowed disparate impact challenges to institutionalized work practices that do not reflect historical discriminatory biases, but instead stem from historical social practices that presumed women would be tangential workers at most.[264] Moreover, the disparate impact theory codified in the Civil Rights Act of 1991 is not limited only to circumstances that involve subtle or covert discriminatory intent.[265] Nevertheless, at least one court has suggested that the very fact that a work practice based on time norms has become institutionalized may insulate it from disparate impact challenges.[266]

In *Dormeyer v. Comerica Bank-Illinois*,[267] the plaintiff lost her job because of absences related to morning sickness.[268] The Seventh Circuit recognized that disparate impact theory might apply if the absenteeism policy "weighed more heavily on pregnant employees than on nonpregnant ones and . . . was not justified by compelling considerations of business need."[269] The court then suggested, however, that disparate impact theory should apply only to "eligibility requirements that are not really necessary for the job," referencing the education and testing requirements cases of the past.[270] In the court's view, any disparate impact challenge to an absenteeism policy would be an argument that employers "excuse pregnant employees from having to satisfy the *legitimate* requirements of their job."[271] Although dicta, the court's conclusion was that "the concept of disparate impact [did] not stretch that far."[272]

The reasoning in *Dormeyer* fails to require the employer to demonstrate that restrictive attendance policies are consistent with

264. *See supra* notes 249–256 and accompanying text.
265. Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k) (2006).
266. *See Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 584 (7th Cir. 2000).
267. 223 F.3d 579 (7th Cir. 2000).
268. *Id.* at 581.
269. *Id.* at 583.
270. *Id.* at 583–84.
271. *Id.* at 584.
272. *Id.*

business necessity; instead the court assumes that they are legitimate requirements of the job. By implicitly deciding, without inquiry, what the legitimate requirements of work are, the court's dicta makes a normative judgment about necessary work practices, assuming rather than investigating whether work requires uninterrupted attendance. This approach enforces and obscures the mutually constitutive relationship between work practices and traditional gender roles by labeling restrictive absenteeism policies as necessary and insulating them from challenge.[273]

Other developments in the Fifth Circuit illustrate how institutionalized time standards may be particularly impervious to disparate impact reasoning even when other workplace policies are successfully challenged through disparate impact claims. *Stout v. Baxter Healthcare Corp.*[274] involved a challenge to a strict absenteeism policy that required the termination of any employee who missed more than three days during her ninety-day probationary period.[275] The Fifth Circuit had previously held, in *Garcia v. Woman's Hospital of Texas*,[276] that statistical evidence of disparate impact was unnecessary when all or substantially all pregnant women would be affected by a mandatory job requirement, in this case the requirement that employees be able to lift 150 pounds.[277] The plaintiff in *Stout* argued that, like the lifting requirement in *Garcia*, the three-day absence rule would disproportionately affect all, or substantially all pregnant women.[278] Although the Fifth Circuit agreed that the plaintiff had demonstrated that all or substantially all pregnant women who give birth during the probationary period would be terminated, the court refused to apply *Garcia* to claims in which the "only challenge is that the amount of sick leave granted to employees is insufficient to accommodate the time off required in a typical pregnancy."[279] To reach this conclusion, the court reasoned that:

273. Moreover, even when the courts reach the business necessity analysis, to the extent an absentee policy is well-established and incorporated into institutionalized conceptions of work, employers may find it easier to meet the business necessity standard. In other words, the institutionalized nature of the policy may make it seem necessary because it is hard to imagine organizing work any other way.

274. 282 F.3d 856 (5th Cir. 2002).

275. *Id.* at 858–59.

276. 97 F.3d 810 (5th Cir. 1996).

277. *Id.* at 813.

278. The plaintiff "provided expert testimony that no pregnant woman who gives birth will be able to work for at least two weeks" afterward. *Stout*, 282 F.3d at 861.

279. *Id.*

> [W]hen the *Garcia* rule is applied to cases (such as this one) in which a plaintiff challenges only an employer's limit on absenteeism the rule produces an effect which is contrary to the plain language of the statute. It is the nature of pregnancy and childbirth that at some point, for a limited period of time, a woman who gives birth will be unable to work. . . . If *Garcia* is taken to its logical extreme, then every pregnant employee can make out a *prima facie* case against her employer for pregnancy discrimination, unless the employer grants special leave to all pregnant employees. This is not the law . . . .[280]

The court locates the conflict between work's time standards and pregnancy not in the challenged work practice, but in the nature of pregnancy and childbirth. This rhetorical move avoids any meaningful inquiry into whether a three-day absenteeism policy is in fact job-related and consistent with business necessity, or whether less discriminatory alternatives are available. Of course not all employers have three-day absenteeism policies, and many with more generous policies provide no special leave to pregnant employees, so a disparate impact challenge to this particularly restrictive policy should be possible at least in theory. But because this disparate impact challenge might require the employer to change the taken-for-granted time standards of work (and do so for a pregnant employee), the court categorically holds that disparate impact theories do not apply, even though after *Garcia* logically they should.

