

**The Struggle to Care:  
Negotiating Family and  
Medical Leave Rights in the Workplace**

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## **Abstract**

Recent research regarding the Family and Medical Leave Act (FMLA) has focused on adoption of family leave policies by organizations in response to legislation and on patterns of leave taking in general. Very little is known, however, about how leave rights operate in practice when workplace conflicts arise over leave or about how legal norms construct the meaning of leave in the workplace. This study of FMLA rights draws together two strands of social constructivist theories, one from the law and society tradition and the other from sociological understandings of work and family. First, I review how the institutionalized features of work historically were constructed in opposition to gender and came to exclude care. Second, through qualitative interviews with workers who negotiated contested leaves in the workplace, I examine how social institutions, culture, and social interactions shape the process of asserting these rights. I find that employers' resistance to leave and respondents' understandings of their situations are shaped by institutionalized conceptions of work and care. Family wage ideology continues to give meaning to taking time off from work, despite the protections of the law, and legal rights remain embedded within deeply held belief systems, institutionalized work practices, and relations of power. I also find, however, that the FMLA's legal norms make the tensions between work and gender more visible, allowing workers to challenge institutionalized work practices that exclude care.

## **Introduction**

Until recently, the United States was virtually the only major industrialized country without a family leave policy (Dowd 1989). Employers could legally fire workers who needed time off to care for seriously ill children, ill or injured spouses, or aging and dying parents. Employers also could legally fire workers unable to work due to temporary serious illnesses or injuries. And employers could legally fire women who needed time off for pregnancy, childbirth, or related medical conditions if they also denied time off to nonpregnant employees who were unable to work. Time off after the birth of a new child remained a benefit provided at employers' discretion, a benefit primarily available to well-paid professional or management employees (Kammerman, Kahn, and Kingston 1983).

By the end of the twentieth century, significant changes in family and work patterns made difficult choices about managing work, family, and illness more visible. More women, particularly women with children, worked, and increasing divorce rates meant many working women were their families' sole source of support (Reskin and Padavic 1994).<sup>1</sup> As medical care improved and laws required states to educate children with disabilities, the number of workers with disabilities increased as well (Shapiro 1993). As a result, work and "private" care needs increasingly came into conflict. Research about how workers and families address this conflict made difficult choices more visible and revealed how social institutions and culture construct the conflicts among work, family, and disability (Hochschild 1989, 1997; Stone 1984). The state constructed this conflict as well. By failing to adopt any employment policy providing for family or medical leave, it effectively defined the problem as a private dilemma.

Since 1993, however, the Family and Medical Leave Act (FMLA) has provided some workers with a legal right to unpaid, job-protected leave for care-related purposes. Thus, the state now defines the conflict between work and "private" care needs as a public issue. The FMLA requires covered employers to provide up to twelve weeks of unpaid leave per year to certain workers who need time off for family or medical crises.<sup>2</sup> Workers may also use FMLA leave for pregnancy disability, and both men and women may take FMLA parental leave after the birth of a new child.<sup>3</sup> The statute protects workers who use FMLA leave from retaliatory harassment, termination, and discrimination.<sup>4</sup> Perhaps most important, FMLA leave is an entitlement; the

statute contains no hardship defense.<sup>5</sup> Employers must provide FMLA leave even if they allow time off for no other reason. In other words, the statute leaves employers no discretion to deny qualified workers job-protected leave.

The FMLA's provisions challenge institutionalized beliefs and practices regarding work, gender, and disability. By requiring work to accommodate the demands of care on a gender-neutral basis, the FMLA disrupts the opposition between public and private life and reveals the mutually constitutive relationship between work and gender. It challenges fundamental but implicit assumptions about the nature of work. It chips away at employers' unilateral control over the time requirements of work. And by protecting the jobs of workers who are temporarily unable to work due to illness or injury, it undermines cultural conceptions of "disability" and "work" as mutually exclusive categories. It not only creates a new benefit for workers, but also challenges taken-for-granted conceptions of what work, gender and disability mean. It thus opens up new ways of thinking about and organizing the relationships among work, gender and disability, creating opportunities for social change.

Recent research regarding the FMLA has focused on legislation and on the adoption of family leave policies by organizations, rather than on how these policies work in practice (Guthrie and Roth 1999; Kelly and Dobbin 1999). And although some research examines whether workers use leave rights (Commission on Leave 1996; Fried 1998), most focuses on how economic concerns affect those choices, rather than on workers' subjective understandings of leave, work, and care (but see Hochschild 1997). How the FMLA constructs the meaning of taking leave for workers has not been systematically examined.

In this paper, I argue that understanding whether the FMLA can really bring about social reform requires understanding the social meaning of taking leave in the workplace. Although the FMLA creates formal rights to leave, these formal rights are embedded within informal institutions, social relations, and culture, all of which can create resistance to law. Indeed, in particular social contexts, institutionalized practices and expectations can displace, reinterpret, and transform legal rights (Edelman, Erlanger, and Lande 1993; Ellickson 1986, 1991; Heimer 1999; Macaulay 1963). But legal rights also construct meaning. Law has a particular capacity to create reality; it makes the social world by naming it, creating rights, defining wrongs and

constructing the meaning of social events. Thus, law also gives meaning to workplace conflict over care.

In this paper, I focus on how the institutions of law, work, and gender interact when workers negotiate contested FMLA leaves in the workplace, leaving aside for the moment the important but complex issue of care and disability. My aim is to highlight how these institutions construct the meaning of workplace conflicts over leave. My data are from qualitative interviews with workers who informally negotiated their leave rights in the workplace without going to court. I show the complex ways in which institutions other than law permeate workplace conflicts over leave rights and influence workers' choices about asserting those rights. I trace how institutions, social relationships and culture play out in these workplace conflicts and how law can be a means of social change through these negotiations. I conclude that although workers who seek time off to care can face resistance from these institutions, the law also provides a way to reimagine the meaning of work, gender, and care.

### **A Brief Theoretical Framework of Social Constructivist Approaches, Institutions, and Social Change**

This paper draws together two strands of social constructivist theories, one from the law and society tradition and the other from sociological understandings of work and family. From sociology, I take the insight that work, gender, and family are not natural, universal, and unchanging categories, but rather are historically situated, contingent, and variable, created and re-created through social interaction. From law and society theorists, I take a similar insight about law. That is, law is not determinant and universal, but instead is historically determined and situationally contingent. In this view, law is not separate from society. Instead, law and social relationships are constitutive of each other. Moreover, law is not simply a top-down influence on society, but is also subject to reinterpretation and transformation from “below.”

These strands of sociological and legal research draw on theories of social structure that emphasize the reciprocal relation of structure and action in social life (Giddens 1984; Sewell 1992). These perspectives view social structure as the institutionalized outcome of past actions, as rules or schemas that develop as the product of social behavior, and also as the medium

through which social action occurs (Scott 1995; Sewell 1992). Thus, human agents' actions are shaped by culture and social institutions, but culture and institutions are also reproduced by the actions of those agents (Sewell 1992).

From this perspective, although structure shapes behavior, structure does not absolutely determine human action. This is because social structures do not exist apart from the social practices that construct and reconstruct them (Berger and Luckman 1967). Also, actors retain knowledge and awareness of the meaning systems that shape and re-create social life. Accordingly, social transformation is possible through innovative use of cultural "schemas" to reinterpret, enact in new ways, and therefore transform structure (Sewell 1992; Swidler 1986). Opportunities for transformation arise as agents respond to conflicting or overlapping social structures, sometimes transposing systems of meaning developed in one context to another (Sewell 1992).

