

Women Can and Should Have It Both Ways

Finding a Balance Between the EU's New Law on Maternity Leave and American Maternity Provisions

Amy Lai*

Abstract

This paper critiques the EU's new law on maternity leave by contextualizing it in the historical development of EU law as well as in feminist criticism. It argues in favour of generous paid maternity leave provisions based on economic and psychological arguments. It then examines the likely impact of an extension of maternity leave at the EU level on member states. Finally, it studies the Family and Medical Leave Act of the United States to reveal the insufficiency of its maternity leave provisions, especially when compared to the generous provisions in current EU law. This paper arrives at the conclusion that new mothers, be they Europeans or Americans, can and should be able to reconcile their work and family obligations.

Keywords: European Union, maternity leave, family, work.

A. Introduction: Hearing a Plathian Lament

So I began to think maybe it was true that when you were married and had children it was like being brainwashed, and afterward you went about as numb as a slave in a totalitarian state.¹

I'm no more your mother
Than the cloud that distills a mirror to reflect its own slow
Effacement at the wind's hand.²

* Amy Lai is a student at Boston College Law School and holds a Ph.D. from Cambridge. The author would like to express her gratitude to Professor Sophie Robin-Olivier for her comments on the draft.

1 S. Plath, *The Bell Jar*, Harper & Row, 1971, p. 127.

2 S. Plath, 'Morning Song', *Ariel*, Perennial Classics, 1999, p. 1. Plath wrote this poem after she gave birth to her first child, Freida, in England. This paper begins with a citation from Plath because of her status as a feminist icon in Anglo-American literature, as well as her insights into motherhood, which were gained from her life in both the United States and England.

We can't have it both ways [...] so we have to think carefully about which way we want to have it.³

American writer Sylvia Plath, in her autobiographical novel *The Bell Jar*, described her mental breakdown as a college student who aspired to become a writer despite the social demand to follow the conventional path of marriage and motherhood.⁴ Her endeavour to break social conventions and become recognized and respected as a writer was concomitant with a nation of women trying to become equal to their American male counterparts in the 1960s. Nevertheless, Plath's subsequent marriage and her poems about motherhood indicate her realization that work and family are coterminous, although, as her ambivalent vision of motherhood suggests, being a new mother is both rewarding and stressful, fulfilling and draining.⁵ Given that accomplished writers like Plath have celebrated the uniqueness and wonder of motherhood, it therefore came as a surprise when, twenty years later, feminists such as Wendy Williams resorted to a reconciliatory position by contending feminists must choose policies that treat men and women the same.⁶ By not treating men and women as both different and equal, such policies thus fail to accommodate their differences and attain true gender equality. Admittedly, though, this "different but equal" ideal is difficult to fully materialize, as shown by the issue of maternity leave, which has presented a long-standing problem for legislators and policymakers.

On 23 February 2010, the Committee on Women's Rights and Gender Equality (FEMM) of the European Parliament passed draft legislation to make it compulsory for employers in the European Union (EU) to extend maternity leave from fourteen to twenty weeks on full pay.⁷ Pursuant to this proposal, member states must also give fathers the right to fully paid paternity leave of at least two weeks within the period of maternity leave.⁸ Business groups have expressed concern that such new legislation would pose problems for companies and that employers would discriminate against young women.⁹ Moreover, such costs, if

3 W. Williams, 'The Equality Crisis: Some Reflections on Cultures, Courts, and Feminism', 8 *Women's Rts. L. Rep.* 1982, p. 175 at p. 196. A chief spokeswoman for the US feminist movement, Williams argues that feminists should choose policies that treat men and women the same. *Id.*

4 See Plath, *supra* note 1.

5 See Plath, *supra* note 2.

6 See Williams, *supra* note 3.

7 European Parliament, 'Extending maternity leave to 20 weeks fully paid', 23 February 2010, available at: <www.europarl.europa.eu/news/expert/infopress_page/014-69364-054-02-09-902-20100223IPR69363-23-02-2010-2010-false/default_en.htm>. The Committee recommended that this legislation on maternity and paternity leave also apply to parents who adopt a child of less than twelve months old. Furthermore, fully paid additional maternity leave should be granted in specific situations, such as premature childbirth, children with disabilities, mothers with disabilities, teenage mothers, multiple births and births occurring within eighteen months of previous births.

8 *Id.*

9 E.g., BBC News, 'Maternity Leave Extension Backed by European MPs', 24 February 2010, available at: <<http://news.bbc.co.uk/2/hi/8533438.stm>>.

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reimbursed by governments, would impose huge burdens on public finances.¹⁰ There have also been fears, both within the Committee and among the general public, that such an extended pay leave would upset the stability of the whole EU at a time when government budgets are already burdened by an aging population.¹¹ Nevertheless, supporters believe that, at a time of low birth rates, generous maternity leave should be a right for all mothers, not only those who could afford it, and that paid paternity leave would offer an excellent opportunity for fathers to play an active role in the family.¹² Because several member states expressed concern about this new directive, the European Council decided to assess its possible social, environmental, economic and budgetary costs and benefits. Hence, the plenary vote on the proposal, originally scheduled for 25 March 2010 in Brussels, was postponed. Finally, on 20 October 2010, the European Parliament passed the proposal in Strasbourg, hence making twenty weeks of maternity leave on full pay compulsory in EU countries.¹³

