Does EC Pregnancy and Maternity Legislation Create Equal Opportunities for Women in the EC Labor Market? The European Court of Justice's Interpretation of the EC Pregnancy Directive in *Boyle* and *Lewen*

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DOES EC PREGNANCY AND MATERNITY LEGISLATION CREATE EQUAL OPPORTUNITIES FOR WOMEN IN THE EC LABOR MARKET? THE EUROPEAN COURT OF JUSTICE'S INTERPRETATION OF THE EC PREGNANCY DIRECTIVE IN BOYLE AND LEWEN

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In this article it is argued that, instead of enhancing equal opportunities for men and women in the labor market, the EC Pregnancy Directive No. 92/85 has reinforced the public/private dichotomy. By lifting the pregnancy/maternity issue out of the equality debate, the Pregnancy Directive has made pregnancy/maternity a sui generis category that is incomparable to any other situation a worker may find himself/herself in. Following the Aristotelian equality paradigm, the worker who falls within the scope of the

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Pregnancy Directive may be treated differently from a worker in any other situation. That does not necessarily lead to a victory for working women, as will be illustrated by the European Court of Justice's decisions in Boyle and Lewen. The conclusion of the article is that the equality theory must be the background for any discussion concerning the accommodation of pregnant workers and the creation of equal opportunities for men and women in the labor market.

INTRODUCTION

Despite protective legislation and affirmative action, working women in the European Communities (EC) continue to be taken less seriously than their male competitors. While some employers may simply dislike women, doubt their abilities, or think that their place is in the home, this article presumes that most sex discrimination in the EC labor market is economically rational. Employers believe that the average female employee is a bad investment. In a free market economy, employers want employees to maximize their work with no interruption in time. The possibility that women may decide to have children is an important reason not to hire them. Even women who do not actually plan to start a family may similarly suffer from what economists call "statistical discrimination," which is, discrimination against women based on the stereotype that they all will inevitably interrupt their careers to have and raise children. Therefore, employers conclude that the

1. The European Communities (EC) are: the European Community (originally established in 1957 as the European Economic Community (EEC)), the European Atomic Energy Community (established in 1951) and the European Coal and Steel Community (established in 1951). The Treaty on European Union (1992) established a legal link between the 3 Communities and the supplementary policies and forms of cooperation between the Communities and their (currently fifteen) Member States. See Koen Lenaerts & Piet Van Nuffel, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 1-10 (Robert Bray ed., 1999) (containing detailed information regarding the European Communities and Union).

2. See, e.g., Gary S. Becker, The Economics of Discrimination 39-40 (2d ed. 1971) (claiming an employer's subjective "taste for discrimination" leads to discrimination because they do not like to be associated with women).


4. Richard Posner defined statistical discrimination against women as follows: "[I]t may be rational for employers to discriminate against women because of the information costs of distinguishing a particular female employee from the average female em-
expected return from the average woman to the company is lower than that of the average man.

The primary causes for a woman’s career interruption include childbirth, breastfeeding and childrearing. Childbirth and breastfeeding are biologically imposed on the mother and temporarily prevent her from contributing to the world of paid labor. In addition to these biological constraints, female workers tend to take a leave of absence, or quit their jobs more often than men in order to raise children.

Childbirth and breastfeeding are biological phenomena specific to women, which (for the time being at least) cannot be altered. By contrast, the belief that women will take a leave of absence because their natural role is that of a caretaker for children is not connected with biology, but involves “a [broader] spectrum of issues focusing not only on women’s role in the work force but on the domestic division of labor between men and women.” This distinction between childbirth and breastfeeding on the one hand, and childrearing on the other, exemplifies the difference between sex and gender. Childbirth and breastfeeding are sex issues, with sex being defined as a biological category. Childrearing relates to gender, with gender usually being defined as a socially constructed category.

The accommodation by employers of pregnancy and breastfeeding necessarily constitutes the very first step towards the full integration of women in the workforce. It seems impossible to tackle discrimination based on the belief that a woman’s natural role is that of a caretaker for

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7. See Issacharoff & Rosenblum, supra note 5, at 2156.
children (i.e. gender discrimination), before tackling discrimination on
grounds of pregnancy/breastfeeding (i.e. sex discrimination). It would
be overly optimistic to start with the more complicated gender dis-
crimination without first resolving the easier sex discriminatory aspects
of women’s position in the labor market. After all, changing cultural
patterns and attitudes through law is much more difficult than legally
fighting discrimination on the basis of clear biological facts.  

As the main preoccupations of the EC are primarily economic (i.e.
the creation of a common market in the Member States), the Treaties
establishing the EC do not contain many references to either sex or
gender equality. The right to sex or gender equality was originally (i.e.
at the time of establishment of the European Communities) believed to
have no connection whatsoever with the creation of a common market.
The one exception is Article 141 of the EC Treaty, which requires the
EC Member States to ensure equal pay for equal work or work of equal
value for men and women.  

This Article was—of course—introduced into the Treaty for economic purposes. It was meant to preclude competitive advantages for Member States who hired women at lower wages than men. At a later stage, this Article became the heart of a more general principle of equality between men and women in employment. Although the EC now attempts to uphold the principle of equality between men and women (the distinction between sex and gender equality is usually not made in the EC), their equality legislation often reinforces gender inequality by cementing women into their traditional roles of childbearer and child caregiver.

This article discusses the EC’s legal accommodation of pregnancy
in the workplace and the interpretation thereof by the European Court
of Justice.  

The leitmotiv is the question to what extent such accommoda-
tion enhances women’s position in the labor market. The suspicion

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9. Treaty Establishing the European Community, Mar. 25, 1957, Art. 141 (for-
merly article 119) O.J. (C 340) 181 (1997) [hereinafter EC Treaty]; as amended
and renumbered by the Treaty of Amsterdam Amending the Treaty on Euro-
pean Union, the Treaties Establishing the European Communities and
of Amsterdam].
10. The European Court of Justice, which is situated in Luxembourg, has the principal
responsibility of interpreting the contents of the Treaties establishing the European Communities and the European Union, and the legislation passed pursuant to those
Treaties, and to insist upon their recognition and application. For more information,
see Koen Lenaerts & Dirk Arts, Procedural Law of the European Union
being that, in a well-intentioned attempt to fight discrimination of women, the EC institutions entrench gender discrimination. In other words, in their attempt to fight sex discrimination (by accommodating pregnancy), the EC often places women in a position that confirms the traditional perception of women as childbearers and caregivers.