Why did the Fifth Circuit accept the disparate impact challenge in *Garcia* but reject it in *Stout*? One answer is that 150-pound lifting requirements are not as taken-for-granted and entrenched as employer-imposed time standards. Time standards implicate the mutually constitutive relationship between work and gender in a way that lifting requirements do not, and they also reach to the heart of hard-won employer prerogatives to control the process of production. To say that work must accommodate pregnancy leave is to remake the divide between public and private life, and to recognize that barriers to women's employment are not inherent in the nature of their gender, but instead are constructed by workplace policies such as attendance requirements. That is, pregnancy renders women unable to work only in a world in which institutionalized work practices require uninterrupted attendance and minimal leave, just as using a wheelchair renders one disabled only in a world in which access is provided primarily in terms of stairs. For this reason, courts may resist changing

280. *Id.*

the time standards of work because to do so disrupts a far deeper social structure that implicates work and gender, the gendered meaning of public and private life, and the employer prerogative of control over work time that was built in part around gendered conceptions of labor.

Even if an employer demonstrates business necessity in a disparate impact case, a plaintiff may still prevail by demonstrating less discriminatory alternative practices exist.[281] This analysis provides another way to challenge institutionalized work practices because it involves articulating alternative ways of organizing work that do not rely on outdated conceptions of gender. It remains to be seen, however, whether courts will accept alternative practices that appear to increase costs and reduce efficiency; some commentators and courts have expressed skepticism about less discriminatory alternatives that appear to be costly.[282] Institutionalization plays a role here as well: to the extent that practices such as restrictive absenteeism policies have become common, deviating from the norm is unlikely to be costless, just as installing a women's restroom in the lawyer's lounge at the Supreme Court to accommodate the growing number of women arguing cases before the Court was not costless.[283] The question is how costs like these should be understood. One can view the expense of deviating from institutionalized norms as costs imposed on employers by employment laws, or one can view these expenses as the product of the historical factors that structured work in an inefficient way that excludes women from work.[284] The later view suggests a justification for imposing costs that the employer, or even society, should bear to eradicate institutionalized inequality, given that women primarily bear the costs of current institutional arrangements (i.e., inflexible

281. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (k)(1)(C) (2006); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

282. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 114–15 (1974).

283. Anna Quindlen, *Public & Private: A (Rest) Room of One's Own*, N.Y. TIMES, Nov. 11, 1992, at A25.

284. The status quo is not necessarily the most efficient or optimal solution, even from a purely economic perspective, because inefficient institutions can persist even as fundamental social conditions, such as the structure of families, change. Institutions are path dependent and self-regenerating; an institution that may have been efficient and optimal in the historical conditions under which it developed can persist even though it is no longer optimal given changing social conditions. *See generally* Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000). Institutional perspectives suggest that considering the costs of changing institutionalized practices without interrogating the continuing necessity and utility of the practices themselves itself makes little sense. Such an approach would also undermine the effectiveness of the less discriminatory practices analysis for challenging institutionalized work practices with discriminatory effects.

workplaces). Allowing the workplace to remain the same is not costless; the costs of such a decision are borne by women workers who are excluded or penalized by existing arrangements. Treating the burden of change as an impermissible cost accepts the structure of work as the natural, rather than socially constructed, baseline.

D. The Failure to Accommodate Family Life

Pregnancy discrimination cases illustrate why Title VII and the PDA have limited potential for restructuring the institution of work. But the limitations of these laws become even more apparent when accommodating family life beyond pregnancy is considered. Even after Title VII, employers remain free to structure their workplaces around a two-parent family in which work must be mutually exclusive from caring for children. For example, courts have held that Title VII does not require parental leave to care for new children once the mother was no longer physically disabled.[285] Clearly, however, someone still must be available to care for children after they are born. Courts have also held that Title VII does not require employers to provide part-time or flexible work schedules,[286] nor does it protect women who hold part-

285. *See, e.g.*, *Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440, 444–45 (7th Cir. 1991) (holding leave policies that disproportionately impact women who "forego returning to work in favor of spending time at home with [their] newborn child" do not violate Title VII); *EEOC v. Sw. Elec. Power Co.*, 591 F. Supp. 1128, 1130, 1135 (W.D. Ark. 1984) (holding that firing a woman who requested six rather than four weeks of leave after giving birth did not violate Title VII where worker's doctor said she physically could go back to work after four weeks but he recommended the extra time in part to bond with her child); *Roberts v. U.S. Postmaster Gen.*, 947 F. Supp. 282, 288 (E.D. Tex. 1996) (noting that "parental leave clams—claims of leave that are not directly attributable to pregnancy, childbirth, or related medical conditions—are not covered under Title VII" and collecting district court cases that support this proposition). In some cases it seems clear that the key distinction for courts is "legitimate" physical incapacity compared to the "choice" of individuals physically able to work to care for new children in the family. *See Barrash v. Bowen*, 846 F.2d 927, 931–32 (4th Cir. 1988) ("One can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies.").

