1993

# Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective

Paolo G. Carozza
*Notre Dame Law School*, pcarozza@nd.edu

# Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective

Paolo Wright-Carozza†

*The United States and Italy have taken quite different approaches towards providing legal protections for working parents. This Article uses a comparative perspective to highlight crucial aspects of the American legal and cultural attitudes towards parental leave. The author demonstrates how deeply rooted beliefs about equality, work, and family life have influenced the development of parental leave law. In particular, the Article describes how Italian law rests on notions of fundamental social equality, as well as on views concerning the importance of the interests of children and the family. As a result of this broad conception of the interests involved, Italy provides a great deal of benefits to aid in the support of childbirth and childrearing. In contrast, the author suggests that American legal developments have been based on a cramped deliberation over the issue of gender discrimination, which in turn has led to narrow judicial debates such as how pregnancy might be construed as analogous to a disability. While in recent years there has been some expansion of American parental leave benefits, the author contends that judicial doctrine and governmental benefits have been limited by the original legal framing of the debate. The author suggests that recent statutory developments in the United States are important precisely because they may provide the basis for a more expansive conceptual foundation for this area of law.*

## I
## INTRODUCTION

The enactment of the Family and Medical Leave Act of 1993 has brought new attention to the intersections of gender equality, work, and family life in the United States, and to the tensions, contradictions, and

† Lecturer on Law and Ford Fellow, Harvard Law School. A.B. 1985, Harvard College; J.D. 1989, Harvard Law School. I am grateful for Mary Ann Glendon's encouragement and helpful comments and for the constructive criticism I received from Anna DeVita, Karen Engle, Wendy Williams, Barbara Woodhouse, and participants in the Ford Fellows colloquium at Harvard Law School.

unfulfilled promises they contain. In the United States, the conflicting demands and desires of parenting and earning a living both reflect and reinforce the persistent social inequality between men and women.[1] Where, as here, deep human and social aspirations clash with harsh realities, we might expect law to seek to mitigate the dilemmas presented. Instead, the dominant American legal understanding of those areas where gender equality, work, and parenthood converge—in questions of pregnancy discrimination and parental leave, for example—has disregarded the normative complexities involved and expressed an impoverished vision of society and personhood. This vision has discouraged collective interest in and support for solutions to the problems posed. It has sustained the sexual division of labor between market work and family care and marginalized values such as relationships and responsibility, particularly with regard to the needs of children. Ultimately, the framework prevailing in U.S. law until now has rested on a thin notion of equality that separates individuals from the full context of their lives and on a neglect for the interrelationship of human goods implicit in these areas of life and law. It does this not just through its complex of rules, but even more importantly, through the language, symbols, and constructed understandings of legal narrative. The importance of the Family and Medical Leave Act of 1993, however, lies in its potential for providing a new foundation for legal discourse which departs from the strictures of the law as it has developed until now.

I propose to illustrate these contentions by approaching U.S. law from a comparative perspective, examining the contrast between the changes and evolution of American and Italian law in the post-World War II period. Comparative study of parental leave or child care policies has been fairly common in the United States for at least a decade,[2] mostly because these are areas in which the United States has been so

1. *See, e.g.*, ESCHEL M. RHOODIE, DISCRIMINATION AGAINST WOMEN 444 (1989) (identifying, in general observations on the United States, the problem of reconciling work and parenting as "[w]omen's greatest problem" with respect to eliminating discrimination); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 801 (1989) (arguing that the relationship between work and family responsibilties is "at the core of the contemporary gender system, which systematically enriches men at the expense of women and children").

2. *See, e.g.*, CHILD CARE, PARENTAL LEAVE, AND THE UNDER 3s (Sheila B. Kamerman & Alfred J. Kahn eds., 1991) (examining child care and parental leave policies of the United States and various European countries); SHEILA B. KAMERMAN ET AL., MATERNITY POLICIES AND WORKING WOMEN 14-24, 133-60 (1983) (same); Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311 (1989) (examining French and Swedish systems); Arvonne Fraser et al., *Maternity Leave Policies: An International Survey*, 11 HARV. WOMEN'S L.J. 171 (1988) (comparing the policies of several African countries, Chile, India, Singapore, Sweden, Turkey, and the United States); Caroline Little, *Mother Load or Overload: The Need for a National Maternity Policy*, 17 N.Y.U. J. INT'L L. & POL. 717 (1985) (comparing policies of the United States and the United Kingdom); Anne Lofaso, Comment, *Pregnancy and Parental Care Policies in the United States and the European Community: What Do They Tell Us About Underlying Societal Values?*, 12 COMP. LAB. L.J. 458 (1991).

clearly at odds with the overwhelming trend in other countries.[3] Many European countries, in particular, have long experience handling these matters with which U.S. legislatures, both state and federal, only recently have begun to grapple. Accordingly, many studies look to European law and policy as examples of practical models either to emulate or to distinguish.[4] The description of Italian law in this Article may be valuable in this respect: over the past forty years, Italy has implemented one of the most extensive and generous systems of childbearing and childrearing benefits for workers, even relative to other European countries;[5] in the past fifteen years, Italy has taken noteworthy steps to enhance the promotion of gender equality within that system. Yet, these areas of Italian law are largely unknown in the United States.

Nevertheless, the purpose of this Article is not simply to present a functionalist, policy-oriented exposition of the rules and institutions of foreign legislation. Rather, I begin from the premise that embedded in legal rules and systems are complex normative frameworks that both reflect and help to constitute social experience.[6] I propose to compare

3. In 1984, the International Labour Organisation surveyed the national maternity protection laws and regulations of 127 countries. *See* INT'L LABOUR ORGANISATION, MATERNITY BENEFITS IN THE EIGHTIES 3-25 (1985). The survey noted that, while the average length of maternity leave worldwide is between 12 and 14 weeks, the United States had no federal legislation concerning maternity protection, and that the leugth of leave in those U.S. states with such legislation ranged from only six to eight weeks. *See id.* at 1, 15 & n.32. Of course, this study was done before the recent period of legislative activity in the United States, which narrowed the gap between the United States and other countries. *See infra* Section III.D.

Prior to passage of the Family and Medical Leave Act of 1993, the United States and South Africa were the only two of the 26 most-industrialized countries in the world not to have any national maternity leave legislation. *See* RHOODIE, *supra* note 1, at 260. Further, while at least 117 countries guarantee women childbirth leave with job protection and some level of income replacement, the United States did not guarantee any job protection until this year, and still does not provide for any income replacement. *See id.*; *see also* Shelia B. Kamerman & Alfred J. Kahn, *A U.S. Policy Challenge, in* CHILD CARE, PARENTAL LEAVE, AND THE UNDER 3S, *supra* note 2, at 1, 10 (charging that "the United States is almost unique in its negligence" in failing to implement national maternity protection laws).

4. *See, e.g.*, KAMERMAN ET AL., *supra* note 2, at 14-24, 133-60 (surveying and comparing statutory preguancy and maternity policies in Europe, Canada, and the United States); Little, *supra* note 2, at 744-47 (contrasting pregnancy benefits in the United States and the United Kingdom); Lofaso, *supra* note 2, at 489-97 (contrasting European maternity leave laws with U.S. policies). Nancy Dowd takes a slightly more sophisticated view of comparison, arguing that "the most critical lesson Ameriean policymakers can learn from the experiences of Sweden and France is the important role the vision of work and family plays in the development of policy." Dowd, *supra* note 2, at 339.

5. *See* RHOODIE, *supra* note 1, at 437.

6. Although this emphasis on law as both containing and creating a normative framework runs counter to common and still strong traditions of U.S. legal thought, from formalist to functionalist understandings, it is consistent with a broad range of recent legal scholarship. Of the numerous examples available, see, e.g., Katharine T. Bartlett, *Re-Expressing Parenthood,* 98 YALE L.J. 293, 293-97 (1988) (emphasizing the expression and creation of values through legal rules regarding child custody disputes); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory,* 94 YALE L.J. 1, 8 (1984) (noting that the goal of legal theory is edification, because the formulation of legal rules is a way of constituting and expressing shared values). Professor Bartlett's

these webs of meaning in the law through an interpretive—or hermeneutic—approach to the "stories about the culture that helped to shape [the law] and which [the law] in turn helps to shape."[7]

As both philosophers and legal scholars have emphasized, one can only begin to grasp meaning by understanding that such normative frameworks are situated in a social and cultural narrative.[8] Thus, I examine U.S. and Italian law within an historical context—to see not just what the law is, but how it has been formed and where it is going. I examine each legal framework within a system of multiple forms of law-making and interpreting bodies,[9] rather than through the juxtaposition of cases or statutes separated from their contexts. More importantly, I seek to proceed through "thick description" of the respective legal orders—that is, through the language of qualitative, contextual description rather than through merely formal, external description.[10]

It should be clear from this discussion that my goal is not to advocate the adoption in the United States of the Italian legal model for parental leave or gender equality in the workplace. Indeed, the American view of law and its relation to society would virtually preclude

---

article, in particular, has influenced my thinking in the present work more subtly than the formalities of footnotes would suggest. On the "normativism" of newer legal scholarship in general, and its contrast to other strands of legal thought in the United States (especially legal process theory), see William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 745-47 (1991).

7. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8 (1987). Glendon's work is groundbreaking in taking such an approach to comparative law, although Clifford Geertz has also urged comparatists to recognize law as a system of meaning, "a species of social imagination." CLIFFORD GEERTZ, LOCAL KNOWLEDGE 232 (1983) [hereinafter GEERTZ, LOCAL KNOWLEDGE]. On the whole, however, comparative law has been untouched by the pervasive and well-established interpretive turn in the human sciences generally. Compare the taxonomy of the paradigmatic methodologies of comparative law in Günter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT'L L.J. 411, 426-40 (1985), with the hermeneutics in HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. Crossroad Publishing 1991) (1975); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973) [hereinafter GEERTZ, THE INTERPRETATION OF CULTURES]; INTERPRETING LAW AND LITERATURE (Sanford Levinson & Steven Mailloux eds., 1988); INTERPRETIVE SOCIAL SCIENCE (Paul Rabinow & William M. Sullivan eds., 1979); PAUL RICOEUR, INTERPRETATION THEORY (1976).

8. This point has been made in a variety of contexts, from exploring the concept of self and individual human agency in ALASDAIR MACINTYRE, AFTER VIRTUE 204-25 (2d ed. 1984) and CHARLES TAYLOR, SOURCES OF THE SELF (1989), to defining the requisites for hermeneutical understanding in the human sciences in GADAMER, *supra* note 7, at 171-264. In legal scholarship, see, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983) ("No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.") (footnote omitted).

9. Rodolfo Sacco has emphasized the latter approach to comparative methods, using the English neologism "legal formants." *See* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 1-6 (1991).

10. *See* GEERTZ, THE INTERPRETATION OF CULTURES, *supra* note 7, at 6.

the possibility of incorporating or adopting another culture's legal norms without inexorably altering them. Abstracting the practices, rules, and institutions of the law from their organic context would sacrifice their meaning and coherence.

Yet, through comparison I hope to accomplish more than just a modicum of intercultural communication and commentary. As Paul Ricoeur has remarked, "To 'make one's own' what was previously 'foreign' remains the ultimate aim of all hermeneutics."[11] By reaching behind the rules and institutions to their normative meaning, I hope to make the Italian experience part of our own, by asking what it has to reveal to us about the way we can lead practicable, principled lives through our law.[12] Of course, a comparatist can achieve this goal only by recognizing our perspectives as necessarily situated in a particular social and legal culture. The comparatist must ask what comparison has to say to us, here and now, rather than seeking to analyze or evaluate different systems from some Archimedean, value-free referent.[13] In this way, comparative law creates the conditions for a confrontation of different discourses and for the cognitive disruption that can generate creativity.[14] It forces us to articulate a different legal and normative framework, and thus opens a space for the recognition of ways in which our own framework is deficient or flawed.[15] In doing so, it makes us aware of other possible understandings that better account for who we are and who we aspire to be. Put another way, comparative analysis creates a possibility for critical, practical reasoning about ourselves.[16]

By situating ourselves in the Italian legal narrative, then, we find a particular vantage point from which to regard and critique our own. I have used the example of Italian law principally because its very difficulties and developments in some ways can be understood to provide a

---

11. RICOEUR, *supra* note 7, at 91.

12. *See* GEERTZ, LOCAL KNOWLEDGE, *supra* note 7, at 234 ("The primary question, for any cultural institution anywhere, . . . is whether human beings are going to continue to be able . . . through law, anthropology, or anything else, to imagine principled lives they can practicably lead.").

13. *See* Frankenberg, *supra* note 7, at 441 ("Instead of continuing the endless search for a neutral stance and objective status, comparatists have to recognize that they are participant observers . . . ."). For a broader critique of any attempt at a neutral-framework epistemology, see generally RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

14. *See* Mary Ann Glendon, *Comparative Law as Shock Treatment, in* FESTSCHRIFT FOR JACOB SUNDBERG (forthcoming 1993); Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism,* 13 CARDOZO L. REV. 1443, 1453 (1992).

15. *Cf.* Frankenberg, *supra* note 7, at 448 (asserting that "comparative legal studies offer a better chance for distance and for exposing in law deficiencies, contradictions, ideological components and competing visions").

16. *See* TAYLOR, *supra* note 8, at 72 (noting that practical reasoning "is concerned, covertly or openly, implicitly or explicitly, with comparative propositions"); *see also* GEORGE E. MARCUS & MICHAEL M.J. FISCHER, ANTHROPOLOGY AS CULTURAL CRITIQUE (1986) (advocating a similar move from the acknowledgment of subjective authorship in interpretation to cultural self-criticism as the goal of anthropological studies, particularly ethnography).

model foil for exposing certain characteristics of U.S. law. For all its limitations and failings, I argue that Italian law has addressed the problems of gender equality, work, and parenthood in a way that struggles to respect the integrity of persons and the multiplicity of values involved. In contrast, we can see better how the story told through U.S. law has oversimplified the way we comprehend ourselves and our society; how our legal concepts and discourse have precluded and marginalized certain issues; and how our laws imply and generate certain social relations and moral visions instead of others. We can also see better the possibilities present for changes and growth in our law and society, and thus we might articulate a different, better story for the future.

I begin with an outline of the development of Italian law regarding parenthood, work, and gender equality since World War II, emphasizing the evolution of an inherently normative vision. I then survey the changes in American law during the same period. Finally, I offer a critique of some of the assumptions, concepts, and understandings prevalent in American law in these areas, based on the contrasting frameworks implicit in the two countries' laws, and briefly suggest how recent statutory developments in the United States have begun to depart from the dominant approach and to incorporate a more organic understanding of the human values in this area.

## II
## ITALIAN LAW

### *A. The Constitution: Work-Family Tension and the Ambiguous Promise of Equality*

The grounding of all current Italian legislation relating to gender equality is in the republic's post-war constitution. Approved in December 1947 after a year and a half of negotiations, the document reflects the great degree of compromise that was necessary to bring the politically heterogeneous Italian republic into being.[17] The recognition of competing views of equality is apparent in Article 3, which sets forth the general principle of equality. The article first establishes formal equality of the sexes with its pronouncement that "[a]ll citizens have equal social dignity and are equal before the law, without distinctions of sex."[18] Yet the article also recognizes the limitations of merely formal or

17. The elected Constituent Assembly consisted of 207 Christian Democrats, 115 Socialists, 104 Communists, 23 Republicans, and 19 Liberals. GISBERT H. FLANZ, COMPARATIVE WOMEN'S RIGHTS AND POLITICAL PARTICIPATION IN EUROPE 213 (1983). As one commentator describes the process of drafting the Constitution, it involved "a series of compromises and balances that were the necessary result of the meeting of three clearly distinct cultures: the liberal-democratic tradition . . . , the Marxist-inspired worker and socialist tradition, and finally the Catholic culture . . . ." RENATO FABIETTI, LA COSTITUZIONE ITALIANA 135-36 (1984). All translations of Italian sources are my own.

18. COSTITUZIONE [Constitution] [COST.] art. 3 (Italy).

legal equality, as it continues:

> It is the task of the Republic to remove the obstacles of an economic and social nature that, by substantively limiting citizens' liberty and equality, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.[19]

The second part of the article was considered to be "an 'opening to the left,' " which would justify and promote affirmative governmental action against the historical and institutional biases of the Italian system.[20] Thus, Article 3 alone would seem to be sufficiently comprehensive to deal with issues of both formal and substantive equality of men and women.

From the start of the debate in the Constitutional Assembly, however, there was sharp disagreement over the exact legal status of the first twelve articles of the constitution, known as the "Fundamental Principles." Some considered them merely statements of the political aspirations and social values underlying the new republic, to serve at most as interpretive guides—as a preamble might—but too general and vague to give rise to specific, enforceable rights.[21] Article 3 was among those constitutional principles consigned from the start to a "metajuridical limbo," as one commentator has called it.[22] Therefore, the

---

19. *Id.*

20. FLANZ, *supra* note 17, at 213. In the words of Piero Calamandrei, one of the architects of the constitutional structure, " 'to compeusate the forces of the left for the revolution manqué, the forces of the right did not oppose . . . a promise of revolution.' " Piero Calamandrei, *Commi introduttivi sulla Costituente e sui suoi lavori, in* COMMENTARIO SISTEMATICO ALLA COSTITUZIONE ITALIANA (Piero Calamandrei & Levi eds., 1980), *quoted in* Cecilia Assanti, *Il lavoro e la Costituzione nella condizione complessiva della donna,* 40 RIVISTA GIURIDICA DEL LAVORO E DELLA PREVIDENZA SOCIALE [RIV. GIUR. LAV. PREV. SOC.] I 167, 172 (1989).

21. On the debate in the Constitutional Assembly on this point, see Paolo Barile, *La nascita della Costituzione: Piero Calamandrei e la libertà, in* 2 SCELTE DELLA COSTITUENTE E CULTURA GIURIDICA 15 (Ugo De Siervo ed., 1980). Early scholarly analysis of the Constitution supported a distinction between "preceptive norms," with immediate and concrete legal application, and "programmatic norms," meant to express long-term goals and basic values of the constitutional order and thus dependent upon legislative action to carry legal force. *See, e.g.,* Pietro Virga, *Origine, contenuto e valore delle dichiarazioni costituzionali,* 3 RASSEGNA DI DIRITTO PUBBLICO 243 (1948). The sharp line between programmatic and preceptive norms began to be challenged vigorously as early as the 1950s. *See, e.g.,* Vezio Crisafulli, *La Costituzione e le sue disposizioni di principio in* I QUADERNI DELLA COSTITUZIONE 51-83 (A. Guffrè ed., 1952). Nevertheless, the Fundamental Principles are still considered largely "programmatic." *See* ENRICO S. MUSSO, DIRITTO COSTITUZIONALE 251-56 (3d ed. 1990). For a recent debate of the judicial application of these clauses, see Andrea Belvedere, *Le clausole generali tra interpretazione e produzione di norme,* 19 POLITICA DEL DIRITTO 631 (1988) (discussion by Andrea Belvedere, A. Pizzorusso, and F. Roselli).

