March 16, 2009

Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict

Julie C Suk

Available at: https://works.bepress.com/julie_suk/2/
Are Gender Stereotypes Bad for Women?
Rethinking Antidiscrimination Law and Work-Family Conflict

Julie C. Suk*

ABSTRACT: The work-family conflict is a significant barrier to women’s equality in the workplace. As many commentators have noted with envy, the United States stands apart from most European countries in its failure to give women a legal right to paid maternity leaves. This Article argues that the United States’ potential for reconciling the work-family conflict is undermined by the predominance of antidiscrimination law in tackling the problem. To expose this American idiosyncrasy, this Article develops a thorough comparative analysis of successful European models for work-family reconciliation. The unique trajectory of U.S. antidiscrimination law has pushed family and medical leave into a single legal regime, leading to maternity leaves that are grossly inadequate and medical leaves that are easily abused. In France and Sweden, by contrast, maternity is given special, generous protections, while sickness leaves are less generous and administered separately. European countries’ laws are paternalistic towards women, protecting the special relationship between a woman and her child. The American amalgamation of family and medical leave is the result of an antidiscrimination framework that combats paternalism and gender stereotypes, such as the assumption that women, rather than men, tend to be primary caregivers. But today, due to the costs and fears of abuse of sick leaves, treating maternity the same as illness forecloses the possibility of generous maternity leaves. This Article critiques both the American antidiscrimination approach as well as the gender-conscious European family-policy approach to synthesize new ways of reorienting the American legal frameworks for family and medical leave.

TABLE OF CONTENTS

Introduction……………………………………………………………………….1
I. The American Approach to Work-Family Conflict……………………5
   A. Family and Medical Leave……………………………………...5
   B. The Antidiscrimination Alternative……………………………..7
      1. Title VII and Maternity Leave………………………….7
      2. The Rise of Pregnancy Discrimination Litigation………..8

* Associate Professor of Law, Benjamin N. Cardozo School of Law – Yeshiva University, & Jean Monnet Fellow, Robert Schuman Centre for Advanced Studies, European University Institute. All translations, unless otherwise noted, are my own.
Introduction

French women are bullied into maternity leave.¹ That’s what the American media suggested in marvelling at the latest French scandal: The French Justice Minister Rachida Dati resumed work five days after giving birth in

---

¹ See Tracy Clark-Flory, Bullying Women into Maternity Leave, salon.com, Jan. 14, 2009.
January, much to the French public’s outrage. After all, French women are entitled to take sixteen weeks of paid maternity leave, and most employers are prohibited from allowing women to work two weeks before and six weeks after childbirth. “[W]omen need to rest after giving birth,” declared French feminists, predicting that Dati’s example would be terrible for all women. Americans, by contrast, found the French public reaction more scandalous than the event itself. Salon.com reacted by defending the woman’s “right to choose to opt out of full maternity leave.” A Wall Street Journal blog noted that “[m]aternity leave . . . is an intensely personal decision. . . New dads who go back on the job quickly, meanwhile, are rarely ever subject to this kind of scrutiny and criticism.” To Americans, the presumption that every woman should take a long maternity leave is bad for women, because that expectation itself is premised on paternalistic gender stereotypes rather than respect for a woman’s choice.

This recent episode offers a glimpse of the differences in American and European ways of thinking about maternity, work, choice, and gender stereotypes, which have shaped very different legal frameworks for addressing work-family conflict. The differences run deep, and explain why the United States has failed so miserably to reconcile work-family conflict, whereas some European countries have succeeded. The work-family conflict has become something of an American media obsession. The United States stands virtually alone in the world in not providing women a legal guarantee of paid leave from work after the birth of a newborn. The popular media frequently looks to

---


3 See C. trav. Art. L 1225-17; C. trav. Art. L 1225-29. These Labor Code provisions apply to private sector employees, and not to the Justice Minister.


5 Tracy Clark-Flory, Bullying Women into Maternity Leave, salon.com, Jan. 14, 2009.


European countries with envy on this issue. Social scientists and legal scholars often recommend that the United States learn from European models for reconciling work and family. Meanwhile, the work-family conflict, as it is currently debated in American law and politics, is at an impasse. This Article explains why, and what to do about it. It shows how the unique trajectory and strength of American antidiscrimination law can undermine U.S. law’s ability to reconcile the work-family conflict. This complicates the possibility of adopting successful European models.

The gap between the United States and Europe on this issue is remarkable: In the United States, legislative proposals for six weeks’ partial wage replacement for parental leave remain controversial. By contrast, the European Commission is now debating a directive that would require all European Union member-states to provide 18 weeks of paid maternity leave, increasing it from the currently required and uncontroversial 14 weeks. President Obama has vocally supported paid family leave and the expansion of childcare programs. While new initiatives to reconcile work-family conflict become realistic possibilities, this Article examines the European experience to


11 Only two states, California and New Jersey, provide some fraction of an employee’s wages for family leave. Although proposals for paid leave have been introduced in the state legislatures of Arizona, Massachusetts, Minnesota, New York, and Pennsylvania, none have succeeded. See Paid Leave Activity in Other States, Paid Family Leave California, at http://www.paidfamilyleave.org/otherstates.html.


expose the entrenched and often unnoticed barriers to work-family reconciliation in the United States.

Comparative law is a useful method because it draws attention to features of U.S. law that we take for granted, which may not strike us if they were not so different from other countries’ legal approaches to the social and economic problems. American scholars and advocates for working families tend to recommend the adoption of policies that Europeans have long enjoyed, especially paid family leave. But they never notice other significant features of European countries’ laws to reconcile work-family conflict: the separation of maternity and parental leave regimes from all other forms of family and medical leave, gender-differentiated entitlements, and paternalism. In France and Sweden, family policies and antidiscrimination law make use of assumptions and understandings about women and gender that might be rejected as “stereotypes” from an American perspective. The European models demonstrate the wisdom of separating maternity leave from the legal regime that administers medical leave, a move that requires the erosion of some tenets of American antidiscrimination doctrine. Furthermore, the European models shed light on the ways in which U.S. law’s primary concern with gender stereotypes can intensify the dynamics that make work and family conflict. At the same time, the European experience highlights the ways in which successful work-family reconciliation policies can reinforce existing gendered patterns of caring and working.

The Article proceeds in six Parts. Part I highlights the limits of the American family leave laws, and describes the growing use of antidiscrimination law in legal attempts to alleviate work-family conflict.

Part II diagnoses the current impasse in debates about legislative reforms to alleviate work-family conflict in the United States. It shows how the costs of sick leave have undermined the legitimacy of parental leave, creating significant barriers to the adoption of paid family leave.

To illuminate the blind spots of American approaches to work-family conflict, Part III examines family and medical leave in European legal regimes, particularly France and Sweden. In these countries, the comprehensive social-


welfare supports for women and families are more generous than, and entirely separate from, the medical leave regimes.

Part IV argues that the United States’ strong resistance to separating family and medical leave stems from the particular trajectory of its antidiscrimination law. Unfortunately, the result is a maternity leave entitlement that is not generous enough, and a medical leave regime that is arguably too generous and costly to administer.

Part V deepens the comparison between the United States and European countries by focusing on the European regimes’ reliance on gender stereotypes to reconcile work-family conflict.

Part VI explores further problems generated by the American antidiscrimination approach to work-family conflict. It argues that the success of “family responsibilities discrimination” litigation can reinforce the dynamics that make work and family conflict. At the same time, the European models resolve work-family conflict without disrupting the gendered patterns of working and caring.

The Article concludes by drawing lessons from the comparison between the United States and Europe. The comparison reveals how difficult it would be to transplant the European policy models without rethinking other features of the American legal order that are taken for granted, namely, our antidiscrimination tradition. The antidiscrimination framework needs to be revamped in order to disaggregate family and medical leave, but the challenge will be to do so in a way that avoids the European entrenchment of gender roles.

I. The American Approach to Work-Family Conflict

A. Family and Medical Leave

In the United States, the Family and Medical Leave Act (FMLA) entitles covered employees to 12 weeks of unpaid leave annually to care for a newborn baby or adopted child, to care for an ill family member, or to care for one’s own serious health condition.\(^\text{17}\) The employee is entitled to be restored to the same job upon return, or to a job with equivalent pay, benefits, and other terms and conditions of work.\(^\text{18}\) The federal statute does not distinguish between maternity and paternity leave. It also provides the same amount of unpaid leave per year for an employee’s own serious illness as it provides for parental leave. In so doing, it does not distinguish between the medical incapacity to work resulting from pregnancy and childbirth from other medical conditions that might require an employee to be absent from work.

Legal scholars have criticized the FMLA for being too limited to be significantly helpful to most American workers facing conflicts between work and family.\(^\text{19}\) First, the statute defines “eligible employee” in a way that excludes

\(^\text{17}\) 29 U.S.C. § 2612(a)(1).


many American employees from coverage. To be eligible, an employee must work for an employer who employs at least 50 people within a 75-mile radius. Furthermore, in order to be entitled to leave under the FMLA, an employee must have worked for the same employer for 1,250 hours in the previous year—which excludes part-time workers, even those who work up to 25 hours a week. According to a large-scale study undertaken by the Department of Labor in 2000, 89.2 percent of U.S. establishments are not covered by the FMLA. As a result, only 58.3 percent of American workers work for covered employers, and even fewer are actually covered by the statute, due to the minimum hours provision.

Second, the FMLA is unhelpful, even to covered employees, because the leave guaranteed by the statute is unpaid. A National Study of Employers funded by the Alfred P. Sloan Foundation and the Families and Work Institute reported that only 16 percent of employers offer full pay during periods of maternity-related leave. Thus, many eligible employees who are covered by the statute do not take the leave to which they are entitled. According to the Labor Department’s 2000 Surveys, 3.5 million employees reported that they needed leave in the prior 18 months but could not take it. The most commonly cited reason for not taking leave was the inability to afford it, cited by 77.6% of those who reported needing leave. Indeed, 87.8% of these leave-needers reported that they would have taken leave if some pay had been available. Of the employees who needed leave but could not take it, 9.3% were those who needed leave following the birth of a newborn or adoption of a child. Although the gender-neutrality of the statute makes it possible for both the mother and the father of a newborn each to take 12 weeks off to take care of the baby, (leading to


23 Id.
24 See Ellen Galinsky, James T. Bond, & Kelly Sakai, National Study of Employers 20 (2008). The study included a sample of 1,100 nationally representative employers with 50 or more employees, most of which were covered by the FMLA. The employers studied included for-profit enterprises (77 percent) as well as non-profit organizations (23 percent). See id. at 3.
25 Balancing the Needs, supra note__, at § 2.2.
26 Id.§ 2.2.4.
27 Id.
28 Id. § 2.2.2.
24 weeks of parental care for the child), these statistics confirm the common-sense conclusion that very few families are able or willing to live for the first 6 months of a newborn’s life without a salary, despite the job security protection guaranteed by the FMLA.

B. The Antidiscrimination Alternative

Perhaps due to the limited nature of family leave laws in the United States, the FMLA and state equivalents are not the main mechanism by which American workers have pursued the reconciliation of the work-family conflict. Rather, Title VII’s prohibition on discrimination on the basis of sex has historically played an important role in enabling women to obtain maternity leaves. Furthermore, there are two important developments in the last fifteen years that have established antidiscrimination law as an important tool in addressing work-family conflict. First, pregnancy discrimination claims have been on the rise. Second, more and more Title VII cases allege sex discrimination based on the adverse treatment of employees who have family responsibilities.

1. Title VII and Maternity Leave

Although the FMLA only guarantees unpaid leave, some 52 percent of female employees in large enterprises receive some wage replacement during maternity leave under the employer’s temporary disability insurance plan. This form of paid maternity leave is an achievement of the Pregnancy Discrimination Act, a statute that was passed in response to Title VII litigation in the 1970s.

It is worth noting that, unlike some European countries like France, temporary disability wage replacement existed prior to paid maternity leave. In France, the state provided financial assistance to women during the final weeks of pregnancy and following childbirth prior to the establishment of sickness insurance regimes. In the United States, it was the other way around. In the 1940s, a handful of American states began to provide temporary disability insurance. When the temporary disability regimes were established, there were no programs to cover new mothers’ pregnancy, recovery from childbirth, or newborn care.

As of 1974, California, like four other states, provided a disability insurance system for private employees temporarily unable to work due to an illness or injury not covered by workmen’s compensation. The insurance system was paid for by employee contributions. The scheme excluded disabilities attributable to normal pregnancy. Pregnancy was only covered for those who experienced pregnancy complications, such as ectopic pregnancies or miscarriages.

Antidiscrimination law was seen as a way of obtaining wage replacement for temporary work absences due to pregnancy. In Geduldig v. Aiello, pregnant employees alleged that California’s disability insurance system violated the Equal Protection Clause: By excluding pregnancy-related disabilities, they

claimed, the scheme discriminated against women. According to the plaintiffs, normal pregnancy was “functionally indistinguishable” from other disabilities, because it required medical care, hospitalization, anesthesia, surgical procedures, and genuine risk to life.\textsuperscript{30}

But the Supreme Court rejected these arguments, holding that California’s disability insurance program was consistent with Equal Protection because it did not exclude anyone from benefit eligibility because of gender. Two years after Geduldig, the Supreme Court held that the exclusion of pregnancy from a private employer’s disability plan did not violate Title VII. In General Electric v. Gilbert, the Court relied on similar reasoning, noting that the exclusion of pregnancy from an employer plan was not discrimination, but rather, a rational decision about costs.\textsuperscript{31}

In Geduldig and Gilbert, the plaintiffs developed the theory that pregnancy was the same as other temporary medical conditions that disabled employees, in order to enable pregnant women to obtain a benefit that was already established in the legal order for temporary disabilities. Obviously, the argument would not have been necessary if pregnant women had already been separately protected by the state, as they were in France. The argument grew out of these particular historical circumstances, leading to today’s received wisdom that sick leave must cover pregnancy and vice versa.

