Sex Equality

■ by *Kathryn Culek**

During the 1980s, North American feminist and feminist legal scholarship came to be dominated by what is now referred to as the sameness/difference debate. At issue were diverging opinions on the appropriate legal and political strategies to achieve women's equality. Should women focus on their similarity to men or should women emphasize (and perhaps even celebrate) their differences? Framed as mutually exclusive, diametrically opposed approaches, there seemed to be no common ground or space for dialogue between the two. In the end, the debate was not so much solved as it was eclipsed by more divisive debates on differences amongst women. Challenges to the presumed homogeneity of the category 'woman' resulted in fragmentation and a proliferation of multiple, particularized identities; rendering the language in which the sameness/difference debate was conducted unintelligible.

Within the European Union, this debate continues to inform feminist legal scholarship (the result of feminists' use of the anti-discrimination framework); however, it has not come to dominate the focus of their work as it did in North America. The majority of scholarship on sex equality law in Europe is written from a liberal feminist perspective; it is informed by a particular understanding of women's disadvantage, from which legal and political strategies were developed to achieve women's equality.[1]

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1 The reference to a homogeneous group of 'women' is problematic, particularly in light of criticisms that such broad categorizations result in differences being erased and/or ignored. My (very) weak excuse is that while it is not possible to speak of 'women' without specifying which women within North American feminist and feminist legal theory, it still appears appropriate to generalize about 'women' within Europe. Although it is completely outside the scope of this paper to explore such differences, one likely cause is the particular nature of anti-discrimination law within the EU. Sex discrimination was the only form of discrimination (apart from nationality discrimination) originally included in the Treaty of Rome (Article 119 on equal pay). Other grounds of discrimination such as race, age, disability and sexual orientation were only to appear after an amendment in 1997 to add Article 13 (on the basis of which were adopted the

Women, liberal feminists argue, ought to be treated the same as men in all circumstances, save during pregnancy, when physical difference requires different treatment. Outside of this limited space of permissible difference, different treatment is disadvantageous to women's equality rights as it most likely rests on gender stereotypes rather than on any true understanding of women's nature.

Given this perspective's commitment to equal treatment before the law, any time the European Court of Justice strays from the permissible exception of pregnancy, it is invariably vilified for reproducing and reinforcing traditional gender roles and stereotypes. At the same time, jurisprudence that allows different treatment during pregnancy is praised as a demonstration of the Court's progressive commitment to substantive equality. The result of the Court's indiscriminate application of sameness and difference approaches to equality is, according to liberal feminist legal scholars, a body of jurisprudence that is "ambiguous," "incoherent" and "contradictory."

This essay attempts to reread the jurisprudence on pregnancy and maternity using the insights of feminist postmodernist theory. In particular, it will be argued that the case law is (and will be) necessarily ambiguous and incoherent, consistent with the multiplicity and diversity of meanings attributed to women's differences (i.e. biological and/or socially-constructed) and to the concept of equality. Upon this view, liberal feminists' concerns with clarity and coherency may be construed as attempts to universalize one particular vision of equality to all women, regardless of the differences. Coherency therefore, in addition to being descriptively impossible, may not even be normatively desirable.

At the same time however, the introduction of ambiguities and contradictions poses a threat that women's equality may be fragmented to the point where it becomes impossible to speak about/argue for equality at all. I believe that we can avoid this danger while simultaneously avoiding the drawbacks of liberal feminist legal theory by taking our inspiration from the case law of the Court. Just as the Court has struggled to delineate the boundaries of women's difference, a space in which derogation from the principle of equal treatment will be permissible; similarly, we can re-imagine women's equality as a space of dialectical tension between sameness and difference.

PART I: LEGAL FRAMEWORK

Pregnancy and anti-discrimination law have historically had an uneasy relationship; at first, it was unclear whether pregnancy could even be accommodated within the equal treatment framework. According to the Aristotelian model of equality, "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion

Racial Equality Directive in June 2000 and the Framework Directive in November 2000). As the visibility of other forms of discrimination increases, greater instability in the category of 'women' is to be expected. See Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford: Oxford University Press, 2002).

to their unlikeness."[2] Since no man could become pregnant, there was no one to whom a pregnant woman could be compared and consequently, pregnancy could be excluded from anti-discrimination law.[3] Although today, disparate treatment because of pregnancy is clearly acknowledged as discrimination on the grounds of sex under sex equality law, doubts continue – this time on the part of feminist legal scholars – about whether anti-discrimination principles can in fact adequately account for pregnancy and whether attention ought to be shifted to other legal remedies.