22. Pasquale Chieco, *Principi costituzionali, non discriminazione e parità di trattamento: recenti sviluppi nella giurisprudenza,* 40 RIV. GIUR. LAV. PREV. SOC. I 447, 455 (1989). In practice, Article 3 has rarely been applied directly in the decisions of the Constitutional Court. *See* Beniamino Caravita, *L'art. 3, comma 2, nella giurisprudenza della Corte costituzionale,* 28 GIURISPRUDENZA COSTITUZIONALE [GIUR. COST.] I 2359 (1983). It is, however, sometimes used as a general principle in conjunction with other, more specific constitutional provisions to provide interpretive and normative context. *See infra* text accompanying notes 89-107 (discussing the Constitutional Court's Judgment of Jan. 19, 1987, No. 1). For good, though somewhat dated, general discussions of Article

Constitutional Assembly went on to articulate certain particular areas in which the general principle of equality would carry legal force.

Of the several provisions that elaborate on Article 3 and in particular on the equal status of women, Article 37 provides the specific basis for much of the legislation relating to women in the workplace. Addressing the problematic task of trying to reconcile Italian women's roles in both the workplace and the family, the Constitutional Assembly had a particularly lively and contentious debate regarding the language of Article 37.[23]

With the drafting of the article, women in Italy had an opportunity to overcome the restrictive and exclusive norms of the fascist era. From 1922 until 1943, the regime had adopted various measures to limit female employment, particularly in the public sector, and to concentrate women in marginal areas of the workforce.[24] Exclusionary legislation added to the expansion of already existing single-sex protective standards to curtail severely the freedom and flexibility of working women. Maria Vittoria Ballestrero summarizes the fascist perspective on women's work as "a problem of protecting women from the physical and moral dangers of extradomestic work . . . through a system of restrictions and disincentives that equated adult women's work with that of children and adolescents."[25]

At the time of the foundation of the new republic, there was a sincere general consensus for reform of the fascist-era norms. However, there were considerable differences of opinion, within the ranks of the political left as well as between the parties of the right and left, as to the ways in which the fascist system should be superseded. The women involved in drafting the constitution recognized that a mere statement of formal equality would not redress the actual exploitation of women's work that, since the turn of the century, had been defended as necessary to protect working women.[26] Achieving substantive equality, they thought, would mean retaining those protections that considered the

3, see Antonio S. Agrò, *Art. 3, 1 comma, in* COMMENTARIO DELLA COSTITUZIONE: PRINCIPI FONDAMENTALI, ART. 1-12 123 (Giuseppe Branca ed., 1975); Umberto Romagnoli, *Art. 3, 2 comma, in id.* at 162.

23. The following summary of the debate in the Constitutional Assembly regarding Article 37 is based largely on the complete account, including the different positions of the parties and interests, in SEGRETARIATO GENERALE, CAMERA DEI DEPUTATI, 2 LA COSTITUZIONE DELLA REPUBBLICA NEI LAVORI PREPARATORI DELLA ASSEMBLEA COSTITUENTE 1571-78 (1970).

24. For example, the Decree-Law of Oct. 15, 1938, No. 1514, limited the total number of women working in any public or private sector enterprise to a maximum of 10% of the workforce, except in sectors "particularly suited to women," as later specified in the Decree-Law of June 20, 1939, No. 898. *See* MARIA V. BALLESTRERO, DALLA TUTELA ALLA PARITÀ: LA LEGISLAZIONE ITALIANA SUL LAVORO DELLE DONNE 74 (1979).

25. *Id.* at 110. For a detailed description of the fascist-era's legislation regarding women's work, see *id.* at 57-108. There is a notable similarity between this view and the ideology of "separate spheres" in U.S. law, discussed *infra* Section III.A.

26. BALLESTRERO, *supra* note 24, at 110-11.

actual conditions and exigencies of working women and that were meant to overcome their historical exploitation. To this end, the political left sought to affirm formal equality, yet to mandate differential treatment where necessary to further substantive equality. At the same time, even the left wanted to emphasize the importance of the family in Italian life, criticizing its "corruption" by fascist ideology.[27] Many of the more liberal Christian Democrats joined the left's affirmation of equality first and family second. On the political right, however, there was a more explicit desire to emphasize the traditional familial role of women as wives and mothers prior to and above their status as equal workers.

Not surprisingly, the final product was fraught with ambiguities and contradictions: "The working woman shall have the same rights and, for equal work, receive the same remuneration as the working man. Working conditions must allow the fulfillment of her essential family function and assure the mother and child a special, adequate protection."[28] The language of Article 37 expresses a reformist position with regard to equality in the workplace, but with important concessions in substance and tone to the interests of traditional family life in Italy. Particularly significant is the article's reference to the "essential family function" of women. After unsuccessfully trying to delete the word "essential," the representatives of the left sought to limit its importance through assurances and clarifications from the majority that it would not be interpreted as women's "exclusive" function or as "more essential" than the man's function.[29] However, the Assembly merely agreed that "essential" referred "only to that which is truly important and characteristic" and of "essential social value," such as maternity.[30] A more narrow protection of maternity, however, is already contained in the "special and adequate protection" clause, and indeed there it is a stronger guarantee, mandating affirmative intervention in favor of the mother and child rather than passively assuring the opportunity for the fulfillment of dual roles. Moreover, none of the controversy surrounding Article 37 seems to have arisen in the debate over the specific protection of maternity in Article 31 of the constitution.[31] Clearly, the "essential" family function in Article 37 was understood to refer to something more than women's strictly biological role in childbearing: the woman's traditional role as primary caregiver was at least to some extent also implied to be "essential." The article thus reflected a vision of family life and parenthood in which

27. Thus, they diluted somewhat the more traditionally Marxist view of extradomestic work as a liberation from the exploitative relations of the patriarcbal family.

28. COST. art. 37 (Italy).

29. Tiziano Treu, *Art. 37, in* COMMENTARIO DELLA COSTITUZIONE: RAPPORTI ECONOMICI, TOMO I: ART. 35-40 146, 156 (Giuseppe Branca ed., 1979).

30. *Id.*

31. COST. art. 31 (Italy) ("The Republic . . . [p]rotects maternity . . . favoring the institutions necessary to this end.").

women are understood to be the principal caregivers while, by implication, men are the principal supporters of the family through extradomestic work.

In short, Article 37 sought to combine two values, one of equality and another implying inequality for women. The article implicitly ascribed to women a role in tension with equality and extradomestic work, sanctioning limitations on women's work in order to "protect" their familial roles. The article aspired to remove obstacles to working women's equality, yet also placed domestic roles in competition with, and to some extent above, professional ones. These themes, Bianca Beccalli observes, "were developed in tandem for several years after World War II . . . as parallel goals without any perception of a contradiction between them."[32] In fact, the underlying tension affected the development of Italian legislation on parenthood and gender equality in the workplace not just in the immediate post-war period, but for the next forty years.[33]

### *B. Legislation*

#### *1. Protecting Traditional Roles: 1950-1970*

After the promulgation of the Italian constitution and the establishment of new political institutions in 1948, one of the first legislative initiatives was a proposal by the women parliamentarians of the left's Popular Democratic Front for the reform of the 1934 law on working mothers. For two years, the Communist Party and labor unions campaigned intensively for the proposal, which finally passed in 1950.[34] Though the initial proposal was even more far-reaching than the version that finally received approval,[35] the 1950 maternity legislation was considered by some at the time to be the most advanced of its kind in any western capitalist country.[36]

In its major provisions, the 1950 Act required women to take a

32. Bianca Beccalli, *Italy, in* WOMEN WORKERS IN FIFTEEN COUNTRIES 158 (Jennie Farley ed., 1985).

33. For further discussions of Article 37, see MARIA G. MANFREDINI, LA POSIZIONE GIURIDICA DELLA DONNA NELL'ORDINAMENTO COSTITUZIONALE ITALIANO 238-42 (1979); Renato Scognamiglio, *Il lavoro nella Costituzione italiana, in* IL LAVORO NELLA GIURISPRUDENZA COSTITUZIONALE 13, 94-106 (Franco Angeli ed., 1978); Treu, *supra* note 29.

34. Law of Aug. 26, 1950, No. 860, Gazzetta ufficiale della Repubblica italiana [Gazz. uff.] No. 253, Nov. 3, 1950, Le Leggi II 1483 (1950). It should be noted, however, that many of the terms of maternity protection contained in the new law had already been instituted in the late 1940s through collective bargaining agreements such as that of the textile workers union in 1947. *See* Loredana Fiori, *La tutela fisica ed economica delle lavoratrici madri alla luce della nuova legge di parità di trattamento tra uomini e donne in materia di lavoro,* 55 IL NUOVO DIRITTO: RASSEGNA GIURIDICA PRACTICA 306, 308-09 (1978); Lucia Silvagna, *Assistenza del figlio minore e diritti del padre lavoratore,* 10 LE NUOVE LEGGI CIVILI COMMENTATE 438, 446 (Giorgio Cian ed., 1987).

35. BALLESTRERO, *supra* note 24, at 144.

36. Beccalli, *supra* note 32, at 159.

maternity leave of six weeks prior to and eight weeks after childbirth (longer for some industrial and agricultural workers),[37] and allowed an optional six months of additional leave.[38] It provided women with eighty percent of their normal remuneration during the obligatory leave period, to be sustained by the social security system.[39] Additionally, working mothers received two daily rest periods for nursing until the child reached one year of age.[40] The law prohibited employers from firing women during pregnancy and for one year after childbirth, thereby guaranteeing women their jobs on returning from maternity leave.[41]

As Ballestrero points out, the enthusiasm for the 1950 Act seems less justified in retrospect.[42] Though clearly a great improvement over the legislation of the fascist regime, it was subject to significant restrictions and limitations throughout the twenty years it was in force, including narrow judicial interpretations of some of its more essential provisions, such as the prohibition on firing pregnant workers or recent mothers.[43] Most importantly, however, the 1950 Act failed to fulfill its implicit promise of reconciling women's conflicting roles as both mothers and workers, as little effort was made to improve the general conditions of working women. For instance, throughout the 1950s, labor unions fought for the implementation of the equal pay provision of Article 37 of the constitution. Yet they did not even begin to attack many of the other discriminatory practices and laws still in force. Instead, Article 37's mandate of equality was ignored collectively for over a decade, so much so that some early commentators on the constitution insisted that Article 37, like the Fundamental Principles, only provided programmatic norms, not preceptive ones.[44] Maternity and family, as social values strengthened through legal norms, dominated over aspirations of equality.

In the 1960s, some important developments began to breathe new life into Article 37 and the effort to achieve equality in the workplace. In 1960, collective agreements with three of the major labor unions gave some force to the principle of equal pay for equal work, helping to reduce

37. Law of Aug. 26, 1950, No. 860, art. 5, Gazz. uff. No. 253, Nov. 3, 1950, Le Leggi II 1483, 1487 (1950).

38. *Id.* at art. 6, p. 1487.

39. *Id.* at art. 17, pp. 1493-94.

40. *Id.* at art. 9, p. 1488.

41. *Id.* at art. 3, p.1484.

42. BALLESTRERO, *supra* note 24, at 145.

43. *See, e.g.,* Judgment of Apr. 28, 1964, Corte di cassazione, [court of last appeal] [Cass.], with comment by Alfonso Sermonti, *Conglobamento nella paga della retribuzione per festività e prova dell'innocenza: Tutela della maternità e "reato di licenziamento,"* 37 MASSIMARIO DI GIURISPRUDENZA DEL LAVORO [MASS. GIUR. LAV.] 439 (1964); BALLESTRERO, *supra* note 24, at 145-46.

44. *See, e.g.,* Giovanni M. Brunetti, *Critica alla precettività immediata dell'art. 37 della Costituzione,* 30 MASS. GIUR. LAV. 80 (1957); *see also supra* note 21 and accompanying text. *But see* Ugo Natoli, *Sulla precettività dell'art. 37 della Costituzione,* 1955 RIV. GIUR. LAV. PREV. SOC. II 371 (arguing for the preceptive nature of Article 37).

gender-based wage differences by about fifteen percent in the early 1960s.[45] In 1963, legislation prohibited employers from dismissing women on account of marriage.[46] This law helped remove one of the most widespread forms of sex discrimination in employment, which had in large part diluted the benefits of the maternity laws. Previously, employers could and would often dismiss a woman upon marriage—anticipating her possible pregnancy—in order to avoid the application of the maternity laws. In upholding the constitutionality of this law, the Italian Constitutional Court made its first important decision interpreting Article 37.[47] Confronting the tensions and ambiguities of equality and protection for the first time, the court affirmed the article's dual goals, noting that the aim of the constitution and the implementing legislation was to achieve the full compatibility of each woman's roles in the workplace and in the family. The law was to help her avoid "the dilemma of having to sacrifice employment in order to safeguard her liberty to give life to a new family or, vice-versa, to have to renounce this fundamental right in order to avoid unemployment."[48]

### 2. *The 1971 Law for Working Mothers*

The renewed attention to the principle of equality and the growing concern for the status of women as workers, coupled with a period of powerful union militancy beginning in 1968, came to fruition in the 1970s with several significant reforms. One of the first was new legislation concerning working mothers, a revision of the 1950 law.[49] The 1971 legislation was the result of arduous union pressure that galvanized the consensus of working women, unions, politicians, and the press.

At first sight, the final product of all this effort does not appear to differ tremendously from the previous maternity law. The 1971 law prohibited employers from assigning dangerous, heavy, or unhealthy work during pregnancy and for seven months after childbirth[50] (under the 1950 law, it was three months); the period of mandatory leave was extended to two months prior to the presumed date of delivery and three months afterwards,[51] still at eighty percent of normal pay;[52] the prohibition of dismissal remained throughout pregnancy and until the child reached one year of age, with an added provision guaranteeing reinstatement in the case of unfair dismissal.[53] Also, during the optional six

45. Beccalli, *supra* note 32, at 160.
46. Law of Jan. 9, 1963, No. 7, Gazz. uff. No. 27, Jan. 30, 1963, Le Leggi I 238 (1963).
47. Judgment of Mar. 5, 1969, Corte cost., 92 Foro italiano [Foro it.] I 545 (1969).
48. *Id.* at 546.
49. Law of Dec. 30, 1971, No. 1204, Gazz. uff. No. 14, Jan. 18, 1972, Le Leggi I 80 (1972).
50. *Id.* at art. 3, p. 81.
51. *Id.* at art. 4, p. 81.
52. *Id.* at art. 15, p. 83.
53. *Id.* at art. 2, pp. 80-81.

months of additional leave, the mother received thirty percent of her normal pay under the new law, also at public expense.[54] Significantly, this optional leave could be taken any time before the child reached one year of age.[55] Mothers were entitled to be absent (without pay) from work during periods of a child's illnesses, until the child's third birthday.[56] Finally, mothers were still entitled to the two daily rest periods from work during the child's first year, but these could now be combined to make one longer period per day.[57]

The legislation also made some major changes to the 1950 law. In addition to the moderate expansion in benefits, the 1971 legislation extended the maternity law to certain previously excluded categories of employees, such as apprentices and domestic workers, and strengthened sanctions and remedies, especially for unjust dismissal.[58]

At least as significant as the substantive changes in the law, however, were the changes in vision and philosophy that accompanied the law's passage and reception. First, rather than justifying the law merely in terms of protecting mothers from the physical risks and dangers of the workplace, as the 1950 law did, the new maternity legislation was more explicitly tied to Article 37's guarantee of equal opportunity in employment. The debate and commentary thereby began to confront the tensions between the law's protection of women workers and its promise of equality[59]—issues that largely were ignored in the previous two decades. In addition, the legislation complemented the Law of December 6, 1971 (No. 1044), which was intended to establish nurseries on the premises of all major employers.[60] The attempted linking of these two efforts (maternity benefits and infant child care) marked an important turning point in the legal system's vision of the responsibilities for motherhood and childbearing, toward a recognition of their social context and of society's obligations to support them accordingly.[61] Instead of merely purporting to accommodate the woman's private obligations, the law began to take account of the constitution's unfulfilled promise of collective responsibility for easing the burdens of parenting. Finally, the law's extension of benefits was founded firmly on a recognition of the centrality of the child's interests, taking account not just of the needs of the woman worker insofar as she is also a mother, but also of the needs of the chil-

54. *Id.* at art. 15, p. 83.

55. *Id.* at art. 7, p. 82.

56. *Id.*

57. *Id.* at art. 10, p. 82.

58. *E.g., id.* at art. 31, p. 87.

59. *See, e.g.,* Giorgio Cottrau, *La tutela della donna lavoratrice e la legge 30 dicembre 1971, n. 1204,* 46 DIRITTO DEL LAVORO [DIR. LAV.] I 366 (1972) [hereinafter Cottrau, 46 DIR. LAV. I 366]. For a contemporary discussion of equality and women workers, see generally GIORGIO COTTRAU, LA TUTELA DELLA DONNA LAVORATRICE (1971).

60. Law of Dec. 6, 1971, No. 1044, Gazz. uff. No. 316, Dec. 15, 1971, Le Leggi II 2114 (1971).

61. BALLESTRERO, *supra* note 24, at 183.

dren of working parents.[62]

The 1971 law was at the forefront of European legislation concerning working mothers and was praised for having "attained a considerable degree of perfection."[63] Nevertheless, the law had its share of critics as well. The 1970s saw a surge in the number of women in the work force, and also the rise of a strong and—for Italy—unusually radical women's movement.[64] In addition to pressing for reforms in areas such as family law and reproductive freedom, feminists (together with labor unions) pressed for changes in labor laws and collective bargaining agreements.[65] Looking beyond the prevailing debate on protection versus equality, feminists sought a "third alternative":

> The movement claimed that the traditional dilemmas caused by policies toward women workers, such as protection versus equality, were false: traditional protective policies were wrong but policies of equality were not appealing either; women's specificity, women's difference, had to be proclaimed and placed at the center of trade union policy toward women workers. However, women's difference had to be the pivot of a policy of general change in the male-shaped world of work and not be used to justify traditional protective policies.[66]

From the feminist perspective, changes in the 1971 law improved upon the previous legislation, both by giving maternity more social support and by facilitating somewhat more women's work outside the home, but they also fell short of truly radical reforms. By adjusting labor conditions to suit family life without seeking to promote changes in family relations or adapting to shifting family structures, the law still implicitly sanctioned the priority of a woman's family function and her traditional role with respect to childrearing.[67] While perhaps taking account of the realities of Italian social structure, the law did not encourage changing the underlying assumptions and premises regarding women's work and family roles. In large part, advocates of further reform considered that

62. Fiori, *supra* note 34, at 312.

63. Cottrau, 46 DIR. LAV. I 366, *supra* note 59, at 395.

64. For a history and description of Italian feminism, see generally LUCIA C. BIRNBAUM, LIBERAZIONE DELLA DONNA: FEMINISM IN ITALY (1986). Birnbaum emphasizes the political and ideological pluralism and the paradoxes of the women's movement in Italy, arising from the interactions of feminism, communism, and Catholicism.

65. *See id.* at 199-218 (diseussing feminists and the labor movement); *see also id.* at 89-90 (presenting list of "feminist political successes" in Italy during the 1970s).

66. Beccalli, *supra* note 32, at 162. This approach reflects a broader affirmation of difference characteristic of Italian feminism generally: "Iconoclastic to both traditional catholicism and traditional marxism is the insistence of Italian feminists that genuine equality includes recognition of differences: women's own definitions of their differences from men, the value of women's differences among themselves, and the integrity of differing interpretations of accepted truths...." BIRNBAUM, *supra* note 64, at xv.

67. *See* Silvagna, *supra* note 34, at 447.