Relying on this theoretical framework, constitutive theories of law treat law as a meaning system through which actors reinterpret and re-create social structure. Social change through legal change is theoretically possible because law is constitutive of social life and therefore can disrupt established structures and meanings. That is, "law's effects are seen in meanings and self understandings rather than in the results of sanctions (Sarat and Kearns 1993: 27)." For instance, Galanter (1983) describes an "enculturation" process in which communicating a legal standard changes the normative evaluation and cultural understanding of social events. He notes:

Law is more capacious as a system of cultural and symbolic meanings than as a set of operative controls. It affects us primarily through communication of symbols—by providing threats, promises, models, persuasion, legitimacy, stigma, and so on. (Galanter 1983: 127)

Law reconstitutes social relationships by delegitimizing conduct previously accepted as normal and natural, undermining institutionalized understandings of social life, and naming new roles and statuses (Engel 1993; Engel and Munger 1996; Sarat and Kearns 1993; Williams 1991). From this view, law shapes social life, defines which social relations are appropriate and legitimate, and is constitutive of the social structure within which actions are embedded (Sarat and Kearns 1993). Constitutive perspectives also acknowledge that law is not the only normative

system structuring social life and that meaning can flow from society toward law as well as from law to society (Edelman, Uggen, and Erlanger 1999).

Constitutive theories see law as a potent agent of social change. Law, however, is not launched into a naked normative landscape. It is embedded within existing institutions, social relationships and culture. This is particularly so when legal rights, such as FMLA rights, challenge taken-for-granted expectations about social life, such as the structure of work or the gendered nature of care. Also, competing normative systems may be particularly salient when workers negotiate leave rights informally in the workplace. Law casts a “shadow” over these informal negotiations (Mnookin and Kornhauser 1979), affecting how the parties think about their choices. But other institutions cast their shadows as well, shaping workers’ understandings of leave rights and law’s role in conflict over leave. Accordingly, understanding the ways in which these social institutions and law interact becomes central to understanding whether the FMLA can change conceptions of care.

### **Legal Conceptions of Care in the FMLA**

The FMLA conceptualizes the relationship between work and care as one in which work accommodates care. In the FMLA’s conception of care, workers are entitled to take up to twelve weeks of job-protected leave per year for care-related purposes. These purposes include childbirth, parental leave, care for workers’ own serious health conditions, and, perhaps most significantly, care for a child, parent, or spouse with a serious health condition. Employers may not deny or discourage leave, fire workers who use leave, or “use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions” based on attendance.<sup>6</sup> Thus, not only must employers accommodate care, they may not value workers differently based on their choices to take leave to care.

One explicit goal of the FMLA is to promote equal employment opportunity among men and women. It accomplishes that goal, however, through a model of employment rights that departs from prior legal theories of formal equality. That is, it does not take work’s requirements as given and then require equal treatment of men and women within those requirements. Instead, it modifies the taken-for-granted structure of work itself. In doing so, it constructs both work and

the normative worker in a new way. As Vogel (1995) notes, the FMLA reconceptualizes a nongendered worker with diverse needs for care.

The FMLA's approach undermines scripts about gender, work, and care. Simply by requiring leave to care for others, it reveals and destabilizes taken-for-granted conceptions of workers as independent individuals free from connections with others (Kittay 1995; Okin 1989; Pateman 1988; Vogel 1995). By providing leave to care on a gender-neutral basis, it also challenges implicit norms that women are the appropriate caretakers for children and sick family members. Moreover, the FMLA specifies what counts as "care" in a fairly broad manner. Workers can take leave not only to provide physical care, but also to provide psychological comfort or care or to arrange for care by others.<sup>7</sup> And courts have construed leave to care in terms of the relationship between the caregiver and the care receiver, not just in terms of meeting specific needs for care.<sup>8</sup>

Implicitly, however, the FMLA also constructs a vision of care that is exclusionary. It defines who counts as "family" in a way that excludes grandparents, adult children, and domestic partners, among others, from those entitled to workers' care.<sup>9</sup> Also, feminists argue that the FMLA's gender-neutral provisions incorporate the structural inequalities of the workplace and may be too limited to be useful to those most in need (Dowd 1989; Kittay 1995). The FMLA may indeed unintentionally exacerbate gender inequalities. For example, it requires workers to work at least twenty-five hours per week to qualify for its benefits. Ironically, this excludes many women who work part-time because of their caretaking responsibilities (Williams 2000). Also, the gender wage gap creates an incentive for women rather than men to take unpaid leave in order to minimize the families' loss of income, reinforcing traditional arrangements in which responsibility for care falls primarily upon women (Dowd 1989). Class inequalities also affect the FMLA's practical meaning. The FMLA applies only to workplaces with fifty or more employees; this excludes half the workforce (Kittay 1995). The fifty-employee threshold also excludes most domestic workers, home health care providers, and child care workers, all positions typically held by low-income women. In addition, feminists argue the FMLA disproportionately benefits wealthier families that can afford unpaid leave, although it does protect poor workers' jobs when leave is unavoidable (Kittay 1995).

These are significant limitations. Nevertheless, the FMLA still challenges institutionalized understandings of care by reimagining the relationships between work and care. Law is a pervasive cultural force in American society that shapes our assumptions about the self and the relationship of self to others. Accordingly, formal legal entitlements to care may also change cultures of care. The law not only reflects conceptions of work and care; it is also constitutive of them. That is, law may construct what workers believe is possible in terms of leave, and workers may come to want time off to care in part because the FMLA makes that time off an entitlement. Also, the FMLA must be evaluated not only against theoretically desirable alternatives, but also against the absence of any family leave policy at all, an alternative that allows institutionalized conceptions of work and gender to define legitimate care.

### **Cultural Conceptions of Work and Care**

The FMLA attempts to reimagine both work and workers in a way that allows for care. But work is more than a set of social practices that can be easily regulated and changed. Work is also an institution. By “institution,” I mean “a web of interrelated norms, social meanings, implicit expectancies, and other ‘taken-for-granted’ aspects of reality, which operate as largely invisible background rules in social interaction.” (Krieger 2000: 478; see also Berger and Luckman 1967; Nee 1998). Work’s practices and normative associations are the product of history; they reflect a particular sequence of historical events and developments, yet that history is no longer apparent. Instead, work as an institution is experienced as objective reality, simply the way things are (Berger and Luckman 1967).

The institution of work is a set of social practices that is familiar, yet unspoken. If we are asked to imagine “work,” our mental image is likely to include certain features even if our own experience or that of others we know differs. Those features include labor for a wage or salary, working in a location separate from home, and permanent, uninterrupted year-round work. We probably imagine a standard workweek of at least forty hours on a daily schedule, five days per week. In addition, we usually expect employers to control the work schedule and the way workers perform their tasks.

Of course, many jobs deviate from this standard, but we mark those deviations by referencing (and therefore reinforcing) the institutional norm. That is, we speak of “part-time” work or “night shifts,” “working at home” or “working for oneself.” Indeed, some forms of labor outside this norm are not considered “work” at all, such as unpaid labor in the home (Siegel 1994). Employers who 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 week-end work.

The institutionalized features of work are not determined solely by “nature” or production demands, but instead reflect work’s historical development, particularly during the transition to modernity. An enormous body of historical literature explores this transition from preindustrial to industrial systems of production, and details of this transition, such as when and how much of a transition took place, are highly contested. It is beyond the scope of this paper to explore this literature in detail, and the following discussion greatly simplifies its themes and the controversies within those themes. I focus on how the features of work reflect two themes from this literature: the fundamental reorganization of productive activities as society transitioned from household economies to industrial production and the ways in which this transition constructed a gendered division of labor.

One aspect of the transition to modernity that is often discussed (and contested) is how time has come to define the meaning of work and the standard against which good workers are measured. In the received interpretation, industrialization occasioned a transition from task-oriented work to time discipline (Thompson 1967). Preindustrial production was task-oriented work that made little distinction between the activities of work and life and followed “natural” rhythms dictated by the nature of tasks. It typically proceeded in irregular patterns, including alternating bouts of intense labor and idleness. In contrast, time became currency within the industrial wage system. Capitalists enforced time discipline through the regular rhythms of machinery, the timesheet, and timekeepers, and workers began to make sharp distinctions between time belonging to their employer and their own time. Thompson (1967) argues that although workers initially resisted time discipline, over time they came to contest only the

amount of time required for work. That is, the wholesale reorganization of productive activities eventually became institutionalized:

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 1967: 86)

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.”