I. THE PROHIBITION OF SEX AND PREGNANCY DISCRIMINATION IN EC LEGISLATION

Article 141 of the EC Treaty inspired all measures regarding equality between men and women in employment. Over the years, Article 141 has formed the legal basis for a number of directives with respect to pay, employment and vocational training, as well as aspects of statutory and occupational social security. None of these directives, however, prohibit discrimination on the basis of pregnancy in particular. Only the Equal Treatment Directive, adopted in 1976, refers to unequal treatment on the basis of pregnancy. Yet, it appears to allow, rather than prohibit, such unequal treatment, and therefore arguably permits discrimination on the basis of sex in some circumstances.

The Equal Treatment Directive generally prohibits sex discrimination in regard to employment, including promotion, vocational training and working conditions. Sex discrimination is defined as discrimination "on grounds of sex either directly or indirectly by reference in particular to marital or family status." The directive thus prohibits

11. Directives are measures that have binding force in relation to the result to be achieved for each Member State to which they are addressed, but leave the Member States free to choose the form and methods of implementation. EC Treaty art. 249. There is no clear legal parallel for this legal instrument in national or international law. See P.J.G. Kapteyn & P. Verloren van Themaat, Introduction to the Law of the European Communities 326–331 (Laurence W. Gormley ed., 3d ed. 1998).
13. The idea behind this Directive was that the rule of equal pay for equal work as originally laid down in Article 141 was an empty box as long as women were discriminated against with respect to employment and vocational training, and with respect to working conditions. For a legislative history of the Directive, see Catherine Hoskins, Integrating Gender: Women, Law and Politics in the European Union 99–107 (1996).
both overt and covert discrimination. However, it does not clarify whether discrimination on grounds of pregnancy qualifies as direct (i.e., overt) or indirect (i.e., covert) sex discrimination, or if it even constitutes sex discrimination at all. Still, the EC legislators hinted that it would allow a well-defined form of unequal treatment of men and women on the basis of pregnancy; the Directive allowed protective measures for pregnant women and women who have just given birth.

In the early 1970s when the Equal Treatment Directive was negotiated, the legal systems of many Member States contained special protective measures for pregnant women and for their unborn children. During negotiations, the question arose as to how to solve the tension between the sex equality principle on the one hand, and the existing special protective provisions on the other. After all, special protection for women implies unequal treatment of men.

Eventually, the Member States decided to allow deviation from the equal treatment principle. Article 2(3) of the Equal Treatment Directive provides that "this Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity." At the time of its adoption, Article 2(3) was believed to relate to measures like maternity leave.

15. For example, an employer who bluntly refuses to hire a woman because she is a woman, directly/overtly discriminates on grounds of sex; whereas an employer who offers less attractive benefits to part-time (usually female) rather than full-time (usually male) employees indirectly/covertly discriminates on grounds of sex, i.e., part-time work can be used as a proxy for sex.

16. Special protective legislation for women emerged in Western Europe in the latter part of the nineteenth century and the early part of the twentieth century, long before the EC came into existence. Member States prohibited night work for women, limited the number of hours they could work, and even excluded women altogether from certain kinds of jobs, for example, work in mines. The underlying idea was that women were weak and should be protected. Their place was thought to be at home with their children, and not in the male world of paid labor. In the latter half of the twentieth century, many Member States developed apparently more genuine health and safety measures, controlling female exposure to certain substances associated with reproductive risks, such as zinc and lead. Many of those measures, however, concerned jobs that involved reproductive hazards for both sexes. See Olive Banks, Faces of Feminism 106 (1981); Helen Fenwick, Special Protections for Women in European Union Law, in Sex Equality Law in the European Union 63, 67-68 (Tamara K. Hervey et al. eds., 1996); Ruth Nielsen & Erika Szyszczak, The Social Dimension of the European Community 260 (2d ed. 1993); Valerie Cromack, The E.C. Pregnancy Directive—Principle or Pragmatism?, 1993 J. Soc. Welfare & Fam. L. 261, 262.


The main guideline for the interpretation of Article 2(3) should be the EC Court of Justice’s fixed case law suggesting that exceptions to the equality principle of the Equal Treatment Directive are to be narrowly construed. This was also the European Commission’s view. The word “pregnancy” offers little room for interpretation. “Maternity,” however, is a concept that has both sociological and biological connotations. If “maternity,” as used in Article 2(3), ought to be read as referring to the sociological concept of being a mother, this would imply that women can be treated differently with respect to everything that touches upon their status as mothers. That could not have been the aim of Article 2(3) of the Equal Treatment Directive since women, in their sociological position as mothers, are not different from men in their position as fathers. That is the idea that the EC conveys in many of their enforceable and non-enforceable documents.

It seems more reasonable to assume that the Equal Treatment Directive provides for the possibility of treating women differently when they are not in the same situation as men. In this respect, and taking into account that the Directive mentions “pregnancy” and “maternity” in the same breath, the interpretation of “maternity” should be strictly limited to the time, immediately after delivery, that a mother needs for physical recovery. In other words, Article 2(3) of the Equal Treatment

21. In the eighth consideration of the Preamble to the Framework Agreement on Parental Leave, for example, the Council of the EC stated: "Whereas men should be encouraged to assume an equal share of family responsibilities, for example they should be encouraged to take parental leave by such as awareness programmes." Council Directive 96/34, O.J. (L 145) 4, 6 (1996) [hereinafter Parental Leave Directive]. Susan Cox voiced the opinion that "it is inherently sex discriminatory, and profoundly undermining of the development of equality of opportunity, for only women to have the right to time off work to develop a 'special relationship' with their children." Susan Cox, Maternity and Sex Discrimination Law: Where Are We Now?, 1997 EQUAL OPP. REV. 23, 29.
22. Prechal and Burrows warn that a wider interpretation can also be defended:

According to the Commission this paragraph of Article 2 refers only to the protection of women needed because of pregnancy and the bearing of children; in other words, it deals with physical protection. However, in that case, it is not clear what is meant by maternity (the days or weeks following a confinement?). Moreover, the provision refers to 'provisions concerning the protection of women, particularly (emphasis added) as
Directive should be read only to allow unequal treatment of female workers as far as the real biological differences between men and women are concerned, such as pregnancy and the short period after delivery which the mother needs for physical recovery.

However, the European Court of Justice has interpreted Article 2(3) of the Equal Treatment Directive much more broadly than what was suggested above. In doing so, the Court has often endangered women’s position in the labor market, by simply reinforcing women in their traditional roles of childbearers and child caregivers. The Court has backed the opinion that women should stay at home and should not enter the market place. The Hofmann case is the clearest example. In that judgment, the Court brought within the scope of Article 2(3) a notion of maternity leave that was not restricted to the limited period necessary for physical recovery after childbirth, and thereby allowed unequal treatment of women workers that went further than was intended by Article 2(3).

