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Childcare Leave: Unequal Treatment in the European Economic Community

J. Kevin Mills†

May Member States in the European Community ("EC" or "Community") grant childcare leave¹ to mothers but not to fathers? The European Court of Justice ("ECJ") has held in two cases that childcare leave discrimination is not sex discrimination.² Benefits programs that make childcare leave available only to mothers are valid under the Equal Treatment Directive ("ETD"),³ which prohibits employers from discriminating on the basis of gender, marriage, or family status.⁴ In two decisions the ECJ found male-excluding policies valid under an express exception to the ETD: the protection of women in connection with pregnancy and maternity.⁵ This Comment examines these decisions and concludes that they may ultimately impede, rather than advance, the European drive for sexual equality in the workplace.

Part I of this Comment compares employee childcare benefits in the EC and the United States. This comparison suggests that European nations may be more strongly committed to using childcare benefits to improve sexual equality than their United States counterpart. Part II compares the ETD to the United States' Preg-

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¹ As used in this Comment, leave taken by the mother while she is actually disabled on account of pregnancy, childbirth, or related medical conditions is pregnancy disability or childbearing leave. Leave taken during other periods, traditionally for infant care, is childcare or parental leave.


⁴ Id. Article 1(1) implements the principle of equal treatment in the Member States with respect to access to employment, vocational training and promotion, and working conditions. Under article 2(1), the principle of equal treatment means "that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."

⁵ Id, art 2(3), 1976 OJ at L39:40. The ETD’s general prohibition against employment discrimination on the grounds of gender contains several express exceptions, including the protection of women. Article 2(3) provides, "[t]his directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."
nancy Discrimination Act ("PDA") and discusses the different philosophies underlying each. Part III examines feminist solutions to the maternity/workplace dilemma. This part recommends adherence to the Equal Treatment Model of sexual equality. Finally, Part IV compares American and European judicial solutions to the childcare leave question. This Comment concludes that the American solution, which mandates equal childcare leave for mothers and fathers, better serves the interests of women and better fulfills the EC's commitment to achieving sexual equality.

I. EMPLOYEE CHILDCARE BENEFITS IN THE EC AND IN THE U.S.

In general, European workers enjoy far more job and income security than workers in the United States. In addition to almost universal health insurance coverage, most Member States also grant female employees fourteen weeks of paid maternity leave. Most of these countries have extended their disability leave periods to accommodate infant care and to foster parent-child bonding. In the United States, however, to the extent that women receive childcare benefits at all, receipt of such benefits is conditioned solely on a woman's physical disability. Few em-

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7 Sheila B. Kamerman, Maternity and Parenting Benefits: An International Overview, in Edward F. Zigler and Meryl Frank, eds, The Parental Leave Crisis 235 (Yale U Press, 1988). The various maternity and parental leave and income replacement policies can be broken down into four overlapping domains:

(1) social-insurance related measures to protect income lost before or after childbirth; (2) measures to protect the health of the pregnant woman and of the mother, immediately before and after childbirth; (3) measures to protect women against job loss and related benefits at the time of pregnancy and childbirth; and (4) measures intended to facilitate the development of wholesome parent-child attachment.

Note, Childbearing and Childrearing: Feminists and Reform, 73 Va L Rev 1145, 1147 n 17 (1987). In all four domains, workers in Europe generally enjoy far greater benefits than workers in the United States. Id at 1147.

* Id at 1150 (such policies typically provide eight weeks of paid leave immediately following childbirth).

* See Kamerman, Maternity and Parenting Benefits: An International Overview at 241-43 (cited in note 7).

Employer policies base leave policies on encouraging the development of parent-child relationships.\(^{11}\)

Not only are benefits more widely available in Europe, but employers are also required to provide them as a matter of national law.\(^{12}\) By contrast, benefits in the United States are generally a matter of private concern, provided only at the discretion of employers.\(^{13}\) The United States thus remains one of the few advanced industrialized nations that has no national health insurance, no national maternity or parental leave policies, and no national legislation mandating job-protected leaves at the time of childbirth.\(^{14}\)

Deep-rooted respect for the freedom of contract may explain why the United States has not enacted a comprehensive national leave policy.\(^{15}\) However, case studies of European legislation also suggest that differences in societal attitudes towards (1) maternity/childcare benefits and (2) sexual equality may account for the paucity of childcare legislation in the United States.\(^{16}\) For example, with respect to maternity, many European nations actively encourage families to have and raise children,\(^{17}\) whereas the United States has traditionally viewed procreation and childrearing as

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\(^{11}\) Presumably, women use disability or unpaid leave time to care for the newborn and to recuperate from childbirth. Note, 73 Va L Rev at 1149-50 (cited in note 7).


