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## Pregnant Transgender People: What to Expect from the Court of Justice of the European Union's Jurisprudence on Pregnancy Discrimination

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PREGNANT TRANSGENDER PEOPLE: WHAT  
TO EXPECT FROM THE COURT OF JUSTICE  
OF THE EUROPEAN UNION'S  
JURISPRUDENCE ON PREGNANCY  
DISCRIMINATION

*Hannah Van Dijke\**

ABSTRACT

*Pregnant transgender people's experiences vary: they may identify as male or non-binary and may seek gender-affirming medical care to different degrees. This variety in gender identities and bodies puts additional pressure on CJEU's pregnancy discrimination case law—a case law that is, as this Article argues, already flawed. Building on a critique of the CJEU's decision in Dekker, this Article discusses three alternative approaches to addressing pregnancy discrimination in EU law. The first two approaches are different ways of construing pregnancy discrimination as sex discrimination. First, the Article discusses a gender-stereotyping approach to direct sex discrimination, and, second, an indirect sex discrimination analysis. The third approach is to introduce a separate provision on pregnancy discrimination in EU legislation. This Article argues that this third approach provides the fullest protection for all types of pregnancy discrimination—including the pregnancy discrimination that pregnant transgender people experience.*

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\* S.J.D. Candidate, University of Michigan Law School. I would like to thank Professor Liesbet Stevens, Annelies Cardon and Charlot Bonte—this Article grew out of working with them at the Belgian Institute for Equality of Women and Men. I am especially grateful to Annelies Cardon, Samira Seraji, and Professor Maureen Carroll for commenting on this Article, as well as to the *Michigan Journal of Gender & Law* team for working so patiently with me on this piece.

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## INTRODUCTION

Shaun Simmons, who was assigned female at birth but identifies as male, became pregnant while working at Amazon.<sup>1</sup> After he told his supervisor about his pregnancy, he was demoted to a position that involved lifting heavy items. Mr. Simmons raised the demotion and the abdominal pain he experienced lifting heavy items while pregnant with Human Resources and asked for accommodations. Amazon refused the requested accommodations and placed Mr. Simmons on unpaid leave. Mr. Simmons then brought a pregnancy discrimination lawsuit under the New Jersey Law Against Discrimination, which is currently pending before the Superior Court of New Jersey.<sup>2</sup>

Under EU law, Shaun Simmons could not as easily bring a case for pregnancy discrimination. EU legislation does not prohibit pregnancy discrimination independently.<sup>3</sup> Thus, to bring a claim of pregnancy discrimination under EU law, the plaintiff must fit it under another explicit EU non-discrimination provision. The Court of Justice of the European Union (CJEU) attempted to close this protective gap by construing pregnancy discrimination as direct sex discrimination.<sup>4</sup> The CJEU considers pregnancy a ground for discrimination that only adversely affects

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1. See Complaint at 10, *Simmons v. Amazon Services, Inc.*, No. 3:20-cv-13865 (N.J. Super. Ct. Oct. 5, 2020).

2. *Id.* at 71.

3. See Eur. Union Agency for Fundamental Rts., *Handbook on European Non-Discrimination Law* 143 (2018), [<https://perma.cc/BN72-A3ZN>] [hereinafter *Handbook*].

4. See Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, 1990 E.C.R. I-03941.

women.<sup>5</sup> The Advocate General assisting the Court was particularly clear: “At the expense of stating the obvious, motherhood can only ever affect women.”<sup>6</sup> Under the CJEU’s case law, Mr. Simmons thus could only bring a claim for pregnancy discrimination at the cost of denying his male gender identity.

In this Article, I discuss these challenges of EU pregnancy discrimination law. In Section I, I argue that the CJEU’s construction of pregnancy discrimination as direct sex discrimination is flawed in and of itself. It is important to make this more general point. It helps to show that an argument for revising the CJEU’s pregnancy discrimination jurisprudence does not fit the narrative that presents the recognition of transgender rights as a threat to cisgender women’s rights.<sup>7</sup> Because of the flaws of the CJEU’s pregnancy discrimination jurisprudence more generally, revising this jurisprudence benefits both cisgender women and pregnant transgender people. The different experiences of some transgender people, namely people who were assigned female at birth but have a different gender identity such as male or non-binary, with pregnancy make this revision simply more urgent. Mr. Simmons is but one example. Transgender people’s experiences vary: some choose not to seek any gender-affirming medical intervention and thus not to change their sex characteristics, while others seek varying degrees of medical intervention but choose to keep their uterus and ovaries to retain the ability to have children.<sup>8</sup> Transgender people’s various gender identities and bodies make the CJEU’s narrow pregnancy discrimination jurisprudence, which assumes that pregnancy only adversely affects women, particularly jarring. Continuing to erase the various gender identities and bodies of pregnant transgender people is not an option, especially given the marginalization and the hostility that transgender people, and in particular pregnant transgender people’s bodies, already face.<sup>9</sup>

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5. *Dekker*, C-177/88, 1990 E.C.R. I-03941 at 17.

6. Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, 1989 (opinion of AG Darmon) at 25.

7. See, e.g., Elinor Burkett, Opinion, *What Makes a Woman?*, N.Y. TIMES (June 6, 2015), [<https://perma.cc/L38R-64SG>].

8. See, e.g., Alexis Light, Juno Obedin-Maliver, Jae M. Sevelius & Jennifer L. Kerns, *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, 124 OBSTETRICS & GYNECOLOGY 1120 (2014) (setting out some of those experiences based on a survey of forty-one self-identified transgender men).

9. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223 (2016); Eur. Union Agency for Fundamental Rts., *Being Trans in the European Union – Comparative Analysis of EU LGBT Survey Data* (2014), [<https://perma.cc/23K8-CG67>] (finding that 54 percent of the trans respondents were discriminated against or harassed for being trans, and 34 percent experienced violence or were threatened with violence).

In Section II, I step away from the CJEU's case law and propose two alternate ways to construe pregnancy discrimination as sex discrimination. This construction is important because under current EU law, protection against pregnancy discrimination depends on it. I propose: 1) a gender-stereotyping approach to direct sex discrimination; and 2) an indirect sex discrimination analysis.

Both alternatives have issues of their own, so in Section III I make an argument for revising EU legislation by introducing a separate provision on pregnancy discrimination. Un-sexing pregnancy most easily opens the door to recognizing the various lived experiences of pregnancy.

### I. THE CJEU'S PREGNANCY DISCRIMINATION JURISPRUDENCE

EU legislation does not prohibit pregnancy discrimination independently.<sup>10</sup> EU law only protects against pregnancy discrimination indirectly: the cause of action must instead arise from another explicit EU non-discrimination provision. As a result, the CJEU categorizes pregnancy discrimination as direct sex discrimination, which the EU Gender Equality Directive explicitly prohibits in matters of employment and occupation.<sup>11</sup>

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10. *Handbook, supra* note 3, at 143. EU law does prohibit certain specific forms of pregnancy discrimination, but only to a limited extent. Art. 10 (1) Pregnant Workers Directive prohibits dismissal based on pregnancy from the beginning of the pregnancy to the end of the maternity leave. Directive 92/85/EEC of the Council on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, 19 October 1992, O.J. (L 348) (hereinafter Pregnant Workers Directive). This provision at most provides limited protection against this form of pregnancy discrimination, however. *Id.* Art. 10 (1) allows for exceptions under national law in cases where the dismissal is not connected to the pregnancy. For example, in *Porrás Guisado v. Bankia S.A.*, the CJEU found that under art. 10 (1) the employer in this case could dismiss pregnant workers as part of general staff cuts. Case C-103/16, *Porrás Guisado v. Bankia S.A.*, ECLI:EU:C:2018:99 (Feb. 22, 2018). Art. 2.2(c) Gender Equality Directive could also be used to address certain forms of pregnancy discrimination, yet the precise implications of that provision are currently unclear. That article reads in full: "For the purposes of this Directive, discrimination includes: (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC." The CJEU hinted only once at its possible application for pregnancy discrimination cases. In *Otero Ramos v. Servicio Galego de Saude*, the CJEU observes that an employer's failure to assess the specific risk of exposure to certain toxic substances or diseases for a breastfeeding worker, as required by art. 4 (1) Pregnant Workers Directive, constitutes direct sex discrimination based on art. 2(2)(c). Case C-531/15, *Otero Ramos v. Servicio Galego de Saude*, ECLI:EU:C:2017:287, ¶ 63 (Oct. 19, 2017).