In Hofmann, a young father applied to the German authorities requesting the same extended maternity leave and concomitant pay to which the mother of his child was entitled. When the authorities refused to give him the benefit because it was reserved for mothers, he claimed that the refusal was discriminatory, not only against him, but also against the mother of his child. The European Court of Justice rejected Hofmann’s claim. In doing so, it reinforced the stereotypical idea that women, and not men, should take care of newborn babies. The regards pregnancy and maternity’. Such wording suggests a wider field of application than the Commission’s interpretation.

Prechal & Burrows, supra note 20, at 111.
24. Under German law, women could not be employed during the eight weeks that followed childbirth. Mothers were entitled to extended maternity leave from the end of said eight-week period until the day on which the child attained the age of six months. There was no provision for paternity leave and pay. See Hofmann, supra note 23, at 3049–3050 (citing Gesetz zum Schutz der erwerbstätigen Mutter (Mutterschutzgesetz) v.18.4.1968 (BGBl.IS.315); Gesetz zum Schutz der erwerbstätigen Mutter (Mutterschutzgesetz) v.25.6.1979 (BGBl.IS.797).
25. Pannick stated: The major defect of the ECJ judgment in Hofmann is its failure to explain that any more than six months special leave for a mother following confinement would breach the principle of equal treatment in the Directive by accepting different treatment of men and women by reason only of stereotyped assumptions about the respective roles of the mother and the father in rearing a child.
Court emphasized the public (male)/private (female) dichotomy, and failed to recognize that traditional ideas about women's tasks in the private sphere prevent women from being equal in the public sphere. In other words, it failed to see the gender discriminatory effect of its own interpretation of the Equal Treatment Directive. By allowing periods of childcare to be called "maternity" leave, the Court allowed Member States to maintain the unequal treatment of women that is entirely inspired by traditional societal ideas on how women—and not men—should behave, irrespective of any biological difference between the sexes. This is an instance of gender discrimination that endangers women's chances in the labor market. The legal acceptance of the idea that women are better placed to care for babies, and the reservation of related benefits to women, turns them into less attractive employees.

II. The Pregnancy Directive

In 1992, the EC institutions further implemented Article 2(3) of the Equal Treatment Directive by adopting a new legislative rule, the Pregnancy Directive. From a legal-technical point of view, the Pregnancy Directive was not adopted on the basis of Article 141, but on the basis of the old Article 118a of the EC Treaty, which offered a legal ground for qualified majority decisions concerning the improvement of the health and safety of all workers in the workplace. The Directive

David Pannick, Sex Discrimination Law 130 (1985). Also, Rubenstein noted that "[m]aternity leave beyond the point where a woman is capable of returning to work is positive action beyond that required by sex discrimination law". Michael Rubenstein, Understanding Pregnancy Discrimination: A Framework for Analysis, 1992 Equal Opp. Rev. 22, 27.


28. Article 118a was introduced into the Treaty (at that time still called EEC Treaty. Compare footnote 1) by the Single European Act (1986). The Treaty of Amsterdam
was also inspired by the 1989 Health and Safety Directive which provided that “particularly sensitive groups must be protected against the dangers which specifically affect them,” and by the Action Program for the Implementation of the Community Charter on the Fundamental Social Rights of the Workers, which included, among its aims, the adoption of a directive for the protection of pregnant women at work.

It should be considered at least problematic that the Pregnancy Directive has been adopted as a specific implementation of the Health and Safety Directive, and not a specific derogation from the Equal Treatment Directive. In doing so, attention was drained away from the Equal Treatment Directive and its limited number of exceptions, including protection of women as regards pregnancy and maternity. One could argue that, as directives, the Equal Treatment and Health and Safety directives merged the old Articles 118, 118a and Article 2 of the Agreement on Social Policy (1992 O.J. (C 224) 127). This merger resulted in the new Article 137. It was necessary to resort to Article 118a, as the United Kingdom was vigorously opposed to widening the ambit of social policy measures in EC law. E.g., Evelyn Ellis, Protection of Pregnancy and Maternity, 22 INDUS. L. J. 63, 64 (1993); Ellen E. Hodgson, Sex Discrimination on Grounds of Pregnancy in European Community Law: The Case of Great Britain, 2 J. TRANSNAT' L. & POL'Y 245, 287 (1993).


30. Communication from the Commission Concerning its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM(89)568 final at 36–37. The Community Charter on the Fundamental Social Rights of Workers was adopted on December 9, 1989, by eleven of the then twelve Member States of the EC.

The United Kingdom did not feel that it was appropriate for it to be a party to the Charter since it was of the firm opinion that many of the matters addressed by the Charter were not within the Community’s competence, and were, therefore, a matter for regulation on a national level by the Member States.


31. Noreen Burrows mentioned that “[the] linkage [between the Equal Treatment and Pregnancy Directives] has been dropped in the Council's agreed position, although the two directives must obviously be read together.” Noreen Burrows, Maternity Rights in Europe—An Embryonic Legal Regime, 11 Y.B. EUR. L. 273, 289 (1991). Helen Fenwick also highlighted that:

[T]he draft of the Directive was based on Article 118A which authorises Directives on the health and safety of workers, thereby avoiding the requirement of unanimity. This procedural manoeuvre was highly significant, since it led to characterisation of the Directive as one concerned with the health and safety rights of pregnant women and new mothers, although it also supported the equal treatment principle.

Fenwick, supra note 16, at 74.
Directives are on par in the EC legal hierarchy and that, as a consequence, neither one should take priority over the other. While this may be true, one should not forget that the Equal Treatment Directive is a specification of the equality principle, which is one of the basic principles of EC law. To that extent one should expect the Pregnancy Directive to be consistent with the Equal Treatment Directive; however, as will be highlighted below, the Pregnancy Directive is often at odds with the principle of sex equality in employment.

The Pregnancy Directive contains in its preamble a clause stating that protective measures for pregnant workers “should not treat women on the labor market unfavourably nor work to the detriment of directives concerning equal treatment for men and women.” Nevertheless, the Pregnancy Directive provides two types of protective measures: restrictive/negative protective measures and enhancing/positive protective measures. Restrictive/negative measures exclude pregnant women from certain job functions or working conditions, for example, work in mines, or deny them access to certain categories of employment altogether, such as night work. Enhancing/positive measures require employers to give pregnant workers special treatment that they are not obliged to give non-pregnant workers.

