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CLARE MCGLYNN

European Union Family Values: Ideologies of "Family" and "Motherhood" in European Union Law

Abstract

This article argues that European Union law, and particularly the jurisprudence of the European Court of Justice, has reproduced and thereby legitimated a traditional ideology of the "family" and "motherhood." This ideology limits the potential of the European Union's sex equality laws to bring about real change in the lives of women and men, as well as restricting the scope and entitlement of European Union rights, excluding those who fall outside this normative vision of "family." Furthermore, as the European Union contemplates ever more competence in the family policy and family law fields, it is of considerable concern that it may be this ideology of "family" that provides the normative foundation for further developments in this area.

It is often thought that issues concerning families and the regulation of family life lie outside the realm of the European Union (EU) and particularly European law. The EU is supposedly a largely economic enterprise, distanced from the daily lives of the citizens of Europe, with a correspondingly remote legal system. Even were this ever to have been true, it certainly is no longer. The scope of EU activities continues to increase, encompassing ever more hitherto na-

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tional fields of social and cultural policy, including a developing regulation of family forms and practices. To some, this evolving process of ever more European regulation may appear inevitable and a necessary part of a more closely integrated Europe; to others it may appear not only inevitable, but also advantageous. However, it is my view that the increasing EU regulation of families is neither inevitable and necessary, nor does it represent a positive development. Accordingly, I argue that the evolving EU regulation of families should be greeted with great caution and its further advance, in its present form, must be challenged.

The EU's interest in family policy is not new, with many resolutions, expert committees, and research projects being funded and undertaken in the EU's name since the mid-1980s (Hantrais and Letablier 1996). However, what is new about recent developments is the progress from an EU family *policy* toward the regulation of families by EU *law*. This shift represents a significant change in the jurisdiction of the EU in this field, moving beyond general statements of intent to legally binding measures which directly impact on individuals and may curtail national powers. EU law and judgments of the European Court of Justice are binding in all fifteen member states and override contrary national law. Accordingly, legal regulation of families by the EU is of profound importance and has serious implications for the future development of family policy and family law in all member states.

The particular concern of this article is with the ideological foundations of the developing legal regulation of families and family forms by the European Court of Justice. It is the European Court which has fashioned a concept of "family" from the bare bones of EU legislation on sex equality and the free movement of persons. The ideology of the "family" privileged by the European Court is that of the traditional "nuclear" family: that is, a heterosexual married union in which the husband is head of the family and principal breadwinner and the wife is the primary child care provider. The appropriate roles to be adopted by women and men within this family unit are also traditional, being based on a "dominant ideology of motherhood." This model bears little relation to the realities of family life in the EU (European Commission 1994; Drew et al. 1998), but is nonetheless a powerful concept within the EU and particularly in EU law.

This dominant ideology of the "family" and "motherhood," developed and reproduced through the case law of the European Court, is important for four main reasons. First, as noted above, the judgments of the European Court are of considerable importance because they are binding in all member states. The European Court is, therefore, the final arbiter on all matters of EU law and its rulings on families and family forms will have an impact on all member states and all areas of EU activity. Second, the analysis reveals that it is the ideological foundations of the European Court's development of the EU's sex equality legislation which is limiting the potential of the equality laws to bring about real improvements in the lives of many women. In this way, far from alleviating discrimination against women and men, the European Court is reinforcing traditional assumptions about appropriate familial roles. Third, this dominant familial ideology restricts entitlements to a number of EU law rights, such as the right to free movement of workers. Thus, in EU law, only certain "families" are privileged, and arguably the status of excluded families as part of the citizenry of the EU is thereby reduced. The fourth main concern is that as the EU contemplates ever greater jurisdiction in the family field, this dominant ideology potentially provides the normative foundation for the development of a Europe-wide family law which applies across the fifteen member states.

In order to develop my argument, the first part of this article considers what constitutes the dominant ideology of motherhood (for a justification of my use of the concept of ideology, see McGlynn 2000b). The article goes on to examine, in part two, the extent to which this ideology has been reproduced in the sex equality jurisprudence of the European Court of Justice. The third part continues the discussion by considering the European Court's privileging of particular family forms. The fourth and final part concludes by considering some of the implications of the foregoing discussion for the future development of EU policy regarding families and in particular the prospects for a European Union family law.

Ideology and Motherhood[1]

Turning, therefore, to consider what constitutes the "dominant ideology of motherhood," it was succinctly summarized in the 1970s by Anne Oakley as the belief that "all women need to be mothers, that all mothers need their children and that all children need their mothers" (Oakley 1974, 186). Thus this ideology broadly constructs a normative model of women and motherhood, the foundation of which is the perceived natural, universal, and unchanging nature of the maternal role, together with the presumed existence of a strong maternal instinct in *all* women (Glenn 1994, 1). This leads to the assumption that motherhood is the usual and appropriate role for women: the rightful (and actual) ambition of all "normal" women. Unsurprisingly therefore, the mother-child relationship is privileged,

it being held to be sacrosanct and pivotal to the emotional and physical well-being of the child.

Accordingly, child care is seen to be the primary responsibility of women, and if paid employment is taken up, it must take second place to the woman's responsibilities within the home. This aspect of the dominant ideology stresses the "responsibility of the biological mother for the rearing of her own children, especially during the early years" (Wearing 1984, 9). My aim here is not to suggest that the dominant ideology of motherhood is immutable or represents all assumptions about motherhood; ideologies of motherhood are historically and culturally contingent, and indeed will vary from member state to member state (Boyd 1996; Smart 1996, 52). However, this does not detract from the fact that it is the dominant ideology which, as argued below, informs the jurisprudence of the European Court of Justice.

