

The Costs of Reproduction: History and the Legal Construction of Sex Equality

BIOLOGICAL REPRODUCTION and caring for young children incurs economic costs. For female employees, the costs of reproduction may include the medical expenses of pregnancy and childbirth; lost income during periods of pregnancy- and childbirth-related disability; and costs associated with reentry to the workforce, if childbearing women lose their jobs. Employers may incur the costs of including pregnancy and childbirth within medical and temporary disability insurance benefits; the administrative costs of providing leave when a pregnant employee is disabled; and the cost of accommodating some women's changed capacity to perform their job duties during pregnancy. Childrearing may cost parents lost investment in human capital, when they forego education or career advancement to perform caregiving in the home. Childrearing is also expensive, as employees replace parental caregiving with care by a third party.

From the mid-1960s through the 1980s, legal and political debates raged over how to allocate the costs of reproduction. Participants disputed whether individual women, the private family, employers, or the state should shoulder responsibility for the costs of reproduction. Diverse and often opposing groups weighed in on these debates, including employers and union leaders, judges and politicians, feminists and social conservatives. In this article, I draw upon novel historical research to shed new light on the normative content of contemporary doctrinal and policy debates about how to allocate the costs of reproduction.

Today, legal and political actors sever the issue of cost sharing from that of sex equality. This pattern emerges both in courts' interpretation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), and in political arguments about work-family policy. Courts often interpret the PDA to prohibit only discriminatory animus against pregnant women. They hold that the PDA does not remedy sex-neutral policies, such as harsh absenteeism or meager sick-leave policies, even when these policies disproportionately exclude childbearing women from the workplace. In the political arena, pundits argue that sex equality does not require society as a whole to subsidize individuals' private reproductive decisions.

By contrast, this article argues that cost sharing is a critical component of sex equality. I seek to deconstruct the dichotomy between cost sharing and sex equality via contributions to both historical and normative legal literatures. First, I contribute to a nascent historical literature that revises the conventional understanding of legal feminism in the sixties and seventies. The conventional narrative is that legal feminists—advocates using the law to realize equal citizenship for women—pursued only the

right to formal equal treatment. Powerful critiques argue that the sex-equality jurisprudence that emerged out of 1970s feminism has failed to meet the unique needs of poor women and women of color, to realize substantive reproductive justice, or to achieve legal recognition for the social and moral value of caregiving. Social historians, however, are beginning to uncover the diversity of

grassroots feminist coalitions, the breadth of activists' goals, and the working-class origins of feminists' struggle for economic justice. In this vein, I recover a broader feminist vision for legal sex equality and offer a richer historical explanation of why it never came to fruition. This article joins recent historical scholarship demonstrating that mid- and late-20th-century legal and social movements commonly described as identity based also embraced redistributive agendas.

Legal feminists sought legal recognition for women's right to equal treatment as individuals as well as a set of redistributive aims. In the 1960s and 1970s, legal feminists developed a critique of the family-wage system. The cultural ideal that the nuclear family should consist of an independent male breadwinner, a dependent female caregiver, and children, shaped law as well as social policy and employer practices. Although the family-wage ideal did not comport with demographic reality for many American families, it nevertheless contributed to both gender and racial inequities.

Legal feminists articulated a new vision of sex equality premised upon women's right to social and economic independence. Upending the family-wage system would require more than the right to formal, equal treatment. Feminists also fought for the redistribution of childrearing labor between women and men in the home, as well as the redistribution of the costs of pregnancy, childbirth, and childrearing between the family and society.

Second, in revising the legal history of feminism, my article uses historical evidence to deconstruct the boundaries between antidiscrimination and accommodation mandates. Some legal scholars argue that individuals have the right to freedom from market-irrational discriminatory animus on the basis of protected characteristics, including sex. But, they argue, groups do not share the same right to accommodation, defined as the prohibition on market-rational discrimination. Other scholars contend that there



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is no clear categorical distinction between antidiscrimination and accommodation mandates. Rather these categories overlap in their normative purposes and cost effects.