The EU is regarded as an important proponent of gender equality. The 1957 Treaty of Rome established the principle of equal pay for equal work, although its primary aim was not so much to promote women's rights as to stimulate economic cooperation.¹⁴ In the mid 1970s, the Directorates for Labour and Social Affairs passed directives on the fundamental principles of equal pay, equal access to employment and equal treatment of women and men in matters of social security, hence laying the basis for a more comprehensive approach to eliminating gender-related discrimination and integrating women into the labour market.¹⁵ The Equal Treatment Directive, adopted in 1976, defined equal treatment as "no discrimination whatsoever on grounds of sex". At the same time, it added that "[t]his Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity".¹⁶

In the 1990s, the EU further passed directives on maternity protection, parental leave and part-time work, in order to facilitate reconciliation of employment and family life.¹⁷ The 1992 Pregnancy Directive imposed minimum standards on member states regarding the legal protection of the "safety and health at work of pregnant workers and workers who have recently given birth or are

10 See, e.g., J. Groves, *Business and taxpayers face £2bn bill under Brussels plans to give new mothers 20 weeks leave on FULL pay*, Mail Online, 26 February 2010, available at: <www.dailymail.co.uk/news/article-1253200/EU-plans-maternity-leave-increase-cost-2bn.html>.

11 See, e.g., EUBusiness, 'Euro-MPs vote for 20 weeks paid maternity', 24 February 2010, available at: <www.eubusiness.com/news-eu/budget-health.2uc>.

12 *Id.*

13 European Parliament, 'Extending maternity leave to 20 weeks with full pay', available at: <www.europarl.europa.eu/news/public/focus_page/008-86242-281-10-41-901-20101008FCS86210-08-10-2010-2010/default_p001c012_en.htm>.

14 E.g., P. Schott, 'The European Union: A Trailblazer for Equality', in S. Baer & M. Hoheisel (Eds.), *Between Success and Disappointment: Gender Equality Policies in an Enlarged Europe*, Kleine Verlag, 2007, p. 12; R.A. Cichowski, 'Women's Rights, The European Court, and Supranational Constitutionalism', 38 *L. Soc. Rev.* 2004, p. 489.

15 M. Rossilli, 'Introduction', *Gender Policies in the European Union*, Peter Lang, 2000, p. 6.

16 Council Directive 76/207, OJ 1976 L 39/40, Art. 2.1-3.

17 Schott, *supra* note 14, at pp. 12-13.

breastfeeding”, and required at least fourteen weeks of maternity leave “in accordance with national legislation and/or practice”.¹⁸ The 1997 Amsterdam Treaty made the task of securing equality between men and women a primary aim of the European Community, thus for the first time putting equality of gender on a par with nationality.¹⁹ The Charter of Fundamental Rights of the European Union, signed in Nice on 7 December 2000, similarly described the equality between men and women as a fundamental principle of the EU.²⁰ The Lisbon Strategy, passed in the same year, calls for the development of the EU into the most competitive economic region in the world by 2010, a proposal which, according to the heads of state, could not be achieved without women.²¹ The Lisbon Strategy’s objective of increasing women’s participation in the work force therefore dovetails with the EU’s aim to promote gender equality and better reconciliation between work and family.²²

This paper critiques the EU’s new law on maternity leave by contextualizing it in the historical development of EU law as well as in feminist criticism. Part B argues in favour of generous paid maternity leave provisions based on economic and psychological arguments. It gives a brief overview of the cost calculus of maternity leave to explain how it benefits employers in the long run despite both direct and indirect costs. While scholars either disapprove of gender stereotypes altogether or attempt to accommodate them, this paper, by making use of Martha Fineman’s feminist theory, affirms the mother-child bond and arrives at a more refined understanding of gender stereotypes. By recognizing the differences between men and women and the value of such differences, this paper contends that men and women should be treated as different, yet equal.

Part C examines the likely impact of an extension of maternity leave at the EU level on member states. The EU’s status as a supraconstitutional legal regime will empower it to enforce its new law at the expense of national legislation, because citizens who feel that they are unfairly treated by laws that do not conform to this new law will bring suits to national courts or even appeal to the European Court of Justice (ECJ). At the same time, though, the EU will continue to defer to national governments that offer more generous maternity leave benefits than the new law, which means that the new law will reinforce gendered policies already in existence. This paper argues that, besides disrupting the gendered policies that disadvantage new mothers, there are other strong reasons why paid paternity leave, like paid maternity leave, should be made mandatory.

Part D studies the Family and Medical Leave Act of the United States to reveal the insufficiency of its maternity leave provisions, especially when compared to the generous provisions in current EU law. It briefly reviews the various social and historical factors behind this insufficiency to explain how, despite the anti-paternalism in the US Constitution and the anti-stereotyping legislative tra-

18 Council Directive 92/85, OJ 1992 L 348/1, Arts. 1, 8.

19 *Id.*, at p. 28.

20 *Id.*

21 *Id.*, at p. 14.

22 *See id.*

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dition, strong initiatives need to be implemented to refine people's understanding of gender stereotypes and persuade legislators and policymakers to reform the country's non-mandatory maternity and paternity leave provisions. This paper arrives at the conclusion that new mothers, be they Europeans or Americans, can and should be able to reconcile their work and family obligations. Contrary to Wendy Williams' assertion, women can and should have it both ways.