"legal protection of workers' motherhood is not a factor of discrimination; discrimination depend[ed] on the responsibility for motherhood itself."[68] Thus, they sought more comprehensive legislation outside the narrow area of protection of working mothers, from a better provision of adequate social services to a reform of the entire ensemble of legislation relating to women, family, and work.

### 3. *From Equal Treatment to Positive Action: 1977-1991*

Six years later, an attempt at such far-reaching reform took place, with the Law of December 9, 1977 (No. 903) on the equal treatment of men and women workers (hereinafter Equal Treatment Act or ETA).[69] The immediate impetus for adoption of the ETA was the Italian government's effort to comply with the Equal Treatment Directive passed by the Council of the European Community, the purpose of which was "to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and . . . social security."[70] Extending the EC directive's aims somewhat, the

68. Maria V. Ballestrero, *Women at Work in Italy: Legislation—Evolution and Prospects, in* WORKING WOMEN 107 (Marilyn J. Davidson & Cary L. Cooper eds., 1984) [hereinafter Ballestrero, *Women at Work in Italy*]; *see also* Maria V. Ballestrero, *Occupazione femminile e legislazione sociale,* 27 RIV. GIUR. LAV. PREV. SOC. I 645 (1976).

69. Law of Dec. 9, 1977, No. 903, Gazz. uff. No. 343, Dec. 17, 1977, Le Leggi II 1730 (1977). For a complete English translation of this law, see FLANZ, *supra* note 17, at 402-08. For an article-by-article analysis, see *Parità di trattamento tra uomini e donne in materia di lavoro,* 1 LE NUOVE LEGGI CIVILI COMMENTATE 786 (Tiziano Treu ed., 1978).

70. Council Directive No. 76/207, art. 1, 1976 O.J. (L 39) 40. The Directive, in turn, resulted from the EC's Social Action Programme, initiated in 1974. *Id.* at pmbl. Since the 1976 Directive, however, the case law of the European Court of Justice has helped minimize the direct impact of the Directive on EC Member States' legislation. In particular, in its first enforcement action under the Directive, the European Commission charged Italy with having inadequately implemented the Directive in several respects. The court dismissed the application in its entirety, ruling that Member States of the EC have wide discretion as to the form and methods of implementation of the Directive, so long as the general result sought by the Directive is formally achieved. Case 163/82, Commission v. Italian Republic, 1983 E.C.R. 3273, 3286-87. In a subsequent case involving Germany, the court affirmed the Member States' wide discretion in implementing the Directive and, in addition, concluded that the Directive was not intended to reach questions concerning the structure of the family and the relative roles of men and women within it. Case 184/83, Hofmann v. Barmer Ersatzkasse, 1984 E.C.R. 3047, 3075-76. Accordingly, since Italy's adoption of the Equal Treatment Act, the Directive has been marginal to Italian law in the area of gender discrimination and work. *See* Michele De Luca, *La "parità di trattamento" tra lavoratori e lavoratrici nell'ordinamento italiano: prime riflessioni su una sentenza "assolutoria" della Corte comunitaria,* 107 Foro it. IV 119, 121 (1984). Even the European Court's recent cases finding pregnancy discrimination in employment to be sex discrimination do not seem to have affected Italian law, which had defined pregnancy discrimination as sex discrimination in the Equal Treatment Act. *See* Case C-177/88, Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, 1990 E.C.R. 3941, 3973 (holding that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex). On EC law regarding gender discrimination generally, see EVELYN ELLIS, EUROPEAN COMMUNITY SEX EQUALITY LAW (1991); SACHA PRECHAL & NOREEN BURROWS, GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY 104-58 (1990).

Italian law can be said to have had three broad goals: (1) to establish formally the equal dignity of men and women workers in Italian law and their equal economic and normative treatment; (2) to promote the equality of working women through a restructuring of their family role, or rather through the affirmation of the equal importance of working men's family role; and (3) to provide greater incentives for increasing the level of employment of women.[71]

The ETA sought to achieve a drastic alteration of the whole landscape of women's working conditions and relations by advancing a very formal concept of equality. It emphasized equal access to employment; invalidated the remaining legislation restricting women's work;[72] prohibited direct or indirect discrimination on the basis of sex, including pregnancy or marital status;[73] guaranteed equal pay for identical work or work of equal value;[74] assured equal retirement and promotion practices;[75] and generally equalized social benefits for men and women workers. Of most interest here, the ETA extended certain provisions of the 1971 maternity law to *fathers* in order better to reflect and promote the sharing of family responsibilities. For instance, under Article 7 of the ETA, a father, in place of the mother, can take both the optional six-month additional leave of absence (after the mother's three-month *post partum* leave), and the unpaid leaves for their children's illnesses. The ETA also allowed families adopting children to enjoy most of the benefits of the maternity law.

With these changes, Italian legislation took a significant step away from the previous laws' implicit reinforcement of the woman as the natural primary caregiver within the family. Instead, in contrast to all of the previous Italian legislation relating to women's work, the 1977 law on the whole affirms the fundamental social commitment to equality as the broad background of the law, against which the values of parenting and work are set. Thus, beyond the benefits and protections relating strictly to biological differences such as childbirth, the law implies that family responsibilities could, and should, be shared by men and women workers.

As many have noted, the ETA has had a more limited overall success in making substantive improvements in working women's conditions than had been hoped.[76] A wide variety of factors have been cited as

71. Maria V. Ballestrero, *Legge di parità e discriminazione del lavoro femminile, in* M. V. BALLESTRERO ET AL., LAVORO FEMMINILE, FORMAZIONE E PARITÀ UOMO-DONNA 9, 11 (1983).

72. Law of Dec. 9, 1977, No. 903, art. 19, Gazz. uff. No. 343, Dec. 17, 1977, Le Leggi I 1730, 1733 (1977).

73. *Id.* at art. 1, p. 1730.

74. *Id.* at art. 2, pp. 1730-31.

75. *Id.* at arts. 3, 4, p. 1731.

76. *See, e.g.*, Ballestrero, *Women at Work in Italy, supra* note 68, at 108-21; Luigi de Angelis, *La legge di parità uomo-donna nella prassi giurisprudenziale,* 54 DIR. LAV. I 331, 342 (1980); Carla Martone, *Quale parità fra uomo e donna? (prima verifica dello stato di applicazione della legge n. 903 del 1977),* 132 GIURISPRUDENZA ITALIANA [GIUR. IT.] IV 275, 280-83 (1980); Cristina Rapisarda,

contributing to the law's relative inefficacy. For instance, in the tradition of Italian labor issues, the law relies more heavily on union activity and collective bargaining than on judicial intervention for the enforcement and development of many of its provisions. Yet unlike previous legislation on working women, union pressure had relatively little to do with the passage of the law, accounting perhaps for the unions' initial lethargy in implementing it.[77] To the extent that the judiciary has played a role in the law's enforcement, the Supreme Court of Cassation, in particular, certainly has not encouraged an expansive reading of the statute.[78] Weak, inappropriate enforcement mechanisms, along with inadequate public institutions to aid in the law's implementation, also contributed to the law's relative disuse.[79] In the first six years after its passage, the ETA led to less than forty findings of discrimination.[80]

One of the most fundamental reasons cited for the ETA's relative ineffectiveness has been "the persistent subordinate position of women in the socio-cultural context" of Italy.[81] Here, the ETA seemed to founder on its own limited conception of equality between men and women. Emphasizing the formal over the substantive, it assured equality in law and offered a vision of a more equitable division of benefits and burdens in society, but it made no effort to intervene affirmatively in the background social and economic conditions that impeded women's full realization of the promises of formal equality. In the late 1980s, increased attention to this problem generated strong calls for affirmative action programs for women.[82] In 1991, the Italian parliament approved an act

---

*Osservazioni in tema di attuazione della legge di parità uomo-donna in materia di lavoro,* 40 RIVISTA DI DIRITTO PROCESSUALE 386, 387 (1985). For an overview of judicial decisions during the first ten years of the ETA, see Vincenzo A. Poso, *Profili applicativi della legge n. 903 del 1977 in materia di parità di trattamento tra uomini e donne,* 42 FORO PADANO II 73 (1987).

77. *See* Beccalli, *supra* note 32, at 163 ("The law came out of the blue. The trade unions had not pushed for it as they had for the maternity law . . . ."); de Angelis, *supra* note 76, at 332.

78. *See, e.g.,* Judgment of May 23, 1978, Cass., 102 Foro it. I 153, 155 (1979) (holding that different mandatory retirement ages for men and women do not violate the ETA, because equal treatment "can neither be understood in an absolute sense nor applied in an automatic way").

79. *See* de Angelis, *supra* note 76, at 342-43. This problem led to the creation in 1984 of regional employment commissions, staffed by counselors who are responsible "for the fulfillment of the principles of equality between men and women in the area of work." Law of Dec. 19, 1984, No. 863, art. 4, Gazz. uff. No. 351, Dec. 22, 1984, Le Leggi I 1708, 1716 (1984) (originally Decree-Law of Oct. 30, 1984, No. 726, Gazz. uff. No. 299, Oct. 30, 1984, Le Leggi I 1396 (1984)). For an early evaluation of this law, see Paola Catalini, *Prime esperienze dei Consiglieri di parità: riflessioni critiche e propositive,* 61 DIR. LAV. I 564 (1987).

80. Rapisarda, *supra* note 76, at 387. Many of the cases brought under its provisions have been reverse discrimination claims, like much of the American sex discrimination litigation in the 1970s.

81. *Id.* at 390.

82. *E.g.,* Annamaria Galoppini, *Principio di eguaglianza e azioni positive,* 41 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 1046 (1987). Note, however, that Italians tend to refer to "positive" rather than "affirmative" action, in part to distinguish their approach from the U.S. affirmative action experience, which is frequently criticized as too mechanical, rights-based, and adversarial. *See, e.g., id.* at 1051.

regarding "Positive Action for the Realization of Equality Between Men and Women."[83]

The new statute complements the 1977 ETA by focusing on the background and institutional factors that help make equal treatment meaningful. Where the ETA could be said to implement the first clause of Article 3 of the constitution, the law on "positive action" has its fundamental basis in the second clause of that article.[84] The law's stated goals include the elimination of *de facto* disparities in training, access to work and promotion, the advancement of women's career choice through academic and professional training, the elimination of substantive situations differently affecting the economic conditions and pay of working women, and the promotion of women's entry into professions in which they are underrepresented.[85] Notably, it also parallels and reinforces the ETA's changed vision of familial roles by seeking "to favor, even through the different organization of work, of conditions of work and of hours of work, the balancing of family and professional responsibilities and a better distribution of those responsibilities between the sexes."[86] The law's implementation depends on a combination of enforcement of a broader definition of discrimination under the 1977 ETA[87] and a variety of promotional responsibilities and supervisory powers delegated to the national, regional, and local equal employment commissions and counselors.[88] While the statute on positive action is too new to have generated commentary or analysis of its concrete results, it is clearly a significant development in the Italian law of gender equality.

### C. *The Constitutional Court: Extending Statutory Protections to Working Fathers*

While the political process has focused on positive action for women, the Italian Constitutional Court has embarked on a further extension of the maternity laws to working fathers. In a landmark decision on January 19, 1987, the court ruled that the 1971 maternity law was constitutionally invalid insofar as it guaranteed women a three-month leave and daily rest periods for a year after childbirth, but did not guarantee the same right to fathers, even when the mother was infirm or

83. Law of Apr. 10, 1991, No. 125, Gazz. uff. No. 88, Apr. 15, 1991, Le Leggi I 1022 (1991). The law was apparently inspired by the EC recommendations and decisions. *See* Tiziano Treu, *La legge sulle azioni positive: prime riflessioni,* 10 RIVISTA ITALIANA DI DIRITTO DEL LAVORO 108, 109-11 (1991).

84. *See* Treu, *supra* note 64, at 109, 111.

85. Law of Apr. 10, 1991, No. 125, art. 1, § 2(a)-(d), Gazz. uff. No. 88, Apr. 15, 1991, Le Leggi I 1022-23 (1991).

86. *Id.* at art. 1, § 2(e), p. 1023.

87. *Id.* at art. 4, p. 1024.

88. *Id.* at arts. 3, 5, 6, pp. 1024-26.

deceased.[89] The case unified questions of constitutionality raised in four different cases from lower jurisdictions. In the first three cases, the plaintiffs were fathers of newborn children whose mothers had died in childbirth, leaving the fathers to care for the children alone. In the fourth case, the plaintiff was a father whose wife was infirm and immobilized, and incapable of caring for their young child.[90] In all four cases, the fathers requested that the three-month period of leave granted exclusively to women after childbirth be extended to them.[91] In the fourth case, the father also requested a right to the daily rest periods normally guaranteed to a mother during the first year of her child's life.[92] The judges decided that in all of these cases the fathers' claims implicated relevant and substantial questions of constitutionality, and referred the issue to the Constitutional Court.[93]

The Constitutional Court began with an examination of the 1971 maternity law. Like the 1950 law, the court noted, the 1971 law was intended to safegnard the health of mothers and pregnant women, give them job security, and help them overcome the financial burdens associated with maternity. However, according to the court, the new law also helped develop the "awareness of the social function of maternity, [and] of the value of women's inclusion in the workplace."[94] In addition, the 1971 law (along with the law on nurseries, of the same year) looked to the interests of the child—so much so, said the court, that outside of the provisions narrowly protecting the health of the mother, it could be said that the main object of the law was the mother-child relationship.[95] Specifically, the court observed that the progressive extension of the period of leave (from one month after birth in 1929, to two months in 1950, and to three months currently) indicated a growing concern for the mother's relation to the child as well as her own health, and for the child's affective and psychological well-being as well as its biological needs.[96] Likewise, though the daily rest periods guaranteed in the maternity laws originally were meant to allow for breastfeeding, the 1971 provisions permitted mothers to combine the two daily rest periods if they wished, even taking them at the beginning or the end of the working day. In this way, the law clearly separated these rest periods from the necessities of breastfeeding. From all these developments, the court interpreted the

89. Judgment of Jan. 19, 1987, Corte cost., 110 Foro it. I 313 (1987).

90. *Id.* at 314.

91. *Id.*

92. *Id.*

93. In the Italian judicial system, lower courts do not have the power to review legislation on constitutional grounds; if they find a relevant and substantial claim of constitutional defect in the law in question, they must seek a ruling of the Constitutional Court. *See generally* Alessandro Pizzorusso et al., *The Constitutional Review of Legislation in Italy,* 56 TEMP. L.Q. 503 (1983).

94. Judgment of Jan. 19, 1987, Corte cost., 110 Foro it. I 313, 314 (1987).

95. *Id.* at 314-15.

96. *Id.* at 317.

1971 law as having added the assistance and promotion of parent-child bonding generally to the fundamental goals of Italian maternity legislation.[97]

The court's subsequent analysis of the 1977 Equal Treatment Act served to confirm that understanding of the purposes of the maternity laws.[98] For example, the court said that the ETA's extension of leave and rest periods to adoptive parents demonstrated that the maternity law's scope exceeded the physiological exigencies of childbirth and touched the development of family relationships generally. Thus, the court rejected the defense's argument that the maternity law's *post partum* benefits were intended principally to protect the health of the mother.[99]

In addition, the court reasoned that the ETA's amendment of maternity legislation sought to remove obstacles to women's equal access to and advancement in the workplace, and to promote "a new vision of the roles of the parents in family life, and in particular of the way in which they must contribute to the assistance of their children with equal rights and duties."[100] The law does not thereby "diminish the essential function of the mother with respect to her child, but recoguizes, if anything, with particular clarity, that the father is also suited to giving material and affective support to the child."[101]

Thus, the court held that even where the mother is no longer able to care for her child because of death or illness, the 1971 law recognized a continued interest in assuring material and emotional care for the child. The court concluded that, given the ETA's recognition and affirmation of the father's role as well as the mother's in caring for children, the failure to extend the benefits in question to the plaintiffs violated the constitution in several ways.[102] Generally, the denial discriminated against the children whose mothers were incapacitated and against the working fathers who were denied the possibility of caring for their children.[103] More specifically, it violated the constitution's protection of family life as expressed in Articles 29, 30, and 31.[104] In addition, the denial of equal

97. *Id.*

98. *Id.* at 318.

99. *Id.*

100. *Id.* at 315.

101. *Id.* at 318. The ETA extended the option of taking an additional six-month leave to the father in place of the mother and guaranteed the father leave from work in place of the mother in case of the child's illness.

102. *Id.* at 319.

103. *Id.*

104. *Id.*; *see also* COST. art. 29 (Italy) ("The Republic recognizes the rights of families as natural associations founded on marriage."); *id.* at art. 30 ("It is the parents' duty and right to support, instruct and educate their children . . . ."); *id.* at art. 31 ("The Republic shall facilitate the formation of the family and the fulfillment of related obligations through economic measures and other provisions . . . .").

benefits to the fathers failed to give their children the "special, adequate protection" guaranteed by Article 37.[105] In sum, this "complex of pre-eminent constitutional values" showed that the law in question "does not take into adequate account the needs of families in their entirety, and in particular those of . . . the child."[106] For these reasons, the court extended the benefits that the ETA granted to fathers to include the three-month *post partum* leave and daily rest periods in the child's first year.[107]

The court reaffirmed its interpretation of the development of Italian legislation on parenthood and equality in the workplace, as well as its willingness to extend the maternity laws to working fathers, in its Judgment of July 15, 1991.[108] The case involved a father who had sought to take the three-month mandatory leave in place of the mother, who had renounced her right to do so.[109] When the request was refused by the administrative authority, the father challenged the constitutionality of the parental leave legislation. The lower court held the constitutional question was well-founded since the law unjustifiably treated the father differently from the mother with respect to the "right and interest to participate in the first and most delicate phase of insertion of the minor into the family."[110]

The Constitutional Court again reviewed the development of the maternity legislation and its relation to the equality of men and women. It traced the extension of benefits from "natural" mothers (1971) to mothers adopting (1977) or entrusted with small children (1983), and from mothers, exclusively, to fathers (in part) in the 1977 and 1983 legislation. The court noted that the ETA was the first law with which "the father is concretely called upon and put into a position to exercise his right/duty to participate equally in the care and assistance of his natural, adopted or entrusted child."[111] Summarizing its 1987 decision on leave for working fathers, the court stressed that the requirements of the law were not merely to protect the mother's physical health, but also to address the "relational and affective needs that are connected to the

105. Judgment of Jan. 19, 1987, Corte cost., 110 Foro it. I 313, 319 (1987).

106. *Id.*

107. *Id.* The court refused to rule on circumstances other than the death or incapacity of the mother, since these questions were not before it. This case should also be noted for its contribution to the development of the Italian jurisprudence of "additive interventions," that is, the extension of a statute's provisions by the court in order to fill gaps that violate constitutional norms. *See* Ginevra Galli, *La Corte costituzionale e i diritti dei padri lavoratori,* 38 RIV. GIUR. LAV. PREV. SOC. II 3, 6 (1987).

108. Judgment of July 15, 1991, Corte cost., 114 Foro it. I 2297 (1991).

109. The parental leave provisions had been extended to parents entrusted with small children by the Law of May 4, 1983, No. 184, Gazz. uff. No. 133, May 17, 1983, Le Leggi I 942 (1983). This law imposed the three-month mandatory leave upon placement of the child only on the mother, while the six-month optional additional leave could be taken by either parent.

