My reflections on the subject of “origins” begin with social reproduction in feminist activism and thought. This topic is more commonplace in feminist scholarship outside of the legal academy. Feminist sociologists, political philosophers, and historians define social reproduction as the “various kinds of work—mental, manual, and emotional—aimed at providing the historically and socially, as well as biologically, defined care necessary to maintain existing life and to reproduce the next generation.”¹ Social reproductive labor includes unpaid care work within families, kin networks, and communities as well as various forms of paid work. Such labor divides along racial as well as gender lines.² The law’s role in distributing, rewarding, and regulating social reproductive labor is pivotal to the construction of gender, race, and class identities and inequalities.

Over the last half century, feminist activists fought to realize justice in the organization of social reproduction. The standard law-school curriculum teaches only part of this story: the effort to free individuals from prescriptive gender roles related to work and family. Constitutional law casebooks discuss the development of the “intermediate scrutiny” standard under the Equal Protection Clause. Students learn that this doctrinal trajectory led the Supreme Court to strike down laws that excluded women from professional and educational spheres and denied men access to benefits related to familial care. Even if a student does not take a specialized employment discrimination class, she is likely to gain a basic knowledge of Title VII of the Civil Rights Act of 1964 as well as an intuition that disparate

† Professor of Law, Cornell Law School. Thank you to Serena Mayeri for fruitful conversations about this piece. I am also grateful to Allie Blank, Poonam Daryani, Jelani Hayes, and the staff of the Yale Journal of Law & Feminism for their thought-provoking prompt, insightful feedback, and excellent editorial work.

treatment is unlawful. A central theme in family law is the rise of formal equality, in arenas ranging from the resolution of custody disputes to marriage licensing. Dominant narratives thus suggest that the animating principles of feminist legal thought and practice are nondiscrimination, prohibitions on gender stereotyping by employers, and state neutrality respecting sex.

This view of feminist legal theory, however, obscures a more fundamental struggle. A less well-known strand of feminist legal activism has focused upon making social reproduction a public, rather than private, responsibility. The liberal welfare state, which developed during the Progressive Era, New Deal, and post-World War II period, supported male breadwinners and enforced their provision for dependents within heteropatriarchal family structures. As a result, workplace practices and policies took as their model male employees who benefitted from the unpaid labor of wives. Formal equality could help women break into these jobs, but only to the extent that they could mimic the male ideal. The liberal welfare state took for granted that care for children, the sick, and the elderly took place within nuclear families. Caregivers, regardless of gender, did not enjoy full economic citizenship. Families bore the costs of social reproductive labor—from health insurance for childbirth to the costs of leave from work—largely as a private responsibility. Feminists fought to transform labor and employment laws, family laws, and social welfare policies on the model of working mothers. Sex neutrality was sometimes a means, at other times an obstacle, and, often, an objective orthogonal to the goal of public responsibility for social reproduction.

Feminists advocated for laws that valued women’s unpaid social reproductive labor and for a welfare state that socialized care. Reva Siegel analyzes women’s claims to property rights in their household labor in the antebellum era. In the Progressive Era, social feminists prioritized economic justice over equal treatment of the sexes. When Lochnerian jurisprudence

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3 She is perhaps less likely to focus on disparate impact liability, which remains in tension with dominant conceptions of formal equality. For a conservative exploration of that tension, see, for example, Ricci v. DeStefano, 557 U.S. 557, 594-97 (2009) (Scalia, J., concurring). For an explanation that disparate impact liability is indeed essential to the achievement of substantive equality, see Ricci, 557 U.S. at 620-29 (Ginsburg, J., dissenting).

4 The liberal welfare state originated in Progressive Era advocacy, was institutionalized in federal law and policy during the New Deal, and developed further in the post-World War II period and during the Great Society. For a sampling of the feminist analyses of this history, see generally, ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA (2001); JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA’S PUBLIC-PRIVATE WELFARE STATE (2003); and SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY (1998).


struck down protective labor standards, they devised a gendered strategy to win sex-specific standards that they hoped would serve as an entering wedge. The 1908 case of *Muller v. Oregon*, which upheld a state limit on the hours women could work, is often located in the feminist anti-canon.\(^7\) Certainly, the Court’s decision reinforced gender stereotypes, suggesting that women were physically weaker than men were and that their primary social role lay in motherhood. Yet this decision was also a pragmatic feminist victory for state protection of working-class women, given the legal constraints of the time. In the post-World War II period, labor feminists reworked the social feminist vision to take account of women’s changing economic roles as familial providers and of their shifting identities as workers. They used unions to fight for women’s rights both to employment opportunity and to fulfilling lives outside their work, including time spent caring for their families.\(^8\) The just organization of social reproduction, they understood, necessitated legal regulation of the labor market and employment relationship.