B. Different but Equal: A Precarious Balance

Dorothea Alewell and Kerstin Pull studied the direct and indirect costs of maternity leave and its long-term benefits to employers. Direct costs include the payments that a woman receives during maternity leave, if co-financed by the employer.²³ Since employers often cannot pass on the entire cost of maternity pay to female employees, it would seem to be more expensive to employ women than men.²⁴ Indirect costs include the cost of human capital depreciation as well as the cost of reorganization.²⁵ The former refers to the cost of retraining the mothers who have lost part of their human capital during maternity leave; the latter refers to the cost of reorganizing the work during their absence.²⁶ Nevertheless, if the female employees value their paid maternity leave, their labour supply will likely rise; in addition, more women returning to work after taking leave will also decrease recruiting and training costs. Thus, the net effect of maternity leave regulations on women's labour market position might very well be positive, even if at first sight maternity leave would seem to simply increase the employment costs of female employees and worsen their employment chances.²⁷ Whether such effects will indeed be positive depend upon a number of factors. One important factor is the generosity of maternity leave provisions, which in turn hinge on how pregnancy is treated.

I. How Bad Are Gender Stereotypes? – From Foubert to Suk

Some commentators believe that classifying pregnancy as a *sui generis* condition in an attempt to rule out discrimination of women in the labour market would only lead to further stigmatization of women as child bearers, hence thwarting the application of the principle of equal treatment between working men and

23 D. Alewell and K. Pull, 'An International Comparison and Assessment of Maternity Leave Legislation', 22 *Comp. Labor L. Pol'y J.* 2001, p. 297 at p. 304. In countries such as France, however, the law does not require the employer to pay the employee during maternity leave. Rather, female employees are guaranteed wage replacement through a regime known as Assurance Maternité, or 'Maternity Insurance'. In addition to wage replacement, Maternity Insurance covers, first and foremost, all the medical and pharmaceutical expenses related to pregnancy.

24 *See id.*, at p. 305. Legally or collectively set minimum wages may constitute lower bounds on wages and hamper wage reductions for women in lower income areas. Anti-discrimination rules or affirmative action programmes with 'equal pay for equal work' wage setting rules may have the same effect. *Id.*

25 *Id.*, at p. 299.

26 *Id.*

27 *See id.*, at pp. 315-316.

women.²⁸ Petra Foubert, for instance, contends that Article 2(3) of the EU's Equal Treatment Directive, or the Pregnancy Directive, should only allow unequal treatment of female workers as far as the real biological differences between men and women are concerned, such as pregnancy and the short period after delivery that the mother needs for physical recovery.²⁹ By giving broad definitions to the Pregnancy Directive and maternity, not only to protect a woman's biological condition but also to safeguard her special relationship with her child, the ECJ would only reinforce the traditional roles of women as child bearers and child rearers and induce employers to statistically discriminate against women.³⁰

In contrast, legal scholar Julie Suk asserts in her latest journal article that gender stereotypes are not necessarily bad after all. The anti-stereotype doctrine is based on the assumption that an individual should not be subject to generalizations and that he or she is entitled to become an exception to that generalization.³¹ In the case of gender stereotype, however, this doctrine does nothing to change the hard reality that women tend to face this conflict between work and family more acutely than men do in societies where women are expected to engage in more caregiving than men.³² When employers make the same demands on women and men without regard for their actual caregiving responsibilities, people who are primary caregivers will find it more difficult to meet the employer's expectations than people who do not have to shoulder such responsibilities.³³ Policies that purportedly safeguard gender equality and individual rights thus impose a heavy burden on primary caregivers and, in many cases, women.³⁴ A successful work-family reconciliation policy therefore has to rely upon some generalizations about gender roles.³⁵

Foubert's argument, which tends to annihilate the differences between men and women, is unrealistic. Credit should be given to Suk's view, which is well grounded in social reality. Nevertheless, this should not detract the reader from the weaknesses in her proposal. Despite her assertion that stereotypes are not necessarily bad, she does imply that they are undesirable and need accommodation, which makes her position a highly reconciliatory one.³⁶ Moreover, her proposal to accommodate the differences in gender roles risks perpetuating women's status as caregivers. In addition, she does not examine the nature of stereotypes; rather, she adopts a generic, common understanding of stereotypes.³⁷ Thus, she

28 *E.g.*, P. Foubert, 'Does EC Pregnancy and Maternity Legislation Create Equal Opportunities for Women in the EC Labor Market? The European Court of Justice's Interpretation of the EC Pregnancy Directive in *Boyle and Lewen*', 8 *Mich. J. Gen. & L.* 2002, p. 219 at pp. 225-234.

29 *Id.*, at pp. 225-226.

30 *Id.*, at pp. 229-234.

31 *See* J. Suk, 'Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict', 110 *Columbia L. Rev.* 2010, p. 1 at p. 55.

32 *Id.*, at p. 56.

33 *Id.*, at p. 57.

34 *See id.*

35 *Id.*, at p. 66.

36 *See id.*, at pp. 55-57, 66.

37 *See id.*

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fails to recognize anything essential, if not universal, to the mother-child relationship, namely, the mother-child bond, which deserves protection by the law.

II. *Beyond Gender Stereotypes: Prioritizing the Mother-Child Bond*

In the context of motherhood, radical feminists contend that biological differences between men and women have led to the oppression of women, while cultural feminists celebrate motherhood as the source of women's power.³⁸ Radical feminists, like Shulamith Firestone, reject motherhood and traditional gender roles as innately oppressive, because they embody the sexual subordination of women and enforce male supremacy not only in the family, but also in the legal and political structures of the state.³⁹ In contrast, cultural feminists embrace and celebrate women's differences from men. Carol Gilligan, for instance, argues that the experience of mothering has made women more connected and caring than men.⁴⁰ Hence, the law should adopt these female values, especially in the legal treatment of motherhood. These two opposing views pose a difficult dilemma.⁴¹ Celebrating mothers could lapse into defining women according to their biological nature.⁴² On the other hand, condemning the subordinating features of motherhood might turn into the total rejection of motherhood as an "annihilation" of women.⁴³