110. Judgment of July 15, 1991, Corte cost., 114 Foro it. I 2297, 2710 (1991).

111. *Id.* at 2298.

development of the personality of the child."[112] With respect to those needs, the court emphasized

> the principle . . . of joint participation of both spouses in the care and education of their children, without distinction or separation of roles between men and women, but with their reciprocal integration, as much in the family as with respect to extrafamilial activities. It is thus recognized that the father is also suited—and therefore bound—to provide material assistance and affective support to the minor . . . .[113]

The court observed that the purpose of the parental leave legislation, and the role of both parents in fulfilling it, is all the more pronounced in cases of parents legally entrusted with children. In such cases, the law's sole function was to facilitate the development of the child "by creating conditions for a more intense presence of the couple, both parts of which are trustees; as such, both are protagonists, through the exercise of their duties and rights, in the successful outcome of the delicate task committed to them."[114]

In sum, the constitutional interests and values here "attend to the complete protection[115] of the child through a fuller realization of the principle of the substantive equality of the spouses and of their equal participation in [the child's] care and assistance."[116] The statute, however, by establishing mandatory leave for the mother and not for the father in her place, "does not allow for the possibility of a more complete, rational and balanced presence of both parts of the trustee couple . . . [, thus] preventing the organization of their family and work life best suited to the ends" of guarding the child's interests.[117] Therefore, to the extent that the legislation did not grant leave to the father in place of the mother, it violated the constitution's guarantees of equality of the spouses, protection of families, and protection of minors (Articles 29, 30, and 31), and its guarantee of equal treatment of men and women in matters of work (Article 37).[118] Finally, the legislation violated both clauses of Article 3 of the constitution

> inasmuch as, by indirectly imposing only on the woman the sacrifice of the needs and interests inherent in her work in order to

112. *Id.*

113. *Id.*

114. *Id.* at 2299.

115. The court used the Italian word "tutela," which I have translated as "protection," and which can also be translated as either "tutelage" or "guardianship." *See* JOSEPH T. GENCO, DICTIONARY OF ITALIAN LEGAL TERMS 300 (1980). In my view, however, none of these English words alone entirely captures the meaning of "tutela," which connotes a certain responsibility of stewardship.

116. Judgment of July 15, 1991, Corte cost., 114 Foro it. I 2297, 2299 (1991).

117. *Id.* at 2300.

118. *Id.* at 2299-300.

care for the entrusted minor, it places the development of a woman's personality in aspects of work in a position subordinate to the consideration given to a man's work.[119]

The above is but a bare outline of certain features of Italian law on work, gender equality, and parenthood. Nevertheless, this sketch of the Italian experience does illustrate the contours of a distinctive social understanding and a unique way of conceptualizing and articulating the issues in question. The legal landscape of the United States looks starkly different.

## III
## UNITED STATES LAW

Compared to Italian law, U.S. law regarding the intersections of work, parenthood, and equality has largely presented a telling silence. The U.S. Constitution, unlike those of twentieth-century social welfare states, does not feature prominently social or economic rights; it barely mentions equality.[120] Until this year, U.S. law has had no complex statutory and regulatory schemes regarding working mothers, let alone fathers. Instead, from a starting point comparable to that of post-war Italian law, U.S. law has grown almost exclusively out of antidiscrimination law. This has led to decades of disagreement in scholarship, legislation, and, above all, the courts, over the appropriate way to relate pregnancy to women's equality in the workplace, and whether to accord it some "special" status.

### *A. Maintaining "Separate Spheres"*

Similar to pre-war Italian law, U.S. law until the 1960s embodied and enforced an ideology of "separate spheres" of male and female activity, based on "natural" differences between the sexes. A woman's sphere was the hearth and family; a man's was work outside the home. Laws frequently restricted women's paid employment and even categorically excluded them from certain professions. Courts treated these gender-based classifications with extreme deference.[121] For instance, the earliest U.S. Supreme Court case addressing a question of sex discrimination upheld a statute denying women the right to practice law.[122] One of the

119. *Id.* at 2300.

120. Of course, there is an extensive jurisprudence of equality arising out of the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, in the language of the constitutions themselves, equality certainly receives a great deal less treatment in the United States than in Italy or most other contemporary constitutional systems.

121. *See* DEBORAH L. RHODE, JUSTICE AND GENDER 38-50 (1989) (providing an overview of protective labor legislation and the cases interpreting it).

122. Bradwell v. State, 83 U.S. 130, 139 (1872).

Justices, in a now infamous concurring opinion, offered a paradigmatic articulation of the legal understanding of women and work:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . .
>
> . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.[123]

Even as the Supreme Court, as self-appointed standard-bearer of natural rights and substantive due process, was refusing to allow regulatory restrictions on male workers' freedom of contract in the early years of this century,[124] it employed the dominant view of women's proper roles in upholding legislation limiting women's working hours.[125] Women workers were regarded as frail and weak compared to their male counterparts and in need of special protection. By 1912, over two thirds of the states had laws restricting women's working hours; by the Depression era, many of these laws were extended to require women to leave work when they became pregnant.[126] As Wendy Williams points out, these laws " 'protected' pregnant women right out of their jobs" when mandatory leave did not include guaranteed wage replacement or job security.[127]

Labor shortages during World War II brought an influx of women into the workforce. Consequently, increased attention was given to employer practices regarding maternity. In 1942, the Women's Bureau issued guidelines to employers recommending that women be given six weeks of leave prior to delivery and two months of *post partum* leave, with reinstatement guarantees and preservation of seniority rights.[128] Where women did receive leave, however, it was typically mandatory and unpaid. Further, reinstatement practices frequently permitted demotion and a loss of accrued benefits.[129] Although the employers'

123. *Id.* at 141 (Bradley, J., concurring).

124. *See* Lochner v. New York, 198 U.S. 45 (1905) (invalidating a statute that limited maximum working hours for bakers).

125. *See* Muller v. Oregon, 208 U.S. 412, 422-23 (1908) (upholding a state law setting maximum hours for women working in laundries, on the grounds that certain restrictions are essential to ensuring healthy offspring).

126. *See Evolution of Legislation,* 70 CONG. DIG. 99 (1991) (special issue on the Family and Medical Leave Act); Meryl Frank & Robyn Lipner, *History of Maternity Leave in Europe and the United States, in* THE PARENTAL LEAVE CRISIS 3, 11-14 (Edward F. Zigler & Meryl Frank eds., 1988).

127. Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate,* 13 N.Y.U. REV. L. & SOC. CHANGE 325, 334 (1984-85).

128. *See Evolution of Legislation, supra* note 126, at 99; Frank & Lipner, *supra* note 126, at 15.

129. *See* Frank & Lipner, *supra* note 126, at 16.

ostensible justification for these policies was to protect both mother and child, there is evidence that the actual reasons were more deeply rooted in fundamental notions about the propriety of women's work. One study, for example, noted that employers did not consider it "nice" for pregnant women to work in factories and thought their presence had a "bad effect" on male employees.[130]

In short, the rules of the workplace, from employer practices to constitutional doctrine, stressed that a woman's proper place was in the home, not the workplace. In Wendy Williams' words, "[t]he pattern of rules telegraphed the underlying assumption: a woman's pregnancy signaled her disengagement from the workplace. Implicit was not only a factual but a normative judgment: when wage-earning women became pregnant they did, and should, go home."[131] Pregnancy and maternity, in this view, were little more than the boundary between women as workers (i.e., women imitating men) and women as mothers (i.e., women as such). A contemporary conception of society or law seeking to integrate the roles of workers and parents could not even be articulated here; it simply had no place.

### *B. Addressing Pregnancy Within the Antidiscrimination Paradigm: 1964-1978*

Passage of the Civil Rights Act of 1964 marked the beginning of a new order in employment discrimination law in the United States with regard to both race and sex. Title VII of the Act, the principal federal antidiscrimination statute, prohibits employers with fifteen or more employees from discriminating "because of . . . sex" in "compensation, terms, conditions, or privileges of employment."[132] The Act does not specifically mention pregnancy or maternity, however, and its effect on discrimination on these grounds was severely curtailed for many years by the Equal Employment Opportunity Commission's (EEOC) interpretation and implementation of Title VII. Throughout the 1960s, EEOC guidelines regarding sex discrimination did not mention discrimination on the basis of pregnancy. In response to questions, the General Counsel of the EEOC issued an opinion letter in 1966, saying:

> "The Commission policy [with respect to pregnancy] does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated

130. *See id.*; *see also* KAMERMAN ET AL., *supra* note 2, at 38; RHODE, *supra* note 121, at 117-18; *Evolution of Legislation, supra* note 104, at 99-100.

131. Williams, *supra* note 126, at 335.

132. 42 U.S.C. § 2000e-2(a)(1) (1988).

during the working life of most women employees."[133]
Another opinion letter shortly thereafter specified: " 'an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory.' "[134]

The early 1970s saw significant shifts in policy and law relating to sex discrimination. In 1971, the EEOC reversed its position that pregnancy discrimination was not sex discrimination under Title VII. Its 1972 regulations took the position that "pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities," and therefore must be subject to the same terms and conditions, including length of leave and wage replacement or insurance coverage, as any other temporary disability.[135]

This change in EEOC policy coincided with broader developments in the law of gender equality. In 1971, for the first time, the Supreme Court found that sex discrimination could violate the Equal Protection Clause of the Fourteenth Amendment.[136] In *Reed v. Reed,* the Court invalidated a law that mandated a preference for a male over a female where they were otherwise equally qualified to administer an estate.[137] The Court applied a standard of review requiring sex-based classifications to bear a rational relationship to a legitimate state objective and held that the law did not meet this standard.[138] In this way, the Court opened the door to heightened judicial scrutiny of sex-based legislation, and many cases following *Reed* successfully attacked such laws.[139]

These developments in law and policy provided the bases for constitutional challenges to rules and practices that disadvantaged pregnant women in the workplace. By the mid-1970s, several factors had combined to block the professional advancement of working women: traditional assumptions about women's roles, employers' common prac-

133. Opinion Letter from the General Counsel of the EEOC (Oct. 17, 1966), *quoted in* General Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976).

134. Second Opinion Letter from the General Counsel of the EEOC (month and date unknown) (1966), *quoted in Gilbert,* 429 U.S. at 143.

135. 29 C.F.R. § 1604 (1975).

136. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

137. 404 U.S. 71 (1971).

138. *Id.* at 76.

139. *See, e.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (holding that a gender-based distinction in the provision of social security benefits was unjustifiably discriminatory); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that a statute denying certain benefits to male spouses of female officers that were available to female spouses of male officers was unjustifiably discriminatory). Many of these cases, similar to the post-1977 period in Italy, were brought by men claiming reverse discrimination under legislation supposedly protecting or benefitting women. *See, e.g.,* Califano v. Goldfarb, 430 U.S. 199 (1977) (holding that a gender-based distinction in the provision of social security benefits was unjustifiably discriminatory); Craig v. Boren, 429 U.S. 190 (1976) (holding that a statute prohibiting the sale of 3.2% beer to males under 21 and females under 18 was unjustifiably discriminatory).

tice of dismissing pregnant workers without reinstatement guarantees, and the lack of insurance coverage for pregnancy and maternity. These factors were mutually reinforcing and combined to block women's advancement by channeling them into low-paying, static jobs.[140] Litigants who sought to eliminate occupational obstacles that were justified by "traditional" notions about pregnancy tried to attain the same employee benefits for pregnancy that would be given for any temporary disability. Comprehensively "equal" treatment was the goal; their view was that childbearing deserved neither special protection that harmed women under the gnise of benefitting them, nor exclusion from those programs that compensate other temporary impairments of the physical ability to work.

Shortly after *Reed,* the Supreme Court addressed the issue of pregnancy and maternity leave under its due process doctrine. *Cleveland Board of Education v. LaFleur* involved mandatory maternity leave policies adopted in Ohio and Virginia.[141] The Ohio rule required teachers to take an unpaid leave five months prior to and three months after childbirth, with reinstatement possible only at the beginning of a semester. In Virginia, the rule required a teacher to give notice of her pregnancy six months before childbirth and to take four months' prenatal leave. The Court ruled that both statutes violated the Due Process Clause of the Fourteenth Amendment. The four- and five-month mandatory leaves prior to delivery, as well as the three-month wait before returning required by the Cleveland rule, were arbitrary and too broad to serve the legitimate state interests in keeping "unfit" teachers out of the classroom and ensuring continuity of instruction.[142] The Court also ruled that the mandatory leave policies impermissibly interfered with a woman's right to decide to bear children. Recognizing that "freedom of personal choice in matters of marriage and family life is one of the liberties protected" by the Constitution,[143] the Court concluded that the maternity rules in question "unnecessarily penalize[d] the female teacher for asserting her right to bear children."[144] Having decided *LaFleur* on due process grounds, however, the Court never reached the equal protection issues.[145]

140. See RHODE, *supra* note 121, at 118.

141. 414 U.S. 632 (1974).

142. *Id.* at 646-50.

143. *Id.* at 639.

144. *Id.* at 650.

145. Both circuit courts addressed the issue of equal protection, and they reached opposite conclusions. *Compare* Cohen v. Chesterfield County Sch. Bd., 474 F.2d 395 (4th Cir. 1973) (holding that discrimination on the basis of pregnancy is not sex discrimination under the Fourteenth Amendment's Equal Protection Clause), *rev'd sub nom. on other grounds, LaFleur,* 414 U.S. at 632 *with* LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972) (holding that a mandatory maternity leave policy discriminated on the basis of sex, in violation of the Fourteenth Amendment's Equal Protection Clause), *aff'd,* 414 U.S. at 632.

The first challenge to pregnancy discrimination based on equal protection came later in the same year as *LaFleur,* in *Geduldig v. Aiello.*[146] In *Geduldig,* the Court concluded that exclusion of pregnancy and normal pregnancy-related disabilities from a California disability insurance program did not constitute discrimination based on sex, because both men and women received the same coverage under the plan. The system "does not exclude anyone from benefit eligibility because of gender . . . [because, w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[147] Using tortuous logic, the Court argued that this exclusion of pregnancy did not discriminate on the basis of sex as such:

> The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.[148] [Therefore, t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.[149]

By simply pointing out that some women were in the group of employees covered by the program—non-pregnant persons—the Court distinguished discrimination based on pregnancy from sex discrimination, thereby avoiding the heightened judicial scrutiny that was triggered in the line of cases following *Reed.*

Justice Brennan, in dissent, asserted not only that pregnancy-related conditions were as much disabilities in need of medical care as any others, but also that exclusion of this sex-specific condition, while other male-specific disabilities such as prostatectomies received coverage, amounted to less favorable treatment based on gender. "Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."[150]

In rejecting Brennan's view, the Court assumed that pregnancy has a "unique" status that distinguishes it from other temporary disabilities. If decisions based on pregnancy did not constitute sex discrimination, employers—and governments—were free to treat it differently from other disabilities. In *LaFleur,* the Court had cited its line of cases from *Griswold v. Connecticut*[151] to *Roe v. Wade*[152] to support the proposition that personal choices involving procreation were constitutionally entitled

146. 417 U.S. 484 (1974).
147. *Id.* at 496 n.20.
148. *Id.* at 497 n.20.
149. *Id.* at 496-97.
150. *Id.* at 501 (Brennan, J., dissenting).
151. 381 U.S. 479 (1965).
152. 410 U.S. 113 (1973).

to be free from government intrusion.[153] Thus, it implicitly asserted that pregnancy was something special, emphasizing the fundamental nature of the interest it entailed and its uniqueness to women. Unreasonably heavy burdens on maternity interests, like those challenged in *LaFleur,* were illegitimate as a violation of due process. However, more reasonable regulations presumably would be acceptable, as the *LaFleur* Court implied in noting that it was not ruling on the constitutionality of maternity leave policies in general.[154] The holding and language of *LaFleur* came close to establishing a test that would measure the reasonableness of regulations based on pregnancy by whether they unduly restricted women's abilities to both work and bear children. In part, *LaFleur* did not extend constitutional doctrine further in that direction because other considerations made it a little-used precedent.[155]

Women's rights litigants generally saw the turn toward the special treatment of pregnancy in *Geduldig* and *LaFleur* as inappropriate.[156] Equal treatment remained the goal of pregnancy law reform, but because the Supreme Court had effectively shut pregnancy discrimination cases out of the scope of the Equal Protection Clause, plaintiffs looked to Title VII for relief. In 1976, the Supreme Court had the opportunity to rule on the question of pregnancy under Title VII in *General Electric Co. v. Gilbert,* and the Court interpreted the statute as it had the Equal Protection Clause: discrimination on the basis of pregnancy was not sex discrimination.[157]

The disability plan in question in *Gilbert* was very similar to the one in *Geduldig.* The system covered a wide variety of disabilities arising from sickness or accident, but specifically excluded pregnancy and pregnancy-related conditions from coverage. Reasoning that Congress had to some extent adopted the terms and interpretations of the Fourteenth Amendment in passing Title VII, the Court asserted that its previous holding in *Geduldig* had considerable bearing on the question of sex discrimination in *Gilbert.*[158] The Court made more explicit its view that pregnancy was a "special" condition, distinguishable from other disabilities:

153. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974).

154. *Id.* at 647 n.13; *see also id.* at 656 n.5 (Powell, J., concurring) ("In light of the Court's language, . . . a four-week prebirth period would be acceptable.").

155. *LaFleur* asserted that the leave policy was irrational and arbitrary because it established an "irrebuttable presumption," *id.* at 644, that was "neither 'necessarily [nor] universally true.' " *Id.* at 646 (quoting Vlandis v. Kline, 412 U.S. 441, 452 (1973)). However, the Court abandoned the irrebuttable presumption analysis in subsequent due process cases. *See, e.g.,* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 22-24 (1976); Weinberger v. Salfi, 422 U.S. 749, 784-85 (1975).

156. *See, e.g.,* Williams, *supra* note 127, at 343 ("In certain contexts, such as those in *LaFleur* and *Geduldig,* the equal protection approach speaks more relevantly to the position in which pregnant women find themselves . . . .").

157. 429 U.S. 125 (1976).

158. *Id.* at 133.

> [W]e have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a "disease" at all, and is often a voluntarily undertaken and desired condition.[159]

Pregnancy, in this view, is something different from "normal" (i.e., male) disabilities, and thus need not receive the same treatment as those other disabilities.[160]

### C. *The Pregnancy Discrimination Act of 1978*

#### 1. *The Equal Treatment/Special Treatment Debate*

Intensive lobbying in reaction to the Supreme Court's ruling in *Gilbert* induced Congress to enact the Pregnancy Discrimination Act (PDA) in 1978.[161] Specifically intending to overrule *Gilbert* and disapprove of its reasoning,[162] Congress amended the definitions in Title VII to read: "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."[163] Ensuring, in particular, that disability plans would no longer exclude pregnancy from coverage, the amendment provided 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."[164] Pregnancy was explicitly equated with other working disabilities, and pregnant women were to receive the same treatment as healthy workers when they were fit, as in *LaFleur,* or the same benefits as other disabled workers when they were not, contrary to *Gilbert.*

---

159. *Id.* at 136.

160. Curiously, Justice Rehnquist, who authored the opinion in *Gilbert,* seemed to equate pregnancy with temporary disabilities when writing for the Court one year later in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). In *Satty,* the Court invalidated a company policy that denied women their seniority status upon returning from maternity leave, when workers returning from other disabilities retained their seniority status. *Id.* at 139-40. Rehnquist explained that the extra "benefits" desired in *Gilbert* differed from the "burden" imposed in *Satty,* and Title VII did not compel the former but prohibited the latter. *Id.* at 142.