In the late 1960s and through the 1970s, labor feminists intensified and broadened their struggle. Myra Wolfgang, a Detroit organizer for the Hotel Employees and Restaurant Employees Union, opposed the demise of maternalist labor standards she saw as critical to protecting female workers who lacked bargaining power, who were not unionized, and who did not enjoy coverage under federal labor statutes.\(^9\) When enforcement of Title VII began to wash away the architecture of maternalist protection, Wolfgang reinterpreted the rise of antidiscrimination law as a potential catalyst to expand labor regulation. She joined Caroline Davis, Director of the Women’s Department of the United Auto Workers, in fighting for the extension of protective standards to men.\(^10\) Across the country, the Union Women’s Alliance to Gain Equality (Union WAGE) lobbied the California Industrial Welfare Commission for the extension of labor protection to agricultural and domestic workers and for increases in the minimum wage, overtime pay, and maximum-hours rules.\(^11\) Union WAGE opposed the proposed Equal Rights Amendment because of the threat that equal treatment would jeopardize maternalist labor standards, when there existed insufficient political will to

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\(^7\) Muller v. Oregon, 208 U.S. 412 (1908).


\(^10\) Id., at 290-94. For further discussion of Wolfgang’s biography and ideology, see Cobble, *supra* note 8, at 2-3, 188, 192.

\(^11\) Dinner, *supra* note 9, at 296.
realize universal standards.¹² Labor feminists understood that sex discrimination law, in the absence of a strong welfare state, might serve corporate interests rather than workers. Their insight proved prescient, as the assault on unions, demise of the family-wage ideal, growth of feminized service sectors, and contraction of both public welfare and private employment benefits produced an increasingly precarious labor force.

While labor feminists advocated a humane workplace that supported workers in their social reproductive roles, the women’s liberation movement that blossomed in the late sixties pursued public forms of care provision. One of their most important goals was free, federally funded, community-controlled childcare. The National Organization for Women (NOW) Bill of Rights demanded that “child care facilities be established by law on the same basis as parks, libraries and public schools . . . as a community resource to be used by all citizens from all income levels.”¹³ Radical and socialist feminists believed that universal childcare would liberate women from the constraints of solitary mothering and remediate the extraction of unpaid childrearing labor. Representatives Shirley Chisholm and Bella Abzug pursued the feminist vision in Congress and, although their specific bill did not advance, they helped to shape the Comprehensive Child Development Act of 1971. The passage of this Act brought the nation the closest it ever has come toward universal childcare, but the mobilization of the New Right against the legislation yielded a devastating veto from President Nixon.¹⁴

In addition to labor regulation and public forms of care, feminists fought for social welfare entitlements for mothers. These efforts ranged from reforms that preserved marriage as a privileged social status to ones that sought to dismantle hetero-patriarchal households as a site of benefit distribution. Betty Blaisdell Berry, the Chair of NOW’s Task Force on the Family, worked to achieve “the necessary reforms to make housewife a bonafide occupation.”¹⁵ She wanted “homemakers”—married women who cared full time and did not engage in paid work—to receive both public and private benefits. Berry and fellow NOW activists called for Social Security credits for homemakers, which would protect women against economic vulnerability at the time of divorce or widowhood. Berry’s proposal was ambitious in imagining public remuneration of care work, yet it nevertheless

¹² Joyce Maupin, Equal Rights for Whom?, box 16, folder 7, Union WAGE (Women’s Alliance to Gain Equality) Records, San Francisco State University Labor Archives and Research Center (on file with the author).


would preserve marital families’ legal and economic privilege. By contrast, Margaret Prescod, a Caribbean American public school teacher and activist in Brooklyn, advanced a vision that disestablished marriage as a site of economic citizenship. Prescod co-founded Black Women for Wages for Housework, elaborating upon socialist feminists’ use of the metaphor of “wages” to unmask how women’s unpaid social reproductive labor sustained capitalism. Prescod linked this transnational movement to the domestic welfare rights struggle for poor women’s dignity and economic security. Both Berry and Prescod, therefore, sought to revalue women’s unpaid care work within the welfare state, though their proposed solutions held different implications for both class and gender.