It is worth considering in greater detail this emphasis on the mother's role as primary child care provider, as this informs considerable elements of the jurisprudence of the European Court. The dominance of the idea of, and importance attached to, the mother-child relationship stems in large measure from psychological and psychoanalytical theories discovered in the immediate aftermath of World War II. Theories of infant to mother "attachment" and mother to child "bonding" were defined as essential biological processes, akin to that of imprinting in animals.[2] In essence, the research purported to show that there is a biologically based requirement for mothers to be physically close to their babies immediately after birth. It was claimed that the attachment of infant to mother is instinctual and is the "primary social bond" that forms the entire basis on which all future social relations are constructed (Bowlby 1958; Eyer 1992, 62). Researchers concluded that those mothers who had greater contact with their babies in the first few days of their lives than the control group exhibited stronger mother-infant "bonding" (Klaus and Kennell 1976).

Furthermore, the "maternal performance" of the women without extended contact was "poor," which was said to have an adverse affect on the future development of the child. The consequences of an ineffective attachment or bond was said to have devastating pathological consequences for children, ranging from retarded development, to emotional immaturity, to juvenile delinquency (Eyer 1992, 47). Some studies even recorded failure to bond in the first few hours after birth as the root cause of child abuse or neglect (Lynch et al. 1976; Eyer 1992, 31). Accordingly, it was claimed that full-time employment of a mother is on a par with "death of a parent, imprisonment of a parent, war, famine" and so forth as a cause of family breakdown (Bowlby 1951, 73; Eyer 1992, 50).

However, almost immediately after publication, the foundations of this research began to crumble under the weight of criticism (Pinneau 1955; Rutter 1972; Eyer 1992, 60, 66–69). The research conclusions were challenged on the basis that the problems which had been laid at the door of inadequate or no attachment/bond may have been caused by many other factors, not least the experiences which may have led up to a mother-child separation, rather than the separation itself. In addition, the criteria by which the researchers judged "failure to bond" were revealed to be based on spurious grounds (de Chateau 1976; Eyer 1992, 31). For example, it had been considered that the presence of an active father demonstrated a lack of bonding between mother and child, as was a higher incidence of leaving the home shortly after birth (Eyer 1992, 21).

However, despite the criticisms of both the attachment and bonding theories, they were supported by bodies such as the World Health Organization and were highly influential in changing many institutional practices (Eyer 1992, 61; Forna 1998, 58). In addition, they attracted, and continue to attract, a broad consensus of support from many disparate groups, from conservative family campaigners to feminists. Some feminists welcomed the theories for the apparent power and control they gave to women, particularly over health professionals involved in childbirth and child care. In addition, these ideas were seen to give value to hitherto marginalized "women's work," namely child care. The ideas also live on in popular culture, policy and political debates, and legal discourse (Buxton 1998, 17, 37; Forna 1998, especially chapter 4), and are popularized through their repetition in child care and parenting manuals and guides (Spock 1958, 18; Bowlby 1965; Leach 1994, 84).[2]

These ideas have not been forced on an unwilling public, but nonetheless, the theories and their application have been highly prescriptive of the behavior of mothers, with consequential effects on fathers and family life. In so doing it is perhaps of little coincidence that the theories replicate a clearly defined traditional ideology of motherhood and the family. This perhaps explains further why the ideas were taken up so readily: they have a particular resonance in that they fit preexisting ideas about women and motherhood. And, once given the veneer of objective, neutral scientific fact, the propagation of these myths became embedded in popular, legal, and scientific discourse, and thereby justified in the eyes of the beholders. As a result, there remains one idealized vision of motherhood that is dominant, that of "exclusive, bonded, full-time mothering" (Forna 1998, 3).

This is a dominant ideology of motherhood which elevates certain biological facts of female reproduction to the status of "universal truths" about women, preserving women's subordination in the gendered division of labor in the home (Finley 1986, 1118–1142). In effect, this reduces the choices open to women, thereby justifying their inequality. It can therefore be seen that the perceived importance of the maternal instinct, and the privileging of the mother-child relationship, replicates traditional assumptions about the separate spheres of the sexes. Women's primary responsibility is for the home, her identification is with the private sphere; while for men it is the workplace and public life. Thus this dominant ideology of motherhood is closely related to normative notions of the "family": it legitimates the existing sexual division of labor and particular designated roles for fathers (breadwinner, protector, and authority figure) (Smart 1984, xii).

To repeat, the aim of this argument is not to dispute that these ideas are adhered to by many individuals, nor that these ideas may appear seriously outdated in some member states, but to argue that they are employed in dominant discourses such as EU law, such that they come to represent the norm, legitimating their pursuit and further reproduction through law. Furthermore, it is not my aim to disparage any need for parental "attachment" to their children. Indeed, as Sandra Fredman cogently argues, there remains "insufficient recognition of the value of children and of active parenting" in European society (Fredman 1997, 181). The crucial point is the need to value *parenting*, not only mothering. My criticism, therefore, is directed at the privileging of the mother-child relationship, exclusive of the role of the father, and the conclusions which are drawn from this supposedly scientific requirement for mother-child contact regarding the organization of child care and the "family."

The Dominant Ideology of Motherhood in EU Sex Equality Law

Following on from the above discussion, the aim of this section is to consider the extent to which the dominant ideology of motherhood constrains the sex equality jurisprudence of the European Court of Justice.[4] It will be argued that in a series of cases, predominantly in the area of pregnancy and maternity law, the court has reproduced, and thereby legitimated, a particular vision of womanhood and motherhood that is largely premised on the dominant ideology of motherhood discussed above.