At the core of any discussion on pregnancy and maternity lies the issue of women's essential nature in relation to men. In order to access Directive 76/207/EEC[4] or the Equal Treatment Directive, the legal claim must be framed in terms of similarity or difference. Article 2(1) sets out the principle of equal treatment:

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

Although the concept of 'discrimination' is not defined within the Equal Treatment Directive, it is well established in the Court's jurisprudence that discrimination arises through the application of different treatment to similar situations or the application of similar treatment to different situations.[5] The nature of the legal concept of equality makes it impossible for feminists to escape the tension between sameness and difference.

In contrast to pregnancy, maternity is not dealt with under the principle of Equal Treatment, but constitutes a special exception under Article 2(3), which states:

2. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

Without this derogation, provisions that granted special entitlements to women because of their pregnancy, such as maternity leave, prohibition on night work, could be challenged as contrary to the principle of equal treatment. The scope of the pregnancy and maternity protection exception was laid out in *Hofmann*,[6] where the Court held that it was legitimate in terms of the principle of equal treatment first, "to ensure the protection of a woman's biological condition" and second, "to protect the special relationship between a woman and her child" after childbirth.

In a move away from the treatment of pregnancy and maternity as an issue of equal treatment between men and women, Directive 92/85/

2 Gillian C. More, "Equal Treatment of the Sexes in EC Law" (1993) 1 Fem. Legal Stud. 45 at 48.
3 Claire, Kilpatrick, "How long is a piece of string? European Regulation of the Post-Birth Period" in Hervey, Tamara K. and David O'Keeffe, eds., *Sex Equality in the European Union* (Chichester: John Wiley & Sons, 1996) at 82.
4 Council Directive 76/207/EEC of 9 February 1976 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 [hereinafter the *Equal Treatment Directive*].
5 For example, Case C-342/93 Joan Gillespie and others v Northern Health and Social Services Boards [1996] [Gillespie].
6 Case 184/83 Ulrich Hofmann v Barmer Ersatzkasse [1984] [*Hofmann*].

EEC[7] or the Pregnancy Directive was adopted by the Council in order "to implement measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or who are breastfeeding."[8] The protectionist language and content of the Directive is most likely the result of the legal basis under which it was adopted;[9] however, it is clear from the Preamble that such protections are not to "work to the detriment of directives concerning equal treatment for men and women."[10]

The Pregnancy Directive goes further than the Equal Treatment Directive by imposing a requirement on Member States to provide a minimum of employment protection. Among the more important provisions, Article 8 mandates that pregnant workers are entitled to a continuous period of maternity leave of at least 14 weeks, allocated before and/or after confinement[11] of which two of those weeks are compulsory.[12] Article 10(1) codifies the Court's case law by explicitly prohibiting the dismissal of workers from the beginning of their pregnancy to the end of maternity leave "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."

PART II: LIBERAL FEMINIST PERSPECTIVES ON PREGNANCY AND MATERNITY

Academics commenting on pregnancy and maternity in the EU tend to adopt a liberal feminist framework.[13] Although differences do exist amongst feminists – even within the category of liberal feminism – in this instance there is a significant uniformity of opinion that makes it possible to speak of *a* liberal feminist position. This section is not intended to be a comprehensive summary of current literature, but rather attempts to highlight some of the more important commonalities and areas of agreement.

General Introduction to Liberal Feminism

In light of the damaging consequences of being classed as an inferior 'other'[14] it is not surprising that some women have argued that they are equal to men and should be treated equally. These women, referred to

7 Council Directive 92/85/EEC of 19 October 1992 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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [hereinafter the *Pregnancy Directive*].
8 *Ibid*. at Article 1(1).
9 Article 138 EC (ex Article 118a) concerning health and safety at work under which only a qualified majority was necessary.
10 *Pregnancy Directive*, *supra* note 7 at para 25.
11 *Pregnancy Directive, ibid.* at Article 8(1).
12 *Pregnancy Directive, ibid.* at Article 8(2).
13 This is my own assessment as the authors do not self-identify as liberal feminist. Some support for this conclusion is found in Jo Shaw's chapter "Gender and the Court of Justice" in *The European Court of Justice* at 94.
14 The notion of the 'Other' has its roots in existentialist thought and can be traced back within feminist theory to Simone de Beauvoir's famous work, *The Second Sex*. Among her more famous statements, de Beauvoir wrote:
For him she is sex - absolute sex, no less. She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute - she is the Other.

as liberal feminists, make a simple claim to equality by denying their substantial differences from men. Women's disadvantaged position within society is not due to any natural or inherent biological differences, but rather stems from socially-constructed gender roles and stereotypes. Activities and characteristics traditionally associated with women, such as motherhood and family, are eschewed in favor of participation in the male public sphere.

The liberal feminist legal project might be best characterized as barrier-removal. Feminists in this category normally have faith in the potential of traditional equality rights (and indeed the entire legal apparatus) to remedy women's disadvantage. Liberal feminists concentrate on the elimination of practices and laws that treat women differently than men, which act as barriers to women's full and equal participation in the public sphere, i.e. education, employment and politics. Any differential treatment within law – even if intended to ameliorate women's disadvantage – is viewed with a high degree of suspicion by liberal feminists, as such special protections/ entitlements only serve to reproduce and reinforce culturally-determined stereotypes and gender roles.

