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Reversing roles: bringing men into the frame

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Abstract

The attempt to secure maternity rights has been a major focus of decades of campaigning for women's equality. However, it is of concern that maternity rights might reinforce women's responsibility for childcare. This paper considers how we bring men back into the frame, through a critical assessment of the contrasting approaches in Europe and the US to claims by fathers for parenting rights. It is argued that the goal of equal participation of women in the workplace needs to be matched by equal participation of men in the home. This is only possible if the conception of equality is shaped by a conscious and explicit commitment to the social value of parenthood. Substantive equality can only be genuinely furthered if pregnancy and parenthood are appropriately distinguished. Whereas pregnancy is unique and should be treated as such, a true application of substantive equality requires a 'levelling up' option, extending women's parenting rights to fathers.

Introduction

It is now readily acknowledged that women's continuing primary responsibility for childcare is a major factor in perpetuating the stubborn gender gap. The attempt to secure maternity rights has therefore been a major focus of decades of campaigning for women's equality. However, it has always been of concern that maternity rights might reinforce rather than dispel the assumption of women's responsibility for childcare. This paper considers how we bring men back into the frame. In the wake of major new cases both in Europe and the US, the paper critically assesses the courts' approach to claims by fathers in a range of jurisdictions. It is immediately apparent that, despite the advances of recent decades, this debate remains ensnared in the ambiguities of the equality principle. Equality has been used to support claims of exclusion, of special treatment, of sameness or of difference.

I argue that real progress is only possible if the conception of equality is shaped by a conscious and explicit commitment to the social value of parenthood (Fredman, 1994, p. 107). The goal of equal participation of women in the workplace needs to be matched by equal participation of men in the home. Substantive equality in this sense can only be genuinely furthered if pregnancy and parenthood are appropriately distinguished. Whereas pregnancy is unique and should be treated as such, a true application of substantive equality requires a 'levelling up' option, extending women's parenting rights to fathers. In the end result, however, the contestation over parenting rights demonstrates that, to achieve genuine equality, legal change needs to go well beyond affording equal rights to both men and women. It is well known that simply changing the law is not sufficient. If real cultural change is to be achieved, parental rights for both fathers and mothers should be structured in such a way as to provide appropriate incentives to ensure fathers

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utilise their rights.[1] This needs to be accompanied by changes in the structure of work and working time which make it possible for fathers and mothers to participate equally in parenting and the paid workforce. Moreover, the need for parenting rights is not confined to newborn babies, or indeed to preschool children, but extends much longer. In addition, current legal developments tend to concentrate on mothers who are in the relatively privileged position of being 'employees' and therefore eligible for maternity or parental rights. Yet a significant and increasing number of women work in the informal sector, are self-employed, or are engaged in precarious work. Formulating parental rights for such workers remains a central challenge.

This paper's primary concern is with the meaning of equality and, in particular, the conception of substantive equality that is appropriate to the development of the law in relation to pregnancy and parenting. The traditional understanding of equality as based on the formula that likes should be treated alike requires a prior understanding of when two individuals are appropriately alike. This pushes the discourse into a sameness–difference debate which is ultimately unproductive. Alternative formulations have concentrated on equality of opportunity or equality of results, permitting specific rights in relation to pregnancy or parenting in order to further a more substantive goal of enabling women to participate equally in the workforce. However, this in turn depends on how the substantive goal is defined. Little attention has been paid to the goal of enabling men to participate equally in the home.

The paper uses this critical framework to assess legal developments in the US, Canada, the UK and in the two meta-legal structures in Europe: the European Union (EU) and the European Convention on Human Rights (ECHR). These jurisdictions are chosen for a comparative perspective because, against a background of similar economic development, the challenges raised for women on both sides of the Atlantic are similar; yet the approaches to equality in the context of pregnancy and parenting contrast markedly. This permits us to tease out the implications of the different approaches and to use them to build an alternative model.

This paper aims to make a contribution to legal analysis and the ways in which the concept of substantive equality on grounds of gender can be elaborated in law. It uses a comparative perspective to analyse recent cases from the highest courts in different jurisdictions in the light of different understandings of equality, in order to illuminate the importance of imbuing equality with a clear substantive value, that is, the social value of parenting. While there has been extensive discussion of pregnancy and parenting rights in specific jurisdictions,[2] this paper provides a comparative perspective, using the most recent developments in the case-law to develop the understanding of equality. The evaluation and assessment of the important sociological or psychological literature on child welfare and the value of paid parental leave from the perspective of the children are beyond the scope of this paper.[3]

The first section of this paper examines the evolution of the law in relation to pregnancy and parenting. For the major part of its development, the law has drawn little or no distinction between pregnancy and parenting, instead constructing the issue around women and maternity. The earliest development saw courts grappling with the equality–difference dichotomy. Was this an 'equality' issue, requiring pregnancy to be treated as a matter of the 'same' treatment, in which case it was necessary to find an appropriate male comparator to a pregnant woman? Or was this a question of 'difference', regarding pregnancy and maternity as women's issues, and requiring

1 For statistics comparing uptake of fathers' rights in the UK and Nordic countries, see online: ‹http://www.tuc.org.uk/workplace-issues/just-one-172-fathers-taking-additional-paternity-leave›.

2 See generally Caracciolo di Torella and Masselot (2009); James (2009); Caracciolo di Torella (2007); Smith (2001–2002).

3 For a very helpful insight into the children's perspective, see James (2013).

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special rights rather than equal treatment? Neither of these, however, is a satisfactory result. The second section argues that a substantive equality approach requires a levelling up approach, which confronts gender preconceptions and reconfigures the division of roles as between mothers and fathers. In important new cases in the EU, the ECHR and the US Supreme Court, evolution towards this approach can be discerned. These cases are analysed in the third section. However, this is only the first step towards substantive equality. Parenting rights need to be accompanied by proper incentives for fathers to take up their entitlements, which should trigger a deep-seated culture change in the way in which society regards the value of parenting and children.