The court's approach has been developed through what might be termed the EU's "protection of women" principle. This principle takes legislative form as an exception to the general principle of the equal treatment of women and men enshrined in the EU's Equal Treatment Directive.[5] This paternalistic "protection" principle overrides the promotion of equal treatment where "*the protection of women*, particularly as regards pregnancy and maternity" is required (my emphasis).[6] Accordingly, insofar as women are considered to be in need of "protection" (for which no definition is offered), the equal treatment principle need not apply. This "protection of women" principle is fundamental to the court's approach: it has been developed from a perceived need to "protect" pregnancy and maternity, as stated in the Equal Treatment Directive, to the protection of the dominant ideology of motherhood. The chosen language of "protection" is crucial.[7] The rhetoric of "protection" taps into a stream of thinking that sees all women as delicate and in need of paternal/patriarchal control and supervision. As Joanne Conaghan has observed, it reinforces the idea of women as the "weaker sex," a conception that has "served to legitimate their oppression throughout history [and] is closely related to the idea that pregnancy confers upon women a particular vulnerability" (Conaghan 1993, 82–83).[8]

Constructing the Dominant Ideology of Motherhood: The European Court of Justice in the 1980s

Commission v. Italy

A clear statement of the court's view was given in *Commission v. Italy* (1983). In this case the European Commission challenged before the European Court Italian legislation which granted leave to women, and not men, on the adoption of a child under six years of age. The commission argued that the legislation was contrary to the Equal Treatment Directive in that it discriminated against men, who were not able to avail themselves of the right to adoption leave. The Italian government stated that the provision was designed to place "the adoptive mother in the same position as the natural mother in order to ensure that the former has the same opportunity, in her interest and in the interest of the child, of creating the emotional ties for which the earliest part of a child's life . . . has a decisive role to play" (*Commission v. Italy* 1983, 3281). Accordingly, the aim of the legislation was to replicate, as far as possible, what was seen to be the "normal" position with natural parents, namely that the mother takes leave. This brings into sharp relief the fact that the period of leave is a manifestation of the belief that it is the woman's role to care for a child, whether adopted or newborn. The "decisive" role of the mother (not the father) is emphasized, together with the impli-

cation that without this the emotional development of the child will be harmed.

Accordingly, the European Court was faced with legislation based on a traditional conception of motherhood and had the opportunity to rule on whether the legislative pursuit of this vision was compatible with EU sex equality law. It held that the Italian legislation did not conflict with EU law and, moreover, that the Italian government had been motivated by a "legitimate concern" which led it "rightly" to introduce legislation attempting to assimilate the entry of adoptive and natural children into the family, especially during the "very delicate initial period" (*Commission v. Italy* 1983, paragraph 16). The court continued that, in these circumstances, the difference in treatment between women and men "cannot be regarded as [sex] discrimination" (*Commission v. Italy* 1983, paragraph 17).

Here we see the European Court endorsing the view, which was the linchpin of the bonding research discussed above, that the initial contact between mother and child is crucial to the child's future development. But, more significantly, whereas the bonding research was premised on biological motherhood, we see the ideas here applied to *all* mothers, whether biological or not. Underpinning this judgment is the belief that different treatment on account of motherhood (and not biological differences regarding the capacity to give birth) does not constitute unlawful discrimination. In doing so, the court reinforces sexual divisions of labor in which child care is always the responsibility of mothers, ignoring any conception that the father may also have a legitimate need and/or desire for a period of leave. Fatherhood is thereby limited, by implication, to a breadwinning role, with the assumption that a man's primary commitment and identification should be with paid work rather than child care (Collier 1999).

Hofmann v. Barmer Ersatzkasse

The European Court's approach was defended and extended in the now infamous *Hofmann* (1984) case. This case involved the court passing judgment on German legislation which provided that an optional period of maternity leave, which took effect eight weeks after birth, was only available to women. Mr. Hofmann, the father of a newborn baby, argued that this leave was for child care purposes and should therefore be available to mothers and fathers.[9] In response, the German government justified the policy on the grounds that it had "favourable repercussions in the sphere of family policy, inasmuch as it enables the mother to devote herself to her child," free from the "constraints" of employment (*Hofmann* 1984, 3061). Again we see the privileging of a particular family model wherein

the mother has primary responsibility for child care and in which employment is deemed to be all but incompatible with motherhood. The emphasis on "devotion" perhaps also has a resonance with the attachment/bonding theories which demand "good" mothering.

This privileging of particular family models and modes of mothering are ideological preferences the European Court endorsed by upholding the German legislation. The court went on to give what Tamara Hervey and Jo Shaw have rightly called the "archetypal statement of the perpetuation of 'separate spheres' ideology" in EU law (Hervey and Shaw 1998, 50), namely that EU law was not designed to settle questions relating to the "organisation of the family," or to "alter the division of responsibility between parents" (*Hofmann* 1984, paragraph 24; *Stoeckel* 1991).[10] This appearance of neutrality regarding the "family" suggests that EU law stands outside the sexual division of labor in the home, thus absolving EU law of any responsibility for the "social organisation" of family life.[11] However, EU law is unquestionably implicated in the reproduction of traditional family ties and responsibilities. The "family" is not a neutral or purely descriptive term, but an "ideological and economic site" that is protected from scrutiny by the idea of "privacy of the family" (Smart 1984, 5). In not intervening, the court, and thereby EU law, legitimates the status quo. The court sanctioned a policy which helped ensure that women are, and should remain, primarily responsible for child care.

Indeed, Advocate General Darmon went a step further in arguing that the leave for mothers only was necessary because of the multiple burdens placed on a woman after childbirth which include not only the "resumption of employment," but also the "upkeep of the household" (*Hofmann* 1984, paragraph 11).[12] This is an argument which goes further than "protecting" women who are pregnant or who have just given birth: it preserves an ideology of motherhood that entails the performance of, and responsibility for, particular tasks within the home. In other words, as in *Commission v. Italy*, there is no unlawful discrimination where the provision at issue accords with the dominant ideology of motherhood.