11. Directive 2006/54/EC, of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and

The CJEU first equated pregnancy discrimination with direct sex discrimination in *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, a case on refusal of employment based on pregnancy.<sup>12</sup> Using “sex” and “women” interchangeably, the CJEU considers that pregnancy, as a ground for refusal of employment, exclusively affects one sex: female.<sup>13</sup> Thus, an employer who refuses employment based on an applicant’s pregnancy is refusing employment based on the applicant’s sex.<sup>14</sup> As I will explain, the CJEU in *Dekker* deviated from EU law’s usual comparative approach to direct discrimination.<sup>15</sup>

In this Section, I critique *Dekker*’s reasoning. The Court carved out an exception to EU law’s usual approach to direct discrimination without a convincing justification for doing so. I suggest that the CJEU introduced this exception only to serve its goals of filling the protective gap left by EU legislation and ensuring its idea of substantive equality for pregnant employees. The CJEU further relies on a narrow, exclusionary understanding of pregnancy discrimination. It overlooks that pregnancy also disadvantages pregnant transgender people, who cannot be put in the box of female sex.<sup>16</sup> The CJEU fails to recognize that pregnancy discrimination is not necessarily based on sex; it can also be based on gender

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women in matters of employment and occupation (recast), 5 July 2006, O.J. (L 203/24) (hereinafter Gender Equality Directive). The Directive applies to access to employment, including promotion, access to vocational training, working conditions, and occupational social security schemes. The prohibition on sex discrimination is in articles 4, 5 and 14. *Id.*

12. Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, 1990 E.C.R. I-03941.

13. Case C-177/88, *Dekker*, 1990 E.C.R. I-03941 at ¶¶ 10, 17.

14. Case C-177/88, *Dekker*, 1990 E.C.R. I-03941 at ¶¶ 10, 17.

15. *See, e.g.*, Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 2, 2000 O.J. (L 180) (EC); Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, art. 2, 2000 O.J. (L 303) (EC); Council Directive 2004/113, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, art. 2, 2004 O.J. (L 373) (EC) (providing EU law’s definition of direct discrimination).

16. Some might say that at the time of the *Dekker* decision, it is not surprising that the CJEU failed to consider the experiences of pregnant transgender people. In 1992, there was indeed less widespread awareness of the lived realities of transgender people, and gender-affirming medical interventions were less common. *See, e.g.*, J. Bhinder, P. Upadhyaya, *Brief History of Gender Affirmation Medicine and Surgery*, in *UROLOGICAL CARE FOR THE TRANSGENDER PATIENT* (Dmitriy Nikolavsky & Stephen A. Blakely eds., 2021). The Court has, however, never revised *Dekker*. *Dekker* thus still holds today, despite the increased awareness of the lived realities of transgender people, including pregnant transgender people, and gender-affirming medical interventions.

stereotypes. By overlooking these various experiences of pregnancy discrimination, the CJEU's pregnancy discrimination case law only provides partial protection against pregnancy discrimination—despite setting out to fill the protective gap that EU legislation leaves for pregnancy discrimination.

### A. *The Absence of Comparison*

Direct discrimination in EU law centers around comparison. EU law defines direct discrimination as less favorable treatment based on a protected characteristic.<sup>17</sup> Less favorable treatment requires showing that a person possessing a protected characteristic is treated less favorably than another person in a comparable situation without that characteristic.<sup>18</sup> For example, there is less favorable treatment when a female employee can show that she is paid less than her male colleague who has the same job, expertise, and experience. In *Dekker*, the CJEU deviates from this usual, comparative test. The Court rejects the need to compare Ms. Dekker to find direct sex discrimination.<sup>19</sup> Instead, the CJEU finds a showing of refusal of employment based on pregnancy sufficient.<sup>20</sup> The CJEU later confirms its non-comparative approach in cases of dismissal based

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17. See, e.g., Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 2, 2000 O.J. (L 180) (EC); Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, art. 2, 2000 O.J. (L 303) (EC); Council Directive 2004/113, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, art. 2, 2004 O.J. (L 373) (EC) (providing EU law's definition of direct discrimination).

18. See, e.g., Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 2, 2000 O.J. (L 180) (EC); Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, art. 2, 2000 O.J. (L 303) (EC); Council Directive 2004/113, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, art. 2, 2004 O.J. (L 373) (EC) (providing EU law's definition of direct discrimination).

19. The CJEU considered the lack of male comparators to Ms. Dekker irrelevant, finding that "whether the refusal to employ a woman constitutes direct or indirect discrimination depends on the reason for that refusal." Case C-177/88, *Dekker*, 1990 E.C.R. I-03941 at 17. The CJEU confirms that comparison is unnecessary using stronger words in Case C-32/93, *Webb v. EMO Air Cargo (UK) Ltd.*, 1994 E.C.R. I-3578, 24 ("[T]here can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reason."). *Id.*

20. Case C-177/88, *Dekker*, 1990 E.C.R. I-03941 at 17.

on pregnancy and dismissal based on pregnancy-related illnesses during pregnancy and maternity leave.<sup>21</sup>

In certain later cases, the CJEU reconsiders its non-comparative approach and engages in some form of comparison. In both *Hertz v. Aldi* and *North Western Health Board v. Margaret McKenna*, the CJEU compares a pregnant employee who is absent due to pregnancy-related illness after maternity leave to a male employee who is absent for the same duration due to illness.<sup>22</sup> These cases are the exception. The general rule for pregnancy discrimination cases remains a non-comparative analysis.<sup>23</sup> Nevertheless, that the CJEU in *Hertz* and *McKenna* switched back to a comparative approach adds a level of complexity to the CJEU's pregnancy discrimination case law.<sup>24</sup> It is not clear why the Court did so.

Despite deviating from the usual comparative analysis, the CJEU never explicitly explained its reasons for doing so. One explanation that the Court, at times, hints at is that it considers pregnancy to be a unique situation that cannot be compared to other conditions or choices. In *Webb v. EMO Air Cargo*, the Court, for example, observes that “pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on nonmedical grounds.”<sup>25</sup> The Advocate General assisting the CJEU in *Webb* offers further explanation as to the incomparability of pregnancy with certain choices:

Nor does it seem to me to be possible *a fortiori* to draw comparisons . . . between a woman on maternity leave and a man unable to work because, for example, he has to take part in a sporting event, even if it were the Olympic Games. Other considerations apart, a sportsman, even a champion (whether a

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21. Case C-179/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening*, 1990 E.C.R. I-3994; Case C-32/93, *Webb v. EMO Air Cargo (UK) Ltd.*, 1994 E.C.R. I-3578; Case C-421/92, *Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. eV.*, 1994 E.C.R. I-1668; Case C-394/96, *Brown v. Rentokil Initial UK Ltd.*, 1998 E.C.R. I-4224; Case C-438/99, *Jiménez Melgar v. Ayuntamiento de Los Barrios*, 2001 E.C.R. I-6938.

22. Case C-179/88, *Handels - og Kontorfunktionærernes Forbund* 1990 E.C.R. I-3994; Case C-191/03, *North Western Health Board v. McKenna*, 2005 E.C.R. I-7659, ¶ 52.

23. *See, e.g.*, Case C-179/88, *Handels - og Kontorfunktionærernes Forbund*, 1990 E.C.R. I-3994; Case C-32/93, *Webb*, 1994 E.C.R. I-3578; Case C-421/92, *Habermann-Beltermann*, 1994 E.C.R. I-1668; Case C-394/96, *Brown*, 1998 E.C.R. I-4224; Case C-438/99, *Jiménez Melgar*, 2001 E.C.R. I-6938.

24. Case C-179/88, *Handels - og Kontorfunktionærernes Forbund* 1990 E.C.R. I-3994; Case C-191/03, *McKenna*, 2005 E.C.R. I-7659 at ¶ 52.

25. Case C-32/93, *Webb v. EMO Air Cargo (UK) Ltd.*, 1994 E.C.R. I-3578. *See also* Case C-394/96, *Brown*, 1998 E.C.R. I-4224 at ¶ 25; Case C-179/88, *Handels - og Kontorfunktionærernes Forbund*, 1990 E.C.R. I-3994 at ¶ 33.

man or a woman) is confronted with a normal choice reflecting his needs and priorities in life; the same cannot reasonably be said of a pregnant woman, unless the view is taken—but it would be absurd—that a woman who wishes to keep her job always has the option of not having children.<sup>26</sup>

The incomparability of pregnancy is an unconvincing explanation, however, for deviating from the usual comparative approach. While pregnancy might be incomparable in certain aspects to other conditions and choices, pregnancy is comparable to these conditions and choices in terms of needs.<sup>27</sup> Like these other conditions and choices, pregnancy might lead to a temporary unavailability to work. Such a needs-focused comparison also finds support in the CJEU's jurisprudence. In some cases following *Webb*, the CJEU observes that “[a]lthough pregnancy is not in any way comparable to a pathological condition . . . , the fact remains . . . that pregnancy is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to rest absolutely for all or part of her pregnancy.”<sup>28</sup>

What's more, the CJEU itself has undermined the viability of the incomparability of pregnancy as a convincing explanation for its non-comparative approach. In *Hertz* and *McKenna*, the Court compares pregnant employees with male employees absent for the same duration due to illness.<sup>29</sup> This suggests that the CJEU considers pregnancy comparable to illness, at least with regards to the unavailability to work.