286. *See Spina v. Mgmt. Recruiters of O'Hare*, 764 F. Supp. 519, 529, 536 (N.D. Ill. 1991) (holding employer was not obligated to provide part-time work to "rescue [an employee] from a predicament for which it was not responsible," i.e., health complications following pregnancy, even where male employees with health problems were given leave (quoting *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 315 (7th Cir. 1986))); *Haas v. Phoenix Data Processing, Inc.*, No. 89-0305, 1990 U.S. Dist. LEXIS 3797, at *13–14 (N.D. Ill. Apr. 5, 1990) (holding Title VII did not prohibit terminating pregnant employee who refused to work overtime due to pregnancy and child-care issues because employer had a legitimate expectation that the employee would work overtime).

time positions from being laid off first, even if those women have more seniority than full-time workers who are retained.[287] These cases all involved disparate treatment theories, however. It appears to be an open question whether such policies could be challenged under a disparate impact theory.[288]

In *Armstrong v. Flowers Hospital, Inc.*,[289] the Eleventh Circuit summed up the constraints on choice that the institution of work creates for working women. The court concluded that a woman faced with a workplace that fails to accommodate her pregnancy or her family responsibilities "may choose to continue working, to seek a work situation with less stringent requirements, or to leave the workforce. In some cases, these alternatives may, indeed, present a difficult choice. But it is a choice that each woman must make."[290] She may not, however, rely on Title VII to challenge institutionalized features of her job that exclude her from work, no matter how arbitrary or nonessential they may be.

Of course, full-time work schedules, restrictive attendance policies, and lack of pregnancy leave are not inherent in the nature of work, nor is the fact that they are now common practice unrelated to past gender inequality and discrimination. Current judicial interpretations of Title VII, however, obscure how such institutionalized work practices rest on a historical connection to outdated conceptions of gender and work and how they constrain the choices of both women and men in the present. The result is to treat these barriers to employment as a natural consequence of gender and pregnancy, rather than as a socially constructed feature of work with deep roots in the family wage gender norms of the past.

Nevertheless, there is a growing recognition that workplace decision-making based on gendered stereotypes about family care giving is prohibited by Title VII. For example, Williams and Segal outline how existing theories under Title VII and other laws can be used

287. *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1155–56 (7th Cir. 1997) (refusing to find a violation of Title VII when the employer terminated a pregnant part-time employee before full-time employees, even though the part-time employee had more seniority than full-time employees who were retained).

288. *Roberts*, 947 F. Supp. at 288 (noting that whether employer policies denying parental leave could be challenged under a disparate impact theory was an open question); *see also* 29 C.F.R. § 1604.10(c) (2009) (if leave policy of federal contractor has a disparate impact on pregnant employees it must be justified by business necessity); *Record v. Mill Neck Manor Lutheran Sch.*, 611 F. Supp. 905, 907 (E.D.N.Y. 1985).

289. 33 F.3d 1308 (1994).

290. *Id.* at 1315.

to challenge discrimination against care givers.[291] In addition, the EEOC has issued enforcement guidance about unlawful disparate treatment of workers with care giving responsibilities.[292] The guidance makes clear that Title VII prohibits gender role stereotyping of working mothers: employers may not, for example, treat female workers less favorably because they assume women will perform care taking or that care responsibilities with interfere with their work.[293] The guidance also states that in stereotyping cases, comparative evidence from similarly situated men may not be necessary to establish a prima facie case of disparate treatment, an important factor for avoiding some of the pitfalls outlined above.[294]

Stereotype theories are enormously useful because they allow plaintiffs to proceed without difficult-to-obtain comparative evidence from similarly situated male employees, and without expensive and complicated statistical evidence. In addition, they allow plaintiffs to take into account the role of culture, history, and social meaning, in this way unearthing many of the gender dynamics discussed in the genealogy of work above. But stereotype theories also run the risk of reifying time norms and work structures. These theories emphasize that employers may not presume that pregnant women will take time off work, but they also suggest that if a pregnant woman needs time off or an accommodation, that would be a different situation and outcome. Although these developments make good use of existing laws to challenge disparate treatment of workers based on gendered stereotypes about care and work, even the EEOC guidance suggests that employment decisions based on workers' performance on the job as that job is already defined do not generally violate Title VII.[295] Accordingly, to the extent a worker needs time off or other changes to existing work practices to manage work and family responsibilities, Title VII still offers limited protection.

E. Moving Beyond Antidiscrimination Models

Title VII has proven to be an inadequate tool for challenging institutionalized work practices such as time norms. To be sure, Title VII has been relatively successful in curtailing discrimination against

291. Williams & Segal, *supra* note 188, at 122–61.

292. *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC Compl. Man. (BNA) § 615 (May 23, 2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.pdf.

293. *Id.* at 11.

294. *Id.* at 8–9 & n.43.

295. *Id.* at 16.

women, including pregnant women, who continue to be able to do their jobs as those jobs are currently defined. For working women who cannot meet time requirements because of pregnancy, childbirth, or related medical conditions, however, only disparate impact theories offer an avenue for directly challenging time norms, and these challenges have become increasingly difficult to bring. In short, although excluding women who can do their job as it is currently structured is no longer accepted, challenges to work's structure are, for the most part, rejected. Although women able to meet institutionalized work norms may now be legally protected, the way in which those norms rest on and recreate outmoded notions of gender remains unchallenged.