Nonetheless, having pronounced on the apparent neutrality of the EU's position regarding family life, the court went on to reveal its partiality. It outlined what is perceived to be the reasoning behind the "protection" of women afforded by EU law in relation to pregnancy and maternity. It stated that the first reason for granting maternity leave was to "protect" and ensure that the "woman's biological condition during pregnancy and thereafter have returned to normal" (*Hofmann* 1984, paragraph 25). The court went on to state that a second rationale for the maternity leave in *Hofmann* is that it

is "legitimate to protect the special relationship between a woman and her child" over the period which follows pregnancy and childbirth (*Hofmann* 1984, paragraph 26). The language of the "special relationship" inevitably recalls the discredited theories of mother-infant bonding in which the bonding of mother and child is seen as crucial to the future healthy development of the child and reinforces the "notion that women's child care obligations are 'natural' and unchangeable" (Fredman 1997, 195). This is the "special protection" of a particular conception of motherhood, one that perpetuates the assumption, based on the bonding research, that because "women bear children they are therefore automatically the sex that is responsible for rearing them" (Bovis and Cnossen 1996, 19).

The court underscored the importance of the "special relationship" between mother and child by stating that maternity leave prevents this relationship "from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment" and motherhood (*Hofmann* 1984, paragraph 26). This again suggests that motherhood and employment are incompatible. Mr. Hofmann argued that allowing fathers an entitlement to child care leave would relieve mothers of this "burden." However, the court said that the leave of a mother must be protected as it is only she who is subject to "undesirable pressures to return to work prematurely" (*Hofmann* 1984, paragraph 26).

This statement reveals clearly the partiality and ideology of the court. It conceives, normatively, of a workplace in which only women take time off to care for children. It may be that at present it is mainly women who are absent from work to care for children, but this should not provide a basis for withholding from men the opportunity to do so, or from implying that this is how care *should* be organized. If fathers had an enforceable right to (paid) leave at the time of the birth of a child *and* it was commonplace for fathers to avail themselves of this right, the "burdens" and "pressures" to return to work would be more likely to be faced by both women and men. Moreover, if fathers availed themselves of their rights to leave, the pressures on a woman to return to work may not be "undesirable," nor "premature." Thus the court is encouraging "women to stay at home with their children during the early months at least, while men continue with their uninterrupted careers. This in turn leads to greater emphasis being placed on the father's career while the mother's inevitably slows down" (Fredman 1992, 127).

Accordingly, therefore, we see in *Hofmann* the court according primacy to the role of the mother, stating that the "protection" of "pregnancy and motherhood" (*Hofmann* 1984, paragraph 26) is a legitimate aim of member state and EU policy. This is the reproduction of the dominant ideology of motherhood in which the mother and child are expected to have a very close relationship and where the child is to receive constant and individualized care and attention given solely by the mother (Windebank 1996). This child care represents the mother's primary social responsibility during the child's early years, a role "protected" by EU law. This clearly assumes that the mother has a privileged role over that of the father. There is no desire to protect (or encourage) fathers, or fathers' special relationships with their children.[13] Thus in *Commission v. Italy* and *Hofmann*, the European Court has articulated a clear vision of the role of mothers, and, by implication, of fathers, representing a judicial reinforcement of the dominant ideology of motherhood.

The Reproduction of an Ideology: The European Court of Justice in the 1990s

It might be thought that as the above judgments were given in the mid-1980s, the ideology on which they rely would have given way in subsequent years to a more progressive understanding of familial responsibilities and women's position in the workplace.[14] However, the European Court has continued to employ the reasoning developed in the above cases and more recently has developed and applied a broader principle, that of the "protection of women within family life."

Protecting the "Special Relationship Between a Woman and Her Child"

Before considering the recent development of the European Court's approach in this area, it is worth reviewing the extent to which the statements of ideology offered in *Commission v. Italy* and *Hofmann* have been affirmed in subsequent cases. What we see is that the court has chosen to repeat its arguments in a number of cases reinforcing, if not explaining, its ideology.

It will be recalled that in *Hofmann*, the European Court justified the granting of child care leave to women only on the basis that this was essential for the mother's health and for the protection of the "special relationship" between the mother and child. The quandary in which the court found itself was that granting any entitlements to women only is contrary to the principle of equal treatment and will only be lawful if it falls within one of the exceptions laid down in the Equal Treatment Directive, the relevant one here being the "protection of women, especially as regards pregnancy and maternity" (article 2(3)). Accordingly, the court had to justify the grant of leave to women only, but appeared to consider that the "health care" ar-

gument was an insufficient justification, presumably because the leave was actually for child care purposes. However, as the court was not seeking to defend leave per se, but leave for women only, it could not justify it simply by reference to the need for parents, of whatever sex, to have time to care for their child at such an early age, but had to privilege the mother-child relationship. Hence it augmented its argument by referencing the "special relationship" between mother and child. In doing so, as argued above, the court resorted to tired and inappropriate conceptions of motherhood, premised on the dominant ideology and the discredited bonding theories outlined above.

The court has subsequently been faced with a number of cases challenging the scope of the "protection" of pregnant women and has therefore been called on to justify the grant of protective rights. The crucial difference between the *Hofmann* case and these later ones is that *Hofmann* concerned parenting rights, to which both sexes could be entitled, whereas the later cases all strictly concern pregnancy and maternity leave. In such cases, justification by reference to the uniqueness of pregnancy and the health care needs of pregnant women and those who have recently given birth would have been sufficient. However, the court chose to repeat its *Hofmann* formula, namely that *maternity* leave, and not parental leave, was essential to "protect the special relationship between a woman and her child." Thus, in *Stoeckel* (1991, paragraph 13), *Habermann-Beltermann* (1994, paragraph 21), *Webb v. EMO* (1994, paragraph 20), *Brown v. Rentokil* (1998, paragraph 17), *Thibault* (1998, paragraph 25), and *Boyle* (1998, paragraph 41), the court repeated verbatim the *Hofmann* statement.[15] In each case, no explanation was given of this statement, why it was deemed necessary, nor why the "special relationship" was relevant to the justification of the grant of maternity leave or why the need for child bonding was exclusive only to mothers.