Liberal Feminist Scholarship on Pregnancy and Maternity

Traditionally, liberal feminism has had difficulties theorizing pregnancy within its framework of equal treatment. The theory works best for women who are able to approximate the male norm. Women who are pregnant or who have childcare responsibilities are left with no other choice than to conform to the male norm or be excluded. In recognition of the limitations for these groups of women, liberal feminism has had to undergo a shift in thinking. Currently within European feminist scholarship, there appear to be two approaches to pregnancy:[15] one which is more traditional and the other, which depending on your location might appear more progressive.

The first group is those liberal feminists[16] who attempt to mitigate the negative impact of a formal application of the equal treatment principle to pregnant women, but who still insist on retaining a symmetrical approach. They argue that pregnancy is not a unique condition justifying special treatment, but is one of the many physical conditions that affect an employee's ability to work. Pregnant women should therefore be treated no differently from similarly treated workers with disabilities or illness. For example, if a male co-worker would be dismissed because of his absences due to illness, then under this approach, the pregnant worker should also be dismissed.

A second group of liberal feminists, who form the majority of authors writing on pregnancy in the EU, recognize a very limited space of women's difference during pregnancy which ends upon childbirth (i.e. maternity is *not* included). As only women are affected by pregnancy, detrimental treatment because of pregnancy is necessarily discrimination

15 Kilpatrick, *supra* note 3.
16 See Evelyn Ellis *EC Sex Equality Law* (Oxford: Clarendon Press, 1998).

on the grounds of sex. This approach ensures that women will be entitled to a remedy regardless of the treatment received by her male co-worker. The recognition of difference does not necessarily signify recognition of the intrinsic value of reproduction; rather it is intended to more equitably distribute the social and economic costs of pregnancy.

In stark opposition to their position on pregnancy, liberal feminists refuse *all* possibility of recognition of difference for maternity. This attitude is understandable in light of the fact that historically women's difference has been used against them, no more so than in the area of reproduction where women's capacity to bear children has been used to justify their confinement to the private sphere of the family and home. The fear raised by liberal feminists is that "permitting differential treatment may well legitimate stereotypes and entrench women's disadvantage."[17]

Liberal feminist scholarship on sex equality in the EU has focused its attention on the ways in which legislation and jurisprudence on maternity continues to be informed by traditional discourses on motherhood and mothering. According to one set of authors, "the framework in which the Court has operated (and still operates) was based on the idea that women have the main responsibility for childcare and on the public/domestic sphere dichotomy."[18] The general consensus is that the Court has had a poor track-record with respect to maternity.

The solution proposed therefore is to remove the maternity exception from the principle of equal treatment. Childcare should be addressed within the principle of equal treatment to encourage participation by both sexes in childrearing instead of as a derogation deserving of special protections. In essence, liberal feminists have distinguished pregnancy and maternity along the axes of sex/gender and biology/culture. Pregnancy is a manifestation of women's biological difference, in opposition to maternity, a socially-constructed difference, which unlike pregnancy is neither inherent nor natural. Whereas special benefits for pregnancy are acceptable, "rights in respect of child-care obligations to mothers rather than to both parents perpetuates women's primary responsibility for child-care."[19]

PART III: BEYOND LIBERAL FEMINISM

Liberal feminism purports to provide the answer as to which differences and similarities ought to be taken into account; however, this is only one concept of equality and we might easily imagine an opposite understanding of equality. Difference feminism[20] places itself in opposition to liberal feminism. Difference feminists reject the notion that they have to become like men and forfeit traditionally female experiences such as pregnancy,

17 Sandra, Fredman, "European Community Discrimination Law: A Critique" (1992) 21 ILJ 119 at 126.
18 Caracciolo Di Torella, Eugenia and Annick Masslot, "Pregnancy, Maternity and the Organisation of Family Life: an attempt to classify the case law of the Court of Justice," 26 Eur. L. Rev. 239 at 258 (2001).
19 Fredman, *supra* note 17, at 122.
20 The label 'difference feminism' actually refers to a number of feminist perspectives, which despite their theoretical disagreements accept that women are different from men.

childbirth and childcare. Instead, they take the identity that has been denigrated within dualistic modes of thought, such as pregnant woman, mother, and use it to construct a positive identity. Women are different from men, and thus equality requires different treatment or special accommodations, not similar treatment as liberal feminists would suggest.

Whatever the equality approach preferred – whether liberal or difference feminism – by arguing that some differences are relevant and others are not, women who do not or cannot identify with those classifications will be excluded. The reality is that neither liberal feminism nor difference feminism alone can adequately account for the complexities of women's experiences during pregnancy and maternity. Each communicates critical insights, but ultimately can only offer partial and limited solutions. As Tamara K. Hervey notes, "questions of gender differences are not readily solvable by application of one 'right answer'."[21] A new understanding of equality is therefore necessary.