As exceptions to the principle of equal treatment, both types of protective measures should meet the requirements of Article 2(3) of the Equal Treatment Directive, which states: “This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.” As mentioned before, “pregnancy” and “maternity” should be given a narrow construction. Herein lies the core of what is wrong with the Pregnancy Directive: it has gone beyond biological sex differences and has reinforced women in their social (and not merely biological) role of

32. See, e.g., L’UNION EUROPÉENNE ET LES DROITS FONDAMENTAUX, Stéphane Leclerc et al., eds., 1999.
33. Theoretically, the preamble should be taken into account when construing a directive (see, e.g., Case 7/75, Mr. and Mrs. F. v. Belgium, [1975] E.C.R. 679, ¶ 13). However, by not referring to the Equal Treatment Directive in the Pregnancy Directive itself, the EC institutions invite the Member States to be guided solely by the conviction that women should be protected. Also Lynn Roseberry noted that the Pregnancy Directive “does little to dispel the Member States’ propensity to restrict women’s employment opportunities under the cover of protecting female (and fetal) health and safety.” Lynn M. Roseberry, THE LIMITS OF EMPLOYMENT DISCRIMINATION LAW IN THE UNITED STATES AND EUROPEAN COMMUNITY 315 (1999).
34. Equal Treatment Directive, supra note 12, art. 2(3).
childrearers. Under the guise of health and safety measures, women are “protected out” of the workplace. The level of protection that is offered to women alone is so high that it induces employers to (statistically) discriminate against women.

The Pregnancy Directive contains many loopholes, which allow the Member States to keep in force, or even introduce, legislation that runs counter to the equal opportunities available to men and women in the EC labor market. Restrictive/negative protective measures may easily allow escape from the equal treatment principle. Under the guise of protection, women’s career prospects can be seriously diminished. The discussions sparked by the European Court of Justice’s judgments ruling out national bans on night work for women can illustrate this. In a number of cases the Court of Justice held that, except in the case of pregnancy or maternity, the risks to which women are exposed when working at night are, in general, not different from those to which men are exposed. As a consequence, the Court concluded that national bans on night work for women undermined the principle of equal treatment for men and women. It should be stressed, however, that even positive/enhancing measures, such as maternity leave, may jeopardize women’s opportunities in the labor market and can, therefore, be counterproductive.36 Those measures add to the costliness of having female

35. For example, Article 8 of the Pregnancy Directive obliges the Member States to ensure that a pregnant worker has a right to a minimum of fourteen weeks of maternity leave, two of which must be obligatory and twelve of which can be made optional. See Pregnancy Directive, supra note 27, art. 8. The fact that the Pregnancy Directive allows the Member States to force women workers to take fourteen weeks maternity leave runs counter to the notion of equal opportunities for men and women in the EC labor market. According to medical specialists, women need six to eight weeks to recover from childbirth. See Arlene Eisenberg et al., What to Expect When You’re Expecting 302–04 (1984); Penny Simkin et al., Pregnancy, Childbirth and the Newborn 199–202 (1984). Thus, maternity leave beyond eight weeks after childbirth is not given for the benefit of the mother, but for the benefit of the child. The fact that those extra weeks of childcare-leave are available to the mother alone reinforces the traditional view that mothers should take care of the children.


37. See Fenwick, supra note 16, at 75. Fenwick refers to “special protective provisions” where I call such measures negative/restrictive. She refers to “special entitlements” where I refer to positive/enhancing measures.
employees and, thus, may contribute to the "statistical discrimination" of women.  


The mere existence of the Pregnancy Directive and its inherent over-emphasis of the *sui generis* position of the pregnant worker have far-reaching consequences on the application of the principle of equal treatment between working men and women. The Pregnancy Directive has institutionalized the incomparability of pregnancy with any other situation a male or female worker may find himself or herself in. Given that incomparability, the Aristotelian equality paradigm inevitably leads to the conclusion that a pregnant worker may be treated completely different than any other worker in any other situation.

III. THE PROBLEMATIC RELATIONSHIP BETWEEN THE EQUAL TREATMENT AND PREGNANCY DIRECTIVES: THE EUROPEAN COURT OF JUSTICE'S APPROACH IN BOYLE AND LEWEN

Recent case law from the European Court of Justice illustrates that lifting pregnancy out of the equality debate and giving it special protection does not necessarily entail a victory for working women. The


39. The Pregnancy Directive directs Member States to protect pregnant and breastfeeding workers against hazardous agents, processes or working conditions; it requires Member States to make an alternative to night work available to female workers, before and after childbirth; it obliges Member States to grant pregnant workers a continuous period of maternity leave of at least fourteen weeks allocated before and/or after childbirth; it urges Member States to ensure that pregnant workers are entitled to attend pre-natal examinations; it prohibits dismissal during the period from the beginning of pregnancy to the end of maternity leave; it requires the Member States to safeguard a worker's employment rights connected with her employment contract while she is taking maternity leave. However, during the period of maternity leave, payment can be replaced by an adequate allowance.

40. Aristotle's definition of equality required that like cases be treated alike, and unlike cases unlike, in proportion to their unlikeness. *ARISTOTLE, NICOMACHEAN ETHICS* 122–28 (Terence Irwin trans., Mackett 1985).
Court's interpretation of the Pregnancy Directive shows that, in an attempt to level the playing field for working women (by accommodating pregnancy), the Pregnancy Directive in fact adds to gender discrimination. Such is undoubtedly contrary to the spirit of the Equal Treatment Directive, which guarantees equal treatment for men and women in employment.

\textit{A. Boyle and Others v. Equal Opportunities Commission (1998)\textsuperscript{41}}

The Court of Justice interpreted the Pregnancy Directive for the first time in \textit{Boyle.} The Court's answer to the technical questions put forward by the British court clearly illustrates that the relationship between the Equal Treatment Directive and the Pregnancy Directive is ambiguous. \textit{Boyle} shows that the Pregnancy Directive drew an arbitrary line between pregnant working women, to whom the Equal Treatment Directive still applies and, women who are on maternity leave, to whom the Pregnancy Directive is applicable.

Ms. Boyle and her colleagues applied to the Industrial Tribunal, Manchester, for a declaration that certain conditions of their employment contract were void or unenforceable because they discriminated against female employees. In particular, they claimed incompatibility with Article 141 of the EC Treaty and the Equal Pay, Equal Treatment and Pregnancy Directives.\textsuperscript{42} The Industrial Tribunal decided to stay the proceedings in order to refer five questions to the European Court of Justice for a preliminary ruling.\textsuperscript{43}

The first question concerned the admissibility of a clause in the employment contract that made payment during the period of maternity leave, referred to in the Pregnancy Directive,\textsuperscript{44} higher than the statutory payments conditioned on the woman's agreement to return to work after the birth of the child. If the woman did not return, she would be required to repay the difference between the amount of pay

\textsuperscript{41.} Case C-411/96, Boyle & Others v. Equal Opportunities Comm'n, 1998 E.C.R. I-6411.
\textsuperscript{42.} \textit{Boyle}, 1998 E.C.R. at I-6445–48. National judges may refer requests for a preliminary ruling (regarding the correct interpretation of the Treaties establishing the EC, or regarding the compatibility of national law with EC law) to the European Court of Justice. \textit{See Boyle} 1998 E.C.R. at I-6444.
\textsuperscript{43.} \textit{Boyle}, 1998 E.C.R. at I-6448–49.
she would have received during the period of maternity leave and the amount of the statutory payments.\textsuperscript{45} No such agreement was required in the case of an absence from work through illness; workers on sick leave were paid the higher amounts regardless of whether or not they returned to work.