When Congress passed the PDA in 1978, it did so with Geduldig and Gilbert in mind. It amended Title VII to clarify the definition of the language “because of sex” to include “on the basis of pregnancy.”\textsuperscript{32} The PDA was intended to prohibit all forms of discrimination on the basis of pregnancy, such as discriminatory failures to hire and promote. But it was also very explicit in spelling out one form of employer conduct that would surely violate Title VII: the exclusion of pregnancy from sickness and disability programs:

\begin{quote}
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[.]
\end{quote}

Thanks to antidiscrimination law, women who work for employers with such programs can get some wage replacement during the time they take off for pregnancy and childbirth.

2. The Rise of Pregnancy Discrimination Litigation

\textsuperscript{30} These similarities are highlighted in the dissenting opinion’s quotation of the Appellee’s brief, which cited the American College of Obstetricians and Gynecologists’ Policy Statement on Pregnancy-Related Disabilities.


\textsuperscript{32} 42 U.S.C. 2000e(k).

\textsuperscript{33} 42 U.S.C. 2000e(k).
Today, the PDA continues to play a significant role in protecting the social-welfare benefits that women receive from their employers. According to a recent report by the National Partnership for Women & Families, pregnancy discrimination claims have been on the rise for the last fifteen years. From 1992 to 2007, the charges filed by individuals alleging pregnancy discrimination increased by 65%. About 75% of the states also had increases in charges between 1996 and 2005. The study also found that the growth in pregnancy discrimination claims during this time period was largely fueled by charges filed by women of color. The FMLA was passed in 1993; thus this increase coincides with the time during which some Americans have enjoyed a federal statutory right to unpaid parental leave.

A significant component of today’s PDA litigation consists of disputes about benefits. Settlements in recent pregnancy discrimination cases have required employers to grant seniority credit to women for the time that they spent on leave for pregnancy or maternity for the purposes of retirement benefits. In one of the largest settlements reached by the EEOC, Verizon agreed to pay $49 million to settle a class action that challenged Verizon’s practice of denying women service and pension credits for pregnancy and childcare leaves. The EEOC had brought suit under the Pregnancy Discrimination Act. This Term, the Supreme Court has heard oral arguments in AT&T v. Hulteen, a case in which female plaintiffs challenged AT&T’s practice of denying credits for pregnancy and maternity leaves taken prior to the passage of the Pregnancy Discrimination Act. The Verizon settlement and the Hulteen case highlight the important role played by the Pregnancy Discrimination Act in protecting women’s employment benefits from disadvantages that could arise from childbearing.

Although the Supreme Court in Geduldig attempted to draw a sharp line between antidiscrimination law, on the one hand, and the expansion of social welfare, on the other, the Pregnancy Discrimination Act has blurred the line. Employment discrimination litigation under the PDA, and the cases that precipitated its passage, enables women to get benefits that the social welfare state provides in other countries. The PDA experience shows how important employment discrimination law has been to the American strategy for reconciling work-family conflict.

3. The Emergence of “Family Responsibilities Discrimination”

Continuing in this tradition, the last decade has given rise to Title VII litigation developing a new legal theory of discrimination on the basis of sex


35 Id. at 3.

36 Id. at 5.

37 See Amy Joyce, Verizon Bias Suit Deal Sets Record, Wash. Post, June 6, 2006, at D06.

38 See Hulteen v. AT&T Corp., 498 F.3d 1001 (9th Cir. 2007).
known as “family responsibilities discrimination” (FRD). When the employer treats an employee, male or female, adversely because of his or her family responsibilities, such practices can constitute FRD in violation of Title VII. Feminists and advocates for work-life balance are increasingly turning to Title VII in their attempts to achieve legal protection for employees with family responsibilities: In the last decade, cases alleging discrimination on the basis of family responsibilities have increased fourfold. This increase, like the increase in pregnancy discrimination claims, is all the more significant in light of a 23 percent decrease in employment discrimination cases generally. A recent empirical study of FRD cases in the federal courts examined 613 cases that were found in legal databases, and professional and general news media sources. This study suggests that FRD cases have a greater than 50% win rate, which is significant when compare to plaintiff win rates in all other causes of action in the federal courts (around 20%), and to the 1.6% win rate in race and gender discrimination cases. The “family responsibilities discrimination” theory of Title VII was recognized by the EEOC in 2007 when the agency issued an enforcement guidance on “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.”

Legal scholars have articulated and debated the theories behind the concept of FRD. Joan Williams, in her influential book, Unbending Gender: Why Family and Work Conflict and What To Do About It, argued that the work-family conflict should be seen as a problem of sex discrimination. Williams’ theory really consisted of two very different accounts of the relationship between the work-family conflict and sex discrimination. The first account is the “masculine ideal-worker” theory of family responsibilities discrimination. For Williams, the work-family conflict is a consequence of designing the workplace around masculine norms. Employers tend to envision an ideal worker who is able to work full-time, move when the job requires it, and take little time off. This ideal is “masculine” because the ability to be an “ideal worker” usually depends on the worker’s access to a stay-at-home spouse who raises the children, and very few women fit this description. Thus, when an employer requires


40 Id. at 7.

41 Id. at 6.

42 Id. at 6.

43 Id. at 13


45 See Williams, supra note __, at 271.

46 See id. at 5.
employees to perform as “ideal workers,” they are imposing masculine norms that are difficult for women to achieve, and thereby discriminating against women.\textsuperscript{47} Williams suggested that the disparate impact theory could be used to challenge masculine employment norms, including employers’ scheduling demands that can only be met by a worker without caregiving responsibilities.\textsuperscript{48} Many scholars have seen great potential in the disparate impact cause of action for challenging family-unfriendly employer policies.\textsuperscript{49}

The second account that Williams developed is the “maternal wall” theory of FRD. The “maternal wall” refers to the hostility experienced by women when they return to work after having a baby. Employers assume that women who have children are not going to work as hard as men with children or women without children. Based on the simple fact of motherhood, rather than work performance, women with young children are passed over for promotions and other opportunities.\textsuperscript{50} The focal point of the “maternal wall” theory is the gender stereotype: Typically, an employer presumes that a mother, particularly a mother of a young child, will have more family responsibilities than other workers, and will prioritize her family responsibilities over her work and thus perform worse at work.

In practice, the “maternal wall” theory, rather than the “masculine ideal-worker” theory, has dominated FRD litigation under Title VII. In the 1990s, women began bringing Title VII actions after being subject to adverse employment actions based on the employer’s stated or implied assumptions about motherhood. For example, in a 1997 Title VII case, a female plaintiff alleged sex discrimination when she was denied a promotion because she was a married woman with children. In that case, there was direct evidence that the supervisor told her that he would not consider her for the promotion because he believed that a woman should stay at home with her family, and that the job would require too much traveling for a married mother.\textsuperscript{51} In denying the employer’s motion for summary judgment, the district court noted that this statement did not require “any leap of logic or inference by a jury to conclude that discrimination occurred.”\textsuperscript{52}

Although women bring the vast majority of claims alleging discrimination on the basis of caregiving responsibilities, men have also brought

\textsuperscript{47} See id. at 65.

\textsuperscript{48} See id. at 104-05.


\textsuperscript{50} See id. at 69-70.


\textsuperscript{52} Id. at 434.
For instance, a male plaintiff ultimately won a jury verdict in a § 1983 action alleging sex discrimination against the state of Maryland. Plaintiff Knussman, a state police employee, attempted to take a paid sick leave under a Maryland statute that allows state employees to use paid sick leave to care for a newborn. The statute allows “primary care givers” to use up to 30 days to care for a newborn, and “secondary care givers” up to 10 days. Knussman was granted two weeks’ leave, but was denied the 30-day paid leave because the employer claimed that he was not a primary care giver. Knussman’s wife was recovering from a medically complicated birth, and Knussman claimed that he was doing most of the caregiving for the baby. However, his employer insisted that “God made women to have babies, and unless [he] could have a baby, there is no way [he] could be primary care [giver]” unless his wife was “in a coma or dead.”

These cases illustrate courts’ conception of “family responsibilities discrimination” as sex discrimination. Treating an employee with family responsibilities adversely amounts to sex discrimination when the employer relies on gender stereotypes about caregivers. Gender stereotypes include the assumption that women can no longer be good workers once they become mothers, or that men are not caregivers and are therefore lying if they demand the parental or family care leave to which they are statutorily or otherwise entitled.

In 2007, the EEOC adopted an enforcement guidance on family responsibilities discrimination. The enforcement guidance is limited to “Unlawful Disparate Treatment for Workers with Caregiving Responsibilities;” it says nothing about the disparate impact theories of discrimination against such workers. The EEOC guidance characterizes gender stereotyping as the touchstone of these cases. “[W]omen with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less competent than other workers, regardless of how their caregiving responsibilities actually impact their work.” For men, the opposite stereotype can be applied: “Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts.”

The enforcement guidance provides narrative examples of employer actions against workers with caregiving responsibilities that would violate Title VII. In these examples, the employer engages in unwarranted gender stereotyping that bears no correspondence to the actual behaviors of the employee in question. Sex discrimination is diagnosed when an employer assumes that a woman with children will not meet the job’s duties and expectations, either falsely or without giving the woman a chance to prove otherwise. In one example, a female job candidate is asked several questions about her plans to balance work and childcare, and not hired due to the

53 Still, supra note __, at 8.
54 Knussman v. Maryland, 272 F.3d 625, 630 (2001).
55 Equal Employment Opportunities Commission, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, at I.B.
56 Id.
employer’s belief that being a mother is not compatible with the job, despite the candidate’s assurances that she planned to share caregiving responsibilities with her husband.57

The American approach to work-family conflict can be summarized as follows: FMLA protects employees’ job security if they want to take up to 12 weeks off for childbirth and care of a newborn, but the leave that is guaranteed is unpaid. The main mechanism that employees are increasingly using to assert their attempts to combine work and family is employment discrimination litigation under Title VII. The remainder of this Article criticizes the unintended consequences of antidiscrimination law’s role in addressing work-family conflict in the United States.

II. The American Impasse in Family Leave Reform

To understand these unintended consequences, we need to grasp the current impasse in American debates about family leave reform, a central policy issue that affects work-family conflict. I will argue that this impasse is an outgrowth of the antidiscrimination framing of work-family issues. While litigation alleging pregnancy and caregiver discrimination is on the rise, political debates about legislative and regulatory reform of family and medical leave are going nowhere. Paid family and medical leave bills have been introduced in Congress several times over the last few years,58 with no success.

Feminists and advocates of working families urge the adoption of new laws guaranteeing paid leave for all of the reasons for which covered employees can now take FMLA leave. Employers and industry groups tend to oppose any expansion of family and medical leave, including paid leave, on the grounds that existing FMLA entitlements are already too burdensome and costly. Feminists and advocates of working families tend to oppose any reforms that make it more difficult for employees to take any form of FMLA leave, including such as medical certification rules. Employers and industry groups often argue that FMLA leaves are already too difficult and costly to administer, and they fear the skyrocketing costs of paid leave. For the most part, despite the myriad proposals on the federal and state level to introduce paid family and medical leave, the opposition by industry groups has been too strong to enable these proposals’ success.

Both advocates for working families and industry groups tend to treat “family and medical leave” as a legal unit that cannot be disaggregated. Nobody on any side of the political spectrum suggests that we treat these two types of leave differently in deciding whether and how to provide paid leave. In April 2008, the Family Leave Insurance Act was introduced in the House of Representatives, proposing a program that provides for 12 weeks of paid leave for the birth of a child, placement of an adopted or foster child, caring for a child, parent, spouse, domestic partner, sibling, or grandparent who has a serious medical condition, to care for one’s own serious medical condition, or exigencies

57 See id. At § 3, Example 2.

arising from the deployment of a member of the armed forces. Nearly-identical bills were introduced in the Senate and the House of Representatives, with no success, in 2007 and 2005.

To understand the barriers to reform, industry groups’ opposition to FMLA expansion must be understood. As articulated, opposition to FMLA expansion tends to be premised on the unmanageable costs of administering the existing FMLA entitlements. Employers are reluctant to take on the additional costs that FMLA expansion would impose on them, largely because they experience existing costs of FMLA compliance as excessive. Take, for example, a statement by the so-called National Coalition to Protect Family Leave, an organization that consists almost exclusively of industry associations including the National Association of Manufacturers and the Society for Human Resource Management:

> While we understand that some members of Congress are interested in providing additional work flexibility to employees and their families, or providing these benefits to more employees and their families, the Coalition believes that the FMLA regulations need to be improved before expansion of the Act or other mandates are considered. Expanding a law that is not working properly will only exacerbate the problems currently experienced by both employers and employees. Similarly, we are opposed to amending the FMLA to make leave paid. We believe this will create a strong incentive for employees to look for opportunities to take leave that is not consistent with the balance of interests established in the Act.

Understanding the costs derided by industry groups, and seeking to minimize them, might thus remove some of the political barriers to paid family leave. This Part will establish that these costs largely arise from the medical portion of the FMLA. Yet, they are invoked to oppose expansion of both medical and family leave.

In November 2008, the Department of Labor promulgated regulations adopting new rules governing the administration of the FMLA. The regulations responded to concerns that have been raised since Senate hearings on the FMLA

59 H.R. 5873, Family Leave Insurance Act of 2008 (110th Cong.).
60 S. 1681, Family Leave Insurance Act of 2007 (110th Cong.)
61 H.R. 3192, Paid Family and Medical Leave Act of 2005 (109th Cong.)
62 A full list of the coalition’s members is available at http://www.protectfamilyleave.org/about/memroster.cfm. They include


in 2005 and the DOL’s Notice of Proposed Rulemaking and Request for Information in late 2006. Debates about the new regulations provided the opportunity for data to be collected regarding patterns of FMLA use and costs. It appears that employers’ most serious complaint about the FMLA arises in opposition to intermittent leaves, most often taken to care for an employee’s own illness, rather than to care for babies or other family members.