While it is difficult to explain "motherhood" that grasps both its affirming and oppressive aspects, Martha Fineman, sometimes described as belonging to the camp of cultural feminists, successfully resolves the tension between glorifying mothers and annihilating them.⁴⁴ Fineman avoids celebrating women according to their biological nature, thereby essentializing them, by proposing the concept of a "gendered life", which recognizes the gendered implications of women's lives, but without assuming that all women's experiences are the same.⁴⁵ She also avoids renouncing motherhood, by distinguishing between the burdens that mothers undertake when they care for children and the oppression of women.⁴⁶ Thus, she acknowledges that women's domestic labour, while entailing material costs and consequences, may indeed provide joy and, therefore, is not necessarily oppressive.⁴⁷

Indeed, the mother-child bond has become a universal symbol of the human relationship as well as an icon for the ultimate affectionate tie in humanity.⁴⁸ The relationship has two unique characteristics that set it apart from the relationship

38 J. Wald, 'Outlaw Mothers', 8 *Hastings Women's L.J.* 1997, p. 169 at pp. 176-77.

39 *Id.*, at p. 177.

40 *Id.*

41 *Id.*

42 R. West, 'Jurisprudence and Gender', 55 *U. Chi. L. Rev.* 1988, p. 1 at pp. 28-42.

43 See J. Allen, 'Motherhood: The Annihilation of Women', in J. Trebilcot (Ed.), *Mothering: Essays in Feminist Theory*, 1984, p. 315 at p. 316.

44 See M. Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, Routledge, 1995.

45 See *id.*, at p. 48.

46 See *id.*, at p. 162.

47 See *id.*

48 See M.H. Klaus & J.H. Kennell, *Maternal-Infant Bonding*, C.V. Mosby, 1976, p. 1.

between the child and another adult, such as the father. First, prior to birth, the mother gestates the child.⁴⁹ Second, after birth, the child is dependent upon the mother for survival.⁵⁰ Once a bond has been established, one may experience emotional distress and/or personality disturbance, such as anxiety, anger and depression, when unwillingly separated from the person with whom one has established a bond.⁵¹ Moreover, contrary to portraits of happy mothers offered by the world of media, art and literature, researches have demonstrated that motherhood subjects women to much stress, and women are far more likely to be diagnosed as mentally ill in the first year after the birth of their first child than at any other time in their lives.⁵² These are some of the reasons why Fineman, despite the fact that the maternal presumption has been regarded as outdated in relation to child custody, argues that women and children will fare better under legal rules that reference their material and emotional needs.⁵³ Accordingly, she advocates for a custody model in family law in which the mother-child bond becomes more central.⁵⁴

Fineman's position is superior to those of Foubert or Suk, because she affirms the mother-child bond, thus expressly acknowledging that men and women are both equal and different. Her prioritization of the mother-child bond as well as her refined understanding of gender stereotypes and motherhood should empower legislators and policymakers to advocate paid maternity leave provisions for pregnant women. The next question that needs to be dealt with concerns the generosity of maternity leave and the necessity of mandatory paid paternity leave.

C. Between Enough and Too Much: Maternity Leave in the EU and its Member States

The debate surrounding EU's new legislation on maternity leave has centred on how generous maternity leave provisions should be. According to the new law, EU employers must extend maternity leave from fourteen to twenty weeks on full pay, and give fathers the right to fully paid paternity leave of at least two weeks within the period of maternity leave.⁵⁵ Given the diversity of current maternity

49 I. Hurwitz, 'Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood', 33 *Connecticut L. Rev.* 2000, p. 127.

50 *Id.*

51 *Id.*; J. Bowlby, *The Making and Breaking of Affectional Bonds*, Routledge, 1979, p. 127.

52 *See, e.g.*, J. Price Knowles, 'Woman-Defined Motherhood', in J. Price Knowles & E. Cole, (Eds.), *Motherhood: A Feminist Perspective*, The Howarth Press, 1990, pp. 4-5. As Knowles describes it, inside the potential ring of happiness of mothering for both mother and child is a "black hole", which she uses as a metaphor for the reality of the limits of the mother and of her environment. *Id.*, at p. 6.

53 M. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, Univ. Chicago P., 1991, p. 11.

54 *Id.*, at pp. 11, 173-190.

55 European Parliament, *supra* note 7.

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and paternity provisions in EU Member States, their responses to the proposal – even before it was passed – have varied greatly.

I. Varying Parental Rights: France, Germany and Britain

Because France already has very extensive, generous policies that help women combine paid work and family responsibilities, it is no surprise that no objection has been heard from this EU nation. Under the French Labour Code, every female employee is entitled to a maternity leave period totalling sixteen weeks, of which six must be taken before the birth of the baby.⁵⁶ The periods of leave, both before and after the birth, are further lengthened 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 is increased such that the total amount of leave is 26 weeks.⁵⁷ 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. Moreover, by making eight weeks of maternity leave mandatory, the Labour Code sets aside two months during which female employees cannot choose to work, thereby making it impossible for employers to encourage women to take shorter leave or to reward those who forego leave altogether.⁵⁸ The provisions for paternity leave are far less generous by comparison. The father of a newborn, upon giving his employer one month's notice, has the right to a paternity leave of eleven consecutive days, or eighteen days in the case of multiple births.⁵⁹ Provided that he stops working, he is entitled to a daily stipend equivalent to that received by mothers on maternity leave.⁶⁰ Fathers are entitled to leave that is comparable in length to that enjoyed by mothers only if the mother dies. Unlike maternity leave, paternity leave is never compulsory.⁶¹

Maternity leave provisions in the United Kingdom and Germany are far less generous, and the strong reactions against the maternity proposal are therefore understandable. In the United Kingdom, mothers are entitled to 39 weeks of maternity leave. For the first six weeks they are entitled to receive 90 per cent of their average earnings. After that they get a flat rate per week, which rose from £123.06 in 2009 to £124.88 in 2010, or 90 per cent of their average earnings if those are less than the flat rate.⁶² Fathers are entitled to a maximum of two weeks of paternity leave, which must be taken together, at any time up to eight weeks after birth, on the same pay as mothers after the first six weeks of leave.⁶³ Germany's provisions, while more generous than those of the United Kingdom,

56 C. trav., Art. L 1225-24.

57 *Id.*, Art. L 1225-18-19.