This distinction between time discipline and task orientation is closely related to a second theme, the ways in which industrialization constructed a division of labor between the sexes. Again, in the received interpretation, preindustrial production took place within the household, where “work,” household upkeep, and child care were all part of an undifferentiated process. In this view, industrialization moved productive activities from the household to industrial factories and workplaces, leaving “residual” tasks such as caretaking in the home. This shift created two gendered spheres of activity: the workplace, which was framed as economic in nature, and the home, which was framed in opposition to work and the market (Boydston 1990; Skocpol 1992). Time discipline deepened this distinction between home and work because household activities continued to be task oriented, in sharp contrast to the time discipline of the factory clock (Cott 1977; Thompson 1967). And, as many scholars have noted, ideology justified this division of labor as not only an existing pattern, but also as a morally appropriate division based on the nature of women and men (Welter 1966).

The family wage ideal, and its simultaneous construction of the ideal worker and the ideal family, is the core ideology in this transition. During the early twentieth century, white workingmen claimed independence and citizenship based on an implicitly male standard of wage labor – “a wage sufficient to maintain a household and to support a nonemployed wife and children” (Fraser and Gordon 1994: 316).

As wage labor became increasingly normative—and increasingly definitive of independence—it was precisely those excluded from wage labor [women working in the home] who appeared to personify dependency. (Fraser and Gordon 1994: 316)

Paradoxically, however, “independence” through men’s wage labor presupposed interdependence with nonworking women.

[T]he construction of “worker” presupposes that he is a man who has a woman, a (house)wife, to take care of his daily needs. The private and public spheres of civil society are separate, reflecting the natural order of sexual difference, and inseparable, incapable of being understood in isolation from one another. The sturdy figure of “worker,” the artisan, in clean overalls, with a bag of tools and a lunch-box, is always accompanied by the ghostly figure of his wife. (Pateman 1988: 131)

As Pateman (1988) notes, work, nominally a free contract between worker and employer, assumes a private marriage contract with a stay-at-home wife who works without pay. Work signified independence, but nevertheless came to require dependence on someone else to care for the worker and his children. Thus, institutionalized work practices such as uninterrupted, full-time labor, do not easily accommodate care-related activities or childbirth. They not only exclude the life experience of women, but also assume women’s traditional role in the family. As a result, work ideologies and practices construct not only employment, but also the relationships among gender, work, and care.<sup>10</sup>

In the received interpretation, the institutionalized features of work become gendered because industrialization divorced “work” from home. That is, men came to perform “work” (meaning wage labor) while women performed residual “life” activities at home. This approach, however, obscures how the very definition of work itself changed and was constituted by industrialization. It takes for granted that “work” means only those tasks that move from home to factory and assumes that those tasks left behind were “residual” nonwork. That is, this approach accepts modern definitions of work as given without interrogating how historical events socially constructed the meaning of work. A rich body of recent scholarship investigates this historical construction of the meaning of work, although I cannot review it sufficiently here (see, e.g., Boydston 1990; Siegel 1994; Valenze 1995). For the purposes of this discussion, I take from it one simple point: that time discipline and industrial organization not only changed how work was done, but also came to define what work means in a way that largely excludes care. In this historical reconstruction of the meaning of work, care remained on the feminine, noneconomic, and home-based side of the line between work on the one hand and gender on the other.

The institutionalized features of work construct a culture of work and an implicit culture of care in terms of time and gender. In what Juliet Schor calls the American “culture of time,” only full-time work, or sometimes more than full-time work, counts as legitimate labor (Schor 1992). In American workplaces, part-time workers are devalued; they are paid less than full-time workers even on a proportional basis, they receive fewer benefits, and they have less job security (Kalleberg 1995; Williams 2000). And the devaluation of part-time workers is also linked to ideologies of work and gender. For instance, the family wage ideal constructs the ideal worker as an independent individual, free from connections with others or responsibility to care for others. Thus, institutionalized work practices, against which good workers are measured, make no provision for time off to care, and failure to meet this standard signifies lack of work commitment and effort.<sup>11</sup> The “cult of true womanhood” constructs the other side of the family wage equation, one in which care is and should be provided by women as expressions of their idealized nature (Welter 1966). Separate spheres ideology and the pastoralization of home life help link traditional images of care with “things feminine, private, natural” and definitely apart from work (Boydston 1990; Hochschild 1995). Thus, in a culture where care takes time, work is defined by time, and care is defined by gender and in opposition to work, needing time to care has become a legitimate basis for discounting workers. Because work and gender are constitutive of each other, care and time can become both signifiers of and mechanisms for enforcing the divide between gender and work.

An often-proposed solution to this conundrum is legal rights to family and medical leave, legislation that protects time off to care in a similar manner to leaves for jury duty or military service. Indeed, leave policies seem to provide some instrumental leverage: workers fired or demoted for taking leave could sue, and employers anxious to comply with the law would provide leave to care. But the institutional context and cultural meaning of family leave are different than leave for jury duty or military service; jurors and soldiers (historically men) have also been viewed as workers, but mothers have not. Moreover, individually enforced rights like the FMLA must be negotiated anew by each person who claims them.

Legal rights created by legislation like the FMLA remain embedded in institutionalized expectations about work and care. Because the institutions of work, gender, and family provide a

context for the FMLA, they also shape the process of negotiating leave rights in the workplace. Rights negotiations become a medium through which both the law and other institutions are deployed, reinterpreted, and (re)created. As respondents negotiate FMLA rights, they engage in a subjective struggle over the meaning of taking leave. In this subjective struggle, they internalize and attempt to reconcile disparate schemas about work, gender, and care. They also respond to cultural discourses about taking leave that are put forth by those around them. In this process, law plays a key normative role; it constructs the relationships among workers, employers, and family members. But the institution of work and the structuring processes of gender also interact with the law and create resistance to FMLA rights. As law collides with institutionalized expectations and practices in the process of mobilizing rights, these taken-for-granted meanings emerge in how respondents talk about their situations.

### **Data and Methods**

How, I wondered, do workers who needed leave but encountered some resistance from their employers make sense of their situations? How do they understand the conflict over leave and their choices about leave and care? How do social institutions, culture, and social interactions shape that process? When workplace conflict over leave arises, how do workers resolve the tension between the legal norms of the FMLA and institutionalized expectations and practices regarding work and care?

To answer these questions, I conducted qualitative telephone interviews with individuals who contacted a California-wide toll-free legal advice and assistance information line with questions about family or medical leave. The information line is a free service provided by a private, nonprofit public interest law organization. This organization conducts statewide outreach for the information service through public presentations about laws affecting workers' rights, through informal outreach to unions and other labor organizations, and through conventional advertising. Most respondents who contacted the information line learned about the service from a friend or co-worker.

I pursued the universe of individuals who contacted the information line with leave questions within a period of one year from 1998 to 1999. Twenty-four of the thirty-five

individuals in this group agreed to be interviewed, yielding a response rate of almost 70 percent.<sup>12</sup> Because California has a relatively heterogeneous population, this was a fairly diverse group of respondents in terms of age, race, education, marital status, income, and occupation (see appendix). Only five of these twenty-four individuals were men, however, which is perhaps not surprising given that, traditionally, women disproportionately perform care work. This paper focuses on the experiences of nineteen respondents who were in dual-worker, middle-class families at the time of their leaves. For clarity of presentation, I chose five respondents whose collective experiences illustrate themes present throughout all of the interviews. The experiences and comments of these respondents are typical of the group of respondents as a whole.

As with any interview data, these data are respondents' interpretations of events in their workplaces, not firsthand observations of those events. However, these self-reports are less problematic than in some studies because I focus primarily on respondents' subjective experience of negotiating leave. Also, this study focuses on how workers who invoke their leave rights negotiate their leaves in the workplace; it should be clear that the subjects are not and were not intended to be a random sample of the population of potential leave users. Rather, these respondents are workers who had questions about the nature and extent of their rights and who anticipated or experienced some difficulty in obtaining leave. Workers who did not know they might have legal rights or who took leave with no difficulty probably did not call the information line. Accordingly, these data cannot speak to how often workers encounter problems taking leave. Nor can they shed light on the differences between workers who experience problems and those who do not. Focusing on problem cases, however, is more likely to yield rich and detailed data about situations in which law and other social institutions conflict and interact.