At times the Court also hints that it considers the comparison of pregnancy with other conditions and choices undesirable rather than impossible. One such hint is found in the CJEU's phrasing when it says that “there can be no question of comparing” a woman who is unable to perform her job because of pregnancy to a man similarly unable to do so due to medical or other reasons.<sup>30</sup> The concern is that comparing pregnancy to an illness would present pregnancy as something socially undesirable

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26. Case C-32/93, *Webb v EMO Air Cargo (UK) Ltd.*, 1994 (opinion of AG Tesouro).

27. See Robert Wintemute, *When is Pregnancy Discrimination Indirect Sex Discrimination?*, 27 *INDUS. L. J.* 23 (1998).

28. Case C-394/96, *Brown*, 1998 E.C.R. I-4224 at 22; See, e.g., Case C-179/88, *Handels- og Kontorfunktionærernes Forbundi Danmark v. Dansk Arbejdsgiverforening*, 1990 E.C.R. I-3994, ¶ 33; Case C-191/03, *North Western Health Board v. McKenna*, 2005 E.C.R. I-7659.

29. Case C-179/88, *Handels - og Kontorfunktionærernes Forbund*, 1990 E.C.R. I-3994; Case C-191/03, *McKenna*, 2005 E.C.R. I-7659.

30. Case C-32/93, *Webb v EMO Air Cargo (UK) Ltd.*, 1994 E.C.R. I-3578.

and unwanted.<sup>31</sup> This again is an unconvincing explanation for deviating from the usual comparative approach to direct discrimination. Comparing pregnancy to illness does not necessarily imply that pregnancy is the same as illness. When the comparison centers around the needs arising from pregnancy and illness, it only acknowledges that pregnancy and illness give rise to comparable needs. Also, this explanation relies on the problematic assumption that sickness is socially undesirable. This assumption impedes the full social inclusion of those who are ill.

Thus, the CJEU does not give a convincing explanation for carving out an exception to EU law's usual, comparative approach to direct discrimination. The actual reason for carving out this exception then appears to be that it serves the Court's goals. First, the exception enables the Court to—at least partially—fill the protective gap left by EU legislation on pregnancy discrimination. Under the CJEU's current case law, which understands sex in strictly biological terms as I discuss in Section II.A., the usual comparative approach to direct discrimination would not have enabled the Court to fill that gap.<sup>32</sup> It does not show discrimination on the basis of sex understood in biological terms that a pregnant employee is treated less favorably than another employee similarly unable to work for non-pregnancy related reasons. This requires that the group of non-pregnant people only includes people of the male sex and the group of pregnant people only includes people of the female sex. Both groups, however, include people with all sex characteristics.<sup>33</sup> The group of non-pregnant

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31. RICHARD LANG, *COMPLEX EQUALITY AND THE COURT OF JUSTICE OF THE EUROPEAN UNION: RECONCILING DIVERSITY AND HARMONIZATION*, 54 (Brill Nijhoff, 2018) (citing scholarship describing the comparison between pregnant women and sick men as “insulting,” “inappropriate,” “distasteful,” “unfortunate,” “inaccurate,” and “politically damaging”). As Robert Wintemute explains, “The importance of pregnancy to society and to the achievement of equal employment opportunities for women is such that there is often a strong case for treating it *better than* illness.” Wintemute, *supra* note 27, at 35.

32. *See also* Wintemute, *supra* note 27 (arguing that the CJEU rejected comparison to get around the practical issue of construing pregnancy discrimination as sex discrimination).

33. *See* the U.S. Supreme Court rejecting the construction of pregnancy discrimination as sex discrimination on similar grounds in *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974): “While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides

people includes cisgender women who cannot or choose not to become pregnant, while the group of pregnant people includes pregnant transgender people who cannot be put in the female sex box. Pregnant transgender people do not identify with the female sex they were assigned at birth, and may seek gender-affirming medical intervention to align their physical appearance with their male gender identity.

Second, a non-comparative analysis fits with EU law's understanding of substantive equality for pregnant employees better than a comparative analysis does.<sup>34</sup> Under EU law's understanding, substantive equality for pregnant employees requires the guarantee of special rights or protection. The CJEU's case law repeatedly recognized the legitimacy of granting special rights to pregnant employees in order to protect "a woman's biological condition during pregnancy and thereafter."<sup>35</sup> Some examples of such special rights in EU law are provisions enabling positive or affirmative action in matters of pregnancy,<sup>36</sup> and special measures to ensure the safety and health of pregnant employees.<sup>37</sup> The underlying idea is that without such special rights, pregnancy would particularly disadvantage pregnant employees. Pregnancy would put employees at an additional risk for workplace discrimination because pregnant employees can both be prevented from working because of their pregnancy, as well as because of other causes, such as illnesses or family emergencies, that also prevent other employees from working.

The CJEU's non-comparative approach fits with this idea of substantive equality better than a comparative approach would because it grants pregnant employees special rights. Unlike when others claim direct sex discrimination, it suffices for pregnant employees to show that their

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potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."

34. See also Case C-32/93, *Webb v EMO Air Cargo (UK) Ltd.*, 1994 (opinion of AG Tesaurò), ¶ 8 ("The view that a refusal to appoint and/or a decision to dismiss on the ground of pregnancy can relate only to women . . . implies—obviously—that substantive equality between men and women as regards employment precludes any consideration, either when taking up employment or during the employment relationship, of a factor which—by definition—only affects women.").

35. Case C-184/83, *Hofmann v. Barmer Ersatzkasse*, 1984 E.C.R. 3048; see Case C-32/93, *Webb*, 1994 E.C.R. I-3578 at ¶ 20; Case C-394/96, *Brown v. Rentokil Initial UK Ltd.*, 1998 E.C.R. I-4224, ¶ 17; Case C-203/03, *Comm'n of the Eur. Cmty. v. Republic of Austria*, 2005 E.C.R. I-954, ¶ 43; Case C-104/09, *Roca Alvarez v. Sesa Start Espana ETT SA*, 2010 E.C.R. I-8677, ¶ 27. This case law is consolidated in consideration 24 of the Gender Equality Directive, which stipulates that "the Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy."

36. Gender Equality Directive, *supra* note 11.

37. Pregnant Workers Directive, *supra* note 10.

unfavorable treatment was motivated by their pregnancy. There is no need for the pregnant employee to find a suitable comparator and make a comparison with them, nor to show that their treatment was motivated by their sex. This is a lower threshold for making a direct sex discrimination claim than the usual comparative analysis—and in that sense it is a special right. The usual comparative analysis for direct sex discrimination would require that the pregnant employee shows less favorable treatment by reference to comparison to a suitable comparator, and that the pregnancy discrimination they experienced was motivated by their sex.<sup>38</sup>

In a way, it is laudable that the Court in *Dekker* was so creative in filling the protective gap left by EU legislation on pregnancy discrimination. Within the bounds of its own case law, which understands sex in strictly biological terms as I discuss in Section II.A., and EU law's understanding of substantive equality for pregnant employees, *Dekker's* reasoning is the most the Court could do. By eliminating the comparison with men, the CJEU treats pregnancy as an issue on its own terms, i.e. without taking men as the comparator.<sup>39</sup> The issue is that the CJEU used a Frankenstein-esque means to achieve its goals. The Court introduced an exception to EU law's usual comparative approach to direct discrimination without providing a convincing justification for doing so. That this exception was meant to give a special right to pregnant employees and to fill the protective gap in legislation helps explain the exception, but does not justify it. There is no need to grant pregnant employees special rights when it comes to pregnancy discrimination. Pregnancy, like other grounds of discrimination, exposes the group defined by it to unfavorable treatment. There is no need to treat pregnancy discrimination in a special way relative to other forms of discrimination. Finally, to fill the protective gap of pregnancy discrimination, the Court could also have opted to maintain the usual comparative analysis without its narrow approach to sex as a strictly biological status. I discuss this option in the next section.

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38. See Council Directive 2004/113, *supra* note 15 (providing EU law's definition of direct discrimination).

39. See, e.g., Catharine A. MacKinnon, TOWARD A FEMINIST THEORY OF THE STATE 220-21 (1989) (criticizing using men as the measurement).

### B. *Pregnancy as a Proxy for Sex*

In *Dekker*, the Court equated pregnancy with sex as illegitimate reasons for refusal of employment.<sup>40</sup> Thus, an employer who refuses employment based on an applicant's pregnancy is refusing employment based on the applicant's sex. Pregnancy is therefore a proxy or placeholder for sex as grounds for refusal of employment. The CJEU did not really explain this in *Dekker*, but some discussion in that decision hints at the Court's reasoning.

The Court observed that whether Ms. Dekker's discrimination constitutes direct sex discrimination "depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex."<sup>41</sup> The CJEU further found that "only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex."<sup>42</sup> That the Court uses "women" and "sex" interchangeably is confusing. "Women" refers to gender, which is socially constructed, while "sex" refers to biological status.<sup>43</sup> That the Court used a *sex* discrimination analysis, rather than a *gender* discrimination analysis, suggests that it intended to refer to sex as biological status. The Court's reasoning thus was that pregnancy is a proxy for sex because pregnancy, as a ground for refusal of employment, exclusively affects one sex: the female sex.