The doctrinal landscape described above creates a set of choices for workers that is constrained by existing work institutions. For example, is pregnancy incompatible with employment because childbirth naturally requires absence from work, or because workplace policies typically prohibit more than a few days of sick leave? More generally, note that work and family do not *always* conflict; instead, it is the families that fail to adhere to traditional gender roles that experience problems balancing the two. Yet because Title VII tends to focus only on the gender side of the equation without interrogating work practices, it invites courts to locate barriers to working in the personal circumstances and choices of women, and not in the structure of work itself. This approach, in turn, reinforces institutionalized work practices that push workers, both men and women, to adopt traditional gender roles at home.

There is a danger here: attempting to change work by relying on gender as a social category can inadvertently end up reifying the current oppositional relationship between the two. The very process of defining what gender and work mean for purposes of legal analysis tends to solidify and naturalize existing conceptions of these categories, and the relationship between them, in ways that undermine social change. For example, when courts analyze gendered patterns in part-time work or parental leave, they often fail to consider how workplace structures constrain choice and help generate the social conditions that produce gendered behavior at work and at home.

Understanding work and gender as mutually constitutive cultural categories suggests a potential solution to this dilemma. Rather than focusing solely on prohibiting discrimination on the basis of the already socially constructed category of gender, one might ask directly what work should look like, and enact specific, substantive modifications of institutionalized work practices that generate institutional inequality. Substantive reform of work practices is not unprecedented. For example, some laws specifically protect other types of temporary leave,

such as leaves for jury duty,[296] or perhaps more to the point, military leave, which traditionally has been taken mostly by men.[297] In addition, our taken-for-granted expectations of a forty-hour work week flow from Progressive Era legislation that sets the hours of work in a standard work week; historically, work weeks have been both much longer and shorter than this legal standard.[298] Highly contested at one time, these restrictions on the schedule of work are taken for granted today. These laws weigh the social importance of civic responsibility, military preparedness, and reasonable work-life balance against our institutionalized expectations regarding work.

Merely prohibiting discrimination on the basis of gender leaves the historically determined relationship between work and gender both implicit and unchallenged. Although prohibitions on gender discrimination were necessary, something more is needed for the next wave of measures. Laws that focus on changing workplace practices directly are an explicit challenge to the other side of the equation, namely work. Moreover, because work organizes both workplace and non-workplace social life, once work's structure begins to change the meaning of gender may change as well.

When the focus shifts away from who is protected by antidiscrimination statutes to what work should look like, the question is not whether women should get special treatment even though they cannot live up to deeply entrenched time norms in the workplace. The question becomes whether the institution of work itself should be restructured by law, and along with it both the workplace *and* the non-workplace ways of organizing social life around traditional gendered roles. This approach queries whether any given work practice is necessary, or even desirable, without simply assuming it is necessary because it is part of the way things have always been done. Moreover, by treating work and gender as an interrelated system of meaning, one can examine directly how certain workplace practices could be restructured to avoid reproducing inequality. In this way, theorists can envision a broader range of meanings for both work and gender, and avoid reifying any particular understanding of either category.

296. 28 U.S.C. § 1875 (2006 & West Supp. 2009).

297. 38 U.S.C. § 4311 (2006).

298. Fair Labor Standards Act, 29 U.S.C. § 201 (2006 & West Supp. 2009); HUNNICUTT, *supra* note 92, at 154–55, 178; BENJAMIN KLINE HUNNICUTT, KELLOGG'S SIX-HOUR DAY 50–51 (1996).

III. RESTRUCTURING WORK THROUGH THE FMLA

One fundamental difference between the FMLA and Title VII is that the FMLA focuses on the structural features of work itself, rather on the identity of the class of persons protected by law. That is, the FMLA focuses on the work side of the equation, rather than on the category of gender that implicitly constitutes work. The FMLA restructures work's time norms in a fairly direct manner.[299] It provides for up to twelve weeks of job-protected, unpaid leave each year for pregnancy disability, for parental care of a new child, to care for a worker's own serious health condition, and to care for a child, parent, or spouse with a serious health condition.[300] Employers are required to reinstate workers to the same or equivalent position after a leave.[301] The FMLA also prohibits interfering with, restraining, or denying the exercise or attempt to exercise rights to leave.[302]

As this brief description suggests, the FMLA addresses some of the limitations of current judicial interpretations of Title VII. Unlike Title VII, the FMLA explicitly requires employers to change institutionalized work practices by providing leave for pregnant workers, rather than leaving to the courts the question of whether equal treatment for pregnant workers requires employers to grant leave. The FMLA requires employers to provide job-protected leave for childbirth even if they do not provide short-term disability leave in any other circumstances. Workers must be reinstated after their leaves unless their jobs no longer exist. Thus, employers cannot fire or replace workers simply because they need time off from work, unlike the

299. The FMLA and its direct approach toward changing time norms at work were heavily contested. Similar legislation was passed by Congress twice and vetoed both times by President George Bush Sr. (President Bush vetoed the Family and Medical Leave Act of 1989 in 1990 and later vetoed an identical act, the Family and Medical Leave Act of 1991, in 1992). *See* Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 58–67 (1994) (summarizing legislative history of prior versions of the FMLA, including those that were not passed by Congress).