161. 42 U.S.C. § 2000e(k) (1988). The PDA was supported by the Campaign to End Discrimination Against Pregnant Workers, a coalition of representatives from unions, civil rights groups, and women's organizations. Dorothy M. Stetson, *The Political History of Parental Leave Policy, in* PARENTAL LEAVE AND CHILD CARE 406, 412-13 (Janet S. Hyde & Marilyn J. Essex eds., 1991).

162. H.R. REP. No. 948, 95th Cong., 2d Sess. 2-3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750-51.

163. 42 U.S.C. § 2000e(k).

164. *Id.*

When it first had occasion to interpret the PDA in 1983, the Supreme Court recognized Congress' intent to overrule *Gilbert.* In *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* the Court found that an employer's health insurance policy violated the PDA by providing less coverage for pregnant spouses of male employees than for dependents with other medical conditions.[165] The Court concluded that the plan discriminated against the male employees, because "the husbands of female employees receive a specified level of hospitalization coverage for all conditions; [whereas] the wives of male employees receive such coverage except for pregnancy-related conditions."[166] Noting that Congress "unequivocally rejected" the reasoning in *Gilbert,*[167] the Court saw the PDA as having put an end to the special regard for pregnancy in the courts, prescribing equal treatment of pregnant workers.[168]

The PDA did not, however, put an end to differences over the appropriate treatment of pregnancy and parenthood in the law. Those who believe that pregnancy should be essentially comparable to other temporary physical conditions advocate the equal treatment of pregnancy and workers' disabilities. Proponents of this line of thought generally acknowledge that pregnancy is different from other disabilities, but deny that the differences should be relevant to the rules of employment.[169] Wendy Williams, for example, claims that the equal treatment approach to pregnancy "is the one best able to reduce structural barriers to full workforce participation of women, produce just results for individuals, and support a more egalitarian social structure."[170] Classifying pregnancy as a disability separates women's physical capacity for childbearing from the social construct of childrearing, preventing employers and governments from using rules relating to pregnancy that enforce traditional, male-dominated family models.[171] This makes the workplace more open to women and at the same time opens the family to greater male participation.

Advocates of "special treatment" argue that the law should, in some instances, take account of women's biological reproductive differences.[172]

165. 462 U.S. 669, 683-85 (1983).

166. *Id.* at 684.

167. *Id.*

168. It should be noted, however, that the Court's ruling in *Geduldig* is still valid constitutional law; *Newport News* only addressed the statutory requirements of Title VII.

169. *See, e.g.,* Williams, *supra* note 127, at 357.

170. *Id.* at 351-52.

171. *See id.* at 353-54.

172. *See, e.g.,* Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account,* 54 FORDHAM L. REVIEW 699 (1986) (discussing different theoretical approaches and arguing in favor of special treatment); Herma H. Kay, *Equality and Difference: The Case of Pregnancy,* 1 BERKELEY WOMEN'S L.J. 1 (1985) (suggesting an "episodic" analysis in conceptualizing reproductive conduct); Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality,* 13 GOLDEN GATE U. L. REV. 513 (1983) (arguing that equal treatment may result in inequality).

For instance, Herma Hill Kay argues that when women exercise their ability to bear children—but only when they do—they should be treated in a way that recognizes this special capability:

> [U]nlike Williams, I insist that during the episode of pregnancy itself the woman's body functions in a unique way. We must recognize that unique function in order to prevent penalizing the woman who exercises it. If confined in this way, the recognition of pregnancy as "unique" will enable the law to treat women differently than men during a limited period when their needs may be greater than those of men as a way of ensuring that women will be equal to men with respect to their overall employment opportunities.[173]

Advocates of this approach criticize the equal treatment view as "premised on a male model" of employee benefits, which ignores "the disproportionate impact of preguancy within the range of potential temporary disabilities" under existing employment structures.[174]

Nevertheless, these criticisms and proposals actually reveal a certain common ground between the equal treatment and the special treatment camps: both are ultimately concerned with equality, and both agree that in order to achieve equality, preguant women must be protected with certain guarantees of job security. They disagree only about where the lines should be drawn.[175] While both agree on the need to compensate women for the temporary disability of preguancy, where one insists that pregnancy be benefitted as such, independently of other conditions, the other would have pregnancy receive the same compensation as other disabilities (and if that were insufficient, they would raise the overall level of benefits). Though perhaps narrow, this difference was at the heart of disagreements over state legislation in the 1980s.

Following the passage of the PDA, a number of states attempted to redress the lack of adequate maternity leave policies through statutes or regulations requiring all employers to provide maternity leave and job protection for preguant workers.[176] These provisions only required unpaid leave for the period of actual disability or a presumed period of disability.[177] Though limited, the prescribed benefits seemed to derogate from the equal treatment of pregnancy and other disabilities mandated by the PDA, since the states required certain benefits for maternity, but

173. Kay, *supra* note 172, at 34 (footnote omitted).

174. Dowd, *supra* note 172, at 719.

175. John D. Gibson, Note, *Childbearing and Childrearing: Feminists and Reform*, 73 VA. L. REV. 1145, 1172 (1987).

176. *See, e.g.*, KAMERMAN ET AL., *supra* note 2, at 77-98 (reviewing the maternity leave policies of California, Hawaii, New Jersey, New York, and Rhode Island during this period); Dowd, *supra* note 147, at 720-35 (surveying state maternity leave provisions).

177. If other disability leaves are compensated, then pregnancy leave must be compensated to the same extent, pursuant to the PDA. *See* Dowd, *supra* note 172, at 721.

left compensation for other causes of absence to the discretion of the employer. Battle lines between equal treatment and special treatment proponents were drawn around the question of whether the PDA prohibited such maternity leave legislation. The Supreme Court decided the question in 1987, one day before the Italian Constitutional Court rendered its decision on working fathers.[178]

### 2. *The Limits of the Disability Model in the Federal Courts*

In *California Federal Savings & Loan Ass'n v. Guerra,* the U.S. Supreme Court found that the Pregnancy Discrimination Act does not preempt state statutes that require employers to grant periods of leave with reinstatement to pregnant employees.[179] California employers challenged a 1978 amendment to the state's Fair Employment and Housing Act requiring them to grant "reasonable" periods of leave for pregnancy and childbirth.[180] A state agency's regulation interpreting that law had required employers to give a returning employee her previous job, unless it was unavailable because of business necessity.[181]

Lillian Garland was employed as a receptionist at California Federal Savings and Loan (CalFed) when she took a pregnancy disability leave in 1982. On her return, she was not offered a comparable position, and she filed a complaint with the California Department of Fair Employment and Housing, which on Garland's behalf accused CalFed of violating California law. The District Court granted CalFed's motion for summary judgment on the grounds that the PDA preempted the California statute by requiring equal treatment of pregnant women and temporarily disabled men.[182] The Ninth Circuit reversed, holding that nothing in Title VII prevented states from treating pregnancy *more* favorably than other disabilities; the PDA established "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[183]

In affirming the Ninth Circuit's opinion, the Supreme Court first examined the legislative history of the PDA. The Court noted that in

---

178. Judgment of Jan. 19, 1987, Corte cost., 110 Foro it. I 313 (1987); *see also supra* text accompanying notes 89-107.

179. 479 U.S. 272, 292 (1987).

180. The relevant portions of the law read as follows:

> 'It shall be an unlawful employment practice . . . [f]or any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . . [t]o take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.'

*Id.* at 275 n.1 (quoting CAL. GOV'T CODE § 12,945(b) (West 1980)).

181. *Id.* at 276.

182. *Id.* at 279.

183. California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985), *aff'd*, 479 U.S. at 272.

overruling *Gilbert,* Congress did not seek to impose limitations on a state's power to remedy discrimination, but did intend "to provide relief for working women and to end discrimination against pregnant workers."[184] Quoting one of the sponsors of the PDA, the Court asserted that " '[t]he entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.' "[185] Because the California statute was narrowly drawn to cover only the actual physical disability of the woman and did not "reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers,"[186] the Court concluded that the state law, like the PDA, "allows women, as well as men, to have families without losing their jobs."[187]

Moreover, employers were still able to comply with both state law and Title VII, since the former "does not compel California employers to treat pregnant workers *better* than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers. Employers are free to give comparable benefits to other disabled employees," thereby also complying with the requirements of the PDA.[188]

Thus, because the California maternity leave requirements neither conflicted with the purposes of the PDA nor compelled an unlawful act under Title VII, the state law was upheld.[189] This conclusion did not mean that Title VII did not impose limits on the preferential treatment of pregnancy, however, as Justice Stevens emphasized in his concurring opinion. He considered the test to be whether such favorable treatment accords with Title VII's intent " 'to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.' "[190]

184. *California Federal,* 479 U.S. at 286.

185. *Id.* at 289 (quoting 123 CONG. REC. 29,658 (1977) (statement of Sen. Williams)).

186. *Id.* at 290.

187. *Id.* at 289.

188. *Id.* at 291. Not surprisingly, some advocates of equal treatment, led by the National Organization for Women (NOW), submitted a brief urging the Court to extend the same benefits required for pregnancy to all other disabilities. Brief Amici Curiae of the National Organization for Women at 20, California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494). Other parties joining the NOW brief were the NOW Legal Defense and Education Fund; National Bar Association Women Lawyers Division, Washington Area Chapter; National Women's Law Center; Women's Law Project; and Women's Legal Defense Fund.

189. *California Federal,* 479 U.S. at 292. Title VII preemption of state statutes is limited to those instances where the state statute requires or permits employers to violate the federal law. *Id.* at 281-82. In *California Federal,* this meant the Court had to "determine whether the PDA prohibits the States from requiring employers to provide reinstatement to pregnant workers, regardless of their policy for disabled workers generally." *Id.* at 284.

190. *Id.* at 295 (Stevens, J., concurring) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

Just one week after its opinion in *California Federal* upheld the right of states to give preferential treatment to pregnant women, the Supreme Court ruled that states are not required to do so in *Wimberly v. Labor & Industrial Relations Commission.*[191] Like Lillian Garland, Linda Wimberly took a pregnancy-related leave of absence from her job and was refused reinstatement to her previous position when she sought to return less than a month later. But since her case arose in Missouri, which did not have a statute similar to California's, Wimberly had no legal right to a leave with reinstatement. She therefore filed a claim for unemployment benefits with the Missouri Division of Employment Security. The Division denied her claim, determining that she "had 'quit because of pregnancy,' and therefore had left work 'voluntarily and without good cause attributable to [her] work or to [her] employer,' " making her ineligible for unemployment benefits under Missouri law.[192] Wimberly challenged the state rule, arguing that it violated the federal standards for state participation in the federal-state unemployment compensation plan, which mandated that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy."[193]

The Court unanimously denied Wimberly's claim. Since "the Missouri scheme treats pregnant women the same as all other persons who leave for reasons not causally connected to their work or their employer, including those suffering from other types of temporary disabilities," the Court held that it was consistent with the federal requirement.[194] Wimberly claimed that this "equal treatment" of pregnancy and other "similar disabilities" was insufficient, that the federal law required preferential treatment by "affirmatively requir[ing] States to provide unemployment benefits to women who leave work because of pregnancy . . . regardless of the State's treatment of other similarly situated claimants."[195] The Court, however, concluded that the federal statute merely mandated neutral eligibility requirements: "[T]he State cannot single out pregnancy for disadvantageous treatment, but it is not compelled to afford preferential treatment."[196]

The federal courts have had relatively few opportunities to interpret and apply *California Federal* and *Wimberly.* One case, however, is of particular interest to our comparative analysis. Like the recent Italian

191. 479 U.S. 511 (1987).

192. *Id.* at 513 (quoting Appendix to Petition for Certiorari A52-A53) (citation omitted) (alterations in original). Under the Missouri law in effect at the time, "all persons who leave their jobs are disqualified from receiving benefits unless they leave for reasons directly attributable to the work or to the employer." *Id.* at 516.

193. 26 U.S.C. § 3304(a)(12) (1988).

194. *Wimberly,* 479 U.S. at 516.

195. *Id.*

196. *Id.* at 518.

constitutional cases, it involved a father who sought to obtain leave to care for his child, when the leave policy established between his employer and the employees' union applied only to women.[197] Gerald Schafer, a Pittsburgh teacher, requested an unpaid leave of absence of one school year because, he said, he could not find appropriate child care for his son. The Board of Public Education granted him a three-month unpaid emergency leave, but denied his request for the one-year unpaid childrearing leave because the collective bargaining agreement with the Federation of Teachers provided for childrearing leaves only for females.[198] Schafer was forced to resign because of the denial, and later he filed a complaint alleging sex discrimination in employment and seeking reinstatement and back pay.[199] The Board, however, argned that the policy was permissible, and the district court agreed, interpreting the leave as intended for "*maternity* and not childrearing and concluding that [*California Federal*] permitted this favorable treatment to pregnant females."[200]

The Third Circuit reversed, interpreting *California Federal* as allowing preferential treatment to women only when they make "a simultaneous showing of a continuing disability related to either the pregnancy or to the delivery of the child."[201] The court's inquiry thus focused on whether, under *California Federal,* "a leave for up to one year for childrearing is related to the conditions of pregnancy, childbirth or related medical conditions."[202] Concluding that the unpaid one-year leave had no connection with a showing of physical disability, the court found its exclusive applicability to women to constitute sex discrimination in violation of Title VII.[203]

While *Schafer* helps define the reach of the Pregnancy Discrimination Act in the wake of *California Federal,* another recent circuit court case, *Maganuco v. Leyden Community High School District 212,*[204] helps identify the limits of the PDA and Title VII's applicability

197. Schafer v. Board of Pub. Educ., 903 F.2d 243 (3d Cir. 1990).

198. The agreement provided, in part, that " 'leaves without Board pay for personal reasons relating to childbearing or childrearing . . . shall be available to female teachers and other female personnel. Such leaves shall not exceed one (1) year in length from the date of their inception . . . . This sick leave provision is applicable to all female personnel.' " *Id.* at 245 n.1 (quoting Collective Bargaining Agreement between Pittsburgh Board of Education and Pittsburgh Federation of Teachers, art. 31, § 3(c)) (court's emphasis omitted).

199. Seven months after being forced to resign, Schafer had filed a complaint with the EEOC. *Id.* at 245. The EEOC initiated proceedings against the Board and the Federation of Teachers. *Id.* Almost five years after Schafer filed his complaint, the parties reached a consent agreement extending the childrearing leaves to men. *Id.* at 246. The agreement, however, was prospective only, and thus not applicable to Schafer. *Id.* Schafer subsequently moved for and was granted the right to intervene in court proceedings, seeking reinstatement and back pay. *Id.*

200. *Id.* at 246.

201. *Id.* at 248.

202. *Id.*

203. *Id.*

204. 939 F.2d 440 (7th Cir. 1991).

to parental leave. Rebecca Maganuco, also a schoolteacher, sought to combine paid sick leave and unpaid maternity leave to take one year off from work following the birth of her child. The collective bargaining agreement between the school and the teachers provided for both kinds of leave, but did not allow them to be used together—for example, by taking forty days of paid sick leave followed by the rest of the year as unpaid leave, as Maganuco sought to do. Instead, she was told that she had to use one or the other. Maganuco claimed that the policy violated the PDA because it prevented women "from using their sick leave for pregnancy-related disability, leading them to forego the use of accumulated sick days for what was likely to be among the longest periods of disability that they would experience during their careers."[205] The court dismissed Maganuco's claim, noting that she and other women schoolteachers could use their accumulated sick leave to cover their period of disability due to pregnancy and childbirth, provided they did not follow that leave with an additional unpaid maternity leave:

> The impact of the leave policy that Maganuco contests, then, is dependent not on the biological fact that pregnancy and childbirth cause some period of disability, but on a . . . schoolteacher's choice to forego returning to work in favor of spending time at home with her newborn child. However, this choice is not the inevitable consequence of a medical condition related to pregnancy, and leave policies that may influence the decision to remain at home after the period of pregnancy-related disability has ended fall outside the scope of the PDA.[206]

### *D. Recent Statutory Law: Towards Gender Neutrality and away from Disability Law*

To some extent the existence or absence of state laws requiring employers to give maternity leave determined the differing outcomes in *California Federal* and *Wimberly*. At the time, federal law permitted such benefits (*California Federal*), but did not require them (*Wimberly*). In the years immediately following these decisions, legislative initiative in the area of family, work, and equality rested with the states. A significant majority of states enacted measures to ensure some degree of parental leave.[207] The various state schemes differ widely with regard to nearly all their basic terms: employers covered (e.g., size of company,

205. *Id.* at 442.

206. *Id.* at 444-45.

207. Thirty-one states and the District of Columbia currently have statutes mandating some form of parental leave, from a minimum of maternity leave for public employees, to comprehensive family leave for public and private employees. *Appendix B: State Laws and Regulations Guaranteeing Employees Their Jobs After Family and Medical Leaves, in* PARENTAL LEAVE AND CHILD CARE, *supra* note 161, at 468-89; *Current State Laws*, 70 CONG. DIG. 106-07 (1991). Many of the laws have been instituted or expanded in the last few years. *See, e.g.*, D.C. CODE ANN. §§ 36-

public vs. private sector), length of leave, and reinstatement provisions, for example. Many of them are extremely limited, applying only to state employees,[208] for instance, or not even guaranteeing reinstatement.[209] The new Family and Medical Leave Act (FMLA) eliminates many of these differences by establishing minimum requirements at the federal level. Until now, however, the overall approach of each scheme could generally be divided into one of three types.

The first approach used by states merely requires some sort of general disability leave, either partially compensated or unpaid.[210] Either of their own initiative, or through application of the Pregnancy Discrimination Act, these laws accord pregnancy and childbirth the same benefits as a variety of physical disabilities.

A second approach instituted by some other states establishes leave for employees meeting independent requirements, but limits it to female employees, like the law involved in *California Federal.*[211] A typical example is Massachusetts' statute, which requires public and private employers to grant female employees (who have completed a minimum period of employment) eight weeks of leave "for the purpose of giving birth" with a guarantee of job reinstatement and no loss of benefits or status.[212] The leave could be paid or unpaid at the employers' discretion. More recently, Vermont adopted a maternity leave statute entitling female employees "to take unpaid leave for a period not to exceed [twelve] weeks during the employee's pregnancy and following the birth of her child."[213] This statute also guaranteed continuation of all benefits and reinstatement to the same or a comparable position.

The PDA, as applied in cases such as *California Federal* and *Schafer,* limited statutes that apply exclusively to women to mandating benefits only for the period of actual disability. Thus, these maternity-leave-only laws were unavoidably tied to the disability framework by federal law, even if established on other grounds.

In contrast, a number of other states (including California, Connecticut, Maine, New Jersey, Washington, and Wisconsin) use a third approach, an approach which escapes the disability model altogether by instituting parental or family leave for both male and female employees.[214] These systems dissociate the basis of the policy from the

1301 to 1317 (Supp. 1992) (adopted 1990); N.J. STAT. ANN. § 34:11B (West Supp. 1992) (enacted 1990).

208. E.g., Arizona, Florida, and Maryland. *Current State Laws, supra* note 207, at 106.

209. E.g., Illinois and Missouri. *Id.* at 106-07.

210. E.g., Iowa. *Id.* at 106.

211. Note that since *California Federal,* California has expanded its statute to cover parental and family care leave for male as well as female employees. *See* CAL. GOV'T CODE § 12,945.2 (West 1992).