The semistructured interview primarily consisted of open-ended questions asked in a standard format. The interviews, which typically lasted about forty-five minutes, were tape-recorded, transcribed, and later analyzed using NUD\*IST, a qualitative analysis software program that allows the researcher to identify and code themes as they emerge from the transcripts. My goal in analyzing these data was to identify commonalities and themes in workers' experiences with leave and the ways they thought about law, care, and leave. I also focused on how gender and the social institution of work interacted with FMLA rights and on

respondents' legal consciousness,<sup>13</sup> or how the law gave meaning to their workplace conflicts over leave. The aim of qualitative analysis is not to make claims about the average effect of sociological variables, and indeed, my sample size is too small to permit accurate analyses of differences among workers or to attempt causal inferences based on differences among them. Instead, my objective was to analyze how respondents made sense of their situations and made choices about leave and care and the roles of social institutions, culture, and social interactions in that process.

### **Discussion**

To illustrate how legal conceptions of care interact with cultural conceptions of care and work, I consider five examples drawn from my interview data. In each worker's experience, legal norms, institutionalized work expectations and practices, and conceptions of appropriate care and caregivers interact in complex and contingent ways. My aim in this discussion is to suggest how legal norms about care can sometimes prevail, but also can be deflected, obscured or transformed through the process of negotiating leave rights in the workplace. I focus on respondents' subjective experience to reveal the ways in which these disparate conceptions of care collide and interact, affecting their choices about leave rights.

### **Isabel**

Isabel is a middle-class Hispanic woman who completed some college. She had worked for sixteen years as a reservations manager for a hotel before she needed FMLA leave. Isabel was hospitalized for a difficult pregnancy and delivery of twins, and needed leave to recover and to care for her twins after they were born. In response to her request for leave, however, her employer sent her a letter canceling her insurance while she was in the hospital. As she described it:

I was on these machines that monitor you for contractions, and they were just going off. And then the nurses came in and said "What's going on?" And I said "Look at this letter I got, what am I going to do?" And then my doctor came in and said, "They can't do this to you – this is illegal."

When Isabel's co-workers called to see how she was, she learned that her supervisor had said she didn't need her job because her husband, who was a doctor, made a good living.

Isabel was very upset by her employer's actions, especially because she had been a long-term and loyal employee.

I never believed that it would happen to me with my employer because I was with them for sixteen years, I've been loyal, and I'm in management. I've worked many hours without extra pay and when, and I was really hurt. I was so emotional about the way they handled it.

Although a lawyer told Isabel that she would have a good legal claim if she returned to work and was fired, she feared that involuntarily losing her job would hurt her chances of finding work in the future. She learned from her co-workers that her employer had fired other long-term employees when they needed leave, despite their loyal service to the company, and so she decided to quit.

[Isabel's Male Coworker] got fired. [Isabel's Female Coworker] they said, one of my colleagues at the time, her aunt was dying. She came from Burma and so she was the only family she had here and they said, "Oh, we can't give you time off. You have to wait until [Isabel] or [Male Coworker] comes back" because we were both in the hospital. And so she said, "Well, I can't. My aunt is dying, so she needs me," so she left. They fired her. . . And she trained me; she was there for eighteen years.

Interviewer: So did your knowledge about what had happened to other people influence what you did in your situation?

Yes, because those two got fired first. And then I just said, you know, I don't want to get fired. I mean, I have a good record, and I would hate to have to go and start somewhere at, in your mid-thirties and then your employer that you've worked for sixteen years fired you? That doesn't bok good. And my husband said, "Is it really worth it all?"

Even though she quit because she feared the consequences of involuntary termination, to avoid confrontation, Isabel told her supervisor that she could not return to work because she lacked child care.

Isabel's story illustrates how the competing meanings of taking leave can interact and play out in the process of negotiating FMLA rights. It highlights the role of social interactions in shaping workers' perceptions and choices. Isabel's employer, friends, family, and professionals

(i.e., doctors and lawyers) deployed different interpretive frames in their interactions with her. For example, despite her sixteen years of service, Isabel's employer viewed her through the family wage lens, a woman whose employment was subordinate to that of her husband, who worked for "extra" money and therefore had no moral claim to her job. By arguing that she didn't need her job because her husband had a good job, her employer legitimized denying her leave by mobilizing cultural presumptions that women are and should be economically dependent upon their spouses.

Others within her social circle, however, interpreted these events in terms of legal norms. For example, when Isabel received the letter from her employer, her doctor said that her employer's conduct was illegal. Medical professionals at the hospital also told Isabel that they had never seen a situation as egregious as hers. A friend who was a lawyer emphasized that she would have a good legal claim if she returned to work and was fired. And to some extent, Isabel internalized these legal norms, expressing outrage not only at her employer's conduct, but also that her employer ignored legal requirements regarding leave.

Nevertheless, Isabel decided not to return to work and force the issue. Clearly, her employer's power over not only her present employment, but also her future prospects played a part in her decision to quit. Thus, not only the financial costs of losing a job, but also the stigma of being fired in the larger wage market shaped how Isabel thought about her circumstances. Also, her husband reinforced her perceptions, asking her whether it was really worth it to pursue her rights. Her understanding of the situation shows how employers' implicit power to fire can subtly limit the FMLA's effectiveness by preventing disputes from ever arising.

Isabel's decision also reflects her own view of the appropriate culture of care in the context of her long-term relationship with her employer. To Isabel, her employer's conduct violated a reciprocity norm, an implicit bargain that employers should accommodate the care needs of loyal workers, particularly management staff. This was in part because she had "worked many hours without pay" and thus had gone beyond the legal construction of employment as merely labor in exchange for a wage. Indeed, many other respondents in this study expressed similar perceptions that by denying them time off for care purposes, their employer violated an implicit reciprocity norm. This model of reciprocity differs sharply from the arms-length

employment contract contemplated by the law and has important implications for FMLA's potential to produce social change. Congress intended FMLA to help prevent the breaks in employment previously caused by denying leave, breaks that disproportionately disadvantaged women, who often bear the primary burden of caretaking and parenting. These data suggest that even given legal protections, workers may voluntarily leave their employment in the face of resistance to leave rights because they believe that conflict over leave violates an informal norm of reciprocity.

In the end, Isabel told her supervisor she was quitting because she could not find child care, even though her fear of termination was the real reason. Consequently, to casual observers, the family wage schema scripts this situation as a mother who decided to stay home and care for her children because she can depend upon her husband for support, reinforcing traditional conceptions of gender, work, and care. This family wage narrative masked the legal norms applicable to Isabel's situation. It also obscured her employer's implicit power over her present and future employment. Even though legal norms construct a different meaning for her experience, Isabel's legal right to return to her job never explicitly comes up.

### **Larry**

Larry is a middle-class Hispanic man with a high school diploma. He has worked for five years as a laborer doing maintenance work for a public transit authority. Although his wife used to work, she is now terminally ill. Because she has kidney failure, she regularly goes through dialysis at home. On occasion, her illness worsens, and she needs Larry to stay home from work to care for her. Accordingly, he used FMLA leave on an intermittent basis to take time off to care for his wife.

Larry contacted the legal information line because his employer was giving him trouble about taking leave. His employer sent him a letter telling him to keep his time off to a minimum. In addition, his employer demanded a doctor's note for every day that he missed work, even though Larry had documented his wife's ongoing and terminal illness two years earlier when he first requested leave. Larry had researched his rights, however. Because he knew that the law did not require him to always provide a doctor's note, he saw this demand as intimidation.

Well, it put the extra burden of, because you see, my wife is on dialysis among other things, and she does it at home. So as the law states, if my wife is ill, or whatever, my proper form of letting them know I won't be in or the legal aspect is just calling and letting them know. Now for them to ask me to get a note and stuff does put a burden on me because, if my wife is at home and she does dialysis at home, there is no need for me to go to the doctor in most cases to get a note, and that would just put an extra burden of financial burden of having to pay to go see the doctor. But it does entail some money and also the transportation, etc., etc. So it did put that extra burden to intimidate me and/or whatever, you know.