\(^{14}\) President Bush vetoed the Family and Medical Leave Act of 1990 in July 1990. The Act would have entitled employees to job protection and to continuation of benefits, but not to income replacement, for leave of up to twelve weeks, taken to care for a newborn or adopted child, or a spouse or parent who has a serious medical condition. See Family and Medical Leave Act of 1990, HR 770, 101st Cong, 1st Sess (1989). Both the House of Representatives and the Senate have reintroduced similar bills. See Family and Medical Leave Act of 1991, HR 2, 102d Cong, 1st Sess (1991); S 5, 102d Cong, 1st Sess (1991).

\(^{15}\) See Message to the House of Representatives Returning Without Approval of the Family and Medical Leave Act of 1990, Pub Papers Pres (June 29, 1990).

\(^{16}\) Allen, *European Infant Care Leaves* at 247-70 (cited in note 12).

\(^{17}\) Id at 266-68. In most European nations, leaves have been justified by reference to their positive effect on birthrates. Id at 267. In a study of European attitudes toward infant care leaves, the most frequent explanation for why leaves are offered to parents is: "It's in
matters of private concern, rather than as activities that it should encourage.\textsuperscript{18} With respect to sexual equality, Sweden's approach to infant care\textsuperscript{19} is also illustrative of the European philosophy.\textsuperscript{20} Indeed, Sweden has one of the most generous and flexible childcare policies in Europe; it allows either parent to choose from among a wide variety of leave options.\textsuperscript{21}

Europeans also seem committed to improving sexual equality at the Community level. The EC Council has approved a Recommendation on childcare\textsuperscript{22} that requires Member States to develop measures to reconcile parents' often conflicting occupational and familial obligations.\textsuperscript{23} More particularly, the Recommendation directs Member States to develop measures designed to provide: (1) private and public childcare centers for working parents;\textsuperscript{24} (2) flexible leave provisions that allow all working parents to take childcare leave;\textsuperscript{25} and (3) workplace environments that are hospitable to working parents with childrearing responsibilities.\textsuperscript{26} Finally, the Recommendation requires Member States to "promote and encourage" increased participation by men in childrearing "in order to achieve a more equal sharing of parental responsibilities between men and women."\textsuperscript{27}

the best interest of society to support families and parenthood in whatever way possible." Id.

\textsuperscript{18} Allen, \textit{European Infant Care Leaves} at 267 (cited in note 12). European nations also seem to share a view of the family as the childrearing agent of choice and, therefore, may have a stronger interest in preserving traditional family structures. Id at 268. Thus, European parents have expressed strong beliefs that they need to be with their children in the first few months following birth. Id at 266. Accordingly, they believe that leave time helps facilitate parent-child bonding that is critical to children's healthy development. Id at 268. These beliefs have manifested themselves most conspicuously in the social legislation that many European nations have enacted.

\textsuperscript{19} Sweden's parental-leave law resulted from a decade of examining possible means of promoting equality between men and women, and the Swedes have heralded the law as an important step towards this goal. Allen, \textit{European Infant Care Leaves} at 249 (cited in note 12). Thus far, however, the policy's equality-promoting effect has been largely symbolic; men have used only two percent of the total parental leave days taken in Sweden. Id.

\textsuperscript{20} Id at 247.

\textsuperscript{21} Id at 247-48.


\textsuperscript{24} Id, art 3, 1991 OJ at C242:4.

\textsuperscript{25} Id, art 4, 1991 OJ at C242:5.

\textsuperscript{26} Id, art 5, 1991 OJ at C242:5.

The Childcare Recommendation evinces a Community belief that making it possible for both men and women to bear responsibility for childrearing is a precondition for sexual equality. Thus, the Commission has proposed a Directive that would require Member States to extend childcare leave to fathers, adoptive parents, and step-parents.

The Economic and Social Committee has even suggested that the Equal Treatment Directive might require extending childcare leave to fathers. However, in *Ulrich Hofmann v Barmer Ersatzkasse*, the ECJ expressly rejected the notion that the ETD was designed “to alter the division of responsibility between parents.” Yet, the ECJ left unexplained why it interpreted the ETD to frustrate an individual family’s choice as to which parent should bear responsibility for childcare.