Postmodernist Theory

The rise of postmodernism within feminist and feminist legal academia in North America essentially brought the sameness/difference debate to the end. Many women felt excluded by the dominant feminist and feminist legal theories. The postmodernist skepticism of grand narratives capable of encompassing the totality of women's experiences, capitalized on this general sentiment. Indeed, postmodernist feminism completely transformed the way feminists interacted with theory and knowledge. Sweeping statements gave way to the promotion of local, situated forms of knowledge. Theories such as liberal or difference feminism which claimed an ability to explain the equality of *all* women were replaced by more modest claims, such as what equality meant for a single lesbian mother of color.

The correlate was, of course, the end of categories of identity. The idea that there was a broad category of 'women' (and 'men') with similar needs and interests was refuted and replaced by the idea of a multiplicity of individualized, particular identities. In this context, the liberal and difference feminism presumption that it could speak to and for all women was discounted. The advantage of such an approach was that the sameness/difference dualism completely collapsed. Without the idea of a group of women and men, how would it be possible to even discuss whether one was similar to the other?

While these sorts of inquiries are necessary, particularly for feminists trying to think beyond the inherent limitations of the concept of equality, it is doubtful whether this amount of fragmentation and uncertainty could successfully be operationalized within law. While the goal is to recognize the complexities and ambiguities of women's equality, the danger is in fragmenting to the point where there are no common threads running

21 Tamara K. Hervey and David O'Keeffe, eds., *Sex Equality in the European Union* (Chichester: John Wiley & Sons, 1996) at 410.

through women's experiences. With no minimal level of coherence, how would it be possible to argue that women are entitled to legal remedies? In other words, how would it be possible to bring about legal and political change?[22]

Despite the limitations of the equality framework, I believe that we still need to engage strategically with it for pragmatic reasons. If we only were to adopt a postmodernist approach, we would be in effect cutting ourselves off from the principle of equal treatment as any attempt to work within the current equality framework must necessarily incorporate elements of sameness and difference. To even be heard, legal claims must be intelligible within the internal context of EU sex equality law. Feminist legal projects adopted using only an external perspective[23] would be potentially limiting the force of their strategy by failing to engage with the "language games" used by internal actors such as judges, lawyers, legislators.[24]

Alternate approach

In this section, I will examine the ways in which we might overcome the sameness/difference dualism while still remaining within an internal perspective. Eco-feminist Val Plumwood's work[25] on the nature of dualisms and dualistic thinking offers a useful set of criteria for thinking about the content of what she refers to as "an appropriate relationship of non-hierarchical difference."[26] First, we must recognize the dependency of sameness and difference on one another. Each is constructed in opposition to the other, and in so doing, places the other into the background. Second, sameness and difference are often viewed as mutually exclusive and separate when in fact, they are better conceived of as continuous. Third, *both* sameness and difference need to be questioned and critiqued.[27]

What is needed essentially is a theory that can both encompass and mediate between sameness and difference and at the same time, allow space for the liberal critiques of difference and the difference critiques of sameness. I propose that instead of viewing the relation between sameness and difference as exclusive (i.e. *either* sameness *or* difference), we re-conceptualize of the concept of sex equality as a positive dialectic between sameness and difference. Unlike liberal feminism, which only recognizes continuity between male and female, or difference feminism, which only recognizes difference, a dialectical relationship would recognize the complex interaction of both continuity and difference.

22 Kathryn Abrams, "The Constitution of Women," 48 Ala. L. Rev. 861 (1997).
23 Postmodernist, critical legal scholars, feminist scholars, etc. are concerned with the distinction between "internal" and "external perspectives." (Litowitz, 1997: 25) (An analogous distinction suggested by Jo Shaw (2001: 87) might be "legalist" versus "political visions.") Postmodernist (like Marxist) theory operates at an external level, usually neglecting the "language game" which takes place internally within the legal system. In contrast, an internal perspective works from within, "viewing the system as a coherent, ordered set of objective rules."(Litowitz, 1997: 25) Although presented here as separate and distinct, critiques at both the internal and external perspectives are necessarily connected. On the one hand, external critique allows insiders to gaze upon the legal system from another location, and on the other hand, internal critique translates/makes intelligible language used by those situated externally.
24 In response to this dilemma, some critical legal scholars have argued for "multiple levels of consciousness" which involves a self-conscious and political deployment of the language of equality, while simultaneously working from the outside to critique the notion of equality itself.
25 Val Plumwood, *Feminism and the Mastery of Nature* (New York: Routledge, 1993).
26 *Ibid*. at 60.
27 *Ibid*.