212. MASS. GEN. LAWS ANN. ch. 149, § 105D (West Supp. 1992).

213. VT. STAT. ANN. tit. 21, § 472 (Supp. 1991).

214. *E.g.,* CAL. GOV'T CODE § 12,945.2 (West 1992); CONN. GEN. STAT. ANN. § 31-51cc

actual physical incapacity of pregnant workers, and emphasize instead family development and stability, the importance of parental care, and the responsibilities of family relations that workers have. By using gender-neutral terms, this approach recognizes that men can and should share in these concerns.

These plans, though sometimes referred to as "comprehensive," still limit the scope of the benefits in a variety of ways. For instance, they typically apply only to employers with a substantial number of employees, such as fifty or one hundred;[215] they require minimum periods of employment before workers attain leave;[216] none requires paid leaves or provides for any publicly subsidized income replacement. Nevertheless, in some respects these laws are among the most innovative and important means to address the intersections of work and family in the United States. They require a minimum amount of leave over an extended period of time—for instance, twelve weeks in a two-year period[217]—for both women and men, and for reasons not limited to the birth of a child, but usually including adoption,[218] placement of a child in foster care,[219] and in some cases even for the care of family members with serious health conditions.[220]

In general, the foundation for conceptualizing these statutes as parental leave plans, rather than as disability schemes, is only implicit in the statutes' language and approach. In some cases, the legislatures have emphasized the need to "promote family stability" and "flexibility in the workplace" at a time when more families have single parents or both parents employed outside the home.[221] California's new statute is notable for its explicit affirmation that "[b]ecause of the changing roles of men and women in the work force and the family, . . . both men and women should have the option of taking leave for child-rearing purposes," and that "[c]lose contact between parent and child is in the best interest of the child, particularly during the child's infancy and early

(West Supp. 1992); D.C. CODE ANN. § 36-1302 (Supp. 1992); ME. REV. STAT. ANN. tit. 26, § 844 (West Supp. 1991); N.J. STAT. ANN. § 34:11B (West Supp. 1992); WASH. REV. CODE ANN. § 49.78 (West 1990); WIS. STAT. ANN. § 103.10 (West Supp. 1992).

215. *E.g.*, WASH. REV. CODE ANN. § 49.78.020 (West 1990) (100 employees); WIS. STAT. ANN. § 103.10(1)(c) (West Supp. 1992) (50 employees).

216. *E.g.*, D.C. CODE ANN. § 36-1301(1) (Supp. 1992) (12 months and 1000 hours); N.J. STAT. ANN. § 34:11B-3(e) (West Supp. 1992) (same).

217. *E.g.*, CAL. GOV'T CODE § 12,945.2(a) (West 1992) (four months in any 24-month period); ME. REV. STAT. ANN. tit. 26, § 844(1) (West Supp. 1991) (10 weeks in any two years); N.J. STAT. ANN. § 34:11B-4 (West Supp. 1992) (12 weeks in any 24 months).

218. *E.g.*, CONN. GEN. STAT. ANN. § 31-51cc(7)(b) (West Supp. 1992).

219. *E.g.*, D.C. CODE ANN. § 36-1302(a)(2) (Supp. 1992).

220. *E.g.*, CAL. GOV'T CODE § 12,945.2(b)(3)(B) (West 1992); CONN. GEN. STAT. ANN. § 31-51cc(7)(b)(1) (West Supp. 1992); N.J. STAT. ANN. § 34:11B-2 (West Supp. 1992).

221. WASH. REV. CODE ANN. § 49.78.010 (West 1990); *see also* N.J. STAT. ANN. § 34:11B-2 (West Supp. 1992) (citing the need to "promote the stability and economic security of family units").

years, and this contact promotes family stability."[222]

Although state legislatures took the lead in enacting comprehensive gender-neutral leave programs, many of these statutes were inspired by the proposed Family and Medical Leave Act (FMLA), which was introduced in Congress seven times before finally being signed into law in February of this year.[223] The FMLA requires businesses with fifty or more employees to provide twelve weeks of unpaid leave a year and uninterrupted health benefits to male and female workers for the birth, adoption, or foster care placement of a child, or for the care of a family member with a serious health condition.[224] Like the state statutes, the FMLA does not provide universal coverage: by the federal government's own analysis, the FMLA only applies to about five percent of all employers and forty percent of employees;[225] it does not provide for any income replacement and accords no public support for the higher costs it imposes on employers.

However, the FMLA is important not just for its material benefits, but also for its potential to transform the terms of legal discourse. It establishes, nationally and uniformly, a minimum level of benefits according to the comprehensive, gender-neutral schemes only present in a handful of individual states until now.[226] It therefore offers a much clearer move away from the predominant disability-based framework. Instead, the FMLA emphasizes "the development of children and the family unit"; the need for "fathers and mothers [to] be able to participate in early childrearing"; the importance of gender-neutral measures; and the preservation of "family integrity."[227] It closely links job security, family life and gender equality without subsuming them all into the plane of employment discrimination.

Of course, it is too soon to tell how extensively the FMLA may alter the nature of debate over work-family issues in these directions. To the extent that it does, considering it against the background of U.S. law as it has developed until now allows us to see just how significant the change could be.

222. CAL. GOV'T. CODE § 12,945.2 (West 1992) (historical and statutory notes, quoting 1991 Cal. Stat. 462).

223. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993).

224. *Id.* § 102(a)(1).

225. *See The Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources,* 102d Cong., 1st Sess. 14 (1991).

226. The FMLA explicitly leaves in place any benefits which exceed the requirements of the Act. FMLA, *supra* note 223, at 401.

227. *Id.* § 2.

## IV
## CONTRASTS IN LEGAL DISCOURSE

These broad reviews of the development of Italian and U.S. law describe two remarkably different understandings of what is involved in mediating the tensions among the values of work, family, and equality. From the perspective provided by Italian law, we can identify a number of characteristic elements of U.S. legal discourse and their underlying assumptions. Although these elements unite in a coherent narrative, for descriptive purposes I divide them into three broad themes: understandings of pregnancy and parenthood; conceptions of equality; and approaches to substantive human and social values more generally. I emphasize characteristics that have heavily dominated U.S. law until now, in spite of the passage of the Family and Medical Leave Act, both because I do not believe the FMLA alone has yet fundamentally altered the terms of discourse, and also to underscore the significance the statute could have in giving U.S. law a new direction.[228]

### *A. Pregnancy and Parenthood: Individual Disabilities vs. Collective Responsibilities*

Perhaps the most evident contrasts between U.S. and Italian law regarding pregnancy, parenthood, and the workplace are in the differing conceptual justifications for legislation in these areas. While in Italy such legislation has been built principally on the pillar of protecting family life, the U.S. rationale for leave traditionally has been grounded in notions of women's disability, illness, and infirmity.

The drafters of the Italian Constitution explicitly endorsed the importance of the family. The particular conception of women's place within the family, however, was based on traditional views of gender roles: women's position in the family was paramount, and her extradomestic work was secondary. Accordingly, the 1950 law was aimed both at assuring that working women fulfilled their "essential family function,"[229] and at protecting mothers from the moral and physical hazards of the workplace. Over time, a more complete affirmation of gender equality in society and family fundamentally altered traditional conceptions of men's and women's proper roles. Yet the emphasis on the importance of family relationships remained, expressed more and more in terms of parent-child bonding, the interests of the child, and the importance of parental presence and care. This shift also made possible the acknowledgment of fathers' roles in child development and care.

With the 1971 reforms, the focus began to shift to an emphasis on parent-child relationships and on the broader emotional and economic

228. *Cf. infra* text accompanying notes 285-88.

229. COST. art. 37 (Italy).

stability of the family. The 1977 Equal Treatment Act both confirmed and extended that trend—for instance, in its attention to fathers' roles and to the interests of families with adopted children. The Constitutional Court's recent decisions on the rights of working fathers illustrate again how these developments have remade the foundations of parental leave. In those decisions, the court has gone to great lengths to present the law's concern with family welfare as paramount. It has culled those provisions of the statutes that can be interpreted to promote child care and parenthood and used them to extend the law ever further in that direction. The principal constitutional grounds for the court's holdings are the needs of families, the duties of parents, and the state's obligation to facilitate and protect those relationships. The father is deemed to enjoy certain rights and benefits by virtue of his ability and duty to care for his child because the court recognizes that protection of pregnancy and childbearing are but a limited part of the law's larger goals. Thus, the court concluded in its 1987 decision that excluding fathers from some of the benefits of the maternity laws is unconstitutional,

> above all . . . [because] it actually prevents the tightening of firm family relationships . . . , it blocks the fulfillment of the duties of assistance which are entrusted to the parents with equal responsibility . . . , it contrasts sharply with the obligation imposed on the public to facilitate the fulfillment of those duties . . . , [and] it ignores the "special and adequate protection" due to the child.[230]

From statutory development to constitutional values and their judicial interpretations and applications, we see that Italian law relies on the importance of family relationships as its fundamental justification for parental leave policies and as its impetus for further development.

In the United States, by contrast, as the legal order's construction of family relations into separate spheres was found unacceptable and was, at least formally, dismantled, the law simply left women to face the workplace on the same terms as men always had. Indeed, this is what many feminists of the 1970s explicitly sought.[231] Consideration of pregnancy, parenting, and the workplace in the United States thus arose not in the context of an evolving recognition of the relationships between parents and children, but almost exclusively in the context of achieving formal equality with men—specifically, through employment discrimination law.[232] Of course, workplace norms, structured and oriented toward

230. Judgment of Jan. 19, 1987, Corte cost., 110 Foro it. I 313, 319 (1987).

231. *See, e.g.*, David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. J. 33, 39-40 (1984).

232. This focus, according to Nancy Dowd, is extremely limited in its ability to mitigate work-family conflicts. *See* Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 135-54 (1989). Moreover, it arose through antidiscrimination law paradigms developed primarily to address

men who were free from family responsibilities, had not previously needed to account for tensions between childbearing, parenting, and work.[233] The closest workplace analogue to parenting leave was the disability system, which consequently provided the only context for addressing the conflicts of work and family.[234]

Thus, the only question for the EEOC in its policy decisions was whether pregnancy could be excluded from an employer's illness or injury insurance by virtue of its being a "temporary disability unique to the female sex,"[235] or whether it had to be covered because it was "equal" to other disabilities. Litigation strategies, seeking to gain women the privileges accorded to men, necessarily worked within the context of already existing rules,[236] thus reinforcing the consideration of pregnancy and parenting as disabilities. The principal court cases dealing with maternity leave in the 1970s, such as *Geduldig* and *Gilbert,* addressed the issue in terms of disabilities as well. The only exception was *LaFleur,* where the Supreme Court relied on a conception of pregnancy as a unique, fundamental interest; this might have implied a qualitative distinction from the disability approach had it been taken up in subsequent legislation. Instead, Congress passed the Pregnancy Discrimination Act, which specifically targeted the treatment of pregnancy and childbearing under disability plans. Most of the states confronting the issue did the same by requiring disability benefits for pregnancy.

By the time the Supreme Court considered California's leave statute, the conceptual framework of disability programs had become the cage of pregnancy and parenthood, and we can see in *California Federal* the pervasiveness of this approach. The Court's decision and the statute that it upheld give no sign that pregnancy has anything to do with parental con-

---

problems of racial discrimination; this added even further conceptual limitations when dealing with problems of sex discrimination. *See, e.g.,* RHODE, *supra* note 121, at 82 (asserting that a racial model is inadequate for addressing sex discrimination difficulties); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law,* 100 YALE L.J. 1281, 1288-91 (1991) (describing an assimilationist approach to sex discrimination adopted wholesale from racial discrimination cases as "stunningly inappropriate," *id.* at 1290).

233. *See, e.g.,* Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers,* 59 B.U. L. REV. 55, 55-61 (1979) (criticizing ways in which the labor market is organized around workers with no family responsibilities).

234. *Cf.* Stetson, *supra* note 161, at 413 ("The triumph of the feminists in the 1970s was to find a way to relate pregnancy and childbirth to something that happened to men—namely, job-related disability."). As Stetson points out, however, even though the disability-oriented approach became dominant in the 1960s and 1970s, its origins go back to at least the 1920s. *Id.* at 410-12. Wendy Williams has pointed out to me that this approach can be understood to have been principally a pragmatic strategy designed to obtain at least some degree of income replacement for working mothers, given the practical political limitations of the time.

235. Opinion Letter from the General Counsel of the EEOC (Oct. 17, 1966), *quoted in* General Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976).

236. *See, e.g.,* Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976,* 8 COLUM. HUM. RTS. L. REV. 373, 389-95 (1976).

cerns generally, nor do they consider that maternity leave might imply family relationships of any sort. Rather, childbearing is only thought of, spoken of, and understood as a particular occupational disability, an obstacle to an otherwise "normal" working life; it is this disability-based approach that justifies compensation under insurance or leave programs. In fact, it is in part precisely *because* "[t]he statute is narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions" that it is held to be valid.[237] The Third Circuit's recent decision in *Schafer* accentuates this aspect of *California Federal,* concluding that any disparate compensation of pregnancy *beyond* that aimed at actual physical incapacity is impermissible.[238]

In the United States, then, pregnancy has been merely something that takes a female worker out of the workplace for a limited period—perhaps different from other personal medical conditions in duration or in precise physical symptoms, but not qualitatively different in any normative sense. The only relevant issue has been the pregnancy's effect on an individual woman's physical capability to work. Maternity benefits, accordingly, merely have tried to compensate for and neutralize the temporary disability of childbearing. Broader issues of parental leave, necessarily reaching beyond purely physical conditions, are incomprehensible within this framework.[239] This imposes formidable conceptual limitations and has had far-reaching implications for U.S. law.

To begin with, U.S. legal discourse has marginalized the importance of parental responsibilities and family relationships. Whereas Italian legal discourse revolves around acknowledgments of responsibilities, U.S. law not only did not, but also *could not,* recognize them within its dominant framework of understanding. Seen as no more than a disability, childbearing inherently involves only one subject: the "ill" woman. No other person or social group is involved; therefore, by definition, no relationship is at issue. Without a recognition of relationships, U.S. law also has excluded the concept of responsibility, since by its nature it involves commitments on behalf of other persons.[240] Lucinda Finley has astutely identified the importance of "[i]ncorporating the [i]deal of [r]esponsibilities" into the legal discourse of the debate over conflicts

237. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290 (1987).

238. Schafer v. Board of Pub. Educ., 903 F.2d 243, 248 (3d Cir. 1990).

239. As an anecdotal example, one employer who denied a father's request for unpaid parental leave was quoted as saying, "I didn't know Tim was pregnant. Gynecology is not my field. I don't know if this man has had a sex change operation or what." Joseph H. Pleck, *Fathers and Infant Care Leave, in* THE PARENTAL LEAVE CRISIS, *supra* note 126, at 177, 177 (citing telephone interview with T. Scioli (Jan. 29, 1983)).

240. As Katharine Bartlett has put it, specifically in the context of parenthood, "[r]esponsibility . . . is a self-enlarging, open-ended commitment on behalf of another." Bartlett, *supra* note 6, at 299 (emphasizing the interdependence of relationships and responsibilities).

between parenting and workplace in the United States.[241] Clearly, a vocabulary of responsibilities will never arise from the disability approach.

It might be argued that the disability model need apply only to the actual biological exigencies of childbirth; a vision of parent-child relationships and responsibilities should, in fact, be separate from those physiological needs. Otherwise, the language of responsibilities could be tied to women's unique capacity to bear children, and the responsibilities themselves assigned disproportionately to women's care. But while this would be true if there were another, parallel framework within which to address parenting concerns beyond pregnancy, one that emphasized responsibility in gender-neutral ways, such has not been the case in the United States.[242] The disability model has provided the sole vocabulary for addressing parenting in the workplace. Consider, for instance, Gerald Schafer's case. Even though what was at issue was not Schafer's physical impairment, but rather his responsibility as a father to care for his son, the court did not—and could not—talk about the case in those terms. It had to focus on the fact that the women covered by the leave policy were not required to show that the leave was due to a pregnancy-related disability, and that Schafer, therefore, was in the same position. It would have taken a different legal imagination entirely—one freed of the constraints of justifications based on disabilities—to say that Schafer and the women given leave were equally bound by the responsibilities of parenthood, and therefore could not be denied equal leave rights.

Another important distinction between Italian and U.S. law has been in the treatment of children's interests. The disability model's inherent focus on the individual woman does not merely ignore the parent's responsibilities; correlatively, it precludes consideration of the needs of children. By charting the interactions between workplace and parenthood according to a projection based on family relationships and responsibility, the Italian map locates children at the center of the normative world. The evolution of Italy's statutory system of parental leave has focused increasingly on the interests of children, enabling the Constitutional Court to conclude that it is the child's interest that the legislature did not consider adequately when it excluded fathers from enjoying the benefits enjoyed by working mothers.[243] In cases of entrusted children, the court went so far as to say that "a more functional and complete assistance to the child" is the only aim of the legisla-

241. Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate,* 86 COLUM. L. REV. 1118, 1171 (1986).

242. It is, however, the approach that California has taken. *See* CAL. GOV'T CODE §§ 12,945-12,945.2 (West 1992).

243. Judgment of Jan. 19, 1987, Corte cost., 110 Foro it. I 313, 319 (1987).

tion.[244] Even the principle of equality of the spouses is explicitly understood in this context to be instrumental to addressing adequately the needs and interests of children.[245]

On the normative map of U.S. legal discourse, in contrast, children have been situated somewhere beyond the frontiers of public space. The interests of children are never described as having anything to do with the rationale for parental leave. Again, the strictures of the disability conception leave no room for such relational concerns. A language of parental relationships and responsibilities would give voice to the requirements of children, but U.S. law has left those interests mute.[246]

Failure to consider the intersubjective context and meaning of work-family tensions in U.S. law does not stop at the perimeter of the family, either. It extends to the social dimensions of responsibility as well. One of the effects of a focus on relationships in Italian law is to encourage the socialization or sharing of the burdens involved. Framed in terms of interpersonal values, such as responsibility, duty, affective development, and parent-child bonding, Italian law reflects and creates an awareness that the intersections of work and family implicate societal relations, not merely private and individual choices. Beginning with the constitution, the legal order extensively recognizes a public, social commitment to supporting family relations, workplace integration, children's needs, and so forth. To be sure, these are in large part reflections of a more fundamental commitment in Italy, as in Western Europe generally, to an extensive social welfare state, a commitment that the United States has always approached with ambiguity.[247] But beyond those basic social ideologies, the law itself in Italy generates an understanding of individuals, family units, and the larger social structure as vitally interrelated. The legal discourse recognizes a continuum of connections, from child through parents to society, and the law's orientation toward responsibility is manifest at every level. Thus, the recognition of the duties of mothers and fathers toward children necessarily entails recognition of the societal obligation to facilitate and participate in those duties as well.

Concretely, we can see this in the progressively greater public commitment to maternity laws from 1950 onwards; the 1971 reforms and the Equal Treatment Act are chapters in a story of the unfolding acknowl-

244. Judgment of July 15, 1991, Corte cost., 114 Foro it. I 2297, 2299 (1991).

245. *Id.*; *see also* Silvagna, *supra* note 34, at 450 (explaining the court's 1987 decision as endorsing the equality of parents in virtue of the goal of protecting the child).