I. The sameness–difference dichotomy: maternity discrimination in the courts

1.1 Context

Although we have advanced well beyond the view that childbearing is incompatible with continued participation in the paid workforce (Fredman, 1997, p. 182),[4] women continue to face staggering levels of discrimination in the workplace on grounds of pregnancy or maternity leave. A 2005 survey found that almost half the 440,000 pregnant women in Britain experience some form of disadvantage at work each year on grounds of pregnancy or maternity leave. As many as 30,000 are forced to resign or are dismissed (Equal Opportunities Commission, 2005, p. 4). Moreover, 'anecdotal evidence is shocking: 80% of [Human Resources] professionals replying to one on-line survey said that they think twice before employing women of childbearing age' (Equal Opportunities Commission, 2005, p. 4). A similar picture emerges in the US. According to statistics from the US Equal Employment Opportunity Commission (EEOC), 'over the past ten fiscal years, EEOC and state and local Fair Employment Practices agencies (FEPAs) have received 53,865 charges alleging pregnancy discrimination, resolved 52,396 charges, and obtained $150.5 million in monetary benefits for Charging Parties' (EEOC, 2012b). Pregnancy discrimination disproportionately affects low-paid women workers, who have less economic bargaining power and are more likely to be in precarious employment and therefore out of the reach of statutory employment protection.

At the same time, women continue to experience a 'motherhood' penalty. Both in the US and the UK, statistical surveys continue to show that mothers are worse off in the labour market than fathers or women without children. US studies show a wage gap of about 5 per cent per child; and motherhood constitutes a significant risk factor for poverty (EEOC, 2012a). This disadvantage continues throughout the mother's working life, so that the lifetime penalty is substantial (EEOC, 2012a). Similarly, according to the 2007 report of the Commission set up to investigate inequalities in the UK, 'There is one factor that above all leads to women's inequality in the labour market – becoming mothers' (Equalities Review, 2007, p. 66).

It is in this context that women have attempted to claim their rights to equality. Yet the search for a meaningful application of equality in this field has continually been bedevilled by the 'sameness–difference' dichotomy. On the one hand, it has been argued that women should be regarded as the same as men in order to qualify for equal treatment. However, this 'sameness' approach has had a dismal record in relation to pregnancy. This in turn has reinforced demands for different treatment in the form of specific rights for women relating to pregnancy and maternity. Specific rights, however, risk reinforcing the expectation that women are primary carers, exposing them to further workforce discrimination and excluding the claims of fathers. This section charts the parallel approaches based on sameness and difference respectively.

4 Factory Act 1891, s. 17; see further, *Price v. Rhondda UDC [1923] 1 Ch 372*, *Short v. Poole [1926] Ch 66.*

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1.2 The pregnant male: equality as sameness

The traditional approach to equality takes the form of the straightforward Aristotelian principle that likes should be treated alike. For pregnancy and maternity to fall within this principle, however, an appropriate male comparator must be found. Absent a pregnant male, however, does pregnancy discrimination simply fall outside the equal treatment principle? In the early cases, courts in the US, Canada and the UK answered this question in a strikingly similar way: detrimental treatment of pregnant women did not breach the equality principle because there was no relevant male comparator (Fredman, 1994). In the words of the Supreme Court of Canada in *Bliss*: 'Any inequality between the sexes in this area is not created by legislation but by nature.'[5] In a similar vein, in the case of *Geduldig*, the US Supreme Court, upholding an occupational disability insurance policy which excluded pregnancy from the insured risks, stated: 'There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'[6] Most graphic was the approach of the UK Employment Appeal Tribunal: 'When she is pregnant a woman is no longer just a woman. She is a woman … with child and there is no masculine equivalent.'[7]

One way out of this conundrum is to regard pregnancy as equivalent to illness for the purposes of the comparison. Foreshadowed in the dissenting judgments of Brennan J in *Geduldig*[8] and *Gilbert*,[9] the 'ill male comparator' has become prevailing orthodoxy in the US. Thus the Pregnancy Discrimination Act 1978 amended Title VII to provide: 'Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work'.[10]

The notion of the ill male comparator, however, comes at a cost. Pregnancy is not an illness, and should not be stigmatised as 'unhealthy'. Moreover, it assumes that the main issue is a woman's inability to work, ignoring the positive reasons for leave, including breastfeeding and developing a relationship with the child. In addition, if there are no applicable protections in respect of illness, then pregnancy remains likewise unprotected. This generally means that even if pregnancy discrimination can be brought within the equal treatment principle, it is difficult to develop a system of rights to maternity leave independent of sick-leave entitlements.

Triggered by such concerns, other jurisdictions have begun to develop the equality principle beyond the limitations of the like treatment approach. Of particular importance has been the move away from the need for a comparator at all. Thus, instead of requiring a pregnant woman to embark on the futile project of finding a similarly situated male comparator, this approach takes the view that detrimental treatment on grounds of pregnancy itself constitutes discrimination on grounds of gender. In a series of important cases, both the Court of Justice of the European Union (CJEU)[11] and the Canadian Supreme Court[12] have held that since only women have the capacity to become pregnant, discrimination on grounds of pregnancy is necessarily discrimination on grounds of sex. In the words of the Supreme Court of Canada, reversing *Bliss* in 1989: 'The

5 *Bliss v. Canada (AG)* [1976] 1 SCR 183 (Supreme Court of Canada).

6 *Geduldig v. Aiello* 417 US 484 (1974) at 497 (US Supreme Court); see also *General Electric Co v. Gilbert* 429 US 125 (1976) (US Supreme Court).

7 *Turley v. Allders Stores Ltd* [1980] I.C.R. 66 (EAT).

8 *Geduldig v. Aiello* 417 US 484 (1974) (US Supreme Court).

9 *General Electric Co v. Gilbert* 429 US 125 (1976) (US Supreme Court).

10 The Pregnancy Discrimination Act, 1978 (PDA) added subsection (k) to § 701, the definitional section of Title VII.

11 Case C-177/88 *Dekker* [1990] ECR I-394; Case C-32/93 *Webb* [1994] ECR I-3567.

12 *Brookes v. Canada Safeway Ltd* [1989] 1 SCR 1219 (Supreme Court of Canada).