In many respects, such an approach shares affinities with the "differentiated approach to equality"[28] put forth by Tamara K. Hervey in "The Future for Sex Equality Law in the European Union." Hervey writes of her "differentiated approach to equality":

It therefore constitutes a method of exploring women's difference (and sameness) as created by a complex web of social structures – in other words difference as relational, dependent upon circumstance and particularity; rather than inherent, as part of the essence of womanhood. If we recognise difference (and sameness) as relational, and dependent upon circumstance, then we also need a relational and dependent definition of sex equality.[29]

Like Hervey, I believe that what is required is a more fluid concept of sex equality that can respond to the changing equality needs of women. Sometimes, a sameness approach will be appropriate and at other times, the recognition of difference will be critical to the full recognition of women's equality.

This means that unlike the liberal feminist concept of equality, sameness and difference will not fall neatly into the maternity vs. pregnancy distinction. Maternity does not always have to be dealt with under a sameness approach. While I may personally agree with liberal feminists that parenting responsibilities ought to be shared between parents (where there are two parents, irrespective of their genders), the current reality is that women are disproportionately responsible for childcare. As Christine Littleton argues:

> *If women currently tend to assume primary responsibility for childrearing, we should not ignore that fact in an attempt to prefigure the rosy day when parenting is fully shared. We should instead figure out how to assure that equal resources, status and access to social decision-making flow to those women (and few men) who engage in this socially female behavior.*[30]

To accept different treatment is not to necessarily accept that there is a biological basis to childrearing, but merely to acknowledge that as social relations are currently organized, there is a difference between men and women.

At the same time, the assertion by the majority of liberal feminists that pregnancy is a contained physical marker of women's difference that must always be treated differently within law can be problematic as well. While I appreciate the fear that introducing similar treatment may lead to adverse consequences for pregnant women, recognition of difference does not necessarily correlate in every case to positive outcomes on women's equality. For example, in *Gillespie*,[31] where the amount of pay during

28 Hervey, *supra* note 21 at 407.
29 *Ibid.* at 408.
30 Littleton, Christine A., "Reconstructing Sexual Equality", 75 Calif. L. Rev. 1279 at 1297 (1987).
31 *Gillespie*, *supra* note 5.

maternity leave was at issue, the Court in holding that the principle of equal pay did not apply, stated that women taking maternity leave "are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman who actually work."[32] Protections are now in place for pregnant workers with respect to dismissal/failure to hire within the Pregnancy Directive but it appears that the next major issue to be litigated will be pay; in particular, the levels of pay during maternity leave and during sick leave because of pregnancy-related illness.

To be clear, a dialectical tension between sameness and difference is not the same as a 'both/and approach,' which tends to be the instinctive response to 'either/or' problems, i.e. the limitation of selecting *either* liberal feminism *or* difference feminism. By 'both/and' I refer to some attempt to combine what was previously polarized into a new whole; the classic example perhaps being androgyny. The distinction between a 'both/and' response and the approach I am proposing can appear quite subtle (even Tamara K. Hervey's approach sometimes slips into the former[33]) but a 'both/and' solution is essentially liberal feminism: differential treatment is applied where women are different and similar treatment is applied where women are the same. Of course, this tells us nothing about why or how difference and sameness are constructed and maintained through sex equality law.

PART IV: (RE)READING THE CASE LAW

As we previously saw, liberal feminists would prefer a distinction between difference and sameness premised on the distinction between pregnancy and maternity. The Court however allows differential and similar treatment within each of the areas; hence, the liberal feminist assertion that the jurisprudence on pregnancy and maternity is incoherent and contradictory. Rather than assume that the disjointed results must necessarily lead us to the conclusion that there is no common thread, I argue that we ought to re-imagine the case law as a space which begins from childbirth and continues past the end of maternity leave. In this way, we are able to examine where the boundaries or tensions between sameness and difference are currently located.

Dekker and Hertz or Where does pregnancy end?

In the *Dekker*[34] and *Hertz*[35] decisions, the Court for the first time examined women's employment rights during pregnancy and maternity with respect to the principle of equal treatment (as found in the Equal Treatment Directive). *Dekker* and *Hertz* were delivered on the same

32 *Ibid.* at para 17.
33 See Hervey, *supra* note 21 at 407 that special protections for women would be limited to "situations women's biological difference from men mandates differential treatment."
34 Case C-177/88 Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus [1990] [*Dekker*].
35 Case C-179/88 Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening [1990] [*Hertz*].

day and generally speaking set up the boundary between equal treatment (sameness) and differential treatment (difference) that persists today in the Court's jurisprudence with respect to pregnancy: pregnant women are entitled to be treated differently from the start of pregnancy until the end of their maternity leave. At the end of maternity leave, women's differences end and equal treatment is reintroduced or perhaps more accurately, the norm of equal treatment is re-established.