This reasoning of the Court relies on a narrow, exclusionary notion of pregnancy discrimination. Discrimination based on pregnancy is not necessarily based on sex. Pregnancy is both a biological condition and a social construct, and both inspire discrimination. For example, an employer might discriminate against a female employee because of her physical inability to work caused by the biological condition of pregnancy. An employer might also discriminate against a pregnant employee who is physically able to work based on the gender stereotype that women who

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40. Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, 1990 E.C.R. I-03941 (discussing pregnancy as the reason for refusal of employment: "If that reason is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate." ).

41. Case C-177/88, *Dekker*, 1990 E.C.R. I-03941.

42. Case C-177/88, *Dekker*, 1990 E.C.R. I-03941. The AG assisting the Court is more explicit: "At the expense of stating the obvious, motherhood can only ever affect women; taking account of it in order to justify a refusal of employment is therefore ipso facto direct discrimination on grounds of sex." Opinion AG Darmon, *Dekker*, C-177/88 (CJEU 1992).

43. See, e.g., *Sex and Gender*, COUNCIL OF EUROPE, [<https://perma.cc/3DAZ-DQGD>].

are expectant mothers should focus on that role exclusively, or that women are too fragile to combine pregnancy with job responsibilities. Similarly, a pregnant transgender employee might be discriminated based on the heteronormative idea that pregnancy must align with a feminine gender identity and/or female sex.<sup>44</sup>

Pregnancy discrimination does not exclusively affect people of the female sex. Pregnant transgender people also experience pregnancy discrimination, yet they cannot be put in the female sex box simply because they have a uterus and ovaries. Putting pregnant transgender people in the female sex box erases their gender identities and bodies. Pregnant transgender people may not identify with the female sex they were assigned at birth, and at times seek gender-affirming medical intervention to partially or fully align their sex characteristics with their male gender identity. Putting pregnant people in the box of female sex because they have a uterus and ovaries is also inconsistent with how binary societies, and at times the law, assign sex.

Under societal binary sex norms, categorization into male and female sex is based on *external* sex characteristics. Internal characteristics, such as possessing a uterus and ovaries, are irrelevant. For example, binary sex norms put a cisgender woman who had a hysterectomy in the female sex box, despite her not having a uterus. Under such norms, an intersex person who has external sex characteristics that are considered male, but who has a uterus and ovaries, is put in the male sex box. Such norms also put a transgender man who had a partial gender-affirming medical intervention to align his external sex characteristics with his male gender identity, but who chose to keep his uterus and ovaries, in the male sex box. In countries that allow for legal sex change in cases of partial gender-affirming medical intervention, the law also puts this transgender man in the box of male sex.<sup>45</sup>

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44. Imagine the following case: A transgender man who sought gender-affirming medical intervention to align his external sex characteristics with his male gender identity works as a receptionist. During his pregnancy, he was discharged because of customer complaints that he “looks strange.” Here, we understand that he has been discharged because his (pregnant) body does not conform to heteronormative ideas about alignment between pregnancy and perceived female sex.

45. The law of some EU jurisdictions evolved in this sense. These jurisdictions removed requirements of sterilization and full gender-affirming surgery for legal sex recognition. For example, Portugal changed its legislation in this sense in 2001, Spain in 2007, the Netherlands in 2013, Denmark and Croatia in 2014, France in 2016, Belgium in 2017, and Luxembourg in 2018. See Marjolein van den Brink & Peter Dunne, *Trans and intersex equality rights in Europe - a comparative analysis*, European Commission, 60 (November 2018), [https://ec.europa.eu/info/sites/default/files/trans\\_and\\_intersex\\_equality\\_rights.pdf](https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf). For a recent overview of this legislation, see Lucy Arora et al.,

This narrow, exclusionary notion of pregnancy discrimination raises a particular problem in practice. The result is that the CJEU's pregnancy discrimination jurisprudence only provides partial protection against pregnancy discrimination. Pregnant employees who are discriminated against because of gender stereotypes cannot rely on this case law for protection against pregnancy discrimination. Pregnant transgender people can only use the CJEU's case law at the cost of arguing in binary sex terms, and thus at the cost of denying their own lived realities. Since in these cases pregnant employees cannot rely on the CJEU's case law, they must present a case for direct sex discrimination under the usual comparative analysis. As discussed in Section I.A., it is impossible to make this case because comparison with non-pregnant people is unproductive. Neither pregnant nor non-pregnant people strictly belong to one sex.

## II. RECONCEPTUALIZING PREGNANCY DISCRIMINATION AS SEX DISCRIMINATION

In the previous section, I critiqued the Court's reasoning in *Dekker* as serving its own purposes and relying on a narrow, exclusionary notion of pregnancy discrimination. The Court overlooked pregnancy discrimination based on gender stereotypes and pregnancy discrimination against transgender people. In those cases, the Court's pregnancy discrimination jurisprudence provides no remedy. As a result, plaintiffs claiming protection against pregnancy discrimination, such as Mr. Simmons, are faced with the protective gap in EU legislation for pregnancy discrimination. Plaintiffs in those cases must argue that their pregnancy discrimination fits under an explicit EU non-discrimination provision. As I discussed in Section I.A, the provision on direct sex discrimination in the Gender Equality Directive, when approached through the usual comparative analysis for direct sex discrimination and an understanding of sex in strictly biological terms, is not a good option. Neither pregnant nor non-pregnant people strictly belong to one sex.

The best options for bringing a pregnancy discrimination case are nevertheless the provisions on sex discrimination in matters of employment and occupation in the Gender Equality Directive. The Court in *Dekker* indeed relied on the prohibition on direct sex discrimination in

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EUROPEAN COMMISSION, *Legal Gender Recognition in the EU: the Journeys of Trans People Towards Full Equality* 112 (2020), [<https://perma.cc/HX49-ARNX>].

the predecessor of the Gender Equality Directive.<sup>46</sup> The only other alternatives are provisions prohibiting disability discrimination.<sup>47</sup> Yet, pregnancy is not in any way comparable to disability,<sup>48</sup> even when adopting a needs-based approach to the comparison. For example, pregnancy typically results in a temporary inability to work, while some disabilities result in a permanent inability to work. In this section, I discuss and evaluate two alternative ways to construe pregnancy discrimination as sex discrimination under the Gender Equality Directive: 1) a gender-stereotyping approach to direct sex discrimination; and 2) an indirect sex discrimination analysis.

#### A. *A Gender-Stereotyping Approach to Direct Sex Discrimination*

In *Price Waterhouse v. Hopkins*, the U.S. Supreme Court adopted a gender-stereotyping approach to disparate treatment.<sup>49</sup> Under this jurisprudence, sex discrimination arises when gender non-conformity (i.e., non-conformity to certain gender stereotypes or roles) motivates the unfavorable treatment.<sup>50</sup> *Price Waterhouse* concerned the withholding of partnership from Ms. Hopkins, a senior manager.<sup>51</sup> A partner told Ms. Hopkins that she could become a partner if she would “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>52</sup>

Using this gender-stereotyping approach, some pregnancy discrimination can similarly be construed as direct sex discrimination under the

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46. Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, 1990 E.C.R. I-03941. The predecessor of the Gender Equality Directive is Council Directive 76/207/EEC, On the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39).

47. Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, arts. 1-2, 2000 O.J. (L 303/16) (EC) [hereinafter *Employment Equality Directive*].

48. Some of the CJEU’s case law also comes close to recognizing this. In *De Weerd*, the Court found that the inability to have a child does not constitute a disability within the meaning of the *Employment Equality Directive*. Case C-343/92, *De Weerd v. Bestuur van de Bedrijfsvereniging voor de Gezondheid*, 1994 E.C.R. I-587.

49. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

50. *Price Waterhouse*, 490 U.S. 228 at 250-51.

51. *Price Waterhouse*, 490 U.S. 228 at 250-51.

52. *Price Waterhouse*, 490 U.S. 228 at 235.