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capacity to become pregnant is unique to the female gender.'[13] A further step forward was taken in the UK where, in the Equality Act 2010, pregnancy is recognised as a ground of discrimination in itself.[14] In a particularly decisive move away from the comparator model, instead of defining pregnancy discrimination as 'less favourable' treatment, as is the case for discrimination on most grounds, the Equality Act 2010 defines pregnancy discrimination as occurring when a woman is treated 'unfavourably because of the pregnancy'.[15] By using the words 'unfavourably' rather than 'less favourably', direct discrimination on grounds of pregnancy can be established independently of the need to find a comparator.

This move is not, however, universally accepted. For some, this is not an equality, but a difference, approach. As will be seen below, there is a strong stream of US feminists who regard it as essential that women's protection is equivalent to that of ill men, in order to prevent discrimination against pregnant women.[16] In addition, while this approach might be important in relation to pregnancy, it does not make any clear provision for maternity rights, let alone parental rights which include fathers.

1.3 Equality as difference: specific rights in relation to pregnancy and maternity

The evolution of the equal treatment principle towards one which regards pregnancy as unique signals a potential convergence with an older and parallel tradition, which expressly regards maternity as different and therefore aims to grant specific rights aimed at protecting women's participation in the paid workforce as well as their reproductive role. This approach dates back to International Labour Organization (ILO) Convention No. 3 of 1919.[17] This Convention was well ahead of its time in insisting on rights that ensured *both* that 'women's work does not pose risks to the health of the woman and her child *and* that women's reproductive roles do not compromise their economic and employment security' (ILO, 2013, emphasis added). The key elements of this package, which have been broadly maintained in later iterations in 1952[18] and 2000,[19] include: maternity leave; cash benefits; medical care; protection from workplace risks; protection from dismissal and discrimination; and the right to continue breastfeeding on return to work. Similarly, the Convention on the Elimination of Discrimination Against Women (CEDAW)[20] requires states to introduce paid maternity leave, as well as to provide special protection to women during pregnancy in types of work proved to be harmful to them.[21]

The EU stands out for its attempt to use both the equality principle and that of specific rights. As mentioned above, case-law from the CJEU established the pioneering principle that pregnancy per se was a species of sex discrimination, even in the absence of a male comparator. Soon after, this elaboration of the equality principle was complemented by an approach which stressed difference, and therefore specific rights. Passed in 1992, the EU Pregnancy Directive covers rights for both

13 *Brookes v. Canada Safeway Ltd* [1989] 1 SCR 1219 (Supreme Court of Canada).

14 Equality Act 2010 (UK), s.4.

15 Equality Act 2010 (UK), ss.17–18.

16 S. Rep. No. 101-77, p. 32 (1989) as cited by Ginsburg J in *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court).

17 ILO Maternity Protection Convention, 1919 (No. 3).

18 ILO Maternity Protection Convention (Revised), 1952 (No. 103).

19 ILO Maternity Protection Convention, 2000 (No. 183).

20 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (entered into force 3 September 1981).

21 Art. 11(2).

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pregnancy and maternity, giving specific protection for the health and safety of pregnant workers, and providing for maternity leave, of which a portion is compulsory. It also provides for protection against dismissal and detrimental treatment.[22] Recent amendments have been progressively in the direction of increasing the length of maternity leave, as well as raising the levels of pay. Both the European Commission and the European Parliament have consistently been pressing for longer periods of paid maternity leave, albeit against opposition by the Council of Ministers, which has stalled any further moves.[23] In the meantime, most European countries offer well above the current EU minimum of fourteen weeks. Indeed, only Germany and Malta offer the minimum level, while Bulgaria offers the longest paid maternity leave at forty-five weeks (European Parliament, 2012).

In Europe, this approach is regarded as achieving substantive equality for women, by equalising their opportunities to remain in the paid workforce through removing the risks of pregnancy and childbirth. In the US, by contrast, giving specific rights to women in relation to pregnancy and childbirth has been viewed as a 'difference' approach which undermines the right to equality. This dispute was played out in the *Guerra* case, where California's 'specific rights' model, requiring employers to provide female employees with unpaid pregnancy disability leave of up to four months,[24] was challenged as potentially in breach of the Pregnancy Discrimination Act (PDA).[25] As we have seen, the PDA requires pregnancy to be treated no less favourably than illness. The outcome of the case depended on whether the equality principle in the PDA insisted only on same treatment, or whether a more substantive approach could be taken whereby treating women differently could be regarded as equalising women's opportunities in the workplace. In the words of Ginsburg J in the later case of *Coleman*, women's rights advocates were 'sharply divided ... "Equal-treatment" feminists asserted [the California statute] violated the PDA's commitment to treating pregnancy the same as other disabilities. It did so by requiring leave only for disability caused by pregnancy and childbirth, thereby treating pregnancy as *sui generis* ... "Equal-opportunity" feminists disagreed, urging that the California law was consistent with the PDA because it remedied the discriminatory burden that inadequate leave policies placed on a woman's right to procreate.'[26]

The different courts' responses mirrored this debate. The District Court held that provisions aimed specifically at maternity constituted preferential treatment for female employees and discriminated against men on the basis of pregnancy.[27] By contrast, the Court of Appeals held that the California statute furthered the goal of equal employment opportunity for women. It was this latter position which held the day in the Supreme Court. Justice Marshall, delivering the judgment of the court, stated: 'By "taking pregnancy into account", California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.'[28]

22 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of art. 16(1) of Directive 89/391/EEC) [1992] OJ L 348).

23 European Industrial Relations Observatory On-line 'Social Council Debates New Maternity Provisions', online: <http://www.eurofound.europa.eu/eiro/2010/12/articles/eu1012021i.htm>.

24 California Fair Employment and Housing Act, §§12900–12996, §12945(1).

25 *California Federal Savings & Loan Association v. Guerra* 479 U.S. 272 (1987) (US Supreme Court).

26 Ginsburg in *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court).

27 *California Federal Savings & Loan Association v. Guerra* 479 U.S. 272 (1987) (US Supreme Court) 279–280.

28 *California Federal Savings & Loan Association v. Guerra* 479 U.S. 272 (1987) (US Supreme Court).