Most FMLA leaves are medical, rather than family leaves, and medical leaves tend to impose costs that family leaves don’t. In 2000, the Department of Labor produced a report studying patterns of FMLA leave taking. It found, consistent with findings in 1996, that the majority (52.5%) of FMLA leaves are taken for the purposes of caring for the employee’s own serious health condition. In short, FMLA functions primarily as a national unpaid sick leave policy, rather than as a source of pregnancy, maternity, or paternity leaves. As Michael Selmi has noted, this reality is surprising in light of legislators’ focus on sex equality and the need for better balance between work and family when the statute was enacted.

The administration of leaves for employees to care for their own serious illnesses raises two significant categories of costs that do not arise in the administration of leaves related to the birth or adoption of a child. First, since the FMLA entitles employees to take the 12 weeks of annual leave intermittently when medically necessary, there are costs arising from the unforeseeability of these leaves, the unpredictability of lengths of time for which these leaves are taken. For childbirth and newborn care, by contrast, employers usually have advance notice of at least 60 days, and the leaves are usually taken for a predictable, set period of time. In fact, the statute does not entitle parents of healthy newborns to take intermittent leave, although they may do so if the employer agrees. Second, medical leaves for the employee’s own illness raises the potential for abuse and the accompanying suspicion of abuse, which do not


69 Department of Labor, Balancing the Needs of Families and Employers (2000).

70 Id. at __.


73 Employees certify their own need for medical leave, and employers experience this as a system of employee absence at will. See National Coalition to Protect Family leave, Unintended Consequences of the FMLA and its Regulations § 3 (2008), available at www.protectfamilyleave.org.
exist in the context of childbirth and newborn-care leave. Obviously, abuse of FMLA leave imposes costs on employers. But the potential for abuse also imposes additional costs, because employers must verify the legitimacy of leaves through costly transactions with healthcare providers.

Many industry groups reported to the DOL that a significant percentage of employees have medical certifications on file for a chronic serious health condition that would enable them to take unscheduled intermittent leave. The National Association of Manufacturers’ survey reported that 25 percent of workers eligible for FMLA leave had such certifications. Many airline companies reported that 50 percent or more of their flight attendants had medical certification for FMLA leaves. A U.S. Chamber of Commerce survey reported that large companies have a 15 percent certification rate. Verizon reported rates as high as 44 percent in some of its divisions, and the City of New York reported a 32 percent rate for 911-call-takers. 74

When employees take leave to care for their own episodic conditions, the lack of notice and the need to keep track are costly for employers, even when these leaves are taken legitimately. This is due to the nature of intermittent health conditions, as compared to pregnancy and childbirth. An employee with an episodic condition can’t predict when it will flare up and how long the incapacity will last, unlike most pregnant women, who know their due dates and likely recovery periods. When a significant percentage of the employees in a given workplace have medical certifications on file for intermittent leave, keeping track of the leaves taken can become time-consuming for human resource specialists and thus costly for employers.

Furthermore, sick leave opens up possibilities for abuse that do not arise in the context of childbirth and newborn-care leave. Any system of medical leave can be abused by healthy workers who “call in sick” to get some time off of work. “Calling in sick” is as American as apple pie. Sympathetic characters do it on popular American television shows,75 and Wikipedia has a wikiHow entry advising employees on “How to Call in Sick when You Just Need a Day Off.”76

Employers’ concerns about FMLA abuse arise largely in the context of short, unforeseen leaves for permanent episodic conditions, such as migraines, asthma, or mental disorders such as depression or anxiety.77 The FMLA regime entitles employees to take leaves intermittently when necessary to care for episodic serious illnesses, but does not entitle employees to take intermittent leaves to care for healthy babies.78 The FMLA and regulations do not require

74 Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information; Proposed Rule, supra note __, at 35622.

75 See 30 Rock episode [cite]


77 Statement of Sue Willman, 2005 Senate Hearings, supra note __, at 27.

78 As the regulations make clear, an employee wishing to take intermittent leave to care for a healthy baby can only do so with the consent of the employer, in contrast to employees whose health condition necessitates intermittent leave, who may take such
the employer to get medical certification for each absence due to an episodic medical condition. It enables the employer to demand medical certification confirming the episodic condition, but then leaves it to the employee to determine when he needs time off to care for that condition. This naturally creates opportunities for abuse, as well as employer suspicions about abuse that would never arise in the context of pregnancy or parental leaves taken to care for newborns. Pregnancy is usually visible, and the birth of a new child is easily verifiable, so the incentives for abuse of FMLA in this context are very low.

Nonetheless, any system of medical leave must be designed with institutional mechanisms to minimize and deter abuse. One way to minimize abuse is to require the employee alleging a serious illness to see a doctor. Many provisions of the new rule were designed to minimize employee abuse, by requiring more doctor visits and enabling easier access by employers to medical information. The new rule now refines the definition of “serious health condition.” Now, an illness is only sufficiently serious if it involves at least three consecutive days of incapacity plus two visits to a health care provider within thirty days of the onset of the condition. Previously, two doctor visits within thirty days were not required. For intermittent conditions, the new rule requires that the employee with certification for intermittent leave must visit a health care provider at least twice a year to certify that the episodic condition still exists and is serious enough to warrant leave. Furthermore, the rule also now makes it possible for the employer’s human resources professional, leave administrator, or management official to contact the employee’s health care provider directly for purposes of clarifying and authenticating the medical certification. Prior to the adoption of the new rule, employers had to communicate with the employee’s health care provider through a health care professional, which increased costs of FMLA administration for employers.

Opponents and critics of these new provisions have complained that they increase the burdens on employees, and make it more difficult for them to take legitimate leaves. Employee groups opposed the redefinition of “serious health condition” as requiring two doctor visits within 30 days, pointing out that it can often take over 30 days to get an appointment with a specialist. As for the requirement that intermittent conditions be certified twice a year, one criticism was that this would be too costly for many employees. The burdens and costs leave whenever necessary, regardless of whether the employer consents. See 29 C.F.R. 825.202.

79 29 C.F.R. 825.306(7).
80 29 C.F.R. 825.115(a)(1).
81 29 C.F.R. 825.115(c)(1).
82 29 C.F.R. 825.307(a). Note that, under the new rule, the direct supervisor of the employee is prohibited from contacting the employee’s health care provider for purposes of clarifying and authenticating the medical certificate. Id.
associated with ways of verifying an employee’s serious health condition are
directly connected to some of the unique problems in the American healthcare
system – the delays in procuring appointments with medical professionals, and
the costs to the employee of seeing a doctor to certify an episodic condition, in a
system where healthcare is expensive and all too often uninsured.

The most costly and controversial aspects of the FMLA are difficult
problems that arise because of sick leave. These issues do not bear directly on
women’s ability to reconcile work and family or gender equality. Nonetheless,
organizations devoted to the interests of women and families tend to be as ardent
in support of existing medical leave rights under the FMLA as they are in support
of rights that directly affect work-family balance. The amalgamation of family
and medical leave is so entrenched in the American legal landscape that
advocates for working families seem unable to advocate for one without the
other. Efforts to curb abuse of sick leaves are often depicted as attacks on the
American family, even though the interests of employees with episodic
conditions are not the same, and may sometimes conflict, with those of
employees with caregiving responsibilities.

The National Partnership for Women & Families’ (NPWF) response to
the new FMLA regulations is illustrative. This organization, formerly the
Women’s Legal Defense Fund, played an important role in drafting the FMLA.
Prior to the FMLA, it worked on issues of pregnancy discrimination and sexual
harassment. NPWF describes its work as “changing the world in ways that make
life better for women and families.” NPWF was one of the most vocal critics of
new rules that will mostly affect those taking leave to care for their own illnesses,
particularly intermittent conditions. NPWF viewed the increased medical
certification requirements and the employer’s access to the employee’s medical
information as burdensome for workers, and therefore objectionable, without
distinguishing between the leave-takers it would burden the most (e.g sick leave
takers) and those it would not burden (e.g. newborn care leave-takers).
Immediately following the rule’s adoption, NPWF stated that “the new FMLA
regulations for workers take us in the wrong direction,” and that they were
harmful for “workers and their families.”

85 About Us, History/Timeline, Taking Action Since 1971, National Partnership for

86 For instance, the National Partnership opposed the requirement of twice-annual
medical certifications for intermittent conditions. See 73 Fed. Reg. 67949. The National
Partnership also opposed the change in definition of “serious health condition.” 73 Fed.
Reg. 35568.

87 See Written Testimony of Debra Ness, Subcommittee on Workforce Protections,
Hearing on the Family and Medical Leave Act, April 10, 2008, available at nationapartnership.org [get site]

88 FMLA Update: DOL Releases Two-Part Regulations Helpful for Military Failies,
gulations
Another example is the response of the National Women’s Law Center (NWLC), a highly visible legal advocacy group in Washington devoted to the advancement and protection of women’s rights. In response to the Labor Department’s Request for Information on the new FMLA Rule, the NWLC issued a statement objecting to the revised definition of “serious health condition” as well as changes to the certification requirements.\textsuperscript{89} Similarly, during the debates about the proposed rule, many other women’s groups joined the National Partnership for Women and Families and the National Women’s Law Center in opposing the definition of “serious health condition,” wanting to leave it as broad as possible. These groups included the Women’s Employment Project at Golden Gate University, The Mothers Movement Online, Women’s City Club of New York, and the University of Michigan’s Center for the Education of Women.\textsuperscript{90}

The received wisdom is that anything that burdens sick leave necessarily hurts women and families. But sick leaves raise a unique set of evidentiary issues that then raise costs, in part due to features of the U.S. healthcare system, including concerns about employee privacy. This leads to controversies about how best to allocate those costs. This Pandora’s box is not opened by a policy regime that is limited to administering leaves for childbirth and newborn care, which are easy to verify and unlikely to be falsely claimed. Paid leave for childbirth and newborn care is extremely important to employees seeking to continue their labor market participation and raise children. Yet, Americans have tied the fate of parental leave to the fate of medical leave, which is much more costly and controversial.

III. European Models: The Social Welfare State’s Support for Parenthood

European approaches to family and medical leave can bring American idiosyncrasies into sharper focus. They show that it is possible to be very generous with maternity leave without being equally generous with medical leave. In European countries, there are comprehensive social welfare policies designed to promote the well-being of children raised by their mothers and fathers. Maternity and parental leave are treated more generously than all other forms of family leave as well as sick leave. I provide an overview of EU law, as well as French and Swedish law on family and medical leave. Both EU law and the national examples highlight the extent to which the state generously supports citizens’ ability to work and raise their children. Although these social welfare states also provide paid sick leaves and family leaves for other forms of caregiving (such as caring for sick parents), such leaves are separately categorized and not as generous. In Europe, controversies about the costs and abuses of sick leave are separate political and legal problems from maternity and parental leave. European family and sick leave policies expose the dysfunction of a single regime that ties family and medical leave together.


\textsuperscript{90} 73 Fed. Reg. 35568-69.
A. The European Directive

Many countries’ laws on maternity leave preceded the adoption of a 1992 European directive which imposed minimum standards on the member-states regarding the legal protection “safety and health at work of pregnant workers and workers who have recently given birth or are breast-feeding.”91 The 1992 directive required at least 14 weeks’ maternity leave “in accordance with national legislation and/or practice”92 with regard to arrangements for pay.93 The article on maternity leave also stipulates that the 14 weeks of leave “must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and practice.”94 The directive also requires member-states to adopt measures to ensure that pregnant workers can receive paid time off work to receive prenatal care.95 To protect pregnant workers from discrimination, the directive also requires member states to adopt laws protecting the dismissal of employees from the beginning of their pregnancy until the end of their maternity leave except in “exceptional cases not connected with their condition.”96

The remainder of this Part examines the maternity and family policies of France and Sweden, which offer two different examples of European social welfare approaches to the work-family conflict, both of which are consistent with the minimum requirements laid out in the EU directive. In both France and Sweden, the work-family conflict is not merely a matter of employment law governing the rights of employees and the duties of employers. In addition to rules governing leaves, job security protections, and non-discrimination in employment, the legal regimes governing social security, education, and public health also play significant roles in easing work-family conflict in both countries. These coordinated regimes are designed to protect maternity, promote parenthood, and support the nuclear family.

B. Family Policy in France

1. Maternity Leave

The Labor Code entitles female employees to various absences from work due to pregnancy and maternity. These entitlements are more extensive than those available to employees who are otherwise temporarily disabled by physical illness. First, female employees are entitled to maternity leaves totaling

92 Id. art. 8.
93 See id. art. 11.
94 Id. art. 8.
95 Id. art. 9.
96 Id. art. 10.
sixteen weeks, of which six may be taken before the due date. During the maternity leave, the employment contract is suspended, but the leave period is counted as time worked for the purposes of rights held by the employee by virtue of seniority. Furthermore, the periods of leave, both before and after the birth, are augmented if the employee is expecting more than one baby. If the woman already has two or more children, the maternity leave for the third child, both before and after the birth, is increased such that the total amount of leave is 26 weeks. At the end of the leave, the employee is entitled to “her previous job or a similar job with, at the very least, equivalent pay.” To support women’s reintegration into the workplace after this required absence, the law entitles the woman, when she returns to work, to an “interview with her employer with regard to her professional orientation.”