Gender Equality Directive. It requires making a prima facie case that gender non-conformity motivated the pregnancy discrimination.<sup>53</sup> Unlike when focusing on sex as a biological status, a comparison with a similarly situated comparator can make out such a prima facie case. Take, for example, the fact pattern of *Struck v. Secretary of Defense*, a case considered by the U.S. Court of Appeals for the Ninth Circuit.<sup>54</sup> Ms. Struck, a U.S. Air Force officer, was discharged once the Air Force discovered that she was pregnant.<sup>55</sup> The Air Force had a policy of dismissing female officers who became pregnant.<sup>56</sup> At the time of her discharge, Ms. Struck was on active duty in Vietnam and several months pregnant.<sup>57</sup> Since male members of the Air Force who were similarly temporarily unable to work due to fatherhood were accommodated,<sup>58</sup> Ms. Struck's temporary inability to work caused by her pregnancy could not explain her discharge. Using the gender-stereotyping approach of *Price Waterhouse v. Hopkins*, Ms. Struck could have made a prima facie case for direct sex discrimination by showing that another cisgender pregnant employee who stopped working during her pregnancy was not discharged. This would constitute a prima facie case that Ms. Struck's non-conformity with gender stereotypes, such as the stereotype that women who are expectant mothers should focus on that role exclusively, or that women are too fragile to combine pregnancy with their work responsibilities, motivated her discharge.<sup>59</sup>

Some discrimination that pregnant transgender people face can also be construed as sex discrimination using a gender-stereotyping approach. Imagine the following case: A transgender man who sought gender-affirming medical intervention to align his external sex characteristics with

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53. EU anti-discrimination law has a mechanism for shifting the burden of proof. Once the plaintiff makes a prima facie case of discrimination, the burden of proof shifts to the defendant to show that there was no discrimination. See Gender Equality Directive, *supra* note 11, at §30 and art. 19(1) which requires “facts from which it may be presumed that there has been direct or indirect discrimination” to shift the burden of proof to the discriminating party.

54. *Struck v. Sec'y of Def.*, 460 F.2d 1372 (9th Cir. 1971). The case was appealed to the Supreme Court but the Court never actually heard oral arguments because the Air Force waived Ms. Struck's discharge and changed its policy so that the issue became moot. See Neil S. Siegel and Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 Duke L.J. 771, 777-78 (2010).

55. *Struck*, 460 F.2d at 1373.

56. *Struck*, 460 F.2d at 1373-74.

57. *Struck*, 460 F.2d at 1373.

58. *Struck*, 460 F.2d at 1375.

59. Ginsburg, in the brief for the petitioner, similarly argued that Ms. Struck's discharge was sex discrimination based on “stereotypical assumptions that operate to foreclose opportunity based on individual merit.” See Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L.J. 1095, 1100 (2009).

his male gender identity works as a receptionist in a hotel. Once he becomes visibly pregnant, his employer discharges him because of customer complaints that he “looks strange.” The transgender employee can make a prima facie case for direct sex discrimination using a gender-stereotyping approach. He can do so by showing that a pregnant cisgender employee or a pregnant transgender employee, including a hypothetical one, who had no gender-affirming medical intervention was not discriminated against. This would make the prima facie case that his non-conformity with the heteronormative idea that pregnancy must align with perceived female sex motivated his discharge.

Unlike the CJEU’s pregnancy discrimination jurisprudence, the gender-stereotyping approach is sensitive to a gender identities and bodies of pregnant transgender people. It acknowledges that the non-conformity of pregnant transgender people’s gender identities and bodies to heteronormative ideas can be the root cause of their discrimination. What’s more, it recognizes that certain stereotypes of women—and motherhood—can motivate pregnancy discrimination.

Despite these advantages, a gender-stereotyping approach is not a good replacement for the CJEU’s flawed pregnancy discrimination jurisprudence. Like the CJEU’s jurisprudence, it only provides partial protection against pregnancy discrimination. It only protects against pregnancy discrimination based on pregnancy as a social construct. It does not provide protection against discrimination strictly based on the biological condition of pregnancy. For example, it does not protect against the discriminatory discharge of a pregnant employee because they are physically unable to work due to a pregnancy-related illness.

The CJEU adopting a gender-stereotyping approach in its pregnancy discrimination cases is also an unrealistic prospect.<sup>60</sup> A gender-stereotyping approach to sex discrimination similar to the U.S. Supreme

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60. Even the U.S. Supreme Court, which adopted a gender-stereotyping approach in *Price Waterhouse*, has not applied this approach in pregnancy discrimination cases. See Siegel, *supra* note 59, at 1106 (providing a more detailed overview of this case law). The Court has, however, kept the door ajar for a gender-stereotyping approach to pregnancy discrimination. In certain cases, for example, the Court recognizes the role of gender stereotypes in issues related to pregnancy. *Id.* (citing *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003)). In *Hibbs*, the Supreme Court found that state leave policies offering mothers maternity leave that far exceeds the time needed to physically recover from pregnancy are inspired by “the pervasive sex-role stereotype that caring for family members is women’s work.” *Id.* Quoting Congress, the Court further observes: “Historically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women’s roles has in turn justified discrimination against women when they are mothers or mothers-to be.” *Id.* at 1107. In *Planned*

Court's is currently absent from the CJEU's jurisprudence.<sup>61</sup> In its sex discrimination jurisprudence, the CJEU understands sex in strictly biological terms, rather than as a social construct.<sup>62</sup> This follows from its case law on sexual orientation discrimination and discrimination against transgender people. The Court refuses to classify these forms of discrimination as sex discrimination, except for in the limited case in which the transgender plaintiff had, is having, or intends to have gender-affirming surgery.<sup>63</sup>

This indicates that the Court considers sex in biological terms rather than in terms of social construct. If the Court were to entertain a notion of sex as a social construct, it could qualify sexual orientation discrimination and all discrimination of transgender people as sex discrimination.<sup>64</sup> The basis of their discrimination is their non-conformity with heteronormative ideas about the alignment of biological sex with gender identity and sexual orientation. That the Court did find sex discrimination in cases in which the plaintiff had, is having, or intends to have gender-affirming surgery,<sup>65</sup> further supports that an understanding of sex as a social construct is lacking from CJEU's jurisprudence. In those cases, there is

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*Parenthood v. Casey*, the Court found that denying women access to abortion is the State improperly imposing its vision of a woman's role as mother and caregiver. 505 U.S. 833, 852 (1992).

61. For an in-depth discussion of the CJEU's engagement with gender stereotypes, see Alexandra Timmer, *Gender Stereotyping in the case law of the EU Court of Justice*, 1 EUROPEAN EQUALITY L. REV. 37 (2016).
62. See JULE MULDER, *EU NON-DISCRIMINATION LAW IN THE COURTS: APPROACHES TO SEX AND SEXUALITIES DISCRIMINATION IN EU LAW 47-54* (Hart Publishing 2017).
63. For sexual orientation discrimination, see Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-636; see also Joined Cases C-122/99 & 125/99 D and *Sweden v. Council*, 2001 E.C.R. I-4342 (providing additional examples). For discrimination against transgender people, see Case C-13/94, *P. v. S. and Cornwall Cnty. Council*, 1996 E.C.R. I-2159; Case C-117/01, *K.B. v Nat'l Health Service Pensions Agency*, 2004 E.C.R. I-568; Case C-423/04, *Richards v. Sec'y of State for Work and Pensions*, 2006 E.C.R. I-3602; Case 451/16, *MB v. Sec'y of State for Work and Pensions*, ECLI:EU:C:2018:492, ¶1 (June 26, 2018). This is also reflected in the Gender Equality Directive, *supra* note 11 at §3, which only construes discrimination based on gender reassignment as sex discrimination.
64. See, e.g., *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020) (holding discrimination on the basis of sexual orientation and gender identity to be sex discrimination under Title VII because "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.>").
65. Case C-13/94, *P. v. S. and Cornwall Cnty. Council*, 1996 E.C.R. I-2159; Case C-117/01, *K.B. v Nat'l Health Servs. Pensions Agency*, 2004 E.C.R. I-568; Case C-423/04, *Richards v. Sec'y of State for Work and Pensions*, 2006 E.C.R. I-3602; Case C-451/16, *MB v. Sec'y of State for Work and Pensions*, ECLI:EU:C:2018:492, ¶ 1 (June 26, 2018).

conformity with heteronormative ideas. The issue becomes a strictly biological sex discrimination issue: It is a matter of being treated the same as those of the biological sex that the transgender person transitioned to, is transitioning to, or intends to transition to.

The CJEU even fails to address the role of gender stereotypes in its sex and pregnancy discrimination case law.<sup>66</sup> For example, in *Public Ministry v. Stoeckel*, the defendant governments justified national prohibitions on women doing night work by reference to “the risks of attack and the heavier domestic workload borne by women.”<sup>67</sup> The Court remained silent on these stereotypes of women as fragile and primary caregivers. In *Hofmann v. Barmer Ersatzkasse*, the CJEU considers the need to protect “a woman’s biological condition during pregnancy and thereafter,” and “the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.”<sup>68</sup> With observations like this, the Court explicitly affirms stereotypes of mothers as caregivers and as too fragile to combine caregiving with work responsibilities.<sup>69</sup> In *Hofmann*, the Court even rejects a gender-stereotyping approach in so many words where it observes that the Gender Equality Directive “was not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents.”<sup>70</sup>

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66. At times, the Court does engage with the role of gender stereotypes, yet they remain the exception. *See, e.g.*, Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6392 (acknowledging that stereotypes of women as caregivers can limit their opportunities for promotion). *See also* Case C-104/09, *Roca Alvarez v. Sesa Start Espana ETT SA*, 2010 E.C.R. I-8690 ¶36, Case C-222/14, *Maistrellis v. Dikaiosynis*, ECLI:EU:C:2015:473 ¶ 50 (July 16, 2015) (providing examples of the Court observing that paternal leave derived from that of the mother, is “liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.”). These cases are the exception, however. In Case C-5/12, *Betriu Montull v. INSS*, ECLI:EU:C:2013:571 (September 19, 2013), a case that came after *Roca Alvarez* and *Maistrellis*, for example, the Court went back to its gender stereotypical considerations of *Hofmann*—acknowledging the need to protect pregnant employees during pregnancy and to protect their relationship with their child.