Thus although the final outcome given in some of the above cases may be said to be generally favorable to many women, in that they prohibited discrimination on the grounds of pregnancy, the quid pro quo for the positive outcome is the perpetuation of outmoded assumptions about child care and parenting which conform to the dominant ideology of motherhood and may therefore have a detrimental impact on women's opportunities in the future (cf. Heide 1999; Mancini and O'Leary 1999). To emphasize, it is not my argument that pregnant women should not be afforded any rights that derogate from a formal equality principle of treating like as like (More 1993), but that pregnancy-related rights should not be justified by reference to ideologies about motherhood. As argued by Evelyn Ellis, the language of the court evolves too easily from the need to protect "maternity" to "motherhood," with the court appearing to legitimize preferential treatment for pregnant women and those who have recently given birth on the basis of "outdated notions of parental role-playing within families" (Ellis 1998, 242). Furthermore, the court appears to be conflating the concepts of motherhood and maternity as if the two are equally biologically determined (Hervey and Shaw 1998, 51). Rights should be granted in respect of pregnancy, but rights in relation to parenting should be available to women and men.

Abdoulaye v. Renault

Any expectation that there would be a move away from the judgments in *Commission v. Italy* and *Hofmann* were dashed in the 1999 case *Abdoulaye v. Renault* (1999). In *Abdoulaye* the court was asked to rule that a payment made to women "when taking maternity leave" constituted discrimination against men, in view of the fact that the payment was equivalent to a child allowance to which women and men should be equally entitled. This argument was augmented by an examination of two further aspects of the company's policy, namely the fact that the payment was made to women in addition to their entitlement to maternity leave on full salary and that on the adoption of a child, the company made a payment to either the adoptive mother or father. In this way the case is similar to *Hofmann*, which also involved the grant of a right to women only, which was challenged on the basis that, as it was an entitlement based on parenting, it should be available to women and men (McGlynn 2001a).

The European Court chose to follow its judgment in *Hofmann*, legitimating the grant of rights to women only. It upheld the payment, arguing that women suffer "several occupational disadvantages inherent in taking maternity leave" (*Abdoulaye* 1999, paragraph 18) which makes their situation not comparable with men becoming parents. As it was not possible, according to the court, to compare the treatment of women and men, the payment to women only did not constitute a breach of the equal pay principle.[16] This ruling does not take into account the fact that if men were to avail themselves of rights to parental/paternity leave, they too would be absent from work for a period of time and may suffer "occupational" disadvantages. However, as a result of this case, were a man to become a father and take leave to care for that child, he would not be entitled to a payment which is made to women in similar circumstances. Although the grant of lump sum payments to employees in circumstances such as these are welcome, helping to offset the

costs of child care, the restriction of such payments to women only can only further inhibit men from taking parental leave.

The court has thereby legitimated special treatment on account of motherhood, reinforcing the idea that the birth of a child is the principal responsibility of women. The appropriate comparison in *Abdoulaye* would have been women and men becoming parents. As both become parents, as both could become adoptive parents, the payment to women only would have constituted direct sex discrimination.[17] To exclude men from a societal recognition of the significance (and financial expense) of the birth of a child is to perpetuate a traditional assumption that the birth and care of a child is a women's concern and responsibility, thereby reproducing the dominant ideology of motherhood.[18]

Hill and Stapleton: "Protecting Women Within Family Life"

We can look to the recent judgment in *Hill and Stapleton* (1998) for a further expansion of the court's philosophy. This case concerned a claim by two women job-sharers that they were indirectly discriminated against on the grounds of sex as they were paid less per hour than those working full time. The court agreed that the job-sharers suffered a disadvantage and, as more than 99 percent of job-sharers were women, it held that there was a prima facie case of indirect discrimination. Having so held, the majority of the court's judgment concerned its assessment of the possible justifications for the discriminatory treatment, which ranged from a concern regarding higher wage costs, to the suggestion that to grant the same pay to job-sharers and full-time workers in the situation in *Hill* would constitute discrimination in favor of women. The court vigorously rejected each of the proposed grounds of justification (*Hill and Stapleton* 1998; McGlynn and Farrelly 1999).

It was in rejecting the justifications for discriminatory treatment that the court substantiated the ideology underlying its judgment. The court stated that the aim of EU policy was to "encourage, and if possible, adapt working conditions to family responsibilities" (*Hill and Stapleton* 1998, paragraph 42). Moreover, it stated that EU policy aims to ensure the "[p]rotection of women within family life and in the course of their professional activities" (*Hill and Stapleton* 1998, paragraph 42). In these comments we may see a reaffirmation of the dominant ideology of motherhood. The "protection" principle has been extended from protecting women in connection with pregnancy and maternity to protecting women "within family life." In many ways this is simply a more explicit rendering of the court's ideology as stated in *Hofmann* and *Commission v. Italy*. It was argued above that the court's reliance on the dominant ideology of

motherhood could be implied from its judgments, despite its claim to be neutral. In *Hill* the court dispenses with its earlier claim that EU policy was not designed to alter the "organisation of the family," and asserts that it is indeed an explicit objective of EU law to "protect women within family life."

The crucial factor here is what constitutes the "family life" in need of protection. It is arguable that this is a conception of family life premised on the dominant ideology of motherhood. The court implies that it is policy to change working conditions to meet *existing* family responsibilities—not that family responsibilities need to change in order to liberate women. Thus the court assumes a static position regarding family responsibilities, and seeks to adapt working conditions to meet that reality. This suggests a workplace in which traditionally male modes of working continue, with adaptations only being made to enable *women* to meet *their* family commitments. Although this would constitute a belated recognition of the need for some change, it is a limited vision. It is indeed crucially important that working conditions are modified, but they must be altered for women and men. In addition, there must be concomitant changes in the domestic responsibilities of women and men, with men taking on more familial obligations. If only working conditions change, with women retaining the dual burden of home and workplace responsibilities, there will be only small improvements in the lives of women and men, not the radical liberation and substantive equality which is being sought.