A portion of the maternity leave is mandatory for both the employee and the employer. American women, for example, now-Senator Kirsten Gillibrand, are applauded for working until they go into labor. French women are normally not permitted to do so. An employee may, with the permission of the medical professional who is monitoring her pregnancy, shorten the leave prior to birth to three weeks, in which case the period of leave to which she is entitled following the birth is augmented. In a similar paternalistic vein, the Code prohibits employers from employing pregnant women and postnatal women too close to the time of giving birth. Article L 1225-29 provides, “It is prohibited to employ the employee during a period of eight weeks total before and after childbirth. It is prohibited to employ the employee in the six weeks following childbirth.” This provision effectively prohibits the employer from allowing pregnant employees to work in the two weeks preceding the due date. By making eight weeks of maternity leave mandatory, the Labor Code sets aside eight weeks during which female employees cannot choose to work, thereby making it impossible for employers to encourage women to take shorter leaves or to reward those who forego leave.

The Labor Code does not require the employer to pay the employee during the maternity leave. Rather, female employees are guaranteed wage

98 Id.
103 Then-Representative Gillibrand (D-NY) received a standing ovation from her colleagues in the House of Representatives for having worked right through the very day on which she gave birth. See Danny Hakim & Nick Confessore, Paterson Picks Gillibrand for Senate Seat, N.Y. Times, Jan. 24, 2009.
replacement through a regime known as “Maternity Insurance,” within the Social Security Code. Maternity insurance is not merely a wage-replacement program; it is a comprehensive package of state benefits to support motherhood. It covers, first and foremost, all the medical and pharmaceutical expenses related to pregnancy, childbirth, and postpartum, including laboratory tests and hospitalization. Maternity insurance also includes a daily cash benefit to replace wages for six weeks before the due date and ten weeks after, provided that the woman has stopped paid work during this period, with augmentations for multiple births or the birth of a third child. This provision also reiterates the rule that the pregnant employee must stop working for at least eight weeks around the time of the birth.

Another indicator of the law’s recognition of the special medical circumstances of maternity is found in the provisions of the Labor Code and the Social Security Code that set rules in the event of unforeseen birth outcomes. For instance, the Labor Code provides for extra time off, and the Social Security Code provides for payment on those days, if the baby is hospitalized beyond the sixth week of birth. The Labor Code also provides that, in the event that the birth occurs more than six weeks before the due date, and requires the baby’s postnatal hospitalization, the maternity leave is prolonged, lasting the number of days from the date of birth to the beginning of the period when the employee would have been entitled to begin her leave. The Labor Code also provides for the augmentation of maternity leave when a medical certificate confirms a “pathological state” resulting from pregnancy or childbirth.

2. Pregnancy Protection

Female employees have the right to be absent for prenatal care. In France, prenatal care is obligatory under the Public Health Code, and thus, Labor Code art. L.1225-16 provides that women are entitled to miss work to undergo obligatory medical tests for the monitoring of their pregnancies. Employers bear the costs of these absences, under the provision, which states that these absences cannot lead to a decrease in wages, and the time must be counted toward the period of work used to calculate paid vacation time or other legal

---

106. C. sécurité sociale L 331-2.
107. C. sécurité sociale L 331-3.
108. *Id.*
112. C. santé public, art. L. 2122-1.
rights that are dependent on the amount of time that the worker worked or her seniority.  

Like U.S. law, the French Labor Code prohibits discrimination against pregnant workers in hiring, firing, and all other terms and conditions of employment. Pregnancy is one of many protected categories in the antidiscrimination provisions of the Labor Code. But the antidiscrimination provisions are not frequently litigated in France, and the general antidiscrimination provision is a small and relatively insignificant part of the larger package of legal protections conferred on pregnant employees.

In addition to the general antidiscrimination provision, which prohibits discrimination on the basis of various characteristics including pregnancy, Article L1225-1 of the Labor Code specifically provides that the employer “must not take into account a woman’s state of pregnancy to refuse to hire her, or to end her work contract during the course of a trial period,” or notwithstanding the exceptions explicitly authorized in the Code, to change her conditions of work. Thus, the Code also explicitly prohibits the act of researching information regarding the woman’s state of pregnancy. Another provision explicitly makes clear that a pregnant job candidate has no duty to reveal or state of pregnancy, except when she is requesting the benefit of the legal provisions for the protection of pregnant women. If any litigation arises regarding the employer’s attempt to obtain information about a job candidate’s pregnancy, or the pregnant candidate’s right not to disclose her pregnancy, the Code provides that, if any doubt remains after the employer has communicated the justification of his decision to the judge, the presumption lies in favor of the pregnant worker.

To make sure that a worker is not treated badly on the basis of pregnancy, the Labor Code imposes additional constraints on the employer’s behavior. For example, it is simply prohibited to fire an employee while she is pregnant, and during the period for which she is entitled to maternity leave, whether or not she takes the leave. The only exception to this rule is termination based on a “serious fault, not tied to pregnancy or the impossibility of maintaining the contract for a reason not related to pregnancy or childbirth.” Even under these exceptional circumstances, the Code provides that the termination cannot take affect or be announced during the period for which an

---

114 Id.


119 Id. art. L 1225-2.

120 Id. art. L 1225-3.

121 Id. art. L 1225-4.
employee is entitled to maternity leave. Another rule provides that any termination of an employee that occurs within fifteen days of presenting a medical certificate confirming that employee’s pregnancy is invalid.\textsuperscript{122} In short, the law attempts to prevent pregnancy discrimination by making it virtually impossible to fire a woman while she is pregnant or on maternity leave.

Beyond rights against discrimination and termination, the Labor Code also protects pregnant workers by entitling them to accommodations in their working conditions appropriate to the special state of pregnancy. The employee may be placed temporarily in another job, either by her own initiative or that of the employer, if “her state of health requires it medically.”\textsuperscript{123} This provision also guarantees that the change cannot last longer than the pregnancy, and entitles the woman to return to her previous job when her state of health permits. It requires that there be no reduction in the employee’s salary despite the change of work. Another provision requires employers to propose work changes if the work exposes a pregnant employee to risks that are incompatible with pregnancy.

Finally, pregnant women enjoy another special protection in the Labor Code. Article L1225-34 provides that a pregnant woman, unlike other workers, can terminate the employment contract unilaterally at will, without notice and without being liable for damages for breach of contract.\textsuperscript{124}

3. Paternity Leave

Unlike U.S. law, French law treats paternity leave differently from maternity leave. However, when paid paternity leave is combined with the unpaid parental leave that is available to both men and women, French fathers are entitled to more time off to care for young children than are most American women.

The father of a newborn has the right to eleven consecutive days of leave, during which time the employment contract is suspended, and eighteen consecutive days in the case of multiple births.\textsuperscript{125} Note that, although a father receives an extra week of leave for multiple births, the paternity leave is not increased for the father who already has two children. There is no parallel to the rule that increases maternity leave for the mother who already has two children. The father is required to give his employer notice of at least a month before he plans to take paternity leave.\textsuperscript{126} The Labor Code guarantees that a father can return to his previous job or a similar job, with pay that is at least equal.\textsuperscript{127} As in the case with maternity leave, the provisions for pay during paternity leave are found in the Social Security Code. Provided that he stops working, the father is entitled to a daily stipend equivalent to that received by mothers on maternity

\textsuperscript{122} Id. art L 1225-5.
\textsuperscript{123} Id. art L 1225-7.
\textsuperscript{124} Id. art. L1225-34.
\textsuperscript{125} Id. art. L1225-35.
\textsuperscript{126} Id. art L1225-35.
\textsuperscript{127} Id. art. L1225-36.
Finally, fathers are entitled to leaves that are comparable in length to those enjoyed by mothers only if the mother dies. If the mother dies during her maternity leave, fathers become entitled to 10 weeks of leave and a suspension of their employment contract. But unlike maternity leaves, paternity leaves are never compulsory.

4. Support for Parenthood and Childrearing

In addition to maternity and paternity leaves, which are paid, French employees also have legal entitlements to unpaid job-protected parental leaves of up to one year, regardless of gender. For up to a year, employees are entitled to take an unpaid “Parental leave for education,” in which case their employment contract is suspended for that period, or to reduce their working hours, so long as the employee works at least sixteen hours a week. The parental leave can be prolonged twice up until the third birthday of the child. Employees who are on parental leave are not permitted to engage in any professional activities, but they are permitted to engage in training and education. Half of the period of the parental leave is counted towards the employee’s seniority, and the employee is entitled to his or her previous job or a similar job with at least equivalent pay.

An employee returning to work after a parental leave has various rights to facilitate his or her reintegration into the workplace. As is the case for maternity-leave takers, employees returning from parental leave have the right to an interview with their employer with regard to their professional orientation. They are also entitled to training, particularly if techniques of methods of work have changed.

The Labor Code has specific provisions entitling employees to time off to care for sick children, separate from, and in addition to, provisions for maternity, paternity, or parental leave for the education. Every employee is entitled to three unpaid days of leave per year to care for a sick child of which he or she has custody, as long as the child is under sixteen years of age and a

---

135 C. trav. Art. L1225-54
medical certificate is provided. Five days are available if the child is under one year of age, or if the parent has custody of three or more children. Longer paid leaves are available for parents seeking leave to care for children with more serious medical problems. Known as the “leave for parental presence,” the law guarantees it when the custodial child of the employee is afflicted with a serious illness or handicap or is the victim of an accident rendering indispensable the sustained presence and care by the employee. The duration is determined by a medical certificate, and cannot exceed 310 days. The Social Security Code provides for a daily stipend to be paid to a parent taking a “parental presence” leave. The employee is entitled to return to his previous job, or similar job, with at least equivalent pay, after such a leave.

In addition to employment laws guaranteeing various forms of leave related to caring for children, the French state provides various cash benefits to support parenthood. Some of these benefits are only available to persons whose income is below a certain ceiling, but several benefits, which I shall outline here, are available to all parents, so long as they have worked for statutorily required amounts of time. A person who interrupts his or her professional activities to look after a child under the age of 3 is entitled to a monthly stipend for “free choice of activity” for up to six months. The person must have worked for at least two years to be eligible. A separate category of benefit, with higher stipend awards, is available for a person who interrupts her professional activities for a year to take care of at least three children. For dual earner households, a benefit for “free choice of form of care” is available. This benefit covers the social security taxes that the parent owes when hiring a caregiver at home to care for a child under the age of six years.

In France, nursery schools for children between the ages of 2 and 6, known as écoles maternelles, are part of the national education system. About a quarter of all two year olds are enrolled, and almost all children between the ages of 3 and 6 are enrolled. The écoles maternelles are administered by municipal governments. Parents do not pay fees for the écoles maternelles. The hours are 8:30 to 4:30, covering a good portion of the work day. At the same time, the

---

139 Id.
145 Id.
école maternelle has an educational purpose; it does not merely exist to provide childcare for working parents. According to the Ministry of Education, the program of the école maternelle is “to appropriate language and to discover writing, to become a pupil, to express oneself with one’s body, to discover the world, to perceive, feel, imagine, and create.”

For children under 2 years of age, regional and municipal governments provide a variety of childcare options that are generously subsidized. The crèches collectives are daycare centers that care for babies from ten weeks of age. There are also crèches familiales, or family daycares, in which an assistante maternelle, a state-licensed childcare provider, cares for a number of children in her home. It is different from a privately organized family daycare in that the municipal government pays the assistante maternelle, freeing the parents from the burden of an employer-employee relationship with the care provider. Unlike the écoles maternelles, the crèches are not free of charge. Parents are charged based on a formula that calculates the fee based on the parents’ income.

The various forms of parental leave in France, in addition to cash support for child-rearing, state-subsidized child care, and early childhood education, point to the conclusion that French law and public policy affirmatively support parenthood and child-rearing within the nuclear family. The law is more generous with regard to child-rearing than it is towards other family responsibilities. Although the French Labor Code, like the FMLA, offers job-protected leave to care for ill family members other than one’s minor children, these leaves are not paid, and the law requires the illness to be more serious than the FMLA does. Unpaid leave of up to three months, renewable once, is available for “familial solidarity,” when one’s parent, child, or spouse suffers from a life-threatening illness. Another type of unpaid leave, called “leave for family support,” is available for employees wishing to care for a disabled family member who suffers a serious loss of autonomy.

5. The Separate Medical Leave Regime

In addition, French law treats pregnancy and maternity differently from illness and medical incapacity. A separate set of rules applies to sick leaves which do not apply to maternity, paternity, and parental leaves. Although the law recognizes important commonalities between maternity and temporary disability, it nonetheless administers these leaves through separate legal regimes. As one leading treatise on the law of social security notes:

---

148 Id.

149 C. trav. L 3142-16.

150 The family members for which the “support” leave is available are defined more broadly than those included by the “solidarity” leave. The support leave is available to care for a spouse, a live-in partner, a partner with whom one has a civil union, an ascendant or descendant, a child over whom one has custody, other family members to the fourth degree, and the ascendants and descendants, or other family members to the fourth degree of one’s spouse, live-in partner, or civil union partner.

151 C. trav. L 3142-22.
Pregnancy and childbirth poses for social insurance problems that are very near to those posed by illness: the necessity of covering medical costs; and for the female employee, the need for income replacement during the period of leave.

At the same time, maternity insurance is distinct from sickness insurance, as there is no simple transplant, pure and simple, of the rules that govern the latter; first of all, maternity insurance takes on a certain originality, and furthermore, its benefits are more favorable than sickness insurance.

For one thing, one needs to note a particular concern with regard to the mother; furthermore, the risk of fraud is difficult to imagine, and one sees no reason to discourage the use of medical services; ultimately, with regard to the protection of the mother, maternity insurance also covers the child, it sits in the complex ensemble of measures centered on this double protection.\textsuperscript{152}

French legal thinkers thus justify the separation of the sick leave regime from the maternity leave regime on two grounds: First, maternity protections are special because they necessarily implicate the well-being of the future child. Second, a sick leave system needs rules that curb the dangers of fraud, which are far less relevant to maternity protections. The upshot of these differences between maternity and sickness benefits is that generosity is more appropriate to the former.