246. Of course, the great promise of the Family and Medical Leave Act is that it may change the terms of the debate.

247. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK 101 (1991) ("The place accorded to responsibilities by American and continental legal systems, respectively, seems related importantly to the shape of the welfare state in each country . . . ."); Frank & Lipner, *supra* note 126, at 3, 4 (arguing that a combination of social and political influences in Europe "played a major role in the adoption of extensive welfare states in which maternity leaves and insurance were included as a matter of policy").

edgment of a social role. This development is apparent not just in the law's rhetoric, but also in material assistance: extensive guarantees of job security, time off, and income replacement for working parents. Moreover, while each of those laws has been criticized for failing to support and socialize parental roles adequately, the discussion indicates that it is less a question of whether society *should* be fulfilling this responsibility and more a question of *how* it can do so adequately. In its 1987 decision, for instance, the Constitutional Court interpreted the development of Italian law as reflecting a growing awareness of the need for society to intervene. It then extended the rights of working fathers in part because the public authority had failed in its obligation to aid parents in fulfilling their responsibilities.[248]

Throughout U.S. law, instead, there has been little language indicating a social commitment to childbearing and parenting. Approaching parenthood from the individualistic perspective of disabilities not only prevented courts from articulating intrafamily responsibilities, but also severed the interconnecting ties of individual, family, and society. Accordingly, any perception of a social dimension to work-family interactions faded into a distant background, and with it faded any commitment to public obligations of assistance. Acknowledging the social dimensions of pregnancy and parenthood only through omission, the law effectively left their costs to the privacy and resources of the individual. Friction between parenting and the workplace did not implicate far-reaching social action and collective obligations because the rationale for benefits was strictly isolated from the responsibilities of parenthood.[249]

A rhetoric of voluntarism both reflects and reinforces the individualistic nature, and therefore burden, of conflicts between work and family in U.S. legal discourse. Ignoring relational and societal aspects of childbearing and parenting encouraged an understanding that they have normative value only insofar as they are individual choices. Emphasizing that they are voluntarily chosen by individual women[250] in turn helps keep them private and subjective, rather than relational or social. For example, in *Wimberly* the Court upholds the state's decision to treat pregnancy as a voluntary termination of employment without good cause.[251] This statutory and regulatory system communicates that since Wimberly's choice to have children was voluntary, her disengagement from the workplace was also her choice, and thus she assumes the costs of parenthood as well. Similarly, when Rebecca Maganuco's desire to

248. Judgment of Jan. 19, 1987, Corte cost., 110 Foro it. I 313, 317 (1987).

249. *Cf.* KAMERMAN ET AL., *supra* note 2, at 145 ("U.S. employment practices with regard to pregnancy and childbirth seem to reflect the most niggardly approach of any advanced industrialized country, and defining maternity as a disability seems only to reinforce this.").

250. *See* Finley, *supra* note 241, at 1136-38 (identifying the "voluntary" nature of pregnancy as one of the fundamental assumptions underlying U.S. pregnancy policies).

251. Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511, 515-18 (1987).

take a one-year leave of absence to care for her child instead of a mere forty days precluded her from compensation during her absence, she was trapped by the language of voluntarism: her claim was dismissed because it was "dependent not on the biological fact that pregnancy and childbirth cause some period of disability, but on a . . . schoolteacher's *choice* to forego returning to work in favor of spending time at home with her newborn child."[252]

Leaving aside the highly problematic question of whether and to what extent pregnancy and parenthood are always purely voluntary conditions, even if they were unambignously so, it is odd that this alone should obviate the need for society to support workers who bear and rear children. The message is that individual choice implies individual obligation. That it does so is evidence of the law's failure to consider the intersubjective aspects of the roles of both worker and parent, and the social value of both. In other words, because the United States has viewed pregnancy and parenthood merely as aspects of personal, individual choice instead of having normative meaning within a social context, their resulting obligations or costs have fallen upon the individual alone. In the end, this emphasis on individual choice did more to restrict women's options than an approach that emphasized the social context of the problem and sought to spread out the costs of choice. The choice to maintain both work and family roles has been limited by having private economic burdens unmitigated by social assistance; the choice to take time to care for children has been circumscribed by not having a guarantee that a job will be kept open.[253] Linda Wimberly's predicament is a stark example of this paradox: despite the rhetoric of choice, she in fact had none.

In sum, we have seen in the fabric of U.S. law an expression of childbearing and childrearing that has been premised on disability and incapacity, that is individualistic and voluntarist in its origin, that has denied any normative social meaning to having or raising children, and that has suppressed the intersubjective relations and responsibilities of parenthood and family life.

### *B. Equality: Insular vs. Integral*

In some ways the portrait of the working parent in U.S. law painted above could be considered a minimalist one. Instead of the rich detail of persons situated in social contexts with their connections, development,

252. Maganuco v. Leyden Community High Sch. Dist. 212, 939 F.2d 440, 444 (7th Cir. 1991) (emphasis added).

253. In fact, Joan Williams goes so far as to argue that the language of voluntarism is one of the principal means of legitimating the continued marginalization of women in the workplace: "In the work/family context, the rhetoric of choice masks a gender system that defines childrearing and the accepted avenues of adult advancement as inconsistent and then allocates the resulting costs of childrearing to mothers." Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1596 (1991).

and responsibilities, it eschews complexity and focuses on the essential bare outlines of the individual. In this way, it also embodies an approach to gender equality that is thin and impoverished.

Again, it is possible to clarify our image of the distinctiveness of the U.S. approach to equality here by examining it through the lens of certain characteristics of Italian law. In Italy, the struggle for women's equality has been a struggle to share and socialize the responsibilities and obligations that society historically has imposed on women alone and that helped keep women out of the workforce. As the goal of women's equality in the workplace came to the fore and society acknowledged the tension between women's roles as mothers and workers, Italy passed laws to encourage a distribution of the burden of the maternal role, both in society generally and within the family specifically. Significantly, however, where the formal contradictions between family responsibilities and workers' equality could have been removed by ignoring family life, Italian law has instead sought to integrate gender equality in the workplace with a continued vision of the value of childbearing and childrearing. Thus, the law has progressed slowly towards equality while embracing both work and family life, defending and promoting equal participation in both the family and the workplace. This requires an equal distribution of the responsibilities of parenthood as well as equal access to the opportunities and benefits of work. In turn, the social commitment to assisting working parents must regard men *and* women as both workers *and* parents.

In this framework, equality never stands alone as an abstract concept. Rather, it always exists in relation to a person's roles and activities: worker, parent, caring for children, developing through work, participating in social life. It situates him or her in a complete context of life, implying an understanding of the individual as inseparable from that environment. Ultimately, then, equality rests on an understanding of what it means to be a full, flourishing person.

The language of the Italian Constitution provides a synthesis of this approach to equality. The general clause on equality rests on individuals' "equal social dignity" and the importance of equality to "the full development of the human person." It aims at workers' "effective participation . . . in the political, social, and economic organization of the country."[254] Subsequent articles specify that this ideal of equality bears special importance on the one hand with regard to family life, the roles of parents, and the equality of spouses,[255] and on the other with regard to work.[256] In all this, the constitution never separates the principle of equality of individuals from their situation in certain roles; it does not

254. COST. art. 3 (Italy).
255. *Id.* at art. 29.
256. *Id.* at art. 37.

guarantee an abstract equality standing by itself or assert the essential equality of individuals prior to and isolated from their environment. Instead, it understands individuals' equality, growth, and social context as intertwined.

More concretely, both the Equal Treatment Act and the new law on positive action, though principally intended to address equality in the workplace, specifically recognize the necessity of considering workers in their broader familial and social contexts. The ETA, even though faulted for its overly formalistic approach, did not seek to establish equality in the workplace by severing it from the values of family unity, child development, and maternal responsibility; it reformed both labor and maternity laws by unifying these values and broadening them to include men. The law on positive action notes the interrelationship of the family and the workplace, emphasizing that its purpose is to achieve a broad equality within both by "favoring a balance between family and professional responsibilities and a better division of these responsibilities between the sexes."[257]

The Constitutional Court's recent paternity leave decisions also stress the equality of persons situated within roles, relationships, and society. In its 1987 decision, the court noted that parents must come together to assist their child "with equal rights and duties," and it sought to integrate the "tasks of women and men . . . as much in the family as in extra-familial activities."[258] It found a violation of constitutional principles of equality both because working fathers were denied the equal possibility of assisting their children, and because the children of these fathers were denied equal opportunities of parental care.[259] More recently, in its 1991 decision, the court reiterated the importance of parents' "equal rights and duties" with respect to their children, and their "equal participation . . . in the care and education of children."[260] In fact, the court saw the "fuller realization of the principle of substantive equality of the spouses" to be primarily an instrument towards the complete consideration of the interests of the child.[261] Finally, the court extended the rights of working fathers in this case in part because the law unconstitutionally infringed on equality by "placing the development of the woman's personhood in dimensions of work in a subordinate position."[262]

257. Law of Apr. 10, 1991, No. 125, art. 2, Gazz. uff. No. 88, Apr. 15, 1991, Le Leggi I 1022 (1991).

258. Judgment of Jan. 19, 1987, Corte cost., 110 Foro it. I 313, 318 (1987).

259. *Id.* at 319.

260. Judgment of July 15, 1991, Corte cost., 114 Foro it. I 2297, 2299 (1991).

261. *Id.*

262. *Id.* at 2300. The Italian word "svolgimento," which I have translated here as "development," is also used to mean "unrolling" or "unwinding." It suggests an understanding of personhood as inherent in the individual, but only revealed or known through, in this case, work;

These statutory and judicial developments reflect a conception of equality that regards persons as participants in multiple aspects of society through their roles as both workers and parents. This conception of equality considers equality of responsibilities and equality of relationships; above all, it links equality to the complete personhood of those involved: worker, parent, and child. In short, this approach to equality concerns whole persons, women and men in complex interconnected areas of life. It is, in a word, integral.

Seen in contrast to this integral approach to equality, U.S. law has looked strikingly one-dimensional. Statutes, regulations, and cases have focused almost exclusively on the formal equality of unattached individuals within the workplace. Title VII, including the Pregnancy Discrimination Act, is limited in its scope to guaranteeing that employers do not discriminate on the basis of preguancy. By definition, therefore, the statute seeks to have the workplace ignore pregnancy, to ensure that pregnancy is neutral and inconsequential with respect to work. Parenthood and family relations simply are irrelevant to the statutory scheme. As the court of appeals in *Maganuco* succinctly stated, "leave policies that may influence the decision to remain at home after the period of pregnancy-related disability has ended fall outside the scope of the PDA."[263] The many disability-based state statutes regarding pregnancy or maternity leave essentially take the same approach, aiming to ensure that pregnancy is neutralized and irrelevant. These statutes acknowledge the distinct impact of pregnancy on women workers only to compensate for, and therefore nullify, that aspect of a woman's life; they establish the equality of workers by counteracting any physical difference between the sexes that affects the ability to work. The courts have reflected and accentuated this perspective. All the cases we have seen addressing maternity leave under the Equal Protection Clause or Title VII ask only whether pregnancy must be accorded the same benefits as temporary disabilities in order for male and female workers to be treated "equally."

U.S. law has historically spoken volumes with its silences. Any hint of relationships or obligations has been carefully omitted; life outside the workplace has been ignored. Rather than an affirmative, positive vision of equal membership in the associations of the family or broader society, a negative norm has prevailed in which all individuals are regarded as equally insulated from the full context of their lives. In short, this is an equality of individuals shorn of their external attachments and relation-

thus it is somewhat different from "development," which suggests a change, an addition to the human person. The Italian word in itself can perhaps be read to imply a more holistic view of individual persons and their relation to their roles and activities in life.

263. Maganuco v. Leyden Community High Sch. Dist. 212, 939 F.2d 440, 445 (7th Cir. 1991).

ships; it is the equality of selves radically disengaged from their human and social environments.

Because it has refused to acknowledge the roles and responsibilities of persons in their entirety, U.S. law has neither been inclined nor able to suggest an adaption of the workplace to promote equality in roles and responsibilities that extend beyond the workplace, such as parenting. U.S. law has been similarly unwilling and unable to acknowledge the importance of equality in the family to the achievement of substantive equality in the sphere of working.

The Supreme Court's decision in *California Federal* is noteworthy both for its attempt to articulate some of these larger concerns, and for its limited success due to the cramped understanding of equality on which it draws. The Court did recognize that the goal of the PDA was, in the words of one of the law's sponsors, "to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[264] Similarly, the Court understood the aim of the California statute requiring pregnancy disability leave to be to "allow[ ] women, as well as men, to have families without losing their jobs."[265] By upholding the state law, the Court took a step towards envisioning the problem of work-family conflicts from the perspective of someone who is both worker and parent.[266] Nevertheless, in the end, the Court's opinion, like the statutes it construed, failed to look beyond ensuring equal treatment within the workplace of women disabled by pregnancy with men who are not. It upheld the statute because it was limited to addressing the work-family problem at the level of physical differences that affect a woman's ability to work. Thus, while the Court strove to acknowledge the dual roles of parent and worker, it did so by limiting its discussion of equality to the stripped-down, physical self.

A fuller understanding of equality, not just by the Court but within the law as a whole, would look beyond the question of whether the law " 'allows women, as well as men, to have families without losing their jobs.' "[267] It would ask whether the law substantively encourages and supports the overall integration of women's and men's roles in both the family and the workplace—in their responsibilities as parents and in their development through work. Such questions require considering simultaneously the equality of individuals in their various spheres of life. But by insulating individuals from their environment, U.S. law necessarily also

264. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) (quoting 123 CONG. REC. 29,658 (1977) (statement of Sen. Williams)).

265. *Id.*

266. *See* Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered,* 101 HARV. L. REV. 10, 40-42 (1987) (considering *California Federal* an example of overcoming the implicit male norm by "establish[ing] the pregnant person as the point of comparison," *id.* at 42).

267. *Id.* at 41 (quoting *California Federal,* 479 U.S. at 289).

separated consideration of equality in one area—work—from equality in others—such as family.

Another important consequence of U.S. law's non-contextual approach has been the continued partition of society into separate spheres. The abandonment of the principle of separate spheres of activity for the sexes freed women to enter the world of men's work on terms equal to men, but it did not change the larger structuring of work and family as separate domains. The norms and values of the workplace remained separate from those of the home.[268] Thus, the explicit ideology of separate spheres, applied at the level of individual women, merely ceded to the implicit structure of separate spheres writ large. Ostensibly, the approach to the issues in U.S. law addressed precisely this difficulty; it was, after all, intended to allow women (rarely men) to have both children and jobs. This was, in part, the message of *California Federal.* Ultimately, however, insular equality reinforces the division by separating the issue of equality within the family from equality within the workplace.

### *C. Goods: Inarticulate vs. Organic*

Underlying and unifying the differences in expressions of parenthood and equality in U.S. and Italian law are fundamentally disparate approaches to the multiple social and individual values and interests implicated by the convergence of family, work, and gender. Where Italian law is grounded in an outspoken recognition of these ends or goods, U.S. legal discourse brackets and ignores them.

The contrasting understandings of equality reveal this distinction as well. Italian legal discourse, we have seen, brings together the multiple spokes of human activity and social environment and links them to a single hub of individual human personhood. But not even the statements in *California Federal* acknowledging the intersection of work and family spheres, let alone the langnage elsewhere in this area of U.S. law, hint at a relationship between individual equality, society, and human development in a similarly integral way. The narrow U.S. understanding of equality does not consider the relation of equality to individuals' "social dignity" and "effective participation" in society, nor the importance of equality in work and family for the "full development of the human person," to use the Italian Constitution's phrases.[269] In this way, it offers no explanation of *why* equality is a goal, a value, a necessity—it just is. U.S. law has left the value of equality itself inarticulate; unspoken, its relation to the other values at issue is uncertain and tenuous.

268. *Cf.* Finley, *supra* note 241, at 1165 (noting that "[t]he problem is that the spheres of work and family have been viewed as separate in a way that has excluded the values, needs, and perspectives of one from recognition in the other").

269. COST. art. 3 (Italy).

This contrast can be seen not only with respect to equality, but broadly throughout the discourse of the U.S. law examined here. In addition to equality, Italian law articulates a complex of interrelated values and interests; U.S. legal discourse has ignored this multiplicity. Consider the difference, for instance, in the reasoning of the Italian Constitutional Court's 1987 decision on the rights of working fathers with the U.S. Circuit Court's language in the factually similar case of Gerald Schafer. From the former, we can compile a long list of values and interests explicitly considered to be relevant to the cases before the court: concern for the affective and biological necessities of children's health and development; protection of the family as a social institution; recognition of the importance of parent-child relations; affirmation of the moral and legal equality of spouses within the family; attention to the equal division of parental rights and responsibilities; promotion of women's entry into the workforce; defense of women's equal personal development through work; and advancement of society's role in safeguarding all of the above. As the Italian court acknowledges, these goods are interrelated: although the legal question before the court is unitary—whether fathers can constitutionally be denied certain leave benefits granted to women—it involves a "normative complex," "an ample spectrum of values and interests," "a plurality of normative references," and a "complex of preeminent constitutional values."[270] Elsewhere, the court refers to the "normative fabric,"[271] an apt metaphor, for the distinct threads of value are woven together into a single cloth.

The U.S. court faced a similar question of law in *Schafer*: Can a working father legitimately be denied certain leave benefits accorded to women? In the court's perception, this question hinged on "the full enjoyment by men and women of their right to employment without discrimination or classification based on sex."[272] No other basic value or interest was implicated or even identified. A chasm of difference separates the two courts' recognition of the human and social goods involved in their decisions.

In part, this contrast might be ascribed to different styles of adjudication in Italy and the United States, particularly with regard to statutes. The Italian cases show a greater tendency to take what has been termed a "public values" approach to statutory interpretation.[273] Yet that alone does not account for the difference. As in most adjudication, both cases narrow the relevant facts and values through the selection, interpreta-

270. Judgment of Jan. 19, 1987, Corte cost., 110 Foro it. I 313, 315-16 (1987).

271. *Id.* at 316.

272. Schafer v. Board of Pub. Educ., 903 F.2d 243, 246 (3d Cir. 1990).

273. A "public values" approach involves using legal norms that form fundamental underlying precepts for a policy as an aid to statutory interpretation. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation,* 137 U. PA. L. REV. 1007, 1007-09 (1989).

tion, and application of (apparently) objective rules or laws in order to make their decisions both possible and legitimate. The Italian court can encompass a much wider spectrum of relevant values in its discussion, not merely because the judges themselves are willing to do so, but also because the legal order as a whole allows them to acknowledge these goods and link them to objective sources of law. In other words, it is the entire framework of law—constitution, statutes, and cases—that gives the Italian court the raw material from which to draw the complex of values that it does.[274]

The comparison between the reasoning of the *Schafer* court and that of the Italian Constitutional Court appears to be weakened by *Schafer*'s status as a lower court opinion involving statutory, not constitutional law. As such, the court could not draw on the variety of fundamental interests and values available to the Italian court. Yet, taking all the U.S. cases considered here, we still find little more than the value of the right to be free from employment discrimination. *LaFleur*, as a due process case, was of course more inclined to frame the issues in terms of fundamental interests; it emphasized women's "right to bear children,"[275] as well as "freedom of personal choice in matters of marriage and family life."[276] *California Federal*, the only other case to get beyond the value of antidiscrimination, identified women's "basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[277]

What is particularly striking here is not only that the U.S. legal discourse has identified such a narrow range of values, but that the few values that are implicated have been framed in terms of the rights of highly autonomous individuals. Given the complex and intersubjective aspects of the problems here, rights—especially their more typical U.S. incarnations[278]—do seem to be particularly ill-suited to grapple with such values. Critics of rights discourse in the United States have emphasized that understanding and framing conflicts in terms of individual rights can reify the substantive goods involved in a dispute (and therefore the dispute's political nature and potential political challenges). It also tends to amplify individualistic and autonomous aspects of liberal society

274. To use Duncan Kennedy's metaphor, law can be understood as a physical medium with which legal arguments are constructed, and "[h]ow my argument will look in the end will depend in a fundamental way on the legal materials" that are available. Duncan Kennedy, *Toward a Critical Phenomenology of Judging*, *in* THE RULE OF LAW 141, 150 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

275. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 650 (1974).