Moreover, the language of "protection" employed by the court, stressing the conservation and preservation of existing mores, and the emphasis on women's *role*, suggests an inclination to ensure that women maintain their existing responsibilities. Some accommodation has been made toward women's changing work patterns, in that the court is concerned with ensuring that the family responsibilities of women can be maintained in the face of their "professional responsibilities," but this appears to be a reluctant recognition of the, perhaps economic, necessity of women's (part-time) participation in the paid workforce.

The court goes on to state that it is also EU policy to protect men's role in family life (*Hill and Stapleton* 1998, paragraph 42). In so stating, the court appears to be adhering to a notion of equality between women and men: it protects women's role in family life, *ergo* it protects men's. It is important, however, to look beyond this apparent equality.[19] It has been argued above that the court is seeking to ensure the protection of a particular conception of family life, one that adheres to the dominant ideology of motherhood. The corollary of this ideology of motherhood is a prescribed role for men and fathers. This is a conception of men as primary breadwinners and of fathers

removed from day-to-day child care, which is the mother's responsibility. The logical implication of the court's statement is that the role of men, particularly in relation to family life, is a "traditional" one which is the mirror of the dominant ideology of motherhood. It thus suggests a preservation of the limits of men's existing involvement in the family. Thus when the court in *Hill* states that it wishes to "protect" the roles of women and men in "family life," it is clearly arguable that it is seeking to preserve the traditional roles of women and men. Ultimately EU law is not seeking to change or liberate women's or men's lives, but to "protect" the existing "role" allocated to them. The court has entered the family arena and come out fighting for one particular conception of the family and motherhood, one that is the embodiment of the dominant ideology of motherhood. That it is such a "traditional" vision of "family life" which the court wishes to "protect" is also supported by an examination of the court's privileging of particular family forms, which is examined further below.

The Dominant Ideology of "Family" in EU Law

The above section examined how the court has reinforced traditional family roles for women and men. As well as these rulings on the practices within families, the European Court has also ruled on the particular forms which families take, and in doing so has privileged heterosexual marriage. This issue came to the fore when the court was asked to interpret the law relating to rights to free movement of workers, and in particular the rights of workers to bring their "family" with them as they move states to take up work (Ackers 1998). Under EU law, workers are entitled to be accompanied by members of their "family," including their "spouse." In *Netherlands v. Reed* (1986), the court was asked whether the term "spouse" included a cohabitant. Ms. Reed, a British national, had moved to the Netherlands to be with her partner who worked there. She was denied a residence permit on the basis that the couple were not married, with the Netherlands authorities stating that the term "spouse" only referred to marriage. Ms. Reed challenged this interpretation before the European Court, arguing that the term "spouse" should be given a wide interpretation and should include cohabitants. The European Court disagreed, and held that for the purpose of the grant of free movement "family rights," the term "spouse" is limited to married persons and does not therefore include cohabitants. A European "family" therefore entails heterosexual partnerships which are accorded the status of "family" only via marriage.

Equally, whereas marriage bequeaths the status of "family," divorce appears to take it away. In *Diatta v. Land Berlin* (1985) the court implied that on divorce, a spouse's right of residence could be revoked. The court appears to be privileging a traditional form of "family," that of marriage, and any rights granted to the spouse are only valid so long as the couple remain married. In this way the rights of the spouse are said to be "parasitic"; that is, the spouse has no rights of her/his own, but derives rights from the husband or wife. These derived rights are extensive and are granted in order to facilitate the free movement of workers. However, their parasitic nature means that the granting of rights to spouses and children remains reliant on the "breadwinner," most often the male worker. This has led Kirsten Scheiwe to argue that the free movement rights promote men's mobility, since the function of women's mobility is "assumed to be primarily as the provision of the infrastructure for men's mobility" (Scheiwe 1994, 251). The EU "intervenes" in the "family," in this case to privilege the status quo of family relations, with the aim of "guaranteeing the stabilizing function of the existing gendered division of labour" (Scheiwe 1994, 251). Thus the free movement rules privilege not only a particular family form, that of heterosexual marriage, but also particular gendered roles within families. This affects not just women and men; as Louise Ackers and Helen Stalford (1999) have argued, the conceptualization of "family" is also one which reinforces the notion of children as dependents.

This privileging of the movement of male workers can also be demonstrated by the absence of any real measures being taken to facilitate women's free movement. Most particularly there is a significant lack of any meaningful measures to promote a reconciliation of paid work and family life at the EU level (Moebius and Szyszczak 1998, 146; McGlynn 2001b), especially the "improvement of childcare facilities" (Scheiwe 1994, 251). Furthermore, the court's limited interpretation of the concept of "worker," on which many free movement rights are based, effectively excludes all informal/unpaid care work. This significantly limits the rights of many women to exercise free movement, and where they do so, renders them dependent on a male "worker." In this way, while the unpaid care work of women is encouraged under sex equality laws, via the dominant ideology of motherhood, this does not mean that such work is valued such that it attracts EU rights and entitlements. Women's opportunities for migration are undermined by the fact that the status of mother or caregiver is not considered a sufficient ground for the exercise of free movement within the EU. The free movement provisions may indeed be legitimating a "male breadwinner family model," as suggested by Moebius and Szyszczak, which effectively "reproduces and reinforces traditional patterns of gender relations and dependency within the family" (Moebius and Szyszczak 1998, 144, 148).