300. 29 U.S.C. § 2612(a)(1) (2006 & Supp. 2009).

301. *Id.* § 2614(a)(1) (2006).

302. *Id.* § 2615(a) (2006). To be sure, the FMLA does focus on workers' *characteristics*, or at least their *situations*, to define eligibility for leave. *See id.* § 2611(2) (2006). Those characteristics, however, are for the most part not confined to identity, except to the extent that being pregnant is unique to women. For workers who meet the statute's defined characteristics, leave is an entitlement. *Id.* § 2612(a)(1). In this sense, then, the FMLA established a minimum-employment benefit, rather than a more amorphous antidiscrimination principle that must be interpreted by courts.

comparative standard under Title VII, which allows employers to deny time off so long as they do so evenhandedly.

Perhaps most importantly, the FMLA explicitly requires employers to grant time off to care for new children and sick family members, two needs that for the most part are not covered by Title VII.[303] In addition, these forms of family leave are gender neutral. Not only women, but also men may take job-protected leave to care for new children, or to care for their seriously ill children, spouses and parents.[304] When both men and women use these provisions, they undermine implicit expectations that caring for family members is women's work, and that workers have no family responsibilities because they have the support of a partner at home. And by allowing intermittent time off when necessary, the FMLA challenges expectations that work requires full-time, year-round, and continuous labor to the exclusion of other needs. Instead, FMLA reconceptualizes a non-gendered standard worker with diverse needs for giving and receiving care.[305] In this way, work is forced to reckon with family responsibilities, chipping away at the cultural divide between work and family responsibilities.

In short, the FMLA's approach is to make substantive changes to the structure of work, rather than requiring equal treatment for certain groups within work's existing structure. By focusing directly on the structure of work, this approach is akin to the Fair Labor Standards Act, which limits regular work hours to forty hours per week, or to Occupational Safety & Health Administration, which requires employers to provide a safe workplace.[306] This approach is by design: the FMLA is codified in Title 29 of the United States Code, along with these other basic employment benefits, rather than in Title 42, where one finds antidiscrimination legislation such as the Civil Rights Act of 1964.[307] By treating family and medical leave like these basic benefits,

303. *See supra* Section II.D.

304. 29 U.S.C. § 2612(a)(1) (2006 & Supp. 2009).

305. Lise Vogel, *Considering Difference: The Case of the U.S. Family and Medical Leave Act of 1993*, 2 SOC. POL. 111, 115–16 (1995).

306. Fair Labor Standards Act of 1983, 29 U.S.C. §§ 201–219 (2006); Occupational Safety and Health Act of 1970 § 2(b), 29 U.S.C. § 651(b) (2006); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 n.2 (1st Cir. 1998) (noting that "[t]he FMLA's legislative history reveals that it 'is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment'" (quoting S. REP. NO. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 6–7)).

307. Title VII of the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2006).

or like leave for jury duty or military service, the FMLA explicitly recognizes the substantive value of caring for others, rather than focusing only on questions of identity and equal treatment.

Nevertheless, the FMLA has some limitations. Although the FMLA requires leaves of absence in certain circumstances, it does not protect employees who change their work schedule to accommodate family care responsibilities but do not reduce the hours they work.[308] Also, it does not solve the problems that arise when a pregnant worker wants to continue working but requires some changes in her job duties to do so. For example, in *Harvender v. Norton Co.*,[309] the plaintiff, a pregnant lab technician, submitted a note from her doctor indicating that she should not work around chemicals.[310] She neither requested nor wanted FMLA leave, but instead wanted to change her duties to avoid these chemicals, as 60 percent of her job duties did not require working around chemicals.[311] Rather than granting this request, her employer placed her on forced leave when she was two months pregnant, and indicated she would be terminated if she did not return to work after twelve weeks of leave.[312] The court held that employers were not required change job duties so that the work would be compatible with pregnancy, and could instead place pregnant women unable to perform the essential functions of their positions on involuntary leave.[313] Thus, although the FMLA may provide pregnancy disability leave, it does not require employers to structure work so that pregnant women can continue working during their pregnancies.[314] This lack of legal protection for women who could continue working with some minimal accommodations helps reinforce the cultural divide between the status of work and the status of (expectant) mothers.

One must caution, however, that despite the FMLA's explicit attempt to change work's time requirements, time norms still permeate how some courts interpret the FMLA. Many courts have expressed a dim view of the legitimacy of FMLA leave in light of the historical control of employers over the timing and nature of work. They describe the statute as the "so-called Family and Medical Leave Act,"[315] and

308. *See Giles v. Christian Care Ctrs., Inc.*, No. 96-2168, 1997 U.S. Dist. LEXIS 20351, at *11–12 (N.D. Tex. Dec. 11, 1997) (plaintiff did not state an FMLA claim where she requested a "flexible schedule" rather than leave of absence).

309. 4 Wage & Hour Cas. 2d 560 (N.D.N.Y. Dec. 15, 1997).

310. *Id.* at 561.

311. *Id.* at 561 & n.1.

312. *Id.* at 561.

313. *Id.* at 565.