58 *Id.*, Art. L 1225-17.

59 *Id.*, Art. L 1225-35.

60 C. séc. soc., Art. L 331-8.

61 C. trav., Art. L 1225-26.

62 Directgov, 'Maternity pay', available at: <http://webarchive.nationalarchives.gov.uk/+www.direct.gov.uk/en/Parents/Moneyandworkentitlements/WorkAndFamilies/Pregnancyand-maternityrights/DG_10029290> (last accessed 20 April 2010).

63 R. Sheasby, 'A Guide to Paternity Rights', NetDoctor, available at: <www.netdoctor.co.uk/health_advice/facts/paternity_rights_003737.htm> (last accessed 20 April 2010).

are less so than France. German mothers are entitled to fourteen weeks of maternity leave, during which they are paid their full salary, of which eight weeks are mandatory. They are entitled to a further twelve months at 67 per cent of pay, up to a maximum of €1,800 per month.⁶⁴ Fathers can take paternity leave for twelve months on the same pay, or fourteen months if they are single fathers.⁶⁵

II. *Expanding Mothers' Rights: Impacts of a New Law*

In the past, when domestic law offered less protection than EU law, women who felt that they experienced discrimination utilized the new law to bring claims before their national courts.⁶⁶ The European Court's activism since the 1960s and 1970s has transformed the Treaty of Rome, an international treaty governing nation-state economic cooperation, into a "supranational constitution" granting rights to individual citizens.⁶⁷ For example, in *Boyle v. Equal Opportunities Commission*, female employees filed a complaint to the industrial tribunal in Manchester claiming that the maternity leave policy offered, particularly the connection between sick leave and maternity leave, was incompatible with the EU law.⁶⁸ In the *Pedersen* case, plaintiffs challenged the Danish law stating that women were unfit for work for reasons connected with pregnancy.⁶⁹ In both cases, the ECJ ruled in favour of plaintiffs on the basis of the EU's Pregnancy Directive.

Since the new law was passed, it has formed a part of the supranational legal regime, under which the EU will continue to uphold its own interests at the expense of national government policy positions.⁷⁰ Thus, if nations, such as Germany and United Kingdom, do not follow the new EU law, which makes women feel that they are discriminated against, they will utilize the new directive to bring claims before their national courts and even to appeal to the ECJ. Like the plaintiffs in *Boyle* and *Pedersen*, they may very well succeed.

The EU's supranational constitution will not only uphold the new law at the expense of domestic law, but will also continue to defer to member states if the domestic policies happen to provide more generous maternity benefits than the EU law. Article 2(3) of the Equal Treatment Directive permits member states to exempt from equal treatment "provisions concerning the protection of women, particularly as regards pregnancy and maternity".⁷¹ It is true that the ECJ has been able to combine a vigorous defence of fundamental rights with a sensitivity to discretion over social policy by member states.⁷² Nevertheless, pregnancy remains the immutable boundary that EC equality law will not penetrate. Once

64 A. Strocel, 'Maternity Leave in Germany', 1 June 2009, available at: <www.strocel.com/maternity-leave-in-germany>.

65 *Id.*

66 See Cichowski, *supra* note 14, at pp. 507-508.

67 *Id.*, at pp. 489-490.

68 Case C-411/96, *Boyle & Others v. Equal Opportunities Comm'n*, [1998] ECR I-6411.

69 Case C-66/96, *Handels-og Konturfunktionærernes Forbund i Danmark (acting for Høy Pedersen)*, [1999] IRLR 55.

70 See Cichowski, *supra* note 14, at pp. 494-507.

71 Council Directive 76/207, OJ 1976 L 39/40, Art. 2.1-3.

72 S. Pager, 'Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality', 511 *Am. J. Comp. L.* 2003, p. 553 at p. 561.

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women become pregnant, they automatically fall within the ambit of Article 2(3) and become eligible for special protection.⁷³ In *Hofmann*, for example, the plaintiff appealed the defendant's denial of offering him payment for his paternity leave to take care of his illegitimate child in the same way that it would have offered to the mother under German law.⁷⁴ The ECJ stated piously that "the directive is not designed to settle questions concerned with the organization of the family, or to alter the division of the responsibility between parents."⁷⁵ Such a hands-off approach can be expected to continue, under which the ECJ will allow member states to settle these questions regarding pregnancy according to communal standards that foreclose the option for individuals to make non-traditional choices.⁷⁶

This hands-off approach will nevertheless perpetuate the gendered patterns of working and caring that are already dominant in many EU member states, which offer generous maternity leave but allow paternity leave to remain an option. Thus, now that the law has been passed, it is even more necessary than before for the EU to mandate paid paternity leave, something that it has not done before.