The Court followed the questionable reasoning of the Advocate-General\textsuperscript{46} and considered the above requirement to be perfectly in line with the Pregnancy Directive. The Advocate-General reiterated that the Pregnancy Directive guarantees an adequate allowance during the period of maternity leave, which should be “at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation.”\textsuperscript{47} Contrary to what the Commission maintained, he advanced that the Directive refers to “allowances paid by the national social security schemes and not to pay from the employer in respect of employment.”\textsuperscript{48} In other words, according to the Advocate-General and the Court of Justice, the Directive guarantees the amount an ill woman would get from social security authorities, and not the amount an ill woman would receive from her employer in each individual case.\textsuperscript{49} Still, the very words of the Pregnancy Directive point in the opposite direction: reference is made to the “worker concerned” and not to an average worker in general.\textsuperscript{50}

The Court then went on to test the clause against the Equal Pay Directive. Ms. Boyle and her colleagues submitted that for other forms of paid leave, such as sick leave, employees were entitled to the agreed salary without having to undertake to return to work at the end of their leave.

The Court stressed the \textit{sui generis} character of pregnancy and maternity. Pregnant workers and workers who have recently given birth or are breastfeeding are in a vulnerable position, making the right to

\textsuperscript{45} \textit{Boyle}, 1998 E.C.R. at I-6423.
\textsuperscript{46} \textit{E.C. Treaty}, O.J. (C340) 181 (1997). “It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it.” \textit{E.C. Treaty} art. 222.
\textsuperscript{47} \textit{Pregnancy Directive, supra} note 27, art. 11(3).
\textsuperscript{48} \textit{Boyle}, 1998 E.C.R. at I-6454.
\textsuperscript{49} The Advocate-General enumerated five unconvincing reasons to come to this conclusion. Case C-411/96, Boyle & Others v. Equal Opportunities Comm’n, 1998 E.C.R. I-6411, I-6454.
\textsuperscript{50} See \textit{Petra Foubert & Babette Koopman, Note: Boyle, 2000 S.E.W. 298}, 301.
maternity leave necessary.\textsuperscript{51} During such time, those workers cannot be compared to men or women on sick leave.\textsuperscript{52} After all, maternity leave is not only intended to protect a woman's biological condition, but also to safeguard the special relationship between a woman and her child.\textsuperscript{53} Unfortunately, it was the latter aspect that induced the Court to see maternity leave as being very different from other forms of paid leave, and led it to hold that women could be treated differently during such leave.\textsuperscript{54}

This conclusion is especially difficult to accept since the Pregnancy Directive did not intend maternity leave to be used as a tool to safeguard the mother-child relationship. The Pregnancy Directive was merely meant to protect the health and safety of the pregnant worker and the worker who has just given birth.\textsuperscript{55} The idea that maternity leave is also intended to safeguard the special relationship between a woman and her child has been imported from judgments that interpreted the Equal Treatment Directive.\textsuperscript{56} In those cases, the Court did consider the equality debate, but its reasoning only resulted in negative consequences for the women workers concerned. The Court gave too broad an interpretation to the exception based on pregnancy and maternity and, in doing so, limited women's employment opportunities in the labor market.

The Industrial Tribunal's second question related to the retroactive imposition of maternity leave. As the sickness scheme was more favorable financially than the maternity scheme, Ms. Boyle and her colleagues naturally wanted to take as little maternity leave as possible and revert to sick leave instead. However, British legislation had limited that possibility. When a woman is on sick leave with a pregnancy-related illness before the date on which her maternity leave is to commence, and when she gives birth during that period of sick leave, her sick leave may retroactively be converted into maternity leave. The date on which her paid maternity leave commences is brought forward to the beginning of the sixth week preceding the expected week of childbirth or to the beginning of the period of sick leave, whichever comes later. The applicants found this to be discriminatory as, unlike any other worker who is sick, a female worker who is unfit for work is not able to

\textsuperscript{51} See Boyle, 1998 E.C.R. at I-6455-56.
\textsuperscript{52} See Boyle, 1998 E.C.R. at I-6455-56.
\textsuperscript{53} See Boyle, 1998 E.C.R. at I-6456.
\textsuperscript{54} Boyle, 1998 E.C.R. at I-6406.
\textsuperscript{55} Foubert & Koopman, supra note 50, at 301.
\textsuperscript{56} See supra note 23 and accompanying text.
exercise her contractual right to unconditional paid sick leave if her illness is pregnancy-related and if she gives birth while on sick leave.\(^{57}\)

The Court again followed the Advocate-General’s opinion. It decided:

> [A]lthough Article 8 of Directive 92/85 provides for a continuous period of maternity leave of at least 14 weeks, including compulsory maternity leave of at least two weeks, it nonetheless leaves open to the Member States to determine the date on which maternity leave is to commence... The clause to which the second question relates merely reflects the choice made in such national legislation.\(^{58}\)

Neither the Court nor the Advocate-General made any reference to the *Larsson*\(^{59}\) and *Brown*\(^{60}\) cases, which also concerned pregnancy-related illness that arose before maternity leave. However, the Pregnancy Directive was not then enacted, and as a consequence, only the Equal Treatment Directive came into play. While in *Larsson* and *Brown* the discussion focused on the need for a (male) analogy for a woman confronted with pregnancy-related illness beyond maternity leave, that question was completely absent in the *Boyle* case. To that extent, the *Boyle* case clearly shows that there is no overlap between the scopes of both the Pregnancy and Equal Treatment Directives. The Court merely checked whether the Member State had respected the requirements of the Pregnancy Directive (*in casu* the date on which maternity leave is to commence). It recognized that the Pregnancy Directive is an implementation of Article 2(3) of the Equal Treatment Directive,\(^{61}\) but did not feel the need to check whether Ms. Boyle and her colleagues had been discriminated against.\(^{62}\) This is further proof that the Pregnancy Directive has disconnected the pregnancy debate from the equality debate.