II. THE EQUAL TREATMENT DIRECTIVE AND THE PREGNANCY DISCRIMINATION ACT

Article 119 of the EEC Treaty requires equal pay for men and women for “equal work.” The ETD enlarged the principle of equal pay to require employers to treat male and female employees equally. Equal treatment forbids all discrimination based on gen-

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See id, preamble, 1991 OJ at C242:3. The proposal for the Childcare Recommendation was the Commission’s first measure under the “third (1991-1995) medium-term action program” to promote equal opportunities between men and women. The primary goal of this program is to promote the full participation of women in the labor market. *Euroscope: Social Affairs*, Jan 30, 1992 (LEXIS, Europe Library, Eurscp File).


Id, 1984 ECR at 3075, 1986:1 CMLR at 264.


The Directive requires Member States to implement this principle with respect to “access to employment,” “vocational training,” and “working conditions.” Because the term “working conditions” includes policies governing childcare benefits, equal treatment would seem to require equal access to childcare leave benefits. Nevertheless, the ECJ has determined that Member States may deny fathers childcare leave even if they extend to mothers a right to such benefits.

The United States counterpart to the ETD is Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of gender. The Pregnancy Discrimination Act of 1978 (“PDA”) amended Title VII to forbid discrimination on the basis of pregnancy. It makes clear that discrimination on the basis of pregnancy, childbirth, and related medical conditions constitutes the kind of gender discrimination that Title VII prohibits.

The PDA, like the rest of Title VII, is a nondiscrimination provision: it requires employers to treat pregnancy the same as they treat any other physical disability similarly affecting employment. Therefore, the PDA prohibits both imposed pregnancy leave and termination of physically-able, pregnant women, and it requires that women who are unable to work because of their preg-

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40 42 USC § 2000e(k) (1988) provides, in part:
The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.
41 Piccirillo, Legal Background of a Parental Leave Policy at 302-305 (cited in note 10).
nancy receive the same sick pay, insurance coverage, and job protection as other disabled employees.42

The PDA does not redress all the employment disadvantages that pregnant workers face.43 First, because it does not expressly require employers to provide disability leave or other benefits to any employees, the PDA does not require employers to provide benefits to pregnant workers.44 Employers with inadequate leave policies may maintain such policies as long as they apply them equally to all workers. Second, the PDA addresses pregnancy only as a physical, medical condition.45 To the extent that employers provide disability leave, they need only extend leave to pregnant workers during the period of actual physical disability caused by pregnancy or childbirth—typically between four and eight weeks.46

In fact, employers have argued that the PDA actually prohibits states from requiring employers to provide pregnancy leave because such laws discriminate against men.47 The Supreme Court, however, rejected this argument in California Federal Savings & Loan Association v Guerra.48 It held that a state may require pregnancy leave if it is confined to the period of physical disability.49 The Court left unresolved the question of whether the PDA permits states to require benefits for those physically disabled by pregnancy while not requiring similar benefits for those who suffer from other similar physical disabilities. Even if the Supreme Court eventually addresses this issue,50 it is unlikely to allow states to

42 Id at 302-303.
43 Id at 303. However, Piccirillo suggests that the PDA has improved women’s work environment: “Because employers are not allowed to assume that pregnancy will interfere with a woman’s employment, a more equitable atmosphere exists in the workplace toward pregnant workers and pregnancy-related leave.” Id at 304.
44 Id at 303.
45 Piccirillo, Legal Background of a Parental Leave Policy at 303 (cited in note 10).
46 Id.
49 Id at 292.
50 Some language in the Cal Fed decision supports the conclusion that the Court would decide this issue in the affirmative. First, the Court spoke loosely in terms of “special treatment” and “special accommodation of pregnancy.” Second, at one point the Court characterized the issue for decision as “whether the PDA prohibits the States from requiring employers to provide reinstatement to pregnant workers, regardless of their policy for disabled workers generally.” Id at 283-84.

Equally plausibly, the Court may have used “special” in the limited sense that only women can be entitled to pregnancy leave, because men cannot be disabled on account of
distinguish between male and female recipients of childcare benefits. Indeed, the Third Circuit, relying on the implicit *Cal Fed* distinction between pregnancy disability leave and childcare leave, has held that the PDA forbids employers from granting childcare leave only to mothers.\textsuperscript{51}

In contrast to the PDA, the Equal Treatment Directive expressly favors extending special pregnancy and maternity leave benefits to women—even where men have no comparable leave benefits. Indeed, by exempting “provisions concerning the protection of women” from the ETD’s requirement of equal treatment,\textsuperscript{82} Article 2(3) authorizes Member States to require employers to provide childbirth and childcare leave benefits exclusively to women.\textsuperscript{83}

Whereas the PDA authorizes benefits on account of “pregnancy, childbirth, or related medical conditions,”\textsuperscript{4} ETD article 2(3) authorizes benefits on account of “pregnancy and maternity.”\textsuperscript{55} By singling out pregnancy and childcare for special treatment, article 2(3) protects and affirms European societal attitudes towards pregnancy and childcare benefits. Conversely, the nondiscrimination provisions of Title VII, inasmuch as they treat pregnancy no differently than any other medical conditions, reflect a commitment to gender-blind legislation in the name of equal treatment.