These understandings are manifested in the Labor Code and Social Security Code’s provisions for sick leave. The Labor Code authorizes the employee’s absence from work due to his or her own illness by way of the legal rules governing termination for cause. Under the Code, employers generally may not fire employees without a “real and serious cause.”\textsuperscript{153} Under the anti-discrimination provision, employers cannot terminate an employee on the basis of various protected characteristics, including “state of health.”\textsuperscript{154} Accordingly, employees are entitled to be absent from work when they are sick without risking termination, as long as they provide their employers notice within 48 hours\textsuperscript{155} and produce a medical certificate.\textsuperscript{156} Failure to observe these requirements is considered a “real and serious” cause for termination.\textsuperscript{157} When an employee is too ill to work, the employment contract is temporarily suspended.\textsuperscript{158} This means that the employer does not have to pay the employee, unless a collective agreement stipulates to the contrary. But an employee who is too ill to work can

\textsuperscript{152} Jean-Jacques Dupeyroux, Michel Borgetto & Robert Lafore, Droit de la sécurité sociale § 752 (16th ed. 2008).

\textsuperscript{153} C. trav. Art. L 1232-1.

\textsuperscript{154} C. trav. Art. L 1132-1.

\textsuperscript{155} Cass. Soc. 10 janv. 1980.

\textsuperscript{156} Cass. Soc. 25 mars 1963.


receive daily payments from their social security accounts, to cover the costs of their medical care, medicines, and some fraction of their lost wages.159

Furthermore, aside from sick leave, another provision of the Labor Code entitles employees to accrue 2.5 days of paid vacation for each month worked for a given employer. This enables healthy employees to accrue 30 days of paid vacation annually. But employees do not accrue paid vacation time on days that they miss work due to illness. They do, however, accrue vacation time during the period of maternity leave. French case law makes clear that the annual vacation days accrued by a female employee are to be taken separately from maternity leave; an employer cannot deny a woman her 30 days of paid vacation on the grounds that she has already taken them while on maternity leave.160 But taking days off for one’s own illness can decrease the number of vacation days to which an employee is entitled annually.

In addition, unlike vacation days and maternity leave, the number of sick days available to each worker in France is not capped at a particular number. The law simply provides that employees may suspend their employment contracts when ill, as long as they can provide medical certification, during which time they are paid by the state. An employer can’t fire a person simply on the basis of their state of health, but can fire an employee whose absences due to illness disrupt the functioning of the enterprise.

In this regime, the employee’s incentive to abuse sick leave is limited, as compared with the American regime. For one thing, if they “call in sick,” their day off is somewhat dampened by a trip to the doctor’s office to get medical certificate. By contrast, recall that, under the FMLA, American employers can require medical certificates from employees, but once a doctor certifies an “intermittent” condition, employees have the right to take leave whenever they themselves deem it necessary, without additional certification for each absence, until they exhaust the 12 weeks per year allotted by statute.161 Until the 12 weeks are exhausted, adverse actions against the employee would constitute an interference with the exercise of his FMLA rights. In France, taking such significant sick leaves could lead to an employee’s termination for cause, provided that such behavior was sufficiently disruptive to the enterprise.

C. Family Policy in Sweden

Swedish family policy is similar to French family in many respects. It, too, offers maternity leave immediately before and after the birth of a newborn as a special category of protection for female employees. Like the French state, the Swedish state provides a variety of subsidies to support parents, as well as a system of public daycare and early childhood education. But an important difference between Swedish and French parental leave law is that the Swedish statute provides long periods of paid gender-neutral parental leave, with provisions that are designed to create incentives for men to take parental leave. Swedish policy has pursued the explicit purpose of bringing about a more

159 C. Sec. soc.


161 See supra, text accompanying notes __ to __.
equitable division of labor within families and homes, by using both gender-specific and gender-neutral initiatives.

1. Parental Leave

The Swedish parental leave scheme attracts much attention and discussion, as it is thought to be among the most generous in the world. The Parental Leave Act provides for maternity leave for female employees in connection with childbirth or breastfeeding, but all other forms of parental leave are described in gender-neutral terms. Female employees are entitled to job-protected leave for 14 weeks, 7 of which may be used prior to the due date. There is no specific requirement that the maternity leave be paid, but normally, women are paid because women simultaneously take maternity leave and paid parental leave, the latter of which is available to both sexes.

In addition, the Parental Leave Act enables Swedish parents to take “full leave for the care of a child until the child reaches 18 months, irrespective of whether the parent receives parental benefit.” The parental benefit is paid by the state, pursuant to the National Insurance Act, for up to 480 days that a parent gives up gainful employment to look after a child. The 480 days of pay are allocated per child, to be shared by the parents. Thus, in a two-parent household, each parent is entitled to 240 days of the benefit. One parent may transfer his or her allocation to the other parent, with the exception of 60 days. In other words, if only the mother takes leave the family’s total allocation of parental benefits in connection with care for one child is reduced to 420 days. If the father does not take 60 days of leave, those benefits are lost to the family. Furthermore, as of July 2008, there is a “gender equality bonus” in the form of a tax rebate, with greater rebates for parents who share the leave as evenly as possible. The Parental Leave Act also makes it possible for parents to reduce their working hours during the period that they receive the parental benefit, with a proportionate reduction of the benefit.

2. Pregnancy Protection

The Parental Leave Act also protects pregnant employees, but not with the same degree of specificity as the French Labor Code. The Swedish law entitles the pregnant or postnatal woman to be transferred to other work if safety standards require it. In addition, a pregnant woman is entitled to be transferred to other work if her work is too physically demanding for a pregnant person, but this right is only effective from the sixtieth day prior to the due date. In addition, unlike the French counterpart, Swedish law requires that accommodation of pregnant workers be “reasonable.” That is, Section 20

162 Parental Leave Act, 1995:584, available at JämO (Swedish Equality Ombudsman); www.jamombud.se/InEnglish/laws/parentalleaveac.asp.

163 See For families with children, Försäkringskassan, www.fk.se/sprak/eng/foralder

164 [cite]

165 Parental Leave Act Section 19.
provides that “[t]he right to transfer . . . applies only to the extent that the employer can be reasonably required to provide the woman with other work within the activity.”\footnote{166} Thus, if the transfer is “not practicable,” the law provides that the woman is entitled to a leave of absence, but during such a leave, she is not entitled to retain employment benefits, as she would if she were transferred to a different job.\footnote{167} At the same time, a pregnant woman can draw pregnancy benefits from the social insurance system if she is not transferred and therefore on leave of absence.

3. Support for Parenthood and Childrearing

Every child who lives in Sweden is entitled to a child allowance. A child is eligible beginning the month after birth. It is not taxed, and it is paid monthly until the child reaches the age of 16. The Swedish government also provides a childcare allowance for parents who care for sick or disabled children in their homes.\footnote{168} In addition, as of July 2008, a new program provides for childraising allowance to assist parents in their transition from parental leave to work. The childraising allowance is administered by municipal governments, and is available to parents of children between the ages of 1 and 3. It can be combined with paid work.

Like France, the Swedish state provides extensive support for daycare and early childhood education. A 1999 study indicated that 75 percent of all Swedish children between the ages of 1-5 participate in public daycare. As of 1991, every child from the age of 1.5 is legally entitled to public childcare. Preschools are seen as having an educational function in addition to providing care while parents work. According to the Ministry of Education, “the task of the pre-school is to make the most of this thirst for knowledge and lay the foundations for a lifelong learning process.”\footnote{169} The Education Act also imposes standards with regard to the quality of care: Over half of all preschool employees have university degrees in preschool education.

4. The Separate Medical Leave Regime

Like France, Sweden has a sick leave regime that is separate from its family leave regime. Unlike France, Sweden has been struggling over the last few years with its paid sick leave policy, due to widespread concerns about its overuse and abuse.\footnote{170} In Sweden, the law effectively allows workers to take paid sick leave for seven days whenever they deem it necessary, since employers can

\footnote{166}{Parental Leave Act Section 20.} 
\footnote{167}{Parental Leave Act Section 20.} 
\footnote{168}{See General Information About Social Insurance, Försäkringsskassan, at 18.} 
\footnote{169}{Id.} 
\footnote{170}{See Warren Hoge, Swedes Are Out Sick Longer, and Budget is Ailing, N.Y. Times, Sept. 24, 2002.}
require medical certification for absences longer than a week. The first day of sick leave is unpaid, but the next fourteen days are paid by the employer at a rate of 80 percent of the employee’s wages. When an employee takes sick leave, the employer must inform the Swedish Social Insurance agency. The employer’s obligation to pay ends after two weeks. At that point, the worker is entitled to the government’s sickness benefit, equal to 80 percent of the employee’s usual wages.

Many Swedish social scientists have documented the high levels of sick-leave absenteeism in the Swedish workplace. In 2002, a government study reported that one in 20 Swedish workers were on sick leave for more than a week in the previous year, which was double the average of EU countries. Ten percent of the Swedish work force is on sick leave at any given time. Another study included survey data in which 62 percent of employees said they had taken sick leave when they were not really sick, and they felt there was nothing wrong with doing so. The government has proposed reforms in 2003 and in 2008 in the hopes of reducing sick-leave taking, but these proposals have been met with resistance from unions and other groups. The issue of sick leave reform is hotly contested in public debate.

But because sick leave is a completely separate legal entitlement with a separate regime for its administration, controversies about sick leave and its excesses do not cast doubt on the legitimacy of Sweden’s generous and ever-expanding family-friendly policies. In the last decade, despite ongoing controversies about the government’s excessive spending on sick leave benefits, and a growing consensus that sick-leave taking needs to be reduced in Sweden, changes to the parental leave system have simply made it more generous. In

171 National Insurance Act, [cite-. See also If you fall ill – how sickness insurance works, Försäkringskassan (Swedish Social Insurance agency), www.forsakringskassan.se/sprak/eng/sjuk

172 1992 Sick Pay Act (Sweden).

173 Id.

174 Id.


176 Hoge, Swedes Are Out Sick Longer, supra note __.


2002, a reform increased the “Daddy month” from one month to two months, and also increased the total number of days for which parental benefits can be paid to the parents of a child, from 450 days to 480 days.

In 2006, the monthly cap on the parental leave benefit was increased to motivate more fathers to use extra days for parental leave.\textsuperscript{179} Two other reforms in 2006 strengthened protection for potential takers of parental leave: One new law prohibits employers from refusing to employ someone on the grounds that they wish to take parental leave in the near future. Another new law protects employees in termination proceedings: employers may not commence a term of notice for termination for just cause until an employee has returned to work after parental leave.\textsuperscript{180}

The situation in Sweden shows how the expansion of family-friendly policies need not be accompanied by an expansion of sick leave benefits. Similarly, problems with the overuse and possible abuse of sick leave need not detract from legislative initiatives to protect and promote parental leaves. It is possible for the government to aim to halve sick leaves while aiming to increase parental leave-taking. This lesson is an important one for members of Congress and advocates of women and families in the United States, who seem incapable of imagining the expansion of parental leave without including the costly appendage of medical leave on equal terms.

IV. The Antidiscrimination Amalgamation of Family and Medical Leave

The American resistance to disaggregating family and medical leave needs to be overcome in order to get beyond the current impasse in American debates about work-family conflict. In this Part, I show how antidiscrimination law has brought about the American amalgamation of family and medical leave. Antidiscrimination law has shaped U.S. law’s feeble attempts to address the work-family conflict, largely because the problem has always been framed as one of gender inequality. By contrast, European policies reconciling the work-family conflict originated in conscious attempts by the state to promote children and families, long before the modern concept of gender equality entered the equation. In the United States, antidiscrimination law depended on the similarities between pregnancy and sickness when it was used to advance the interests of pregnant women and new mothers in the workplace. That analogy was consolidated in the gender-neutral legal architecture of the FMLA. The antidiscrimination goals of the FMLA required it to be framed as much broader than a special protection for pregnancy and mother-newborn bonding. The antidiscrimination framing explains why the FMLA treats pregnancy and newborn care equally with serious health conditions. I trace this evolution to expose the historical contingency of this analogy.

A. Consolidating the Pregnancy-Sickness Analogy


\textsuperscript{180} Id.
The litigation in the 1970s that equated the exclusion of pregnancy from temporary disability regimes with discrimination on the basis of sex consolidated the legal pairing of maternity and illness for the purposes of creating employee entitlements. The Pregnancy Discrimination Act was not simply a ban on generalized discrimination against women on the basis of pregnancy. It imposed a legal duty on employers to treat pregnancy the same as other physical disabilities in their provision of benefits. The text of the statute explicitly provides that “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.” Indeed, a House Report specifically noted that the proposed legislation would prohibit employers from excluding pregnancy and childbirth from disability and sick leave benefits. The same report also pointed out, however, that the employer would be not be required to provide maternity leaves beyond the time necessary for a woman to recover from the medical fact of childbirth: “For example,” it noted, if a woman wants to stay home to take care of the child, no benefit must be paid because this is not a medically determined condition related to pregnancy. In the United States, benefits for pregnancy became legally and politically possible by framing pregnancy as a gender-neutral medical condition rather than as a gender-specific cultural condition (maternity).