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Although the California statute was ultimately upheld by the US Supreme Court, US equal treatment advocates continued to oppose the use of specific rights in the context of pregnancy and parenting on the ground that 'legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect'.[29] Thus equal treatment feminists began campaigning for gender-neutral legislation.[30] This eventually reached the statute books in the form of the Family and Medical Leave Act of 1993 (FMLA). Under the FMLA, eligible employees have the right to up to twelve weeks of unpaid leave per year for the birth, adoption or fostering of a child; the care of spouse, son, daughter or parent with a serious health condition; and for self-care in relation to a serious health condition.[31] This was supported in Congress on the grounds that it prevented discrimination against pregnant women: 'Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy-related disability.'[32]

A specific rights approach, however, does not inevitably risk discrimination against pregnant women. One way to prevent this is to include protection against discrimination on grounds of pregnancy. Under EU law, failure to recruit on grounds of pregnancy constitutes discrimination on grounds of sex.[33] This complements the protection against dismissal on grounds of pregnancy or maternity.[34] The ILO Conventions prohibit dismissal on grounds of pregnancy and maternity, although this protection does not extend to discrimination on recruitment.[35] The Convention on the Elimination of Discrimination against Women[36] also requires states to prohibit dismissal on grounds of pregnancy or maternity leave.[37] Admittedly, the protection provided by these provisions is not always effective, since pregnancy discrimination, particularly in relation to failure to recruit, can be very difficult to prove, but the legal prohibition at least operates as a counter to the employers' incentive to discriminate.

Similarly, it is possible to mitigate the risk that protection for pregnancy and maternity is regarded as making women more costly to employ than men. This can be done by shifting the costs of maternity protection away from both the employer and the pregnant woman and onto the state. The ILO Convention from the very start has required that the cost of maternity be borne by the state, and not by either the mother or the employer. Thus the ILO requires cash benefits to be payable to the mother for the duration of the leave, at a level sufficient for the full and healthy maintenance of the mother and her child and a suitable standard of living. Moreover, it is not the

29 S. Rep. No. 101-77, p. 32 (1989) as cited by Ginsburg J in *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court).

30 Ginsburg J in *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court).

31 29 U. S. C. §2612(a)(1).

32 S. Rep. No. 101-77, p. 32 (1989) as cited by Ginsburg J in *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court).

33 Case C-177/88 *Dekker* [1990] ECR I-394.

34 Council Directive 92/85/EEC of 19 October 1992, art. 10.

35 ILO Maternity Protection Convention No. 183 (2000), art. 8.

36 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (entered into force 3 September 1981).

37 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (entered into force 3 September 1981), art. 11(2).

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employer who should be individually liable for payment of such benefits;[38] instead, they should be paid by the state or national insurance. The criticism is more apt for the EU, which makes no provision for shifting the cost away from the employer.

1.4 Breaking the stereotypes: from maternity to parental rights

A more pertinent criticism of the pattern of specific rights set in place by the ILO is that, by endorsing a difference principle, specific rights implicitly reinforce women's primary responsibility for childcare. Whereas only women can experience pregnancy, parenthood should be seen as a shared responsibility if women's marginalisation is ever to be fully addressed.[39] However, the specific rights approach tends to deal with pregnancy and maternity as a continuum. Thus at the level of the ILO and the EU, both pregnancy and maternity rights are given to the mother. Fathers are conspicuous by their absence in all three ILO Conventions. It is only in the 1981 Workers with Family Responsibilities Convention that any reference is made to fathers' responsibilities.[40] Even then, it is in highly dilute form, its major provision being that 'each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities'.[41] This is only somewhat strengthened by the accompanying Recommendation, which provides for the possibility of obtaining parental leave immediately following maternity leave.[42]

CEDAW similarly privileges maternal rights. Fathers are dealt with more by exhortation than entitlement. Thus Article 5 requires States Parties to take all appropriate measures 'to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases'. Similarly, under Article 11(2) (c), States Parties are urged to 'encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities'.

The EU has taken a step further by introducing an apparently gender-neutral parental leave to go hand in hand with women's rights as granted by the EU Pregnancy Directive. However, levels of entitlement are well below those of the Pregnancy Directive. Thus the 1996 Parental Leave Directive[43] gives an individual right to mothers and fathers of a newborn or adopted child to at least three months' parental leave (increased to four months in 2010)[44] to allow them to take care of a child until up to eight years. This is significantly lower than the provision for mothers: it is far shorter and, most importantly, it is unpaid. The Directive does make a gesture towards incentivising fathers to take up parental leave, by providing that parental leave entitlement is not

38 ILO Maternity Protection Convention No. 103 (1952), art. 4(2) and (8); ILO Maternity Protection Convention No. 183 (2000), art. 6(8); the 2000 Convention allows this to be rebutted by individual agreement with the employer, by collective agreement or by pre-existing law or practice.

39 See further, Kossek, Lewis and Hammer (2010).

40 ILO Workers with Family Responsibilities Convention No. 156 (1981).

41 ILO Workers with Family Responsibilities Convention No. 156 (1981), art. 3(1).

42 ILO Workers with Family Responsibilities Recommendation, 1981 (No. 165).

43 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L 145 at Clause 2.1.

44 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L 68/13 at clause 2.2.

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transferable; that is, a father cannot transfer his parental leave allowance to the mother of the child. It is lost if not taken.[45] Nevertheless, parenting rights remain significantly inferior to maternity rights.[46]

As we have seen, the US provision, the FMLA, is gender-neutral as between parents. Equal treatment has, however, been achieved at a very low level, at least by European standards. FMLA leave is considerably less than women's entitlement in the EU; indeed, even EU parental leave is more generous than the FMLA. While both are unpaid, the EU provides for four months' as against the twelve weeks' (three months') entitlement in the FMLA. Moreover, FMLA leave is limited to employees who have worked for at least a year and at least 1,250 hours during that year. High-ranking employees are excluded. Employees need to give advance notice, employers might require a doctor's certificate and recoverable damages are strictly defined.