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\textsuperscript{51} Schafer v Board of Public Educ., 903 F2d 243, 248 (3d Cir 1990). The distinction between pregnancy and childcare is crucial to an understanding of the Schafer decision. The Schafer court apparently felt that *Cal Fed* legitimated pregnancy as a legally-relevant difference justifying preferential treatment. Schafer, 903 F2d at 248. Thus, the Schafer court rested its decision upon its conclusion that childrearing ability is not a legally-relevant difference between the sexes.


\textsuperscript{83} Case 163/82, Commission of the European Communities v Italian Republic, 1983 ECR 3273; Case 184/83, Ulrich Hofmann v Barmer Ersatzkasse, 1984 ECR 3047, 1986:1 CMLR 242.

\textsuperscript{4} 42 USC § 2000e(k).

III. THE AMERICAN FEMINIST RESPONSE: THE EQUAL TREATMENT MODEL OF SEXUAL EQUALITY

In the United States, feminist legal theory has been primarily reactive, deriving inspiration from the development and success of racial equality theory. The traditional equal protection model of racial equality holds that physical differences among races can never be legally significant. Accordingly, early feminist theory stated that courts should treat gender like race: most physical differences between men and women should not be accorded legal significance. This equal treatment approach does, however, allow courts to take legal cognizance of certain differences between men and women.

Because they initially embraced the equal treatment approach, nearly all feminists lobbied for and supported the PDA as a beneficial tool for combating discrimination. However, when an employer invoked the PDA in Miller-Wohl v Commissioner of Labor & Industry, arguing that pregnancy leave laws discriminated against men, the feminist community was divided as to the proper outcome. As a result, a number of feminists rejected the equal treatment approach, contending that pregnancy is a significant difference that justifies special legal treatment.

The disagreement between the equal and special treatment approaches is largely strategic. All feminists continue to share a common goal: restructuring the workplace to allow either parent to assume responsibility for childrearing so that women can compete on an equal basis with men, thereby assuring women that "preg-
nancy will not hinder their achievements."^[61] Thus, feminists disagree only as to the means by which their goal should be achieved.

Advocates of the equal treatment approach suggest that the law should treat pregnancy and recovery from childbirth the same as any other temporary physical disability that prevents an employee from working.^[62] Courts should not recognize pregnancy as a legally relevant difference. Rather, they should simply ensure that benefits are made equally available to all similarly situated, disabled workers.^[63]

Special treatment advocates respond that pregnancy imposes unique burdens on women that similarly situated men do not face. Therefore, courts should recognize pregnancy as a legally significant difference.^[64] Assuring equal opportunities for women in the workplace requires special treatment of pregnancy.^[65] Thus, courts should uphold provisions singling out pregnancy for favorable treatment.^[66]

The danger implicit in the special treatment approach is that it may encourage a return to the condescendingly paternalistic, "separate-spheres" approach.^[67] Indeed, there is good historical evidence to suggest that according legal significance to gender roles

^[63] See, for example, Brief for the National Organization of Women as amici curiae, California Federal Savings & Loan Ass'n v Guerra, 479 US 272 (1987) (No. 85-494) (Wendy W. Williams, Of Counsel).
^[64] Kay, 1 Berkeley Women's L J at 35 (cited in note 61). In her response to Professor Williams, Professor Kay calls for an "episodic analysis" that ignores biological differences except during the time a female is actually pregnant. See Herma Hill Kay, Models of Equality, 1985 U Ill L Rev 39, 77-78 (confining biological differences to "immutable sex differences," most notably, pregnancy).
^[68] Williams, 13 NYU Rev L & Soc Change at 352-74 (cited in note 60). The ideology of "separate spheres" promoted division of the world into two separate spheres, one public and one private. Men inhabited the public world of commerce and politics; women, the private sphere of family and home. See also, Bradwell v Illinois, 83 US (16 Wall) 130, 141 (1872) ("the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman").
has often resulted in the exclusion of women from the workplace.\textsuperscript{68} Thus, equal treatment advocates argue that special treatment of pregnancy may actually perpetuate workplace inequality by reinforcing the "separate-spheres" notion that a woman's primary role is that of a mother, not a worker.\textsuperscript{69} However, a clearly drawn exception for pregnancy might avoid the dangers of reintroducing gender-based distinctions.\textsuperscript{70}