The Industrial Tribunal’s third question concerned the clause in Ms. Boyle and her colleagues’ contracts which prohibited them from

62. I do not believe that one can deduce from the judgment that the Court decided that there was no conflict with the Equal Treatment Directive. See *Boyle*, 1998 E.C.R. at I-6406.
taking sick leave during the minimum period of fourteen weeks' maternity leave or the unpaid supplementary period of maternity leave granted to them by their employer. That prohibition could only be overcome if they elected to return to work and thus terminate their maternity leave.63 Still the applicants argued they should be able to interrupt their maternity leave, be declared unfit for work on account of illness and, on recovering, return to their previous position. The Court ruled that maternity leave as referred to in the Pregnancy Directive could be interrupted by a period of sick leave.64 The Pregnancy Directive provides for two weeks of compulsory maternity leave and an option for twelve additional weeks.65 As a woman may waive the latter right, the Pregnancy Directive could not prevent her from placing herself under the sick leave arrangements after the two weeks of compulsory maternity leave. However, if that sick leave ended before the expiration of the period of maternity leave, she could not be deprived of the right to continued enjoyment of maternity leave until the expiration of the minimum period of fourteen weeks.66 According to the Court, "Any other interpretation would compromise the purpose of maternity leave, in so far as that leave is intended to protect not only the woman's biological condition but also the special relationship between a woman and her child over the period which follows pregnancy and childbirth."67

As already mentioned, the Pregnancy Directive aims at protecting the health and safety of the pregnant worker. To fulfill that purpose, it forces the pregnant employee to take two weeks' maternity leave and gives her the right to add another twelve weeks at her discretion. By giving a woman the opportunity to interrupt her maternity leave with a period of sick leave and complete the remaining period of maternity leave later, the Court acknowledges that the optional twelve weeks of maternity leave are meant to safeguard the mother-child relationship rather than to protect the mother's health and safety.69 After all, when a

68. By making only two of the fourteen weeks of maternity leave obligatory, the EC institutions deviated from the view in medical science that, generally speaking, women need six to eight weeks to physically recover from childbirth. See, e.g., Eisenberg et al., supra note 35, at 302–04; Simkin et al., 199–202.
woman decides to go on sick leave while on maternity leave, this implies that her condition is not related to pregnancy or childbirth,\textsuperscript{70} for otherwise maternity leave would cover the situation. When a woman considers that her illness is no longer related to pregnancy or childbirth and, as a consequence, interrupts her maternity leave, the completion of the remaining period of maternity leave cannot be connected with her health and safety. Indeed, in that case, both her maternity leave and her sick leave should come to an end.

The Advocate-General’s ideas regarding this question were more coherent, but unfortunately the Court did not adopt his reasoning this time. He rejected the possibility of interrupting maternity leave by a period of sick leave for three reasons.\textsuperscript{71} First, he stressed that apart from the two weeks compulsory leave, workers can waive the right to maternity leave.\textsuperscript{72} Second, he pointed out that the Pregnancy Directive provides clearly that maternity leave is to comprise a continuous period of at least fourteen weeks. It would not therefore be possible to divide it into separate time periods.\textsuperscript{73} Third, he considered that the Pregnancy Directive allows national authorities to make the payment or allowance during maternity leave conditional upon the woman concerned fulfilling certain conditions of eligibility for such benefits.\textsuperscript{74} He highlighted that “[t]he possibility of treating maternity leave as having ended and being given paid sick leave will, for a woman who falls ill after giving birth and is not entitled to receive any income during maternity leave, offer indubitable advantages.”\textsuperscript{75}

The Court allowed the employer to prohibit his female workers from taking sick leave during the additional leave granted to them by the employer on top of the 14 week maternity leave provided in the Pregnancy Directive. On the one hand, such a clause does not fall within the scope of the Pregnancy Directive, since it concerns maternity

\textsuperscript{70} Neither the Court nor the Advocate-General specified whether the woman’s condition concerned pregnancy or non-pregnancy-related illness. Boyle, 1998 E.C.R. I-6406.
\textsuperscript{71} Boyle, 1998 E.C.R. at I-6433.
\textsuperscript{72} Boyle, 1998 E.C.R. at I-6433.
\textsuperscript{73} Boyle, 1998 E.C.R. at I-6433.
\textsuperscript{74} Boyle, 1998 E.C.R. at I-6433.
\textsuperscript{75} Boyle, 1998 E.C.R. at I-6433.
leave granted on top of what is guaranteed by the Pregnancy Directive. On the other hand, the clause does fall within the scope of the Equal Treatment Directive, but according to the Court, “the principle of non-discrimination laid down in Article 5 of Directive 76/207 does not require a woman to be able to exercise simultaneously both the right to supplementary maternity leave granted to her by the employer and the right to sick leave.”

The Court did not feel obliged to check whether the employer also provided the possibility for fathers to take parental leave and, if that were the case, whether fathers were also required to terminate their parental leave in the event of illness. The Advocate-General defended the questionable view that additional leave for women only is a measure covered by Article 2(3) of the Equal Treatment Directive and does not therefore constitute discrimination. As noted before, Article 2(3) should be given a strict interpretation and should not be read to refer to anything more than a woman’s biological make-up. Still, the Advocate-General did understand some of the problematic aspects of the interpretation he offered to the Court, as he stated:

Quite apart from the fact that I consider that reserving solely to women the availability of unpaid leave to look after a newborn child does not help to promote equality of opportunity between the sexes, since what it does in reality is to perpetuate in society the idea that it is women who as a matter of priority should take care of the children—with all the concomitant adverse effects on their future careers—I do not share the view put forward by the applicants.

The fourth and fifth questions presented in Boyle concerned the interpretation of Article 11(2)(a) of the Pregnancy Directive, which requires the Member States to safeguard a worker’s rights under her employment contract while she is taking the maternity leave provided in the Directive. The Court interpreted the Article to mean that annual

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78. Foubert & Koopman, supra note 50, at 302. It appears from the opinion of Advocate-General Colomer that in the United Kingdom only women may take additional unpaid leave to look after a newborn child.
80. See supra note 19 and accompanying text.
vacation leave should accrue during the period of maternity leave female workers are entitled to under the Pregnancy Directive. The same applied to the accrual of pension rights, and the Court clearly stated that such accrual could not be made conditional upon the woman's receiving the pay provided for by her employment contract or statutory maternity pay during that period. Article 11(2)(a) of the Directive unconditionally guarantees the respect of rights connected with the employment contract.

The fact that no annual vacation leave accrued during additional unpaid leave presented the Court with a more problematic and controversial issue. Ms. Boyle and her colleagues claimed that such a provision constituted indirect (i.e. covert) discrimination on grounds of sex, prohibited by the Equal Treatment Directive. Since a substantially greater proportion of women than men take periods of unpaid leave (because they take supplementary maternity leave), that rule, which is ostensibly gender-neutral, would apply to a greater percentage of women than men. The Court, however, did not follow the applicants' view and reasoned:

[T]he fact that such a clause applies more frequently to women results from the exercise of the right to unpaid maternity leave granted to them by their employers in addition to the period of protection guaranteed by Article 8 of [the Pregnancy Directive].