III. Balancing Parental Obligations: A Socially Desirable and Cost-Effective Approach

Suk rightly argues that in order to disrupt the gendered patterns of working and caring in many EU nations, stronger initiatives than those currently available are necessary to encourage fathers to do more caregiving.⁷⁷ Mandatory, not optional, paternity leave can be a useful tool for this purpose.⁷⁸ Just as mandatory maternity leave limits women's choice to resume work but protects their right to adequate maternity leave, mandatory paternity leave may enable fathers to resist employer pressures to continue working even when they want to stay home to care for a young child.⁷⁹ Suk's argument needs to be supplemented by three more important reasons. First, mothering is a gender-neutral task. Second, gender-neutral mothering was affirmatively acknowledged by the revised Directive on Parental Leave in 2009, and mandating paternity leave would be a logical development in the light of such an evolution. Third, mandating paid paternity leave, instead of increasing paid maternity leave from fourteen to twenty weeks, may very well help to reduce the indirect costs incurred by EU employers.

While the mother-child bond is innate, the task of "mothering" needs not be performed by women alone. Feminists, such as Dorothy Dinnerstein and Nancy Chodorow, have stressed that gender differentiation and sex oppression will exist as long as women continue to be totally responsible for the daily tasks of rearing

73 *Id.*, at p. 567.

74 Case 184/83, *Hofmann v. Barmer Ersatzkasse* [1984] ECR 3047.

75 *Id.*

76 Pager, *supra* note 72, at pp. 563-564.

77 See Suk, *supra* note 31, at 67.

78 *Id.*

79 *Id.*, at pp. 67-68. Suk suggests another possibility, which is to provide paid pregnancy and child-birth leave only to mothers and longer paid caregiving leave only to fathers. *Id.*, at p. 68.

their children.⁸⁰ As early as in the 1980s, American parents already experimented with new models of parenting, in which they shared the burden of “mothering” their children.⁸¹ Anyone can “mother” an infant as long as he or she can provide frequent and sustained physical contact to the child, be sensitive to the baby’s signals and respond promptly to a baby’s crying.⁸² Beyond these immediate behavioural indices, psychoanalysts argue that anyone who has personally experienced a positive parent-child relationship that allowed the development of trust and individuation in his or her own childhood has the emotional capabilities to parent.⁸³ Therefore, contrary to the claims of some socio-biologists, there is no conclusive research indicating that the female body or hormonal structure better equips women for mothering their children than the male counterparts do for men.⁸⁴ On the other hand, years in female-dominated parenting situations and gender-differentiated cultural institutions can and do make women better prepared than men for this task.⁸⁵ Accordingly, mandatory paternity leave provisions will be a strong initiative to encourage fathers to “mother” their children, which is both feasible and desirable.⁸⁶

Indeed, mandating paid paternity leave would also be a logical development in light of the EU’s recent revision of its Parental Leave Directive, which takes an affirmative step towards recognizing the gender-neutral role of mothering. In 2009, the EU revised its 1996 Parental Leave Directive both by expanding the parental leave period from three to fourth months and by making one month of parental leave non-transferable.⁸⁷ The 1996 Directive already tacitly recognized that mothering was gender-neutral. It offered men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years.⁸⁸ To promote equal opportunities and equal treatment between men and women, it considered that the right to parental leave should be granted on a non-transferable basis.⁸⁹ Nevertheless, it is the revised directive that takes a

80 D. Ehrensaft, ‘When Women and Men Mother’, in J. Trebilcot (Ed.), *Mothering: Essays in Feminist Theory*, Rowman & Allanheld, 1983, p. 42.

81 *Id.*, at p. 47. Here, the word ‘mothering’ is used to refer to the day-to-day primary care of a child and to the consciousness of being directly in charge of the child’s upbringing, a level of involvement that is different from the once-a-week baseball games or daily twenty-five minutes of play in which men have typically been involved. *Id.*

82 *Id.*, at p. 48.

83 *Id.*

84 *Id.*

85 *Id.* The author points out that, while the sharing of physical tasks between mothers and fathers is easily implemented, the sexual division of the psychological labour in parenting is often left partially intact. The answer to questions such as ‘Who carries around in their head knowledge of diapers needing to be laundered, fingernails needing to be cut, new clothes needing to be bought?’ is more often than not the mother. Despite their mutual agreements, men thus carry less of the mental load of mothering or parenting, leaving women more caught up in the psychic aspects of the process. *Id.*, at p. 53.

86 *See id.*, at pp. 47-48, 53.

87 Council Directive 10/18/EU, OJ 2010 L 68/18, Cl. 2.1-2

88 *See* Council Directive 96/34/EC, OJ 1996 L 145/4, at p. 7, Cl. 2.1.

89 *Id.*, at Cl. 2.2.

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more affirmative role in safeguarding gender equality by stipulating that, on top of expanding the period of leave to four months, one of the four months shall be provided on a non-transferable basis.⁹⁰ Thus, mandatory paid paternity leave would be a logical development in the context of such an evolution. On the other hand, simply encouraging fathers to take paternity leave would contradict the affirmative acknowledgment of gender-neutral mothering and the equality principle that were laid down in a related directive.