His employer's actions caused Larry to worry about whether he would be able to care for his wife and about his status at work.

From Larry's perspective, his employer lacked sympathy. He questioned the fairness of his employer's attempt to enforce attendance requirements even though the work could wait.

[In] that letter they said, "You need to keep you time off to a minimum." You know, etc. But I know what we do at work, and I know what it entails, and this is not the private sector, where it is on a demand, and this and that. I mean, there are days, I don't want to say exactly what we do, but believe me, it is not priority. It can wait another ten years.... Do you know what I mean?

Interviewer: I understand.

So, I don't really, you know it's just a form of harassment because I don't see how they can say we need you at work, you know, when my wife is here dying. And they should have some sympathy and say, "Do what you have to do." It's not like she's going to be around forever. That's my feeling, how I believe they should be.

Not only Larry's employer, but also his co-workers questioned his time away from work:

Well, during the time off, you know obviously, me missing a lot of time, they'd obviously ask, "Hey, what's wrong with you? Nobody misses that much work." You know what I mean. So I'd tell them, "Hey, my wife's very ill." And you know, that's pretty much how it would come out.

Interviewer: And how did they respond when you told them what was going on?

For the most part, they all are understanding. And even now when I come back to work, they say, "Hey, how's your wife?" or this or that and the other. It's pretty good, you know, for the most part. Obviously, there are some people that don't get it, but that's okay.

Even though Larry used FMLA leave to care for his wife, in his view, taking time off required voluntary compromises in his advancement at work:

Interviewer: So when you first started asking for time off, were you concerned that taking time off may affect your position at work?

No, because there has been plenty of opportunities for me to move up and stuff, but I didn't pursue them because I felt on my own standpoint, I didn't have the, obviously, like a lot of people at work feel, "Hey {Larry}, you know, you should be this and that," because I have a lot of leading authority, you know. But yet I didn't pursue none of them because I'm not ready to give 100 percent responsibility. My responsibility deals with my wife and family at this time. And I've known how sick she is, so I didn't pursue any of those advancements for that reason. It was that my priorities are with my family and not moving up at this time. In other words, for me, anyway, and I grew up, as I said, my parents did a good job with the six of us, and we are pretty middle class. I mean, there is nothing we are deprived of. We probably have more things than what most people got, but that has never been a priority to me, like having more or whatever. You know, my priority is my family, and that's how I'd like to keep it.

At the same time, however, Larry also referenced legal norms to frame the situation:

Interviewer: I am just wondering if you have the same sort of conversation with friends and family about how you were going to handle your situation to deal with your employer and also be able to take the time off that you needed.

Well, you know, as far as my family and that, I always made them understand that I'm under family leave, whatever, and that allows me the right, especially with my family, you know, it allows me the right, like my wife a lot of times, says, "Babe, you can't miss this much work," this and that. And I'd say "Honey, you know, I'm not missing work to miss work. You're sick or whatever and if you need me, I'm here. And that's what family leave is, that's why I'm under it, and that's why we fill out the certification papers with your medical provider to protect me in these times of need."

With the help of a legal aid organization, Larry sent a letter to his employer outlining the provisions of the law and demanding that his employer's harassment stop. At the time of this interview, he was waiting for his employer's response.

For Larry, taking leave invokes a complex web of meaning that includes family wage norms, cultural conceptions of the good worker, and legal norms. Family wage norms construct the meaning of leave for Larry even as he resists their implications. For example, Larry's

complex analysis of his choice not to pursue promotions reflects anxiety about reconciling his time off with meeting the male breadwinner norm. It shows that he accepts the family wage ideal's implicit bargain that workers who prioritize family responsibilities must sacrifice work status and advancement. He emphasizes, however, that he is also fulfilling his breadwinner role, stating "there is nothing we are deprived of." Nevertheless, his advancement was limited not only because his employer retaliated for his use of leave, but also because he internalized the ideal worker norm.

Larry's story also shows how time and attendance as institutionalized measures of a worker's value construct the meaning of leave, despite the protections of the law. For example, both his wife and his co-workers question his absence from work, and his employer warns him to keep time off to a minimum despite the FMLA's provisions. Larry challenges the taken-for-granted norm that time defines a good worker, however. He points to other evidence that he is a good worker, noting that his co-workers ask why he isn't seeking promotion. And rather than simply accepting the taken-for-granted perception that time off work is always bad, Larry balances the need for the work ("It can wait another ten years.") against the need to care for his wife ("It's not like she's going to be around forever."). Larry compares the workplace construction of time as steady, long-term, and full-time with a different, relationship-focused conception of time created by his acute awareness of his wife's impending death. Time off to care for her now is not fungible with time or money later; now is all they have.

For Larry, the same period of time—the time that he takes off to care for his wife—is embedded within two different relationships and takes on different meanings within each of them. To resolve the tensions between them, Larry resists the interpretation that he is "missing work to miss work," but instead justifies his absence through legal norms, saying "that's what family leave is." Thus, the FMLA provides an alternative construction of the meaning of "time" for family leave, one in which time is not "money" but instead is valued in terms of care and the needs of family members. Larry's interpretation reveals how institutionalized expectations about the time discipline of work define "good" workers in ways that obscure and devalue these care needs and how workers may use the FMLA to reinterpret that institutionalized meaning.

Larry's story reflects the social construction of legitimate claims to the status of "worker" in relation to cultures of care. Larry referenced legal norms to justify his choice to care for his wife to himself and to those who questioned his use of leave. That this choice requires justification, however, reveals competing meanings from the family wage model and institutionalized understandings of work (i.e., the stigma of "missing work to miss work"). Those institutions construct Larry as the family breadwinner whose primary commitment should be to work and attach negative meanings to missing work to care for his wife. But Larry relied on legal norms to resist these institutionalized meanings.

### **Sharon**

Sharon is a middle-class white woman who was married at the time of her leave, but has since separated. She had worked for seven years as a file manager at a grocery store before she requested leave. Her job was to update the prices for merchandise when new coupon books came out each weekend. She normally worked thirty hours per week until her manager offered her a full-time position. Before she could be promoted, however, she took FMLA leave to care for her teenage daughter, who was experiencing some psychological problems.

Interviewer: What did her doctor think that you should do?

He is the one who told me that I should take time off, "She needs you there now."

Interviewer : And did this influence what you decided to do in your situation?

Yeah. . . . "Let's see, my job or my daughter." It was a pretty serious situation, so it was like there really was no question. I mean, even if I was to lose my job, oh well, I could find another one. It was just, I had to take the time off.

She talked with her husband about what they should do, but was "shocked" when he said she should keep working because leave would set them back financially.

Just his attitude about the situation, that it was kind of a nonchalant situation where "Oh, she just wanted attention," you know that kind of thing. And in the end, he ended up, 'cause I just told him, "Hey, this is our daughter's life, and you're going to try to tell me that money is more important." I said "I don't agree with you, and I'm taking it off."

For her relationship with her daughter, the time off made all the difference:

The situation with my daughter, it was stuff I didn't know that was going on. And it was more of the, I mean, actually in the whole long run, it is really, it really made the relationship between me and my daughter a lot closer. She feels very comfortable about telling me things that before she felt awkward. It opened my eyes up to a lot of stuff that had been going on in the home while I was at work that I didn't know about. So all in all, it was very beneficial.

When she returned to work, however, things had changed.

Well, when I left work, there was a girl that was actually going to be leaving the department that I was working in. And the manger at that time, we had put in for my full-time status, and he basically offered me the head position to run this department. But I guess during the time I was gone, my full-time status paperwork had come through. And in the meantime a new manager came to that store, he had refused it, sent it back because he didn't know me from Adam. And basically, since I've been back, I've gotten twenty hours a week. That's what he has to give me.

Her new manager told her he would not promote her because he needed someone who would “be there.” He had a difficult time while she was on leave, and so he filled the position with someone else.