Both equal and special treatment advocates reject legally recognizing differences based on archaic and stereotypical views of gender roles. More particularly, they reject stereotypes that suggest a mother is more naturally and inevitably equipped to care for children.\textsuperscript{71} Both place equal responsibility for childrearing on mothers and fathers.\textsuperscript{72} Most importantly, both recognize that distinguishing childrearing ability from childbearing capacity is essential to achieving equality in the workplace. To collapse the two into one may result in rules that perpetuate disadvantageous stereo-

\textsuperscript{68} For example, in Muller v Oregon, 208 US 412 (1908), the Court upheld an Oregon statute that limited women's work hours. The Court reasoned that, because women are physically different from men, special treatment was required in order to "secure a real equality of right." Id at 421. See, generally, Judith A. Baer, The Chains of Protection: The Judicial Response to Women's Labor Legislation (Greenwood Press, 1978).

\textsuperscript{69} Williams, 13 NYU Rev L & Soc Change at 371 (cited in note 60). Professor Christine Littleton has noted that it is not surprising that "the spectre of a return to separate spheres ideology looms so large in any discussion of what feminists do on behalf of women." Littleton, 75 Cal L Rev at 1291 (cited in note 56). Indeed, the Supreme Court recognized the "fact" that a woman is regarded as the center of home and family life as recently as 1961. Hoyt v Florida, 368 US 57, 62 (1961).

\textsuperscript{70} Kay, 1 Berkeley's Women L J at 34 (cited in note 61).

\textsuperscript{71} Williams, 13 NYU Rev L & Soc Change at 355 n 119 (cited in note 60), quoting Law, 132 U Pa L Rev at 988-89 (cited in note 64):

In taking responsibility for children, women act as independent moral agents. When the Supreme Court assumes that biology dictates that women care for infants, it is impossible to attach moral value to the woman's action or to acknowledge the human and social worth of the nurturing that women do. When the Court allows sex-based classifications to be justified by the presumption that fathers are unidentified, absent, and irresponsible, it is more likely that these generalizations will continue to be true.

\textsuperscript{72} Williams, 13 NYU Rev L & Soc Change at 354 n 115 (cited in note 60), quoting Elizabeth Duncan Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N Y Legal F 480, 481 (1971):

The conceptual framework of childbearing and childrearing fits both present and future reality better than a conceptual framework that assumes that childbearing and childrearing are both solely the responsibility of women. The young women feminists insist, quite logically, that assumption by men of a full share in the rearing of children would contribute to the welfare of the whole family.
types and that discourage parents from opting for non-traditional allocations of childrearing responsibility.73

In summary, because the equal treatment approach distinguishes between childrearing ability and childbearing capacity, it insists that courts independently analyze childcare and pregnancy benefits. Special treatment objections emerge only with respect to judicial consideration of pregnancy-related disability. Thus, both special and equal treatment advocates agree that those who undertake to provide childcare leave should make it equally available to both parents.74 Making such leave available only to mothers constitutes sex discrimination.75

73 Williams, 13 NYU Rev L & Soc Change at 354 (cited in note 60); Kay, 1 Berkeley Women’s L J at 34 (cited in note 61).

74 “There appears to be unanimity in feminist legal circles that childrearing (infant care) leaves should be available to parents of either sex. The dispute . . . is limited to how to treat pregnancy.” Williams, 13 NYU Rev L & Soc Change at 354 n 116 (cited in note 60).

75 Until recently, the feminist debate over the proper treatment of pregnancy has taken place solely within the traditional equal treatment approach to sexual equality. In turn, this debate has spawned a variety of feminist responses that reject traditional equality theory. Each of these non-traditional approaches attempts to redefine equality “to respond directly to the concrete and lived-out experience of women.” Littleton, 75 Cal L Rev at 1300 (cited in note 56). Accordingly, they focus not on the source of gender differences, but on the consequences of gender differences. These approaches allow different treatment of men and women whenever the different treatment promotes the goal of ending women’s subordination. For example, see Catharine A. MacKinnon, Sexual Harassment of Working Women (Yale U Press, 1979) (“inequality approach” rejects difference as relevant inquiry and focuses directly on subordination and domination; if a policy subordinates women it violates equality, if it empowers women it enhances equality); Littleton, 75 Cal L Rev at 1312, 1323-32 (“equality as acceptance” model rejects the distinction between biological and cultural differences; the function of equality is to make gender differences, perceived or actual, costless relative to each other). See also, Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 Yale L J 1373 (1986) (rejecting the equal treatment model and accepting MacKinnon’s “inequality approach”); Nancy E. Dowd, Maternity Leave: Taking Sex Differences into Account, 54 Fordham L Rev 699 (1986); Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum L Rev 1118 (1986).