67. Case C-345/89, *Pub. Ministry v. Stoeckel*, 1991 E.C.R. I-4066.

68. Case C-184/83, *Hofmann v. Barmer Ersatzkasse*, 1984 E.C.R. 3075.

69. *See* Timmer, *supra* note 61, at 40 (observing that the CJEU “privileges the mother-child relationship, suggesting that this is the primary relationship.”) Timmer notes that “[t]he result is a ‘paternalistic’ approach, aiming at the ‘protection’ of women. . . . [T]his protective language taps into images of women as the delicate sex, which is also confirmed in the Court’s idea that mothers are ‘burdened’ if they work next to their role as care-givers.” *Id.*

70. Case C-184/83, *Hofmann*, 1984 E.C.R. 3075.

The CJEU is unlikely to revise this case law and adopt a gender-stereotyping approach in its pregnancy discrimination jurisprudence. Such an approach would contradict—at least partially—EU law’s understanding of substantive equality for pregnant employees. As discussed above in Section I.A., EU law understands substantive equality for pregnant employees to require the guarantee of special rights. This is a different understanding of substantive equality than the one central to a gender-stereotyping approach. Under a gender-stereotyping approach, substantive equality is achieved when gender roles and stereotypes no longer influence employment decisions, and pregnant employees can take up the same competitive place in the employment market as men. This means allowing pregnant employees to work when they are capable of doing so and allowing employers to dismiss pregnant employees when they would dismiss a man similarly unable to work. Giving pregnant employees special rights in certain cases contradicts this notion of substantive equality.<sup>71</sup> Rather than eliminating gender stereotypes, special rights can reinforce them. For example, a pregnant employee who is prohibited from doing night work, who wants to do this work and physically can do it, risks reinforcing the gender stereotype that pregnant employees are too fragile to function fully in the workplace.

### B. *An Indirect Sex Discrimination Analysis*

The CJEU’s pregnancy discrimination case law exclusively conducts a direct sex discrimination analysis. This is remarkable because the Gender Equality Directive also prohibits indirect sex discrimination,<sup>72</sup> and the referring national court in *Dekker* asked the CJEU about both direct and indirect sex discrimination.<sup>73</sup> EU law defines indirect sex discrimination as the situation where an apparently neutral provision, criterion, or

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71. This idea is clearly expressed in the following paragraph from Ginsburg’s brief in *Struck v. Sec’y of Def.*, 460 F.2d 1372 (1971): “Presumably well-meaning exaltation of woman’s unique role in bearing children has, in effect, denied women equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society.” See Siegel, *supra* note 59, at 1101-2. In certain instances, there is also some overlap between the two notions of substantive equality. The special protection of a pregnant employee who physically cannot do night work can help her be as competitive in the employment market as men. In that instance, the special protection does not reinforce gender stereotypes. Rather, it responds to a specific, different need of pregnant employees.

72. Gender Equality Directive, *supra* note 11, at art. 2, 2(b).

73. One of the prejudicial questions that the national court referred was: “Is an employer directly or *indirectly* in breach of the principle of equal treatment laid down in Articles

practice puts persons of one sex at a particular disadvantage compared to persons of the other sex without justification.<sup>74</sup> Comparing this with EU law's definition of direct discrimination discussed in Section I.A., the difference with direct discrimination is: 1) the focus on discriminatory effects rather than on discriminatory treatment; and 2) the possibility for justification.

In the case of indirect discrimination, the effects of the action are discriminatory. According to the EU law definition, indirect sex discrimination requires particularly disadvantageous effects for one sex.<sup>75</sup> The CJEU finds a measure to be particularly disadvantageous for one sex if it affects a substantially or significantly higher number of people of one sex as compared to people of the other sex.<sup>76</sup>

Indirect discrimination is easier to defend than direct discrimination. Indirect discrimination can be defended any time the action serves a legitimate aim and is an appropriate and necessary means for achieving that aim.<sup>77</sup> This covers significantly more circumstances than the limited circumstances in which EU law excepts direct discrimination from the principle of equal treatment. For example, direct sex discrimination under

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2(1) and 3(1) of the Directive?" Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, 1990 E.C.R. I-03941 (emphasis added).

74. See, e.g., Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 2, 2(b), 2000 O.J. (L 180/22) (EC); Employment Equality Directive, *supra* note 47, at art. 2, 2(b); Council Directive 2004/113, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, art.2(b), 2004 O.J. (L 373/37) (EC); Gender Equality Directive, *supra* note 11, at art. 2(b) (providing EU law's definition of indirect discrimination).

75. See, e.g., Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 2, 2(b), 2000 O.J. (L 180/22) (EC); Employment Equality Directive, *supra* note 47, at art. 2, 2(b); Council Directive 2004/113, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, art.2(b), 2004 O.J. (L 373/37) (EC); Gender Equality Directive, *supra* note 11, at art. 2(b) (providing EU law's definition of indirect discrimination).

76. See, e.g., Case C-317/93, *Inge Nolte v. Landesversicherungsanstalt Hannover*, 1995 E.C.R. I-4650, Opinion AG Leger (providing a good overview of the CJEU's case law). See also Case C-167/97, *Regina v. Sec'y of State for Emp.*, 1999 E.C.R. I-666; Case C-4/02, *Schönheit v. Stadt Frankfurt am Main*, 2003 E.C.R. I-12607 (requiring a "considerably higher percentage.").

77. See Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, art. 2, 2(b), 2000 O.J. (L 180/22) (EC); Employment Equality Directive, *supra* note 47, at art. 2(b); Council Directive 2004/113, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, art.2(b), 2004 O.J. (L 373/37) (EC); Gender Equality Directive, *supra* note 11, at art. 2(b).

the Gender Equality Directive can only be defended in narrow circumstances such as positive or affirmative action or where the sex of the person is a “genuine and determining occupational requirement.”<sup>78</sup> That is not to say that the justification of indirect discrimination is possible in all circumstances. The defendant must show: 1) a legitimate aim (which excludes strictly economic or financial reasons);<sup>79</sup> 2) that the chosen measures are appropriate to achieve that aim; and 3) that there are no other means to achieve that aim which interfere less with the right to equal treatment.<sup>80</sup>

Pregnancy discrimination can be construed as indirect sex discrimination in certain cases. For example, the refusal to hire Ms. Dekker could be construed as indirect sex discrimination. The employer refused to employ Ms. Dekker because it could not be reimbursed for the sickness benefits it would have to pay to Ms. Dekker during her pregnancy.<sup>81</sup> Ms. Dekker’s pregnancy fell under one of the exceptions to reimbursement, namely the exception of “foreseeable sickness:” when an employee becomes unable to perform their duties within six months of the start of the employment and that inability could be anticipated from the state of the health of the employee at the moment the employment began.<sup>82</sup> Although this reason for refusal applies to people assigned to both the female and the male sex, it has particularly disadvantageous effects for people assigned to the female sex. Pregnancy frequently creates “foreseeable sickness” that affects a significantly higher number of people of the female sex than of the male sex. Under the CJEU’s case law, the employer is not able to justify refusing to employ Ms. Dekker by referring to the financial loss they would incur were they to hire her.<sup>83</sup>

An indirect sex discrimination analysis has two important advantages over a gender-stereotyping approach and the CJEU’s current pregnancy discrimination jurisprudence discussed above. First, unlike the CJEU’s

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78. Gender Equality Directive, *supra* note 11, arts. 3, 14(2). The CJEU interprets these exceptions narrowly. *See, e.g.*, Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.J. I-1663, ¶ 36.

79. Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, 1990 E.C.R. I-03941, ¶ 12 (explaining that “[s]uch discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.”). On indirect discrimination specifically, *see, e.g.*, C-343/92, *De Weerd v. Bestuur van de Bedrijfsvereniging voor de Gezondheid*, 1994 E.C.R. I-587.

80. Eur. Union Agency for Fundamental Rts., *Handbook on European Non-discrimination Law 94-95* (2018), [<https://perma.cc/BN72-A3ZN>].

81. Case C-177/88, *Dekker*, 1990 E.C.R. I-03941.

82. Case C-177/88, *Dekker*, 1990 E.C.R. I-03941.

83. Case C-177/88, *Dekker*, 1990 E.C.R. I-03941.

pregnancy discrimination jurisprudence, it does not rely on the consideration that pregnancy exclusively disadvantages people of the female sex. Rather, for indirect sex discrimination it suffices that pregnancy affects a significantly higher number of people of the female sex as compared to those of the male sex.<sup>84</sup> As such, an indirect sex discrimination analysis does not force pregnant transgender people in the female sex box.