Female workers who exercise that right subject to the condition that annual leave ceases to accrue during the period of unpaid leave cannot be regarded as at a disadvantage compared to male workers. The supplementary unpaid maternity leave constitutes a special advantage, over and above the protection provided for by [the Pregnancy Directive] and is available only to women, so that the fact that annual leave

ceases to accrue during that period of leave cannot amount to
less favourable treatment of women. 88

Apart from the discussion as to whether annual leave should accrue
during unpaid leave, the Court’s reasoning is flawed. The key problem
is that men do not have a right to parental leave. Separating unpaid addi-
tional maternity leave from all other forms of unpaid leave, by
bringing it under Article 2(3) of the Equal Treatment Directive, makes
an easy transfer to indirect (i.e. covert) discrimination. One form of dis-
crimination masks the other. An extreme hypothetical example may
clarify this point. If nursing jobs were only available to women, alleg-
edly because their biological make-up renders them specially suited to
work as nurses, and if authorities then lowered nurses’ minimum wages,
could we conclude that indirect (i.e. covert) discrimination is out of the
picture as only women can be nurses? 89 That does not seem to be the
spirit of the Equal Treatment Directive.

In the recent Schnorbus case, this was nevertheless the Court’s posi-
tion. 90

Ms. Schnorbus was refused admission to practical legal training af-
fter a selection was made in accordance with legal provisions under
which men who have completed compulsory military or civilian service
were to be immediately admitted to the training. The admission of
other applicants (male and female) could be deferred up to twelve
months. 91 Ms. Schnorbus objected to such treatment as contrary to the
Equal Treatment Directive on several grounds. 92 The German court de-
cided to stay the proceedings and refer a number of questions to the
Court of Justice, 93 one of which related to the presence of indirect (i.e.
covert) sex discrimination. 94

The Court easily might have reasoned, by analogy to Boyle, that the
group of persons who completed military or civilian service is distin-
guished from all others by a legal provision based on an objective factor,
thereby allowing for differential treatment. After all, one could maintain
that it is perfectly acceptable to require only men to complete military

89. Foubert & Koopman, supra note 50, at 302.
91. Schnorbus, ¶ 14–15. The legal provisions referred to can be found in the German
Juristenausbildungsordnung (Legal Training Regulations).
92. Schnorbus, ¶ 16.
93. Schnorbus, ¶ 20.
94. Schnorbus, ¶ 20.
service as they are physically better suited for such endeavors. Advocate-General Jacobs defended a similar line of thought in his claim that the indirect (i.e. covert) discrimination against women in admission to practical training could be justified on the basis of objective factors. He stated:

The rule in issue is designed to compensate for (or perhaps rather to avoid exacerbating) a delay of approximately one year in the commencement of legal studies. That disadvantage is defined objectively and applies to members of one sex only because the law (for the time being) imposes it on members of one sex only.

However, the Court of Justice decided not to start from the above-mentioned traditional conviction with respect to women in the military and stated:

It is sufficient to note that, by giving priority to applicants who have completed compulsory military or civilian service, the provisions at issue themselves are evidence of indirect discrimination since, under the relevant national legislation, women are not required to do military or civilian service and therefore cannot benefit from the priority accorded by the above-mentioned provisions of the JAO to applications in circumstances regarded as cases of hardship.

95. In his opinion, Advocate-General Jacobs noted that “there is a distinction to be drawn between a criterion based on an obligation imposed by law on one sex alone and a criterion based on a physical characteristic inherent in one sex alone. No amount of legislation can render men capable of bearing children, whereas legislation might readily remove any discrimination between men and women in relation to compulsory national service.” Opinion of Advocate General Jacobs delivered in Case C-79/99, Schnorbus, ¶ 40. Taking this view into account, my comparison between Boyle and Schnorbus is correct. In both cases, the inequality between the male and female situations is caused by legislation, and not by physical difference between men and women, (e.g., legislation offering supplementary maternity leave to women alone in Boyle, and legislation obliging only men to complete military service in Schnorbus.)

96. Schnorbus, ¶ 49.

97. Schnorbus, ¶ 49.
The answer to the third question must therefore be that national provisions such as those at issue in the main proceedings constitute indirect discrimination based on sex.  

The Court rightly held that the unequal treatment of women in the admission to practical legal training was in fact caused by their exclusion from military service (i.e., direct discrimination). As a consequence, the Court concluded that women were indirectly (i.e., covertly) discriminated against when they could not benefit from certain advantages offered to the group of people who did complete military service.

B. Lewen v. Lothar Denda (1999)

In 1996, Mrs. Lewen was on maternity leave and then took parenting leave for a period ending in July 1999. On December 1, 1996, Mrs. Lewen did not get her usual Christmas bonus. She commenced an action before the national court, which stayed the proceedings pending a preliminary ruling from the Court of Justice. The national court’s questions mainly concerned the interpretation of the Parental Leave Directive (1996), but also required some explanation of the Pregnancy Directive.

The national court sought to ascertain whether a Christmas bonus, which is paid mainly or exclusively as an incentive for future work or loyalty to the undertaking, falls within the concept of pay under Article 11(2)(b) of the Pregnancy Directive, which guarantees “maintenance of a payment to, and/or entitlement to an adequate allowance for, [pregnant] workers.” The Court reiterated that, from a combination

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99. Note that the Court did not explicitly expand on the question of whether or not this type of direct discrimination can be justified. The Court seemed to assume that it could not be justified.
100. Schnorbus, ¶ 38–39.
102. Council Directive 96/34, 1996 O.J. (L145) Annex § II.2. See supra note 21. The Parental Leave Directive grants men and women workers an individual right to at least three months of parental leave on the grounds of the birth or adoption of a child. The interpretation of this Directive also raises interesting questions with respect to sex equality and discrimination. However, a discussion of those questions would go beyond the scope of this article, which only deals with the links between pregnancy protection and the equality debate.
of said Article with Article 11(3) of the Pregnancy Directive, one could conclude that female workers should receive, during maternity leave, an income at least equal to what a worker would receive in case of illness. It would be irrelevant whether that income is paid in the form of an allowance, the form of pay by the employer, or a combination of the two.\textsuperscript{107}

The Court of Justice produced a very short answer.