Under these non-traditional models of sexual equality, special treatment of pregnancy is permissible because it promotes equality in the workplace. See, for example, Brief for the Coalition for Reproductive Equality in the Workplace (CREW) as amici curiae, California Federal Savings & Loan Ass’n v Guerra, 479 US 272 (1987) (No 85-494) (Christine A. Littleton, Attorney of Record). Moreover, because equality theory does not focus on the source of difference, special treatment in connection with childcare is not necessarily impermissible: “[I]f women currently tend to assume primary responsibility for childrearing, we should not ignore that fact in an attempt to prefigure the rosy day when parenting is fully shared.” Littleton, 75 Cal L Rev at 1297 (cited in note 60).
IV. United States and EC Judicial Responses to Pregnancy Leave Policies

A. The United States Judicial Response

In California Federal Savings & Loan Association v Guerra, an employee took pregnancy disability leave from work. When she was ready to return to work three months later, the bank told her that she had been replaced and that no similar positions were available. California law, however, required employers to give pregnancy-related, disabled employees temporary unpaid leave of up to four months, with guaranteed reinstatement in their original job or its equivalent. California Federal claimed that California law violated the PDA because it did not afford similar protection to non-pregnancy-related, disabled employees. The Court disagreed and held the California statute valid on the ground that it promoted equal employment opportunity.

The Supreme Court explained that, subject to certain limitations, Congress intended the PDA to be a “floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.” The PDA and the California statute share a common goal: “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.”

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76 California Federal Savings & Loan Ass’n v Guerra, 479 US at 278.
77 Cal Gov’t Code § 12945(b)(2) (West 1980) provided, in part:
   It shall be an unlawful employment practice unless based upon a bona fide occupational qualification: ...
   (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or other related medical conditions ...
   (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months ... Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions ...
California’s Fair Employment and Housing Commission had construed § 12945(b)(2) to require California employers to reinstate an employee returning from such pregnancy leave to her original job or its equivalent. California Federal Savings & Loan Ass’n v Guerra, 479 US at 276.
78 California Federal Savings & Loan Ass’n v Guerra, 479 US at 279.
79 Id at 289. In addition, the Court emphasized that the California statute was “narrowly drawn to cover only the period of actual disability on account of pregnancy, childbirth, or related medical conditions.” Id at 290. Employees taking leave were not automatically given four months. Rather, employees were only permitted the period of actual disability due to pregnancy for their recovery, up to four months. Id.
80 California Federal Savings & Loan Ass’n v Guerra, 479 US at 285, quoting California Federal Savings & Loan Ass’n v Guerra, 758 F2d 390, 396 (9th Cir 1985).
The California statute promotes equal employment opportunity by "guarantee[ing] women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." In other words, it allows women, like men, to procreate without having to sacrifice their jobs. At the same time, the Court cautioned that the PDA does not permit unequal treatment animated by "archaic or stereotypical notions about pregnancy and the abilities of pregnant workers."

Presumably, both women and men can challenge the legality of unequal treatment grounded in stereotypical assumptions. For example, women can attack maternity leave policies that require them to leave work at a certain point in their pregnancy, because such a requirement is based on stereotypes concerning the capacities of pregnant women. Similarly, men can attack a mothers-only policy that extends leave beyond the period of physical disability, because such a policy is based on anachronistic assumptions about the childrearing abilities of fathers.

Indeed, Schafer v Board of Public Education addressed just such an issue. In this case, a male teacher challenged a collective bargaining agreement that made a one-year maternity leave available only to female teachers. The Third Circuit found no evidence in the record to suggest that the physical disability due to "pregnancy, childbirth, or related medical conditions" extended to one year. Therefore, the court distinguished this leave policy from the pure disability leave statute upheld in California Federal Savings & Loan Association v Guerra, and it ruled that the PDA does not allow "preferential treatment to employees who have recently given birth to a child without a simultaneous showing of a continuing disability related to either the pregnancy or to the delivery of the child." Such agreements violate Title VII and are "void for any leave granted beyond the period of actual disability on account of pregnancy, childbirth, or related medical conditions."