A better approach to the demands of like treatment should be to level up fathers' rights to those of mothers. The beginnings of such an approach can be detected in the US Supreme Court decision in *Guerra*.[47] As we have seen, the petitioners argued that the PDA, by requiring that pregnant workers be treated the same as other disabled workers, precluded any measure which afforded pregnant workers more favourable treatment. However, the Supreme Court deftly turned this argument back on itself. Thus, according to Marshall J:

> 'C Section 12945(b)(2) does not compel California employers to treat pregnant workers better than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers. Employers are free to give comparable benefits to other disabled employees, thereby treating "women affected by pregnancy" no better than "other persons not so affected but similar in their ability or inability to work".'[48]

This opens up the possibility of a levelling-up approach. It would, however, have to go much further in detaching itself from the pervasive link with disability at work since the PDA framework only benefits male comparators who are similar to pregnant women in their inability to work. The ultimate goal would be for a substantive approach to equality, permitting fathers to level up their rights by comparison with existing substantive rights of the mothers of their children.

A similar argument could be mounted in relation to mandatory maternity leave. The principle of mandatory leave dates back to the 1919 ILO Convention, which laid down a period of at least six weeks mandatory leave for women after confinement.[49] This has been carried through to the later ILO maternity Conventions of 1952[50] and 2000.[51] The EU Pregnancy Directive contains a similar principle, requiring at least two weeks' compulsory leave on health and safety grounds, and recent proposals before the European Parliament suggest that this should be raised to six, in line with the ILO Convention. Compulsory leave is widespread in Europe (Suk, 2012, p. 77). Yet it is

45 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L 68/13 at clause 2.2.

46 For an analysis of the effects of low pay on fathers' uptake, see Trade Union Congress, (2013) 'Just One in 172 Fathers Taking Additional Paternity Leave', online: ‹http://www.tuc.org.uk/workplace-issues/just-one-172-fathers-taking-additional-paternity-leave›.

47 *California Federal Savings & Loan Association v. Guerra* 479 U.S. 272 (1987) (US Supreme Court).

48 *California Federal Savings & Loan Association v. Guerra* 479 U.S. 272 (1987) (US Supreme Court).

49 ILO Maternity Protection Convention, 1919 (No. 3), art. 3(a).

50 ILO Maternity Protection Convention, Revised, 1952 (No. 103), art. 3(3).

51 ILO Maternity Protection Convention, Revised, 2000 (No. 183), art. 4(4) unless otherwise agreed by government and representative organisations of employers and workers.

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controversial. Why should women be compelled to take maternity leave? Is this not an infringement on their freedom of choice? As Suk points out, mandatory leave could be challenged on the grounds that it constitutes a paternalist means of tethering women to the breast (Suk, 2012, p. 79). In practice, however, it is better seen as recognising the limitations of individual choice for women already working in highly exploitative situations. Where leave is not mandatory, it is quite possible that there will be strong pressures on women to forego their leave. In this sense, mandatory leave facilitates choice, by setting a non-negotiable minimum standard. Mandatory leave is generally short, and therefore unlikely to prejudice women's long-term ability to rejoin the workforce.[52]

Looked at in this light, it can be seen that the case for mandatory paternity leave is strong. Indeed, the European Parliament recently proposed precisely this (European Parliament, 2009, p. 14). Such a proposal has much to commend it. Fathers are subject to as much or more pressure than mothers to forego any rights to leave which are offered to them. As the European Parliament put it: 'Paternity leave should be established on a binding basis so as to ensure that men will not be made, on account of social pressure, to forgo their entitlement. A signal should be sent to the labour market to the effect that men too have to spend time away from the workplace and their job when they have children' (European Parliament, 2009, p. 14). This 'levelling-up' argument also counters the objection that mandatory maternity leave puts women at a disadvantage in the paid workforce relative to men. Instead of abolishing mandatory maternity leave, the answer to equality concerns is to extend mandatory leave to fathers (Suk, 2012, p. 80). Mandatory paternity leave might be an important way to achieve the kind of culture change which has remained elusive thus far. It also meets the equality objectives of mandatory maternity leave, without losing its very real benefits for mothers. However, the Council of Ministers rejected the proposal (Council of the European Union, 2010, p. 9).

II. Protecting maternity at the expense of parenting

Despite the progress towards substantive equality in relation to pregnancy and motherhood, attempts by fathers to claim parenting rights have, until very recently, been unsuccessful, at least in the European arena. In fact, the exclusion of fathers has to some extent been the paradoxical result of the development of the equality principle away from an approach based simply on the principle that likes should be treated alike and towards a more substantive approach, which recognises that different treatment may be necessary to achieve equal opportunities for women to participate in the paid workforce. In Europe, until the groundbreaking cases of 2011–12, fathers' claims were consistently defeated, not by the sameness principle, but by resort to an approach which regarded different treatment as furthering equality. This occurred for two reasons. The first was the need to protect maternity rights from the 'levelling-down' tendencies of the equality as sameness principle. In the expectation that maternity rights for women might be struck down because pregnancy and maternity were given 'special' treatment, specific provisions were inserted to insulate maternity rights from such challenge. For example, Article 4(2) of CEDAW states: 'Adoption by States Parties of special measures ... aimed at protecting maternity shall not be considered discriminatory.' Similarly, at the EU level, Article 2(3) of the Equal Treatment Directive of 1976 states: 'This Directive shall be without prejudice to provisions concerning the protection

52 Italy appears to have one of the longest periods of mandatory leave, beginning two months prior to the expected date of confinement and ending three months after the actual date of the confinement. Notably, it is paid at 80 per cent of salary. See Law No. 1204 of 30 December, 1971, Eurofound 'Maternity Leave (Compulsory and Optional): Italy', online: ‹http://www.eurofound.europa.eu/emire/ITALY/MATERNITYLEAVECOMPULSORYANDOPTIONAL-IT.htm›.

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of women, particularly as regards pregnancy and maternity',[53] and the identical wording is found in the more recent 'Recast Directive' of 2006.[54]

However, ring-fencing women's rights in this way, while crucial in preventing 'levelling-down' challenges to maternity rights, also had the effect of excluding 'levelling-up' claims by fathers. Particularly problematic was the extent to which pregnancy and maternity were regarded as a continuum and therefore unique to the mother. Thus in the CJEU case of *Hofmann v. Barmer Ersatzkasse*,[55] a father claimed that he was being discriminated against because he was not eligible for a state payment during paternity leave, whereas the child's mother would have been eligible for such a payment during her maternity leave. The Court rejected his argument on the basis that maternity rights fell within the exception from the equal treatment principle. In doing so, it held that maternity rights were necessary to protect not just the mother's health during pregnancy and childbirth, but also the mother's relationship to the newborn child. According to the judgment of the Court: 'By reserving to member-States the right to retain or introduce provisions which are intended to protect women in connection with "pregnancy and maternity," the directive recognises the legitimacy, in terms of the principle of equal treatment, of protecting a woman's needs in two respects. First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment … That being so, such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely.'[56] Of course, as has been argued above, in the modern era the pressure on fathers not to take leave is an equal cause for concern.