[H]e made [the comment] that he never wants to be stuck in that position again. Like it made me feel like, like I made him, like it was my fault that there was no help there. And they're a big corporation. They could've got people from any store to fill that position while I was gone, and they do keep pretty tight schedules at each of the stores. So I'm not saying that it would have been an easy task, but it is available. I mean, there is always people wanting more hours, and there's some people that work at two or three stores to get their hours. So it's not like its an impossibility. . . .

[W]hen I came back, [my co-worker and I] just sat down one day and said, okay, this is what we've got to do. . . . We worked really hard, but it ended up working out perfect because when the auditor . . . came through, the grocery section, which is our main responsibility, we had 100 percent, and our store hasn't gotten that in a long time. . . .

[But now my manger's] like, “Well, she's having a problem with her kid.” . . . He makes me feel like I'm inadequate. Like I can't do the job. Like I'm not bright enough. I don't know.

Sharon decided not to try to push it with her employer. She didn't want to "come back with an attitude" and have her new manager be negative toward her because she might need leave in the future to care for her daughter. Also, working less meant she spent more time with her children, and things seemed unlikely to change.

I haven't really whined about it because I have been able to spend more time with the kids, and they seem to be doing fine. So . . . I can't really be negative on it. I kind of feel sometimes that this is all I'm ever going to get because I have talked to him about getting more hours. . . . I'm a good employee, I don't call in sick, I come in on time. What else can I do?

Since she took leave, Sharon has separated from her husband. Her lawyer warned her that, in the divorce settlement, her husband could push her to work more hours, and she is concerned about what she will do if her manager won't give them to her.

Family wage norms, institutionalized expectations about "good workers," and competing cultures of care shaped Sharon's experience. Like Isabel's supervisor, Sharon's manager evaluated her against the ideal worker norm by devaluing her as a worker because she took time off to care. Sharon's experience mirrors a familiar pattern in which women who take maternity leave, have children, or otherwise allow their family responsibilities to become visible at work are given less desirable work, receive fewer hours, and are assigned to dead-end jobs (Hochschild 1997; Williams 2000). Not only did she lose her promotion, but also her manager reduced her hours to half time, even though she asked for more work. Despite her excellent performance, he now views her as "inadequate" after she took time off to care for her child. Institutionalized expectations that women with children perform only marginal, secondary work and that family is their primary responsibility frame her situation. Sharon cannot, in his eyes, be both an ideal worker and a mother, and she finds herself in a dead-end position, despite the protections of the law.

Sharon's experience also illustrates the way in which time defines the "good worker." Time is a marker of inclusion and status at her workplace. Her manager reserves full-time work for those without family responsibilities, and relegates those who take time off to care to dead-end half-time positions. Moreover, Sharon's workplace uses a two-tiered system of seniority, in which full-time workers have job security, but part-time workers have none. Thus, her lost

position is not simply a matter of a few hours of work; it redefined her role in the workplace and undermined her future employment prospects. Apart from taking FMLA leave, Sharon notes that she complies with institutionalized time standards—"I'm a good employee, I don't call in sick, I come in on time. What else can I do?" The time economy of work also contrasts sharply with Sharon's alternative economy of time, in which time at home is valuable because it deepens her relationship with her children. Legal protections for leave to care do not change leave's social meaning, however. In this workplace, it continues to be associated with absenteeism and lack of commitment to work. Moreover, the way in which Sharon's employer devalues part-time workers denies recognition to alternative economies of time based on sharing time between work and family.

Sharon's experience also shows a clash in cultures of care, even outside of work, between valuing the care she gives her daughter and valuing her economic productivity as a worker. For example, her husband pressured her to continue working for financial reasons, discounting her daughter's need for care ("she just wanted attention"). This attitude, which contributed to their separation, continues through the divorce proceeding, where an increase in her paycheck is valued, perhaps even mandatory, but the care she gives her daughter is not. Sharon's daughter's doctor, however, emphasized her need for care, a view that Sharon shared. She negotiated the conflicting politics of needs assessment among herself, her doctor, her husband, and her employer (Fraser 1990; Tronto 1993). In making her decisions about care and work, Sharon was forced to reconcile these competing valuations of care and recognized that they would exact a price from her regardless of which choice she made.

Sharon saw these contradictions, particularly those in her manager's attitude. She resisted the interpretation that her manager's problems during her absence result from her choice to care for her daughter, noting the real problem was her employer's failure to bring in a substitute worker. Indeed, that things fell apart while she was on leave revealed that she is a valuable worker. Thus, the issue is not her personal failing, but instead a structural feature of a workplace that assumes no workers will take time off for care purposes and therefore provides no institutional support when they do.

The FMLA's legal protections may have made these contradictions more visible by creating at least a formal entitlement to leave to care. In fact, Sharon considered pushing for her rights, but she was concerned that she might need her manager's goodwill if her daughter needs her care in the future. She was also ambivalent because caring for her daughter and her other children alerted her to problems at home while she was at work. Thus, ongoing relationships with both her manager and her daughter, as well as her manager's implicit power over her job, make legal remedies problematic. Note that liberalism's model of formal rights assumes that individuals make choices about claiming rights based on their self-interest. This model does not easily account for the ways in which rights bearers' relationships with others can also affect those choices (Morgan 1999).

### **Ophelia**

Ophelia is a middle-class married white woman who completed some college. She worked full-time for two years as a hostess for an upscale restaurant in San Francisco. She began her maternity leave when she was seven months pregnant because she could no longer work forty- to sixty-hour weeks on her feet. She told her employer in writing that she would return to work six weeks after her daughter's birth. Although she felt conflicted about returning to work with a young child, she needed the income to support her family. When she called about returning to work, however, her employer refused to respond for weeks. Eventually, a manager offered her a few hours on the weekend, but told her there was no other room for her on the schedule.

At this point, she called the information service to find out about her rights and learned that she was legally entitled to return to her job. When she confronted her employer with this information, however, her employer claimed that it would fire her friend and co-worker, also a woman with a child, if she insisted on returning.

Yeah, she basically just said, well, oh, this is what it was. I had friends there. And she said "Well, if we hire you back, you know [Ophelia's friend] is going to have to lose her job." And this is a woman who also has a child. So I basically started crying over that.

Later she interpreted this as a tactic to discourage her from exercising her rights. She learned from co-workers that her friend's job was not in danger, and that her position had actually been filled by a newly hired male host. She also noted that most of the workers at the restaurant were young men without families, and that management didn't expect her to come back after she had her baby.

For Ophelia, deciding what to do at this point was a social process in which her interactions with others shaped her preferences.

I felt like I was kind of in a situation that nobody had really been in, and so I didn't really know what to do. So people's opinions and their thoughts of what I should do made a big impact because I really had no idea of where to go from here. And I have some friends who were very supportive of this and said, "No, you have to go forward with this. You have to go through with it because they can't get away with this." And basically, they were just saying, "Forget that, you need to go forward."

But not everyone in her social circle interpreted her situation in this way.

I talked to my stepmother, who had three children, and, um, I guess had had maternity leave for each child, for each birth. And she told me, "That's just the way it is." You know, I shouldn't try to fight it, I shouldn't get myself all upset. That it's what happens.

Despite her stepmother's advice, Ophelia chose to pursue her rights. But getting what she wanted had little to do with getting her job back:

For a while, I was thinking maybe I shouldn't [try to pursue my rights]. But then I just knew I had to and that it was just, it just seemed to be a matter of principle that mattered. After this especially, I didn't really want my job back, but it was just a matter of I wasn't going to let them get away with this. They're a big corporation, and they can't do this.

Instead, she viewed claiming her rights as a matter of principle and justice, of vindicating the norm expressed in the law. She also saw the law as a remedy for unequal power between workers and "a big corporation."

Ophelia was concerned that if she did not respond, her employer would do the same thing to other working women. Also, she realized that she had the resources to pursue her rights, whereas future workers might not.

Interviewer: So lots of people in a situation like this would just not stand up for their rights. Why do you think you decided to stand up for your rights and do something in this situation?

Um, because I knew the law was clear. I had read the Family and Medical Leave Act over the time, and I read it previously. And I just knew that this wasn't some little business. This was a large corporation that was worldwide and they could not get away with this because they would do it to somebody else. And I think I decided to stand up just because I knew that I had the resources, you know, or the education to stick this out and get this done, whereas some other woman might have this happen to her and not have those resources.