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82 Id at 289, quoting 123 Cong Rec 29658 (Sept 6, 1977).
83 Id at 290.
84 Mary Piccirillo, Legal Background of a Parental Leave Policy at 308 (cited in note 10).
85 Id.
86 Schafer v Board of Public Educ., 903 F2d 243 (3d Cir 1990).
87 Id at 245.
88 Id at 248.
89 Id.
90 Schafer v Board of Public Educ., 903 F2d at 248.
Thus, embracing the equal treatment approach, the Third Circuit held that no legally-relevant difference exists between the sexes with respect to ability to care for children. Childcare leave policies must make benefits equally available to both mothers and fathers in order to comply with Title VII.

B. The EC Judicial Response

The ECJ has reached the opposite result. In Commission of the European Communities v Italian Republic, the ECJ upheld a national law establishing mothers-only childcare leave. In this case, at issue was the validity of an Italian statute that granted, only to adoptive mothers, maternity leave and benefits for three months immediately following adoption. The ECJ upheld the statute without, as required by article 2(3) of the ETD, explaining how adoption leave protects the mother. The ECJ seemed to uphold the statute on the ground that it protects the child. Limiting eligibility to adoptive mothers was justified by the “legitimate concern to assimilate as far as possible to conditions of entry of the child into the adoptive family to those of the arrival of a newborn child in the family during the very delicate initial period.”

If the ECJ upheld the statute solely because it was designed to protect the child, its decision is clearly wrong under the Equal Treatment Directive. The ETD requires equal adoption leave for mothers and fathers, unless such leave is designed to protect the mother. Concern for the child’s welfare cannot justify restricting eligibility to adoptive mothers. Further, adoption leave, unlike pregnancy disability leave, clearly cannot be justified by reference to the physical needs of the mother. However, the ECJ’s Ulrich...
Hofmann v Barmer Ersatzkasse decision may save its Italian Republic holding, because in this case the ECJ held that childcare leave does protect the mother.

In Hofmann, a German worker took an unpaid leave of absence in order to care for his newborn child so that his wife could resume her employment. As required by law, Mrs. Hofmann took convalescence leave from work for the eight weeks immediately following childbirth. The German Government also encouraged working mothers to take four additional months of leave by paying a maternity allowance equal to the mother's salary. Since the Hofmanns decided that Mr. Hofmann should take the additional leave, he submitted a claim for the maternity allowance. The German Government denied his claim on the ground that only working mothers were eligible for benefits. The ECJ affirmed the German Government's denial of Mr. Hofmann's claim.

In contrast to its decision in Italian Republic, the ECJ attempted to fit the German statute within the meaning of article 2(3) of the ETD. According to the ECJ, childcare leave protects the mother because "only the mother [] may find herself subject to undesirable pressures to return to work prematurely." The ECJ explained that:

[I]t 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 multiple burdens which would result from the simultaneous pursuit of employment . . . .

in so far as it is intended to foster the emotional ties necessary to settle the child in the family adopting it.  

Case 163/82, Commission of the European Communities v Italian Republic, 1983 ECR at 3297. Accordingly, she concluded that adoption leave must be granted to adoptive fathers on the same basis as adoptive mothers. Id at 3298.


Id, 1984 ECR at 3075, 1986:1 CMLR at 264.

German Law for the Protection of Working Mothers of April 18, 1968, § 6(1) (Bundesgesetzblatt I at 315).

Id as amended by the Law of June 25, 1979, §§ 8(a) and 13 (Bundesgesetzblatt I at 797) (the substitute salary was subject to an upper limit).


Id, 1984 ECR at 3076, 1986:1 CMLR at 265.

Id, 1984 ECR at 3075, 1986:1 CMLR at 265.

As an historical matter, the ECJ's premise is no doubt correct; traditionally, both childcare and childbirth have disproportionately burdened mothers and have often made employment and motherhood incompatible pursuits. But the premise smacks of "archaic and stereotypical notions about pregnancy" that historically have "protected" women to their disadvantage.

Although the ETD permits Member States to require the provision of pregnancy and childcare leave, it, like the PDA, should not be interpreted to permit differential treatment where such treatment is based on a perceived difference in the ability of each sex to care for children. Indeed, the Advocate-General implicitly supported this view by noting that article 2(3) requires not only that the difference in treatment seek to protect the preferentially-treated sex, but that it must also seek to protect it for an objective reason. The ECJ lacked such an objective reason and it simply failed to distinguish between childbearing capacity and childrearing ability. The former is an innate physiological trait, the latter is

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104 California Federal Savings & Loan Ass'n v Guerra, 479 US at 290.
105 See notes 67-68 and accompanying text. Not surprisingly, both Professor Williams and Professor Kay have rejected the ECJ premise as a valid justification for unequal childcare leave policies:

[This premise] does describe the reality of many women's lives, but it also assumes the inevitability of that reality and, more deeply, the desirability of traditional family roles for women. It is designed to provide unquestionably needed help to assist women in coping with dual responsibilities. The problem is, [this] approach not only gives recognition to one type of family structure, it actively discourages and thwarts alternative models. It ensures the continuance of women's dual burden.