Through the PDA, Title VII enabled many women to obtain the same protection for maternity leaves that other temporarily disabled workers enjoyed prior to the passage of the FMLA. But it gave rise to another problem that continues to haunt family and medical leave today: the theory that an employer violates the PDA by treating pregnancy or maternity more generously than other medical conditions, paternity, or other forms of family caregiving. In the same year that Congress passed the PDA, California enacted a statute requiring companies to allow four months of leave for a temporary disability related to pregnancy or childbirth. Invoking this new law, a female plaintiff sued her employer for terminating her for having taken two months of leave for pregnancy and childbirth. In response, the employer brought a declaratory judgment action in federal court. It argued that California’s maternity leave law was preempted by Title VII and the Pregnancy Discrimination Act. The District Court held that the California law, by granting women maternity leaves that were not available to male employees, was inconsistent with Title VII. A similar controversy had erupted in Montana, where the state’s Maternity Leave Act was challenged as inconsistent with the Pregnancy Discrimination Act. The Montana law, like California’s, only required “reasonable” maternity leave for women. Eventually, the Supreme Court upheld California’s maternity leave law as

183 Id.
consistent with the Pregnancy Discrimination Act and Title VII in California Federal Savings & Loan v. Guerra.\textsuperscript{185}

B. From Pregnancy Discrimination to Family and Medical Leave

But these controversies developed during the same time that legislators began to draft and debate the bill that became the FMLA. Even though the Supreme Court in Cal Fed rejected the legal argument that maternity leaves violated Title VII, the controversy about the California statute led federal legislators to insist upon gender-neutrality in the FMLA.\textsuperscript{186} The first version of the bill that became the FMLA was introduced in Congress in 1986, when the Cal Fed case was pending before the Supreme Court. The Cal Fed case influenced the drafters’ firm understanding that the federal parental leave law had to be framed in gender-neutral terms; it could not simply be a protection for maternity like the California law that had been so controversial.\textsuperscript{187}

As the “findings” section of the FMLA makes clear, legislators framed the gender neutrality of the statute as a deliberate feature aimed at combating discrimination against women. Legislators identified gender inequality, and specifically, gender discrimination, as a problem to which the statute was responding. The “findings” section of the statute reads, in relevant part:

\begin{itemize}
  \item[(5)] due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and
  \item[(6)] employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.\textsuperscript{188}
\end{itemize}

In other words, an employment policy of offering maternity leave only to women, it was feared, would encourage employers to discriminate against women. The legislators explicitly identified sex discrimination as a problem to be combated by the statute, which is how they justified the statute’s constitutionality under Section V of the Fourteenth Amendment. The statute’s purposes included:

\begin{itemize}
  \item[(4)] to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring
\end{itemize}


\textsuperscript{187} \textit{See id.}

\textsuperscript{188} FMLA, 29 U.S.C. § 2601(a)
generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.  

According to this theory, then, offering leave on a gender-neutral basis is a way of combating discrimination against women, based on the assumption that requiring employers to offer more generous leaves to women than to men would give employers the incentive to avoid hiring women.

The statute’s stated findings and purposes explicitly link the gender-neutrality of family leave to the goal of combating discrimination against women. Furthermore, the findings highlight the fact that the statute provides leave for a broad swath of medical reasons, which include maternity-related disability, in the context of explaining the antidiscrimination justification of the law. Thus, the theory is that, if employers are required to provide leave for a whole-range of medical conditions, and not only pregnancy, they are less likely to discriminate against women on the basis of pregnancy or ability to get pregnant.

More recently the Supreme Court has consolidated the notion that Equal Protection principles require the gender neutrality of FMLA and similar state laws. In 2003, the Court upheld the FMLA as a valid exercise of Congress’s Fourteenth Amendment Section 5 power to enforce the Equal Protection Clause in Nevada Department of Human Resources v. Hibbs. In light of the Court’s Section 5 jurisprudence prior to the Hibbs decision, Hibbs seems to suggest that, if a state were to offer family leave to women and not to men on equal terms, such a policy would be premised on gender stereotypes that are impermissible under the Equal Protection Clause.

The Hibbs Court viewed the FMLA as legislating “to protect the right to be free from gender-based discrimination in the workplace.” It thus had to provide an account of how, exactly, the states were discriminating in violation of the Equal Protection Clause prior to the FMLA. The Hibbs majority pointed to states’ reliance on “invalid gender stereotypes in the employment context, specifically in the administration of leave benefits.” The Court was not referring to insurance schemes like those at issue in Geduldig and Gilbert, which excluded pregnancy from disability coverage. Rather, the Court stated,

\[189\] Id.

\[190\] Reva Siegel notes that Justice Rehnquist’s majority opinion in Hibbs is an important statement of the Court’s sex discrimination cases. See Reva B. Siegel, You’ve Come A Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs, 58 Stan. L. Rev. 1871, 1884 (2006).

\[191\] Hibbs, 538 U.S. at 728.


\[193\] Id. At 738.
Many States offered women extended ‘maternity’ leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit. . . This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.\textsuperscript{194}

The Hibbs majority also noted that “seven States had childcare leave provisions that applied to women only,”\textsuperscript{195} while some states left the amount of leave time to the employer’s discretion. Under such circumstances, “Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate.”\textsuperscript{196} The Court concluded, “Against the above backdrop of limited state leave policies . . . Congress was justified in enacting the FMLA as remedial legislation.”\textsuperscript{197}

The Court’s reasoning reflects two different accounts of the practices that constitute discrimination. First, a state discriminates against men by offering childcare leaves only to women. Such a policy presumably relies on the gender stereotype of women as the primary caregivers for young children. In addition, the Court suggests that leaving the amount of leave time to the employer’s discretion also facilitates discrimination. How? Although the Court does not explain, there are two possibilities. First, by not requiring employers to grant parental leave, the state may be discriminating against women, by relying on the stereotype of the ideal worker as a man who is not a primary caregiver. Second, to the extent that an employer has discretion over parental leaves, the employer might rely on stereotypes about the roles of men and women in exercising this discretion. This could lead employers to grant maternity leaves but to deny paternity leaves.

According to the Court in Hibbs, the states were violating the Equal Protection Clause by (1) granting leave benefits to women but not to men; and (2) failing to adopt laws mandating parental leave, because leaving these leaves to employer discretion inevitably led to the employer’s reliance on stereotypes. These were the incidences of discrimination that the FMLA sought to remedy and deter. The notion that states that require employers to grant maternity leaves (without requiring equivalent leaves to fathers) are violating the Equal Protection Clause is a departure from the Court’s reasoning in Cal Fed. Cal Fed upheld a state statute requiring employers to provide maternity leave as consistent with Title VII. In any case, the fact that the leave guaranteed by the FMLA is gender-neutral is critical to the Court’s view of the statute as an appropriate remedy for sex discrimination:

\textsuperscript{194} Id. At 731.
\textsuperscript{195} Id. At 732.
\textsuperscript{196} Id. At 733-34.
\textsuperscript{197} Id. At 734.
By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.\(^{198}\)

Thus, Hibbs suggests that the FMLA had to be gender neutral in order to be a constitutional exercise of Congress’s Section 5 authority. Hibbs strengthened the norm of gender neutrality in law and public policies reconciling the work-family conflict. It suggests that any state action that helps women balance work and caregiving to the exclusion of men is likely based on stereotypes of women as caregivers, which is inconsistent with the antidiscrimination logic of Equal Protection.

This formulation is also confirmed by the EEOC’s interpretation of Title VII in its compliance manual. The EEOC’s compliance manual refers to maternity leave as “a form of disability or sick leave covering only the period of a female employee’s own actual physical inability to work as the result of pregnancy, childbirth, or related medical conditions.” As a result, if an employer only gives leave to pregnant women during their childbirth-related disability, without giving men paternity leave, there is no discrimination. However, the EEOC compliance manual suggests that an employer would risk violating Title VII if it granted women maternity leaves that extended beyond the period of childbirth-related disability, presumably to enable women to bond with their newborns, without giving men equivalent leaves for newborn bonding. The manual explains, “[a]ccommodating female but not male employees constitutes unlawful disparate treatment of males on the basis of their sex.”\(^{199}\)

Taken together, the Pregnancy Discrimination Act and the antidiscrimination framing of the FMLA tend to reinforce the analogy between pregnancy and sickness that was forged in the 1970s. That analogy was part of a legal strategy devised to advance women’s interest under the constraints of historically specific background conditions: Some employers and states offered job security and/or wage replacement to workers who were temporarily disabled. If new mothers wanted job-protected leave or wage replacement, temporary disability was the only game in town. Thus, pregnancy came to be framed as a medical condition requiring the same treatment as incapacitating illnesses and injuries.

C. An Outdated Analogy

The analogy between maternity and sickness is flawed. Countries that successfully reconcile work-family conflict do not use it. However, for the last

\(^{198}\) *Id.*

\(^{199}\) EEOC Compliance Manual § 626.6.
few years, Congressional proposals for paid leave continue to propose 12 weeks of paid leave for all of the family and medical reasons protected by the FMLA, including care for one’s own serious medical condition. It should not come as a surprise that these bills have not gotten very far. American legislators and advocates make no attempt to prioritize the different bases for taking leave, or to vary the amount of time to which an employee is entitled based on the grounds for taking leave.

But common sense should tell us that 12 weeks of paid leave every year for one’s own serious medical condition seems excessive (assuming the application of FMLA definitions of “serious medical condition”), while 12 weeks of paid leave for maternity may seem a bit on the short side, especially as compared with European norms. This senseless one-size-fits-all approach is a result of our legal culture’s deep internalization of the antidiscrimination logic that permeates Hibbs. An “across the board,” “routine employment benefit” for “all eligible employees . . . irrespective of gender” is understood to be necessary to attack “the stereotype that only women are responsible for family caregiving.”

The American legal culture treats the analogy between pregnancy and disability as a principle of equality rather than a legal strategy that was necessary to advance women’s interests at a particular historical moment. As Martha Fineman explains, legal feminists in the 1960s and 1970s argued for equality in terms of sameness of treatment, which led them to assert that differences between men and women were of no significance. This strategy was a reaction to a history of labor legislation that restricted women’s employment opportunities in the name of protecting their capacity to be mothers. In the 1873 case of Bradwell v. Illinois, the Supreme Court upheld an Illinois prohibition on women practicing law, based on an understanding of women’s difference, and in the name of protecting women. In 1908, the Supreme Court in Muller v. Oregon upheld a state law limiting women’s hours of work, noting that “a proper discharge of [a woman’s] maternal functions—having in view not merely her own health, but the well-being of the race—justifies legislation to protect her from the greed as well as the passion of man.”

In 1973, the Supreme Court repudiated these attitudes in Frontiero v. Richardson, referring to them as “romantic paternalism.” U.S. law construed paternalistic protection of mothers as sex discrimination. The argument that pregnant women were “the same” as temporarily disabled men and women grew


201 Hibbs, 538 U.S. at 734.

202 Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies 37 (1995).

203 Bradwell v. State, 16 Wall. 130 (Illinois)

204 Muller v. Oregon, 208 U.S. 412, 422 (1908).

205 Frontiero v. Richardson, 411 U.S. 677, 684 (1973)
out of this legal trajectory, and ultimately prevailed in the passage of the Pregnancy Discrimination Act. The sameness proponents did not foresee the particular ways in which the costs of administering sick leave might begin to threaten the legitimacy of maternity and parental leaves, perhaps because the legitimacy of women’s participation in the labor market was not yet established.

But the analogy between pregnancy and sick leave has now outlived its usefulness. In the 1970s, temporary disability leave programs were already established, during a time when few women were in the work force. Thus, temporary disability enjoyed more legitimacy than pregnancy or maternity leave. In order for pregnancy and maternity leave to become a possibility, it needed to derive its legitimacy from that of disability leave. But today, the reverse is the case. Employers publicly affirm the legitimacy of family leaves under the FMLA but complain about the costs and illegitimate uses of medical leave. The pendulum has shifted, and now, maternity leave enjoys far more legitimacy than medical leave. So it is time to extricate maternity and parental leave from the morass of medical leave.

V. The Gendered Law of European Maternity

A. The “Special Relationship Between A Woman And Her Child”

The generous maternity and parental leaves available in France and Sweden are made possible, in part, by their prioritization and separation from all other forms of family and medical leave. Furthermore, European legal orders are not committed to the proposition that gender equality requires gender neutrality. The special protection of maternity and pregnancy is hardly ever questioned. In both France and Sweden, maternity leaves are far longer than paternity leaves. In France, the special entitlements for pregnant women and mothers are far more generous than those available to fathers or persons suffering from other medical incapacities. There are protections for pregnant workers that are not accorded to other similarly disabled workers, including a prohibition on attempting to obtain information about a woman’s possible pregnancy, and a prohibition on firing pregnant workers except in the most egregious circumstances of wrongdoing by the worker.

Do the European policies rely on gender stereotypes? When a maternity leave lasts 14-18 weeks, it is obvious that the entire period is not necessary for most women to recover from the medical experience of childbirth. Rather, part of the period is clearly intended to allow the mother to care for the newborn. In France, fathers are only entitled to take paternity leave to care for the newborn for 11 days. These rules seem to be premised on the assumption that the mother,

206 For instance, the Vice President of Human Resources Policy for the National Association of Manufacturers stated at a Senate Roundtable on FMLA reform in 2005, “[F]amily leave absences are almost never the problem. The main source of problems identified by employers is with an employee’s own medical absences.”. S. Hrg. 109-229: Roundtable Discussion: The Family and Medical Leave Act: A Dozen Years of Experience, June 23, 2005, at 54. An employers’ attorney also noted, “I do not believe there are problems with the family leave portion of the FMLA or the regulations.” See Statement of Sue Willman, S. Hrg. 109-229, at 22.
rather than the father, is the primary caregiver to a newborn child. Take, for instance, the French rule allowing fathers to take 10 weeks of leave for newborn care only if the mother dies during the maternity leave.\textsuperscript{207} Recall that, in the United States, a man prevailed in a sex discrimination claim under § 1983 challenging his denial of primary-caregiver parental leave after his employer told him that he could not be a primary caregiver unless his wife was “in a coma or dead.”\textsuperscript{208} Furthermore, the EEOC enforcement guidance on caregiver discrimination explicitly warns against subjecting men to the stereotype that “men are poorly suited to caregiving.”\textsuperscript{209} French paternity-leave law affirms the assumption that men are not primary caregivers of newborn babies unless the mother is dead, an assumption that constitutes a gender stereotype and would thus run afoul of U.S. antidiscrimination law.