Second, more than a gender-stereotyping approach, an indirect sex discrimination analysis fits with EU law's notion of substantive equality for pregnant employees. In line with EU law's notion of substantive equality, an indirect sex discrimination analysis recognizes that pregnancy puts people of the female sex at a particular disadvantage in the workplace. What's more, the CJEU is more likely to adopt an indirect sex discrimination analysis in its pregnancy discrimination case law than a gender-stereotyping approach. In some of its pregnancy discrimination cases, the CJEU already conducts an obscured indirect sex discrimination analysis.<sup>85</sup> For example, in *Hertz* and *McKenna*, the Court finds no direct sex discrimination arguably because it in fact conducts an indirect sex discrimination analysis.<sup>86</sup> In both cases, the pregnant employee was treated unfavorably in comparison with male employees in comparable situations. This normally helps to show direct sex discrimination. The Court nevertheless found no such discrimination because, arguably, it considered the unfavorable treatment to serve a legitimate aim (e.g., the exceptional need for leave in *Hertz* and the heavy burden of full pay in *McKenna*).<sup>87</sup> The Court may not have made this explicit in its reasoning so as not to undermine a conception of pregnancy as a healthy, socially important, and desirable condition. When pregnancy is understood as benefiting society, it cannot be outweighed by an employer's individual interests. Finding such a legitimate aim would also directly contradict its

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84. Case C-184/83, *Hofmann v. Barmer Ersatzkasse*, 1984 E.C.R. 3075.

85. See also *Wintemute*, *supra* note 27, at 33.

86. Case C-179/88, *Handels-og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening*, C-179/88 1990 E.C.R. I-3994; Case C-191/03, *North Western Health Board v. Margaret McKenna*, 2005 E.C.R. I-7659.

87. In Case C-179/88, *Handels - og Kontorfunktionærernes Forbund*, 1990 E.C.R. I-3994, ¶ 3, Ms. Larsson was unable to return to work for a period of almost nine months due to maternity leave, annual leave, and pregnancy-related illnesses. In Case C-191/03, *N. W. Health Bd. v. McKenna*, 2005 E.C.R. I-7659, ¶¶ 11-18, Ms. McKenna was unable to work for the whole period of her pregnancy, maternity leave, and some period after that (around one year in total) and claimed full pay from her employer for that time. See also *Wintemute*, *supra* note 27, at 33.

own jurisprudence, which rejects economic or financial considerations as legitimate aims.<sup>88</sup>

However, an indirect sex discrimination analysis is not a good replacement for the CJEU's pregnancy discrimination jurisprudence. It provides significantly less protection against pregnancy discrimination than does the CJEU's direct sex discrimination analysis. Under an indirect sex discrimination analysis, pregnant employees are not protected from pregnancy discrimination any time the employer can justify the disadvantage. Unlike direct sex discrimination, this is any time the employer can show that the treatment serves a legitimate aim and is an appropriate and necessary means for achieving that aim. The threshold for claiming protection under an indirect sex discrimination analysis is also higher than under the CJEU's case law. The pregnant employee must show that the measure particularly disadvantages one sex. Under the CJEU's case law, on the other hand, no reference must be made to the other sex. It suffices to simply show unfavorable treatment based on pregnancy as referenced in Section I. Unlike the CJEU's pregnancy discrimination case law, an indirect sex discrimination analysis also does not grant special protection to pregnant employees as required by EU law's notion of substantive equality as referenced in Section I.A. Pregnant employees receive the same protection against discrimination as other protected groups.

An indirect sex discrimination analysis also only brings in the varying gender identities and bodies of pregnant transgender people through the backdoor. It simply allows them to exist in the negative, undefined space that is left by those of the female sex. By stating that pregnancy particularly disadvantages those of the female sex, an indirect sex discrimination analysis marginalizes pregnant transgender people and makes them the exception.<sup>89</sup> Similar to the CJEU's pregnancy discrimination jurisprudence, an indirect sex discrimination analysis further forces pregnant transgender people to argue in binary sex terms. To bring an indirect sex discrimination case, the claimant must belong to the sex that is argued to be particularly disadvantaged, which in the case of pregnancy is the female sex.

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88. Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, 1990 E.C.R. I-03941, *supra* note 79, at ¶ 12.

89. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989) (critiquing the lack of intersectionality within antidiscrimination frameworks).

### III. A CHANCE TO CHANGE EU LEGISLATION

At the root of the difficulties with EU law's protection for pregnancy discrimination is the lack of a separate provision on pregnancy discrimination in EU legislation. This protective gap forces plaintiffs to fit their pregnancy discrimination under one of the explicit EU non-discrimination provisions—which leads to the different challenges I discussed. Particularly, construing pregnancy discrimination as sex discrimination only enables to partially fill the protective gap left by EU legislation. It does not protect against all forms of pregnancy discrimination, and, under an indirect sex discrimination analysis, only provides a low level of protection against such discrimination. Introducing a separate provision on pregnancy discrimination would help to overcome these challenges.<sup>90</sup> It would make it easier to claim protection against pregnancy discrimination. Instead of having to make the connection with other non-discrimination provisions, it would be sufficient to show discrimination based on pregnancy itself. A separate provision on pregnancy discrimination also would provide protection against all forms of pregnancy discrimination. The various experiences of pregnancy discrimination can unproblematically fit under the separate provision on pregnancy discrimination. Disconnecting pregnancy from sex broadens the meaning of pregnancy. When pregnancy is un-sexed, it can unproblematically be both a biological condition and a social construct and affect people with various bodies and gender identities.

Introducing a new provision has the disadvantage that it takes time and political mobilization. Developing the CJEU's case law may be faster especially because equality bodies within the EU can push the CJEU to decide on the issue by posing prejudicial questions to the Court through strategic litigation.<sup>91</sup> Thus, the two alternative options for construing pregnancy discrimination as sex discrimination that I discussed in the previous section can serve as a transitional solution until the new provision on pregnancy discrimination is in effect.

The EU legislature has the power to adopt a separate provision on pregnancy discrimination. Article 157 (3) TFEU confers the power on

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90. See also Lara Karaian, *Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law*, 22 SOC. & LEGAL STUD. 211 (2013) (arguing for “unsexing” pregnancy discrimination law, fitting within a broader movement of unsexing parenting).

91. See Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*, 2008 E.C.R. I-5198, where the Court made an important decision on racial discrimination following a prejudicial question presented by the Belgian equality body as part of its strategic litigation.

the EU Parliament and Council to adopt “measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.”<sup>92</sup> In short, this provision grants the Parliament and the Council the power to act in the specific matter of sex equality in the workplace. On this basis, the EU legislature can adopt a directive on combatting pregnancy discrimination in matters of employment and occupation parallel to the current Gender Equality Directive. To be able to use article 157 (3) TFEU as a legal basis, the EU legislature would still have to connect pregnancy discrimination to sex equality. Yet, unlike the CJEU’s pregnancy discrimination jurisprudence, the EU legislature needs to make that connection only once, i.e. when adopting the directive. Current CJEU pregnancy discrimination jurisprudence on the other hand requires individuals to connect pregnancy discrimination to sex discrimination each time they want to claim protection against pregnancy discrimination.

Such a separate provision on pregnancy discrimination also fits in the broader framework of EU law. It is, for example, in line with the non-discrimination principle in article 21(1) of the Charter of Fundamental Rights of the European Union.<sup>93</sup> Article 21(1) prohibits “*any* discrimination based on *any* ground” (emphasis added).<sup>94</sup> Article 21(1) thus does not prevent introducing pregnancy as a separately protected characteristic in EU law. Introducing a separate provision on pregnancy discrimination could also present an opportunity for revising EU law on pregnancy-related issues more broadly. At the moment, EU law provisions on pregnancy are scattered over two different directives: the Gender Equality Directive and the Pregnant Workers Directive. This framework is difficult to navigate, especially because these directives cover more than their declared topic. For example, article 10(1) of the Pregnant Workers Directive

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92. Art. 157 (3) of Treaty on the Functioning of the European Union reads literally: “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.” Treaty on the Functioning of the European Union art. 157(3), Oct. 26, 2012, 2012 O.J. (C 326) 118.

93. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, O.J. (C 326) 391.

94. Art. 21(1) of the Charter of Fundamental Rights of the European Union reads in full: “*Any* discrimination based on *any* ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” *Id.* (emphasis added).

provides limited protection against a specific form of pregnancy discrimination, which is inconsistent with the declared topic of the directive.<sup>95</sup>

A separate provision on pregnancy discrimination further acknowledges the various gender identities and bodies of pregnant transgender people. It un-sexes pregnancy. A separate provision on pregnancy discrimination does not say anything about the sex of pregnant people. As such, it encompasses the experiences of people of the female sex who are not pregnant, cannot become pregnant, or do not want to become pregnant. What's more, recognizing pregnancy discrimination independently from sex discrimination steps away from a top-down, singular approach to discrimination.<sup>96</sup> Such an approach forces various forms of discrimination into the mold of a pre-existing set of singular protected characteristics.<sup>97</sup> Instead of forcing pregnancy discrimination into the mold of sex discrimination, a separate provision on pregnancy discrimination starts from the issue of pregnancy discrimination and recognizes it on its own terms.