With the assistance of a legal aid organization, Ophelia sent her employer a letter outlining the law and demanding her job back. Her employer eventually responded by returning her to work and paying her back pay for the weeks it had kept her off the schedule. She never filed a formal complaint or took her dispute to court.

Ophelia's experience is contingent upon her particular workplace, in which the culture of care did not include having a family. In her workplace, the normative worker was a young single man, and despite her written notice to the contrary, Ophelia's employer did not expect her to return to work after her child was born. Nevertheless, her employer was quick to use another worker's family to justify denying Ophelia's right to return. This constructs a bizarre economy of care in which the employer's decision to fire Ophelia for taking leave is simply "business," but her attempt to come back to work after leave becomes a personal attack on a co-worker and her family. By setting workers against each other, Ophelia's employer deflects blame from itself for refusing to give her back her job. Apparently, no one suggested laying off the newly hired male host to preserve the jobs of the women with children, even though this would be consistent with common workplace norms about seniority.

Ophelia's choices about what to do in her situation were framed as a conflict between legal norms that support her choice to care and her stepmother's assessment that family wage norms define reality. Ophelia's stepmother constructed the situation in terms of institutionalized understandings of work—that one should expect to lose one's job for taking maternity leave and that it was a waste of time and energy to try and fight it. Ophelia's stepmother's advice perhaps reflects a different generational positioning from Ophelia and her friends, all of whom came of

age after the reinvigoration of the women's rights movement in the 1970s. For example, Ophelia's friends relied on legal norms and rights' symbolic meaning as weapons against the powerful to offer a counterinterpretation of her situation. Also, Ophelia rejected her employer's interpretation that solidarity with other workers required her to give up her rights claims. Instead, she viewed pursuing her FMLA rights as a way to protect future women and to change her employer's conception of care. In this instance, law provided a counternarrative to the script that what happened to Ophelia is simply the way things are. Law opened an avenue for challenging employers' power that did not exist before. Also, law provided a means for building solidarity among workers, rather than dividing them by setting their interests against each other.

### **Maria**

Maria is a middle-class Hispanic woman who completed some college. She worked as a human resources assistant for a hotel for two years before she needed pregnancy leave. After nearly going into labor at work, she took FMLA leave at her employer's encouragement. When she returned to work, however, she discovered that her employer had replaced her with another worker. She was angry, and some friends suggested she contact a lawyer about pursuing her rights, which she did. She also worried that, by taking maternity leave, she had somehow violated norms about being a good worker, however.

With talking with some friends, they suggested that I should get a lawyer, and a friend of mine gave me a number, the EEOC. She gave me that number, and those people helped me look for a lawyer. And they gave me a couple numbers, and I was speaking with a lawyer all that time, trying to get back my job and see if they would offer me anything else. But they just wanted to put me in housekeeping. They couldn't find anything for me. At least that's what they were saying. Other situations they were hiring for other things like sales. And I was like, well, I can learn sales, anything. A lot of my friends tell me that it's not my fault, that people are just like that. I felt like I was to blame. I even talked to my boss about it. I said, "Didn't I do a good job?"

Although Maria returned to work, her employer demoted her from human resources manager to hotel housekeeper. She continued to work for months after her demotion while her lawyer negotiated to get her job back. During this time, however, she worried about her baby son,

saying, “I just felt that no one else would take care of [my child] like a mother would.” After four months, she found the process too emotionally draining.

I felt bad in my own way and I was very sad. And I think a lot of it was because I knew my child was with this other person. I couldn't do anything about it. My job went to another woman, and what was I going to do? All I could do is cry.

Although some friends thought she should continue to fight, others had a different idea:

A lot of my friends who were there, in fact, I have one friend, she was always telling me, “[Maria], if you feel this way, why don't you just quit your job and just take care of your son?” Then my husband got a better job offer, so that's when I said, I think I will do that.

Maria gave up her negotiations with her employer and quit her job.

Maria's experience shows the enormous emotional work involved in resolving conflicting cultures of care. Maria found the conflict between legal norms and cultural norms about what it means to be a good worker and a good mother hard to reconcile. She was angry about being demoted and hired a lawyer to try to get her job back. Her employer's conduct, however, suggested that her employer valued her less because she used her leave rights, as the only position it offered her was in housekeeping. And in fact, Maria herself questioned whether she had done something wrong, saying, “I felt like I was to blame,” even though her supervisor reassured her that she had done a good job.

The family wage ideal constructed the meaning of her situation not only through the norm of the ideal worker, but also through the norm of the ideal mother. The conflict between these two norms contributed to Maria's stress. She worried about not meeting an idealized norm of a mother-child relationship of intense and personal care (“no one else would take care of [my child] like a mother would”) (Hays 1996). She interpreted the meaning of her situation as if she had been undermined as an ideal worker and as an ideal mother: her child was with another person, and her job went to another woman, and “All I could do [was] cry.”

Maria's friend framed the meaning of her situation as a choice, rather than a legal injury. She suggested that Maria simply quit her job to care for her child. Although this is what Maria did, it is too simplistic to interpret this as choice based simply on gendered “preferences” about work and care. Instead, for Maria, family wage ideology created enormous psychological

burdens associated with both taking leave and embracing legal norms about care. It also constructed the culturally accepted solution for resolving her stress. Her choice, channeled by the family wage ideal, then implicitly reinforces and re-creates institutionalized conceptions of gender and work, despite the competing conceptions of care in the FMLA.

### **Common Themes and Tentative Conclusions**

Some common themes emerge from these respondents' experiences negotiating leave. The first is the important role that others play in constructing the meaning of FMLA leave in the workplace. Not only employers, but also friends, family, and professionals (i.e., doctors and lawyers) deployed different interpretive frames in their interactions with respondents, showing one mechanism through which cultures of care are constructed in the process of negotiating leave. Important theoretical consequences about workers' choices flow from this interactive process. Models that treat workers' choices about care, leave, and rights as rational calculations based on simple "preferences" miss the ways in which these preferences are negotiated and constructed. Through this interactive process, existing social structures and institutionalized expectations, as well as priorities and values that are negotiated through relationships, construct how individuals see their circumstances and choices. Treating these large social forces as atomized "preferences" obscures the ways in which institutions can shape agency.

A second theme closely related to the first is that the FMLA's legal norms about care are embedded in deeply held belief systems, institutionalized practices, and existing relations of power. Because law is an authoritative and powerful institution, it becomes easy to point to legal rights as the solution to workplace conflict over leave. Law, however, competes and interacts with existing systems of meaning embodied in institutionalized practices and expectations. By enacting the FMLA, Congress did not vanquish the conception of work and care implicit in the family wage ideal. Institutions can displace and contest law in particular social contexts. As these respondents' experiences show, family wage ideology continues to construct the meaning of leave, despite the protections of the law. Similarly, at least in these workplaces, institutionalized conceptions of what being a good worker means, including time as a symbolic marker of being a good worker, still construct the meaning of taking time off to care. Power also plays a role.

Employers' unilateral power over the terms and conditions of employment may mean that claiming rights endangers future opportunities to care, as Sharon notes, or even future employment prospects, as Isabel fears. Thus, these respondents' experiences show how social context can affect what FMLA rights mean in practice.

Ironically, the FMLA may help obscure the operation of power by seeming to provide a legal remedy when employers penalize time off to care. Thus, when women like Isabel or Maria quit their jobs without asserting their rights, it confirms deeply held beliefs that most women prefer to care for their children; the easy conclusion is that if their preferences were to continue working, they would simply sue. But relying on objective behavior to interpret preferences in this way allows the complex power dynamics and legal norms that influenced these respondents to remain hidden. Respondents do not "choose" between legal norms and other norms. In reality, legal norms interact with other systems of meaning in ways that sometimes prevent legal disputes from developing. For this reason, qualitative studies of individual's choices that reveal the subjective interplay of these systems of meaning are particularly important.