Feminist legal scholars were left a bit confused by the way in which the Court simultaneously delivered a progressive decision, supportive of women's substantive equality (*Dekker*) and on the same day, adopted a formalistic and arbitrary equality perspective in *Hertz*. Evidently, *Dekker* has been considered quite favorably by feminists, while *Hertz* is read with either condemnation and/or shoulder-shrugging (of the kind, what else could the Court have done?) In this part of the essay, I propose to examine these two decisions, as well as subsequent case law that reaffirms this distinction, not to show that it is incoherent and arbitrary – which it most likely is – and not to argue that the Court got it wrong (or right) but instead to discuss the tension between sameness and difference that lies behind the fixed boundary.

The case of *Dekker* concerned a refusal to hire a pregnant worker because of the financial burden that would result to the employer. Mrs. Dekker was three months pregnant at the time of the interview. She informed the hiring committee of her condition and her name was put forth as the most suitable candidate for the post. When the employer subsequently learned that Mrs. Dekker's daily maternity benefits would not be covered under its insurance scheme, she was refused employment on the basis that the employer would not be able to afford to hire a replacement during her maternity leave.

The Court's most important holding in *Dekker* is the recognition of women's difference during pregnancy. It rejected the need for a male comparator to demonstrate discrimination on the grounds of sex, stating "[] only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex."[36] It was therefore irrelevant that there were no male candidates for the post. The elimination of the need for a male comparator was a clear recognition by the Court that women during pregnancy are different from men.

Hertz confirmed that *dismissal* of a female worker during pregnancy would also constitute direct sex discrimination.[37] In its later jurisprudence, the Court has confirmed this principle[38] and extended the approach to cover dismissal because of pregnancy-related illness during pregnancy.

36 *Dekker*, *supra* note 34 at para 11.
37 *Hertz, supra* note 35 at para 13.
38 For example, the Court held in Case C-32/93 *Webb v. EMO* [1994] at para. 24 [*Webb*]: "[] there can be no question of comparing the situation of a woman who finds herself incapably, by reason of pregnancy discovered 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 reasons." See also *Habermann-Beltermann* [1994] at para 15.

Subsequent preliminary references to the Court regarding the rights of pregnant workers from the United Kingdom have attempted to distinguish previous case law and reintroduce a male comparator.[39] However, at this point, it would appear that the Court will not permit the introduction of any comparator during the worker's pregnancy, whether male, female, or another pregnant female.[40]

In *Dekker*, the Court also held that direct sex discrimination "cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant worker would suffer for the duration of her maternity leave."[41] Subsequent jurisprudence has attempted to determine what justifications, if any, would be permitted to justify detrimental treatment of pregnant workers. Thus far, the Court has held that a pregnant worker cannot be dismissed or not hired for any of the following reasons: she was unable to carry out work engaged to do because of a statutory provision,[42] she was engaged to replace another woman on maternity leave,[43] or she was unable to perform work from the outset of employment for the duration of the pregnancy because of a statutory provision.[44]

All of these judgments gradually extended the protection of pregnant women with indefinite employment contracts, but left open the question of whether discrimination might be permissible in the case of fixed-term contracts. In *Webb v. EMO*, the Court appeared to place emphasis on the fact that the employment was of an indeterminate length, raising concerns that discrimination would have been permitted had it been a determinate employment contract. In *TeleDanmark*, the Court removed any doubts by holding that as dismissal of a pregnant worker on account of pregnancy constitutes direct sex discrimination, "whether the contract of employment was concluded for a fixed or an indefinite period has no bearing on the discriminatory character of the dismissal."[45]

This brief review of the case law on discrimination against pregnant workers *during pregnancy* reveals that the Court has created a clear protected space of women's difference. When a pregnant woman experiences detrimental treatment as a result of her pregnancy, such as refusal to hire or dismissal, it will constitute discrimination on the grounds of sex. Within this zone, the Court will not permit a pregnant woman to lose or fail to obtain employment because of her pregnancy, regardless of her particular employment circumstances. The start of the space of difference – the beginning of pregnancy – corresponds to our commonsense belief that such a moment marks the appearance of difference between women and men. The more difficult question however, is where women's

39 *Webb, ibid.*
40 The only exception in which the Court compared the situation of a pregnant worker with a male co-worker experiencing illness is *Hoj Pedersen* [1998], where the comparison served to ameliorate the situation of pregnant workers. The statutory provisions in question provided that pregnant women suffering from pregnancy-related illness or disability would receive their full pay. The Court found that as both were in a similar situation, the provision was discriminatory.
41 *Dekker, supra* note 34 at para 12.
42 *Habermann-Beltermann, supra* note 38.
43 *Webb, supra* note 38.
44 Case C-207/98 *Mahlburg* [2000].
45 Case C-109/00 *Tele Danmark* [2001] at para 31.

difference ends. Whereas historically or traditionally, women were considered to remain different long after the birth of their children, today changing attitudes have blurred where the marker ought to lie.