314. Some state laws do provide such accommodations, however. *See, e.g.*, CAL. GOV'T CODE § 12,945 (West 2005).

315. *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1127 (W.D. Va. 1996).

note that "the FMLA makes incredible inroads on an at-will employment relationship."[316] Some courts express their skepticism by focusing on the FMLA's preamble, which states that the FMLA provides for leave "in a manner that accommodates the legitimate interests of employers" and the "demands of the workplace."[317] A few have even invalidated an FMLA regulation that could require more than twelve-weeks leave when an employer fails to notify an employee of his leave rights, with one court pointedly noting that the "FMLA never provides that an employer must retain an employee who works fewer than 40 weeks a year."[318] Such reasoning treats a worker's failure to meet the institutionalized norm of year-round work as a self-evident justification for firing her.

Courts have also, on occasion, interpreted the FMLA's requirements to be consistent with the institutionalized divide between work and gender. Some interpretations undermine the protections the statue provides for the temporary limitations associated with pregnancy, suggesting that work need not accommodate the private choice to become pregnant except when serious complications arise. For example, at least one court held that the FMLA's definition of serious health condition excludes normal pregnancies. In *Gudenkauf v. Stauffer Communications, Inc.*,[319] the employer fired the plaintiff one day after she missed a day of work due to the onset of pre-term labor.[320] She testified that she had been experiencing "back pain, nausea, headaches and swelling during her pregnancy," and consequently she had requested leave to work a part-time schedule.[321] The FMLA specifically requires employers to reduce a worker's schedule for "[a]ny period of

316. *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 977 (5th Cir. 1998); *see also Cox v. Autozone, Inc.*, 990 F. Supp. 1369, 1372 (M.D. Ala. 1998) (The FMLA is "[o]ne of the newer nation-wide restrictions on employers" that requires leave "for what Congress considers to be a good reason.") (citing 29 U.S.C. § 2612 (2006 & Supp. 2009)).

317. *See, e.g.*, *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999) (quoting the preamble of the FMLA, 29 U.S.C. § 2601(b)(3) (2006)), *aff'd sub nom. Cox v. Autozone, Inc.*, 990 F. Supp. 1369, 1373 (1998).

318. *Cox*, 990 F. Supp. at 1376; *see also Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939 (8th Cir. 2000); *Neal v. Children's Habilitation Ctr.*, 5 Wage & Hour Cas. 2d (BNA) 1278, 1279–80 (N.D. Ill. Sept. 10, 1999) (adopting the reasoning of *McGregor*). *But see Chan v. Loyola Univ. Med. Ctr.*, 6 Wage & Hour Cas. 2d (BNA) 328, 335 (N.D. Ill. Nov. 23, 1999) (rejecting the reasoning of *McGregor* and deferring to the Department of Labor's regulation).

319. 922 F. Supp. 465 (D. Kan. 1996).

320. *Id.* at 469.

321. *Id.* at 475.

incapacity due to pregnancy, or for prenatal care."[322] Nevertheless, the court held that the plaintiff was not entitled to use FMLA leave to reduce her schedule because her normal pregnancy was not a serious health condition.[323]

The court relied on the fact that the plaintiff's medical records indicated "her pregnancy was normal and that her complaints about the symptoms and conditions commonly associated with pregnancy were not unusual or severe."[324] Even though the employer admitted that the plaintiff had fallen behind in her work and been unable to perform some tasks because of her pregnancy, the court held that the employer need not accommodate normal pregnancy-related complaints.[325] Nowhere in this opinion does the court acknowledge that the symptoms of normal pregnancy might limit the plaintiff's ability to work because work's existing structure does not accommodate those physical limitations. Instead, the plaintiff's only choices were to do her job as usual, despite her pregnancy-related limitations and early contractions, or to be fired. In this court's view, the institutionalized attendance and time requirements of work need not yield to normal pregnancy, even though the intermittent inability to work due to pregnancy is explicitly covered by the statute.[326]

Some courts have also undercut the broad definition of serious health condition[327] by interpreting the concept of notice narrowly.[328]

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322. 29 C.F.R. §§ 825.112–.114, .115(b) (2009); *see also id.* § 825.120(a)(4) ("An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work.").

323. *Gudenkauf*, 922 F. Supp. at 476.

324. *Id.* Although the court also noted that plaintiff's doctors had not certified her need for time off from work, her employer fired her before she could see her doctor regarding her recent contractions and her need for leave. *Id.* at 469, 476.

325. *Id.* at 469, 475–76.

326. 29 U.S.C. § 2611(11) (2006); *id.* § 2612(a), (b)(1) (2006 & Supp. 2009).

327. The FMLA provides for leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." *Id.* § 2612(a)(1)(D). The regulations define "serious health condition" to include an "illness, injury, impairment or physical or mental condition that involves inpatient care" in a hospital or similar facility, "or continuing treatment by a health care provider . . . ." 29 C.F.R. §§ 825.113(a), 825.114. "A serious health condition involving continuing treatment by a health care provider" includes chronic conditions, as well as short-term illness for which medication is prescribed. *Id.* § 825.115 (2009). Serious health conditions also include pregnancy. *Id.* §§ 825.113, 825.115.