The Supreme Court’s reasoning in Hibbs suggests that states would violate the Equal Protection Clause by requiring more generous treatment of mothers as compared to fathers, or pregnant women as compared to other temporarily disabled workers.\textsuperscript{210} Similarly, notwithstanding the Cal Fed decision, lower courts have subsequently held that Title VII prohibits employers from offering women maternity leaves that last longer than the period of physical disability from childbirth, without offering equivalent leaves to men.\textsuperscript{211} This is consistent with the EEOC’s interpretation of the PDA.\textsuperscript{212}

European gender discrimination law, by contrast, has always recognized the distinctiveness of pregnancy and maternity, and has never seriously questioned the provision of special entitlements for pregnant women and new mothers. The Equal Treatment Directive, adopted in 1976, defines equal treatment as “no discrimination whatsoever on grounds of sex,”\textsuperscript{213} but also provides that “[t]hat this Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.”\textsuperscript{214} EU gender discrimination law has shaped gender discrimination law in member-states including France and Sweden. The Equal Treatment Directive has been invoked to invalidate some forms of labor legislation protecting women. For instance, in 1991, the European Court of Justice

\textsuperscript{207} C. trav. Art. L 1225-35, see infra text accompanying note __.

\textsuperscript{208} See Knussman v. Maryland, 272 F.3d 625, 630 (2001); see also supra text accompanying note __.


\textsuperscript{210} See Nevada Dep’t of Human Resources v. Hibbs, 538 U.S. 721, __ (2003), 123 S.Ct. 1978-80; see also text accompanying notes __ to __.


\textsuperscript{212} See EEOC Compliance Manual § 626.6.


\textsuperscript{214} Id. at art. 3.
invalidated a French Labor Code provision that made employers criminally liable for employing women to work at night.\textsuperscript{215}

But in so doing, the ECJ noted, relying on earlier ECJ case law, that it was “clear from the express reference to pregnancy and maternity that the Directive was intended to protect a woman’s biological condition and the special relationship which exists between a woman and her child.”\textsuperscript{216} Thus, a directive that prohibits discrimination has not been interpreted to conflict with the law’s recognition of a “special relationship . . . between a woman and her child,” even though such a statement is arguably based on a gender stereotype. In any case, European antidiscrimination law has not been invoked to challenge member-states laws that give pregnant workers more protection than other temporarily disabled workers, nor has it invalidated policies that provide more generous benefits for maternity than for paternity.

B. Gender Paternalism

As the Supreme Court’s language suggests in \textit{Frontiero}, the American rejection of special protections for maternity was tied up with the rejection of paternalism. European social welfare states, in contrast, did not reject paternalism. Today, in both France and Sweden, women are not only entitled to take maternity leave; they are required to do so for at least a few weeks, consistent with the EU directive.\textsuperscript{217} These mandatory maternity leave laws are remnants of labor legislation protecting women, adopted in most European countries in the late 19\textsuperscript{th} and early 20\textsuperscript{th} centuries -- the same period that gave rise to the American laws that were upheld in Muller v. Oregon and repudiated in \textit{Frontiero} v. Richardson. Some provisions, like the French ban on women’s night work, have been invalidated by European antidiscrimination law. But mandatory maternity leave has endured.

In France, special protections for maternity, in the form of job-protected unpaid maternity leave of 8 weeks, emerged in 1909,\textsuperscript{218} a year after the U.S. Supreme Court’s decision in Muller v. Oregon. In short, French women achieved in 1909 a very similar entitlement (unpaid job-protected leave of several weeks) that American men and women obtained in the FMLA in 1993. When the French unpaid leave law was passed, it was subject to the same criticism that is directed at the FMLA today: the leave was unpaid, and therefore not within poor women’s reach. But interestingly, the 1909 law was criticized by the advocates of paid leave for having another serious defect: It made maternity

\textsuperscript{215} See Case C-345/89, Court of Justice of the European Communities, Judgment of 25 July 1991.

\textsuperscript{216} Id.


leave optional for women, rather than mandatory.\footnote{219} This defect was overcome in 1913, when another law made maternity leave mandatory for four weeks following childbirth.\footnote{220} The 1913 statute also included a provision for a daily allowance for eight weeks before and after birth for all French women who worked for wages outside the home.\footnote{221}

In Sweden, compulsory maternity leave legislation was adopted in a Workers’ Protection Act in 1900, prohibiting women from being employed during the first four weeks after birth.\footnote{222} There were no provisions for pay during this compulsory maternity leave. Legislation adopted in 1931 created maternity insurance, giving the mother economic support during the compulsory maternity leave, which had been extended to six weeks in 1913.\footnote{223} The 1931 law was one of many new laws that sought to protect women as mothers, largely out of concern for the protection of infants and population growth. These laws included compulsory pediatric care, an abortion ban, and a statute prohibiting employers from dismissing women employees on grounds of pregnancy.\footnote{224}

In the United States, by contrast, mandatory maternity leave constitutes discrimination on the basis of sex, violating Title VII and the constitution. In the 1974 case of Cleveland Board of Education v. LaFleur, the Supreme Court invalidated a school district’s policy of requiring pregnant teachers to go on unpaid maternity leave several months before giving birth. The Supreme Court held that these mandatory maternity leave policies violated the Due Process Clause. Such policies, if undertaken by private employers, are also invalid under Title VII. Indeed, one widespread practice to which the Pregnancy Discrimination Act offered a remedy was employers’ policies forcing women to take unpaid leaves of absence after they announced their pregnancies.\footnote{225}

It should be noted that the mandatory maternity leaves that were deemed to violate Title VII and the Due Process Clause were unpaid, unlike the paid mandatory maternity leaves that are required under EU law. Nonetheless, the Supreme Court’s reasoning in LaFleur suggests that any form of mandatory leave

\begin{footnotes}

\footnote{220} See Loi du 13 juin 1913, JORF du 19 juin 1913 page 5254. See also Cova, supra note \_, at 129.

\footnote{221} See Stewart, supra note \_, at 189.


\footnote{223} Id. at 214.

\footnote{224} Id. at 224.

\footnote{225} One legislative report names “mandatory leave for pregnant women arbitrarily established at a certain time during their pregnancy and not based on their inability to work,” as an employment policy that would be prohibited by the PDA. See H.R. Rep. 95-948, 1978 U.S.C.C.A.N. 4749, 4754.
\end{footnotes}
would violate Due Process, even if it were paid. In matters related to childbearing and childrearing, preserving the woman’s choice is constitutionally required. The LaFleur Court adopted a strong anti-paternalistic logic, like that adopted in Frontiero, to explain why mandatory maternity leaves were unconstitutional:

> This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . . [T]here is a right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as a decision whether to bear or beget a child.\(^{226}\)

While Frontiero rejected paternalism on Equal Protection grounds, LaFleur invoked Due Process, citing Roe v. Wade,\(^{227}\) to reject the state’s imposition of mandatory maternity leave. Reva Siegel points out that American equal protection and substantive due process cases of the 1970s repudiated “gender paternalism,” or legal traditions that “allowed government to impose family roles on women and to exclude them from participation in the market and public sphere.”\(^{228}\)

The EEOC’s website includes a page on “Facts About Pregnancy Discrimination,” and while the information presented does not have the force of law, it is worth noting that, the EEOC warns against mandatory maternity leaves like those required by the EU directive, and French and Swedish law:

> Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer may not require her to remain on leave until the baby’s birth. An employer also may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.\(^{229}\)

Thus, in the United States, the paternalistic treatment of pregnant women and mothers is no longer a legal possibility. In contrast, sex discrimination law in the EU and in France and Sweden has never considered mandatory maternity leave to be a form of discrimination.

The difference between the United States and Europe on mandatory maternity leave pushes us to confront the question of whether and how the restriction on women’s choice about the length of maternity leave undermines women’s workplace equality. To illuminate this issue, let’s return to the Rachida Dati scandal that opened this Article. French feminists articulated the view that, once some women start choosing shorter maternity leaves, there will be pressure

---


\(^{227}\) See id.


on all women to do so: “Employers can now use this example, to put intolerable pressure on women,” said Maya Surduts, of one national women’s rights group. Florence Montreynaud, the president of another feminist organization, recalled “the monstrous births by women workers in the 1920s, of whom 20 percent gave birth on the factory floor.” Montreynaud especially feared that Dati’s choice would divide all women into the “superwomen” and the “weaklings.”

These reactions are related to the arguments one might make in favor of mandatory maternity leaves: The choices made by some women can ultimately undermine the choices available to other women. There is a fear that the legal right to choose 16 weeks of maternity leave will become meaningless if the “superwomen” routinely choose to take only 5 days. This would ultimately undermine women’s equality in the workplace. When employers are prohibited from employing women for eight weeks total around the time of childbirth, women can take the time to recover from childbirth and bond with their babies without fear or guilt about the professional consequences of their absence. Understood in this light, the paternalism at work in European maternity policies is more complex than the “romantic paternalism” that is repudiated by American constitutional doctrine. French feminists seem to believe that paternalism can ultimately increase women’s choices and well-being.

The American legal order tends to be more skeptical of paternalism than European legal orders on many different issues. The rejection of paternalism is particularly pronounced in U.S. sex discrimination law, largely because this was the strategy that feminists use to challenge laws that limited and undermined women’s access to good jobs in an earlier historical context. As a result, U.S. law is particularly resistant to using paternalistic rules to advance the interests of women in the workplace.

VI. Gender Stereotypes and Gender Equality

If anything worthwhile is to be done about the work-family conflict, we need to rethink the conventional wisdom that gender equality requires the elimination of gender stereotypes, above all. The relationship between gender stereotypes and gender equality is much more complicated than American thinking about discrimination and work-family conflict allow. In the European Union and in European countries, antidiscrimination law is not primarily concerned with combating gender stereotypes. Antidiscrimination doctrine in ECJ jurisprudence illustrates the courts’ ability to recognize social realities such as the tendency of women to work part-time due to family responsibilities. These realities are recognized to determine the practices that disadvantage women without sufficient justification, thereby constituting indirect discrimination.


231 Id.

232 For example, as James Q. Whitman discusses, European countries tend to have paternalistic legal rules limiting when stores can have sales, to protect consumers from feeling pressured to make inopportune purchases. See Whitman, supra note __, at 380.
A. Stereotyping and the American “Opt-Out Revolution”

By contrast, in the United States, recognizing the social reality that women tend to have family responsibilities that conflict with their ability to meet the demands of the workplace is highly problematic, because it is precisely the type of assumption that constitutes a gender stereotype. And, as many commentators have noted, American sex discrimination law increasingly views gender stereotyping as the paradigmatic injury that it must remedy. European sex discrimination doctrine aims to eliminate practices that cause women’s disadvantage, while U.S. sex discrimination doctrine aims to eliminate gender stereotypes. As Mary Anne Case puts it, American antidiscrimination law is committed to “‘anti-stereotyping’ above all.”

In prohibiting employers from relying on gender stereotypes about mothers and fathers in forming their expectations of employees, the new “family responsibilities discrimination” doctrine can intensify the dynamics that make work and family conflict. “Family responsibilities discrimination” litigation is now being heralded as the “next generation of employment discrimination cases,” and advocates of work-life balance are applauding the EEOC guidance on caregiver discrimination the most important development in the field. However, employers’ widespread internalization of the EEOC’s guidance will likely reinforce the dynamics that lead women to opt out of good jobs.

Recall that all of the examples of employer behaviors which would violate Title VII given in the EEOC guidance document are ones in which the employer acts upon gender stereotypes. In these examples, the discrimination occurs in the employer’s application of stereotypes to female or male workers: The paradigmatic case is one in which the employer presumes that a woman is likely to underperform at work due to conflicts between her duties at work and her family responsibilities. Title VII protects individual women from being subject to such stereotyped assumptions.

But what does it do for workers (often women) who experience difficulty balancing employment and family responsibilities? Consider the EEOC’s example of a factual scenario in which there is no meritorious claim of discrimination against caregivers. Here, the hypothetical plaintiff experiences a real conflict between work and family, not one that is imagined by the employer by way of gender stereotypes: A female law firm associate fails to meet


236 See EEOC Guidance, supra, text accompanying notes __ to __.
important deadlines due to difficulties obtaining childcare. In response, the employer transfers her to another department, in which she is excluded from most high-profile cases. Under such circumstances, the guidance document makes clear that the employer did not violate Title VII.

Title VII’s inability to compel work-family reconciliation is logically connected to the statute’s primary concern with driving out gender stereotypes of mothers as conflicted workers. The success of the stereotyping FRD cases may discourage employers from offering family-friendly options to mothers. In the face of increased FRD litigation, employers have an incentive to ignore, rather than engage, the work-family conflict. Well-intentioned, “benevolent” stereotyping is actionable as caregiver discrimination, according to the EEOC guidance. If an employer offers a lighter, lower-profile caseload to a female employee who is a new mom without offering the same to a male employee who is a new dad, the employer can be liable for discrimination. It is those employers who recognize and respond to women’s caregiving responsibilities who find themselves being sued for family responsibilities discrimination. In this legal landscape, the employer’s best bet for avoiding liability is to apply the same standards to men and women, even if these standards are very demanding.

But it is a well-documented social reality that women tend to do more family caregiving than men, even in dual-career families. So, if employers make the same demands on women and men, without regard for their caregiving responsibilities, chances are, people who are primary caregivers (usually women) will find it more difficult to meet the employer’s expectations than people who are not primary caregivers (usually men). Employers have an incentive to remain willfully blind to the caregiving responsibilities of all of their employees in order to avoid liability for FRD. Such blindness will only make the work-family conflict more acute for employees who are also primary caregivers, and will likely disadvantage their prospects for professional advancement. These

---

237 Id. Example 6.

238 Id.

239 EEOC Guidance, supra note __, Example 7. In this example, an employer expresses concern about the stress and exhaustion that the employee might experience as a new guardian to young children, given the demands of the job. The employer then moves the female employee from lead positions on major accounts to supporting roles in smaller accounts.

employees are more often than not women. As a result, employment discrimination law’s attempts to eliminate gender stereotypes may ironically be bad for women’s continued successful participation in paid employment.