These are just a few examples of dynamic and multi-pronged forms of activism to transform liberalism according to feminist ideals. This history remains largely forgotten in part because conservative opposition overcame feminist advocacy. In place of public support for care, since the 1970s neoliberal governance has facilitated the development of markets that perform social reproductive functions. “State neglect,” in the words of historian Sara Matthiesen, has intensified and rendered more difficult the labor of “family making” for those at the social and economic margins. Consider some illustrations: The United States is one of only two industrial countries that fails to provide paid maternity leave, and employers are less likely to provide paid family and medical leave as a fringe benefit to low-income workers than to professionals. The lack of public childcare and the inadequacies of the daycare market weighs most heavily on mothers, who continue to assume primary responsibility for childrearing. Home health

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19 See Jennifer March Augustine & Kate Pritchett, Gender Disparities in Increased Parenting Time During the COVID-19 Pandemic: A Research Note, 59 DEMOGRAPHY 1233, 1245-1246 (2022) (finding that fathers marginally increased their childrearing time compared to mothers during the pandemic, but mothers took on disproportionate responsibility for the tasks parents found most stressful such as supervising schooling and caring while also engaging in paid work); Claire M. Kamp Dush, Jill E. Yavorsky & Sarah J. Schoppe-Sullivan, What Are Men Doing While Women Perform Extra Unpaid Labor? Leisure and Specialization at the Transitions to Parenthood, 78 SEX ROLES 715, 725-26
Paid care workers, from childcare workers to home health aides, endure long hours, low wages with few benefits, and, sometimes, dangerous work conditions. The COVID-19 pandemic laid bare the inadequacies of state support for social reproduction, when school and daycare closures forced women out of the labor market, low-waged female workers of color disproportionately assumed health and economic burdens as, variously, essential workers or laid-off employees, and lack of resources overwhelmed public health systems. The pandemic did not produce the crisis in social reproduction; it exposed it.

In concluding this Essay, I want to explore the social reproduction of feminist legal theory. Legal education is itself a component of social reproduction. Such education serves as a gatekeeper to the profession that makes, enforces, and reforms society’s rules. It possesses the potential either to replicate or to disrupt existing structures of inequality. For these reasons, the version of feminist legal theory taught in most law-school classrooms has real-world consequences.

The feminist aspiration toward collective public responsibility for social reproduction persists in legal scholarship. Any attempt at a comprehensive survey in this short Essay would be quixotic, and I merely gesture here toward the breadth of this scholarship. Some are explicitly applying the legal visions of social feminists and socialist feminists to contemporary problems. Liberal proposals preserve the divide between state, market, and family but call for workplaces more accommodating of


familial care responsibilities and public subsidies for familial care. Race- and class-sensitive analyses of unions and employment structures extend the labor feminist tradition, with a particular focus on the challenges facing paid care workers both within and outside of families. Martha Fineman and other scholars offer critiques of antidiscrimination ideals and the dominance of equality within certain strands of feminist legal advocacy. This literature draws attention to the ways in which society relies on care-work for its replication and on the resulting obligations to offer public support for dependency. Scholars explore the failures of the market to nourish families and call for workplace and welfare reforms to support children, working parents, and the elderly. Still others call for expansive state recognition for families that disestablishes marriage and for the distribution of public benefits through relationships other than marriage. Comparative analyses of both sex discrimination law and welfare state structures expand the feminist legal imagination. Even feminist dissenters from advocacy for feminist goals to competing state interests.

24 See Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It (2001); Katherine M. Franke, Taking Care, 76 CHI. KENT. L. REV. 1541, 1542-43 (2001) (contrasting an approach that seeks to expand state responsibility for dependency with one that seeks a more equitable balance between work and family).


32 Mary Ann Case, How High the Apple Pie—A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should Be Shifted, 76 CHI. KENT L. REV. 1753, 1763-65, 1771-72 (2001) (arguing that oftentimes subsidies for childrearing benefit high-prestige professional men and burden women in these positions, who are less likely to have children, and opposing the redistribution of
Despite the robust field of feminist legal theory, the understanding of feminist practice transmitted in most law-school classrooms remains a narrow one. For the most part, law school curricula remain tethered to the Langdellian case method, which confines legal theory to doctrinal evolution in the courts. This obscures the full scope of feminist legal thought and activism in two ways. To start, legal education focuses on the positive evolution of doctrine and tends to elide alternative paths not taken. Courses do not cover feminist and other forms of critical legal advocacy that did not come to fruition. In addition, the focus on litigation and federal judicial decisions marginalizes the study of state courts as well as legislative and administrative advocacy. Together, these characteristics of legal education emphasize sex-discrimination law and sideline feminist legal thought and activism respecting protective labor standards, social insurance, and welfare entitlements. For example, if they are lucky, students might study Ruth Bader Ginsburg’s famous case, *Weinberger v. Wiesenfeld*, which won “mother’s benefits” for widower fathers within Social Security. They are far less likely to learn of feminist advocacy for Social Security credits for homemakers.

Recovering a richer history of feminist legal thought and practice may help chart a course from the neoliberal regime toward the just organization of social reproduction. This project of recovery requires broadening the lens of historical analysis to include feminist labor leaders, grassroots activists, and attorneys, and to investigate debates that unfolded at the bargaining table, within feminist commissions and conferences, and before state administrative agencies and legislatures. We possess the seeds of change in feminist legal history and theory; we just need to cultivate them.

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