Not being intended to ensure such a level of income during a worker's maternity leave, the bonus at issue in the main proceedings cannot be regarded as falling within the concept of payment within the meaning of Article 11(2)(b) of the Pregnancy Directive.\textsuperscript{108}

Again the disadvantage of separating the pregnancy debate from the equality debate becomes apparent. As the Pregnancy Directive does not require anything other than guaranteeing women an income that should at least be equal to what they would get in case of illness, women on maternity leave cannot claim any right to a Christmas bonus. Therefore, discrimination is not an issue, since it involves the application of different rules to comparable situations, or the application of the same rule to different situations. The Pregnancy Directive has made women on maternity leave a \textit{sui generis} category, rendering a comparison with any other condition impossible. The Court's only obligation is to check whether the Pregnancy Directive has been respected, which is precisely what it did.

From the Court's judgment, one cannot determine whether a Christmas bonus would fall within the scope of Article 11(2)(a) of the Pregnancy Directive, which protects rights connected with the employment contract other than pay during maternity leave.\textsuperscript{109} However, according to the Advocate-General, it would be perfectly in line with former case law of the Court of Justice to consider a Christmas bonus to be such a right.\textsuperscript{110} This would imply that the reason for awarding the bonus (i.e. as incentive for future work, loyalty to the firm, or work performed in the past) is irrelevant insofar as women on

\textsuperscript{106} Pregnancy Directive, \textit{supra} note 27, art. 11(3).
\textsuperscript{107} Lewen, 1999 E.C.R. 1-7243, 1-7255 (citing Boyle).
\textsuperscript{108} Lewen, 1999 E.C.R. 1-7255.
\textsuperscript{109} Pregnancy Directive, \textit{supra} note 27, art. 11(3).
\textsuperscript{110} Lewen, 1999 E.C.R. 1-7256.
maternity leave are concerned. A woman who is on maternity leave would in all cases retain the right to a Christmas bonus, as that bonus constitutes a right connected with her employment contract, irrespective of whether it is connected with past or future work. It is sufficient that the employment contract still exists, which is certainly the case for a worker who is on maternity leave.

However, it is problematic that Advocate-General Colomer did not make a distinction in his analysis between the payment of a Christmas bonus that is voluntary, on the one hand, and a Christmas bonus to which a worker has a right on the other. He assumed that a worker always has a right to a Christmas bonus, while the Court of Justice clearly asserted that the case at hand concerned a bonus that is paid voluntarily by the employer. This may explain why the Court did not discuss whether the bonus came within the scope of Article 11(2)(a) of the Pregnancy Directive. The Court might have assumed that a worker could never have a right to a voluntary payment by his or her employer.

Although a worker who is on maternity leave would, as I suggested above, retain her right to a Christmas bonus, that does not alter the fact that the Court merely checks whether or not the allowance of a Christmas bonus (or a refusal thereof) meets the requirements of the

111. Lewen, 1999 E.C.R. at I-7283. The classification of the bonus is relevant, however, when the refusal of payment of a bonus to women on parenting leave is concerned. Such a case comes within the scope of Article 141 (ex Article 119) EC Treaty, requiring equal pay for work of equal value. The Court stated:

"The finding that an advantage such as the Christmas bonus at issue in this case falls within the concept of pay as broadly defined in Article 119 of the Treaty does not necessarily imply that it must be regarded as retroactive pay for work performed in the course of the year in which the bonus is paid, as the national court seems to assume. That, however, is a question of fact which is a matter to be appraised by the national court in the light of its national law."

Lewen, 1999 E.C.R. at I-7280.

The Court concluded that:

"Article 119 of the Treaty precludes an employer from excluding female workers on parenting leave entirely from the benefit of a bonus paid voluntarily as an exceptional allowance at Christmas without taking account of the work done in the year in which the bonus is paid or of the periods for the protection of mothers (in which they were prohibited from working) where that bonus is awarded retroactively as pay for work performed in the course of that year. However, [Article 119 does not preclude] a refusal to pay such a bonus to a woman on parenting leave where the award of that allowance is subject to the sole condition that the worker must be in active employment when it is awarded."

Lewen, 1999 E.C.R. at I-7283.
Pregnancy Directive. Neither the Court nor the Advocate-General referred to the principle of equality between men and women in the labor market. The Pregnancy Directive was the only guideline, and was again used to separate the pregnancy and equality debates.

**Conclusions**

The Pregnancy Directive has taken pregnancy out of the equality debate. Classifying pregnancy as a *sui generis* condition, in an attempt to rule out discrimination of women in the labor market, results in the loss of any point of reference for the treatment of pregnancy, thereby allowing the enforcement of certain forms of *gender* discrimination. It follows that it is crucial to always study pregnancy against an equality-background.

In pregnancy discrimination discourse, it is often advanced that the comparative standard should be left out of the equality debate since the standard is usually male (mostly the "ill man"), thereby producing inadequate results.\(^2\) Comparison, however, is an essential element of the equality debate, and, upon closer consideration, it appears that it is not so much the comparative theory that is defective, but rather its application.

One could argue that there is nothing wrong with comparing a pregnant woman to a sick man. In doing so, pregnancy is not degraded to a mere illness; rather, the situation of both conditions in the labor market are aligned.\(^3\) Still, during the period needed for physical

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113. Wintemute states:

[T]he comparison is not between the desirable and socially important condition of pregnancy and the undesirable condition of illness, but between needs arising from pregnancy (for leave with pay) and needs arising from illness (for leave with pay). As Paul Davies has observed, ‘from an employer’s point of view, the relevant fact is not the precise nature of the physical condition giving rise to unavailability for work, but the unavailability for work itself and its likely duration.’

recovery after childbirth, a woman finds herself in a very unique biological situation that is incomparable to any other situation. During this relatively short period, a woman can, in accordance with Article 2(3) of the Equal Treatment Directive, be treated differently, but only with a view to creating substantive equal opportunities for women in the labor market. The Pregnancy Directive clearly fails in this pursuit. It has given too broad an interpretation to the term "maternity" as referred to in Article 2(3) of the Equal Treatment Directive and reinforces the stigma placed on women in their social roles of childbearers and childrearers.

The core problem is not the comparative element, but rather the gender discriminatory societal reality: most women still carry alone the burden of having and raising children. And what is more, the latter is considered the normal situation. Still, having children, in most cases, involves a deliberate choice by a woman and a man. Responsibility, including career breaks and the financial consequences of having children, should be equally distributed between the mother and father of the child.

If the burden of having children were to be equally distributed, it would be easier to apply the equality paradigm, including its comparative standard, to the pregnancy issue. However, as long as pregnancy legislation does not target sex discrimination and the underlying gender discrimination at the same time, it will never produce equal opportunities for men and women in the labor market.

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114. Also, Christine Boch voiced the opinion that the traditional methodology for examining discrimination is limited for two reasons. The first one being the reliance on a male norm and the second one being the lack of a satisfactory answer to the question of who should bear the social cost of pregnancy and childbearing. Christine Boch, Note: Webb, 33 COMMON MKT. L. REV. 547, 553–554 (1996).