From a reproductive rights advocacy perspective, un-sexing pregnancy in this way might appear problematic. Reproductive rights advocacy has historically had an apparent interest in maintaining the connection between pregnancy and female sex. For example, focusing the advocacy on pregnant *women* instead of pregnant *people* makes the harm of in-existent or insufficient reproductive rights understandable, concrete, and measurable, and, as such, presents a convincing case for reproductive rights.<sup>98</sup> Connecting pregnancy to sex, a status that does not always reflect an individual's choice, presents pregnancy as a status that a person does

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95. Art. 10(1) reads in full: "In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:

Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent."

*Id.* at art. 10(1).

96. *See generally* Crenshaw, *supra* note 89, at 139-40 (discussing this concept in discrimination law more broadly).

97. *Id.*

98. Strangio, *supra* note 9, at 233.

not necessarily choose.<sup>99</sup> When becoming pregnant was not an individual's choice, it enables advocates to present such rights as necessary to remedy an unchosen, unwanted situation.

This interest of reproductive rights advocacy in maintaining the connection between pregnancy and female sex means that we must proceed carefully in un-sexing pregnancy to avoid upending reproductive rights advocacy. There is a risk that un-sexing pregnancy would result in a reproductive rights advocacy that exclusively centers around cisgender women and erases pregnant transgender people's experiences. C. Strangio, a U.S. transgender rights activist, argues that something similar happened in response to the U.S. Supreme Court's jurisprudence on reproductive rights.<sup>100</sup> Strangio argues that the Supreme Court's jurisprudence, by obscuring cisgender women's pregnancy and abortion experiences and limiting their reproductive rights, unleashed a reproductive rights discourse that centers exclusively around cisgender women and erases the experiences of pregnant transgender people.<sup>101</sup>

Yet, reproductive rights advocacy does not in fact have an interest, or at least does not have a long-term interest, in maintaining a connection between pregnancy and female sex. While focusing on pregnant *women* instead of pregnant *people* has the short-term benefit of presenting a convincing case for reproductive rights, it presents a long-term loss in terms of pregnancy discrimination. The connection between pregnancy and female sex contributes to the gendered social construct of pregnancy, which underlies some pregnancy discrimination. In Section I.B, I gave the example of the discriminatory discharge of a pregnant employee who is physically able to work based on the gender stereotype that women who are expectant mothers should focus on that role exclusively, or that women are too fragile to combine pregnancy with job responsibilities.

Prohibiting pregnancy discrimination separately, instead of as a part of sex discrimination, has the further advantage of increasing the visibility of pregnancy discrimination. This is appropriate given the prevalence of pregnancy discrimination.<sup>102</sup> Legislating pregnancy discrimination sepa-

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99. See ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* (Colin Harvey eds., 1993).

100. Strangio, *supra* note 9, at 231-34.

101. *Id.*

102. For example, a study of the UK Equal Opportunities Commission (EOC) finds that 45 percent of the 1,006 women interviewed experienced some type of pregnancy discrimination. Jonathan Payne, *Pregnancy Discrimination in the Workplace*, Eurofound (Aug. 13, 2006), [<https://perma.cc/2UQ8-G78D>]. A study of the Dutch College for

rately also enables the CJEU to maintain a narrow sex discrimination jurisprudence, i.e., one that is focused on unfavorable treatment based on sex and not stretched to cover all kinds of related but different issues. What's more, a separate provision on pregnancy discrimination would not be completely new for the EU Member States. Some EU Member States, such as France and Hungary, already protect pregnancy as a status separate from sex.<sup>103</sup>

Finally, to guarantee full anti-discrimination protection for pregnant transgender people, the EU legislature can also consider introducing transgender status as an independently protected characteristic. When transgender people become pregnant, part of the discrimination they face is because of their transgender status. For example, for a transgender man who sought full gender-affirming medical intervention to align his external sex characteristics with his gender identity, his pregnancy can reveal his transgender status and, as such, give rise to discrimination on that basis. Current EU law only partially protects against discrimination based on transgender status. Similar to pregnancy, EU legislation does not prohibit discrimination based on transgender status separately.<sup>104</sup> The CJEU has only partially filled that protective gap. The Court only construes discrimination based on transgender status as sex discrimination in the limited case in which a transgender person had, is having, or intends to have gender-affirming surgery.<sup>105</sup> The Court is unlikely to expand this case law, because it thinks of sex in strictly biological terms as discussed in Section II.A. Without any connection to gender-affirming medical intervention, the discrimination transgender people face is based on their gender identity and not on sex in biological terms.

Since in some cases it is impossible to disentangle whether pregnant transgender people are discriminated against because of their pregnancy

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Human Rights finds that 43 percent of the 1,150 working mothers surveyed experienced some form of pregnancy discrimination. *Vier op de tien vrouwen op de arbeidsmarkt benadeeld vanwege zwangerschap of pasgeboren kind: zwangerschapsdiscriminatie nog steeds onverminderd groot probleem*, COLLEGE VOOR DE RECHTEN VAN DE MENS (Nov. 17, 2020, last updated Nov. 23, 2020), [<https://perma.cc/2L57-55GR>].

103. European Network of Legal Experts in Gender Equality and Non-Discrimination, *A Comparative Analysis of Non-Discrimination Law in Europe 2020*, EUR. COMM'N, 11 (Dec. 2020), [<https://perma.cc/M6F3-APVW>].

104. Eur. Union Agency for Fundamental Rts., *Handbook on European Non-discrimination Law* 143, 172-73 (2018), [<https://perma.cc/BN72-A3ZN>].

105. See Case C-13/94, *P. v. S. and Cornwall County Council*, 1996 E.C.R. I-2159; Case C-117/01, *K.B. v NHS Pensions Agency*, 2004 E.C.R. I-568; Case C-423/04, *Richards v. Secretary of State for Work and Pensions*, 2006 E.C.R. I-3602; Case 451/16, *MB v. Secretary of State for Work and Pensions*, 2018 ECLI:EU:C:2018:492, 1.

or their transgender status, full anti-discrimination protection for pregnant transgender people also requires a remedy for intersectional discrimination.<sup>106</sup> For example, the discrimination Mr. Simmons experienced might have been because of his transgender status, his pregnancy, or because of a mixture of both. Currently, a framework for intersectional discrimination is lacking in EU law.<sup>107</sup>

## CONCLUSION

The CJEU's pregnancy discrimination jurisprudence needs to be revised. The various gender identities and bodies of pregnant transgender people make this particularly urgent, but the Court's reasoning in and of itself calls for revision. The Court's deviation from EU law's usual, comparative approach to direct sex discrimination lacks a convincing justification. It is merely self-serving. It helps to serve the Court's goals of ensuring its notion of substantive equality for pregnant employees and of filling the protective gap EU legislation left for pregnancy discrimination. The Court's reasoning further relies on a narrow, exclusionary notion of pregnancy discrimination and, as such, only provides partial protection against pregnancy discrimination. It excludes discrimination against pregnant transgender people and pregnancy discrimination based on gender stereotypes.

In this Article, I explored three approaches: two for revising the CJEU's jurisprudence, a gender-stereotyping approach and an indirect sex discrimination analysis approach, and one approach that suggests revising EU legislation. Of all three, I put forth revising EU legislation as the best option. My proposal is to introduce a separate provision on pregnancy discrimination in EU legislation. Unlike revising the CJEU's case law, a separate provision on pregnancy discrimination provides full protection for all types of pregnancy discrimination. A gender-stereotyping approach to sex discrimination does not protect against pregnancy discrimination based on biological status. On the other hand, an approach that applies an indirect sex discrimination analysis provides only minimal protection against pregnancy discrimination due to the broad possibilities for justification. Unlike an indirect sex discrimination analysis, a separate provision on pregnancy discrimination fully un-sexes pregnancy. As such,

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106. See, e.g., Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-discrimination Law*, EUR. COMM'N, 66-83 (May 2016), [<https://perma.cc/R7EK-Q4EC>] (discussing some options for how EU law can address intersectional discrimination).

107. *Id.*

it avoids marginalizing the various gender identities and bodies of pregnant transgender people. Revising EU legislation is also a more realistic option than a gender-stereotyping approach. A gender-stereotyping approach is currently completely absent from the CJEU's jurisprudence, so that the Court is unlikely to adopt such an approach in its case law.

The EU legislature has the tools for introducing a separate provision on pregnancy discrimination. Such a provision finds support in article 157(3) TFEU and fits into the broader EU law framework. It is simply a matter of whether the EU legislature wants to make those changes. This Article explains why the status quo is untenable. The CJEU's pregnancy discrimination jurisprudence is flawed, it only provides partial protection against pregnancy discrimination, and it erases the various gender identities and bodies of pregnant transgender people. The EU legislature must step in. ♣