The second way in which fathers' rights have been excluded is much more sophisticated and corrosive. This approach regards special maternity rights as a species of substantive equality, furthering women's substantive equality by specifically recognising the reality of women's primary responsibility for childcare. This is a very attractive approach on its face. However, when extended from pregnancy into parenting, it can quickly transform into a reinforcement of women's childcaring role. This can be seen in the EU case of *Lommers*,[57] in which a father claimed that he had been discriminated against because a workplace nursery provided by the Dutch Ministry of Agriculture provided places for children of female but not male employees. Dutch equality law permitted distinctions between men and women where the 'distinction [was] intended to place women in a privileged position in order to eliminate or reduce *de facto* inequalities' and was reasonable in relation to that aim.[58] Similarly, under EU law, the equal treatment principle is 'without prejudice to measures which, although discriminatory in

53 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 039, at art. 2(3) (Equal Treatment Directive).

54 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23, at art. 28(1).

55 C-184/83 *Hofmann v. Barmer Ersatzkasse* [1986] 1 C.M.L.R. 242 (ECJ).

56 C-184/83 *Hofmann v. Barmer Ersatzkasse* [1986] 1 C.M.L.R. 242 (ECJ), paras. 25 and 26.

57 C-476/99 *Lommers v. Minister Van Landbouw, Natuurbeheer En Visserij* [2004] 2 C.M.L.R. 49 (ECJ),

58 Consolidation Act on Equal Treatment of Men and on Equal Treatment of Men and Women in respect of Employment and Maternity Leave, Consolidation Act No. 711 of 20 August 2002, at Part 5.

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appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life'.[59] This provision was relied on in its defence by the Dutch government. The Ministry argued that the measure reflected its determination to tackle the underrepresentation of women in the Ministry. The CJEU endorsed this approach. The Court pointed out that there was a significant underrepresentation of women in the Ministry of Agriculture and particularly in the higher grades, and that there was similarly a proven insufficiency of suitable and affordable nursery facilities, which it regarded as likely to induce women employees to give up their jobs. The Court was not oblivious to the danger that 'a measure such as that at issue … whose purported aim is to abolish a *de facto* inequality, might nevertheless also help to perpetuate a traditional division of roles between men and women'.[60] However, it was not prepared to hold that the measure was disproportionate for failing to include working fathers, particularly in te light of the very limited number of nursery places available, and the fact the employer could grant requests from male officials in cases of emergency, to be determined by the employer. The Court did stress that a measure which excluded male officials who take care of their children by themselves from access to a nursery scheme subsidised by their employer would go beyond the permissible derogation. But it seemed reassured on this score by the indication given by the Ministry of Agriculture that male officials who bring up their children by themselves should, on that basis, have access to the nursery scheme at issue. What was missing from the analysis was any recognition that the father's claim in fact furthered substantive equality for the mother. Instead, the court assumed that a father who was not bringing up his children alone was able to rely on the mother for childcare.

III. The New Wave? Substantive equality as levelling up

Two recent cases in the EU and ECHR respectively point in a new, more optimistic direction. The first, the CJEU case of *Roca Alvarez*,[61] concerned a Spanish measure giving a right to time off for breastfeeding to employed women. It was agreed that in practice, leave was no longer used for breastfeeding, but as time off to look after babies. Mothers who were employees were always entitled to 'breastfeeding' leave; but fathers who were employees were only so entitled if the child's mother was also an employed person. The claimant in this case was the husband of a self-employed woman and therefore could not claim it. He complained that this was a breach of his right to equality under the Equal Treatment Directive. The Court upheld his claim. As the court put it, 'for men whose status was that of an employed person the fact of being a parent was not sufficient to gain entitlement to leave, whereas it was for women with an identical status'.[62]

The case breaks new ground on several fronts. The first lies in the nature of the comparator. Without engaging in the contortions of earlier case-law on the comparator, it had no hesitation in declaring that 'the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child'.[63] Thus, by distinguishing between an employed mother and an employed

59 C-476/99 *Lommers v. Minister Van Landbouw, Natuurbeheer En Visserij* [2004] 2 C.M.L.R. 49 (ECJ) para. 32; see Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976], OJ L 039 at art. 2(4) (Equal Treatment Directive).

60 C-476/99 *Lommers v. Minister Van Landbouw, Natuurbeheer En Visserij* [2004] 2 C.M.L.R. 49 (ECJ), para. 41.

61 C-104/09 *Roca Álvarez v. Sesa Start España ETT SA* [2011]1 C.M.L.R. 28 (CJEU).

62 C-104/09 *Roca Álvarez v. Sesa Start España ETT SA* [2011]1 C.M.L.R. 28 (CJEU), para. 23.

63 C-104/09 *Roca Álvarez v. Sesa Start España ETT SA* [2011]1 C.M.L.R. 28 (CJEU), para. 24.

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father, the measure established a difference on grounds of sex and was discriminatory within the meaning of Article 2(1) of the Equal Treatment Directive.