328. *See Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 981 (5th Cir. 1998) (reversing judgment for plaintiff after jury trial because requiring employers to inquire further after an employee indicates she will miss work "is not necessary for the protection of employees who suffer from 'serious health conditions', and would be unduly burdensome for employers"); *Reich v. Midwest Plastic Eng'g*, 2 Wage & Hour Cas. 2d (BNA) 1409, 1412 (W.D. Mich. July 22, 1995) (finding inadequate notice of

The FMLA requires workers to notify their employers of their need for FMLA leave as soon as practicable in order to be protected by the statute.[329] But in *Reich v. Midwest Plastics Engineering*,[330] the court held that a pregnant worker who was hospitalized with chicken pox gave her employer inadequate notice of her need for FMLA leave.[331] There was no question that the worker had a serious health condition, and indeed the court held as much.[332] But because the worker went to the bank during her illness but did not obtain a doctor's certification for her employer until the end of her absence, the court found her notice of the need for leave was insufficient.[333] Implicit in the *Reich* opinion is the idea that a pregnant worker who is able to deposit her check in the bank was not sufficiently ill to justify missing work, even though the FMLA explicitly recognized that her time off was protected.

Although some scattered interpretations seem to apply institutionalized conceptions of work to undermine the FMLA's protections, most courts have embraced these protections. For example, in *Whitaker v. Bosch Braking Systems*,[334] the plaintiff requested FMLA leave to avoid working overtime during her pregnancy.[335] Her doctor provided medical documentation stating that due to the plaintiff's normal pregnancy, she should not work more than eight hours per day or more than forty hours per week.[336] The defendant denied the plaintiff FMLA leave, she refused to work overtime anyway, and as a result the defendant required her to take short-term disability leave.[337] The defendant argued that the plaintiff did not have a serious health condition because her pregnancy was normal and she could work a full-time schedule, and therefore she did not qualify for FMLA leave.[338] The court rejected this argument, noting that "nothing in the FMLA provides that a pregnancy can constitute a serious health condition only if the pregnancy is abnormal or if the employee is physically unable to

need for FMLA leave even where pregnant employee was hospitalized with chicken pox because employee visited the bank during her illness but did not obtain a doctor's certification for her employer until the end of her absence).

329. 29 C.F.R. § 825.302(a) (2009).

330. 2 Wage & Hour Cas. 2d (BNA) 1409 (W.D. Mich. July 22, 1995).

331. *Id.* at 1412.

332. *Id.* at 1411.

333. *Id.* at 1412.

334. 180 F. Supp. 2d 922 (W.D. Mich. 2001).

335. *Id.* at 924.

336. *Id.*

337. *Id.* at 925. The plaintiff sought to recover "the difference between the wages and bonus she would have earned working forty hours per week less the amount she received from short term disability." *Id.*

338. *Id.* at 931.

perform her job."[339] Instead, the court reasoned, a pregnant employee could establish a serious health condition if her doctor determines that her particular job duties present a risk to her health or pregnancy.[340]

Similarly, in *Treadaway v. Big Red Powersports, LLC*,[341] the pregnant plaintiff requested leave because of dangerous levels of carbon monoxide in her office at the all-terrain vehicle factory and showroom where she worked.[342] Rather than grant her leave and address the problem, her employer replaced her.[343] The defendant argued that the plaintiff was not eligible for FMLA leave because she was not incapacitated due to pregnancy.[344] To support its argument, the employer pointed to plaintiff's testimony that "[t]he restriction was the environment, not my disability" and that "pregnancy wasn't the problem. It was the carbon monoxide fumes . . . that was the problem."[345] The court rejected the employer's argument, noting that the plaintiff's physician concluded that the plaintiff should not return to work until the carbon monoxide problem was resolved, and that this constituted incapacity sufficient to warrant coverage by the FMLA.[346]

By refocusing the analysis on the characteristics of the job, rather on the question of whether these plaintiffs' pregnancies were "normal," these courts recognized that many existing workplace conditions are incompatible with even a run-of-the-mill pregnancy. In this view, an employee's ability to work depends not only on her physical restrictions, but also on the particular duties and circumstances of her job. In this way, these courts recognized that the FMLA was intended to be a tool for challenging workplace requirements that exclude women when they become pregnant, even when the pregnancy-related symptoms that affect women's ability to work result from a normal pregnancy. The *Whitaker* court rejects the argument that the ability to work a standard full-time schedule rendered a worker ineligible for FMLA leave to avoid mandatory overtime, rather than reflexively accepting workplace time standards as definitive of the (in)ability to work.[347] Similarly, the *Treadaway* court recognizes that it was the interaction between the plaintiff's pregnancy and dangerous working conditions that rendered her unable to work, refusing the defendant's

339. *Id.*
340. *Id.*
341. 611 F. Supp. 2d 768 (E.D. Tenn. 2009).
342. *Id.* at 772–73.
343. *Id.* at 773.
344. *Id.* at 776.
345. *Id.*
346. *Id.*
347. *See supra* notes 334–340 and accompanying text.

interpretation that only incapacity resulting solely from the effects of pregnancy warranted protection by the FMLA.[348] In this way, these courts locate the conflict between work and pregnancy not in the nature of pregnancy, but in the specific characteristics of the workplace and how those characteristics limit pregnant women's ability to work.