In addition, the possible increase in indirect costs to employers posed by twenty weeks of maternity leave suggests that keeping paid maternity leave at fourteen weeks, while mandating paid paternity leave, may be a very good way to disrupt the gendered caregiving patterns while keeping indirect costs at their optimal level. According to the study by Alewell and Pull, while the costs of human capital depreciation normally increase with leave duration, the costs of reorganization, and hence the sum of the indirect costs, may very well be at their maximum for medium leave durations, such as a period of twenty weeks.⁹¹ Because recruiting a substitute gives rise to fixed costs, the average costs of a substitute will decrease with increasing maternity leave duration.⁹² Thus, an employer who is confronted with a given duration of maternity leave and has to choose between work-sharing arrangements or employing a substitute will choose the alternative with the lower costs: if leave duration is rather short, the employer will prefer to shift the mother's work to her co-workers; if the legal stipulations provide for a long period of maternity leave, they will prefer to hire a substitute.⁹³ Intermediate levels of maternity leave may therefore incur the highest reorganization costs, as they render work-sharing agreements difficult, while not yet allowing for practicable replacement solutions.⁹⁴ The reorganization costs would be further complicated by other factors, including the nature of the work, the size of the company and the predictability of leave duration.⁹⁵ Depending on these factors, then, it may be both cost-effective and socially desirable to shift at least some period of the proposed twenty-week maternity leave to mandatory paternity leave.⁹⁶

90 See Council Directive 10/18/EU, OJ 2010 L 68/18, Cl. 2.2.

91 Alewell & Pull, *supra* note 23, at 299.

92 *Id.*, at p. 300.

93 *Id.*, at p. 301.

94 *Id.*, at p. 302.

95 See *id.*, at pp. 303-304. It is up to the young mother if she takes advantage of the full extent of mandated job-protected leave, and she may also decide either to quit her job completely or to take additional parental leave provisions. The shorter the relevant notice periods and the weaker the veto-rights of the employer, the more uncertainty about actual leave duration. Unexpectedly long maternity leave periods may make work-sharing solutions expensive, while early returns may make work substitution inefficient and costly. *Id.*, at p. 303. Hence, such uncertainty in general increases the costs of reorganization and may foster employers' reluctance to employ women in the relevant age groups at the same conditions as men. *Id.*, at p. 304.

96 See *id.*, at pp. 299-304.

D. Between Enough and Too Little, or Nothing: Maternity Leave in the US

Unlike the EU, the United States has had no state-mandated paid leave for working mothers. The US Congress enacted the Pregnancy Discrimination Act (PDA) in 1978, which made it illegal for employers to have employment policies that required termination or mandatory leave for pregnant employees, and guaranteed women who took time off work due to pregnancy, childbirth or related medical conditions that they would be able to return to work on the same basis as other temporarily disabled workers.⁹⁷ Congress further enacted the Family and Medical Leave Act (FMLA) in 1993, which guaranteed that working parents would be able to take time off work for the birth or adoption of a child.⁹⁸ In passing the FMLA, Congress sought to address “the growing conflict between work and family” as an effect of recent economic and social changes.⁹⁹ By providing an eligible employee a total of twelve work weeks of leave during any twelve-month period for the birth or adoption of a child and/or to care for that child, its ultimate purpose was that “[a] woman should not have to choose between her job and becoming a mother and a couple should not be punished for becoming a family.”¹⁰⁰

I. *Annihilating Little into Nothing: A Critique of the FMLA*

The FMLA has been heavily criticized. First, it covers only about 40 per cent of the labour force, leaving the rest of the workforce without any guaranteed family leave benefits.¹⁰¹ Moreover, it guarantees only unpaid leave and, because many American workers cannot afford to sacrifice the income associated with it, many new parents must immediately return to work, hence forgoing bonding with their new child.¹⁰² Indeed, mothers might not even have enough time to physically recover from childbirth because they could use up a good portion of their twelve

97 A. Pelletier, “The Family Medical Leave Act of 1993 – Why Does Parental Leave in the United States Tall So Far Behind Europe?”, 42 *Gonzaga L. Rev.* 2007, p. 547 at pp. 550-551. Title VII of the 1964 Civil Rights Act made it illegal “to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s race, color, religion, sex, or national origin [...]”. In the early 1970s, efforts were made to use Title VII and the Equal Protection Clause of Article XIV of the US Constitution to remedy discrimination against pregnant women and working mothers and fathers who sought to fulfil parental responsibilities. In 1976, the US Supreme Court denied this methodology, finding that classification based on pregnancy did not work to discriminate against any definable group or class because not all women were going to become pregnant. This decision led to the passage of the Pregnancy Discrimination Act (PDA) in 1978 as an amendment to the Civil Rights Act. *Id.*

98 *Id.*, at p. 548.

99 *Id.*, at p. 554.

100 *Id.*, at pp. 555-556. Still, feminists and advocates for work-life balance are turning to Title VII in their attempts to achieve legal protection for employees with family responsibilities. Recent litigation has given rise to a new legal theory of discrimination on the basis of sex: “family responsibilities discrimination”. When an employee, male or female, is treated adversely because of his or her family responsibilities, such practices can constitute FRD in violation of Title VII. Suk, *supra* note 31, at p. 12.

101 Pelletier, *supra* note 97, at p. 558.

102 *Id.*, at pp. 558-559.

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weeks leave before the birth of their children.¹⁰³ In addition, the statute provides the same amount of unpaid leave per year for an employee's illness as it provides for parental leave and, therefore, does not distinguish between the medical incapacity to work as a result of pregnancy and childbirth from other medical conditions.¹⁰⁴ Because the costs and controversies associated with medical leave easily become arguments against paid leave for childbirth and newborn care, family leave cannot be debated on its own merits.¹⁰⁵

Commentators have rightly attributed such policy differences to several factors. First, unlike in European countries, where the upbringing of children is viewed as a societal responsibility, Americans tend to have an individualistic outlook on life, and they tend to presume that individuals who choose to have children should be fully responsible for the costs. Thus, business and industry organizations have resisted the imposition of mandated benefits such as paid family leave.¹⁰⁶ Moreover, governments in many European nations have been motivated to provide universal paid maternity benefits in order to combat low fertility rates or to encourage women's paid labour-market participation in response to labour shortages. Not only has the United States faced neither the challenge of low fertility rates nor employment shortages, but its robust immigration rates and high maternal labour market participation have also created low demand for public policies to motivate behavioural changes.¹⁰⁷