The second important development concerned the use of the exception to equal treatment in Article 2(3), which, it will be recalled, states that the Directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. As we have seen, in previous cases the Court had held that this was not confined to the protection of a woman's biological condition during and after pregnancy. It also protected the special relationship between mother and child immediately after birth 'by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment'.[64] In her opinion in the case, however, Advocate-General Kokott recognised that this approach was now 'in part outdated, since the necessary love and attention can also be provided by the child's father. In any event, the mother's double burden should be preventable precisely because the father assumes responsibility for looking after the child.'[65]

The Court also took a fresh perspective on the question of affirmative action under Section 2(4), which is aimed at 'authorising measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality, which may exist in society'.[66] The Spanish government submitted that the aim of the measure was to compensate for the genuine disadvantages suffered by women in comparison to men. The Court, however, pointed out that to give this right only to an employed mother, and not an employed father, would be 'liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties'.[67] Moreover, this could have the further effect of limiting the self-employed activities of the mother of the complainant's child, since the father had no rights to take time off work for childcare. As a result, she would have to 'bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden'.[68]

A similar positive turn can be discerned in the jurisprudence of the European Court of Human Rights (ECtHR). In the earlier case of *Petrovic*,[69] the Court recognised that in relation to caring for a child, both parents are 'similarly placed'. However, it refused to uphold the claim on the ground that society was only gradually moving towards shared responsibilities. By 2009, it was prepared to take the next tentative step forward. In *Weller v. Hungary*,[70] maternity benefit was only available to mothers, adoptive parents and guardians. The natural father could only claim the benefit if the mother was deceased. The Court reiterated that both parents are 'similarly placed' in taking care of the unborn child.[71]

An even more robust approach is evident in the 2012 Grand Chamber case of *Konstantin Markin*,[72] in which a Russian serviceman claimed the right to three years parental leave to look after his three children, for whom he was the sole carer after his divorce. The Russian Labour Code of 2001 has

64 C-184/83 *Hofmann v. Barmer Ersatzkasse* [1986] 1 C.M.L.R. 242 (ECJ), para. 25.

65 C-104/09 *Roca Álvarez v. Sesa Start España ETT SA* [2011]1 C.M.L.R. 28, Opinion of AG Kokkott (CJEU), at para. 42.

66 C-104/09 *Roca Álvarez v. Sesa Start España ETT SA* [2011]1 C.M.L.R. 28 (CJEU), para. 36.

67 C-104/09 *Roca Álvarez v. Sesa Start España ETT SA* [2011]1 C.M.L.R. 28 (CJEU), at para. 36.

68 C-104/09 *Roca Álvarez v. Sesa Start España ETT SA* [2011]1 C.M.L.R. 28 (CJEU), at para. 37.

69 *Petrovic v. Austria*, no. 20458/92, 27 March 1998 (ECtHR).

70 *Weller v. Hungary*, no. 44399/05, 31 March 2009 (ECtHR).

71 *Weller v. Hungary*, no. 44399/05, 31 March 2009 (ECtHR), para. 33.

72 *Markin v. Russia*, no. 3007/06, 22 March 2012 (ECtHR).

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generous provisions for maternity and parental leave for civilian parents. However, whereas servicewomen were entitled to the full package of maternity and parental benefits available to their civilian counterparts, a serviceman was not entitled to any leave except if his wife had died in childbirth, or he was bringing up a child left without maternal care. Even then, he was only entitled to three months' leave. The Russian Constitutional Court, in rejecting his challenge, reiterated the legitimacy of having regard to 'the special social role of women associated with motherhood'.[73] The ECtHR, however, rejected this approach. Instead, it drew a bright line between maternity leave, 'which is intended to enable the woman to recover from the childbirth and to breastfeed her baby if she so wishes', and parental leave and allowances, which 'relate to the subsequent period and are intended to enable a parent concerned to stay at home to look after an infant personally'.[74] This allowed the Court, like the CJEU in *Roca Alvarez*, to dispose of the comparator problem without much trouble:

> 'Whilst being aware of the differences which may exist between mother and father in their relationship with the child, the Court concludes that, as far as the role of taking care of the child during the period corresponding to parental leave is concerned, men and women are "similarly placed". It follows from the above that for the purposes of parental leave the applicant, a serviceman, was in an analogous situation to servicewomen.'[75]

This left the Court to determine whether the difference in treatment was justified. It noted that in the majority of European countries (including Russia), parental leave was available to both mothers and fathers and only a small minority limited this entitlement to women: 'It follows from the above that contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition.'[76] As in *Roca Alvarez*, the government in *Markin* claimed that the provision of maternity leave to servicewomen and not to servicemen was a measure of positive discrimination. The Grand Chamber gave short shrift to this argument. Instead, it agreed with the applicant 'that such difference has the effect of perpetuating gender stereotypes and is disadvantageous both to women's careers and to men's family life'.[77] Given that Russian society already accepted that parental leave should be available to civilian men, it was impossible to sustain the argument that Russian culture was not ready to do the same for servicemen. The Court accepted that some limits on entitlement to parental leave may be necessary in relation to the armed forces, for example if military personnel were not easily replaced in their duties. However, any limit on their entitlement should apply to both men and women.

The US approach to fathers has come from the opposite direction. Eschewing specific rights for women on the grounds that the extra cost of employing women would constitute an incentive for sex discrimination, the thrust of the legislative approach, as we have seen, has been to provide gender-neutral protection. The real question in this context is whether this entails a 'levelling-down' approach, either by treating women as if pregnancy and maternity made no difference, or by giving men and women the same rights at a very low level. It was noted above that the PDA equates the rights of pregnant women to those of ill men. In the more recent FMLA, the same parental rights are given to all eligible employees, albeit at a very low level. It will be recalled that

73 *Markin v. Russia*, no. 3007/06, 22 March 2012 (ECtHR), para. 34.

74 *Markin v. Russia*, no. 3007/06, 22 March 2012 (ECtHR), paras. 132–3.

75 *Markin v. Russia*, no. 3007/06, 22 March 2012 (ECtHR), paras. 132–3.

76 *Markin v. Russia*, no. 3007/06, 22 March 2012 (ECtHR), para. 140.

77 *Markin v. Russia*, no. 3007/06, 22 March 2012 (ECtHR), para. 141.

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under the FMLA, eligible employees have the right to up to twelve weeks of unpaid leave per year for the birth, adoption or fostering of a child; the care of spouse, son, daughter or parent with a serious health condition; and for self-care in relation to a serious health condition.