This hypothesis is consistent with recent studies and data regarding the labor market outcomes of American women. In 2003, a widely debated New York Times Magazine article described the “Opt-Out Revolution,” in which educated women are increasingly leaving the labor market to care for children full-time. Many sociologists, legal scholars, and journalists are tying to explain the fact that the labor market participation rates of women aged 25 to 54 leveled off in 1994 and began to decline in 2000. One recently published study, based on extensive interviews with women who have “opted out” concludes that the demands of the American workplace are incompatible with the time they wish to spend with their children. At the same time, many mothers report that, had it been possible to combine work and family, they would have preferred to do so. While sociological data seem to confirm the social reality that women, more so than men, experience a work-family conflict that makes it difficult for them to meet employers’ expectations while tending to their caregiving responsibilities, antidiscrimination law’s strong norm against gender stereotypes creates an environment in which employers, judges, and policymakers awkwardly tiptoe around this social reality.

B. Opting Into Part-Time Work in Europe

In Europe, the law recognizes this reality more easily because its antidiscrimination law is less concerned with combating gender stereotypes than Title VII doctrine. In fact, European sex discrimination law sometimes depends upon the generalization that women tend to have more family caregiving responsibilities than men do. Since sex discrimination law in the member-states, such as France and Sweden, is largely directed by developments on the European level, it is worth considering the sex discrimination jurisprudence of the European Court of Justice. European sex discrimination law has developed to protect the various interests of part-time workers. This resulted from cases in which part-time workers claimed that their less favorable treatment constituted a form of sex discrimination. The legal theory in these cases is similar to the disparate impact theory challenging masculine ideal-worker norms, developed by academics like Joan Williams in the United States. This theory has been successful in the European Court of Justice, whereas it has not really persuaded U.S. courts.


244 Id.

245 See supra, text accompanying notes __ to __.
Article 141 of the EC Treaty (formerly Article 119 EEC), in force since 1957, requires that “men and women should receive equal pay for equal work.” In cases litigated under this provision since the 1970s, the European Court of Justice has interpreted this to mean that paying part-time workers a lower hourly rate than full-time workers can violate this provision unless there is some objective justification for the difference. Paying a lower hourly rate to part-time workers solely on the grounds that they work fewer hours constitutes indirect discrimination because such a policy has a disproportionate effect on women. The ECJ has reasoned:

[I]f it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex.

In other words, simply paying part-time workers a lower hourly rate than full-time workers is presumptively sex discrimination, and the employer must then establish that there is an objective reason. This legal framework recognizes and accommodates the difficulties women encounter in arranging full-time work schedules.

Part-time workers have also been protected on similar grounds under directives on Equal Pay and Equal Treatment of Men and Women in Employment. As of 2006, a new directive consolidates the existing provisions of different sex equality directives and some of the case law of the European Court of Justice. The interests of part-time workers dominate the ECJ’s jurisprudence of indirect discrimination, which was inspired in part by U.S. Supreme Court’s disparate impact theory. In addition to the lower hourly wages of part-time workers, the equal pay provision has been invoked to invalidate the exclusion of part-time workers from pension schemes. In holding one such exclusion invalid, the ECJ accepted the plaintiff’s assertion that the exclusion of part-time workers “placed women workers at a disadvantage, since they were more likely than their male colleagues to take part-time work so as to be able to care for their family and children.” Under the ECJ’s jurisprudence, practices that disadvantage part-time workers constitute indirect discrimination.

246 EC Treaty art. 141.
251 Blika Kaufhaus, id., at ¶ 6.
discrimination unless the employer can show that the practice is “necessary and proportionate” for achieving an objective purpose. 252 In developing this legal standard in Bilka-Kaufhaus GmbH v. Karin Weber von Hartz, the ECJ rejected the defendant’s argument that its policy was necessary to discourage part-time work, noting the plaintiff’s observation that the employer could have achieved this goal by refusing to hire any part-time workers at all. 253

C. The Persistence of Gendered Patterns of Working and Caring

By contrast, U.S. courts have been reluctant to accept any claim by Title VII plaintiffs premised on the assertion that women tend to have more responsibilities for children and the home and are therefore more likely to work part-time, even in the disparate impact context. In fact, such a characterization of women seems to constitute precisely the form of gender stereotyping that antidiscrimination law attempts to drive out. For example, the Seventh Circuit rejected a disparate impact claim by a part-time employee who challenged the termination of her part-time position in a reduction-in-force. 254 In Ilhardt v. Sara Lee Corporation, plaintiff argued that the company’s decision to eliminate her part-time position was unlawful because it had a disparate impact on professional women with young children. 255 Although the plaintiff cited studies finding that the majority of part-time workers were women with child-care responsibilities, the Seventh Circuit declined to take judicial notice of this assertion. “If we are to take judicial notice of a fact, however, that fact must be indisputable.” 256 The court noted that the assertion that women with young children tend to work part-time was a disputable fact.

The Seventh Circuit did not explicitly say that taking judicial notice of this assertion would amount to a gender stereotype, but the court’s reluctance to take judicial notice of this fact is natural within a legal order that holds employers liable under Title VII for making similar assumptions. When the employer assumed that women with pre-school-age children have family responsibilities that interfere with job performance in Phillips v. Martin Marietta, Justice Marshall’s concurring opinion referred to such assumptions as “ancient canards about the proper role of women,” 257 which Title VII aimed to prevent. “Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity,” he wrote. In 1985, one district court noted:

Title VII, as amended by the Pregnancy Discrimination Act, does not protect people wishing to take child-rearing leaves as opposed to women wishing to take pregnancy leaves . . . A disservice is

252 Id., ¶ 35.

253 Id. ¶ 34.


255 Id.

256 Id. at 1157.

done to both men and women to assume that child-rearing is a function peculiar to one sex.\footnote{258

Ilhardt’s rejection of the disparate impact theory of part-time employment is consistent with this understanding of Title VII, and is continuous with prior courts’ rejection of disparate impact challenges to family-unfriendly policies.\footnote{259

While the anti-stereotyping approach may lead women to opt out of paid work, the European strategies keep women in paid work, but not on equal terms. European strategies for reconciling work and family life make use of gender stereotypes by protecting the special relationship between mothers and children, providing special rights for pregnant women employees, and recognizing women’s tendency to do more caregiving than men when determining the rights of part-time workers. The main advantage of the European legal approaches, which has been the central focus of this Article, is that maternity and paternity leaves are not tied to the complex problems and costs that plague medical and sick leave regimes.

At the same time, the generous maternity and family policies in France and Sweden have not disrupted gendered patterns of working and caring. If anything, the generous maternity and family policies probably facilitate gendered patterns of working and caring. The persistence of occupational segregation and significant gender gaps in parental leave-taking and part-time work cannot be ignored. So, even if the maternity and family policies make work and family compatible for many women, they may also reinforce gender stratification, which many Americans regard as gender inequality.

In France, a recent analysis of the official statistical data suggests that a growing proportion of women in the labor market are in part-time work. Female labor market participation grew from 50 percent in 1970 to 75 percent in 2000. In the United States, only 59.3 percent of women over the age of 16 are in the labor market. In France, a larger percentage of women are in part-time work. 30 percent of female workers worked part-time by 2002, whereas only 6 percent of male workers worked part-time.\footnote{260

In the United States, of the women who work, only 25 percent are in part-time positions. Although the labor market participation rate of mothers of one child under the age of 3 is high, at 80.6 percent, the rate drops with each subsequent child. Mothers of 2 children, of whom one is under age 3 participate at a rate of 61.3 percent, which, and with 3 children of whom one is under age 3, the participation rate is 39 percent.\footnote{261

In the United States, mothers who have at least one child under age 3 participate at the rate of 60 percent.\footnote{262

\footnote{258


\footnote{259


\footnote{260


\footnote{261

Insee, enquêtes emploi 2007.

\footnote{262

In France, the rate of part-time work amongst women is growing. Although a smaller percentage of women were employed in France in 1972, only 13 percent of these women worked part-time. That percentage has now doubled. This is understandable in light of parallel developments towards legal protections for part-time workers. Furthermore, a recent study shows that women take 98 percent of the unpaid “parental leaves for education” (congé parental d’éducation), even though these leaves are available to both men and women. About 33 percent of all eligible mothers take this leave, as compared to 1 percent of eligible fathers. Indeed, in most European countries, 90 percent of parental leaves are taken by women. One explanation might be that, since women are given long maternity leaves (16 weeks in France) when a baby is born, whereas fathers are only given 11 days, path-dependence might lead women to continue to stay home with the child at the end of the maternity leave. Indeed, the analysis in the study of European member states’ patterns of leave-taking suggests that parental leaves are more evenly shared in countries in which the period of leave available is very short, such as Great Britain.

In Sweden, the female labor market participation rate is one of the highest in the world, at 76.1 percent of women between the ages of 16-and 64. At the same time, 41 percent of employed women work part-time, as compared to 8 percent of employed men. Furthermore, the labor market is highly segregated in Sweden, as compared to other countries. In fact, recent research suggests that countries with high female employment rates have high segregation levels. In Sweden, women are predominantly employed in the service sector, or the public sector in health, education, and child and elder care.

In addition, despite the state’s conscious attempts to incentivize Swedish men to take parental leave, the results have been disappointing. A recent study indicates that men account for about 20 percent of parental leave-taking.

---


264 Id.

265 Id. at 12.


268 See Lena Gonä & Jan Ch Karlsson, Divisions of Gender and Work, in Gender Segregation, supra note __, at 1.

269 See id. at 6.
percent of men do not take any leave at all during the child’s first year.\textsuperscript{270} By contrast, almost all eligible women take parental leave.\textsuperscript{271} Even in Sweden, women do a significantly larger share of child-rearing than men do. Nonetheless, they are better able to combine this with participation in paid work than their American counterparts, in part because policies protect maternity, families, and part-time work.

\textit{Conclusion}

A close look at the American and European legal approaches to work-family conflict casts doubt on the plausibility and desirability of transplanting the European models to the United States, contrary to the recommendations of many scholars and the popular media. Nonetheless, the European contrast draws attention to some dysfunctional pieces of the received American wisdom on work-family conflict, including the law of family and medical leave. Most importantly, the European experience sheds light on the complexity of the relationship between gender stereotypes, gender equality, and the advancement of women and families.

It is time to rethink U.S. antidiscrimination law, particularly as it has shaped the way American lawyers and policymakers frame the work-family conflict. Two lessons can be drawn from the European experience. First, family and medical leave should be disaggregated. Second, gender stereotypes are not necessarily bad for women.

First, the European example demonstrates that a parental leave scheme can be separated from a sick leave scheme without burdening women and families. Due to the unique costs and perceptions of illegitimacy that surround medical leave, disaggregating family and medical leave in the United States will remove a significant barrier to the achievement of paid family leave. Paid medical leave should be pursued, but there is no reason to provide all American employees with 12 weeks of sick leave, paid or unpaid, per year. If it were not assumed that parental leave entitlements must remain the same as sick leave entitlements, it would become possible to imagine the longer paid parental leaves that newborns.

But opening up these possibilities does require the abandonment of at least some established antidiscrimination norms, such as the notion that pregnant women are just like sick people and thus should be treated the same as them. Abandoning this notion does require a legal conception of pregnancy as a special category of work incapacity, which may highlight the difference between men and women. Any advancement in work-family reconciliation will require the liberation of pregnancy, maternity, and parental leave from the costs, baggage, and illegitimacy associated with medical leave.

Second, successful European work-family reconciliation policies challenge the American assumption that antidiscrimination law should combat gender stereotypes above all. Gender stereotypes are not always bad for women.


\textsuperscript{271} Bilan de la mise en oeuvre, supra note __, at 11.
When a legal order treats pregnancy as a special feminine medical condition, or respects the unique bond women form with newborns through breastfeeding, it relies on gender stereotypes to some degree. The Rachida Datis and Kirsten Gillibrands of the world may not need to rest before or after giving birth, and some women may not want to breastfeed. When the law protects the special relationship between the mother and her child, it does rely on stereotypes. But this is not necessarily a bad thing. We need to think more pragmatically about whether the law would actually harm women, as it is often assumed, if it relied on these stereotypes. The European models enable women to combine labor market participation with caregiving. The American alternative is driving more women to opt out of paid work altogether. At the same time, the American ideal of gender equality envisions a world in which gender does not determine the scope of one’s employment opportunities. Thus, the American vision of gender equality is at odds with the gender stratification that persists in Sweden and France.

Nonetheless, perhaps the European experience can inspire a creative synthesis to move beyond the impasse in the American debates about work-family conflict. Once the two lessons I have articulated are internalized, new approaches can emerge. The European experience with mandatory maternity leave is a reminder that paternalistic policies can be carefully designed to improve the options available to working parents. In a similar vein, Richard Thaler and Cass Sunstein have proposed “libertarian paternalism” in several American legal and policy areas.272 Perhaps Americans need to overcome their allergy to paternalism, which is expressed in antidiscrimination doctrine, to fashion new solutions to the work-family conflict.

In Europe, mandatory maternity leave limits women’s choices, but it can also offset the pressure women experience to take less maternity leave, particularly under insecure employment conditions. The problem with mandatory maternity leave is not its paternalism, but the fact that it is only imposed on women and not on men. However, in light of the recent cases suggesting that men, too, are often pressured by gender stereotypes to take less time off for paternity leave than they are entitled to, why not adopt paternalism towards paternity leave? If all men were required by law to take paternity leave, as European women are required to take maternity leave, a more equitable division of caregiving responsibilities might emerge.

Both the disaggregation of family and medical leave and the loosening of anti-stereotyping doctrine require us to undo the received wisdom of American antidiscrimination law. To date, neither the American nor European models have eliminated gendered patterns of working and caring. But hopefully, synthesizing the lessons of the failures and successes of these different legal cultures will generate new solutions that are sorely needed.