276. *Id.* at 639.

277. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) (quoting 123 CONG. REC. 29,658 (1977) (statement of Sen. Williams)).

278. In contrast to typical U.S. understandings and uses of "rights talk," Continental European approaches tend to place more emphasis on the correlative nature of rights and responsibilities, and on the social context of rights-bearing persons. *See generally* GLENDON, *supra* note 247.

at the cost of group identity, community, and intersubjective relations.[279] Thus, we return to the distinctive traits of the U.S. legal understanding discussed in this Article: its focus on individual choice and individual burdens; its inattention to relational concerns, such as family responsibilities; its marginalization of the social dimensions and of the extensive public commitment demanded through political action; and its emphasis on the equality of autonomous beings rather than situated and social ones.

It is far from clear, of course, that these traits are inevitable consequences of the epistemological foundations of rights discourse. Various legal scholars have suggested that it is the way in which "rights" are understood and used that matters.[280] But regardless of the *potential* value of rights, it is clear that the thin language of rights in U.S. legal discourse contrasts sharply with the priority that Italian legal discourse gives to affirmative statements of human and social goods. By articulating the multiple values found at the crossroads of equality, family life, and work, Italian law is able to view these values organically, both in relation to one another and in relation to individuals. Like distinct but interdependent organs, the human and social goods are necessary to the health and development of the person who embodies them; the person cannot be understood integrally without reference to these goods. The U.S. legal understanding, in contrast, has focused on rights-bearing individuals independent of their ends and thus maintains the latter unvoiced and unconnected.

The ability or inability to see the individual person and the human and social goods in question as part of an organic whole is the linchpin of the many contrasts in legal understandings I have mentioned so far. By regarding individuals as situated within a context of parent-child and

279. *See, e.g.*, Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984) (arguing that rights theory fails to resolve the tension between personal freedom and state protection); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (developing four distinct critiques of rights); *cf.* Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984) (discussing the need to overcome the dominant perception that consciousness of rights inevitably leads to alienation).

280. Defenses of rights, by feminist and minority legal scholars in particular, have argued that rights discourse neither necessarily nor exclusively falls into the morass described by the "rights critique"; they offer instead various reconstructive understandings of the ways in which rights can sometimes empower the dispossessed, the ways in which rights discourse and politics can interact dynamically, and the ways in which rights can be reinterpreted to express more intersubjective value. *See, e.g.*, Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987) (responding to rights critiques by depicting law as a communal language and attaching law to the social contexts in which laws can be generated and given meaning); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (arguing that rights discourse, though a necessary component of social change, cannot stand alone as the sole means of reform); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (urging critical legal scholarship to do more than simply demystify rights mythology, but to broaden and universalize mutual respect).

family relations, for instance, and recognizing the value of those attachments as a constituent element of people, Italian law naturally considers intersubjective relations and responsibilities. The very definition of the issues at stake includes acknowledgement of these aspects of individual identity. Thus, it also facilitates the legal system's heightened regard for children and their developmental needs. At the same time, the law encompasses an appreciation of individuals as workers. Because the goods of family and work are enmeshed in an organic vision of people and values, the law embraces both and fosters their integration, at an individual level and at a broader social level. Similarly, the equality to which Italian law aspires is an equality of persons integrally connected to their various spheres of life. It is connected to other concrete goods, not abstracted from them. Finally, the intersubjective, social nature of the goods themselves (e.g., family life, work), and their public recognition and endorsement, encourages and even necessitates a broad public commitment to their full realization.

The inability to articulate and recognize these goods publicly reveals an entirely distinct set of understandings. It leaves the value of ends, such as parenthood or work, subject to their being chosen by individuals. By implication, these individuals are persons, subjects of the legal imagination, prior to and independent of these ends. The U.S. law therefore exalts individual autonomy and private choice, while discounting or disregarding human interdependence as expressed through ideas such as responsibility or parent-child relations. At the same time, the various goods of human personhood cannot be understood to be interrelated, since they are beyond the scope of the law; the interdependence of work and family is ignored. Equality, therefore, is necessarily equality of persons insulated from their ends, separate from the context of their lives. Goods are relegated to individual choice, impeding an understanding of their social dimensions and a public commitment to their realization.[281]

281. It is worth noting, as well, that a number of these qualities of U.S. legal discourse are characteristic of the particular strand of liberal philosophy that has been criticized extensively by communitarian critics of liberalism. Michael Sandel, in particular, has faulted liberalism (particularly that aspect represented by John Rawls) for its untenable conception of the self as a moral agent antecedent to conceptions of the good life. This "unencumbered self," in turn, entails a misplaced emphasis on voluntarism, a false priority of rights over the good, and a failure to appreciate the constitutive aspects of human communities. *Cf.* TAYLOR, *supra* note 8, at 49 (criticizing the "punctual" conception of the self, which is "defined in neutral terms, outside of any essential framework of questions," and "in abstraction from any constitutive concerns"). *See generally* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Michael J. Sandel, *Introduction to* LIBERALISM AND ITS CRITICS 1 (Michael J. Sandel ed., 1984).

## V

## CONCLUSION: SEEKING THE BEST ACCOUNT

The comparison presented here has exposed some of the distinctive ways in which U.S. law has constructed and communicated a particular understanding of pregnancy, parenthood, work, and equality in contrast to one European counterpart. I have suggested that the U.S. legal understanding has been profoundly flawed because it has ignored a broad range of human goods. More specifically, I have argued that this understanding inhibits the recognition and distribution of responsibilities and relationships, hinders gender equality across a variety of social relations, makes it more difficult for people to fulfill roles in both the family and the workplace, and discourages social support and commitment in all of these areas.

These characterizations and interpretations are necessarily simplified for purposes of contrast and analysis. Like Weberian "ideal types,"[282] they are heuristic devices intended to identify and trace one particular thread in an otherwise intricate tapestry of social reality. Accordingly, the analysis here does not pretend to offer a complete depiction of the structure, ideology, and meaning of Italian law. Rather, it is an ideal[283] constructed in order to reveal, through contrast and confrontation, particular aspects of the U.S. legal understandings. Likewise, the contrasting picture of U.S. law that I have drawn does not treat exhaustively the totality of attitudes, policies, and perceptions in U.S. law. More ample concern for responsibility, relationship, and work-family matters, and more comprehensive approaches to equality, certainly can be identified in and extracted from the intricacies of other areas of law.[284] Thus, I do not make the strong claim that all of U.S. legal con-

282. An ideal type is formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct . . . .

MAX WEBER, *"Objectivity" in Social Science and Social Policy, in* THE METHODOLOGY OF THE SOCIAL SCIENCES 49, 90 (Edward A. Shils & Henry A. Finch eds. & trans., 1949); *see also* Hans H. Gerth & C. Wright Mills, *Introduction: The Man and His Work, in* FROM MAX WEBER 3, 59 (Hans H. Gerth & C. Wright Mills eds. & trans., 1946).

283. Like Weber, I use the word "ideal" here in its descriptive, not normative, sense.

284. *See, e.g.*, GLENDON, *supra* note 7, at 135 (noting that the absence of an explicit family policy in the United States does not mean that American society is antifamily or that an implicit policy does not exist in the intricacies of other bodies of law); Lucinda M. Finley, *Legal Aspects of Child Care: The Policy Debate over the Appropriate Amount of Public Responsibility, in* PARENTAL LEAVE AND CHILD CARE, *supra* note 161, at 125, 125 (pointing out that "[v]irtually every substantive area of the law touches on child care"). Critical Legal Studies scholars in particular have argued that U.S. legal and political ideology generally contains a deep ambivalence between the ideals of individualism and altruism. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-37 (1976). In fact, if my critique of U.S. law has any force at all, it is precisely because the more communitarian, altruistic values that I identify are to some degree already immanent in U.S. consciousness; otherwise, the position that I advocate would lose its ability to speak to our society from within. *Cf.* MICHAEL WALZER, INTERPRETATION AND

sciousness has been entirely as univocal in its discourse or as monolithic in its imagination of parenthood, work, and equality as it may appear here. I do contend, however, that the understandings that I describe have dominated heavily that imagination—particularly in the discourse of the principal institutions of U.S. legal culture—on issues of pregnancy discrimination and parental leave.

Yet, I have also identified certain recent statutory schemes, in particular the Family and Medical Leave Act of 1993, that begin to break out of the dominant conceptual cage, opening up possibilities for broadening the legal discourse of work, family, and equality. We are now in a better position to understand the import and promise of these developments. To begin with, the FMLA establishes a new foundation for certain employee leave requirements, outside the framework of traditional, disability-based schemes. It recognizes that employees are also family members, and that family relationships demand care and entail responsibilities. In addition, it includes both women and men in its approach to family and workplace connections, fostering a deeper, more integral equality. Finally, however limited at the level of social commitment, the FMLA suggests a greater degree of public responsibility, affirming the social dimensions of individual human ends.[285] The FMLA, in short, may be one of the seeds of fundamental change in our dominant legal imagination. It gives us the possibility to talk and think about the difficult relationship between work, parenthood, and equality in a broader, more comprehensive way.

Of course, as we begin to do so, it well may be the case that relationship, responsibility, public commitment, and comprehensive gender equality are not the only values that we desire to reflect in our laws. At a minimum, the values and interests expressed in U.S. law will differ from those emphasized in Italy. The heavily normative and value-laden understanding of law that I have relied on here implies the cultural specificity of legal consciousness. United States law does not, and could not, have entirely the same set of values as Italian law.[286] Other ends, such as individual freedom of choice (it is difficult to imagine a *mandatory* leave as either possible or desirable in the United States) or efficiency, for example, are likely to weigh more heavily in the balance.[287] But unless

SOCIAL CRITICISM 35-66 (1987) (arguing that, to be effective, criticism must be immanent, at the margins of a social tradition but not outside it).

285. *See supra* text accompanying notes 242, 277.

286. For example, one commentator has pointed out that, although "legislation and social programming in Italy reflect considerably greater attention to the needs of women, men, and children in their familial roles than does U.S. policy," this is linked to particular ideological and cultural beliefs and values such as "the historical significance of family in the Mediterranean and the centrality of women in maintaining family unity and loyalty." George R. Saunders, *Cultural Values, Child Care, and Parenting: The Italian Experience in Anthropological Perspective, in* PARENTAL LEAVE AND CHILD CARE, *supra* note 136, at 435, 437, 455.

287. *See, e.g., Minority Fact Sheet, in Babies and Briefcases: Creating a Family-Friendly*

the discourse of policy and law moves toward an articulation and acknowledgment of the human goods at stake, we cannot even begin to consider which goods should be given more or less prominence.[288] So, while recent statutory developments may fall far short of broadening the vision of U.S. law to encompass fully the integrity of persons and the organic interdependence of human goods, they are a step in the right direction because they begin to address the issues in terms of the range of public values implicated.

These developments, of course, require a certain faith in the possibility of identifying and deliberating about a common understanding of the elements of the good life, a possibility that has been denied by theorists of various persuasions.[289] Much recent political and legal theory has sought to respond to that challenge without falling victim either to illusions of an epistemologically neutral or privileged standpoint,[290] or to a totally groundless antifoundationalism.[291] The result, in part, has been a renewed bent toward pragmatism and practical reasoning in legal scholarship.[292] In particular, a number of scholars have defended the logical and practical necessity of moral reasoning from a situated—though contingent—perspective. Katharine Bartlett has called this approach "positionality";[293] Charles Taylor refers to it as the "best account" principle.[294] Taylor argues: "What better measure of reality do we have in human affairs than those terms which on critical reflection and after correction of the errors we can detect make the best sense of our lives?"[295] I believe that an approach based on whole persons and interdependent human values is indeed better than what previously has dominated U.S. law precisely because of its foundation in practical reasoning,

---

*Workplace for Fathers: Hearing Before the House Select Comm. on Children, Youth, and Families*, 102d Cong., 1st Sess. 69, 69-75 (1991) [hereinafter *Babies and Briefcases*] (emphasizing flexibility as primary goal of desirable work-family policies); Lofaso, *supra* note 2, at 470 (attempting "to resolve the problems presented by current maternity leave laws and policies in a manner that is favorable from the standpoints of efficiency and equity and that also maximizes individual choice").

288. *Cf.* TAYLOR, *supra* note 8, at 107 ("articulacy . . . will allow us to acknowledge the full range of goods we live by" and "is a crucial condition of reconciliation" of those goods).

289. *Cf.* Martha Nussbaum, Skepticism About Practical Reason, Lecture at Harvard Law School (Oct. 2, 1991) (on file with author) (comparing varieties of both left and right legal theory to classical skepticism).

290. *See, e.g.*, RORTY, *supra* note 13.

291. *See, e.g.*, UNIVERSAL ABANDON? (Andrew Ross ed., 1988).

292. *See, e.g.*, Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569, 1569 (1990).

293. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880-87 (1990) (describing "positionality" as an alternative approach to theories of knowledge reflected in mainstream feminist legal writing).

294. TAYLOR, *supra* note 8, at 3-107.

295. *Id.* at 57.

and its contribution to the best account of who we are and aspire to be, both as individuals and as a society.

At the difficult intersections of equality, parenthood, and work, abstractions do not work well because they cannot account for the varied and complex connections between these areas of life.[296] Instead, we must grapple with the conflicts from their multiple perspectives. Only by recognizing a complex of values can we appreciate their dynamic, difficult interactions and, more importantly, seek solutions that address all of them. In part, therefore, such problems necessitate deliberation about the goods we desire. This deliberation must be highly context-sensitive, rather than abstractly rational, using actual practice as a guide. And in our solutions, we must recognize and embrace the tensions and contradictions of the problems. We must seek to consider and combine their messy, interrelated aspects.[297]

Secondly, when we develop such a multifaceted, contextualized, and experientially-based understanding of these dilemmas, we better describe how we actually live our lives and understand our society. Individuals, and especially women, do live with tensions between the desire and need to work and the value and necessity of family life. The real dilemmas of women caught between children and careers do conflict with our basic aspirations and ideals of gender equality in society. People do live in and through relationships, especially family ones, and those do entail responsibilities. The growth and healthy development of children does depend profoundly on responsible care, especially in the earliest years and particularly by parents. Left to their own resources, without social support, single parent families, poor families, and, most of all, women and children do suffer on account of work-family conflicts.[298] No account that

296. Feminist legal scholars, in particular, have made this point. *See, e.g.*, RHODE, *supra* note 121, at 111 (noting that difficulty surrounding women's legal issues is "compounded by decisionmakers' failure to acknowledge [the issues'] complexity, and to resist frameworks that distort the issue they purport to describe"); Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 202 (arguing that "[a]ny general, or abstract, approach [to equality] is unlikely to effect much real change without seriously risking worsening the situation of many women, especially ordinary mothers and wives"); Dowd, *supra* note 232, at 137 (describing antidiscrimination analysis as a limited tool because it "refracts complex work-family issues into a single image").

297. Katharine Bartlett describes practical reasoning as striving to meet all these requirements, by approaching problems "as dilemmas with multiple perspectives, contradictions, and inconsistencies" requiring close attention to context and imaginative, multifaceted solutions. Bartlett, *supra* note 293, at 851.

298. Even the slightest glimpse at data and studies confirms these basic understandings, as the following unsystematic collection shows.

According to the General Accounting Office, not only were 57 million women in the United States working or looking for work in 1990 (an increase of over 200% since 1950), but 60% of women with young children were working, and 70% of U.S. families had both spouses working. *See* Dana Priest, *Major Changes Seen in Female Labor Force*, WASH. POST, Mar. 25, 1992, at A21. On average, slightly more than two million of these working women give birth to or adopt a child each year, but only 3% receive a paid maternity leave, and only 1% of fathers receive a paid leave. *See*

ignores these realities can provide the "best account" of human experience. Regarding these values and interests as interrelated, and individual persons as situated within and constituted by them, makes it possible for us to deliberate about the nature of the problems and the best solutions.

---

PANEL ON EMPLOYER POLICIES AND WORKING FAMILIES, NATIONAL RESEARCH COUNCIL, WORK & FAMILY: POLICIES FOR A CHANGING WORK FORCE 117-19 (Marianne A. Ferber & Brigid O'Farrell eds., 1991).

Sheila Kamerman and Alfred Kahn point out that almost 25% of all children and 50% of Black children under three years old in the United States were below the poverty threshold in 1988, the highest rate for any age group; this rate was higher throughout the 1980s than at any time since the 1960s. Kamerman & Kahn, *supra* note 3, at 7. Moreover, women workers who are especially likely to be without the right to leave with job and benefit protection, even unpaid, are "unmarried and part-time workers, low-wage workers, and young and/or less educated mothers." *Id.* at 11 (footnotes omitted). In addition, they note, "women workers who do not have job-protected postchildbirth leaves are more likely to experience additional unemployment solely attributable to lack of leave and/or to experience a disproportionate loss in earnings within the first two years after childbirth." *Id.*

A 1990 *Los Angeles Times* poll revealed that 39% of fathers surveyed said they "would quit their jobs if they could to stay home with their children"; 57% of fathers and 55% of mothers "said they felt guilty about spending too little time with their children"; 51% of fathers "said their work interfered with their parental responsibilities," while 28% "felt their parental responsibilities hurt their careers." *Babies and Briefcases, supra* note 287, at 4. In a 1989 *New York Times* poll, 83% of employed mothers and 72% of employed fathers said "they are torn between the demands of their jobs and the desire to spend more time with their families." *Id.* at 116.

The psychologist Urie Bronfenbrenner summarizes the principal conclusions of nearly all the data on the crucial conditions of the development of human beings from early childhood on in just two propositions: first, "[i]n order to develop normally, a child needs the enduring, irrational involvement of one or more adults in care of and in joint activity with that child"; and second, "[t]he involvement of one or more adults in joint activity with the child requires public policies and practices that provide opportunity, status, resources, encouragement, stability, example, and, above all, time for parenthood, primarily by parents, but also by other adults in the child's environment, both within and outside the home." Urie Bronfenbrenner, *Strengthening Family Systems, in* THE PARENTAL LEAVE CRISIS, *supra* note 126, at 143, 144-45. On the importance of the first few years to child development, and the importance of parental care, see generally HANDBOOK OF EARLY CHILDHOOD INTERVENTION (Samuel J. Meisels & Jack P. Shonkoff eds., 1990).

Nancy Dowd has thoroughly outlined many of the multiple facets of work-family conflicts in Dowd, *supra* note 232, at 83-100.