This articulation of the concept of "family" in the area of free movement of persons has been entrenched in recent judgments relating to the rights of gays and lesbians under the EU's sex equality laws. The *Grant v. South West Trains* (1998) case involved a claim of sexual orientation discrimination against a company which granted benefits to an employee's husband/wife or "opposite sex" cohabitant. Lisa Grant argued that this constituted discrimination against her, as she lived with a female cohabitant and was not therefore entitled to the extra benefits. The particular issue was whether the EU's sex equality laws, in this case the principle of equal pay for women and men, could be extended to cover discrimination on the grounds of sexual orientation. The court refused to extend the reach of the equal pay principle, stating that there is a lack of consensus among member states about whether "stable relationships between persons of the same sex may be regarded as equivalent to stable relationships between persons of the opposite sex" (*Grant* 1998, paragraph 35).[20] It continued that member states held this position "for the purpose of protecting the family" (*Grant* 1998, paragraph 33). Apparently, same sex partnerships do not constitute a "family," nor are they deemed worthy of the protection of EU law.

This ruling was followed by the Court of First Instance[21] when it was asked in *D and Sweden v. Council* (1999) to determine whether the term "spouse" included same sex partnerships which were officially registered under the laws of a member state. In this case, D was a Swedish national whose same-sex partnership was registered under the Swedish Law of Partnership which provides many of the rights and privileges of marriage. D's employment benefits, as an EU official, included a "household allowance" for his "spouse." D was refused this allowance for his partner, a decision which he challenged, arguing that his partnership entitled his partner to be treated as his "spouse." The court held that "*Community* notions of marriage and partnership exclusively address a relationship founded on civil marriage in the traditional sense of the term" (*D and Sweden* 1999, paragraph 26). Thus individuals and partnerships that do not conform to this normative family model, even those whose relationship may closely approximate the "male breadwinner" model of "coupledom," such as in *Netherlands v. Reed* and *Grant*, fall outside the remit of EU law (Stychin 2000).

Conclusions: From Constructions of "Family" to Constructing an EU "Family Law"

The aims of this article have been, first, to demonstrate the evolving regulation of families by European *law* and, second, to offer a

critique of the ideological foundations on which these developments are based. My argument is that the European Court has constructed, through its case law on sex equality and free movement law, a concept of "family" in EU law which is premised on a dominant ideology of family and motherhood which privileges heterosexual marriage and legitimates the sexual division of labor in the home.

This construction of "family" in EU law is concerning for a number of reasons. First, it limits the potential of the EU's sex equality laws to bring about real changes in the lives of women. The aim of the sex equality laws should be to encourage a diversity of parental and professional roles for women and men, and of a diversity of family forms, not the "protection," entrenchment, and legitimization of existing roles and relationships. Yet far from the sex equality laws being used as a vehicle for a more liberating rendering of family forms and relationships, the European Court, through its construction of "family" and "motherhood" in EU law, has used its judgments to reproduce traditional understandings and expectations. More remarkable is the fact that the dominant ideology of "family" and "motherhood" on which the court's judgments are based, remains dominant despite the changing contours of women's participation in the labor market and women's relationships with men and children. Recognizing the dominance of this ideology may help explain why, despite decades of antidiscrimination legislation, there has been so little change in the cultural understanding of the roles and expectations of women and men. Accordingly, at the present time, far from alleviating discrimination against women, the court's jurisprudence is reinforcing traditional assumptions that inhibit women and help account for their continued disadvantaged status.

The second concern regarding the court's construction of "family" in EU law is that it limits the persons who are entitled to certain EU rights. Thus the scope of a number of EU policies, such as the free movement of persons, are limited to those families which conform to the dominant ideology of family, that is the heterosexual married union (Ackers 1998; Woods 1999). Heterosexual cohabitants and same-sex partnerships, the latter whether registered under national law or not, are not entitled to avail themselves of many of the rights granted to heterosexual married partners. This seriously undermines the effectiveness of the policy, which in the case of free movement is to encourage the movement of workers throughout the EU. Furthermore, as Woods argues, it calls into question whether the EU "is taking the needs of all individuals equally seriously" (Woods 1999, 31). This is a particularly serious charge as the EU seeks to put flesh on the bones of the concept of EU citizenship, the legal basis of which is the rules on free movement of persons. It is clear that at

present the promise of EU citizenship is held out only to those conforming to the dominant ideology of family fashioned by the European Court.

The third and final apprehension is that the dominant ideology of the family and motherhood discussed above may form the normative foundation for the development of an EU-wide family law. The EU has had a nascent form of "family policy" for a number of years (Hantrais and Letablier 1996), but recent developments mark a significant move away from a form of family policy toward an emerging family law (McGlynn 2000a). For many years the institutions of the EU, particularly the European Parliament, have advocated greater harmonization of family policy in the EU, including more common family laws (McGlynn 2000a), but this appeared to be little more than a pipe dream until the 1997 Amsterdam Treaty provided for the creation of a "European judicial area," with the possibility of common civil and criminal laws. Steps are already being taken toward greater cooperation in the criminal and immigration law fields, and proposals have been made regarding common procedural and evidentiary laws (Hartkamp et al. 1998; O'Keeffe and Twomey 1999). Now proposals are being made to bring about greater harmonization of family laws (Boele-Woelki 1997; Martiny 1998).

Thus far the European Commission has proposed an EU regulation harmonizing laws on the recognition and enforcement of foreign judgments relating to divorce and custody of joint children (McGlynn 2000a). Although this is a somewhat limited measure, it does represent the EU's first direct incursion into the field of family law, in terms of determining the status of individuals and not just granting rights to certain individuals depending on their existing nationally granted status. Furthermore, as common civil laws, including family laws, are contemplated, it is not unlikely that further European regulation of family law will take place. Indeed, the European Commission has stated that this first proposal represents a "first step" and "may open the way to other texts on matters of family law and succession" (European Commission 1998, paragraph 1). My overriding concern is that the foundations for this development of an EU family law may be the dominant ideology of family and motherhood discussed above. Were this the case, it would represent a seriously retrograde step for all committed to progressive and feminist family laws and policies.