The question of where women's difference ends was addressed in the *Hertz* judgment. There the Court was faced with the more complicated case of dismissal for pregnancy-related illness. Mrs. Hertz had resumed work after the expiry of her maternity leave, but the following year was forced to take sick leave as a result of pregnancy-related illness. She was subsequently dismissed by her employer on the grounds of prolonged absences from work. The issue in front of the Court was whether dismissal in such circumstances was "contrary to the principle of equal treatment since a male worker is not subject to such disorders and hence cannot be dismissed on that ground."[46]

The opinion of Advocate General Darmon gives us a clear indication the (male) decisionmakers experienced in this case. If the Court were to hold that it was direct discrimination on the grounds of sex, no justification for the dismissal would be possible (*Hertz*), thereby creating a sort of "immunity"[47] for the employee under the equal treatment principle. After rejecting such an approach, AG Darmon then proposed a sort of double standard approach to pregnancy-related illness whereby not all women who were pregnant or had given birth would be treated the same. Instead, the "normal risks of pregnancy and confinement, and the common attendant complications" would be distinguished from "medical conditions which do not belong to the ordinary risks of pregnancy and should therefore be treated on the same footing as "ordinary" sickness."[48]

In its judgment, the Court rejected the Advocate General's suggestion to create distinctions amongst pregnant women, preferring instead to maintain the same rights for all women who fell inside the limit of maternity leave:

Although dismissal of a female worker on account of pregnancy constitutes direct discrimination on the grounds of sex, in the case of an illness manifesting itself after the maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness.[49]

After maternity leave ends, the focus of inquiry becomes whether the woman who suffers from a pregnancy-related illness was dismissed in similar circumstances as her male co-worker dismissed for illness. If she was, there is no discrimination on the grounds of sex.

In *Brown v. Rentokil*, the Court reaffirmed its distinction between pregnancy-related illness during pregnancy until the end of maternity leave and pregnancy-related illness after the end of maternity leave. Ms. Brown was dismissed while pregnant, after she exceeded the number of

46 *Hertz, supra* note 35, at 8.
47 Opinion of AG Darmon at 43.
48 *Ibid.* at para 48.
49 *Hertz, supra* note 35, at para 17.

consecutive sick days allowed within her contract of employment. The Court held that:

> *dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy.*[50]

Ms. Brown's dismissal therefore constituted direct discrimination on the grounds of sex. On the other hand, Ms. Hertz's dismissal which occurred after the end of her maternity leave was not; her absences were compared to a male employee's absences from work due to illness.

Special protections for maternity
Early decisions: *Hofmann* and *Commission v. France*

Liberal feminists denounce any special protections for maternity that the Court permits under the exception in Article 2(3) of the Equal Treatment Directive. As discussed earlier, liberal feminists take the position that maternity should be subject to equal treatment and should not, in any circumstance, constitute a special protection or special entitlement; the fear being that any kind of differential treatment that the Court allows will not only be based on gendered stereotypes but will also perpetuate and reinforce these stereotypes. Thus, any time that the Court finds a provision cannot fall under the maternity protection exception; liberal feminists consider the case to be correctly decided. Unfortunately (for these feminists), the Court appears to be inconsistent with respect to the maternity exception.

The *Hofmann* decision has continued to draw the ire of liberal feminists since it was decided in 1984, particularly as the Court has reaffirmed its holding in more recent judgments. Mr. Hofmann argued that the optional maternity leave which the state granted to mothers only was a violation of the principle of equal treatment. The optional maternity leave which followed the expiry of an eight-week (compulsory) protective period allowed mothers to extend their maternity leave until the child reached six months of age while receiving a daily allowance from the state. Mr. Hofmann argued that the goal of the leave, which was to protect mothers against the "multiplicity of burdens" imposed by motherhood and employment, could be achieved by making the leave available to fathers as well.

In finding that the measure fell within the scope of the pregnancy and maternity exception of Article 2(3) of the Equal Treatment Directive, the Court held in its now (in)famous statement that "the directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents."[51] The Court found that in creating an exception for pregnancy and maternity, the Equal

50 Case C-394/96 *Brown v. Rentokil* [1998] at 24.
51 *Hofmann, supra* note 6 at para 24.

Treatment Directive recognized the legitimacy of protecting women in two respects:

First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect 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.[52]

The Court has continued to insist on this construction of maternity leave up until the present[53] (incidentally, it has dropped the questionable 'normalcy' language).

Soon after *Hofmann*, in 1988, the Court delivered the *Commission v. France*[54] decision, giving some feminists hope that it was moving away from its *Hofmann* analysis.