The historical development of work-family law and policy illustrates the shared normative impetus and economic consequences of antidiscrimination and cost-sharing mandates. Legal feminists attempted to transform childrearing and workplace structures within the family-wage system by ending overt, market-irrational employer discrimination. They endeavored to transform, as well, market-rational employer norms that excluded women from equal employment opportunity. In addition, they organized for legislative social-welfare entitlements related to childrearing. Moreover, in the case of pregnancy discrimination, even the prohibition of simple discrimination based on sex-role stereotypes had a redistributive effect. Thus, classic prohibitions on disparate treatment, disparate-impact liability, and accommodation mandates, all imposed unique costs on employers associated with hiring childbearing women.

The redistributive aims imagined by legal feminists in the sixties, seventies, and eighties are only partially realized today. Over the last half century, both statutory and constitutional law have evolved to affirm the idea that sex equality entails cost sharing. This evolution has brought some of legal feminists' redistributive objectives to fruition. In particular, the PDA and the Family and Medical Leave Act of 1993 (“FMLA”) shift some of the costs of pregnancy, childbirth, and familial caregiving from individuals to the larger society. But opposition foreclosed feminists' most ambitious reforms. Of particular significance, President Nixon vetoed legislation that approximated the feminist vision for universal childcare. The explanation for why feminists succeeded in advocating for some reforms, and met with defeat in advocating for others, lies in the public/private divides constructed between the family, the market, and the state. Reforms that shifted reproductive costs from individual women and families to employers met with greater success than proposals to shift these costs to the state. And reforms that facilitated parental caregiving within the private family came to fruition, whereas those that attempted to transform familial childrearing structures met with deeper political opposition. Today, women continue to shoulder disproportionate responsibility for the costs of reproduction, which inhibits their ability to realize equal employment opportunity.

This article's historical narrative has powerful implications for both doctrinal controversies and policy debates. The history can illuminate alternative interpretations of the PDA, by complicating the distinctions that courts draw between antidiscrimination and accommodation mandates. Courts often foreclose claims under the PDA that, if successful, would impose redistributive requirements on employers. Such a narrow interpretation of the PDA is evident in the adjudication of claims respecting

sex-unique characteristics other than pregnancy, of disparate-treatment claims respecting the denial of light-duty accommodations for pregnant employees, and of pregnancy-related disparate-impact claims. Constrained interpretations of the PDA limit the potential for the statute to advance women's equal employment opportunity. The history presented in this article points toward more capacious interpretations of the PDA, consistent with the richer vision of sex equality embraced by advocates of the PDA.

In addition to making a legal argument about the interpretation of the PDA, this article makes a recommendation for the future of social-welfare policy. Contemporary equal-protection doctrine has come to recognize that affirmative social-welfare entitlements form an important component of sex discrimination law. If Congress desired to advance sex equality further, then it should build upon this insight. Among a range of other interventions, Congress should augment the entitlements provided by the FMLA.

The article's argument proceeds in four parts. Part I argues that the anti-stereotyping mandates at the heart of the PDA and the FMLA have partially shifted the costs of reproduction from individual women to the larger society. Narrow judicial interpretations of the PDA and limits built into the FMLA's design, however, constrain the extent to which these statutes have dismantled the family-wage system. Part II discusses legal feminists' efforts to transform workplace and childrearing structures during the 1960s and 1970s. Feminists challenged the sex-based division between productive labor and reproductive labor, while also seeking accommodations for pregnancy in the workplace and social-welfare entitlements related to caregiving. Part III examines the evolution of sex discrimination law with respect to pregnancy during the 1970s and 1980s. In the crucible of administrative battles, litigation contests, and legislative debates, the law came *partially* to affirm that accommodating pregnancy, childbirth, and childrearing represents a critical component of sex discrimination law. Part IV discusses the significance that the history of feminist mobilization, of anti-feminist counter-mobilization, and of the evolution in legal norms holds for contemporary doctrinal and political debates. I conclude that advancing sex equality requires judicial interpretations of the PDA that recognize the statute's redistributive purpose, as well as congressional action to augment the FMLA's entitlements. ■■■

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