NOTES

1. This section is substantially drawn from McGlynn (2000b).
2. While the ideas of "attachment" and "bonding" are two distinct theories, with different "scientific" bases, they are conflated here, most often using the term "bonding theories," in view of their similar prescriptions in relation to the behavior of mothers. Furthermore, I argue that it is not the detailed scientific findings which are translated into legal discourse, but the popularized versions of these theories which generally do conflate "bonding" and "attachment."

3. Although the extent to which these theories, first developed and propagated in Anglo-American literature, impacted on the rest of Europe is not clear, it is known that Bowlby's work was taken to a popular audience with his book *Child Care and the Growth of Love* (1965), which emphasized a young child's need for its mother as an ever-present companion, and which sold thousands of copies and was translated into many languages. In addition, sales of a book by Benjamin Spock (1958), which extolled the virtues of bonding and attachment, sold 40 million copies worldwide. In the United Kingdom the trend of using such data in popular child care manuals continues with, for example, Penelope Leach's book *Children First* (1994, 84), citing the work of Bowlby to justify her criticisms of day care and women working.
4. In examining a legal system that spans fifteen countries, each with its own cultural heritage, it is important to be wary of generalizations about common ideas and ideologies. However, and without seeking to diminish the inherent diversity in the member states of the European Union, I would suggest that there is some degree of congruence in terms of attitudes toward motherhood and the family, though the Nordic countries may provide an exception to this general point. My argument, to reiterate, is not that the dominant ideology of motherhood reflects reality in each of the member states, but that it is a controlling influence that affects all women and men, albeit in different ways and at different times. See further Lewis (1993), Dumon (1994), Blanpain (1995), Millar and Warman (1996), and Glasner (1998).
5. The Equal Treatment Directive, directive 76/207, aims to put into effect the principle of equal treatment for men and women with regard to access to employment, including promotion, and to vocational training and working conditions. There are exceptions to the general principle of equal treatment, including occupational activities where the sex of the person is a determining factor (e.g., acting), measures permitting some forms of positive discrimination, and measures taken to "protect" pregnant women. A directive is a binding act of EU legislation with which member states must comply.
6. Article 2(3) of the directive states: "The Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity." The assumption is that were this exception not detailed in the legislation, the introduction of schemes for maternity leave and pay would be contrary to the principle of equal treatment, which demands the same treatment of women and men.
7. The uses of language are a crucial part of the development and continuity of ideologies, and in this case the dominant ideology of motherhood (Fegan 1996, 177).

8. This approach is also evident in the Community's Pregnancy and Maternity Directive (1996), the aim of which is to improve the "safety and health at work of pregnant workers," which was deemed necessary because of the "vulnerability of pregnant workers" and the consequent risk to their "physical and mental state" (preamble). Although I recognize that the directive would not have been adopted had it not been proposed under the health and safety provisions of the Treaty of Rome, which allowed adoption on a qualified majority vote, thus avoiding the U.K. veto, this does not lessen the argument regarding the conceptual basis of the directive, nor the messages that this conveys.

9. This view was supported by the fact that the second period of leave was withdrawn in the event of the death of the baby.

10. A formula repeated in many subsequent cases: see, for example, Stoeckel (1991).

11. This apparent neutrality was echoed in Bilka-Kaufaus (1986, paragraph 43), where the court stated that employers, and EU law, did not have to take into account the "difficulties faced by persons with family responsibilities" when establishing entitlement conditions for occupational pensions.

12. The Advocate General is an officer of the European Court who gives an opinion on the case before the judgment of the European Court is handed down. The Advocate General's opinion is not binding, but is persuasive. In addition, as the judgments of the European Court are often sparsely worded, one looks to the opinion of the Advocate General to flesh out the possible reasoning in a case.

13. As is now common in child custody cases where the importance of the father in terms of the emotional well-being of the family, and children, is often stated (though this is not without its problems) (Smart 1991).

14. For example, the "tender years" doctrine of child custody law has largely fallen into desuetude. See Boyd (1991, 133–35) and Smart (1991, 486).

15. It is the method of the court to reiterate verbatim statements of principle in related cases. This does not, however, absolve the court from responsibility for the implications drawn from its repetition of certain key phrases especially where, as here, the use of the same phraseology in different circumstances is so significant.

16. This case is based on the EU's equal pay principle, for which there is no equivalent to the exception to the equal treatment principle on the grounds of pregnancy. Therefore, if the court was to uphold the grant of rights to women only, it had to hold that the situations of women and men were not comparable, and if not comparable, the equal pay principle did not apply (Ellis 1998).

17. As the court held in *Commission v. France*, in which special rights for mothers only, such as child care allowances and extra holiday entitlements, were held to constitute a breach of the principle of equal treatment in that they granted women special rights in their capacity as parents, which is a category "to which both men and women equally belong" (1986, paragraph 14).

18. Although some "maternal" feminists might argue that the ruling in *Abdoulaye* is favorable to women in that it empowers women in their traditional care-giving roles and protects rights already granted to women from being diluted in the name of equality, my argument is that in the long term, such a perspective will have the effect of entrenching women's existing responsibilities while doing little to bring about change. On maternal feminism, see Williams (2000).

19. An important element of any ideology is that it frames the ways in which issues are addressed. For example, studies of child custody law have shown that despite the recent use of gender-neutral language in decisions regarding the "best interests of the child," the law is still informed by assumptions about the appropriate roles of women and men in the home and workplace (Boyd 1991, 86–87).

20. Note that this "lack of consensus" did not prevent the court extending the Equal Treatment Directive to cover discrimination on the grounds of transsexuality in *P v. S and Cornwall County Council* (1996).

21. The Court of First Instance is "lower" in the judicial hierarchy than the Court of Justice and appeals from its judgments may be made to the Court of Justice.

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