The Commission brought proceedings against France for failing to adopt within the prescribed period all the measures necessary for the implementation of the Equal Treatment Directive. At issue was a law that allowed the application of collective agreements granting special rights to women that were already in force. The French government argued that as the special rights were intended to protect women and ensure their effective equality with men, they did not give rise to discriminatory working conditions. Among the special rights included were the extension of maternity leave; the shortening of working hours; the advancement of the retirement age; the ability to obtain leave when a child was ill; the granting of additional days of annual leave with respect to each child; daily breaks for women working on keyboard equipment or employed as typists or switchboard operators; etc.[55] The Court found that contested provisions could not be justified by Article 2(3) as they included "protection of women in their capacity as older workers or parents – categories to which both men and women may equally belong."[56]

Recent decisions: *Abdoulaye*[57] and *Griesmar*[58]

The more recent decisions of *Abdoulaye* and *Griesmar* appear to shed some light onto the disparate outcomes in *Hofmann* and *Commission v. France*; for although they concern equal pay Article 141 EC (ex Article 119) in addition to the Equal Treatment Directive, they provide a clear indication of the Court's construction of sameness versus difference. It

52 *Ibid.*, at para 25.
53 For example, in late 2004, the Court was still continuing to cite the two criteria from *Hofmann* in C-284/02 Land Brandenburg v Ursula Sass [2004].
54 Case C-312/86 *Commission v. France* [1988] [hereinafter *Commission*].
55 *Ibid.* at para 8.
56 *Ibid.* at para 14.
57 Case C-218/98 Abdoulaye and Others [1999] [hereinafter *Abdoulaye*].
58 Case C-366/99 Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation [2001] [hereinafter *Griesmar*].

would seem that the Court - as in its pregnancy-related illness decisions – permits different treatment during maternity leave (*Hofmann* and *Abdoulaye*) but insists on returning to the norm of similar treatment once the maternity leave ends (*Commission v. France* and *Griesmar*).

The *Abdoulaye* decision concerned a group of male workers at a car manufacturing plant who claimed that they should also be entitled to a lump-sum payment made to pregnant women commencing maternity leave provided for in their collective agreement. The plaintiffs' argument was highly interesting (though ultimately unsuccessful) in that it attempted to introduce equal treatment at childbirth. Although the male workers conceded that maternity leave granted exclusively to women was justified on the basis of physiological differences between men and women, they argued that:

[the birth of a child] is also a social event which concerns the whole family, hence also the father, who should not therefore be excluded from receiving the allowance, as this would constitute unlawful discrimination.[59]

The Court held that female workers on maternity leave were not in a comparable situation to male workers and therefore, a lump-sum payment was permissible "where the payment is designed to offset the occupational disadvantages which arise for those workers as a result of their being away from work."[60]

The *Griesmar* decision concerned a code provision which granted female civil servants a service credit in respect of each of their children. Mr. Griesmar, a retired French magistrate and father of three children, argued that the denial of the service credit to men was sex discrimination. Citing *Abdoulaye*, *Commission v. France*, and *Hofmann*, the Court held that the proper test to determine whether women and men were in a comparable situation was:

> *whether that credit is designed to offset the occupational disadvantages which arise for female workers as a result of being absent from work during the period following childbirth, in which case the situation of a male worker is not comparable to that of a female worker, or whether it is designed essentially to offset the occupational disadvantages which arise for female workers as a result of having brought up children, in which case it will be necessary to examine the question whether the situations of a male civil servant and a female civil servant are comparable.*[61]

Based upon the explanations of the French government, the Court determined that the purposes of the credit fell into the second category – that of bringing up children, and therefore, infringed the principle of equal pay.

These decisions on pregnancy and maternity demonstrate that in the

59 AG Alber's opinion, at para. 5.
60 *Abdoulaye, supra* note 57, at para 22.
61 *Griesmar, supra* note 58, at 44.

face of competing arguments as to if women are different, how they are different, and what should be the legal effect of those differences made by the Member States, the Commission, the parties, feminist scholars, and National Courts, etc. the Court is faced with the tension between sameness and difference and is essentially delineating spaces. With respect to maternity jurisprudence, the Court has drawn a line between maternity, a biological difference that only affects women, and parenting, where men and women are in a similar situation (regardless of actual social reality). In the pregnancy and pregnancy-related illness cases, women are likewise protected before the end of maternity leave and afterwards, are to be treated like men.

CONCLUSION

In this essay, I argued for a reconceptualization of the concept of sex equality as a positive dialectic between sameness and difference in response to what I perceived to be a theoretical impasse within liberal feminism. My approach was not so much an 'answer'; in fact I argued that the time has come to avoid theories that attempt to provide comprehensive solutions. Rather, I envisioned it to be more of a process that allows space for thinking about sameness and difference without getting weighed down in endless debates about the true nature of women and correct or incorrect judgments. Liberal feminism, with its constant emphasis on the proper application of sameness or difference to particular areas of sex equality, misses the opportunity to examine where the borders are fixed and where movement is possible.