In addition, several courts have emphasized that the statute creates a substantive entitlement to leave that is not contingent on the employer's needs and gives employers no discretion to deny family leave to eligible employees, unlike Title VII, which allows employers to refuse to provide leave so long as they treat all employees the same.[349] In cases involving denial or interference with leave, the employer's subjective intent is irrelevant; instead, the question is whether the employee received the benefit to which she was entitled.[350] Because leave is an entitlement, rather than a discretionary benefit, an employer cannot defend against liability by merely offering a legitimate business reason for denying leave. By taking away the employer's discretion to rely on time norms in making employment decisions, the FMLA restructures the workplace to be more compatible with common family responsibilities. And because the statute focuses on the structural features of work itself, rather than the identity of the workers to be protected, it may be more successful in restructuring work than Title VII and the PDA. It may also encourage courts to question arguments that naturalize the current relationship between work and gender, and to be more open to structural change.

One drawback to an approach that targets specific employment practices for substantive reform is the political and technical difficulty of identifying each work practice that generates institutional inequality and then passing legislation to change it. In comparison, broad prohibitions against discrimination, which theoretically can encompass many workplace practices, seem more desirable and efficient. Indeed, it could be argued that challenges to workplace structures that generate institutional inequality could be achieved under Title VII's existing stereotype jurisprudence,[351] although I do not develop that argument here. Nevertheless, as the foregoing analysis of Title VII's interpretive

348. *See supra* notes 341–346 and accompany text.

349. *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 732 (2003) (noting the FMLA was enacted to respond to the "serious problems with the discretionary nature of family leave" (quoting H.R. REP. NO. 103-8, pt. 2, pp. 10–11 (1993))); *Lui v. Amway Corp.*, 347 F.3d 1125, 1135 (9th Cir. 2003) (noting that "FMLA leave for baby bonding time is not contingent upon an employer's needs"); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712–13 (7th Cir. 1997).

350. *Hodgens*, 144 F.3d at 159.

351. *See supra* notes 230–238 and 290–292 and accompanying text.

path shows, courts interpret broad prohibitions against gender discrimination to be consistent with the existing institutional regime because institutions by definition have become so taken for granted that it is hard to imagine that social life can be structured in any other way. Statutes that target work practices directly supply that imagination in legislative form. Once the alternative has been articulated it becomes easier for courts to see that work limitations (or capacities) are not naturalized characteristics of men and women, but products of work institutions that incorporate outmoded conceptions of gender and reproduce gender inequality.

CONCLUSION

Ownership and control of time was one of the great battles in the transition to modernity and to capitalist modes of production. The socially constructed gender arrangements of this era are implicated in this struggle and its resolution helped institutionalize inequality at work. Although the inequalities of this era informed new standards for productive labor, over time the historically contingent inequalities incorporated into those standards became invisible. Now they appear to us as simply the natural, normal, objective, and inevitable nature of work. Yet time standards and work conventions incorporate power relations between employee and employer and power relations among different classes of workers in ways that marginalize women. To accept these standards as inevitable is to accept the institutional inequality deep within work's structure.

Statutory reforms to deeply entrenched social practices such as time norms and employer control over work schedules must contend with institutional frameworks that persist long after legal reforms are enacted. As the analysis above reveals, even well-grounded legal claims under Title VII, the PDA, and occasionally the FMLA can be defeated because courts draw on institutionalized understandings about work and gender when they interpret these laws. Each of these statutes attempts to rework the oppositional relationship between work and gender in some manner. But often the underlying tensions between work and gender derail judgments that would change established work practices. Institutionalized beliefs about the relationship between work and gender also obscure the logical flaws in judicial reasoning that enforces work's existing features. Although specific, substantive strategies like that of the FMLA seem more promising than the more amorphous antidiscrimination strategies of Title VII, in some instances even the FMLA can be subject to reinterpretation to avoid changing work's structure. Nevertheless, direct strategies like the FMLA offer the most promise for social change because they articulate alternatives to work's

current structure and set forth specific requirements for structural reform.

More generally, I argue that changing work's institutionalized features requires more than antidiscrimination, or even accommodation, strategies. Strategies such as these that focus on subordinate identities whose meanings are shaped by work's structure risk inadvertently reinforcing and reinscribing the existing relationship between work and these identities. For example, focusing on how work must change to "accommodate" pregnancy marks women as separate, different, apart from all other standard workers who become normalized in the process. In contrast, understanding which institutionalized work features tend to reinforce outdated conceptions of gender and to marginalize certain workers helps identify which aspects of work to target for change. In this way, institution-focused legal reforms have the advantage of expanding the pie for all workers, rather than carving out small exceptions to a largely unchanged work environment that continues to recreate relations of inequality.

Moving from accommodation to transformation thus requires thinking of work and gender differently. Rather than viewing work and gender as separate categories, one must come to view them as two parts of a mutually reinforcing yet fluid system of meaning. In this system, changing work has the potential to also change gender because current work practices reproduce and construct the meaning of gender. To take this approach, however, requires understanding the historical and institutional processes that produce institutional inequality so that these processes may be challenged and, ultimately, changed.