Because of the limitations on the power of federal legislation to impinge on states' legislative powers, challenges to the FMLA have been based on the proper use of the federal power to enforce the Fourteenth Amendment's requirement that no state shall 'deny to any person within its jurisdiction the equal protection of the laws'.[78] The power to enforce includes the authority both to remedy and to deter violations of the guaranteed rights. In the 2003 case of *Nevada Dept. of Human Resources v. Hibbs*,[79] it was argued that the FMLA was an illegitimate intrusion on state sovereignty by the Federal government. To uphold the legislation, the Court therefore needed to find a persistence of unconstitutional discrimination by the states. In a move that would seem paradoxical from a European perspective, the Court looked primarily to the fact that states were providing maternity rights to women to the exclusion of men as evidence of the need for Federal intervention to achieve equal treatment. Indeed, Rehnquist J, giving judgment for the Court, portrayed the granting of maternity rights to women as on a par with legislation and practices excluding women from the workforce and public positions. Citing the earlier decision of *Frontiero v. Richardson*, where it was stated that 'it can hardly be doubted that … women still face pervasive, although at times more subtle, discrimination … in the job market',[80] Rehnquist J immediately went on to cite statistics from the FMLA's legislative record which showed that, in 1990, 37 per cent of surveyed private-sector employees were covered by maternity leave policies, while only 18 per cent were covered by paternity leave policies.[81] Fifteen states provided women with up to one year of extended maternity leave, while only four provided men with the same. Parental leave policies were rare and, even where childcare policies did exist, men 'receive[d] notoriously discriminatory treatment in their requests for such leave'.[82] This led to the conclusion that 'stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread'.[83] Faced with 'the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits', *Hibbs* concluded that requiring state employers to give all employees the opportunity to take family-care leave was constitutional.

However, while the gender neutrality of the family care provisions in the FMLA were its saviour, the gender neutrality of the FMLA's self-care provision turned out to be its downfall. The self-care provision was a result of lobbying by equal-treatment feminists, who had advocated for a provision 'prescrib[ing] comprehensive leave for women disabled during pregnancy or while recuperating from childbirth—without singling out pregnancy or child-birth'.[84] Since evidence showed that men and women were equally likely to take sick leave, the chief motivation was to counter the expectation that, despite being gender-neutral, the family leave provisions in the FMLA would be used predominantly by women, thus reinforcing disincentives on employers to

78 Under s. 5 of the Fourteenth Amendment of the US Constitution, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'.

79 *Nevada Dept. of Human Resources v. Hibbs* 538 US 721 (2003) (US Supreme Court).

80 *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (US Supreme Court).

81 S. Rep. No. 103-3, pp. 14–15 (1993) as cited in *Nevada Dept. of Human Resources v. Hibbs* 538 US 721 (2003) (US Supreme Court).

82 Washington Council of Lawyers as cited by Kennedy J, Scalia J and Thomas J (dissent) *Nevada Dept. of Human Resources v. Hibbs* 538 US 721 (2003) (US Supreme Court).

83 *Nevada Dept. of Human Resources v. Hibbs* 538 US 721 (2003) (US Supreme Court).

84 *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court) 1342.

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hire women. By including provision for men to take sick leave putatively equivalent to women's pregnancy leave, it was argued, employers' risk in hiring women would be the same as that in hiring men.[85] Despite this history, however, the majority of the Court in *Coleman v. Maryland* concluded that 'nothing in particular about self-care leave … connects it to gender discrimination'.[86] This was because, rather than regarding the provision as a gender-neutral form of pregnancy leave, it looked for evidence of discrimination against women in sick-leave policies. Finding none, it struck down the provision as infringing on states' immunity as sovereigns under the US federal system.[87]

This can be contrasted with the highly perceptive dissenting judgment of Ginsburg J, with which Justices Breyer, Sotomayor and Kagan[88] joined. Ginsburg J reiterated that 'the FMLA was originally envisioned as a way to guarantee—without singling out women or pregnancy—that pregnant women would not lose their jobs when they gave birth. The self-care provision achieves that aim.' Congress clearly aimed to provide leave for women who were pregnant or recovering from childbirth 'without singling out pregnancy or child-birth'.[89] Ginsburg J also took the opportunity to argue that *Geduldig's* finding that pregnancy discrimination was not discrimination on the basis of sex was 'egregiously wrong' and should be overturned.

Nevertheless, the outcome of the case suggests that gender neutrality as to pregnancy might well be as misplaced as specific rights relating to maternity. In the last resort, the risk that employers might not hire women because of pregnancy must be countered, as in the EU, with prohibitions on such discrimination, together with, as under the ILO, the sharing of the costs of pregnancy leave between employer and state; while proper incentives must be provided for fathers to take up their parenting rights. There is valuable research on the interaction of legal provisions with systemic change at the workplace, which highlights both the positive and the negative consequences of specific legal and policy interventions.[90] Courts and legislators should take more note of such research and tailor their responses accordingly.

IV. Conclusion

It has been argued in this paper that the goal of equal participation of women in the workplace needs to be matched by equal participation of men in the home. This is only possible if the conception of equality is shaped by a conscious and explicit commitment to the social value of parenthood. In general, the chimerical character of equality, oscillating between difference and sameness, has made it difficult to achieve real progress in changing gender-based roles. However, the cases of *Roca Alvarez* and *Markin* demonstrate that equality can have positive, levelling-up effects if the background social value of parenthood is appreciated. Nevertheless, equality on its own is insufficient to achieve change. The relationship between law and cultural change is complex:[91]

85 See Ginsburg J's explanation of this history in *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court) 1347.

86 *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court) 1337.

87 *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court).

88 Except in respect of footnote 1 of her judgment. *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court).

89 S. Rep. No. 101-77, p. 32 (1989) as cited by Ginsberg J in *Coleman v. Court of Appeals of Maryland* 132 S.Ct. 1327 (2012) (US Supreme Court).

90 Kossek, Lewis and Hammer (2010).

91 For research on the relationship of policy, culture and social change, see Perez-Vaisvidovsky (2013); Lewis, Knijn, Martin and Ostner (2008).

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more careful thought needs to be given to how such change can be facilitated, from basic issues such as mandatory leave for men, non-transferable parental benefits, and sufficient levels of pay, to wide-ranging restructuring of the working day to permit a more flexible balancing of paid and unpaid work for both men and women. Moreover, more recognition needs to be given to the fact that participative parenting is not confined to the first year of life, but extends throughout the child's school-age years. It is not by accident that women predominate in part-time work. At the same time, the provision of equal parenting rights for fathers is a crucial first step.

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