Williams, 13 NYU Rev L & Soc Change at 377 (cited in note 60). Professor Kay, agreeing with Professor Williams, rejected the rationale in Kay, 1 Berkeley Women's L J at 34 n 173 (cited in note 61).

107 Of course, the ETD does not require that any particular preferential treatment of women be the best means for protecting women. Case 184/83, Ulrich Hofmann v Barmer Ersatzkasse, 1984 ECR at 3075, 1986:1 CMLR at 264. The legal opinion of the Advocate-General supports the ECJ in this regard:

It is sufficient that the national measure which confers an advantage on women in connection with employment should seek to protect them for an objective reason. It is the relationship between its aim (namely, protection) and the objective reason determining that aim (pregnancy or maternity, for example) which justifies the measure, not the absence of alternatives.

Id, 1984 ECR at 3083, 1986:1 CMLR at 253.

108 Id, 1984 ECR at 3083-84, 1986:1 CMLR at 253. The Advocate-General argued for upholding the statute on the ground that the additional leave protected the mother's health by allowing her to recover more fully. While the Advocate-General's rationale comports with the ETD as a matter of law, it will not always comport with the facts. See, for example, the facts in Schafer v Board of Public Educ., 903 F2d 243 (3d Cir 1990) (one year pregnancy leave not necessary to protect mother's health).
not. Consequently, the ECJ effectively emasculated article 2(3)'s "protection of women" requirement.

Further, the German statute may not alleviate the "undesirable pressures to return to work prematurely." If the statute seeks to protect mothers from the "multiple burdens" imposed by motherhood and employment, then shifting childrearing responsibilities to fathers may be necessary. Lengthening the leave period beyond the disability period does not reduce multiple burdens; it merely postpones undesirable pressures. However, giving the fathers the option to take the childcare leave would help relieve women of multiple burdens.109

Although in Hofmann, the ECJ asserted that the ETD is not designed to "settle questions concerning the organization of the family, or to alter the division of responsibility between parents,"110 the ECJ's interpretation of the ETD may in fact frustrate voluntary, individual family choices as to which parent should bear responsibility for rearing a child. Nations and employers should not, by denying men childcare benefits, be permitted to discourage families from vesting fathers with responsibility for childcare. Although making childcare leave available only to women does not prevent men from taking unpaid childcare leaves, it nonetheless exerts subtle economic pressure on families to retain traditional gender roles.111

Finally, the history of EC childcare legislation strongly suggests that Community institutions believe that the ETD should be interpreted to require making childcare benefits equally available to both men and women. Only under such a regime can true equality of opportunity be achieved.

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109 Of course, even if the ECJ had held that gender-based childcare policies discriminate against fathers, Germany still would have had the right to choose the means by which to eliminate that discrimination. Thus, Germany could have extended eligibility to fathers or withdrawn optional leave from both mothers and fathers. Case 184/83, Ulrich Hofmann v Barmer Ersatzkasse, 1984 ECR at 3082, 1986:1 CMLR at 253 (Opinion of Advocate-General). However, given its comparatively strong commitment to childcare benefits for mothers, Germany probably would have extended the benefits to fathers.

110 Id, 1984 ECR at 3075, 1986:1 CMLR at 264.

111 Of course, merely allowing paternity leave would not necessarily affect traditional gender roles in the family. For example, although Sweden grants men paid childcare leave, men have used only two percent of the total parental days taken in Sweden. Allen, European Infant Care Leaves at 249 (cited in note 12). Yet, to the extent that legal rules perpetuate stereotypical gender roles, they should be closely scrutinized. The fact that only two percent of childcare days are taken by fathers does not mean that making such leave equally available to men and women does not represent at least a symbolic victory.
The fact that European women generally fare better than American women on equality issues cautions against exporting United States legal approaches across the Atlantic. Nonetheless, the United States experience strongly counsels against laws that serve to perpetuate stereotypical gender roles. The equal treatment approach has much to recommend it, and it requires employers to make childcare leave equally available to both mothers and fathers.

In the EC, the Hofmann decision emasculates the Equal Treatment Directive's potential for promoting real sexual equality. It may unintentionally perpetuate stereotypical assumptions about the proper childrearing roles of mothers and fathers. Only when Member States and employers are required to make childcare benefits equally available to both mothers and fathers will women gain equality in the workplace.