A third and final theme suggests a more optimistic view of the role of law in constructing cultures of care. Although law may be vulnerable to interactions with other social institutions, law itself also makes and remakes meaning. Law names legitimate and illegitimate conduct, it creates new roles and practices, and, perhaps most importantly, it can enable agents to think about social relationships in new ways. Although not all of these respondents chose to assert their rights, each one took steps to find out how the law constructed his or her need to care. And for some, legal conceptions of care provide a way to reimagine the social structures of work, gender, and care. Through the norms of the FMLA, Larry envisions a culture of care in which he can be both breadwinner and caretaker. Similarly, Ophelia sees a culture of care in which being fired for maternity leave is no longer the way things are, and workers can challenge the "big corporation's" definition of the terms of work. To be sure, the FMLA's culture of care did not prevail in every instance. Legal norms, however, made the contradictions in respondents' circumstances more visible. They revealed cracks in the hegemonic institution of work, allowing workers to question the idea that penalties for care are natural and normal, and that the roles of caretaker and worker are mutually exclusive. And for some, like Larry and Ophelia, legal norms

created a way to explicitly challenge institutionalized practices and beliefs about care. That is, the FMLA provided a counternarrative through which cultures of care could be restructured, reinterpreted, and reimagined. These stories show that we need to think about the FMLA not only as an instrumental tool for court action, but also as a system of meaning. This may be the FMLA's greatest promise for bringing about social change.

## Notes

1 Of course, the breadwinner/housewife traditional family was never a uniform reality. Many less privileged women and women of color did not have the luxury of meeting the family wage ideal and adopted care patterns that differed from this white, middle-class norm (Collins 1991; Lerner 1972).

2 29 U.S.C. § 2612.

3 *Id.*

4 29 U.S.C. § 2614, 2615.

5 In contrast, the Americans with Disabilities Act does not require reasonable workplace accommodations to disabilities if those accommodations would place an undue hardship on employers. 42 U.S.C. § 12112(b)(5)(A).

6 29 C.F.R. § 825.220.

7 See 29 C.F.R. § 825.116 (“What does it mean that an employee is ‘needed to care for’ a family member?”).

8 For example, in *Mora v. Chem-tronics*, the employer argued that the plaintiff could not take FMLA leave to care for his terminally ill son because the plaintiff’s wife was available to provide care. The court rejected this argument, noting that the statute gave the plaintiff the right to care for his son based on his relationship with his son regardless of whether other caretakers were available to meet care needs. *Mora v. Chem-tronics*, 16 F. Supp. 2d 1192 (S.D. Cal. 1998).

9 The FMLA permits leave to care for only certain others: parents, children or spouses. It limits or excludes time off to care for family outside this narrow circle. For example, workers may take leave to care for their grandparents only when those grandparents stood in loco parentis (in the place of the parent) when the workers were children. 29 U.S.C. § 2611(7). Workers can take leave to care for children under eighteen who have a serious illness, such as chickenpox. 29 U.S.C. § 2611(11) The statute sets a higher standard for children eighteen or older, however. “Adult” children must be “incapable of self care because of a mental or physical disability” before their parents are entitled to leave to care for them. 29 U.S.C. § 2611(12). Also, workers can never take FMLA leave to care for their domestic partners because leave rights are limited to caring for “spouses.” 29 U.S.C. § 2612(a)(1)(D).

10 And, as Marxist theorists have noted, this construction of the relationship between work and family indirectly appropriates women’s unpaid labor in the home for capitalist production (Sokoloff 1980).

11 Hochschild (1997) documents this norm in one supervisor's response to a worker's agreed-upon reduced schedule after having a child:

He said to me, "Eileen, I don't know how to do part-time. My experience is that people who put in the hours are the ones who succeed." I said, "Measure me on my results." He replied, "No. It doesn't work that way. What matters is how much time you put into the job, the volume of work. . . . That's all I know how to understand as a basis for getting ahead." (Hochschild 1997: 73)

12 Four individuals could not be contacted after multiple attempts, four refused to be interviewed, one number had been disconnected, and two numbers were incorrect.

13 Although the concept "legal consciousness" continues to evolve, it can be thought of as the process through which individuals' beliefs and experiences give meaning to law, legal institutions, and their role in social interactions (Engel 1998; Ewick and Silbey 1992, 1998; Harrington and Merry 1988; Hirsch 1993; Merry 1990; Sarat 1990). Legal consciousness research often examines how law shapes perceptions of injustice and fairness, and conceptions of the law vary with individual characteristics, experiences, and social context (Engel and Munger 1996; Ewick and Silbey 1992, 1998; Hirsch 1993; Merry 1990). Legal consciousness itself is not a stable attribute, but instead is an interactive process through which people both construct and resist the embodiment of power in cultures and social institutions (Ewick and Silbey 1998; Sarat and Kearns 1993; Sewell 1992).

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## Appendix

**Table 1: Socioeconomic Status of Respondents**

RESPONDENT	GENDER	ETHNICITY	AGE RANGE	MARITAL STATUS	EDUCATION	INCOME (\$ per year)	LEAVE REASON
Andrea	female	white	50-64	married	college grad	30K-50K	multiple-pg <sup>a</sup>
Bob	male	white	35-49	divorced	high school	<20K	own condition
Cathy	female	white	50-64	widowed	some college	30K-50K	own condition
Diane	female	white	25-34	married	some college	50K-75K	multiple-pg
Emma	female	white	65+	divorced	some college	50K-75K	sick child
Felicia	female	Hispanic	35-49	married	college grad	75K+	own condition
Gail	female	white	50-64	married	college grad	75K+	own condition
Hanna	female	white	25-34	Live w/partner	some college	30K-50K	own condition
Isabel	female	Hispanic	35-49	married	some college	75K+	multiple
Jay	male	Asian	25-34	married	some college	75K+	new child
Kate	female	white	18-24	separated	some college	<20K	pregnancy
Larry	male	Hispanic	35-49	married	high school	30K-50K	spouse
Maria	female	Hispanic	25-34	married	some college	<20K	multiple-pg
Nan	female	black	25-34	Live w/partner	some college	50K-75K	multiple-pg
Ophelia	female	white	18-24	married	some college	30K-50K	multiple-pg
Paul	male	Hispanic	25-34	married	some college	75K+	new child
Rachel	female	black	25-34	widowed	some college	50K-75K	pregnancy
Sharon	female	white	35-49	separated	some college	50K-75K	sick child
Teresa	female	white	35-49	Live w/partner	some college	30K-50K	own condition
Veronica	female	white	35-49	married	graduate school	75K+	multiple-pg
Yolanda	female	other	25-34	Live w/partner	some college	20K-30K	own condition
Xavier	male	white	25-34	married	graduate school	75K+	spouse
Zoe	female	Asian	25-34	married	some college	30K-50K	multiple-pg
Alica	female	white	35-49	married	some college	50K-75K	multiple-pg

<sup>a</sup> “Multiple -pg” designates a leave taken for pregnancy and other reasons, such as recovering from a pregnancy-related illness after childbirth, or parental leave after childbirth.

**Table 2: Work Status of Respondents**

RESPONDENT	JOB TENURE (in years unless noted)	JOB TITLE	INDUSTRY
Andrea	26	administrative assistant	education
Bob	4	production associate	manufacturing
Cathy	5	station agent	transportation
Diane	8	customer service rep	[missing]
Emma	10	case manager	medical
Felicia	16	medical assistant	medical
Gail	3	Comptroller	software
Hanna	3	manager/troubleshooter	retail
Isabel	16	reservation manager	hotel
Jay	10	x-ray technician	medical
Kate	7 months	electronic component merchandiser	retail
Larry	5	Laborer	mantainance
Maria	2	human resources assistant	hotel
Nan	8	deli clerk	grocery
Ophelia	2	Hostess	restaurant
Paul	1	car washer	delivery
Rachel	1.5	courtesy clerk	grocery
Sharon	7	file manager	grocery
Teresa	3	account clerk/senior clerk	public administration
Veronica	4	vice president/account supervisor	advertising
Yolanda	2.5	service representative	telecommunications
Xavier	2	Pilot	airline
Zoe	8	key associate	retail
Alica	10	bakery clerk	grocery