In addition, the European feminist movement has struggled for special treatment for mothers to allow them to work while maintaining their traditional role as caregivers. Conversely, the feminist movement in the United States has focused on the equal treatment of men and women, and many equal-rights feminists fear that laws signalling women's differences would be harmful to them.¹⁰⁸ Such a concern has been mirrored in judicial opinions. In 1973, the Supreme Court repudiated patriarchal notions of women's differences in *Frontiero v. Richardson* by referring to them as "romantic paternalism" that violated the Fourteenth Amendment's Equal Protection Clause.¹⁰⁹ From that point on, US law construed paternalistic protection of mothers as sex discrimination.¹¹⁰ Because matters relating to childbearing and child rearing are women's individual choices, mandatory maternity leave also violates the Due Process Clause.¹¹¹ Such policies,

103 See *id.*, at p. 560.

104 Suk, *supra* note 31, at p. 7.

105 *Id.*, at p. 24.

106 L.A. White, 'The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States', 21 *Yale J.L. & Fem.* 2009, p. 185 at pp. 228-229. Although experiences in European countries point to the contrary, American employers fear that the employee has no particular incentive to return to work after taking periods of paid leave. *Id.*, at p. 229.

107 White, *supra* note 106, at p. 229; Pelletier, *supra* note 101, at p. 573.

108 White, *supra* note 106, at p. 230; Pelletier, *supra* note 101, at p. 574.

109 *Frontiero v. Richardson*, 411 US 677, 684 (1973).

110 Suk, *supra* note 31, at p. 48, 51.

111 *Id.*, at p. 51. In *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, on the grounds that it violated the Due Process Clause.

if undertaken by private companies, are invalid under Title VII, one of its goal being to “strike at the entire spectrum of disparate treatment [...] resulting from sex stereotypes.”¹¹²

II. *Pushing Little to Enough: Possibility of Non-Paternalistic Reform*

Suk is correct that the strong American anti-paternalistic tradition and the anti-stereotyping norms of US sex discrimination law both make reforming its maternity leave provisions very difficult, if not impossible.¹¹³ Mandatory maternity leave would also violate women’s rights and privacy under the Due Process Clause.¹¹⁴ Nevertheless, Fineman’s arguments about men and women being different but equal and her recognition of both the mother-child bond and the diversity of pregnant women’s experiences should hopefully inspire legislators and policymakers to re-evaluate the significance of motherhood and to refine their understanding of the meaning of “stereotypes”.¹¹⁵ Accordingly, they will recognize the inadequacy of a law that merely grants men and women equal opportunities and find it both necessary and urgent to reform the current law so as to protect women’s needs that arise out of their differences from men.

While legal paternalism does not work in the United States, strong initiatives, such as educational programmes that are well grounded in a thoughtful understanding of motherhood, the mother-child bond and the diverse experiences of pregnant women, will help. Because of deeply entrenched gender norms, should legal reform happen, fathers may not be motivated enough to take time off to care for their newborns and/or mothers may feel guilty to ask their husbands to share what is commonly considered their work. Initiatives like education will then come into play. Such new laws and initiatives will signal big strides in the reform of American social welfare at large. Although neither maternity nor paternity leave can become mandatory in the United States, more generous leave provisions will fall in line with reforms that have been taking place in other social welfare arenas, including health care.¹¹⁶

E. Conclusion: Resolving A Plathian Riddle

Plath, when pregnant with her first child, described herself as “a riddle in nine syllables”, which captures both her keen expectation for her baby, with whom she had a prenatal nine-month bond, and her utter confusion about and unpreparedness for her new role as mother.¹¹⁷ The long-standing difficulty experienced by anxious new mothers in reconciling work and home is mirrored by the big ques-

112 *Price Waterhouse v. Hopkins*.

113 See US Constitution, Amendment XIV.

114 See US Constitution, Amendment V.

115 See Fineman, *supra* note 44, at pp. 48, 162.

116 See, e.g., ‘Health Care Reform’, *N.Y. Times*, 26 March 2010, available at: <http://topics.nytimes.com/top/news/health/diseasesandhealthtopics/health_insurance_and_managed_care/health_care_reform/index.html>.

117 S. Plath, *Metaphors*, 1959.

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tion confronting legislators and policymakers concerning appropriate maternity leave periods. As long as the daunting task of finding that proper point along the continuum of “enough”, “too much” and “too little” is left unsolved, the Plathian riddle will not become dated. Rather, it will remain a living nightmare that plagues many new mothers, even more so when many more of these mothers are in the work force in the twenty-first century than they were in the 1950s and 1960s.

This paper shows that legislators and policymakers have taken the erroneous position of too often treating men and women as identical, hence ignoring the hardship faced by the latter. An attempt to accommodate social reality and women’s dual role in the home and at work, though a better strategy, is still a reconciliatory one. Hence, EU member states should affirm the mother-child bond by actively enforcing the new law and offering mandatory maternity leave, as well as by mandating fathers to “mother” their children like mothers do. While such mandates would not be constitutional in the United States, the controversy spurred by the new EU legislation should inspire Americans to deepen and refine their understanding of stereotypes and reform the law to offer more generous maternity and paternity leave provisions. The proposal put forward by this paper, no doubt ambitious, will lessen the fear and confusion confronted by new mothers. It will empower women and, regardless of their national origin, enable them to “have it both ways”.